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The Definition of 'Government Entity' under the WTO/GPA: A Comparison with the EU

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The Definition of ‘Government Entity’ under the WTO/GPA: A Comparison with the EU

Wenyi LIAN

**Thesis submitted to the Law School of Bangor University for the degree of Doctor of
Philosophy**

October 2019

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ABSTRACT

The Government Procurement Agreement (GPA) is one of the plurilateral trade agreements of the World Trade Organisation (WTO). It aims to liberalise trade in government procurement among its Parties. While it has many strong points, the GPA does not legally define what entities should actually be covered by the Agreement. Notably, the evolution of the GPA has produced a list approach, whereby Parties list their ‘covered entities’ in a series of schedules. Unfortunately, the plurilateral nature of the GPA accession negotiation as well as the stringent reciprocity features of the list approach have complicated the accession negotiation, and discouraged Parties from providing a ‘wider’ range of entity coverage. This turn of events has limited the effectiveness of the ‘Most-Favoured-Nation’ obligation, and thereby handicapped the GPA expansion. Moreover, this approach raises some tensions and lack of legal certainty as regards which are the entities covered by the GPA, especially in connection with entities that are not strictly ‘government entities’ such as State-owned enterprises (SOEs). This problem is exacerbated in the case of modern SOEs in developing countries, many of which can bear both public and private features.

In order to avoid the drawbacks of the list approach mentioned above and respond to the focal point in GPA accession negotiation, the author attempts to define ‘what is a government entity’ as a reference to address this problem raised by lack of precise definition on the entities that are subject to the GPA.

Based on the analysis of the WTO adjudicatory reports under the multilateral agreements and the most recent influential free trade agreements, the thesis advanced is that generally, ‘commercial SOEs’ (namely SOEs engaging in commercial activities on a commercial basis), and ‘public SOEs’ (namely SOEs performing public functions under government controls or influence) must be treated differently under the GPA based on the nature of its activities, rather than their formal legal status. The thesis argues that only public SOEs should be covered, whereas commercial SOEs should not.

The author arrived at this conclusion by conducting two parallel comparative studies, first, between public SOEs and ‘bodies governed by public law’, and second, between commercial SOEs with ‘public undertakings & undertakings with special or exclusive rights’, under EU Directive 2014/24/EU and Directive 2014/25/EU respectively. The studies clarified that a government entity must be defined by establishing an immediate and decisive causal link

between government control and losing commercial freedom when carrying out activities. The existence of government control is identified from both the internal and external tier of the relationship between the entity and a government. Whether the entity competes with commercial freedom in the market where it carries out activities, can be judged by examination of the contestability of the market where the entity carries out its activities; the market power of the entity; and whether governments restrict the entrance to this market of new market competitors.

Conclusively, the author submitted that the definition of ‘government entity’ consists of general scope and justification: generally, all governments and government-controlled entities shall be covered by the GPA at the first instance. However, if the controlled entity can prove that it operates in a contestable market (i.e. where it competes with other market players for commercial purpose), then the entity should be excluded from GPA coverage.

Keywords: Government Procurement, EU Public Procurement Law, State-owned Enterprises, Functionalism, Government Control, Competition.

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In the essay *The Hedgehog and the Fox*, Isaiah Berlin divided writers and thinkers into two categories: hedgehogs, who view the world through the lens of a single defining idea, and foxes, who draw on a wide variety of experiences and for whom the world cannot be boiled down to a single idea. In my case, I hope I can sometimes be a ‘hedgehog’ that delves deep to develop a definitional solution which can better inform future GPA negotiation. While on other occasions, I hope I can be a ‘fox’ that keeps the mind open to borrow idea, thoughts, and experiences from a broad ranges of sources. Now, at the final stage of the journey, looking back, I can see how I benefitted of both appraoches. I am grateful for taking this PhD journey. It shaped my way of defining a question, finding resources and organising outcomes, independently and staunchly, which is now part of my personability.

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Wenyi Lian

ABBREVIATIONS

- AB:** Appellate Body
- ADB:** Asian Development Bank Institute
- AD & CVD:** Anti-Dumping and Countervailing Duties
- APEC:** Asia-Pacific Economic Cooperation Organisation
- ARRA:** American Recovery and Reinvestment Act 1999
- AVE:** Ad-Valorem Equivalent
- BC:** Before Christ
- BOT:** Build-Operate-Transfer
- CAW:** (the Canadian Auto Workers union
- CEPS:** Centre for European Policy Studies
- CETA:** Comprehensive Economic and Trade Agreement between Canada and the EU
- CFTA:** Canadian Free Trade Agreement
- CEPA:** EU-Armenia Comprehensive and Enhanced Partnership Agreement
- CEPR:** Centre for Economic and Policy Research
- CFC:** Chlorofluorocarbons
- CFTA:** Canadian Free Trade Agreement
- CJEU:** collectively the General Court and the Court of Justice of the European Union
- CPTPP:** Comprehensive and Progressive Agreement for Trans-Pacific Partnership
- CRS-PC:** Constant Returns to Scale and Perfect Competition
- DAC:** Development Assistance Committee
- DG:** Director-General
- DPAD:** Development Policy and Analysis Division
- DSB:** Dispute Settlement Body
- EC:** European Communities
- EEC:** European Economic Community
- EUEPCA:** Enhanced Partnership and Cooperation Agreement between the EU Kazakhstan
- EU:** European Union
- EU Members States:** a State that is a Member of the European Union
- FAR:** Federal Acquisition Regulation
- FDI:** Foreign Direct Investment
- FTA:** Free Trade Agreement

GATT: General Agreement on Tariffs and Trade
GATS: General Agreement on Trade and Services
GDP: Gross Domestic Product
GPA: Government Procurement Agreement
G20: Group of Twenty
HHI: Herfindahl-Hirschman Index
IBRD: International Bank for Reconstruction and Development
ICJ: International Court of Justice
ILC: International Law Commission
ICTSD: International Centre for Trade and Sustainable Development
IDA: International Development Association
IMF: International Monetary Fund
IPO: Initial Public Offering
ITO: International Trade Organisation
LDC: Least Developed Country
MIT: Massachusetts Institute of Technology
MFN (treatment): Most Favoured Nation (treatment)
MSMEDA: Micro, Small and Medium Enterprises Development Act
NAFTA: North American Free Trade Agreement
NBER: National Bureau of Economic Research
NDRC: National Development and Reform Committee
NT: National Treatment
NTMs: Non-Tariff Measures
OECD: Organisation for Economic Cooperation and Development
PIIE: Peterson Institute for International Economics
PPPFA: Preferential Procurement Policy Framework Act
PTA: Preferential Trade Agreement
RSC: Revised Statutes of Canada
SCM: Agreement on Subsidies and Countervailing Measures
SDR: Special Drawing Rights
SIGMA: Support for Improvement in Governance and Management
SOE: State-owned Enterprise
SME: Small and Medium-sized Enterprise

SPS Agreement: the Agreement on the Application of Sanitary and Phytosanitary Measures

SPV: Special Purpose Vehicle

STE: State Trading Enterprise

TBT: Technical Barrier to Trade

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

TTIP: Transatlantic Trade and Investment Partnership

TPP: Trans-Pacific Partnership

UAE: United Arab Emirates

UK: United Kingdom

UN: United Nations

US: United States

USMCA: US-Mexico-Canada Agreement

USTR: United States Trade Representative

UNCITRAL: United Nations Commission on International Trade Law

UNCTAD: United Nations Conference on Trade and Development

UN/DESA: Department of Economic and Social Affairs of the United Nations Secretariat

VCLT (or Vienna Convention): Vienna Convention on the Law of Treaties

WB: World Bank

WTO: World Trade Organization

WTO Agreement: Marrakech Agreement Establishing the World Trade Organisation

WTO Adjudicatory Body (or organs): collectively panels and the Appellate Body, and/or arbitrators, and/or DSB as the case may be

WTO member: a State or separate customs territory that is a Member of the WTO either as original Member or by having acceded to it.

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CHAPTER 1 INTRODUCTION

1.1. Statement of the Problem

Statistics have shown indisputably that the government procurement market is a substantial part of the world economy.¹ Despite their economic significance, trade opportunities in the government procurement market are still relatively restricted by means of explicit and/or covert discriminatory national procurement policies and laws.² Government procurement is recognised as an ideal tool for state intervention in the economy and has, for this reason, remained ‘at the fringe of trade liberalisation efforts’.³

¹ The average public purchasing in the EU (2017), has been estimated to be more than 16 per cent of Gross Domestic Product. The WTO estimates the share of government procurement in the global market (2017) could reach between 10 per cent-15 per cent. In the OECD, the ratio on average is 13 per cent in 2011, and if counting SOEs, the ratio on average could be put an additional 2-12 per cent. See European Commission, Public Procurement – Trade, <http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/> accessed 27 July 2019. And OECD, Public Procurement, <http://www.oecd.org/gov/public-procurement/> accessed 27 July 2019. See also Stephen Woolcock and Jean Heilman Grier, ‘Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations’ (2015) Paper No. 2 in the CEPS-CTR project “TTIP in the Balance” and CEPS Special Report No. 100 / February 2015 2. World Trade Organization, WTO and government procurement, https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm accessed 27 July 2019.

² According to the Annual Report on Trade and Investment Barriers for 2016, released by the European Commission, there are 372 trade barriers across 50 countries, a 10 per cent increase over 2015. Among those trade barriers, government procurement barriers have increased since 2009, although the international regulation on government procurement has made significant progress. A similar conclusion can also be found in the 2017 Trade Barriers Report on Government Procurement by USTR. See Jean Heilman Grier, ‘2017 Trade Barriers Report: Government Procurement’ *Perspectives on Trade* (April 12 2017) and European Commission, ‘Report from the Commission to the European Parliament and the Council on Trade and Investment Barriers’ (2016) <https://ec.europa.eu/europeaid/2016-annual-report-implementation-european-unions-instruments-financing-external-actions-2015-0_en>.

³ Simeon A Sahaydachny and Don Wallace Jr., ‘Opening Government Procurement Markets’ in Miguel Rodríguez Mendoza, Patrick Low and Kotschwar Barbara (eds.), *Trade rules in the making: Challenges in Regional and Multilateral Negotiations* (1999).

Even though an abundance of economic literature,⁴ as well as empirical studies,⁵ have indicated that discriminatory government procurement policies have no positive impact on trade (particularly on reducing imports) and are also non-optimal for overall social welfare, discriminatory government procurement practices and laws are still very common to see, and they are non-tariff barriers to world trade liberalisation.⁶

⁴ Theoretical economic studies have proved that discriminatory/protectionist government procurement neither reduces imports nor increases total social welfare. The economic literature starts with Baldwin (the analysis is made under classic, perfect market conditions, where the purchasing source from domestic and import is homogeneous). This conclusion was later extended to the condition of imperfect competition (foreign oligopoly) and heterogeneity. Under both conditions, the conclusion is the same: discrimination is of no use for the purpose of reducing imports. Based on those conclusions, McAfee and McMillan found that discriminatory government procurement is never an optimal policy for a national or international economy. See Robert E Baldwin and J David Richardson, 'Government Purchasing Policies and NTBs, and the International Monetary Crisis' in HE English and Keith AJ Hay (eds.), *Obstacles to Trade in the Pacific Area: Proceeding of the Fourth Pacific Trade and Development Conference* (Carleton School of International Affairs 1972) 253-254. Robert E. and Baldwin, 'Trade Policies in Developing Countries' in Ronald W Jones and Peter B Kenen (eds.), *Handbook of International Economics*, vol 1 (North-Holland 1984) 571-619. Kaz Miyagiwa, 'Oligopoly and Discriminatory Government Procurement Policy' (1991) 81 American Economic Review 1320-125. See also Florence Naegelen and Michel Mougeot, 'Discriminatory Public Procurement Policy and Cost Reduction Incentives' (1998) 67 Journal of Public Economics 349. R Preston McAfee and John McMillan, 'Government Procurement and International Trade' (1989) 26 Journal of International Economics 291. Federico Trionfetti, 'Discriminatory Public Procurement and International Trade' (2000) 23 The World Economy 57. Aaditya Mattoo, 'The Government Procurement Agreement: Implications of Economic Theory' (1996) 19 The World Economy 695.

⁵ Those empirical studies indicate that discrimination is still prevalent in national trade practice and that a home bias policy in government procurement has negative effects on bilateral trade and overall national welfare.

For example, Kutlina-Dimitrova and Lakatos established a modelling analysis based on the data of the EU Member States and found that most governments (especially local governments) have a low propensity for awarding cross-border government contracts, (which have the lowest propensity). See further, Zornitsa Kutlina-Dimitrova and Csilla Lakatos, 'Determinants of Direct Cross-Border Public Procurement in EU Member States' (2016) 152 Review of World Economics (Weltwirtschaftliches Archiv) 524.

Shingal examines the service procurement from abroad by the GPA signatories Japan and Swiss finding evidence of discrimination against foreign bidders in the government procurement service markets. This finding has been further developed through a sector-level dataset on the government procurement of Japan and Swiss from abroad over 1990-2003. See also Anirudh Shingal, 'Services Procurement under the WTO's Agreement on Government Procurement: Whither Market Access?' (2011) 10 World Trade Review 527. Anirudh Shingal, 'Econometric Analyses of Home Bias in Government Procurement' (2015) 23 Review of International Economics 188.

Richard and Kono analysis discriminatory procurement in a gravity model of trade finding that government spending is significantly and negatively linked to bilateral imports. see Stephanie J Rickard and Daniel Y Kono, 'Think Globally, Buy Locally: International Agreements and Government Procurement' (2014) 9 Review of International Organizations 333.

Trionfetti makes a comparison between government import shares of the OECD countries and those of private companies in thirteen manufacturing sectors. The finding that the import share of governments is systematically lower than that of the private companies suggests the existence of discriminatory policies. Marius Brühlhart and Federico Trionfetti, 'Public Expenditure, International Specialisation and Agglomeration' (2004) 48 European Economic Review 851. Also, Marius Brühlhart and Federico Trionfetti, 'Industrial and Public Procurement: Specialisation Theory and Empirical Evidence' (2001) 16 Journal of Economic Integration 106.

⁶ The general trade-distorting impact of non-tariff barriers have been recognised and studied in Robert Baldwin's works since the 1970s and has been proved by empirical evidence. Generally, Baldwin analysed non-tariff barriers from certain aspects. Firstly, he pointed out the evaluation of trade-distorting effects should be based on the assessment of the combined effects of all existing trade distortions. Secondly, the evaluation should take the world income as criteria to evaluate the trade-distorting measures, because one measure may have different effects on world income, depending on whether it is in a developed country or a developing country. Finally, he asserts that the effect of non-tariff measures should not be restricted in its trade aspects; moreover, it may bring about effects

From the time of the General Agreement on Tariff and Trades (GATT) until the present day, efforts to liberalise government procurement markets have been continuous. Government procurement market liberalisation is a hard nut to crack since the Tokyo Round negotiations and in the GATS negotiations.⁷ Due to large disparities of economic development, multilateral attempts failed. As a result, government procurement agreement negotiations continue to proceed in a plurilateral way.⁸ In the foreseeable future, the plurilateral approach will continue, and the revised Government Procurement Agreement (GPA) is still the most important international government procurement regulation to date.

At present, compared with other trade agreements under the WTO, the GPA has a relatively small number of signatories (see Figure: GPA membership), and the number has grown

outside the commercial field, such as on the monetary or fiscal regime. See Robert E Baldwin, *Nontariff Distortions of International Trade* (Washington: The Brookings Institution 1970) 6-10.

⁷ The GATT system incorporated a Code on Government Procurement (1979) after the Tokyo Round multilateral trade negotiations. The two multilateral initiatives on government procurement achieved no results (the first began in 1996 during the five Ministerial Conferences, and the other is a topic under negotiation by GATS). See World Trade Organization, 'Doha Ministerial Declaration on Fourth Session of Ministerial Conference' WT/MIN(01)/DEC/1 20 November 2001 26. Ministerial Conference Fifth Session Cancún, 'Ministerial Statement Adopted on 14 September 2003 1.' WT/MIN (03)/20 23 September 2003. See also Sue Arrowsmith, *Government Procurement in the WTO*, vol 12 (Sue Arrowsmith ed., 1st edn., Kluwer Law International 2003) Chapter 16. Working Party on GATS Rules, 'Negotiation on Government Procurement: Report by the Chairperson of the Working Party on GATS Rules' (2001) S/WPGR/11 30 June 2003 para 6. See also 'WTO | Services - WTO Negotiations on GATS Rules' <https://www.wto.org/english/tratop_e/serv_e/gats_rules_negs_e.htm> accessed 21 October 2018.

⁸ Since the establishment of the WTO, the GPA has experienced significant expansion, but still maintains its plurilateral nature.

slowly.⁹ Over 85 per cent of the GPA Parties are developed countries.¹⁰ The tasks of expanding the coverage and the number of signatories have been an integral mandate within the GPA.¹¹ The expansion especially encourages more developing countries to sign the GPA, in which the



application of discriminatory government procurement policies is common.

For the GPA accession negotiation of developing countries, an offer of covered entities is very concerned. Generally, GPA covers all procurement for government purpose by government entities.¹² All of the entity coverage schedules are attached in each Party's Annex 1, 2 or 3 to

⁹ During the past five years only New Zealand (2015), Montenegro (2015), Moldova (2015), Ukraine (2016) and Australia (October 2018) have joined the GPA. Since 1996, only two countries (Ireland in 2001 and New Zealand in 2015) took the initiative in seeking accession to the GPA without a prior WTO commitment. See WTO, 'Parties, observers and accessions' <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm> accessed 4 September 2019. Jean Heilman Grier, 'Prospects for Expansion of WTO Procurement Pact' *Perspectives on Trade* (7 June 2017). See also Christopher R Yukins and Johannes S Schnitzer, 'GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement' (2015) VII Trade Law & Development Journal 89.

¹⁰ Among the signatures of the GPA 1994, only Israel and Korea were developing countries. In the revised GPA (2012), only three more developing countries signed, namely, the Taiwan Province of China (signed on 15 June 2009), Hong Kong, China (signed on 19 June 1997) and Singapore (signed on 20 October 1997). Compared to other WTO agreements, which is binding on 164 members, of which developing countries are the majority, the adhesion of developing countries to the GPA is extremely limited. The fact is that most of the WTO developing members countries are under pressure to sign the GPA and to reduce discrimination against foreign suppliers. Currently, all 31 GPA observers are developing countries or economies in transition. The decision of developing countries not to sign the GPA seems guided by the priorities of domestic development and to have nothing to do with a careful and honest assessment of what the nations really stand to gain or lose by signing. See further Victor Mosoti, 'The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?' (2004) 25 University Of Pennsylvania Journal Of International Economic Law 596.

¹¹ Article XXII 7, on Negotiations and Future Work Programmes, states that '...the Parties shall undertake further negotiations...reducing and eliminating discriminatory measures and achieving the greatest possible extension of its coverage among all Parties...taking into consideration the needs of developing countries.'

¹² Article II.2 GPA explains that the covered procurement means 'procurement for government purpose by government entity'. and in the Report of the Panel on *Korea – Measures Affecting Government Procurement*, the

Appendix I, respectively as ‘central government entity, sub-central government entity and other entities’. ‘Other entities’ is a miscellaneous category, referring entities other entities whose procurement policies are not substantially controlled by, dependent on, or influenced by central, regional or local governments. It opened the possibility of inclusion of private entities or quasi-public entities. However, the GPA text does not define ‘government entity’.¹³

It has been observed, for example, that the large scale of state-owned enterprises (SOEs) is a thorny issue with regard to most developing countries. The aggregate share of SOEs in the sphere of world trade, especially in developing members’ government procurement markets,¹⁴ is huge and is still increasing. As growing market powers, the modern giant SOEs have a greater significance in developing economies than in developed economies. In some economies (mainly those of developed countries), most of the SOEs have been privatised, and SOEs account for a minor part of national economies.¹⁵ In other economies, however, mainly developing countries, such as those of Central Eastern Europe, Central Asia, South Asia, and Africa,¹⁶ the privatisation of SOEs is more recent, and SOEs are still recognisable in national economies, and even have strategic or dominant positions in national industries (especially in the energy and utility sectors).¹⁷

Panel also uses the wording of ‘governmental entity’ by emphasising that **“...whether an entity was "governmental" or not rather than to the relationship between two "governmental" entities for purposes of the GPA...** within the GPA, this is a critical question.’ See Report of the Panel, ‘Korea – Measures Affecting Government Procurement’ (2001) WT/DS163/R 1 May 2000 para 172. This language here draws upon that of other WTO multilateral agreements, in particular GATT Article III: 8 (a) and XVII: 2 (the exclusion of government procurement from non-discrimination obligation), and GATS Article XIII.1 (the exclusion of non-discrimination obligation to government procurement). Consequently, Article II (3) Revised GPA, following the GATT and GATS convention, take a list approach to describe covered entity.

¹³ The relevant provisions on entity coverage are Article II Scope and Coverage, Revised Agreement on Government Procurement: “for the purposes of this Agreement, covered procurement means procurement for governmental purposes...” and Article XIX — Modifications and Rectifications to Coverage the parties could propose the ‘withdrawal of an entity from its annexes to Appendix I in exercise of its rights on the grounds that government control or influence over the entity’s covered procurement has been effectively eliminated...’

¹⁴ The proportion of SOEs among the Forbes© Global 500 has grown from 9 per cent in 2005 to 23 per cent in 2014. In the international trade and foreign investments, SOEs take up a significant portion, and the value of their sales represents up to 19 per cent of the value of global flows of goods and service represents up to 19 per cent of the value of global flows of goods and service. See further Jan Sturesson, Scott McIntyre, and Nick C Jones, ‘State-Owned Enterprises: Catalysts for Public Value Creation?’ (April 2015) PWC Public Sector Research Centre Report 9.

¹⁵ Since the 1970s, there have been extensive privatisation programmes in the European countries, and in the USA. See Pier Angelo Toninelli, ‘From Private to Public to Private Again: A Long-Time Perspective on Nationalization’ (2008) XLIII 4° Analise Social 689.

¹⁶ See further, Saul Estrin and Adeline Pelletier, ‘Privatisation in Developing Countries: What Are the Lessons of Experience?’ (2016) IZA Discussion Papers 10297 15-22.

¹⁷ In Western countries, from 1984 to 1996, most of the state ownership was transferred to private enterprises for market competition, and the average share of SOEs in industrial production decreased from 8.5 per cent to 5 per cent. In less developed countries, however, such as those of Asia, SOEs’ contribution to economic development

Generally, there is no disagreement on what central governments or sub-central governments are. The disagreement lies in what ‘other entities’ include. Literally, it includes ‘entities which bear the governmental features but apart from the entities which are governmental bodies according to the constitutional laws of each Party’.¹⁸ Most of the entities in the GPA Parties’ annexes are SOEs, utility enterprises and their equivalents. Unlike the understanding of ‘central and sub-central government entities’, among WTO members, the SOEs and utilities have different relationships with their governments. Consequently, due to the diversity of those ‘other entities’ in WTO members’ national economies, there is no consensus on what ‘other entities’ should be covered under the GPA. The lack of common understanding of ‘other entities’ has made the coverage negotiation lengthy and there is lack of rule as a guide for the accession of developing countries, especially developing countries with large state sectors, such as China, Poland, Russia, Vietnam and so forth.

As a result, the GPA negotiation is more of a power-driven bargaining process rather than rule-based harmonisation. This bargaining game discourages attempts for GPA expansion on the part of both the acceding Parties and the existing Parties.¹⁹

It is argued that the absence of a definition of ‘government entity’ has crippled GPA expansion. This research makes an attempt to solve the problem of the absence of the definition of ‘government entity’ in the interests of facilitating GPA expansion.

1.2. Research Gap and Its Importance

From the OECD Guidance on Government Procurement, the General Agreement on Tariff and Trade (GATT) Tokyo Round Code on Government Procurement (1979) and the GPA/WTO (1994) to the Revised GPA (2012), entity coverage in the WTO/GPA has expanded from central government level to sub-central level and ‘other entities’.

The Revised GPA (2012) has led to a proliferation of studies on the GPA. Previous studies on the GPA have focused on the improvements of the Revised GPA and its impacts on international trade, the concern of transparency and sustainable procurement.²⁰ However, to

is still recognisable, and their share still accounts for over 10 per cent of their GDP. See Toninelli (n 12) 689. Antonio Capobianco and Hans Christiansen, ‘Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options’ (2011) OECD Corporate Governance Working Papers No. 1 OECD Publishing 9,10.

¹⁸ Arie Reich, ‘The New GATT Agreement on Government Procurement’ (1997) 31 *Journal of World Trade* 130.

¹⁹ For an analysis of the drawbacks of the current GPA entity coverage approach, see Chapter 4 Section 3.

²⁰ See the plenty research of GPA improvements and its impact on international trade and national economies, to name a few: Hejing Chen and John Whalley, ‘The WTO Government Procurement Agreement and Its Impacts on

date, only a few researchers have addressed the issue of coverage under the GPA, with the main research on the GPA coverage mostly restricted to the scope of contracts, particularly service contracts.²¹ Scarcely do researchers touch the entity coverage topic,²² and no previous studies have attempted to provide definitions for ‘government entity’ covered by the GPA in the way advanced in this thesis. The subject of entity coverage presents a research gap related to what ‘government entity’ or ‘entities’ should generally be covered by the GPA. While this research gap exists, interestingly the accession negotiation for countries interested in joining the GPA gain importance of the question.

Trade’ (2011) NBER Working Paper No. 17365 August 2011. Julien Gourdon and James Messent, ‘How Government Procurement Measures Can Affect Trade’ (2017) OECD Trade Policy Papers No. 199. Shingal, ‘Econometric Analyses of Home Bias in Government Procurement’ (n 5). Kamala Dawar, ‘Government Procurement in the WTO: A Case for Greater Integration’ (2016) 15 World Trade Review 645. Robert D Anderson and Anna Caroline Muller, ‘The Revised WTO Agreement on Government Procurement as an Emerging Pillar of the World Trading System: Recent Developments’ (2015) 7 Trade, Law and Development 42. Patrick A Messerlin, ‘How Open Are Public Procurement Markets?’ (2015) Robert Schuman Centre for Advanced Studies Global Governance Programme-204 EUI Working Paper RSCAS 2015/89. Changfa Lo, ‘The Benefits for Developing Countries of Accession to the Agreement on Government Procurement: The Case of Chinese Taipei’ in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (1st edn, Cambridge University Press 2011). Robert D Anderson, ‘The Conclusion of the Renegotiations of the World Trade Organization Agreement on Government Procurement: What It Means for the Agreement and for the World Economy’ (2012) 21 Public Procurement Law Review 83. Robert D Anderson and others, ‘Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and an Evaluative Framework for Individual WTO Members Considering Accession’ (2012) 21 Public Procurement Law Review 113. Robert D Anderson and Kodjo Osei-Lah, ‘The Coverage Negotiations under the Agreement on Government Procurement: Context, Mandate, Process and Prospects’, *The WTO Regime on Government Procurement: Challenge and Reform* (2011). Gerard De Graaf and Matthew King, ‘Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round’ (1995) 29 The International Lawyer 432.

The research on the issues of transparency, see for example, Megan A. Kinsey, ‘Transparency in Government Procurement: An International Consensus?’ (2004) 34 Public Contract Law Journal 155. Sue Arrowsmith, ‘Towards a Multilateral Agreement on Transparency in Government Procurement’ (1998) 47 International and Comparative Law Quarterly 793. Vinod Rege, ‘Transparency in Government Procurement: Issues of Concern and Interest to Developing Countries’ (2001) 35 Journal of World Trade 489. William A Kerr, ‘Transforming Vietnam: A Quest for Improved Efficiency and Transparency in Central Government Procurement’ (2014) 42 Policy & Politics 109. Christopher McCrudden, ‘International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of “Selective Purchasing” Laws under the WTO Government Procurement Agreement’ (1999) 2 Journal of International Economic Law 3.

Most recently, for example, the Work Programme on sustainable procurement of the Committee on Government Procurement on 22 February 2017.

²¹ Shingal, ‘Services Procurement under the WTO’s Agreement on Government Procurement: Whither Market Access?’ (n 5).

²² Ping Wang, ‘Coverage of the WTO’s Agreement on Government Procurement: Challenges of Integrating China and Other Countries with a Large State Sector into the Global Trading System’ (2007) 10 Journal of International Economic Law 887. Skye Mathieson, ‘Accessing China’s Public Procurement Market: Which State-Influenced Enterprises Should the WTO’s Government Procurement Agreement Cover’ (2010) 40 Public Contract Law Journal 250. David M Attwater, ‘The Influence of Buy American Policies on Canadian Coverage Under the World Trade Organization Agreement on Government Procurement’ (2012) 46 The International Lawyer 939. See also Yang Junsok, ‘Expansion of the Government Procurement Agreement: Time to Concentrate on Depth as Well as Width’ (2012) 16 East Asian Economic Review 363.

Compared with other WTO Agreements, the GATT and GATS, which deal with trade measures and practice on goods and services respectively, the GPA is virtually *sui generis* as it deals with trade of government nature. Thus, the question of **whether an entity is ‘governmental’ or not** is particularly essential in the GPA context than in the GATT and GATS context. This is because the GPA is a trade agreement that regulates procurement by ‘government entities’ (special subjects), whereas GATT and GATS specifically regulate WTO members’ specific practices, measures and rules with the aim of reducing or eliminating trade barriers such as tariffs or quotas on imports/imports of goods and services between WTO Member countries. Consequently, whether an action is being taken by a ‘government entity’ or a ‘private person’ is at the first instance relevant to the application of the GPA rules.

Furthermore, as different thresholds²³ and variation in tendering processes²⁴ apply to whether an entity is classified as central, sub-central or other government entities, it is indispensable to understand what kind of entities are ‘government entities’ to subject them to GPA obligations.

As noted, the definition of ‘government entities’ not only has conceptual importance for the GPA development and its future coverage expansion, it is also a recurrent cause of disputes among WTO members.²⁵ Thus, it is significant to note that the most recent WTO Appellate Report reveals that unclear definitions remain a source of disagreement among the WTO members.²⁶

Academic literature concerning what kind of ‘government entity’ should be subject to the GPA is sparse. The main works are those authored by Ping Wang and Skye Mathieson which provide their ideas on this issue from certain perspectives. Ping Wang primarily suggests the coverage of entities under the GPA should consider factors of government control and competition’.²⁷

²³ For example, lower threshold values apply to central government procurement than to procurement by the sub-central government. The relevant threshold specified in each Party’s annex to Appendix I of the GPA. To take the EU threshold as an example, the threshold for central government purchase is 130,000 SDR for goods, 130,000 SDR for service, and 5,000,000 SDR for construction service; the threshold for sub-central government purchasing is 200,000 SDR for goods, 200,000 SDR for services, and 5,000,000 for construction services.

²⁴ For example, in procurement by sub-central government and other entities, these bodies can use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement. See Article IX: 12 & 13 Qualification of Suppliers, Revised GPA 2012.

²⁵ See the analysis of the WTO adjudicatory reports on those notions in Chapter 5 Section 3.

²⁶ See Report of the Appellate Body, ‘United States – Countervailing Duty Measures on Certain Products from China Recourse to Article 21.5 of the DSU By China’ WT/DS437/AB/RW 16 July 2019.

²⁷ Ping Wang, ‘Coverage of the WTO’s Agreement on Government Procurement: Challenges of Integrating China and Other Countries with a Large State Sector into the Global Trading System’ (2007) 10 Journal of International Economic Law 887.

However, Wang does not elaborate on the two factors, nor works on a definition of a government entity.

Mathieson's article,²⁸ written in the context of China's accession to the GPA suggests that a 'factor-based' definition of control should be formulated by integrating the relevant practice of the US, the UNCITRAL, the EU, China, and the GPA. With regards to the competition factor, Mathieson suggests using the Herfindahl-Hirschman Index (HHI),²⁹ to indicate whether the public controlled or influenced entity has competitiveness. The HHI is useful for indicating the market concentration, namely, the distribution of competition opportunities. However, the market concentration does not necessarily indicate whether a competitor in this market will or will not distort procurement decisions. Further study is still necessary to elaborate the two factors and to determine how these two factors interact with each other to distinguish the treatment of different SOEs, utility companies, and entities with special or exclusive rights.

This uncertainty and the failure to find operative answers are the ultimate motivation to undertake the present research. Specifically, the author desires to achieve clarity and certainty in relation to the question of entity coverage under the GPA based on the opinion that an improved consensus on what entities should be covered by the GPA rules would facilitate the accession negotiations and support legal certainty for the agreed trade commitments.

1.3. Research Question

The central research question which underpins this research is: *how to define 'government entities' covered by the GPA?* In order to answer this question, the author examines three subsidiary questions, namely:

- a. how is government control to be defined;
- b. how is competition in the market to be identified; and

²⁸ Skye Mathieson, 'Accessing China's Public Procurement Market: Which State-Influenced Enterprises Should the WTO's Government Procurement Agreement Cover' (2010) 40 Public Contract Law Journal 233.

²⁹ The Herfindahl-Hirschman Index (HHI) has proved to be a useful indicator of the market concentration in a specific industry and the market power of any particular entity within that market. The HHI takes into account the relative size distribution of the player in a market. The index is calculated by squaring the market share of each player competing in the market and then summing the resulting numbers. For example, assuming that a market (the total market share is 100) consist of four players A, B, C and D with respective shares of 30 per cent, 30 per cent, 20 per cent, and 20 per cent, the market concentration index of the defined market (where A, B, C and D compete) is 26 per cent (namely, $30 \text{ per cent}^2 + 30 \text{ per cent}^2 + 20 \text{ per cent}^2 + 20 \text{ per cent}^2 = 26 \text{ per cent}$). Basically, the higher the index is, the greater concentration in the concerned market concerned, which further indicates less competition in the market concerned. The index approaches zero when a market is occupied by a large number of players of relatively equal size (perfect competition). On the contrary, when it reached the maximum of 100 per cent (10,000 points), the market is controlled by a single firm (monopoly).

- c. what is the relationship between ‘government control’ and ‘competition’.

1.4. Research Methodology

The research exercise is grounded in a mixed-method which engages with a comparative analysis of two legal systems—the WTO/GPA and the EU procurement directives (Directive 2014/24/EU and Directive 2014/25/EU), and more particularly on the aims and purpose of regulating government procurement in these instruments. Through the critical and comparative analysis, the substances of the covered entities will emerge. This analysis will also employ various other methods, namely doctrinal, historical and interdisciplinary methods.

The choice of those methods for this thesis is motivated by a consideration of the added value it can provide in terms of originality, scope, explicative power, and normativity. It enables a satisfactory answer to the formulated research question to be provided and to do so from a unique point of view that has not been adopted previously.

1.4.1. Doctrinal Legal Method

The established literature and existing legal rules and principles in the two legal systems are the starting point of legal research. Examination of legal sources, such as legal texts, case laws (so-called ‘black letter’ law), will be employed to discover the rules and principles. Based on a doctrinal examination, the researcher can systematically employ these legal sources in a descriptive analysis and then make a normative evaluation.³⁰

The research process begins with a general examination of some important trade initiatives and then reviews the international instruments on government procurement by the World Bank, the OECD and the United Nations Commission on International Trade Law on Public Procurement (hereinafter referred as ‘UNCITRAL Model Law on Public Procurement’). The general overview leads to the premise that, among the existing international initiatives on regulating international government procurement markets, the GPA is the most influential regime on rights and obligations connected with international trade liberalisation of government procurement market. That is why it has raised more concerns and deserves further exploration. Furthermore, the doctrinal study delves into similar notions of ‘government entity’ in some

³⁰ Reza Banakar and Max Travers, ‘Law, Sociology and Method’, *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 7.

specific provisions of the selected WTO multilateral trade agreements, such as ‘State trading enterprise’ in the GATT Article XVII: 1(a), ‘monopoly suppliers’ in the GATS Article XXVIII and ‘public bodies’ in the SCM Article 1.1(a) (1).

The doctrinal study of those provisions and the relevant case laws³¹ are intended to provide legal guidance on how to understand the notion of ‘government entity’, especially in connection with SOEs. In addition, it is useful to make clear the extent to which a consensus on this issue has been reached among WTO members. Primary sources such as legal text and relevant case law, and literature in the form of books and journals³² are also reviewed (secondary sources).

The doctrinal legal study is also particularly important for an examination of the EU ‘entity coverage’ approach as the approach was established based on a long history of legislative evolution and abundant case-law interpretations. Firstly, the doctrinal research will conduct on some fundamental treaty provisions, such as the Treaty on the Functioning of the European Union (hereinafter referred to as ‘TFEU’) Article 34, 49, 56, 245, 106(1) (2), and Article 102. These clauses provide the principle of free movement and non-discrimination, which underpin regulatory public procurement and understanding of the definition of ‘contracting authority’ and ‘contracting entities’ under the EU procurement rules. Furthermore, the research emphasis is placed on the notion of ‘contracting authorities’, especially the notion of ‘bodies governed by public law’ and ‘public undertakings’, since they are very relevant to an analysis of ‘other entities’ in the GPA. The examination of the two notions focuses on Article 2 (4) of the

³¹ Report of the Appellate Body, ‘Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain’ WT/DS276/AB/R 30 August 2004 para 85. Report of the Panel, ‘China-Certain Measures Affecting Electronic Payment Service’ WT/DS413/R 16 July 2012 para 7.587. Report of the Appellate Body, ‘United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US-AD & CVD (China))’ WT/DS379/AB/R 11 March 2011 para 356. Report of the Panel, ‘European Communities — Countervailing Measures On Dynamic Random Access Memory Chips From Korea’ WT/DS299/R 17 June 2005. para 7.29.

³² For example, the Harvard International Law Journal, the Public Procurement Law Review, the Journal of World Trade, the Journal of International Economic Law.

Directive 2014/24/EU³³ and Article 4 (2) Directive 2014/25/EU³⁴, as well as the relevant CJEU case law.³⁵

1.4.2. Interdisciplinary Legal Study

In practice, even doctrinal analysis usually makes at least some reference to other, external, factors, as well as seeking answers that are consistent with the existing body of rules.³⁶ For example, an uncertain or ambiguous legal issue in the GPA can often be more easily interpreted in its proper historical context or economic context.

Consequently, the thesis touches upon the literature and methods of other related disciplines, in particular, political science and economics, and of humanities (for example, history). When it comes to the advantages and disadvantages of discriminatory government procurement policies, political science theory will be touched upon to explain why governments are disinclined to abandon discrimination policies, even though they are economically non-optimal (see Chapter 3). On the other hand, the author argues that, from a political-economic point of view, and in the larger context of globalisation, trade organisations have to allow more space for domestic policies while at the same time to improve the legal consistency between national legislations. Thus, the GPA needs to allow the signatories to adopt government procurement as a policy tool and also to improve consistency in the understanding of the entity coverage (see Chapter 5).

This research also refers to the theories of other disciplines, such as competition law rationales and public law theory (see Chapter 7). The author examines the competition law concept in its relevance to market power and competition and examines the evolution of the division between the public and the private in legal systems. Based on the conclusions of those investigations, the author proposes that the solution of the coverage issue is based primarily on trade theory,

³³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, OJ L 94, 28.3.2014, 65–242

³⁴ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance, OJ L 94, 28.3.2014, 243–374.

³⁵ Such as Case 31/87 *Gebroeders Beentjes BV v State of the Netherlands* (1988) ECR 04635. Case C-380/98 *The Queen v HM Treasury, ex parte The University of Cambridge* (2000) ECR I-0803. Case C-272/91 *Commission of the European Communities v Italian Republic* (1994) ECR I-01409. Case C-283/00 *Commission of the European Communities v Kingdom of Spain* (2003) ECR I-11697.

³⁶ Paul Chynoweth, 'Chapter 3-Legal Research' in Andrew Knight and Leslie Ruddock (eds.), *Advanced research methods in the built environment* (Wiley-Blackwell 2008) 30.

but also on competition theory. Furthermore, as an increasing number of entities conduct private activities while fulfilling public functions that were traditionally undertaken by governments, it became common to see governmental branches carrying out private activities. Thus, under the new public law theories, the dividing line between public and private is becoming blurred.³⁷ Given this new premise, the research takes the approach that the formal legal status of an entity is not the only reliable criteria for the definition of ‘government entity’. To this end, the research deploys the following inter-disciplinary approaches.

1.4.2.1. Law and Economics

Trade law is, in essence, economic law, and it has been subject to rigorous economic analysis.³⁸ The economics can be a method of appraising law rather than formulating laws using economic theory. Specifically, some economic law conclusions provide us with a framework allowing the observance of trade law and the appraisal of the economic effect of trade measures, practices and laws.

In this thesis, economics method is necessary to appraise the economic effect of discriminatory government procurement policies on the wellbeing of national economies, as they are generally expected to have positive effects. This economic appraises of national discriminatory or preferential government procurement laws in Chapter 3 attempts to see if they are desirable from an economic point of view.

The basis of an economics approach to law is the assumption that the people involved with the legal system act as rational maximisers of their own interest satisfaction.³⁹ Therefore, in the appraisal, the author assumes that governments are rational and expect an optimal economic result. The results of the appraisal result would, first of all, explain current laws on the basis that the latter reflects economic thinking and secondly it would inspire ideas for improving laws and policy in the interest of achieving more efficient results.⁴⁰

Furthermore, the results of the economics appraisal of discriminatory government procurement policies could act as evidence for the GPA expansion. This appraisal lays the foundation of the

³⁷ See analysis in Chapter 7 Section 2.

³⁸ Eric A. Posner and Alan O. Sykes, *Economic Foundations of International Law* (Cambridge Massachusetts: Belknap Press of Harvard University Press 2013) Chapter 18.

³⁹ Richard A Posner, ‘The Economic Approach to Law’ (1975) 757 Texas Law Review 761.

⁴⁰ Robert Cooter and Thomas Ulen, *Law and Economics* (6th edn., Berkeley Law Books. Book 2 2016) 3-9.

definitional efforts. Without the economic evidence and empirical conclusion, it is not possible to raise the concern of the current GPA expansion.

1.4.2.2. Law and Political Science

The starting point for the study of law and politics is that politics is beneficial in offering explanations for the prevalence of discriminatory government procurement practice, as it is analysed in Chapter 3, Section 4.2. An understanding of the law and legal institutions can be gained by placing politics in the foreground.⁴¹ WTO law itself is a result of political economy based on gathering a consensus of political wills on trade issues. Even though trade theory stipulates that free trade is optimal for the world economy, every trade agreement has to respect sovereignty and differences in national political wills in order to open domestic markets. The GPA is such a case in point. Theoretically, opening government procurement market brings long-term benefits to these markets. However, those benefits may not be spread evenly among all signatories.⁴² The GPA rules, therefore, need to take into account the interests of all the signatories (both developing countries and developed countries) in order to persuade more signatories to change their discriminatory government procurement policies (see Chapter 4, section 2.5) and open up their government procurement markets to suppliers from other countries.

1.4.2.3. Law and History

The historical approach applies almost everywhere in this research. The historical approach brings some insights from a historical-political perspective, which casts a new light on the current process. Examining the origins of the issue also provides some ideas of when and how the definitional issue became of concern.

The choice of historical method is particularly helpful in establishing the foundation for the discourse in the thesis. For example, a historical review of the evolution of the GPA will reveal the political consensus at the time when the Agreement was reached. That consensus is the foundation for defining what kind of entities could be covered under the GPA in negotiation practice.

⁴¹ Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira, *Overview of Law and Politics the Study of Law and Politics* (Oxford University Press 2011) 2.

⁴² Mosoti (n 10) 597.

Furthermore, the author also uses a historical approach to review the debates on GPA entity coverage issue. The historical review is helpful to reveal the concerns of the signatories and the disagreement between them. Those concerns and those disagreements guide the whole research. Moreover, a historical review of SOEs reform worldwide lends support to a comparison of the regulation of SOEs in history and then the regulation of the most recent free trade agreements.

Furthermore, the author also conducts a historical reflection on the EU procurement legislation to explain how the EU procurement directives progressively improve its definition and how the Court of Justice of the European Union (hereinafter referred to as ‘CJEU’) has interpreted those definitions in relation to the entity coverage of the EU procurement directives.

1.4.3. Comparative Legal Analysis

This research also adopts a comparative approach to the legal analysis of the WTO and the EU approach to covered entities to find out some references for the GPA definition of a government entity. Two obvious questions arise from the choice of a comparative methodology. First, is the comparison necessary? Second, are they comparable? Undoubtedly, there is a practical problem in comparing two different legal systems and, in order to ensure the comparison is meaningful, it is important to keep it within a certain context and to be aware of both differences and similarities.

1.4.3.1. Is the Comparison Necessary?

1.4.3.1.1. *General Justification of Comparisons*

Experience has taught us that comparisons enhance knowledge, and the field of law is no exception. This is indeed the rationale of any form of comparative analysis. The WTO and the EU have their distinct legal system, and a scrutiny of the differences between their respective approaches to the same issue offers opportunities for devising improvements. Through searching the differences and similarities between the two approaches, this comparison attempts to explain why the approaches are different, and also to evaluate the strengths and weaknesses of the two.

However, although an increase in knowledge is the basic reward of a comparative study, the ultimate goal and benefit is the achievement of a critical view. The comparison between EU

public procurement legislation and the WTO/GPA enriches our knowledge of the world's most developed government procurement legal system. The comparison is also an attempt to formulate a critique of the current approach to GPA entity coverage and to find inspiration for a normative approach by referring to the EU definition of contracting authorities, especially that of 'bodies governed by public law'. A critical analysis is so important that it saves comparative law from being merely an exercise of piling up blocks.⁴³

1.4.3.1.2. *The Normative Implications of EU Law for the GPA*

The EU has been recognised as a normative power that plays an international role as a promoter of norms.⁴⁴ It is observed that the EU has evolved into a hybrid of supranational and international forms of governance that transcends Westphalian norms.⁴⁵ This combination of historical context, hybrid and legal constitutions has accelerated a commitment to placing universal norms and principles at the centre of its relations with its Member States and also with the rest of the world.⁴⁶

The impact and nature of EU normative power are affected by whether the EU tends to adopt existing international norms and whether it reflects a balance between States and markets.⁴⁷ In a European context, the economic spectrum has ranged broadly, on the one hand, from British liberalism, which was embedded in a deregulatory and liberal paradigm, and on the other hand, to French *dirigisme* or intervention policies. The process of creating a single European market has driven a consensus on economic policies that were closer to the German *Ordnungspolitik*, in which free markets operate within a framework of rules ensuring some common principles in law.⁴⁸

⁴³ Gerhard Danneman, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2008) 1-37.

⁴⁴ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235.

⁴⁵ Toby King, 'Human Rights in European Foreign Policy: Success or Failure for Post- Modern Diplomacy?' (1999) 10 *European Journal of International Law* 313.

⁴⁶ Michael Merlingen, Cas Mudde and Ulrich Sedelmeier, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria' (2001) 39 *JCMS: Journal of Common Market Studies* 59. Andrew Clapham, 'Where Is the EU's Human Rights Common Foreign Policy, and How Is It Manifested in Multilateral Fora?' in Philip Alston (ed), *The EU and Human Rights* (Oxford: Oxford University Press 1999) 627-683.

⁴⁷ Stephen Woolcock, 'European Union Economic Diplomacy' in Nicholas Bayne and Stephen Woolcock (eds.), *The New Economic Diplomacy: Decision-making and negotiation in international economic relations*, vol 4 (4th edn, Routledge 2017) 175.

⁴⁸ Peter AG Bergeijk, Jan Melissen and Maaike Okano-Heijmans, *Economic Diplomacy: Economic and Political Perspectives*. (BRILL 2011) 92.

In order to facilitate the European market integration and promote competition within the Internal Market, the EU law harmonises essential policies, standards and laws. The regulation of public procurement is one case in point. This normative power is strengthened by internal consensus, and importantly, it enhances the international normative power of EU law.

The EU's global normative power shaped the Uruguay Round multilateral negotiations. Unlike the US approach, which promotes a more *laissez-faire* ideology, the EU approach is so comprehensive and inclusive that the EU regulatory norms can achieve a balance between market and regulation. Thus, it is more acceptable for most WTO members. As a result, the EU rules and regulations on public contracts, investment and competition shape the global economy and the degree of openness to international competition and represents a more developed model of international regulation to follow by WTO. For example, the EU approach was adopted as the foundation for the agreement on Technical Barriers to Trade in the Uruguay Round Negotiations of the WTO.⁴⁹

EU regulation of government procurement is another case in which the normative power of the EU has implications for WTO/GPA. At its outset in 1970s, the EU procurement regulation influenced the OECD work on government procurement regulation, which became the origin of the GATT Tokyo Code on Government Procurement 1979⁵⁰ (as in 1977, the EU-influenced OECD works produced a 'Draft Integrated Text for Negotiations on Government Procurement' and was transferred to the GATT Secretariat).⁵¹ Due to its similar origins, the revised GPA was still influenced by the EU public procurement legislation. For that reason, the EU approach to the same issue could act as a reference for resolving the issue in the WTO/GPA.

1.4.3.2. Are the Two Legal Systems Comparable?

Only comparable things can be compared. Comparability is often stated as the premise for a comparative study.⁵² Thus, the second question in the thesis would naturally be: are the

⁴⁹ Woolcock (n 46) 176.

⁵⁰ See Chapter 4 section 2.1.

⁵¹ The EU/European Community (hereinafter referred to as the 'EC') Supplies and Works Directives of the 1970s also inherited the rules that developed primarily during negotiations with the United States in the OECD, but had limited coverage, and scope for discretion remained with purchasing entities. See Stephen Woolcock, 'Public Procurement in International Trade' (2012) European Parliament's Committee on International Trade Policy Department DG External Policies EP/EXPO/B/INTA/FWC/2009-01/Lot7/28 5, 7, 21.

⁵² Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Oxford University Press 1999) 34.

concepts in the GPA and the EU procurement directives comparable? This question is frequently asked, and the answer to it is fundamental to this research.

At the outset, it is important to note that the European Union has developed its own detailed public procurement discipline over almost forty years. This regime is the most developed regional legal system of public procurement in the world. At the same time, the GPA is the most developed global government procurement regulation that applies to not only the EU Member States, as well as to States that are not within the EU.

WTO law differs from EU law in its aims and background, from law, politics, history, economy and so on as elaborated upon in Chapter 6 Section 2.1.1. With these differences in mind, we should ask whether the two legal systems can be compared on a general level or, specifically, whether the definitional issue in the two legal systems is comparable. Can the EU approach be borrowed and transplanted into the GPA/WTO? The answer is yes. The viability of carrying out a comparative exercise between rules that govern the same subjects and, from this perspective, pursue the same function, is not precluded by differences, even differences in objectives, in the general legal systems. The comparative research in this thesis is a functional one. A functional comparison will assist in comparisons of the ability of different solutions to solve similar problems and spur similar degrees of progress.

The subjects of the comparative research, despite their differences, also share some similarities. The similarities between the two systems lay the foundation for the conclusion that the two systems are comparable. Generally, the WTO and the EU both use competition mechanisms in order to enhance access to regulated procurement markets,⁵³ and both the GPA and the EU procurement rules have suffered similar problems, such as inefficiency in price and delivery conditions and low rates of innovation in the procurement systems.⁵⁴ Those similarities, especially the shared focus on competition, are the foundation for a comparison of their approaches to entity coverage.

On the differences, both the WTO/GPA and the EU, are legal systems that regulate many aspects of government procurement to eliminate barriers to this market, and both have a

⁵³ Sabino Cassese, 'Global Standards for National Administrative Procedure' (2005) 68 *Law & Contemporary Problems* 109.

⁵⁴ Hilde Caroli Casavola, 'The WTO and the EU: Exploring the Relationship Between Public Procurement Regulatory Systems' in Edoardo Chiti and Mattarella Giorgio Bernardo (eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (Springer, Berlin, Heidelberg 2011) 296.

plurality of Member Parties/States with different constitutional and administrative law traditions.

The Aims and Purpose of the EU and the WTO

The aims and purposes of regulating government procurement markets constitute the general premise of a functional proposal of the definition of ‘government entity’. Only if a definition conforms to the general premise will it be legitimate and acceptable to the signatories (because general aims and purpose represent the general consensus of the GPA signatories). Generally, every entity that creates barriers to government procurement markets is not in conformity with the aim of trade liberalisation and could be subject to government procurement rules.

The essential nature of the WTO has long been of interest to scholars.⁵⁵ Howse has stated that ‘the WTO rules are the constitution of the global economy and the international charter of free and fair competition to ensure better market access through negotiations and promote efficient resource allocation.’⁵⁶ Similarly, Regan empirically and theoretically argued that ‘trade agreements restrains protectionism’.⁵⁷ In other words, the constant aim and purpose of the WTO are to eliminate trade protectionism and to promote the most extensive competition.⁵⁸

The questions which then arise are what a ‘market is? and what ‘trade protectionism’ is? The market, be it national or international, is a place where trade and competition occur. Trade refers to the circulation of goods and services within the relevant market. Competition is the process whereby the suppliers struggle in the relevant market to reinforce or develop their

⁵⁵ Thomas Cottier, ‘John H. Jackson, Sovereignty-Modern and the Constitutional Approach to International Law’ (2016) 19 *Journal of International Economic Law* 323. See also John H Jackson, *The World Trading System : Law and Policy of International Economic Relations* (MIT Press 1997).

⁵⁶ Robert Howse, ‘Do the World Organization Disciplines on Domestic Subsidies Make Sense? The Case for Legalizing Some Subsidies’ in KW Bagwell, GA Bermann and PC Mavroidis (eds.), *Law and Economics of Contingent Protection in International Trade* (Cambridge: Cambridge University Press 2010).

⁵⁷ A school of economist argues that trade agreement restrains purposeful exploitation of market power, and another school of economists argues that trade agreement restrains protectionism. Regan has debated that the latter restraining protectionism is true in the real world. See Donald H Regan, ‘What Are Trade Agreements for? - Two Conflicting Stories Told by Economists, with a Lesson for Lawyers’ (2006) 9 *Journal of International Economic Law* 951.

⁵⁸ Ernst Ulrich Petersmann, ‘Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO: Introduction and Summary’ (2004) 7 *Journal of International Economic Law* 585.

position.⁵⁹ Trade protectionism applies whatever measure, policies, legislations on the parties and places involved (such as subsidies and local content requirement respectively).

In the WTO, eliminating trade protectionism is specified as the non-discrimination obligation of each member. The non-discrimination obligation arises from the international legal principle of equality, one of the few guiding principles of international institutions, and one which implies equal treatment of all the members that are signatories to a given treaty.

The WTO objective of promoting the broadest possible competition rests on the assumption that the members trade products, services and suppliers from other members in a manner ‘*no less favourable than*’ that accorded to domestic or any other members’ products, services and suppliers, as enshrined in Article I (the Most Favoured Nation Clause, hereinafter referred to as ‘MFN’) and Article III (the National Treatment Clause, hereinafter referred to as ‘NT’) of the GATT.

An equivalent of Article I and Article III of the GATT can be found in GPA Article III, entitled ‘National treatment and non-discrimination’.⁶⁰ Besides, the recital of the agreement is crucial, as it usually states the aims and purpose of the agreement. The recital of the GPA clearly states that the agreement is ‘to achieve greater liberalisation and expansion of, and improve, the framework for, the conduct of international trade...’. These words expressly indicate the goal of gaining market access for further trade liberalisation.

Both the EU and the WTO were established after the Second World War. European integration is unique in international law,⁶¹ and its nature and role have inspired a great deal of discussion.⁶² The EU has surpassed the GATT and its successor the WTO in aspects of development and integration, and there are apparent differences between the EU and the WTO.

⁵⁹ Luca Rubini, *The Definition of Subsidy and State Aid-WTO and EC Law in Competitive Perspective* (Oxford: Oxford University Press 2009) 25.

⁶⁰ Arrowsmith argues that, in a broad sense, international institutions pursue political objectives rather than the application of largely predetermined law. In particular, as a WTO negotiation forum, the GPA appears as a set of bilateral agreements. For this reason, even if non-discrimination as a comprehensive principle generates detailed tendering procedures, the degree of differentiation between norms and principles is lower than it would be at a national and European level. Arrowsmith, *Gov. Procure. WTO* (n 7) 169.

⁶¹ In *Van Gen den Loos*, the Court of Justice has stated that the European Community constitutes a ‘new legal order in international law’. Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (1963) ECR 00001.

⁶² See, e.g. JHH Weiler and Marlene Wind (eds.), *European Constitutionalism beyond the State* (Cambridge University Press 2001).

While the WTO is an organisation specifically aiming at trade liberalisation, the EU pursues various aims and purposes, including, but not limited to, economic and trade purposes. Thus, the EU has more comprehensive competencies than the WTO. It has legislative competence as well as the power to make and execute policies, laws and to take judicial action against behaviour that is in breach of EU obligations.

As a trade negotiation forum, the WTO appears more like a political institution than an international institution that applies largely predetermined law.⁶³ In this ‘political institution’, the Committee on Government Procurement is an administrative agency, unlike the EU Commission, and it has no legislative or executive competence. It attempts to unify the political will of its members and relies heavily on extensive reciprocal negotiations.⁶⁴ In situations in which the members have different trade interests and economic structures, it is not easy to negotiate agreements. For this reason, the entity coverage negotiations of the GPA are usually lengthy and less effective, and may even end in deadlock, as did the negotiations between the EU and the US in the 1990s.⁶⁵

WTO membership is more diverse than that of the EU. Although the EU has now expanded to include 28 member states, it remains a relatively small and cohesive regional organisation, consisting of a group of European nations sharing similar cultures and values. The smaller group has more interests and values in common (the so-called ‘sense of community’). This sense of community is an essential factor in creating more integrated rules in the EU than in the WTO. The WTO membership, however, consists of countries with different economic status, different legal traditions and different cultures. Those differences determine that the shared values of WTO members is not comparable with those of EU Member States.

As a further result, the trade rules under the WTO are less integrated than those of the EU. It is worth noting. However, that common values and shared interests among the WTO membership (e.g. environment and climate change, human rights, safety, health and economic development)

⁶³ Arrowsmith, *Gov. Procure. WTO* (n 7) 169. Hilde Caroli Casavola, ‘The WTO and the EU: Exploring the Relationship between Public Procurement Regulatory Systems’ in Edoardo Chiti and Bernardo Mattarella Giorgio (eds), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (1st edn, Springer-Verlag Berlin Heidelberg 2011) 296.

⁶⁴ Robert Howse, ‘The World Trade Organization 20 Years on: Global Governance by Judiciary’ (2016) 27 *European Journal of International Law* 9.

⁶⁵ Gerard De Graaf and Matthew King, ‘Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round’ (1995) 29 *The International Lawyer* 443.

is growing along with the spread of globalisation.⁶⁶ Those concerns and challenges have the effect of increasing a sense of community. This sense of ‘community’⁶⁷ is an essential factor if WTO rule-making is to be further enhanced. In this respect, it seems that those wishing to promote the most extensive competition in the GPA could learn from the EU experience.

Besides the common values and shared interests, the principle of ‘assignment of power’, ‘subsidiarity’ and ‘proportionality’ are the basis of political and legal foundations of mutual action within the EU. What is more, the direct effect of EU law guarantees coherence and integration between the national legal systems of each Member State and the EU legal system. Those principles enable the EU more easily to attain a political will for deeper integration of trade rules, whereas the WTO legal system is less sophisticated and effective.

The EU objective of creating a single market is based on the principle of free movement of goods, freedom of establishment, freedom to provide services, and the more profound underlying principle of equal treatment and mutual recognition. The Treaty on the EU (hereinafter referred to as the ‘TEU’) expressly guarantees the free flow of market forces across traditional national boundaries without protectionism. These rules also apply to the procurement market.⁶⁸

Public procurement was not in the spotlight, or even not explicitly mentioned, in the Treaty of the European Economic Community (hereinafter referred to as ‘EEC’), at an early stage of European integration. With the introduction of the Single European Act, however, public procurement was given a central place in the single market project⁶⁹ and has now come to be regarded as a crucial policy tool.

EU procurement directives have undergone evolution to meet different aims or policy needs at different stages. Among various reasons for advancing the regulation of public procurement, the elimination discrimination and the integration of a complete Internal Market are high

⁶⁶ UN Declaration on the Right to Development, Res 41/129 (1986). See, in general, Arjun Sengupta, ‘The Human Right to Development’ (2004) 32 Oxford Development Studies 179. See also Bård-Anders Andreassen and Stephen P Marks, *Development as a Human Right: Legal, Political, and Economic Dimensions* (FXB Center for Health and Human Rights 2007).

⁶⁷ The concept of community rests on various factors, such as the alignment of interest and incentives, the presence of shared interests, the clarity of the goals of the organisation and its appreciation as a shared source, and the confidence in the institutional, procedural and decisional structure of the organisation. See Rubini (n 58) 35.

⁶⁸ See generally Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK*, vol I (Sue Arrowsmith ed., 3rd edn., Sweet & Maxwell 2014). and Christopher Bovis, *The Law of EU Public Procurement* (2nd edn., Oxford: Oxford University Press 2015).

⁶⁹ See the evolution of public procurement regulation in the EU in Chapter 6 Sections 3.2.1 and 3.2.2.

priorities.⁷⁰ With the completion of the Internal Market, the increasing trend towards liberalisation, privatisation and coordination in economic policies has inevitably influenced the reform of procurement directives. Given the origin of the procurement directives, non-discrimination and equal treatment of interested parties are necessarily the general principles of the EU procurement regulation, and these principles are certainly the premise of any reform of the procurement rules.⁷¹

Despite differences between the EU and the WTO and their different government procurement regulations, the procurement systems of both the GPA and the EU are based on the same objective—removal of unnecessary restrictions to national market access. In the attainment of its aims and purposes, the EU can rely upon a regulatory framework of greater sophistication than that of the GPA. The unitary rationale of the EU is realised by a remarkable consistency in its decision-making and rule-making processes. Although the GPA can not match this level of consistency, the EU procurement directives nonetheless provide a developed example for the GPA to follow. This provides a general premise for this comparative research.

Furthermore, the fact that GPA negotiations have a ‘power-driven’ nature rather than a ‘rule-based’ mechanism precisely indicates the necessity of a normative definition of fundamental notions, such as ‘covered entities’. The consistency of the EU helps it to harmonise and integrate national law in the interests of creating a single procurement market. Likewise, a normative definition of the entity coverage of the GPA is also the precondition to the creation of a competitive international government procurement market.

1.4.3.2.1. The Legal interpretation in the EU and the WTO

Systematic differences between the WTO and the EU are reflected in their respective institutional structures and also in their judicial approaches, which have a significant effect on any comparative analysis of the two legal systems, and consequently on the definition of entity coverage.

⁷⁰ Commission of the European Communities, ‘White Paper from the Commission to the European Council on Completing the Internal Market’ COM(85) 310 final, Brussels 14 June 1985. The 1985 *White Paper on completing the Internal Market* referred to the protection of individual national public procurement markets as ‘one of the most evident barriers to the achievement of a real Internal Market’. see also Sue Arrowsmith, ‘Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation’ (1995) *Law Quarterly Review* 235-284.

⁷¹ The principle of non-discrimination and equal treatment apply to all public contracts over and below certain financial thresholds.

There are no explicit rules for the interpretation of EU law. Although Article 19.1 TEU reads: ‘The Court of Justice of the European Union shall ensure that in the interpretation and application of the Treaties the law is observed’, no reference is to be found in the *Statute of the Court of Justice of the European Union* or the relevant *Rules of Procedure of the Court of Justice*.⁷² It is the Court that defines the approach to legal interpretation.

The former President of the Court, H Kutscher, said in 1976 that ‘the literal and historical methods of interpretation recede into the background. Schematic and teleological interpretation...is of primary importance.’⁷³ Moreover, contextual and purposive interpretation ‘are closely interlocked in the case-law of the Court’.⁷⁴ The words of Kutscher imply that the interpretation is not limited to the legal text. Especially since 1958, ‘when the Court confronted with the more programmatic EC treaty, the Court recognised for itself the limitation of literal methods of interpretation and shifted perceptibly towards the contextual and teleological interpretation, with emphasis on the *ratio legis* and the objectives of the Treaty.’⁷⁵

Brown and Jacobs further point out that ‘when the Treaty mainly provides a broad project rather than an operational, legal framework, it would be very appropriate to take the teleological interpretation.’⁷⁶ The TEU and the TFEU have been substantially a Constitution. The TEU does not provide specific rules for the protection of concerned tenders with regard to concluded contracts. Over time, the CJEU has played a fundamental role in developing a standardised approach to an understanding of the definitions and rules of the EU procurement directives. It has given harmonising interpretations, employing teleological methods. With the overall goal of removing unnecessary obstacles to freedom of movement and competition, the CJEU has made clear in its case-law that the EU procurement directives cover all entities. This has, in itself, become an obstacle for the Internal Market of the EU.

⁷² Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013).

⁷³ H Kutscher, ‘Methods of Interpretation as Seen by a Judge at the Court of Justice’ *Reports of the 1976 Judicial and Academic Conference* (Luxembourg: Office for the Official Publications of the Court of Justice of the European Communities 1976) 16.

⁷⁴ Kutscher (n 72) 40.

⁷⁵ NL Brown and FG Jacobs, *The Court of Justice of the European Communities* (5th edn., London: Sweet and Maxwell 2000) 339.

⁷⁶ Brown and Jacobs (n 74).

Consequently, the EU Court of Justice, as a Constitutional Court applies teleological interpretation because it is convenient for keeping EU law up to date with economic developments, political consensus, policy arrangements and cultural needs.⁷⁷

Teleological/Purposive interpretation has various applications in the practice of EU law. Consequently, the CJEU relies on context and teleology and the *effet utile* principle to keep the EU law consistent with the goals and policies pursued by the EU at different stages.⁷⁸ Under the EU legal system, the adjudicatory system enjoys much discretionary power and places more emphasis on the teleological interpretation of the law. Its approach in judicial reviews of the Union's acts is usually deferential.

The WTO adjudicatory body is less prone to activism than the European Court of Justice. It takes a textualism interpretation, in accordance with the principles of Article 31 of the Vienna Convention of the Law of Treaties (hereinafter referred to as the 'VCLT') as well as with the principle of effectiveness. It strictly and heavily relies on the treaty text. The trade agreement texts constitute a natural starting point for any process of interpretation of the WTO Agreement, as well as the gravity of the whole interpretation process.

Professor Ehlermann has summarised the difference between the EU and the WTO in their interpretative approaches by stating that, 'while the Appellate Body privileges 'literal interpretation (based on exact words), the CJEU is a protagonist of 'teleological interpretation (based on purpose).'⁷⁹ As we can see, the interpretation principles followed by both the CJEU and the WTO DSB are not different from those of the WTO DSB. What is different is the weight of various interpretation methods and the process of the interpretations themselves. The legal interpretations of the WTO DSB are more restrictive within the literal meaning of the treaty language. That is because the WTO is less integrated than the EU. The WTO DSB has no legislative competence and can only rely on the text of the treaty, whereas the CJEU has

⁷⁷ See FG Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in D Curtin and D O'Keeffe (eds.), *Constitutional Adjudication in European Community and National Law* (Dublin: Butterworths 1992) 25, 32; Anthony Arnall, 'Judicial Activism and the European Court of Justice: How Should Academics Respond?' Maastricht Working Papers Faculty of Law 2012-3; Albertina Albors Llorens, 'The European Court of Justice, More than a Teleological Court' (1999) 2 Cambridge Yearbook of European Legal Studies 373.

⁷⁸ Although sometimes this approach has been criticised as judicial activism, it can still be safely concluded that the CJEU does not feel constrained by the text of EU treaties and directives. With regard to the criticism, see AH Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986).

⁷⁹ Claus-Dieter Ehlermann, 'Six Years on the Bench of the "World Trade Court" Some Personal Experiences as Member of the Appellate Body of the World Trade Organisation' (2002) 36 Journal of World Trade 605, 616.

more discretion than the WTO DSB, which is why teleological interpretation is more often in EU case law.

Given the differences in legal interpretation, the definitional process of the GPA could well follow the EU functional approach and turn the general aims and purposes of eliminating obstacles to free trade into specific obligations and operational rules. To put it simply, due to the textualism tradition of the WTO adjudicatory body, it is better to have a written definition of the covered entities, and at the same time, the definition would be better if it gave a clear and certain guidance and avoided generalisation, since the general and broad language is of no help in reducing the number of disputes or achieving legal certainty.

1.5. Research Structure

The research explored through eight chapters. Chapter I introduces the background, research question, methodology, structure and limitation for the research.

Chapter 2 explores the question of why government procurement needs to be regulated, from both a national and an international perspective. The research makes a distinction between government procurement and private procurement and restricts the meaning of ‘procurement’ so that it signifies only the procurement stage (rather than the pre-tender and contract management stages). An overview of the domestic aims and purposes, which underpin government procurement regulations, indicate that discriminatory policies and practices are prevalent in this field and contribute to an understanding of the reasons why national governments apply discriminatory government procurement policies and why international government procurement markets need regulations.

Chapter 3 explains the rationale for discriminatory government procurement in international trade regimes and provides a theoretical foundation for the expansion of the GPA. It illustrates why the expansion of GPA signatories and an increase in market access are desirable for WTO members. The analysis adopts an economic perspective and then attempts to explore the political rationale. In Chapter 3, a reference is made to economic research by McAfee and

McMillan,⁸⁰ Baldwin,⁸¹ Miyagiwa,⁸² Matto,⁸³ Trionfetti,⁸⁴ Dawar,⁸⁵ Richardson⁸⁶ and others, demonstrating that the more open the government procurement market is, the more competitive the market is, and the more beneficial the procurement is.⁸⁷ The economists' conclusions theoretically support to open government procurement market and promote fair competition conditions.

Chapter 4 explains the entity coverage issue of the GPA. Firstly, Chapter 4 reviews the evolution of the GPA, particularly from the aspect of entity coverage. The review is indispensable to an understanding of the reasons why the list approach to the covered entities, and especially the lack of a clear and precise understanding of the term 'other entities' are the main barriers to GPA expansion. In the last section of the chapter, the author examines previous GPA texts in the negotiation history indicating that there is a consensus that covered government entities should be entities controlled or influenced by governments but not compete in the market.

Chapter 5 focuses on the core concern of GPA entity coverage negotiations, namely the 'other entities' represented by SOEs. This type of entity has been increasing in number and has attained a significant amount of power in the world trade market. This power continues to increase, and therefore, they must be taken into account in entity coverage negotiations. The chapter studies the regulation of SOEs in the WTO multilateral agreements and the relevant WTO jurisprudence. The author also attempts to find the basis for a new consensus on the regulation of SOEs in the most recent influential trade agreements, such as the USMCA and CPTPP. The findings provide a reference for the definition of the entity coverage of the GPA.

In Chapter 6, three parallel analysis on entity coverage under the WTO/GPA as well as that under EU public procurement regulations are conducted. The EU procurement directives in the

⁸⁰ McAfee and McMillan (n 4) 291.

⁸¹ Robert E Baldwin, 'National Policies and International Trade', *Non-tariff distortions of international trade* (The Brookings Institution 1970) 58. Anne O Krueger, 'Chapter 11 Trade Policies in Developing Countries' in Ronald W Jones and Peter B Kenen (eds.), *Handbook of International Economics*, vol 1 (Elsevier 1984) 519-569. Naegelen and Mougeot (n 4) 349.

⁸² Miyagiwa (n 4) 1320-1325.

⁸³ Mattoo (n 4) 695.

⁸⁴ Trionfetti (n 4) 37.

⁸⁵ Dawar, 'Government Procurement in the WTO: A Case for Greater Integration' (n 20).

⁸⁶ Baldwin and Richardson (n 4).

⁸⁷ See e.g. McAfee and McMillan (n 4). 291. McAfee and McMillan (n 4). Trionfetti (n 4). Kamala Dawar, 'Transcending Mercantilism: Identifying the Positive Externalities from International Public Procurement Agreements' (2016) 5 Public Procurement Law Review 181. Krueger (n 79). Baldwin and Richardson (n 4). Miyagiwa (n 4).

1970s provided a prototype for the GATT Tokyo Round Code on Government Procurement. Even after decades of evolution, the general structure and essential rules of the GPA are unchanged and remain as they were in the GATT age. For that reason, an examination of EU procurement directives is constructive. The EU takes a functional approach to develop the definition of ‘contracting authority’, especially that of the ‘bodies governed by public law’. This approach provides us with a mature and feasible basis for dealing with the issue of ‘other entities’ in the GPA.

Based on the findings of the previous chapters, Chapter 7 attempts to answer the main question raised by the research, i.e. the definition of the ‘government bodies’ under the GPA. At the beginning of the chapter, the author clarifies the theoretical premise of the research question: ‘Is it really necessary to categorise an entity as either public or private?’ Under a clarified theoretical premise, the author defines the contexts of the research question: ‘what kind of approach to the definition is contextually workable’. A comparison between the GPA approach to entity coverage and the EU definition of ‘contracting entities’ helps to establish the theoretical map. A technical test is designed, based on this map. The proposed definition is the result of an examination of government control and competition in the market, wherein each step contains specific technical criteria. The first step defines the general scope, and the second provides the conditions for exemption. This schema is intended to avoid the risk of both the over-inclusion of some commercial SOEs and the under-inclusion of those entities that are under government control and enjoy dominant market power.

Chapter 8, as a concluding remark, summarise the critical statements the author has made in the previous chapters in order to succinctly answer the central research question and the three subsidiary questions.

1.6. Limitations of the Thesis

The foundation of this thesis is an analytical and conceptual framework for the legal definition of a government entity for the GPA/WTO. An attempt has been made to provide a benchmark for this topic, by outlining criteria and features that can be used for GPA accession negotiation.

The author is not going to provide economic variables to the ‘competition’ analysis, because a more economic assessment of the ‘competition’ factor in the proposal is not practically acceptable of the GPA Parties, and from the WTO adjudicatory body’s point of view, a more

economic definition of ‘government entity’ is too much data-demanding, which could be a problem for the evidence-intensive economic analyses in a dispute settlement. Therefore, the research chooses a general legal definition instead of introducing a more economic definition of ‘competition’.

The general definition aims to provide a reference for government control and competition. The internal and external tiers of government control provide a reference. It is not exhaustive. It is hoping that the conceptual framework proposed herein will help to afford the relevant signatories a minimum consensus with regard to current entity coverage and to modernise entity coverage within a framework that relies on rules rather than on trade power.

The analysis of competition in the thesis provides references to competition law and economics methods. Although it would be useful to conduct further research on the economic analysis and on cross-references between GPA and the current work taking place within the WTO to formulate a competition agreement, the author puts these topics beyond the scope of the present research. In the context of WTO law-making, an economic concept of 'competition' is inevitably employed when framing rules. It is commonly believed that discriminatory trade brings about market distortion. For example, export subsidies and preferential government procurement policies interfere with the conduct of economic operators and the groups affected by them and consequently, the latter's competitors. Under certain circumstances, they may disturb a level playing field and distort the competitive process.

Conversely, distorted markets with damaging implications for consumers can have an impact on trade. For example, a government-monopolised industry could fix prices at a level that is not cost-effective and dump the production of this industry onto a foreign market, thus, making foreign products less competitive than domestic goods in the domestic market. In consideration of the interactive relationship between trade liberalisation and competitive markets, a study of GPA coverage and a critical examination of those regulations and practices that cause consumer welfare to be disincentivised could be a worthwhile research project that complements the present work. It would contribute to the study of the developing progress of liberalisation and competitive markets and provide a perspective for an examination of GPA coverage.

Although this topic goes beyond the subject of the thesis with regard to other disciplines, such as political science and economics, the thesis attempts to offer some references to aid a better

understanding of the issue, to further the attainment of consensus among the signatories and gain the latter's confidence so that the GPA could expand in a rule-oriented manner and with increasing legal certainty. If the author fails to provide an adequate definition of a government entity for the GPA, it is hoped that at least this research will raise some new questions, or in any event place the issue in a fresh perspective. If so, it will have provided useful inspiration on which to build new endeavours.

1.7. Conclusion

The main function of this chapter has been to provide an introduction to the research and set the premise for the discussions which occur in subsequent chapters. As discussed in the chapter, the primary concern is with the question of how to define entity coverage in the GPA to achieve greater market access in international government procurement and to replace the current list-approach, which depends on extensive negotiations and which has the disadvantage of excluding State-controlled or State-influenced entities. In attempting to resolve this issue, the author adopts a mixed methodology comprising doctrinal, interdisciplinary and comparative analysis, that reflects GPA/WTO rules and the public procurement framework in the European Union.

CHAPTER 2 AN OVERVIEW OF GOVERNMENT PROCUREMENT REGULATION

2.1. Introduction

Government procurement refers essentially to purchasing by a government body, using public funds. Due to the public nature of the financing, government procurement, unlike private procurement, is subject to regulations. The regulations on government procurement can be found at both national and international levels. This chapter attempts to provide an overview of the objectives of government procurement regulations at both levels, thereby laying the foundation and set the context for the following chapters. The overview is an attempt to provide some basic understandings of government procurement and raise some questions that are relevant to the discussions following in Chapters 3-7.

Statistics from the Organisation of Economic and Co-operation and Development (OECD), indicate the economic significance of government procurement in national economies. It is due to its growing trade importance that government procurement has motivated academic studies on its national and international regulation. The national government procurement regulations of countries such as the US, Canada and China have different definitions of ‘government procurement’, and these diverse domestic definitions have prevented a consensus regarding international government procurement regulations. A natural question to ask is if the definition of ‘government body’ is clear, then why is a common definition of ‘government body’ for international government procurement regulation an issue.

In order to answer this question, the author will first investigate the reasons why we need international government procurement regulations and why national governments are not willing to subject government procurement to international disciplines. Government procurement is a versatile tool by means of which national governments pursue economic and non-economic objectives through discriminatory government procurement practices. By virtue of the trade significance of government procurement markets and in view of the prevalence of discriminatory government procurement practices, international government procurement regulations develop to harmonise national regulations. They also contribute to the elimination of trade barriers in government procurement markets.

The chapter will provide an overview of the aims and purposes of the major international government procurement regulation regimes of the EU and the OECD, and the soft law of

UNCITRAL Model Law on Public Procurement, the World Bank instruments, the UN Conventions and other International Codes in relation to government procurement. Most of those international government procurement instruments pursue economic goals, such as ‘non-discrimination, transparency, competition, and so forth.’ Comparison between the aims of national government procurement regulations and international government procurement instruments demonstrate that international government procurement requires national governments to restrict their discriminatory government procurement practice and promote competition in the government procurement market. This comparison of the general aims and purposes at the two levels is necessary and extremely important. The entire analysis contained in this research may be compared to a ladder, with this chapter serving as its indispensable first rung.

2.2. Why Government Procurement Matters?

Statistics demonstrate that government procurement market plays a substantial part in national economies. Average public purchasing in the EU has been estimated to be over 16 per cent of the Gross Domestic Product (GDP).¹ The weight of government procurement in the national economy is even more significant in developing countries than that of the EU.² The World Bank statistics show that the volume of government procurement of goods and services accounts for as much as 5 to 20 per cent of the GDP of the borrowing countries, which are mainly developing countries.³ In the OECD countries, the average ratio was 13 per cent in 2011 and, if SOEs are included, the average ratio could be put at an additional 2-12 per cent of GDP, depending on the country. (In developing countries, for example, SOEs accounts for a large sector of national economies).⁴ Among the WTO members, government procurement accounts for 10-15 per cent of the GDP of the economy on average.⁵ In some developed countries, this

¹ ‘Public Procurement - Trade - European Commission’ <<http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/>> accessed 15 February 2019.

² See EC DG Internal Market Government Procurement Indicators. 2008.

³ Independent Evaluation Group, ‘The World Bank and Public Procurement — An Independent Evaluation’, vol I (2013) 1.

⁴ OECD, ‘Public Procurement’ <<http://www.oecd.org/gov/public-procurement/>> accessed 6 August 2019. Stephen Woolcock and Jean Heilman Grier, ‘Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations’ (2015) Paper No. 2 in the CEPS-CTR project “TTIP in the Balance” and CEPS Special Report No. 100 / February 2015 2.

⁵ WTO, ‘WTO and Government Procurement’ <https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm> accessed 7 August 2019.

percentage is higher — for example, in the Netherlands, it is 20.2 per cent and in Finland 18.5 per cent.⁶

However, the above figures do not indicate that, in developed countries, the amount of government procurement in national economies is large, while, in developing countries, it is small. The amount of government procurement is not directly correlated with the development stage of each national economy. As previously observed, in the developing countries of South Asia and Sub-Saharan Africa, the ratio of government procurement in terms of GDP can be as high as 19.27 per cent and 14.91 per cent respectively. In the developing countries of East and Southeast Asia, the ratio exceeds 35 per cent in Korea and Japan, but the ratio can also be below 15 per cent, for example, in China, it accounts for only 2.8 per cent, and in the Philippines, 3 per cent.⁷ This difference is partially due to the size of the purchasing entities in each economy. In countries such as China, the purchasing of SOEs is not counted as government procurement.⁸ Whatever the reason for these differences, the overall data illustrates that government procurement concerns both national regulation and international trade regulations.

The significance of government procurement is still growing, along with the expansion of the global economy since the 1960s.⁹ Total government procurement spending in OECD countries has increased from 55 per cent in 2011 to 63 per cent, of which 55 per cent was procurement by the States or local level governments. In federal systems, such as the US, Canada, Germany and Switzerland, government procurement at this sub-central level can reach as high as 76 per

⁶ Federica Saliola Simeon Djankov, Asif Islam, 'How Large Is Public Procurement in Developing Countries? | PIIE' (*Realtime Economic Issues Watch*) <<https://piie.com/blogs/realtime-economic-issues-watch/how-large-public-procurement-developing-countries>> accessed 27 July 2017.

⁷ Simeon Djankov, Asif Islam (n 6).

⁸ According to Article 2 of the Government Procurement Law of the People's Republic of China: 'The term government procurement refers to the procurement...by the State organs, public institutions and bodies with public fiscal funds'. See Government Procurement Law of the People's Republic of China (2014 Amendment). Order No. 68 of the President of the People's Republic of China, <http://en.pkulaw.cn/display.aspx?cgid=233283&lib=law>

⁹ The growth of government spending in the infrastructure is a typical example of this trend. In 2009, governments around the world spent around 2.9 per cent of the world GDP on infrastructure construction whereas in 2008 it had been 2.2 per cent. In 2013, the total expenditures on infrastructure increased to approximately 4.2 trillion whereas in 2009 it had been 3.2 trillion. This spending is expected to keep rising in the ensuing decades. See OECD National Accounts Data and World Bank National Accounts Data, 'General Government Final Consumption Expenditure (per Cent of GDP)' <<http://data.worldbank.org/indicator/NE.CON.GOVT.ZS>> accessed 6 August 2019. This figure refers to government expenditure, excluding social security, pension transfers, interests on public debt, and health care. See further Richard Abadie, 'Capital Project and Infrastructure Spending: Outlook to 2025' (2014) Research by Oxford Economics 6, 14.

cent on average.¹⁰ The significance of procurements by sub-central governmental entities and some new quasi-government entities or SOEs, which are included in the OECD's calculation, fuels the discussion on the coverage expansion of government procurement regulations.

2.3. What Is Government Procurement?¹¹

All procurement, be it government procurement or private procurement, obtains goods, services, or construction through contracts. In a private procurement, the procurement manager has the discretion to choose whatever procurement method, which can best guarantee a cost-effective outcome. The procurement decision will be solely based on economic considerations, whereas in government procurement, the process is subject to legal/policy constraints, such as principles of transparency, equal treatment, competitive procedure, and so forth.¹² For example, under the *United States Code*, government procurement is explicitly subject to the requirements of the *Competition in Contracting Act*.¹³

¹⁰ Kamala Dawar, 'Openness of Public Procurement Markets in Key Third Countries' (2017) European Parliament Directorate-General for External Policies EP/EXPO/B/INTA/2016/12 9.

¹¹ It is necessary to make the notion of 'procurement' clear at the beginning of the research. In the broad sense, the term 'procurement' refers to a documented process of carefully obtaining an 'outcome' within a given time frame. This notion has been used interchangeably with concepts such as 'purchasing, acquisition, contracting'. This process principally consists of the procurement planning, tendering selection, and contract management. In the narrow sense, it only refers to the bidding process, which is unique and technical. No matter whether in private procurement or government procurement, the overall processes are usually the same. Indeed, those concepts may refer either to a stage of the procurement process or to the process as a whole, depending on the perspective. In this research, unless otherwise stated, the term 'procurement' is to be understood in a narrow sense, namely as the bidding process.

Non-specialists with no practical experience of a procurement process, may be confused by the terminology employed. The term 'acquisition' is used in some jurisdictions, such as the US. The authoritative dictionary definitions of the terms 'acquisition' and 'procurement' are the same. In other jurisdictions such as China, 'the term 'procurement' as cited in the current law, refers to the paid acquisition of goods, projects or services **by way of contracts**, including purchasing, leasing, entrusting, employing, etc. This confusion out of diverse definition is supposed to be avoided because from the perspective of procurement practice, you may not have the knowledge about the policies which it shall adhere to. From the academic standpoint, the topic may have a blurred logical start point. See further Ralph C. Nash and others, *The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement* (4th edn., Chicago, IL Wolters Kluwer Law & Business 2013).

Here provides two dictionary meanings for further illustration. Oxford dictionary: procurement means [mass noun] the action of obtaining or procuring something; procure: Obtain (something), especially with care or effort. <https://en.oxforddictionaries.com/definition/us/procurement> <https://en.oxforddictionaries.com/definition/procure> accessed 22 October 2016. Government Procurement Law of the People's Republic of China (2014 Amendment) <http://en.pkulaw.cn/display.aspx?cgid=233283&lib=law#menu0> accessed 10 August 2018.

Merriam-Webster: (1) the act of procuring; (2) the purchasing, leasing, renting, or selling of materials, services, equipment, or construction. <http://www.merriam-webster.com/dictionary/procurement#legalDictionary> accessed 22 October 2016. See also Jonathan Mak, 'What Is Procurement?' (2017) IPPC International Public Procurement Conference 5 Proceedings 6-11.

¹² Sue Arrowsmith, John Linarelli and Don Wallace Jr, *Regulating Public Procurement: National and International Perspectives* (John Linarelli and Don Wallace, eds., The Hague, Boston: Kluwer Law International 2000) 2.

¹³ The Competition in Contracting Act (CICA) of 1984 (41 United States Code 253) (Federal Acquisition Regulation Subpart 6.1 'Full and Open Competition') is a public law enacted to encourage competition for the

That is because unlike private procurement, government procurement is financially powered by public money. It is intended to perform government functions and sometimes needs legal authorisation. In this process, governments have a responsibility to be prudent when spending taxpayers' money and have to keep in line with regulations, such as budget acts or anti-corruption measures, under administrative or judicial supervision/reviews procedures. In addition, government procurement may also be subject to international obligations set out in trade agreements to which the country is a party.¹⁴

Government procurements are rule-based activities compared with discretionary private procurements. The rules or policies that government procurement adheres to must be transparent, clear and certain. Otherwise, the process would be vulnerable to corruption, malfunction or circumvention.

2.4. Is the Meaning of 'Procurement Body' Clear?

National laws on government procurement regulations have different applications. For example, in the *US Federal Acquisition Regulation (1984)*,¹⁵ 'procurement' refers to an acquisition contract of suppliers or services 'by and for the use of all **federal executive agencies**' using appropriated funds.¹⁶ In the *China Government Procurement Law (2014)*, government procurement refers to procurement by a purchaser, which includes **State organs, public institutions and bodies with public fiscal funds**.¹⁷ According to the Canada *Financial*

award of all types of government contracts. The purpose was to increase the number of competitors and to increase savings through lower, more competitive, pricing. The military procurement contracts are mandated to be awarded through full and open competition, except for 'procurement procedures otherwise expressly authorised by statute'. See 10 United State Code 2304 (a) (1) (2000).

¹⁴ To take Canada as an example: apart from the procurement rules on the federal level (such as *Financial Administration Act* and the *Government Contracts Regulations*) and provincial level (such as Ontario's *Broader Public Sector Accountability Act 2010*), the *Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act* was introduced and the Procurement Inquiry Regulations were revised to subject government procurement to the terms of the *Canada European-Union Comprehensive Economic and Trade Agreement* ('CETA' September 2017) and the *Canadian Free Trade Agreement* ('CFTA' July 2017).

¹⁵ The *Federal Acquisition Regulation* is the primary US regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds. It became effective on 1 April 1984. <https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf>

¹⁶ However, several federal agencies, such as the Federal Aviation Administration, the US Postal Service, and various government-sponsored enterprises (e.g., Fannie Mae, Freddie Mac), and certain federal corporations (e.g. the Federal Deposit Insurance Corporation), are not subject to the *Federal Acquisition Regulation* but promulgated their own procurement rules that are generally similar to the *Federal Acquisition Regulation*. See further the US *Federal Acquisition Regulation*, 1.101, 2.101—Definitions. (Emphasis Added).

¹⁷ Article 2, 'The term 'government procurement,' as stipulated in current Chinese law, refers to the procurement of goods, projects and services within the lawfully made centralised procurement lists or above the procurement limits by the State organs, public institutions and bodies with public fiscal funds.' See further Government Procurement Law of the People's Republic of China (2014 Amendment).

Administration Act (2018)¹⁸ and the *Government Contracts Regulations* (2017),¹⁹ all federal **government departments**,²⁰ **departmental corporations** (such as councils, agencies, commissions, institutes),²¹ **crown corporations**,²² **public bodies**,²³ and **private entities in some circumstances**,²⁴ are subject to procurement rules. In the *EU procurement directives*, the process refers to procurement by ‘**contracting authorities**’ (Directive 2014/24/EU) and some ‘**public undertakings and undertakings with special and exclusive rights**’ (Directive 2014/25/EU) carrying out activities in the water, energy, transport and postal services sectors.²⁵

As we can see, the scope of the term ‘contracting body’ in national government procurement regulations differs. No matter whether a general approach is employed, as in the US, or whether there is a descriptive listing approach, as in China and Canada, or a definitional approach, as in the EU, the application of national government procurement regulation is not usually problematical. However, when it comes to the negotiation of international regulation on government procurement, a common understanding of the notion of ‘procurement body’ is the necessary foundation of negotiation.

¹⁸ See Government of Canada, *Financial Administration Act* (R.S.C., 1985, c. F-11), Act current to 2019-02-28 and last amended on 2018-12-30. <https://laws-lois.justice.gc.ca/eng/acts/f-11/page-15.html#h-23> accessed 22 March 2019

¹⁹ Government of Canada, *Government Contracts Regulations* (SOR/87-402), regulations are current to 2019-02-28 and last amended on 2017-05-05. <https://laws-lois.justice.gc.ca/eng/regulations/sor-87-402/FullText.html#h-2> accessed 22 March 2019. Besides those general regulations on government procurement, there is other Canadian legislation in government procurement in specific areas. Such as the *Department of Public Works and Government Service Act*, the *Procurement Ombudsman Regulations*, the *Defence Production Act*, the *Treasury Board Contracting Policy*, the *Comprehensive Land Claims Agreements*, the *Public Service and Procurement Canada Code of Conduct for Procurement*, the *Competition Act*, and so forth.

²⁰ See section 2 of *Financial Administration Act*.

²¹ Such as Canadian Institutes of Health Research, Law Commission of Canada, Canadian Food Inspection Agency, National Research Council of Canada, and so forth. See Article 2 ‘contracting authority (c)’ of *Government Contracts Regulations* and Schedule II to the *Financial Administration Act*.

²² See Article 83 (1) Crown Corporations in *Financial Administration Act*. However, federal government entities created by statute that compete with the private sector are generally not subject to public procurement laws.

²³ At the federal level, government procurement rules generally apply to public bodies, including government departments and agencies, as well as municipalities and organisations that have 50 per cent or more of their Board members appointed by an act of government. For example, Ontario’s Broader Public Sector Procurement Directive applies to most municipal, academic, school and hospital entities, as well as some public-funded organisations.

²⁴ See generally, private entities are not subject to Canada’s procurement legislation. In a Complaint by Jastram Technologies Ltd. (24 May 2016), the Canadian International Trade Tribunal cited previous case law established by the Tribunal and found that ‘a public procurement conducted via a private party was a public procurement nonetheless where the evidence showed that a government institution had substituted a private entity for itself to conduct the tendering of various services.’ See Canadian International Trade Tribunal, Jastram Technologies Limited, File No. PR-2016-008, Decision made Tuesday, May 24, 2016 para 13.

²⁵ Article 2 Definitions, Directive 2014/24/EU. ‘contracting authorities’ means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law; Article 4, Contracting Entities, Directive 2014/25/EU, ‘contracting entities are entities, which are contracting authorities or public undertakings and which operate on the basis of special or exclusive rights granted by a competent authority of a Member State.’ (Emphasis Added)

In law scholarship, the purchasing subjects are broadly referred to as public or government bodies. For example, the classic definition of government procurement commonly refers to the purchasing of goods and services with public funds from external providers **for public interests** by **public bodies**²⁶ or **government departments or agencies**.²⁷ Hoekman simplifies the definition of government procurement by calling it an ‘input and output process’, whereby **government agencies fulfil public functions** by sourcing goods and services as ‘inputs’, and giving them back to the public as ‘outputs’.²⁸ It is noteworthy that Hoekman uses the term ‘government agency’ rather than ‘governments’. The term ‘government agencies’ has a broader meaning than the term ‘governments’. It covers not only the government itself but also its departments and representing agencies. International organisations, such as the OECD, refer to the purchasing subject as referencing **governments and State-owned enterprises**.²⁹ This definition is unique, as it takes into account State-owned Enterprises (SOEs): this is not the case with other international instruments, such as the UNCITRAL Model Law on Public Procurement³⁰ or the World Bank Guidelines on Public Procurement.³¹ There is no specific reference to the procurement subject in those instruments, because of their non-binding nature.

In national legislation, the coverages of government purchasing bodies overlap on the level of central governments but varies somewhat in the case of other government bodies/agencies, SOEs and private entities. In the WTO/GPA, there is no definition of a procurement entity: there is simply a reference to ‘the procuring entities in the coverage schedules after the revised GPA.’³² Jackson observes that the difficulty experienced by States in reaching a consensus on a definition of a government entity is because ‘countries have a wide variety of ideas as to what

²⁶ Sue Arrowsmith, ‘Government Procurement and Its Impact as a Trade Barrier to Trade’, *Government Procurement in the WTO* (Kluwer Law International 2003) 2. (Emphasis Added)

²⁷ Ranja Sengupta, ‘Government Procurement in the EU-India FTA Dangers for India’ (2012) 47 *Economic and Political Weekly* 19. (Emphasis Added)

²⁸ Bernard Hoekman and Michel Kostecki, ‘Plurilateral Agreements’, *The Political Economy of the World Trading System: the WTO and Beyond* (3rd edn, OUP 2009) 513. (Emphasis Added)

²⁹ In the OECD, government procurement or public procurement refers to the purchase by governments and State-owned enterprises of goods, services and works. See OECD, ‘Public Procurement’ (n 2).

³⁰ United Nations Commission on International Trade Law, ‘Guide to Enactment of the UNCITRAL Model Law on Public Procurement’ (2012).

³¹ World Bank, ‘Guidelines Procurement under IBRD Loans and IDA Credits’ (2015).

³² Article II Scope and Coverage, Revised Agreement on Government Procurement: ‘for the purposes of this Agreement, covered procurement means procurement for governmental purposes...’ and Article XIX — Modifications and Rectifications to Coverage the parties could propose the ‘withdrawal of an entity from its annexes to Appendix I in exercise of its rights on the grounds that government control or influence over the entity’s covered procurement has been effectively eliminated...’ For a more detailed analysis, see Chapter 4 Section 3.

is the appropriate sphere of government activity.’³³ With the current list approach, the treatment/status of bodies such as independent government entities, commercial State-owned companies and joint venture (public-private-mixed) enterprises is ambiguous, particularly in relation to the accession negotiations of transition economies.³⁴ As a result, market liberalisation under the GPA does not achieve as much as it could.³⁵

Notwithstanding the differences between countries’ national legislation on the definition of government entities, the spectrum of the ‘government entity’ is undergoing evolution and has become even more complicated than it is used to be.³⁶ In the traditional ‘night-watchman’ States,³⁷ the first and foremost function of a State is to guard against limited dangers and allow people to look after their welfare.³⁸ Under that State theory (Monarchism in the 19th century), a government body refers to an institution that fulfils security duties in an administrative structure. More recently, the Great Depression (1929-1933) engendered reflections on the failure of the minimum State model, which is also known as the *laissez-faire* economic model.³⁹ In the minimum State model, governments play a minimum role in the national economy but take full advantage of the ‘invisible hands’, namely market power. Since government activities in the market were limited, government bodies usually refer to bodies subject to national administrative laws or constitutional laws. With the rise of the big-government model, which is typically represented by the New Deal during the Great Depression, governments took a decisive role in boosting industrial development and tried to operate with greater cost-effectiveness.⁴⁰ The fashion for State intervention into national economies, the so-called the

³³ John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn., Cambridge Massachusetts: MIT Press 1997) 25.

³⁴ David A Collins, ‘Canada’s Sub-Central Coverage Under the WTO Agreement on Government Procurement’ (2008) 9 Public Procurement Law Review 23.

³⁵ See the analysis of the drawbacks of the current GPA entity coverage approach in Chapter 4 Section 3.

³⁶ Collins (n 34) 25.

³⁷ The term ‘night-watchman State’ (*Nachtwächterstaat*) was coined by German socialist Ferdinand Lassalle in a speech in Berlin in 1862, in which he criticised the bourgeois liberal limited-government State, comparing it to a night-watchman, and promoting minimum intrusion of power and government. See further Roderick T Long and Tibor R Machan, *Anarchism/Minarchism: Is a Government Part of a Free Country?* (Ashgate Publishing, Ltd 2008) 196.

³⁸ See Anthony Gregory, ‘The Monarchist’s Dilemma, the Economics’ *The Economics* (London, 9 May 2004).

³⁹ William L Niemi and David J Plante, ‘The Great Recession, Liberalism, and the Meaning of the New Deal’ (2011) 33 New Political Science 421.

⁴⁰ In combatting the 2007-2011 downturn, government spending on infrastructure played a strong role in rejuvenating the economy. See Richard Abadie, ‘Capital Project and Infrastructure Spending: Outlook to 2025’ (2014) Research by Oxford Economics 1-12. John S Bell, ‘Comparative Administrative Law’ (2006) *The Oxford Handbook of Comparative Law* 1261.

Keynesian economic theory,⁴¹ popularised the notion that governments should interfere with the economy, and that government procurement was a useful tool in monitoring the national economy. The growing intervention in the economy complicated the notion of ‘government bodies.’ This coverage of the term is not as extensive as it was in the minimal State model. In some circumstances, government bodies will also compete in a market for a cost-effective result, and some private bodies may also fulfil some functions that are usually performed only by government bodies, for example, the operation of prisons.⁴²

In the 1960s (the so-called ‘Nanny State’ era),⁴³ governments were urged to give more freedom to people and to provide public goods catering for the needs of their people, such as education, social welfare and other public services.⁴⁴ At this stage, the spectrum of the government body was further extended to carry functional social institutions such as colleges, museums, national parks and so forth. After the 1980s and the trend towards privatisation,⁴⁵ governments transferred some welfare services to the market and privatised State-owned enterprise to some extent, which means that ‘government procurement’ became even more intertwined with private activities.⁴⁶ Those newly-established SOEs, or detached entities (i.e., detached from governments), performed some government procurement on behalf of, or for the benefit of, governments. For example, in the construction of government office buildings, a special enterprise for this purpose, called the ‘Special Purpose Vehicle (SPV)’ was created. It was enabled to fulfil the procurement of construction materials or the services of investigation, design, construction, and even operation of the construction. After the building was established, the SPV transferred the building to the government and dissolved. In this situation, although

⁴¹ John F Cogan and others, ‘New Keynesian versus Old Keynesian Government Spending Multipliers’ (2010) 34 *Journal of Economic Dynamics and Control* 281.

⁴² In 2018, 18.46 per cent of prisoners in England and Wales were housed in private prisons, 18.4 per cent of prisoners in Australia was held in private prisons, and 8.4 per cent of the prisoners in the US were held in private prisons. See UK (Ministry of Justice), ‘Prison Population Statistics’ <<https://www.gov.uk/government/collections/prison-population-statistics>> accessed 6 August 2019. Australia Government Productivity Commission, ‘Report on Government Services 2018, Part C, Chapter 8, Corrective Services’ <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2018/justice/corrective-services>> accessed 6 August 2019.

⁴³ The ‘nanny State’ metaphor likens the government’s role in society to that of a nanny in child rearing. It was first used on the 3rd of December 1965 with reference the welfare State model. See Oxford English Dictionary, nanny State n. orig. and chiefly Brit. the government or its policies viewed as overprotective or as interfering unduly with personal choice. <http://www.oed.com/view/Entry/124968?redirectedFrom=nanny%20State#eid35308746> accessed 8 January 2019.

⁴⁴ P Pettit, ‘Freedom and the State: Nanny or Nightwatchman?’ (2015) 129 *Public Health* 1055.

⁴⁵ See Chapter 5 Section 2.2 Privatisation (1980s-2000s).

⁴⁶ Bell (n 40) 1293.

the SPV was registered as a private body. This ‘build-operate-transfer’(BOT) contract was subject to government procurement rules since the SPV acts as an agent of the government to circumvent government procurement rules. It is hardly right to identify those bodies as either ‘government’ or ‘private’ in procurement activities, on account of the body’s legal status.⁴⁷ In addition, the traditional division of procurement bodies into either ‘government body’ or ‘private body’ became problematic.⁴⁸

2.5. Why Is International Government Procurement Regulation Necessary?

A simple rationale of national regulation is based on the assumption that increasing barriers against foreign suppliers decreases competition opportunities in this market, which in turn leads to less efficient procurement decisions. Thus, for the avoidance of wasting public funds, those barriers should be under regulation. That is the so-called ‘value for money’ or most economically efficient procurement. However, saving money is not the only justification for government procurement regulation.⁴⁹ Governments usually employ government procurement to achieve ‘secondary’ goals that go beyond the economic goal of purchasing goods and services at the best possible price.⁵⁰

Those non-economic goals influence the perceptions of civil society, the expectation and confidence of foreign investors and even the good governance or trade policies of governments.⁵¹ Those influences from national government procurement regulation do ‘jump the fence,’ and cross over to the global trade market. Whatever the national objectives that national government procurement regulation pursues, efforts to apply discriminatory

⁴⁷ Pablo Olivera, ‘Defining the Scope of Covered Entities under the WTO Agreement on Government Procurement and the EC Procurement Rules’ (1997) Public Procurement Law Review 1.

⁴⁸ See Chapter 7, Sections 2.

⁴⁹ Government procurement is specifically targeted to boost national economic growth by requiring ‘government entity’ to purchase with national, industrial, or social preference through ‘buy national’ legislations. In the majority of the cases in European countries, public authorities prefer restricted tenders, which adds to the general lack of transparency in public procurement and public purchasing are concentrated in certain industries. See Michael Emerson and others, ‘The Economics of 1992: An Assessment of the Potential Economic Effects of Completing the Internal Market of the European Community’, European Commission Directorate-General for Economic and Financial Affairs No. 35 (1988) 54-55.

⁵⁰ Government procurement is also employed to correct the inequalities of capitalism. Government procurement was heavily relied upon for national, and even global, economic recovery from depression during the post-World War II era, and it rapidly became dominant in national policies. See further JJ McMurtry, ‘The Political Economy of Procurement’ (2014) 40 Canadian Public Policy 30. Martin Dischendorfer, ‘The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO’ (2000) 1 Public Procurement Law Review 37.

⁵¹ Dawar (n 10) 6.

government procurement policies increasingly come into conflict with international trade liberalisation.

The increasing use of government procurement to create trade barriers has been a big concern for further global trade liberalisation. Despite the economic significance illustrated above, trade opportunities in the government procurement market are still relatively restricted, by either overt or covert national discriminatory policies.⁵² According to the Annual Report on Trade and Investment Barriers for 2016, released by the European Commission, there are 372 trade barriers across 50 countries, a 10 per cent increase since 2015. Among those trade barriers, the number of government procurement barriers has been increasing since 2009, although the international regulations on government procurement have made significant progress at the same time.⁵³ At a time when other trade barriers, such as tariffs and subsidies, have been lowered, government procurement barriers have fuelled the discussion on international government procurement regulations.⁵⁴

Although government procurement barriers are rampant, under the current multilateral trade system, government procurement is excluded from WTO non-discrimination obligations.

⁵² Governments are reluctant to open it to free competition unless a significant or reasonable benefit is anticipated. See further Morton Pomeranz, 'Toward a New International Order in Government Procurement' (1982) 12 Public Contract Law Journal 141.

⁵³ The EU Trade Commission classified trade barriers into three categories: border measures, which directly affect imports and exports, such as tariffs, quantitative restrictions, sanitary and phytosanitary measures, import licensing and trade bans; behind-the-border measures, such as restrictions related to services, investments, government procurement, intellectual property rights or unjustified technical barriers to trade; and trade-distorting subsidies. See European Commission, 'Report from the Commission to the European Parliament and the Council on Trade and Investment Barriers' (n 2).

A similar conclusion can be found in USTR, '2017 National Trade Estimate Report on Foreign Trade Barriers' (2017). <http://www.gks.ru/wps/wcm/connect/rosstat_main/rosstat/ru/statistics/fttrade/#>. Perspectives on Trade | Perspectives and Observations, 'EU Highlights Foreign Procurement Barriers' <<http://trade.djaghe.com/>> accessed 26 July 2017. Dawar (n 10) 6.

⁵⁴ The trade distance between countries has been substantially reduced in terms of the time and cost of transport and communication. Tendering in an international competitive market could bring more efficient results. At the same time, the benefits brought by international trade liberalisation has made governments recognise that a common regulation on the means of harnessing the potential of trade liberalisation is necessary. As a principal policy tool, government procurement has drawn the attention of the world trade regulation system, which was represented by the establishment of the Bretton Woods organisations--the World Bank, and the International Monetary Fund (IMF) and subsequently the GATT (later the WTO). After the establishment of the world trade regulation system, regulation on government procurement was put on the table of the multilateral negotiation. See further McMurtry (n 48) 30. For a thorough analysis of the motivation for the regulation of international government procurement market from perspectives of the theory of comparative advantage, competitive advantage and obstacles to international trade, see Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press 2004) Chapter 4.

Article III (8) (a) GATT explicitly states that national treatment⁵⁵ does not apply to the procurement of goods by government agencies for government purposes. Although the most-favoured-nation obligation⁵⁶ does not exclude government procurement from its scope as is clearly stated in the national treatment clause, the negotiation history suggests that those responsible for the drafting of the GATT understood government procurement as being exempted from both the national treatment obligation and the most-favoured-nation obligation.⁵⁷ Similarly, Article XVII.1 GATS takes out any national treatment⁵⁸ obligations to procurement by government bodies. In light of this, government procurement is generally exempted from the WTO non-discrimination obligation.⁵⁹ The derogations from the non-discrimination obligation in the GATT and GATS are part of the reason for the rapid growth of government procurement barriers. In view of the trade significance of government procurement, there is a need for international regulations of government procurement.

Currently, the GPA is the most important international government procurement regulation. Although the coverage, the signatories, the observers and the acceding parties of the GPA have been expanding, discriminatory practices are still rampant. To take Australia as an example: Australia acceded to the GPA in October 2018, but did not adopt non-discrimination as a critical principle in national government procurement legislation, and still maintains preferential measures to benefit small and medium enterprises.⁶⁰ China (which has been seeking membership of the GPA since 2007) still has ‘Buy Chinese’ policies in effect.⁶¹ Israel has long been a signatory of the GPA, but Israeli authorities do not provide sufficient transparency regarding international tenders for potential foreign bidders. Currently, English

⁵⁵ Article III of GATT is the national treatment rule. Under this Article, Members must not accord discriminatory treatment between imports and ‘like’ domestic products. Article III (8) permits governments to purchase domestic products preferentially, making government procurement one exception to the national treatment rule.

⁵⁶ Article I GATT.

⁵⁷ Annet Blank and Gabrielle Marceau, ‘The History of the Government Procurement Negotiations Since 1945’ (1996) 5 *Public Procurement Law Review* 88.

⁵⁸ Article XVII of GATS. Under the GATT, National Treatment and Most-favoured-Nation are accompanied by general obligations applying to all parties, whereas, under the GATS, the National Treatment only applies when a WTO party has made a specific undertaking to apply in its schedules, and the MFN is subject to negotiated derogations.

⁵⁹ Arie Reich, ‘On the Multilateral Level: The GATT Code on Government Procurement’ in Arie Reich (ed.), *International Public Procurement Law: the Evolution of International Regime on Public Purchasing*, vol 12 (1th edn., Kluwer Law International 1999) 116-117.

⁶⁰ The fundamental principles of Australian government procurement are value for money, equal treatment and transparency. Geoff Wood and Anne Petterd, ‘Public Procurement 2017 (Australia)’ in James J McCullough and Michael J Anstett (eds.), *The International Comparative Legal Guide to: Public Procurement 2017* (9th edn., Global Legal Group 2016) 15.

⁶¹ Liang Ding, ‘Public Procurement 2017 (China)’ in James J McCullough and Michael J Anstett (eds.), *The International Comparative Legal Guide to: Public Procurement 2017* (9th edn., Global Legal Group 2016) 65.

notices of international tenders are only published in hard-copy in Israeli English newspapers and are not available online.⁶²

In order to reduce the trade barriers set by discriminatory government procurement, it is argued that a sound and integrated international government procurement regulation is very necessary to balance national policy needs, as well as international trade liberalisation principles. Thus, before promoting international government procurement regulations, it will be helpful to understand the concerns of national government procurement.

2.6. Why Is Government Procurement Difficult to Subject to International Disciplines?

Before the present era, government procurement was an administrative measure. It was devoted to creating a balance between public and private interests. For example, before adopting the EU (formerly the ‘European Community’) legislation to ensure an open and competitive Internal Market), the UK and the other Commonwealth countries took administrative measures to regulate the government procurement process.⁶³ This approach was also adopted by countries in which the legal systems, especially regulatory systems, were heavily influenced by the United Kingdom. Regulating government procurement by **administrative measures** was a characteristic of the Anglo-American Legal System. However, in France and in countries influenced by the French civil law tradition, there is a strong tradition of administrative law, and government procurement is regulated under formal **legal statutes** (namely the ‘*Code of Public Procurement*’ (*Code des Marches Publics*)).⁶⁴ Outside Europe, the US also promulgated an integrated regulatory system for awarding procurement contracts (namely the ‘*Federal Acquisition Act*’). In other jurisdictions, for example, in China, government procurement is neither regulated by purely administrative contracts nor purely by civil contracts. It is subject to economic law discipline (namely the ‘*Government Procurement Law*’), which belongs to

⁶²Sándor Szelekovszky, Eyal Inbar and Uri Fishelson, ‘EU-Israel Trade Briefing’ (2016) EU-Delegation to the State of Israel Trade and Economic Section 14.

⁶³Sue Arrowsmith, ‘National and International Perspective on the Regulation of Public Procurement: Harmony or Conflict?’ in Sue Arrowsmith and Arwel Davies (eds.), *Public Procurement: Global Revolution* (1st edn., Kluwer Law International 1998) 4.

⁶⁴The scope of the *Code des Marches Publics* covers procurement contracts entered into by the French State, its public administrative bodies, local governments and local public bodies. Other procurement contracts entered into by public bodies that are excluded from the scope of the *Code des Marches Publics* are subject to the 2005 Ordinance, which includes most of the State industrial and commercial public bodies and bodies that were established for the specific purposes of meeting needs of general interest.

See European Commission Report, ‘France’ (2014) Public procurement—a study on administrative capacity in the EU 76-77.

the political-economic law regime aiming at monitoring economic development by way of government policies).⁶⁵ Although under these varying legal traditions and political systems, the institutions and regulations on government procurement differ from each other, the ground and justifications for these regulations are similar. The primary procurement legislative objectives are political, industrial, social or other public goals, rather than economic.⁶⁶ In some jurisdictions, the non-economic goals dominate or at least outweigh, the economic goals, (such as achieving value for money). The China Government Procurement Law is a case in point. It was enacted with good governance and anti-corruption as its primary aims.⁶⁷

2.6.1. Economic Goals

Achieving the best value of money is a common goal of most national government procurement regulations. Statistics indicate that competitive bidding processes reduce the overall cost of public expenditure and improve the competitiveness of national industries.⁶⁸ Since government spending accounts for a substantial portion of the national treasury budget, procurement officers are expected to make procurement decisions with all due diligence and integrity and to select the most competitive or efficient supplier. This procurement decision must be made in compliance with general administrative principles,⁶⁹ which means the procurement process must follow legal procedures. The procurement requirements and tendering procedures must be commensurate and appropriate.⁷⁰ Correspondingly, government spending should avoid excessive waste of public expenditure. For example, in a specific case of purchasing furniture, the specification of the procured furniture should be essential and necessary in a frugal way rather than extravagant.

However, seeking the best value for money does not necessarily mean always buying at the lowest price as the only award criteria. Other economic elements such as quality, the life cycle

⁶⁵ Masanobu Kato, 'Civil and Economic Law in the People's Republic of China' (1982) 30 *The American Journal of Comparative Law* 429.

⁶⁶ Arrowsmith, 'Government Procurement and Its Impact as a Trade Barrier to Trade' (n 26) 12.

⁶⁷ OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (2005) 136. Article 1 'The present law has been enacted with a view to regulating government procurement activities, increasing the benefits of government procurement funds, protecting the interests of the State and social/public interests, defending the lawful rights of the parties concerned in government procurement and promoting the building of a clean government.' See Government Procurement Law of the People's Republic of China (2014 Amendment).

⁶⁸ See Emerson and others (n 49) 51-57.

⁶⁹ In the civil law systems, public contractual terms and executions are heavily regulated like other administrative law matters. See further, Sue Arrowsmith and others, 'Public Procurement Regulation: An Introduction' (2010) *Public procurement regulation: an introduction* 2. Trepte (n 54) 18-19.

⁷⁰ See Eric Engle, 'History of the General Principle of Proportionality: An Overview' (2012) 10 *Dartmouth Law Journal* 8.

cost, the post-contract service, and so forth could also be taken into consideration. Value for money is not merely a matter of cost-effectiveness but implies welfare efficiency. Procurement regulation has been primarily developed based on welfare economics in the market economy. Therefore, the implication is that the regulation of procurement should pursue economic welfare.⁷¹ However, all in all, the ‘value for money’ is consistent with the opening up market. To achieve the best value, it should encourage national governments to subject the government procurement market to international regulations.

2.6.2. Non-economic Goals

Government procurement is also applied to implement national policies (such as political/social/environmental/industrial policies), in accordance with specific values other than cost-effectiveness.

Some governments reserve procurement contracts for non-profit organisations to encourage them to provide better social services,⁷² or enhance opportunities for women or disadvantaged ethnic groups in society,⁷³ or favour less-developed areas, small and medium enterprises, or protect the environment and human rights, or other aims.⁷⁴ These examples are not exhaustive. Sometimes, non-economic objectives are the outcome of lobbying by domestic suppliers seeking to maintain their competitive advantages in local procurement markets. Thus, this kind of local protectionism is much criticised for setting trade barriers.⁷⁵ To this extent, the pursuit of non-economic objectives could be a reason not to subject international government procurement to government disciplines.

Other goals may also be achieved through the implementation of government procurement policies,⁷⁶ such as preventing corruption and preserving the integrity and pursuit of good

⁷¹ In Chapter 2 of Trepte’s book, the allocative efficiency as well as market and institutional failure leading to conditions of imperfect competitions that negatively affect economic efficiency was thoroughly analysed in the context of national regulations on government procurement. See Trepte (n 54) Chapter 2.

⁷² See New York City Government (Mayor’s Office of Contract Services), ‘The Procurement Plan’ <<http://www1.nyc.gov/site/mocs/nonprofits/contracting-opportunities.page>> accessed 6 August 2019.

⁷³ Dischendorfer (n 50) 37 notes 120,121.

⁷⁴ Sue Arrowsmith, *Government Procurement in the WTO*, vol. 12 (Sue Arrowsmith ed., 1st edn., Kluwer Law International 2003) 23. Sue Arrowsmith, ‘The Scope of Contract’, *Civil Liability and Public Authorities* (1st edn., Earls Gate Press 1992) 48.

⁷⁵ Valéria Guimarães de Lima e Silva, ‘The Revision of the WTO Agreement on Government Procurement : To What Extent Might It Contribute to the Expansion of Current Membership ?’ (2008) 17 *Public Procurement Law Review* 69.

⁷⁶ Those objectives are usually realised through special procedural requirements. Firstly, it requires the award to be based on objective criteria, and the process to be transparent to curb rent-seeking. For example, the contract winner and the contract value must be published; the failed bidders must have the right to obtain an explanation of the award criteria and the right to challenge the contracting authority’s decision, either through judicial review

governance.⁷⁷ A typical case in point is the implementation of government procurement with World Bank assistance. Anti-corruption is especially significant in countries financially assisted by the World Bank. Loans from the World Bank consist of a significant part of the government financial resource of the borrower countries. In order to ensure the economic and efficient use of the loans as the loan agreements stipulate, whereby any practices, such as fraud, corruption and bribery, which deters competition and transparency, will be prohibited.⁷⁸ Subjecting government procurement to such international discipline reduces government officials' policy discretion, and therefore, leaves less room for corruption.

In particular, some governments favour domestic industries with an advantage over their international competitors, in order to maintain the competitiveness of the domestic industry and to secure employment in the sectors concerned.⁷⁹ The Article III GPA: Security and General Exceptions explicitly allow the parties to derogate from their international obligations under four kinds of circumstances.⁸⁰ It can be inferred that except for those four circumstances, other national government procurement policies promoting social, political or environmental derogations are not allowed due to their discriminatory effects.⁸¹ As a result, most of the GPA Parties make derogations in their coverage schedules, and few developing countries have joined the GPA since maintaining preferential government procurement policies are still an integral

or before an independent and impartial body. A second aim is to avoid self-awarding. Contracting authorities are prohibited from reserving opportunities for economic operators to which they are linked with, for example, procurement officers' relatives and the companies in which the procurement officers invest. See further Arrowsmith, Linarelli and Jr (n 12) 9.

⁷⁷ A full list of the non-economic goals includes: 1. Integrity - avoiding corruption and conflicts of interest 2. Accountability 3. Equal opportunities and equal treatment for providers 4. Fair treatment of providers 5. Efficient implementation of industrial, social and environmental objectives ('horizontal policies') in procurement 6. Opening up public markets to international trade 7. Efficiency in the procurement process. See Arrowsmith and others (n 61) 4.

⁷⁸ World Bank, 'Guidelines On Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants' (2006).

⁷⁹ For detailed analysis, see Arie Reich, 'Normative Analysis of Protectionist Procurement Policies: Are They Economically or Morally Sound?' in Arie Reich (ed.), *International Public Procurement Law: the Revolution of International Regimes on Public Purchasing*, vol 12 (1st edn., Cambridge: Kluwer Law International 1999) 26-34.

⁸⁰ Article III — Security and General Exceptions: '...nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: a. necessary to protect public morals, order or safety; b. necessary to protect human, animal or plant life or health; necessary to protect intellectual property; or d. relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.' See the revised GPA 2012.

The GPA is not alone in this case. The UNCITRAL Model Law on Public Procurement also recognises that the government can take advantages of procurement contracts to fulfil the industrial or socio-economic targets and permit the provisions in domestic procurement legislation.

⁸¹ Arrowsmith, *Gov. Procure. WTO* (n 74) 23-24.

part of their economic policies.⁸² The most prominent example is the US: it has negotiated exclusions for the development of distressed areas and businesses owned by minorities, disabled veterans, and women.⁸³

The non-economic goals pursued by countries (so-called ‘policy space’), are important considerations when deciding whether to join the GPA. Accession to the GPA implies relinquishment, to some extent, of the capacity to use government procurement as a policy tool.⁸⁴ Those domestic policy considerations have been cited as a primary reason for developing countries’ not to join the GPA.⁸⁵ It is argued that only if the trade benefits of accession to the GPA outweigh the loss of ‘policy space’, would countries sign the GPA. Although in the revised GPA and its older versions, policy needs (so-called ‘secondary goals’ of the GPA) are/were considered, those ‘policy space’ still lack flexibility and does not meet the concerns of the prospective signatories, especially those with economies in transition, and those with developing economies and a large State sector. Thus, for further expansion, the GPA must respect and incorporate more domestic ‘policy space’.⁸⁶

2.7. What Are the Objectives of International Disciplines?

Globalisation impacts all aspects of world trade. Multilateral trade negotiations have significantly reduced tariff barriers.⁸⁷ With globalisation, the integration process of trade regulations continues to accelerate in deeper and further directions. Notably, the evolution of the GPA has progressed to gain further expansion of coverage and the number of its signatories. Another consequence of globalisation is that trade markets and economic reforms at the national level may acquire the complexity in cooperation in international trade rule-making.

⁸² See further Silva (n 75) 69. Michael J Hahn, Petros C Matsushita, Mitsuo, Mavroidis and Thomas J Schoenbaum, *The World Trade Organization : Law, Practice, and Policy* (3rd edn., the Oxford International Law Library 2017) 676.

⁸³ See the Annex 2 of the US Appendix 1. Similar exclusions can also be found in the Japan and Canada annexes.

⁸⁴ See further John Linarelli, ‘Corruption in Developing Countries and Countries in Transition: Legal and Economic Perspectives’ in Sue Arrowsmith and Davies Arwel (eds.), *Public Procurement: Global Revolution*, vol 8 (Kluwer Law International 1998) 125-137.

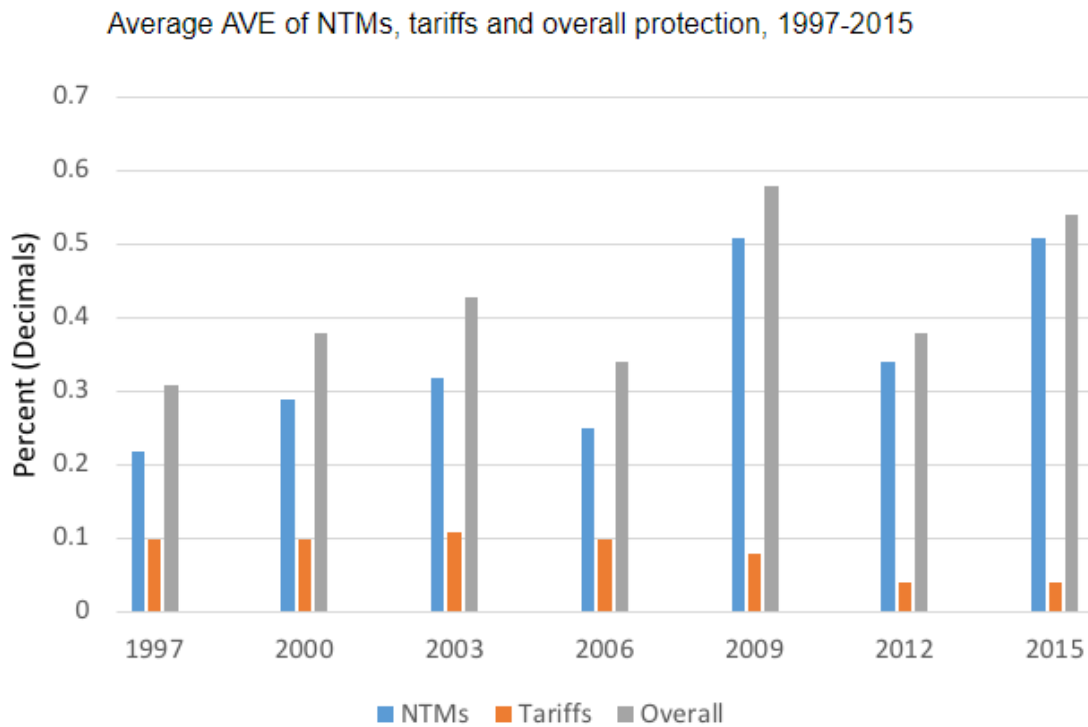
⁸⁵ Working Party on GATS Rules, ‘Government Procurement of Services, Communication from the European Communities and Their Member States’ S/WPGR/W/39 12 July 2002.

⁸⁶ This measure is quite similar to outlawing certain subsidies (mainly export subsidies) while authorising certain categories of subsidy for the avoidance of subsidy wars and the protection of global efficiency. See Luca Rubini, *The Definition of Subsidy and State Aid-WTO and EC Law in Competitive Perspective* (Oxford: Oxford University Press 2009) 58.

⁸⁷ Namely, 1st Round: Geneva Tariff Conference, 1947; 2nd Round: Annecy Tariff Conference, 1949; 3rd Round: Torquay Tariff Conference, 1950-51; 4th Round: Geneva Tariff Conference, 1955-56; 5th Round: Dillon Round, 1960-61; 6th Round: Kennedy Round, 1963-67; 7th Round: Tokyo Round, 1973-79; 8th Round: Uruguay Round, 1986-94.

This has been true with regard to national measures to combat global climate change, but the same can be said about investment policies, standards, and many other fields of government activities. Similarly, the way government procurement policies are enforced has an inevitable impact on the process of trade liberalisation. On the one hand, tariff barriers are disappearing, whereas, on the other hand, non-tariff trade barriers are increasing.⁸⁸ (See the graph below) There is a risk that those flagrant trade barriers may be replaced by latent practices, such as covert discriminatory government procurement measures and practices, thus undermining the process of international trade liberalisation.

⁸⁸ Such as government procurement restrictions, customs and administrative entry procedures, technical barriers to trade, distribution restrictions (measures which make it harder to sell imported goods in all parts of a market), trade-related investment measures (requirements that goods must contain domestic content, or policies that limited imports based on the performance of exports), and so forth. See further, Zhaohui Niu and others, 'Non-Tariff and Overall Protection: Evidence across Countries and over Time' (2018) 154 *Review of World Economics* 676.



Source: Saileshsingh Gunessee, Chris Milner and Zhaohui Niu, ‘Growing Non-Tariff and Overall Protection’ (19 June 2018) CEPR Policy Paper.

Trade liberalisation is a process consisting of dialogue between various international legal instruments. It is clear that the liberalisation of government procurement markets is not only promoted by the GPA but also reinforced by other international instruments.⁸⁹ Generally, there are four influential government procurement regulations, apart from the GPA: (i) the EU procurement directives, (ii) the UNCITRAL Model Law on Public Procurement, and (ii) the Procurement Guidelines of the World Bank.⁹⁰ The primary goals of the EU procurement directives are regional integration and to promote competition in the EU regions. The Model Law is designed as a framework for countries to establish a national government procurement regulation. The World Bank Procurement Guidelines provide a legislative framework for the borrower countries’ practices on government procurement.

⁸⁹ In this process, the GPA evolves with other instruments, whose specific provisions promote and enhance principles, standards and procedures that tie with the interests of government procurement liberalisation, such as bilateral trade agreements, trade agreements promoting transparency and competition. See further Zena Prodromou, ‘In The Name of Public Procurement Liberalisation: The Interaction Between the WTO’s Government Procurement Agreement and International, Regional and Domestic Instruments – Three Shades of Synergy’ (2015) 11 *Croatian Yearbook of European Law and Policy* 215-228.

⁹⁰ World Bank, ‘Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers’ (2015) 6.

There is a growing appreciation of the linkage between specific national objectives and the international objectives of government procurement regulations. A comparison of the various objectives of both national and international regulations is an essential dimension of assessing the performance of current international regulations because it reveals the similarity of the goals. However, a noticeable difference is that in international instruments, the principles of trade liberalisation, competition, and transparency, etc., dominate. Those similarities and differences inspire us to develop the GPA text and expand the coverage and signatories.

2.7.1. The EU

The principle of free movement in the Treaty of Rome (1957) has provided a framework to create a common market, and the concept of trade liberalisation was introduced to eliminate trade barriers between the Member States.⁹¹ As one of the initiatives for the Internal Market (1992), EU procurement discipline has implemented for dismantling market barriers between the Member States and enhanced the competition within the Internal Market.⁹²

Article 34 of the Treaty on the Functioning of the European Union (TFEU), Article 49 TFEU, and Article 56 TFEU⁹³, as a general requirement of all Member States, prohibit the Member States discriminating against products or firms from the other Member States. Since the treaty provisions only imposed negative obligations on the Member States, secondary legislation creates a proper framework to regulate government procurement in the EU. Therefore, following the founding treaty provisions, a series of procurement directives for major contracts was adopted since the 1970s.

Since then, the European Community began to develop implementation procedures for transparent, competitive, and non-discriminatory public procurement within the European

⁹¹ Fernández Martín and José María, *The EC Public Procurement Rules : A Critical Analysis* (Clarendon Press 1996) 6.

⁹² The inception of these principles can be traced back to the Treaty of Rome 1957. At the time, there was no single provision directly dealing with public procurement in the Treaty. In Part I: Principles, the Treaty of Rome enshrines the principles of free movement of persons, goods, services, and establishments. It argued that at that time, there was no idea of independent public procurement disciplines, while others argue that public procurement is an obstacle to the treaty negotiation and that the principles of free movements establish the foundation of free public procurement. See Part I, The Treaty of Rome, 25 March 1957. See further Karen Hill, 'Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions' (September 2016) SIGMA Public Procurement Brief No.1. and Morton Pomeranz (n 52) 39.

⁹³ Article 34: Free Movement of Goods, Article 49: Freedom of Establishment, and Article 56: Free Movement of Services.

Internal Market and public procurement regulation has been specified as a priority since 1985.⁹⁴ After decades of reform, extension, coordination, and updating, the EU procurement regulation is integrated into the following systems and apply to the Member States when the contract value is over certain financial thresholds.⁹⁵ The current EU legal framework on public procurement consists of:

- Directive 2014/24/EU on public procurement (repealing Directive 2004/18/EC), (Public Contract Directive)
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, (Utility Contracts Directive)
- Directive 2014/23/EU on the award of concession contracts
- Directive 92/13/EEC as amended by Directive 2007/66/EC (Remedies Directive for The Utilities), and
- Directive 89/665/EEC as amended by Directive 2007/66/EC (Remedies Directive for The Public Sector)

The definition of ‘contracting entities’ is defined in Article 2 of Directive 2014/24/EU (Public Contract Directive) as ‘contracting authorities.’ which include the State, regional and local authorities, and bodies governed by public law.⁹⁶ In Directive 2014/25/EU (Utility Contracts Directive), the contracting authorities are defined in the same way as in the Public Contract Directive. Besides ‘contracting authorities’, public undertakings and other entities based on special or exclusive rights operating in the utilities sectors are also covered by the Utility Contracts Directive.⁹⁷ The definitions and their relevant legal interpretations guide the application of the EU’s public procurement rules. The EU procurement directives attempt to identify all possible barriers to trade liberalisation within the EU internal market. In line with the general aims and Free Movement goals of the EU treaty, the Directives state in its recitals:

⁹⁴ In 1985, the European Commission released a White Paper containing plans to spur the process of the ‘single European market’ by 1992. The public procurement was highlighted (in the Part II section II) as a crucial area for actions, measures, policies and legislation to ensure the fulfilment of the single European market before 1992. The Green Paper on Public Procurement 1996 provided a framework for the discussion on future developments in the field of public procurement legislation. See further, Commission of the European Communities, ‘White Paper from the Commission to the European Council on Completing the Internal Market’ (n 69). Commission of the European Communities, ‘Green Paper Public Procurement in the European Union: Exploring the Way Forward’ COM/96/0583 FINAL.

⁹⁵ For the full financial threshold of the specific directive, see European Commission, threshold, http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds/index_en.htm accessed 18 June 2016.

⁹⁶ Article 2 Definitions of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC: ‘Procurement means the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities’.

⁹⁷ Article 4 of the Utilities Directive.

‘The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the Treaty on the Functioning of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide service, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency...for public contracts above a certain value... to ensure... public procurement is opened up to competition.’⁹⁸

2.7.2. The OECD

Given the significant size of government procurement markets, countries seek to further open the government procurement market. The OECD countries are especially desirous for free trade in this area. Statistics show that public procurement expenditure accounted for about one-third of total government spending in the OECD countries in 2013.⁹⁹ In the EU, government procurement accounts for over 14 per cent of GDP on average,¹⁰⁰ and in the United States, over 10 per cent of GDP.¹⁰¹

The desire for trade expansion in the government procurement market pushed the development of government procurement regulation. The OECD has accomplished the most significant work in this area to date. In the 1960s, the OECD took initiatives to examine the public procurement policies among its members for trade liberalisation. It developed a number of recommendations to flesh out its procurement policies, including (i) the OECD Recommendation on Enhancing Integrity in Public Procurement (2008);¹⁰² (ii) the OECD Recommendation on Principles for Public Governance of Public-Private Partnerships (2012);¹⁰³ (iii) the OECD Recommendation on Fighting Bid Rigging in Public Procurement (2012);¹⁰⁴ (iv) the OECD Recommendation on

⁹⁸ Recital (1) the Public Sector Directive. An in-depth analysis of the EU procurement directives will be conducted in Chapter 6.

⁹⁹ Lucian Cernat and Zornitsa Kutlina-Dimitrova, ‘International Public Procurement: From Scant Facts to Hard Data’ EU Directorate-General Trade Chief Economist’s Note Issue 1 April 2015 7.

¹⁰⁰ Every year, over 250 000 public authorities in the EU spend around 14 per cent of GDP on the purchase of services, works and supplies. See European Commission, ‘Public Procurement’ <http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm> accessed 1 February 2016.

¹⁰¹ Cernat and Kutlina-Dimitrova (n 99) 7.

¹⁰² OECD Directorate for Public Governance and Territorial and Development, ‘Recommendation of the Council on Enhancing Integrity in Public Procurement’ C (2008)105.

¹⁰³ OECD, ‘OECD Recommendation on Principles for Public Governance of Public-Private Partnerships’ (2012) C (2012) 86.

¹⁰⁴ OECD, *Recommendation of the Council on Fighting Bid Rigging in Public Procurement* (OECD/LEGAL/0396 2012).

Improving the Environmental Performance of Public Procurement (2002);¹⁰⁵ and (v) the Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement (1996).¹⁰⁶

Supported by the policies developed in Recommendation documents, the OECD has taken steps to ensure the implementation of international government procurement standards and best practices. Those instruments facilitate the integration of national government procurement regulations. The continuing contribution of the OECD remains a leading influence in the future direction of government procurement market liberalisation.¹⁰⁷

2.7.3. The UNCITRAL

It is undeniable that the economic significance of the government procurement in international trade has raised the regulation of this market as a ‘focal point’ for the generation of compliance (the various international legal texts on this topic, especially the issue-based plurilateral GPA, provide evidence of this). Besides national laws, supra-national legislation and international instruments, there are also ‘soft laws’ impacting on the regulation of public contracting. One example of soft law on government procurement is the United Nations Commission on International Trade Law (hereinafter referred to as ‘UNCITRAL’) Model Law on Public Procurement.¹⁰⁸

States may use soft law to solve straightforward coordination games where a focal point exists, and it is possible to generate compliance at this point.¹⁰⁹ The UNCITRAL has formulated various kinds of legal texts for governments to refer to, such as model laws, conventions, and legal guides. States choose soft law when they are not sure whether the rules that they adopt today will be desirable tomorrow, and when it is advantageous to allow a particular State or group of States to adjust expectations in the event of changed circumstances. Thus, we can see

¹⁰⁵ OECD, *Recommendation of the Council on Improving the Environmental Performance of Public Procurement* (OECD/LEGAL/0311 2002).

¹⁰⁶ OECD, *DAC Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement* (OECD/LEGAL/5013 2016).

¹⁰⁷ Due to its limited membership of the OECD, market liberalisation is relatively restricted within the OECD. Thus, in order to achieve bigger government procurement market, the negotiation forum moved from the OECD to the GATT Tokyo Round Negotiation. However, it is beyond doubt that the OECD documents provided valuable experience for the development of the GPA.

¹⁰⁸ The UNCITRAL is an inter-governmental organisation, established by the United Nations General Assembly in 1966. It is open to all nations of different economic development levels and political conditions and specialises in commercial law reform to modernise and harmonise the rules on commercial transactions. United Nations Commission on International Trade Law, United Nations Commission on International Trade Law Model Law on Public Procurement, <http://www.uncitral.org/uncitral/en/index.html> accessed 18 June 2016.

¹⁰⁹ Andrew T Guzman and Timothy L Meyer, ‘International Soft Law’ (2009) 2 *Journal of Legal Analysis* 171.

that only a small number of WTO members signed the very first GATT Tokyo Round Code on Government Procurement (1979). Due to uncertainty about the advantages of acceding to the GPA, a large number of WTO members are still not parties to the GPA. UNCITRAL claims that there are currently thirty States whose legislation on public procurement has been modelled or inspired by the UNCITRAL Model Law on Procurement of Goods, Constructions, and Services.¹¹⁰ The high acceptance of the Model Law worldwide enables it to have a significant impact on global public procurement reform.

The Model Law on Public Procurement is a response to the growing demands for legal reform in the field of public procurement. It provides a legal template by taking into account the experiences of countries in regulating public procurement and serves as a neutral template for nations. ‘Public procurement’ in the Model law refers to the acquisition of goods, construction or services by a ‘**procuring entity**’. However, the Model Law does not define the notion of ‘procuring entity’, leaving the enacting States to consider its meaning when drafting national legislation.¹¹¹

The purpose of the Model Law on Public Procurement is not only to compensate for the lack of law-making or legal drafting expertise at the national law level; it also seeks to bring about autonomous harmonisation of national public procurement laws, and therefore, seek to allow foreign suppliers to bid in national public procurement markets on the basis of standardised procedures.¹¹²

In its preamble, it states that the Model Law aims to maximise the efficiency of public expenditure by providing a fair level playing field to boost competition, and by enhancing the integrity of governance in public procurement.¹¹³ According to the Guide to Enactment of the Model Law, the Model Law intends to serve the objectives of (a) achieving economy and efficiency; (b) widening participation by suppliers and contractors in procurement open to international participation as a general rule; (c) maximising competition; (d) ensuring fair,

¹¹⁰ They are Afghanistan (2005); Albania (1995); Armenia (2004); Azerbaijan (2001); Bangladesh (2006); China (2002); Croatia (1997); Estonia (1995); Gambia (2001); Georgia (1998); Ghana (2003); Guyana (2003); Kazakhstan (1997); Kenya (2001); Kyrgyzstan (1997); Madagascar (2004); Malawi (2003); Mauritius (1999); Mongolia (2000); Nepal (2007); Nigeria (2007); Poland (1994); Republic of Moldova (1997); Romania (2002); Rwanda (2007); Slovakia (2003); United Republic of Tanzania (2001); Uzbekistan (2000); Zambia (2008); See United Nations Commission on International Trade Law, ‘Status’ <http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html>.

¹¹¹ United Nations Commission on International Trade Law (n 108).

¹¹² See United Nations Commission on International Trade Law (n 108) 2.

¹¹³ UNCITRAL Model Law on Public Procurement.

equal and equitable treatment; (e) assuring integrity, fairness and public confidence in the procurement process; and (f) promoting transparency.¹¹⁴ It is evident that the Model Law implicitly put trade liberalisation as a high priority. Guided by principles of competition and transparency, the Model Law on Public Procurement provides rules regarding tendering procedures.

International soft law, such as the UNCITRAL example above, exemplifies soft law's important functions in breaking the national-international law divide and illustrates how international organisations help to harmonise national procurement laws. Another example of how soft law, developed by an international organisation, can impact and harmonise national public procurement is the UNCTAD Principle on Promoting Responsible Sovereign Lending and Borrowing.¹¹⁵ It sets out substantive and procedural principles for how States should structure and restructure sovereign debt. However, its purpose is not thus limited. It also aims to harmonise, and thereby to facilitate transactions between public actors and private actors in the global capital market and to contribute to the management of the global market for sovereign debt.

2.7.4. The World Bank

Another important international actor that contributes to the consistency of national public procurement legislation on the international level is the World Bank.¹¹⁶ The World Bank is an international public organisation created by sovereign member States through the Articles of Agreement, which entered into force in December 1945. It requires or encourages the borrower countries to adopt new government procurement mechanisms to enhance the efficiency of the loan.¹¹⁷ This process involves financiers or guarantors of public contracts passed between States and private economic actors. In response to this requirement, the World Bank has issued Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (January 2011), and Guidelines: Selection and

¹¹⁴ United Nations Commission on International Trade Law (n 108).

¹¹⁵ See United Nations Conference on Trade and Development, 'UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing' <https://unctad.org/meetings/en/MiscellaneousDocuments/Principles_Sovereign.pdf>.

¹¹⁶ The World Bank refers to the International Bank For Reconstruction For Development (IBRD) and the International Development Association (IDA).

¹¹⁷ IBRD Articles of Agreement III Section 5. Use of Loans Guaranteed, Participated in or Made by the Bank. <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> accessed 20 December 2016. IDA Articles of Agreement, Article V, Section I (g) and (h), <http://siteresources.worldbank.org/IDA/Resources/ida-articlesofagreement.pdf> accessed 20 December 2016.

Employment of Consultants under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (January 2011).¹¹⁸ The Guidelines apply to all contracts for goods, works and services financed in whole, or part, by World Bank loans, and are made applicable through Loan Agreements. A World Bank Loan Agreement is an ‘international agreement’ with the status of a treaty and is governed by international law. The coverage is described in certain loan agreements.¹¹⁹

There are four aspects of the policies and procedures on government procurement that are of concern to the World Bank. The first of these is to make sure that financial aids are applied properly by the national procuring entity, in order to procure the goods and services needed by the Bank-assisted projects in the most efficient and economical ways. The fiduciary is the first and foremost concern.¹²⁰ With respect to economic and efficiency principles, the UNCITRAL Model Law also provides flexible procedures to ensure the administrative cost and time of conducting each procurement.¹²¹

The second concern is competition, which is a principal pillar of the World Bank.¹²² The non-discrimination principle is closely related to the principle of competition, which is also commonly upheld by the GPA, the EU procurement directives and the Model Law. In the World Bank Guideline, competition means that all bidders from the developing countries and developed countries should have an equal opportunity to bid for the Bank-assisted projects. In the latterly mentioned Instruments, competition means avoiding government procurement rules that apply for domestic protection or discriminate against foreign bidders, goods, or services.

The third concern is accountability for developing the domestic manufacturing and contracting capacity where the projects are built. Accountability is enhanced through transparent procedures. Transparency is the fourth concern. It is a common principle in all World Bank

¹¹⁸ World Bank, ‘Guidelines : Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers’ (n 90).

¹¹⁹ There are no general rules as regards entity coverage of the Guidelines.

¹²⁰ Whereas, with regards to the GPA and other instruments, the financial source of the procurements is not a concern. Thus, there is no emphasis on the principle of ‘economy and efficiency’. See The World Bank, ‘Comparison of the International Instruments on Public Procurement’ (2013) 3.

¹²¹ Draft Guide to UNCITRAL Model Law, para 8,

¹²² The GPA is a trade agreement with the principal objective of achieving ‘greater expansion of market access.’

instruments on public procurement.¹²³ Without transparency requirements, authorities would be very likely to abuse the discretion and defalcation could be easily concealed.¹²⁴

2.7.5. The Political Fora

The effects of soft law on government procurement also have an impact on political fora. For example, the Asia-Pacific Economic Cooperation organisation ('APEC')¹²⁵ and the Group of Twenty ('G20').¹²⁶ They are the most important political fora to show the intentions of international rule-making in trade and economy fields.

Specifically, the APEC aims to strengthen multilateral trade liberalisation, building on the outcome of the Uruguay Round of Multilateral Trade Negotiations.¹²⁷ Most of the APEC countries have fulfilled the trade liberalisation promises made in the Declaration. In order to improve the efficiency of government procurement, APEC economies established a Government Procurement Expert Group in 1995. The Expert Group has completed the development of a set of Non-Binding Principles for Government Procurement, including: 'transparency, value for money, open and effective competition, fair trading, accountability and due process, and non-discrimination'.¹²⁸ The APEC has set the objective of achieving 'trade liberalisation' of government procurement markets throughout the Asia-Pacific region,

¹²³ For example, in order to fulfill the objectives set out at the very beginning of the Guideline on Public Procurement, the World Bank Group designed a 'perfect and non-alternative' procurement system to apply in all international development projects. Similarly, the GPA specifies the rules on public opening tenders, the date, time and place for opening etc. See further Article XI (7) f, Revised GPA 2012.

¹²⁴ The corruption-prone project managements are unlikely to keep fiduciary duty and more likely to frustrate the financial goals of the United Nations. However, public procurement regulation is not the most efficient way to eliminate corruption and sharp practice in business. Case studies on the relationship between discrimination government procurement and corruption show that discriminatory government procurement increases corruption, and raises the cost of the project by as much as 25 per cent to 50 per cent. See further Tim Tucker, 'A Critical Analysis of the Procurement Procedures of the World Bank' in Sue Arrowsmith and Arwel Davies (eds.), *Public Procurement: Global Revolution*, vol 8 (1st edn., Kluwer Law International 1998) 142-157. Bernard Hoekman, 'Using International Institutions to Improve Public Procurement' (1998) 13 *The World Bank Research Observer* 255. World Bank, 'Guidelines : Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers' (n 90).

¹²⁵ The APEC was formed in 1989 by 12 Asia-Pacific countries (now grown to 21), and aimed to become the region's leading economic forum. The 21 members are Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Taiwan, Thailand, the United States and Vietnam.

¹²⁶ The G20 is the international leaders' forum for global economic cooperation. The G20's role in trade forums is to deal with systemic issues that are not well handled by the WTO under a 'business as usual' approach. The members of the G20 are: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States, and the European Union.

¹²⁷ APEC, 'Declaration of Common Resolve, Bogor, Indonesia, 15 November 1994'

<http://www.apec.org/~media/Files/LeadersDeclarations/1994/1994_LeadersDeclaration.pdf>.

¹²⁸ APEC, 'Declaration of Common Resolve, Bogor, Indonesia, 15 November 1994' (n 129) Chapter 9.

contributing in the process to the evolution of multilateral government procurement negotiations.¹²⁹ Restrictions on market access to the government procurement market have been reduced in some of the APEC nations.¹³⁰

The G20 organisation made a similar declaration. At the request of the G20 Anti-corruption Working Group, the OECD prepared a Compendium of Good Practice for Integrity in Public Procurement (2015)¹³¹ and the Compendium of Good Practice on the Use of Open Data for Anti-corruption (2017).¹³² The Compendium provided an overview of initiatives for ‘fighting corruption, increasing public sector transparency and integrity, fostering economic development and social innovation’.¹³³ The G20 also declared eight principles for promoting integrity in public procurement (2015 Turkey) to keep in line with the relevant international standards and to promote a better government procurement system: the eight principles are transparency, **competitiveness**, anti-corruption, the maintenance of adequate complaint mechanisms and clear laws, regulations, policies, and procedures, integrity, accountability, and fostering the culture of integrity in public procurement.¹³⁴

2.7.6. UN Conventions and International Codes

Lastly, there are also some conventions adopted by the UN that seek to promote international standards of transparency and ethical conduct in the field of government procurement, such as the *UN Convention against Corruption: Implementing Procurement-related Aspects*.¹³⁵ In Article 9 of this Convention, it is stated that ‘each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.’

UN Women adopted principles applicable to the UN Women procurement process. Those principles include: ‘best value for money; fairness, integrity and transparency; effective

¹²⁹ APEC (n 130).

¹³⁰ APEC, ‘APEC Project Procurement Principles Guidebook on APEC Projects: Appendix K, August 2012’. APEC, ‘APEC’s Bogor Goals Progress Report’ (August 2014) APEC Bogor Goals Progress Report.

¹³¹ OECD, ‘Compendium of Good Practices for Integrity in Public Procurement’ GOV/PGC/ETH(2014)2/REV1 21 January 2015.

¹³² ‘G20/OECD Compendium of Good Practices on the Use of Open Data for Anti-Corruption’.

¹³³ OECD, ‘Compendium of Good Practices on the Use of Open Data for Anti-Corruption: Towards Data-Driven Public Sector Integrity and Civic Auditing’.

¹³⁴ G20 Principles for Promoting Integrity in Public Procurement.

¹³⁵ United Nations Commission on International Trade Law, the United Nations Convention Against Corruption: Implementing Procurement-related Aspects.

competition; and the best interests of UN Women.’¹³⁶ The UN has also adopted the *International Code of Conduct for Public Officials (1996)* to ensure that international standards can be applied to personnel involved in government procurement.¹³⁷ Although this document does not explicitly promote procurement legislation as such, ‘it does address conflicts of interest in general and contains common elements of monitoring.’¹³⁸

In addition, the UN, as an organisation using public funds, has produced the ‘*UN Procurement Practitioner’s Handbook*’ in the area of procurement.¹³⁹ The guiding principles of the UN procurement are ‘promoting UN objectives, fairness, integrity and transparency through competition, economy and effectiveness, best value for money.’ As indicated, those objectives are exactly the same as other international instruments on government procurement.

The advantages of a regulatory framework enshrining principles of non-discrimination, competition and transparency, have been recognised in all the above international instruments on government procurement. The attempt to regulate government procurement on an inter-governmental basis is still developing. Government procurement has been a subject of numerous recent bilateral and regional trade agreements, such as the agreements between the EU and Singapore (2018),¹⁴⁰ Japan (2018),¹⁴¹ Vietnam (2019),¹⁴² Canada (2018),¹⁴³ Mexico (2018),¹⁴⁴ New Zealand (3rd round negotiation in March 2019),¹⁴⁵ Australia (2018),¹⁴⁶ as well

¹³⁶ UN Women is the United Nation entity dedicated to gender equality and the empowerment of women. United Nation Woman, ‘UN Women Procurement Principles’ <<http://www.unwomen.org/en/about-us/procurement/procurement-principles>> accessed 30 March 2019.

¹³⁷ United Nations International Code Of Conduct For Public Officials Approved By Third Committee. Article 9 of the United Nations Convention against Corruption: Implementing Procurement-related Aspects.

¹³⁸ James Jurich, ‘International Approaches to Conflicts of Interest in Public Procurement: A Comparative Review’ (2012) 7 *European Procurement & Public Private Partnership Law Review* 242-257.

¹³⁹ UN Procurement Practitioner’s Handbook’ (2006) Section 1.3 Guiding Principles.

¹⁴⁰ European Commission, ‘European Union-Singapore Trade and Investment Agreements’ <http://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157684.pdf> accessed 19 February 2019.

¹⁴¹ European Commission, ‘EU-Japan Economic Partnership Agreement: Chapter 10 Government Procurement’ (2019) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>> accessed 19 February 2019.

¹⁴² European Commission, ‘EU-Vietnam Trade and Investment Agreements (Authentic Text as of August 2018) - Trade - European Commission’ (2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 17 February 2019 Chapter 9 Government Procurement

¹⁴³ European Commission, ‘CETA Chapter Nineteen-Government Procurement’ (2018) <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>> accessed 19 February 2019.

¹⁴⁴ European Commission, ‘New EU-Mexico Agreement: The Agreement in Principle and Its Texts - Trade - European Commission’ <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>> accessed 30 March 2019. Chapter 20 public procurement.

¹⁴⁵ The EU has launched negotiations on public procurement and the proposal was published in July 2018. ‘Report on the Third Round of Negotiations for a Free Trade Agreement between the European Union and New Zealand’ <http://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157715.pdf> accessed 30 March 2019.

¹⁴⁶ European Commission, ‘EU-Australia Trade Agreement Negotiations - Trade - European Commission’ <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1865>> accessed 30 March 2019. EU has launched

as regional trade agreements such as the ‘Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP 2018)’,¹⁴⁷ and a recently updated Agreement between the United States of America, the United Mexican States, and Canada (USMCA 2018).¹⁴⁸

In the above newly-concluded trade agreement, non-discrimination¹⁴⁹ and transparency¹⁵⁰ are commonly-recognised principles in the government procurement area. Market commitments made in bilateral trade agreements pre-GPA is usually more significant, or at least no less than those made under the GPA. For example, the EU gives Singapore access to nearly 200 central entities that it withholds under the GPA, and Singapore lists 54 entities, in contrast to its GPA coverage of 23 entities.¹⁵¹ In the EU-Canada Free Trade Agreement, implemented in October 2017, the EU expanded its coverage, especially with respect to sub-central and other entities.¹⁵² Similarly, in the EU-Japan Economic Partnership Agreement which came into force on 30th January 2019, the coverage was expanded, particularly in the railway sector and in sub-central coverage.¹⁵³ Those commonly-recognised principles are the ground for opening up of each countries’ government procurement markets. The widely agreed market access in bilateral trade agreements and regional trade agreements could facilitate GPA negotiations on the further expansion of its market access.

2.8. Conclusion

A perusal of the data from international organisations indicates that the significance of government procurement to the international economy should not be underestimated. Government procurement is economically significant in GDP terms and merits the attention of

negotiations on public procurement in the EU Australia Trade Agreement and the proposal was published in July 2018.

¹⁴⁷ ‘Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

¹⁴⁸ Government of Canada, ‘Canada-United States-Mexico Agreement (CUSMA) - Table of Contents’ <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>> accessed 30 March 2019 Chapter 13 Government Procurement.

¹⁴⁹ Article 9.4: national treatment and non-discrimination European Commission, ‘EU-Vietnam Trade and Investment Agreements (Authentic Text as of August 2018) - Trade - European Commission’ (n 144). Article 11.5 non-discrimination European Commission, ‘EU-Japan Economic Partnership Agreement: Chapter 10 Government Procurement’ (n 143) Article 19.4 general principles-non-discrimination European Commission, ‘CETA Chapter Nineteen-Government Procurement’ (n 145). National treatment of locally established suppliers in European Commission, ‘EU-Australia Trade Agreement Negotiations - Trade - European Commission’ (n 148).

¹⁵⁰ Article 11.7 Transparency European Commission, ‘EU-Japan Economic Partnership Agreement: Chapter 10 Government Procurement’ (n 143). European Commission, ‘EU New Zealand FTA Proposal on Transparency’ <http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157579.pdf> accessed 30 March 2019.

¹⁵¹ European Commission, ‘European Union-Singapore Trade and Investment Agreements’ (n 142) 16.

¹⁵² European Commission, ‘CETA Chapter Nineteen-Government Procurement’ (n 145).

¹⁵³ European Commission, ‘EU-Japan Economic Partnership Agreement: Chapter 10 Government Procurement’ (n 143).

both national regulation and international trade regulation. Statistics show that government purchasing is mainly conducted by sub-central levels of government, such as regional and local governments) and other government entities (such as State-owned enterprise and utility companies). The significance of procurement contracts made by sub-central government entities and other government entities rightly generates the discussion on the necessity to expand the ‘entity coverage’ of government procurement regulations.

Although it is generally agreed that government procurement refers to obtaining supplies, services and constructions through contracts by governments, the coverage of ‘government bodies’ differs in accordance with the various national government procurement regulations. The difference in coverage, in turn, becomes an issue for international regulation on government procurement. Without a normative definition of the term ‘government procurement’, the space of corruption, malfunction or circumvention to enter into the procurement process could increase, and thus, diminishing the effectiveness of government procurement regulations. Therefore, a clear definition of a ‘government entity is essential for the effectiveness of those regulations.

Despite the economic significance of government procurement, overt or covert discriminatory measures are common in this area. The reason for the rampant discrimination that the government procurement regulation would pursue various national objectives. Those objectives can be economic, social, industrial, environmental or political. Compared with the costs of legislative reform and the loss of political discretion, as a result, the GPA membership would be unattractive. It is suggested, however, if international government procurement discipline could better accommodate those ‘national concerns’, opening government procurement could be more attractive.

Those regulations include rules such as those made by the EU and the OECD. There are also international soft laws, such as the UNCITRAL Model Law on Public Procurement and the relevant guidelines and conventions from the World Bank Group and the United Nations. Generally, based on the aims and purposes of the government procurement regulations mentioned above, the author concludes that there are three modes of regulation of government procurement.¹⁵⁴ The first mode is the ‘economic’ model. The priority here is to obtain the best

¹⁵⁴ Trepte (n 54). Caroline Nicholas, ‘Work of UNCITRAL on Government Procurement: Purpose, Objectives and Complementarity with the Work of the WTO’ in Sue Arrowsmith and Robert D Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* 1st edn., Cambridge University Press 2011) 750.

value for money and to ensure competitiveness in the bidding and awarding of government procurement contracts.¹⁵⁵ The Guidelines of the World Bank are typical of that model. When it comes to government procurement, the primary purpose of ‘economic’ regulation is to ensure allocative efficiency. The economic model seeks to ensure the achievement of the most significant economic benefits.

However, in the process of government procurement, the government is not only a purchaser but is also a political body. Political aspects may also be reflected in a government procurement contract. This second mode is the ‘political’ mode. Governments may take account of non-economic outcomes for achieving better social or/and political goals.

This mode reflects that economic efficiency is not the only objective that a government pursues: governments may have other preferential objectives, namely the need for ‘policy space’ in procurement regulation. It is submitted that respecting domestic policy needs (that could be fulfilled by government procurement) is a precondition for opening national government procurement markets to other GPA Parties. Furthermore, the space for those policy needs would, in turn, strengthen the sense of ‘community’, which is the foundation for expanding the GPA ‘community’ (for more GPA signatories).

The international regulation of government procurement consists of internationally-agreed principles and procedures for minimising/eliminating trade-restricting measures and practices. The Model Law and the GPA are of this model. The ‘international mode’ is a compromise between the economic model and the political mode. International initiatives on the regulation of government procurement aim at trade liberalisation, but economic or political considerations are not excluded. Although the three models emphasise different aspects, their objects are not mutually conflicted, and some of them share the same objectives.

Given the significant economic and political dialogue nationally and internationally, why has there been so little progress on multilateral coordination in this field? International trade theory in the 21st century is more pragmatic than that of the last decades of the 20th century.¹⁵⁶ The international trade policies or decisions of each country are no longer ‘all or nothing,’ and are more problem-driven and realistic. The arguments for either ‘multilateral or plurilateral’, and

¹⁵⁵ The economic model is the most popular of the private procurement arrangements.

¹⁵⁶ Carmen Elena Dorobăț, ‘A Brief History of International Trade Thought : From Pre-Doctrinal Contributions to the 21st Century Heterodox International Economics’ (2015) VIII The Journal Of Philosophical Economics: Reflections On Economic And Social Issues 106.

their effects on the future of the GPA are overshadowed by the discussions on ‘how to expand the Agreement’. This stagnation of progress is reflected in both the slow growth in the number of signatories and the absence of consensus on the question of entity coverage.

To be specific, a large number of WTO members, primarily the less-developed and the developing countries, still show little interest in the GPA, due to their concern for domestic policy needs. As we have seen in this chapter, these policy needs to weigh differently among the WTO members. In the EU procurement directives, social and environmental considerations have been promoted, whereas developing countries and economies in transition would like to achieve industrial goals by promoting the influence of their SOEs. Moreover, within one country, the policy emphasis may shift over time. The shift may change the coverage of ‘government entities’ in national government procurement regulations so that their decisions on whether certain entities should be included in the coverage are politically changing.

In national government procurement regulations, the coverage of government purchasing bodies at the central government level has reached a high level of consensus, but the coverage on other government bodies/agencies, SOEs and private entities lack such consensus. In Article II (Scope and Coverage of the GPA), governmental bodies are referred to by means of enumeration, without any clear explanation of the term ‘bodies under effective government control or influence’. The author argues that due to the absence of a clear definition of ‘government bodies,’ the GPA Parties, and also prospective Parties, remain cautious, and are not ready to provide a comprehensive entity coverage.

As a result, the GPA does not achieve as much market liberalisation as it could. To complicate matters, different national legislations on government entities means that the spectrum of the ‘public body/government entity’ is under evolution. The coverage of ‘government body’ is not as sharply defined as it was in the minimal State model. Therefore, in some circumstances, private bodies could also perform functions that in the past were usually fulfilled by government bodies. Thus, formal legal status is not a reliable means of identifying government bodies.

CHAPTER 3 DISCRIMINATORY GOVERNMENT PROCUREMENT AS A TRADE BARRIER

3.1. Introduction

Free trade is a right that every nation and individual should enjoy.¹ With the development of international trade theory, more and more trade areas have been under the remit of trade agreements.² In 1946, the US proposed the ITO Charter aiming to subject government procurement to free trade obligations.³ Since then, the liberalisation of the government procurement market has continued to grow, although its progress has been slow and has been full of obstacles. In this chapter, the author attempts to establish *why government procurement must be subject to international rules* since an understanding of the issue will provide a broader context for the discussions in subsequent chapters of this work.

The author first traces the origin and evolution of international trade liberalisation. The history of trade liberalisation indicates that it is generally beneficial to national and international economies, and also as part of the global market. Secondly, a historical review and empirical studies of the GPA indicate that discriminatory government procurement practice remains prevalent. Although the WTO has made a significant difference in trade liberalisation, government procurement negotiation has not been as successful as progress in other areas of trade, such as anti-subsidies.⁴ Significantly, WTO members have shown limited interest in

¹ In 1608, Hugo Grotius signified the advantages of the total freedom of international trade, which, he claimed, promoted a freedom that no state had the right to oppose. See the arguments in the work of Hugo Grotius, *Mare Liberum* (Ralph Van Deman Magoffin and James Brown Scott (eds.), Ralph Van Deman Magoffin tr, New York: Oxford University Press 1916) 161.

² For example, the Brussel Sugar Convention of 1902 established for the first time a multilateral trading regime, albeit for one commodity. It contained many elements that would become standard in the General Agreement on Tariff and Trade and other later twentieth-century liberal trade regimes. Since then, tariffs, quotas and nontariff barriers (such as subsidies, countervailing measures, technical barriers, etc.) on trade have been subject to multilateral trade agreements, such as: the General Agreement on Tariff and Trade, General Agreement on Trade and Service, the Agreement on Subsidies and Countervailing Measures, the Anti-dumping Agreement, Technical Barriers to Trade Agreement, Agreement on Import Licensing Procedures, and Customs Valuation Agreement were turned into Annex 1a agreements under the WTO. See Geoffrey Allen Pigman, 'Hegemony and Trade Liberalization Policy: Britain and the Brussels Sugar Convention of 1902' (1997) 23 *Review of International Studies* 185 199.

³ See Annet Blank and Gabrielle Zoe Marceau, 'A History of Multilateral Negotiations on Procurement : From ITO to WTO' in Bernard M Hoekman and Petros C Mavroidis (eds.), *Law and policy in public purchasing : the WTO agreement on government procurement* (University of Michigan Press 1997) 32.

⁴ For example, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) upgrades the discipline of the Tokyo Code on Subsidies. In the SCM Agreement, a comprehensive definition of subsidy was introduced along with the concept of 'specificity'. The subsidies were divided into three categories ('prohibited', 'actionable' and 'non-actionable') based on their impact on international trade and competition. See Article 1 Definition of a Subsidy Part II: Prohibited Subsidies, Part IV: Non-Actionable Subsidies and actionable Subsidies of the SCM Agreement).

opening domestic government procurement markets or reducing discriminatory procurement policies. The author's analysis studies the effects and the motivations of applying those policies in order to find whether discrimination is beneficial. The findings of the studies provide support for the conclusion that, in order to maximise the benefits of government procurement markets, discriminatory government procurement practices must be abandoned and that it would be better to liberalise the government procurement market.

3.2. Historical Review of International Trade Liberalization

3.2.1 The Early International Trade Theory

As early as the Classical period of Ancient Greece,⁵ Plato (in 380 BC),⁶ Xenophon (in 340 BC),⁷ And Aristotle (in 350 BC)⁸ argued that fair trade exchange brings higher productivity than the self-sufficient economy.⁹ These are the earliest explications of why trade exchange benefits cities as well as its citizen. The notion of trade benefits continually influenced scholars between the 13th century and 15th century. In the *Summa Theologica* (written 1265–1274)¹⁰ Thomas Aquinas, (1225-1274), further argued that foreign commerce is indispensable since the people and regions of the world were not endowed with all necessary tools for survival.¹¹ Compared with self-reliance, trading with other people and nations by importing scarce resources and exporting abundant resources increases resources for survival.

⁵ The classical period of Ancient Greece covered most of the 4th and 5th centuries BC.

⁶ In 380 BC, in *The Republic*, Plato pointed out that a city-state could have higher productivity and higher output by taking advantage of the division of labour. Division of labour would also allow individuals to specialise according to their natural aptitudes and available natural resources. See Plato, 'The Republic of Plato' (1991) 2nd ed. The Journal of Hellenic Studies 512.

⁷ Xenophon, in 340 BC, also referred to the benefits of the price arbitrage carried out by traders in search of profit, as well as the advantages of larger international markets for the merchants of the Greek city-states. See Xenophon, *Memorabilia and Oeconomicus Symposium Apology* (GP Goold ed., EC Marchant and OJ Todd trs., Cambridge, MA: Loeb Classical Library 1918).

⁸ Around 350 BC, Aristotle pointed out, in his work *Politics*, that city rulers should have a duty to decide which imports and exports were absolutely necessary and to ensure the fairness of the trade exchange through making treaties with other cities. See Aristotle, *Aristotle in Twenty-Three Volumes: Politics* (Harris Rackham tr, Cambridge, MA: Loeb Classical Library 1932).

⁹ Carmen Elena Dorobăţ, 'A Brief History of International Trade Thought : From Pre-Doctrinal Contributions to the 21st Century Heterodox International Economics' (2015) VIII The Journal Of Philosophical Economics: Reflections On Economic And Social Issues 108.

¹⁰ The *Summa Theologica* is the best-known work of Thomas Aquinas. It is 'one of the classics of the history of philosophy and one of the most influential works of Western Literature.' See Jorge JE Gracia, Gregory M Reichberg and Bernard N Schumacher, *The Classics of Western Philosophy: A Reader's Guide* (Oxford: Blackwell Publishing 2003) 165.

¹¹ John P. O'Callaghan, 'Thomas Aquinas on Human Nature: a Philosophical Study of Summa Theologiae Ia, 75-89 (Review)' (2004) 42 Journal of the History of Philosophy 99.

The Aristotelian philosophical idea and the idea of imports and exports laid the foundation for the development of international free trade theory. Hugo Grotius (in 1608)¹² and Francisco Suarez (in 1612)¹³ posited international trade as a fundamental positive right that every nation and people should enjoy.¹⁴ The idea of mercantilism was derived from the concept of free trade and was predominant from the 16th to the 18th century. It was accompanied by the growth of nationalism.¹⁵ The mercantilists believed that international trade was a zero-sum game. Governments were therefore supposed to apply protective trade policies, limit imports of raw materials, while simultaneously promote exports of their own manufactured goods to other countries, by subsidising domestic producers, or building tariff walls against foreign competitors.¹⁶ Since the birth of the mechanism, the growth of trade liberalisation has always been challenged by trade protectionism.

3.2.2 Modern International Trade Theory

Liberal reactions to mercantilism marked the beginning of modern international trade theories. Throughout the nineteenth century, the *laissez-faire* notion in international trade was greatly promoted by Adam Smith and David Ricardo.¹⁷ In the *Wealth of Nations*, Adam Smith's best-known work, Smith argued out that international free trade allocates global resources driven through market mechanisms, by fulfilling national interests.¹⁸ Under the influence of the free

¹² See Grotius (n 1) 161.

¹³ In 1612, Francisco Suarez asserted that the freedom of trade was an inalienable right of every individual and of every nation. See Francisco Suárez, *De Legibus, Ac Deo Legislatore*, Volume 2, vol 20 (James Brown Scott ed., Oxford: Clarendon Press 1944) 915.

¹⁴ They conclude that international trade is inalienable and that total respect the freedom of trade did not bring economic or cultural damage, but on the contrary was in the interests of all human society. See further K Haakonssen, 'Hugo Grotius and the History of Political Thought' (1985) *Political Theory* 239. Dorobăț (n 9)108.

¹⁵ With the emergence of the concept of nation states, international relations between states became more important than before. In nationalism, openness to other countries was not an obligation, but rather a matter of discretion. When dealing with trade relations with other countries, countries have the freedom to apply open or restrictive trade policies, according simply to the optimal national interest. The growth of nationalism prepared the soil for mercantilism.

¹⁶ Mercantilism reached its climax in the 16th and 17th centuries, with the increasing recognition of the works of Thomas Mun and Gerard de Malynes in England and France. Joel Mokyr, 'Mercantilism, the Enlightenment, and the Industrial Revolution' (2003 Presented to the Conference in Honor of Eli F. Heckscher 8. Jacques Fontanel, Jean-Paul Hebert and Ivan Samson, 'The Birth of the Political Economy or the Economy in the Heart of Politics: Mercantilism' (2008) 19 *Defence and Peace Economics* 331. See Gerard de Malynes, *The Maintenance of Free Trade* (W. Sheffard 1622). See also the protectionist policies of Jean-Baptiste Colbert. Also Thomas Mun, *England's Treasure by Forraign Trade* (T & T Clark 1664).

¹⁷ Adam Smith, *the Wealth of Nations* (1776), and David Ricardo, *On the Principles of Political Economy and Taxation* (1817).

¹⁸ Influenced by the philosophical doctrine (originating from David Hume) that commodities are a storehouse of labour because labour is the active agent that produces all commodities, Adam Smith highlighted the importance of the division of labour in increasing output and considered international trade as a particular case of specialisation among nations. Therefore, in a world of scarce resources and unlimited wants, every country is bound to specialise in the industries that they could produce by fewer hours of labour. See further Adam Smith,

market theory, the first modern trade agreement, the Cobden-Chevalier Treaty, was concluded in 1860. In this Treaty, Britain and France abandoned their discriminatory commercial policies and promised to grant one another unconditional ‘most-favoured-nation’ treatment with regard to tariffs concessions, with the possibility that these concessions might subsequently be granted to other trading partners.¹⁹ The most important implication of the Cobden-Chevalier Treaty is that, since its signing, decentralised trade liberalisation by way of a bilateral trade agreement has become a trend.²⁰ Moreover, ‘most-favoured-nation’ has been established as an essential principle of multilateral trade liberalisation. This principle can accelerate the proliferation of free trade. It is a pity that the GPA does not incorporate this principle: its absence is, to a certain extent, the reason why the GPA does not expand more quickly.

David Ricardo and John Stuart Mill enriched Smith’s free trade theory and advanced a new international trade theory by introducing the concepts of ‘comparative advantages,’²¹ as well as ‘reciprocal trade policies’.²² The two concepts are the foundations of all trade agreements, including the GPA. Comparative advantages are the engine of international trade.²³ Countries

‘Book IV Chapter 2: Of Systems of Political Economy’, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) London 229-243.

¹⁹ The so-called Cobden-Chevalier Treaty promised that France would eliminate all import prohibitions on British manufactured goods while limited most duties no higher than 30 per cent (25 per cent after 1865). Britain, in turn, agreed to remove import barriers entirely from all but 48 French commodities while dramatically reducing its tariff on French wine and brandy. Gene M Grossman, ‘The Purpose of Trade Agreements’ (2016) National Bureau of Economic Research Working Paper Series 22070 1-20. AA Iliasu, ‘The Cobden-Chevalier Commercial Treaty of 1860’ (1971) 14 *The Historical Journal* 67.

²⁰ Fifteen years after the conclusion of the Cobden-Chevalier treaty, a network of preferential trade agreements with most-favoured-nation’ provisions was established. With increased trade expansion centred on Anglo-French trading, trading with other European countries was diverted. The trade diversion from France affected manufacturers in Germany, Belgium and other traditional trade partners of France. Other European countries were consequently under pressure to enter into similar trade relationships, need equal treatment with the effect of preventing their products from being pushed out of the French market. Within fifteen years, an additional fifty-six treaties had been signed. ‘By 1875, virtually all of Europe were to a low-tariff zone in the net of agreement that included in the linchpin MFN clause.’ Markus Lampe, ‘Explaining Nineteenth-Century Bilateralism: Economic and Political Determinants of the Cobden-Chevalier Network’ (2011) 64 *Economic History Review* 2. See David Lazer, ‘The Free Trade Epidemic of the 1860s and Other Outbreaks of Economic Discrimination’ (1999) 51 *World Politics* 447. The Cobden-Chevalier Treaty started a ‘free trade epidemic’ in the European continent and led to a ‘swift break with centuries of protection’. Grossman (n 19) 1.

²¹ Ricardo first described the principle of ‘comparative advantage’ based on Smith’s theory of ‘labour theory of value,’ and advocated specialization in producing those goods, which required *relatively* less hours of labour. See generally David Ricardo, *On the Principles of Political Economy and Taxation* (1817).

²² Mill showed that the terms of trade between two countries depended on the intensity of the reciprocal demand for goods, and thus, the share of each country in the total gains from trade could change with the intensity of demand, or with the level of protective trade barriers. See generally, John Stuart Mill, ‘The Principles of Political Economy’, *The Two Narratives of Political Economy* (2011).

²³ International trade occurs because a buyer in one country demands something produced in another country, and is willing to pay the price required to obtain it. In this situation, the buyer is supposed to buy an imported item rather than a domestic substitute, either because of the lower price or higher quality, or because there is no domestic substitute. This circumstance gives rise to the theory of comparative advantages. For detailed analysis of the ‘comparative advantage’ theory, see Alan O Sykes, ‘Comparative Advantage and the Normative Economics of International Trade Policy’ (1998) 1 *Journal of International Economic Law* 49-57.

are recommended to produce and export products with comparative domestic advantages and to import products where there is low home productivity. **Reciprocity** is the cornerstone of every trade negotiation, and the GPA negotiation was no exception to the principle of reciprocity. It is due to the difficulty in reaching reciprocal trade commitments on entity coverage that the GPA accession has been so challenging for developing countries.²⁴ The underlying rationale is that reciprocal trade exchange based on comparative advantages between countries is a positive-sum game, and both participants in the trade exchange will benefit.²⁵

3.2.3 The Great Depression and Trade Barriers

From 1929 to 1933, the world experienced one of the greatest economic crises in its history.²⁶ The defects of its economic pattern were exposed, and the ideology of non-state interference in the market was reassessed and revised. The *Report on the Subject of Manufactures (1791)* by Alexander Hamilton and the *National System of Political Economy (1841)* by Friedrich List began to attract attention in the United States and Germany.²⁷ Both of these works argued that trade barriers were required to support infant industries. At the time, the trade protectionism was rampant, due to the US historically high-level protectionism of the United States.²⁸ On 17 June 1930, the US government enacted the Smoot-Hawley Tariff Act, which raised the average US tariff to the highest level of US protectionism of the 20th century.²⁹ This Act drew international trade into a competition of trade restrictions.³⁰ The US's trade partners were

²⁴ Concerning the drawbacks of the restricted reciprocity principle of the GPA entity coverage negotiation, see the analysis in Chapter 4 Section 4.2.

²⁵ Dorobăț (n 9) 110.

²⁶ This was the result of the US being unwilling to participate in efforts during the 1920s to re-establish a more open global market, a policy which was interrupted by wartime trade policies. In 1929, the US economy moved from recession to depression following the 1929 stock market crash. See further Bernard M Hoekman and Michel M Kostecki, 'The Trading System in Perspective', *The Political Economy of the World Trading System: the WTO and Beyond* (2nd edn, OUP 2001) 24.

²⁷ There was a time lag between the development of theories and government action inspired by them. It was a quarter of a century after the time of their publication that US infant industry protectionism materialised. Although there had been an increase in infant industry protection in the late nineteenth century, trade liberalisation grew much faster than ever before. Hoekman and Kostecki, 'The Trading System in Perspective' (n 26) 23,24.

²⁸ Morton Pomeranz, 'Toward a New International Order in Government Procurement' (1982) 12 Public Contract Law Journal 131.

²⁹ This was an act implementing protectionist trade policies sponsored by Senator Reed Smoot and Representative Willis C. Hawley. It raised average US tariff on dutiable imports from 38 to 52 per cent and established the second highest tariff wall in the United States' history. It was blamed for cutting half of US trade within no more than two years. Subsequently, beginning with the 1934 Reciprocal Trade Agreement Act, US commercial policy generally emphasised trade liberalisation over protectionism. Morton Pomeranz (n 28) 131.

³⁰ For example, in May 1930, Canada retaliated by imposing new tariffs on 16 products that accounted altogether for 30 per cent of US exports to Canada. France and the UK protested and developed new trade partners. Germany developed a system of trade via clearing. See Wilson B Brown and Jan S Hogendorn, *International Economics in the Age of Globalization* (Broadview Press 2000).

provoked to impose retaliatory trade tariffs and engaged in a round of competitive devaluation of their currency.³¹ This domino effect soon led international trade from a modest recession into a great depression.³² The Smoot-Hawley Act was initially enacted to recover the floundering economy. However, unexpectedly, the additional tariff increase had no positive effects. It magnified distress in the agricultural sector³³, and world trade declined by approximately 66 per cent between 1929 and 1934.³⁴

In 1933, the US government took the lead in promoting state aid and infrastructure investment and raised tariff walls against foreign goods.³⁵ This was Roosevelt's 'New Deal', which was introduced around 1932 and continued until the late 1970s. The US government injected more 'interference' into the economy through economic development policies such as the repeal of prohibitions policy, relief programs, public works programmes³⁶ and agencies such as the Works Progress Administration, the Civilian Conservation Corps, Public Works Administration and so forth. These government programmes set a precedent for the federal

³¹ During the period, the devaluation brought about by trade barriers in the world catalysed the formation of the International Monetary Foundation (IMF) to help countries to recover and reform their financial and monetary policies. See Sabine Schlemmer-Schulte, 'International Monetary Fund (IMF)', *Max Planck Encyclopaedia of Public International Law* <<http://citator.ouplaw.com/followlink?type=direct&doc=law-9780199231690-e492>> accessed 17 October 2018.

³² It is also argued that the Smoot-Hawley Tariff itself appears to have been a very small direct shock to trade, but that the tariff could have had indirect, financial effects that magnified the initial shock into a larger macroeconomic shock. See Barry Eichengreen, 'The Political Economy of the Smoot-Hawley Tariff,' in Jeffry Frieden and David Lake (eds), *International Political Economy: Perspective on Global Power and Wealth* (4th edn., Bedford/St Martin's Press 1999) 37-46. For an empirical study on the effect of the Smoot-Hawley Tariff, see Douglas A Irwin, 'The Smoot-Hawley Tariff: A Quantitative Assessment' (1998) 80 *The Review of Economics and Statistics* 326.

³³ The original intention behind the legislation was to increase the protection afforded to domestic farmers against foreign agricultural imports.

³⁴ 'For example, U.S. imports from Europe declined from a 1929 high of \$1,334 million to just \$390 million in 1932, while U.S. exports to Europe fell from \$2,341 million in 1929 to \$784 million in 1932. Overall, world trade declined by some 66 per cent between 1929 and 1934'. See US Department of State, Smoot-Hawley Tariff, https://web.archive.org/web/20090312055958/http://future.state.gov/when/timeline/1921_timeline/smoot_tariff.html accessed 05 October 2018. See Irwin (n 32) 333.

³⁵ Library of Congress, Great Recession and the Second World War 1929-1945, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/depwwii/newdeal/> accessed 09 November 2016.

³⁶ In order to support the New Deal, a bill to legalise the manufacture and sale of alcohol was signed. Infrastructures such as government buildings, airports, hospitals, schools, dams and so forth, were built by public funds and the labour force of those projects also aimed at the relief of unemployed Americans. These policies were aimed at the rejuvenation of the economy; solving social problems, such as labour protection; narrowing the wealth gap; and putting more public accountability into the structure of financial institutions. See further, William Edward Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940* (Harpe & Row 1963) 46-47. Jason Scott Smith, *Building New Deal Liberalism: The Political Economy of Public Works, 1933-1956* (Cambridge University Press 2006) 1-8. See also Niemi and Plante (n 39).

government to play a key role in the economic and social affairs of the nation,³⁷ which in turn helped justify the new role of government spending in the national economy.³⁸

During the period of recovery, the most prominent trade barrier was the US ‘Buy American Act (1933)’.³⁹ The Act required the federal government only to purchase goods made in the US. The effect of the Act was that domestic producers combined so as to be immune from competition from foreign suppliers. The Buy American Act was latterly codified as a provision of the Surface Transportation Assistance Act of 1982.⁴⁰ This provision limited the ability of foreign companies to bid on procurements of manufactured and construction products;⁴¹ such a restriction has made it a priority of the Trump administration to support strong ‘Buy American’ and ‘Hire American’ (2017) policies in government procurement.⁴² Those domestic preferences restrict foreign suppliers from competing for US government contracts, and they also restrict reciprocal access to foreign procurement markets that the US may expect to receive from its trade partners. Discrimination and restrictions of this kind may have been an incentive,

³⁷ Library of Congress, ‘Franklin Delano Roosevelt and the New Deal - American Memory Timeline’ <<http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/depwwii/newdeal/>> accessed 5 November 2019.

³⁸ This revolution legitimised the so-called Keynesian management of the economy. For further re-evaluation and debate on the Public Works Programmes, see Chapter 1 of Smith (n 27).

³⁹ On the last full day of the Hoover Administration (3 March 1933), the Congress quickly passed the US ‘Buy American Act (1933)’. As the U.S. economy collapsed in the early 1930s, many found the idea of self-sufficiency tremendously appealing. In 1933, cities, counties, and states across the countries quickly passed resolutions endorsing the ‘buy State or buy city’ claiming that ‘the U.S. should retaliate against ‘Buy British’ and similar European trade-stimulating movements’. See further Dana Frank, *Buy American: The Untold Story of Economic Nationalism* (Beacon Press 2000) 65. There was a fierce debate in Congress. Some argued with the US government that ‘the American Treasury is not the chest of the world community, and that the economy programme should care more about its own taxpayers’ welfare. Some argued that ‘Buy American’ was not a wise choice to solve domestic problems, and the discriminatory policy against foreign suppliers was not necessary, since the existing tariffs were already high enough to protect domestic producers. Morton Pomeranz (n 28) 131, 132.

⁴⁰ The ‘Buy American Act’ is now the Title 41 Subtitle V Chapter 83 § 8301 of the United States Code, entitled ‘Public Contracts’. Enacted on January 4, 2011, it consists of federal statutes regarding public contracts in the United States Code. ‘Buy American’ provisions are periodically proposed for legislation on infrastructure projects requiring government purchases of iron, steel, and manufactured products.

See <https://www.law.cornell.edu/uscode/text/41/8301> accessed 06 August 2019.

⁴¹ Such as requirements for a 100per cent US content for iron, steel and manufactured products.

⁴² On April 18, 2017, President Trump signed the ‘Buy American and Hire American’ Executive Order (Buy American EO). The ‘Buy American’ component of the Order addressed the Berry Amendment, the Buy American Act, and the Buy American provisions under the ARRA. The issuance of the Buy American and Hire American Executive Order (Buy American EO) issued by President Donald Trump increased the use of domestic preference requirement. It was an expanded Buy American Law. Procurement policy analysts predict that this will entail a higher level of scrutiny of Government contractors’ compliance with the ‘Buy American’ regulations and enabling statutes, with a strategic reduction in the granting of public interest waivers to follow. See further, Marlene Milgram, ‘Future Implications Of The Buy American-Hire American Executive Order And Domestic Preferences On U.S. Government Procurement and Trade Policies’ (2018). Justin Ganderson and others, ‘4 Takeaways From The “Buy American” Executive Order’ *Covington* (19 April 2017).

as well as an impediment, to the expansion of Canadian entity coverage on the provincial and territorial level under the GPA.⁴³

The Great Depression reflected the ineffectiveness of protectionism or ‘beggar-thy-neighbour’ policies (economic policies designed to remedy one’s economic problems at the expense of worsening the positions of other countries).⁴⁴ Free trade, however, is both economically and politically beneficial for all countries in the market, since trade helps create a peaceful environment for interactions. Discriminatory trade policies fail to foster trust and cooperation among nations, in both the political and the economic realm. As the French Liberal economist Claude Frédéric Bastiat said: ‘where goods do not cross borders, soldiers will’.⁴⁵ During a perilous era in international relations, hostile, discriminatory trade policies are usually a potential source of international friction. In history, ‘beggar-thy-neighbour’ policies directly contributed to the outbreak of World War II.⁴⁶ There is, however, a positive correlation between trade and peace and, equally important, between non-discrimination and good foreign relations.⁴⁷ That is why in light of the Great Depression and World War II, the victors

⁴³ Canada did not commit itself at the sub-central level (Annex 2), which is the provincial and territorial government entities during the GPA coverage negotiations in 1996. According to the Canadian delegation on Canada’s implementation of 1994, the lack of commitment at the provincial level is explained by noting the discriminatory and restrictive policy of the US ‘Buy American’ and small business set-aside policies. However, when the Canada-US Procurement Agreement came into effect on 16 February 2010, the US gave temporary exemptions for Canada from the Buy American requirements, and Canada provided a temporary procurement commitment on construction projects for many provincial and territorial agencies not included in the 1994 GPA and a number of Canadian municipalities. The increased contracting opportunities overwhelmed the discriminatory effect of the ‘Buy American’ policies. Therefore, Canada expanded trade commitment at the sub-central level for reciprocal market access to the US. See U.S.-Canada Agreement on Government Procurement (the two major elements of the agreement are permanent and reciprocal sub-central commitments under the GPA and additional temporary reciprocal guaranteeing American companies’ access). <https://ustr.gov/issue-areas/government-procurement/us-canada-agreement-government-procurement> accessed 08 September 2019. See also David M Attwater, ‘The Influence of Buy American Policies on Canadian Coverage Under the World Trade Organization Agreement on Government Procurement’ (2012) 46 *The International Lawyer* 940.

⁴⁴ For the analysis of the ineffectiveness of discriminatory international trade, see, e.g. Skye Mathieson, ‘Accessing China’s Public Procurement Market: Which State-Influenced Enterprises Should the WTO’s Government Procurement Agreement Cover’ (2010) 40 *Public Contract Law Journal* 277-281.

⁴⁵ It is commonly believed that he said this. The idea of a connection between free trade and peace is probably from Bastiat’s *Economic Fallacies* (Ottawa: R.J. Deachman, 1934) or *Economic Sophisms*, First Series, Chapter 5: Our Products Are Burdened with Taxes </title/276/23338> and Chapter 22: Metaphors </title/276/23372> see <http://oll.libertyfund.org/pages/did-bastiat-say-when-goods-don-t-cross-borders-soldiers-will> accessed 15 October 2018.

⁴⁶ There are perceived to be four major sources of the World Wars and the Great Depression: (1) political confrontation; (2) strategic devaluations; (3) large differences in national wealth and incomes and; (4) ‘beggar-thy-neighbour’ trade wars. See Crina Viju and William A Kerr, ‘Protectionism During Recession-Why Are Trade Barriers No Longer the Preferred Policy Choice?’ (2012) 62 *Procedia - Social and Behavioral Sciences* 1368. WTO, ‘World Trade Report 2011 - The WTO and Preferential Trade Agreements: From Co-Existence to Coherence’ (2011) 5. See also S H Bailey, ‘The Political Aspect of Discrimination in International Economic Relations’ (1932) 35 *Economica* 89.

⁴⁷ The intervention of governments has made the already existing natural economic inequalities even more severe with an artificial system of discrimination. The struggle for wealth and power not only leads to competition but also bring friction. See further, Bailey (n 46) 96.

(particularly the UK and the US) of the war were inspired to seek international cooperation and to support multilateral liberalisation efforts to get rid of the ‘beggar-thy-neighbour’ policies of the early 1930s.⁴⁸

3.3. Trade Liberalisation in Government Procurement Markets

In order to achieve higher living standards and to increase income and employment rates, trade barriers must be reduced. The primary option for countries to reduce trade barriers is to enter into trade agreements, through either bilateral, regional, or multilateral negotiations.

Consequently, in the aftermath of World War II, a new system was expected to be established to avoid wars and to resuscitate the world economy. The proposal for an International Trade Organisation (hereinafter referred to as the ‘ITO’) Charter by the US was published in September 1946.⁴⁹ Government procurement was a proposed subject in the US proposal.⁵⁰ However, due to the common desire to retain discriminatory laws and practices favouring domestic suppliers, government procurement was eventually excluded from the obligation of

⁴⁸ Prior to the Great Depression, there was no international organisation dealing with friction and confrontations in a context of devaluations and great wealth gaps. After World War II, both the US and the UK (and other victors) perceived that the absence of international coordination and communication was the main factor that leads to global war. The UK and the US proposed the establishment of mechanisms to avoid competitive devaluation, as well as the excessive use of trade barriers against foreign producers. From the US point of view, the reconstruction of the post-war world economic and trade system had to remove economic friction, which meant providing all trading nations with non-discriminatory access to markets, supplies and investment opportunities. The UK also made a similar proposal. In 1944, the International Bank for Reconstruction and Development (IBRD) was established with the mission of monitoring the reconstruction of European nations, as well as advancing world economic development. Furthermore, to prevent the repetition of ‘beggar-thy-neighbour’ trade wars, the International Trade Organization entered its incubatory stage. See Richard N Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and the Prospects of Our International Economic Order* (Columbia University Press 1980). Viju and Kerr (n 46) 1368.

⁴⁹ History provides evidence that the trade liberalising system plays a key role in promoting trade recovery and preventing the world economy from regression to the same depths as in the interwar period. The GATT is probably not the primary or even the secondary cause for the economic recovery in Western Europe during the decades after 1945, but GATT did serve as an effective supporting factor for that post-war economic growth. See Douglas A Irwin’s study, ‘The GATT’s Contribution to Economic Recovery in Post-War Western Europe’ (1994) Working Paper No. 4944 22-29.

⁵⁰ The US draft a charter for the ITO which subject government procurement to the most-favoured-nation and national treatment discipline in Article 8 and Article 9 stating that: ‘...the principle underlying this paragraph shall also extend to the awarding by Members of governmental contracts for public works, in respect of which each Member shall accord fair and equitable treatment to the commerce of the other Members’ works, in respect of which each Member shall accord fair and equitable treatment to the commerce of the other Members ... the national treatment ...shall...extended to laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment.’ See the proposal in The US delegation to the ITO negotiations, Havana Charter documents, E/PC/T/C.II/ST/PV/3 11 November 1946 17. Blank and Marceau (n 3) 32.

free trade, as incorporated into GATT Article III 8(a),⁵¹ leaving a rather large gap that allowed governments to discriminate flagrantly.

Although the attempt to build an integrated, long-standing world trade mechanism failed,⁵² multilateral negotiation on trade facilitation and monitoring came into existence. The only concrete result of the multilateral negotiation is the General Agreement on Tariffs and Trade, (hereinafter referred to as 'GATT'). It took effect in January 1948.⁵³ Significantly, agreements on tariff or quotas were secured as binding obligations under the GATT.⁵⁴ After the recognition that tariffs became less important as barriers to trade, the GATT system gradually included negotiations on non-tariff policies. As a result, the GATT system incorporated a series of codes⁵⁵ on non-tariff barriers among subsets of countries. The Tokyo Round Code on Government Procurement was one of those codes. The GATT system evolved into a *de facto* multilateral trade organisation (functioning as a set of rules and also as an institution). It is

⁵¹ The proposed provisions for the extension of national treatment to imported goods in the case of government purchases and government contracts 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. See The First Session of the Preparatory Committee (London Report), UN Doc EPCT/33-CII-I-66 page 9, para (d)(iv) (1948). GATT Article III: 8(a) provides that 'The provisions of this Article (on national treatment) 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.' Arwel Davies, 'The GATT Article III:8(a) Procurement Derogation and Canada - Renewable Energy' (2015) 18 *Journal of International Economic Law* 547.

⁵² In Havana, on March 1948, the negotiation for the establishment of the International Trade Organization was completed, and ground rules for international trade and other international economic matters were set. However, due to the disapproval of the US Congress, the ITO Charter never entered into force. See Susan A. Aaronson, *Trade and the American Dream: A Social History of Postwar Trade Policy* (Lexington, the University Press of Kentucky 1996) 114. See also John H Jackson, 'Global Economics and International Economic Law' (1998) 1 *Journal of International Economic Law* 17.

⁵³ It was signed by 23 nations (12 developed countries and 11 developing countries) and lasted until the Uruguay Round Agreements in Marrakesh (1994). The founding of the GATT were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherland, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States. China, Lebanon and Syria subsequently withdraw.

⁵⁴ Extensive tariff reduction was the major achievement of the GATT. The average tariff for the major GATT participant was about 22per cent in 1947. As a result of a series of negotiation rounds (of which the Geneva Round 1947, the Annecy Round 1949 and the Torquay Round 1951 are the keys), the tariff reductions had been great, and after the Uruguay Round in 1993, tariffs were under 5per cent. See Chad P Bown and Douglas A Irwin, 'The GATT's Starting Point: Tariff Levels circa 1947' (2015) Working Paper 21782 1-2. However, there are also different interpretations of the trade increase after World War II. The empirical analysis of Gowa and Kim reveals that trade growth during the post-war period was the outcome of major countries' pursuing an increase in national welfare, and not the attempt to resolve market failure, as promoted by the GATT. See Joanne Gowa and Soo Yeon Kim, 'An Exclusive Country Club: The Effects of the GATT on Trade, 1950-94' (2005) 57 *World Politics* 477.

⁵⁵ There was a Code on Subsidies and Countervailing Measures, Code on Anti-dumping, Code on Technical Barriers to Trade, Code on Import Licensing Procedures, Code on Customs Valuation, Code on Trade in Civil Aircraft, Code on Government Procurement, Code on International Dairy, Code on International Bovine Meat.

commonly agreed that GATT is a set of rules with non-discriminatory obligations⁵⁶ as their cornerstone and that this has had a positive and significant impact on trade.⁵⁷

The institutional function of the GATT was taken over by the WTO when it was established in 1996. The principle of non-discrimination continued to be one of the basic principles of the WTO.⁵⁸ Under this principle, all agreements to which the WTO was party had to uphold the aim of trade liberalisation, and the GPA was no exception to this general aim. The WTO was a more developed system than the GATT and was more economic⁵⁹ and judicial⁶⁰ and less of

⁵⁶ Represented by Articles II Most-favoured-nation treatment obligations (treating one's trading partners equally), Article XVI Market access (If a government commits itself to allow foreign banks to operate in its domestic market, that is a market access commitment; and if a government limits the number of licences for foreign banks it will issue, then that is a market access limitation), and Article XVII National treatment (equal treatment for foreigners and one's own nationals).

⁵⁷ According to the theory of 'comparative advantage', welfare will be maximised if each nation specialises in the production of goods in which it has a comparative advantage and exports them to other nations in exchange for goods in which it lacks comparative advantage. The GATT system expanded trade exchange opportunities and consequently brought benefits for global prosperity, as well as national economic welfare, since nations are free to trade their specialised skills on the marketplace, rather than producing all required goods and services in isolation. See further, Sykes (n 23) 49.

However, there are also findings that are sceptical about this interpretation. It is claimed that from the inter-war and post-war periods, the GATT made a trade impact only on Britain, Canada, France, Germany and the US because, under the GATT protocol, tariff bargaining adhered to the principal-supplier rule. Thus, commitments to reduce barriers were based on concessions on particular goods exchanged between their principal suppliers, which were the nations that were the primary source of these goods to each other's markets. As such, it privileged trade expansion among the major trading nations (that is, Britain, Canada, France, Germany and the US. See further Gowa and Kim (n 254) 477. The principal-supplier rule is the rule under which the request of concession on a particular product is normally made by, and only by, the principal suppliers of the product. This rule aims to avoid the free rider problems out of the most-favoured-nation clause. For the origin, aims and effects of this rule, see specifically in Bernard M Hoekman and Michel M Kostecki, 'Reciprocity and the Mechanics of Negotiations' in Bernard M Hoekman and Michel M Kostecki (eds.), *The Political Economy of the World Trading System: the WTO and Beyond* (2nd edn., Oxford University Press 2011) 126-128.

⁵⁸ As well as other principles, such as transparency and reciprocity.

⁵⁹ WTO Law is not confined to regulations on tariff. It has increasingly extended to the regulation of non-tariff barriers, such as subsidies, technical standards, government procurement and so forth. The regulation on those non-tariff barriers would have specific effects on countries' welfare. For example, the prohibition of protectionism on the part of domestic suppliers in the process of government procurement may reduce the welfare of domestic producers. Therefore, negotiations on those regulatory issues under the WTO may affect the international economy (this is a zero-sum game in which some economies may be regulated whereas others are not. For example, in the negotiations on the regulation of state-owned enterprise. In some developed countries, such as the UK and the US, there are a small number of enterprises that are state-owned, whereas in developing countries, such as China, and economies in transition, such as the Russian Federation, the state sector accounts for a large proportion of the national economy and plays a strategic role in economic competition with other countries. This will be one of the major points of this thesis and will be examined further in Chapter 5).

⁶⁰ When a dispute is brought to the Dispute Settlement Body (hereinafter referred to as the 'DSB'), the panel first refers to the relevant agreements or treaties (and is not prevented from finding a source of law from outside). When the provision of the covered agreement is obscure or ambiguous, the panel and the Appellate Body are obliged to interpret the agreement by reliance on 'the general rule of interpretation.' set out in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), as the Appellate Body stated in the *United States-Gasoline*. See Report of the Appellate Body, 'United States—Standards for Reformulated and Conventional Gasoline' WT/DS2/AB/R 29 April 1996 para 29. See also Jiaxiang Hu, 'The Role of International Law in the Development of WTO Law' (2004) 7 *Journal of International Economic Law* 147. More significantly, the reports of the panels and appellate body are binding on the of the disputes, and the adoption of panel reports can only be blocked by a 'negative consensus', which means every single WTO member has to agree to overturn a decision. See Article 16

political⁶¹ discipline. It handles all trade-related practices and is not limited to reducing tariffs. As the same with negotiations on other trade concerns, the GPA accession negotiation follows the GATT tradition of negotiating trade commitments and combining them as annexes. Although this way of negotiation works well in the GATT context, in the GPA context, this bilateral negotiation for a list of trade commitments cannot provide sufficient legal guidance for acceding members.⁶² The WTO built up a constitutional framework for rule-making among its members,⁶³ in which the trade rights and obligations are specified through treaties and governed by an interplay of principles and exceptions.⁶⁴ In contrast to the GATT, which was an inter-government treaty, namely a set of rules, WTO is an international organisation and is an institution operated based on member's consensus.

Before the establishment of the WTO, multilateral trade negotiations under the GATT system were based on the 'principal supplier rule'.⁶⁵ Under this rule, the request for concessions on a particular product was customarily made by, and could only be made by, the largest suppliers of a product. This rule, with multilateral balancing, has led to the formation of a privileged club (of principal suppliers). The larger the trading powers that the country has, the more likely that its trade needs and attitudes will be reflected and accepted in the negotiation forum. The negotiation on government procurement is a case at this point. In 1965, governments became the major purchaser of both commodities and services, especially in the major trading countries of that time.⁶⁶ All the major trading countries, such as the UK, France, Japan, Germany, and the US, applied domestic preference requirements.⁶⁷ Thus, they had practical trade needs

(4) adoption of Panel Reports, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the WTO Agreement.

⁶¹ See further Meinhard Hilf, 'Power, Rules and Principles - Which Orientation for WTO/GATT Law?' (2001) 4 *Journal of International Economic Law* 111.

⁶² For detailed analysis of the drawbacks of the current GPA coverage approach, see Chapter 4 Section 4.

⁶³ It is generally accepted that WTO law is 'a part of the wider corpus of 'public international law' because it creates international legal obligations between nation States, dealing predominantly with the actions of governments, and establishing disciplines on trade policy instruments such as tariffs, quotas, subsidies or state trading. See further Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 538-540.

⁶⁴ The WTO agreement is compounded of the General Agreement on Trade and Services (hereinafter referred to as 'GATS'), the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as 'TRIPS') and the WTO Dispute Settlement Understanding (hereinafter referred to as the 'DSU'). Those treaties provided the legal basis for trade regulation as well as trade dispute settlements. See further Hu (n 66) 147.

⁶⁵ See Article II, GATT, Tariff Conference 1956, TN/56/4 18 January 1956.

⁶⁶ For example, government agencies bought 17 per cent of goods and services produced in the UK, 13 per cent in France, 19 per cent in Sweden, and 18 per cent in the US. Commodities accounted for about 40 per cent of the governmental expenditures in the UK, 50 per cent in France and 40 per cent in the US. See Robert E Baldwin, *Nontariff Distortions of International Trade* (Washington: The Brookings Institution 1970) 58.

⁶⁷ Those requirements could be on the tendering methods. For example, in the UK in 1962-1963, 50 per cent of government purchasing funds were fulfilled by selective tender and 49 by single tender. There could be a residence requirement for the tenderer. In Italy, for example, government departments, in principle, may purchase only from

in opening government procurement market and have the motivation to restrain discriminatory practice in their trade partners' government procurement market.⁶⁸ Consequently, the initiative on government procurement was taken on the OECD forum and was later on extended to multilateral fora, particularly the Tokyo Round of Trade Negotiations in 1976.

3.3.1 Multilateral Initiatives

Since the establishment of the WTO, most of the trade discrimination measures, policies and practices have been disciplined under multilateral trade initiatives.⁶⁹ However, the main WTO agreements all derogate discriminatory government procurement practice.⁷⁰ Firstly, the GATT non-discrimination obligation does not apply to government procurement practice because of the exclusionary derogation by GATT Article III: 8(a) (the national treatment obligation).⁷¹ Secondly, the GATS Article XVII (national treatment obligation) also does not apply.⁷² Those derogations implicitly acknowledge the necessity of an agreement specifically on government procurement regulations, be it multilateral or plurilateral.

companies legally established in Italy; and in the UK, only resident companies are permitted to undertake government contracts for building and civil engineering services. There could be exclusion of foreign suppliers: the French government, for example, only purchases electronics product from domestic sources. The US preference was made more flagrant than that of France, by the implementation of the Buy American Act of 1933. See generally Baldwin (n 66) 67-67.

⁶⁸ Morton Pomeranz (n 28) 135-144.

⁶⁹ Until the present, nine rounds of multilateral trade negotiations have been held under the GATT auspices. These include Geneva (1947), Annecy (1949), Torquay (1951), another negotiation in Geneva (1956), the Dillon Round (1960-1961), the Kennedy Round (1964-1967), the Tokyo Round (1973-1979), the Uruguay Round (1986-1994) and the Doha Round (2001). After the five rounds, tariff barriers were significantly reduced. Since the Kennedy round, non-tariff barriers began to be placed on the table. Those non-tariff barriers (subsidies, countervailing measures, anti-dumping, technical barriers to trade, import licensing procedures, and customs valuation) were finally subject to a series of Tokyo Round Codes. Those codes were further developed into multilateral trade agreements after the Uruguay Round.

⁷⁰ Currently, government procurement is still generally derogated from the non-discrimination obligation under the WTO, and it is only regulated on a voluntary basis among the GPA signatories. For a detailed analysis of this patchwork, see Chapter 5 Section 3. See also Kamala Dawar, 'Government Procurement in the WTO : A Case for Greater Integration' (2016) 15 World Trade Review 647.

⁷¹ The GATT Article III 8(a) (namely, the national treatment provision) reads that '...the national treatment provision shall not apply to laws, regulations, or requirements governing the procurement by governmental agencies of products 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'. With this general derogation from the non-discrimination obligation, government procurement policies by national governments are non-tariff barriers of market access. Nevertheless, this derogation is not absolute or restrictive. The current WTO appellate body rulings suggest a very narrow interpretation of GATT Article III 8(a) derogations which are possibly subject to some types of government procurement activities to non-discrimination obligation. See further Dawar, 'Government Procurement in the WTO : A Case for Greater Integration' (n 70) 663.

⁷² GATS Article XVII (namely the 'state trading enterprise') reads that '...the general principle of non-discrimination shall not apply to imports for immediate or ultimate consumption in governmental use...' Under this provision, States under the WTO are free to discriminate against foreign suppliers in government procurement of services.

Multilateral trade agreements are binding on all WTO members, and ratified, together with all WTO Agreements by the ‘single undertaking approach’.⁷³ For issues not extensively concerned with multilateral negotiation, a plurilateral trade agreement, which is optional to decide whether to subject to or not when seeking WTO membership, could also be a choice.⁷⁴ At the beginning of the Tokyo Round 1979, there were up to nine issue-based Codes on specific rules for policies covered by the GATT.⁷⁵ After the conclusion of the Uruguay Round in 1995, five Codes⁷⁶ were developed into multilateral disciplines binding upon all WTO members, and four other Tokyo Round Codes⁷⁷ continued the plurilateral nature. In 1997, two more plurilateral agreements⁷⁸ were terminated. Only two plurilateral agreements continue, and the GPA is one of them. It is binding on only 48 signatories.⁷⁹ Since then, a multilateral-level government procurement discipline has become a ‘hard nut’ of the WTO workings on trade liberalisation.

Regarding efforts to achieve a further opening up of government procurement, the first multilateral initiative to expand the GPA started in 1996. However, during the five Ministerial Conferences, the discrimination issue was put aside, and the multilateral efforts to open up

⁷³ This means that when a country joins the WTO, it has to ratify all the agreements under the WTO, namely the Agreement Establishing the World Trade Organization and all other agreements on trade and the adjudicatory body in its 4 annexes, including Multilateral Agreements On Trade In Goods, the General Agreement On Trade In Services, the Agreement On Trade-Related Aspects Of Intellectual Property Rights, the Understanding On Rules And Procedures Governing the Settlement of Disputes, the Agreement on Pre-shipment Inspection, the Agreement on Rules of Origin, the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards Trade Policy Review Mechanism, the Understanding On Commitments In Financial Services and other decisions. For the full list of WTO agreements, see https://www.wto.org/english/docs_e/legal_e/final_e.htm, accessed 18 March 2019.

⁷⁴ Plurilateral agreements are an important issue-based tool for paving the way towards addressing specific issues and areas. See further, Michitaka Nakatomi, ‘Plurilateral Agreements: A Viable Alternative to the World Trade Organization?’ (2013) 1-7.

⁷⁵ GATT 1947 was difficult to amend and expand, and so, in order to circumvent this difficulty, in the 1960s and 1970s groups of like-minded countries sought to reach agreement on more specific rules for policies covered by the GATT negotiated codes of conduct, namely, the Tokyo Round Codes. They were Codes on Subsidies and Countervailing Measures, a Code on Anti-dumping, a Code on Technical Barriers to Trade, a Code on Import Licensing Procedures, Code on Customs Valuation, a Code on Trade in Civil Aircraft, a Code on Government Procurement, a Code on International Dairy and a Code on International Bovine Meat.

⁷⁶ These were: the Agreement on Subsidies and Countervailing Measures, the Anti-dumping Agreement, the Technical Barriers to Trade Agreement, the Agreement on Import Licensing Procedures, and the Customs Valuation Agreement. They were turned into Annex 1a agreements under the WTO.

⁷⁷ The four plurilateral agreements were: the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement and the International Bovine Meat Agreement.

⁷⁸ The International Dairy Agreement and the International Bovine Meat Agreement were terminated at the end of 1997, and the sectors are now handled under the Agriculture and Sanitary and Phytosanitary Agreements. See: Agreement Establishing the World Trade Organization, Annex 4 (c) IDA/8 and Annex 4(d) IMA/8.

⁷⁹ Currently, there are 48 WTO members that were signatories of the GPA, including the EU (the 28 members of which were considered as one party) **Armenia, Australia, Canada, Hong Kong, China, Iceland, Israel, Japan, Korea, Liechtenstein, Moldova, Montenegro, the Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine, United States.** Article II: 2 and 3 of the Agreement Establishing the World Trade Organization https://www.wto.org/english/docs_e/legal_e/04-wto.pdf accessed 10 July 2019; Matthias Herdegen, ‘The Multilateral and the Plurilateral Agreements on Trade’ in Matthias Herdegen (ed.), *Principles of International Economic Law* (1st edn., Oxford University Press 2013) 184.

government procurement in the WTO were confined to the issue of *transparency*.⁸⁰ Expansion of GPA entity coverage was also omitted from the schedule of the Ministerial Conferences. The disagreement between the GPA on whether or not the negotiations on government procurement should be launched as a part of the WTO package was a significant factor in the failure of the ministerial conferences on the government procurement issue.⁸¹ The debate continued relentlessly until the adoption of a General Council Decision of 1st August 2004, which envisaged a framework for continuing negotiations.⁸² However, due to considerable opposition from developing countries, the conclusion was that no further works on government procurement, mentioned in the Doha Ministerial Declaration would take place within the WTO during the Doha Round.⁸³ The first multilateral initiative to open up government procurement under the WTO ended without any consensus.

The other multilateral initiative on government procurement under the WTO took place during the negotiations on the General Agreement on Trade and Services (hereinafter referred to as the ‘GATS’) in 1995. The negotiation on government procurement was conducted, not as an independent agreement, but as a trade practice under the GATS, namely GATS Article XIII:

⁸⁰ At the WTO Singapore Ministerial Conference in December 1996, a Working Group was established to conduct a study that, while taking national policies into account, aimed at gaining transparency in government procurement practices. The basis of the study was to develop ‘elements for inclusion in an appropriate agreement’. No actual mandate for a formal negotiation on the GPA was achieved. It was supposed to achieve a mandate for negotiation on the Third Ministerial Conference in Seattle (in December 1999) which ended up without any such achievement. Finally, in the Doha Fourth Ministerial Conference, held in November 2001, paragraph 26 of the Doha Ministerial Declaration stated explicitly that the negotiation would be restricted to the issue of gaining transparency and would ‘not restrict the scope to give preferences to domestic supplies and suppliers’.

What is more, the Declaration confers a mandate to bring back negotiation ‘by a decision to be taken, by explicit consensus, at the session on the modality of negotiation’ in the fifth ministerial conference focusing on the transparency issue, taking into consideration the ‘development priority’ of the participants. The Fifth WTO Ministerial Conference in Cancún ended on September 2003, with the Chairperson concluding that ‘despite considerable movement in consultations, members remained entrenched, particularly on the “Singapore” issues’ (namely, the relationship between trade and investment, the interaction between trade and competition policy, transparency in government procurement and trade facilitation or possible ways of simplifying trade procedures). Although, as a matter of fact, the negotiation was limited to the transparency issue after the Fifth Ministerial Conference, there was still no result concerning the transparency issue during those conferences, and the coverage expansion and text improvement were still at a stage of stagnation. See Singapore WTO Ministerial Conference 1996: Ministerial Declaration, WT/MIN (96)/DEC, 18 December 1996, paragraph 21. World Trade Organization, ‘Doha Ministerial Declaration on Fourth Session of Ministerial Conference’ WT/MIN(01)/DEC/1 20 November 2001 26. Ministerial Conference Fifth Session Cancún, ‘Ministerial Statement Adopted on 14 September 2003 1.’ WT/MIN(03)/20 23 September 2003. See also, Sue Arrowsmith, *Government Procurement in the WTO*, vol. 12 (Sue Arrowsmith ed., 1st edn., Kluwer Law International 2003) Chapter 16.

⁸¹ Some WTO members, especially the EU, considered negotiation on government procurement to be important to the WTO package as a whole, whereas a number of developing countries strongly opposed the launching of negotiations, stressing that there was no explicit consensus to do so, as was called for in the Doha Declaration. See further: ‘WTO | Ministerial Conferences - Cancún 5th Ministerial, 2003 - Summary of 12 September 2003’ <https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_12sept_e.htm> accessed 21 March 2019.

⁸² Doha Work Programme, ‘Decision Adopted by the General Council on 1 August 2004’, WT/L/579.

⁸³ WTO General Council, ‘Decision Adopted by the General Council on 1 August 2004’ WT/L/579 2 August 2004 para. 1(g).

government procurement in services (together with negotiation on safeguards measures in Article X and subsidies in Article XV).⁸⁴ The first paragraph of Article XIII excluded government procurement of services from the application of the main market provisions⁸⁵ of the GATS. It followed the exclusion in the second paragraph of the negotiating mandate, which stipulated that ‘there shall be multilateral negotiation on government procurement in service under the GATS within two years from the date of entry into force of the WTO agreement’.⁸⁶

According to this mandate, the Working Group of the GATS rules held a series of formal and informal meetings.⁸⁷ In 1998 and 1999, the discussion focused on definitional issues, as well as the scope and coverage of possible disciplines on government procurement. The continued discussions in 2000 and 2001 dealt with further possible multilateral disciplines in this area.⁸⁸ In the discussion, the European Community (now the so-called ‘EU’) and its member states tabled an informal paper, outlining elements such as non-discrimination and transparency, and identified three questions: When is there procurement? i.e., what transactions are covered; and: What is the procuring entity that is being procured?⁸⁹ These questions are indeed fundamental to the opening up of government procurement since several WTO members were concerned about negotiations on access to their respective markets.⁹⁰ Also, Japan submitted a question on

⁸⁴ Working Party on GATS Rules, ‘Negotiation on Government Procurement: Report by the Chairperson of the Working Party on GATS Rules’ (2001) S/WPGR/11 30 June 2003 para. 6. See also ‘WTO, WTO Negotiations on GATS Rules’ <https://www.wto.org/english/tratop_e/serv_e/gats_rules_negs_e.htm> accessed 21 May 2019.

⁸⁵ Such as Articles II, on most-favoured-nation treatment obligation, Article XVI on Market access; and Article XVII on National Treatment.

⁸⁶ However, during the discussion, the WTO members showed varying degrees of willingness to undertake further negotiations on government procurement topics. There were two opposed positions. The European Community, (now called the EU), and its member states insisted that the negotiation on mandates should involve market access, non-discrimination and transparency. Other members considered that market access should be excluded from the scope of negotiation, since Article XIII excludes the MFN. The argument has continued until the present day. See Working Party on GATS Rules, ‘Negotiation on Government Procurement: Report by the Chairperson of the Working Party on GATS Rules’ (n 84) para 4, 14.

⁸⁷ Since the issue of government procurement was first put on the Agenda of the Working Party in December 1995, the item has been on the agenda of each formal meeting of the Working Party; for example, Working Party on GATS Rules, ‘Summary of Comments Made During the Informal Meeting of 29 January 2003, Note by the Secretariat’ JOB(02)/21. as well as being addressed at various informal meetings, such as the Working Party on GATS Rules, ‘Summary of Comments Made During the Informal Meeting of 29 January 2003, Note by the Secretariat’ JOB(03)/21.

⁸⁸ See Working Party on GATS Rules, ‘Government Procurement of Services, Communication from the European Communities and Their Member States’ S/WPGR/W/39 12 July 2002. and Working Party on GATS Rules, ‘Government Procurement of Services – Possible Development of Multilateral Disciplines, Communication from the European Communities and Their Members States’ Job No. 4021 (26 June 2000). See also Working Party on GATS Rules, ‘Negotiation on Government Procurement: Report by the Chairperson of the Working Party on GATS Rules’ (n 84) para 11, 12.

⁸⁹ WTO, Government procurement and the GATS <https://www.wto.org/english/tratop_e/gproc_e/gpserv_e.htm> accessed 13 September 2019.

⁹⁰ Working Party on GATS Rules, ‘Negotiation on Government Procurement: Report by the Chairperson of the Working Party on GATS Rules’ (n 84) para 19.

the market access to concessions and privatised entities.⁹¹ Although those questions were very important, the discussion of these critical issues was pitifully ineffective, since only a small number of proposals and counter-proposals were submitted to the Working Party. As the Working Party explained, the issues of government procurement were particularly crucial for some developed countries, such as Japan and the EU member states, whereas members from developing countries were less interested in the issues.⁹² Due to the lack of consensus, definitional issues and market access issues have remained open to debate until the present day.

3.3.2 The Plurilateral Agreement

Consequently, the plurilateral GPA remained the working emphasis in the short or medium term.⁹³ To open the government procurement market to international competition, the GPA Parties is supposed to be ‘the more, the better’.⁹⁴ Other WTO Agreements are binding on 164 members, whereas the GPA has only 48 signatories (to date 2019), and since the GPA entered



into force in January 1996, the list of signatories has grown slowly.⁹⁵ As we have seen, only

⁹¹ Working Party on GATS Rules, ‘Informal Comments on Concessions’ Job No. 2867 (18 May 1999). And Working Party on GATS Rules, ‘Negotiations on Government Procurement under Article XIII of the GATS’ Job No. 6789 (12 November 1999).

⁹² Working Party on GATS Rules, ‘Negotiation on Government Procurement: Report by the Chairperson of the Working Party on GATS Rules’ (n 84) para 16.

⁹³ Sue Arrowsmith and Robert D Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011) 11.

⁹⁴ The rule of thumb is that the bigger the market and the more the competitors in the market, the healthier the market is and the more beneficial the market is to all the participants in the market. See the economists’ conclusions in the immediately following section 3.1.2.

⁹⁵ During the past five years, only New Zealand (2015), Montenegro (2015), Moldova (2015), Ukraine (2016) and Australia (October 2018) joined the GPA. See WTO, ‘observers and accessions’,

three countries (Ireland in 2001, New Zealand in 2015, Australia in 2018) took the initiative in seeking accession to the GPA without a prior WTO commitment,⁹⁶ which indicates that interest in voluntarily opening the domestic procurement market is rare. In order to expand the number of GPA signatories, accession to the GPA was turned into a *de facto* ‘condition precedent’ for WTO membership, although being a signatory of the GPA is not a *de jure* prerequisite for WTO membership.⁹⁷

Moreover, in contrast to other WTO Agreements, wherein developing countries are a majority, the accession of developing countries to the GPA is extremely limited.⁹⁸ Among the 48 GPA (2012) signatories, only Hong Kong, Chinese Taipei, Singapore, Israel and Korea are developing countries.⁹⁹ Developed countries have the interest and the motivation to move toward the elimination of discrimination against their exports and readily adjust to the great power disparity within the GPA.¹⁰⁰ With the promotion of developed countries, developing countries are under pressure to reduce discrimination against foreign suppliers and to sign the

https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm Accessed 15 September 2019. See also Christopher R Yukins and Johannes S Schnitzer, ‘GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement’ (2015) VII Trade Law & Development Journal 89.

⁹⁶ Jean Heilman Grier, ‘Prospects for Expansion of WTO Procurement Pact’ *Perspectives on Trade* (7 June 2017).

⁹⁷ One case in point was the accession of Chinese Taipei. During the negotiation for accession to the WTO, government procurement was one of the concerns for the current GPA. Some of the trading partners requested Chinese Taipei to become a signatory to the GPA. As a result, Chinese Taipei became committed to acceding to the GPA in the Working Party Report for its accession to the WTO. See Working Party on the Accession of Chinese Taipei, ‘Report Of The Working Party On The Accession Of The Separate Customs Territory Of Taiwan, Penghu, Kinmen And Matsu’ WT/ACC/TPKM/18 5 October 2001 para 164, 166. See also Changfa Lo, ‘The Benefits for Developing Countries of Accession to the Agreement on Government Procurement: The Case of Chinese Taipei’ in Sue Arrowsmith and Robert D Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (1st edn., Cambridge University Press 2011) 141.

Another case in point is the accession negotiation of China. The GPA had been persuading countries to accede to the GPA upon accession the WTO. China firmly rejected the proposition that GPA membership should be a precondition for China to join the WTO, but at the same time was committed to negotiation on accession to the GPA as soon as possible after its accession to the WTO. See Working Party on the Accession of China, ‘Report of the Working Paper on the Accession of China’ WT/ACC/CHN/49 1 October 2001 para 337, 341. See also Ping Wang, ‘Accession to the Agreement on Government Procurement: The Case of China’ in Sue Arrowsmith and Robert D Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (1st edn., Cambridge: Cambridge University Press 2011) 92.

⁹⁸ On 29 July 2016, there were 164 members of the WTO.

⁹⁹ Of the signatories to the GPA 1993, only Israel and Korea were developing countries. In the revised GPA (2012), only three more developing countries signed the GPA, namely, the Taiwan Province of China (signed on 15 June 2009), Hong Kong, China (signed on 19 June 1997) and Singapore (signed on 20 October 1997). There are no WTO definitions of ‘developed’ and ‘developing’ countries. Developing countries are grouped as ‘developing countries’ and ‘least developed countries’ by the criteria set out by see the United Nations Conference on Trade and Development (UNCTAD). Developing countries comprise the majority of the WTO membership. See UN (Development Policy and Analysis Division (DPAD) of the Department of Economic and Social Affairs of the United Nations Secretariat), ‘Country Classification: Data Sources, Country Classifications and Aggregation Methodology’ in *World Economic Situation and Prospects 2018* (New York: United Nations 2018) 139-145.

¹⁰⁰ See further, Simon J Evenett and Bernard M Hoekman, ‘Government Procurement: Market Access, Transparency, and Multilateral Trade Rules’ (2005) 21 European Journal of Political Economy 163.

GPA. As we have seen, all the major developed countries have signed the GPA, and the 31 GPA observers are all from developing countries or economies in transition.¹⁰¹

The failure of the multilateral initiatives, as well as the stagnation of the plurilateral effort on liberalising government procurement market indicate, on the one hand, that WTO members have not given up the attempt to develop government procurement regulation, and on the other hand, that WTO members, especially members from developing countries, are unwilling to abandon discriminatory trade policies. Countries tend to be nationalistic in their thinking about economic/trade matters. Trade policies are, by definition, nationalistic policies, in that they discriminate against foreign producers: this is usually the main reason why discriminatory policies were imposed in the first place. However, trade theory suggests that, in trade relations, a rule of thumb for maximising the wealth of all parties concerned is not to impose trade barriers.¹⁰² A country will benefit from free trade without barriers; it is even better if that country's trade partners do the same.¹⁰³ Governments usually face Prisoner Dilemma's preferences, i.e., they want discrimination against foreign suppliers in the domestic market ('domestic protection') but an open market in foreign markets ('foreign liberalisation'). In this Prisoner's Dilemma, the positive-sum result is mutual liberalisation rather than mutual protectionism.¹⁰⁴ That is why international procurement agreements should be created and should have space for further development.

¹⁰¹ The latest news: the WTO announced that on 17 October 2018, GPA had unanimously approved a decision to welcome Australia as the 48th GPA party. Australia will officially become a GPA party 30 days after submitting its Instrument of Accession to the WTO's Director-General. See Committee on Government Procurement, 'Accession of Australia to the Agreement on Government Procurement' GPA/ACC/AUS/39/Rev.1 17 October 2018.

¹⁰² The central concept underlying trade is the opportunity cost (the loss of other alternatives when one alternative is chosen), which means that producing something comes at the cost of not producing something else. An important economic theorem states that opportunity cost could be minimised through trade. Suppose country A is abundant with cotton and good at making fabrics, and another country B is good at making wines, but both of them could also make fabrics and wines. However, the cost of making fabrics in country A is less than in country B, whereas the cost of making wine in country B is less than in country A. Therefore, if the two countries could produce goods in which they are specialised, the opportunity cost of not making wine in the country A could be compensated by the gain of specialised making fabrics, and the opportunity cost of not making fabrics in the country B could be compensated by the gain of making more wine. In this situation, the total production of both countries will increase, and each of them can consume more fabrics and wine than would be possible without trade. Therefore, generally, international trade provides nations with the opportunity to specialise in production in accordance with their comparative advantages. In principle, a small country could also find its compensation. See Hoekman and Kostecki, 'The Trading System in Perspective' (n 26) 26, 27.

¹⁰³ Although in principle, the opportunity cost could find compensation in the trade, in practice, liberalising of market access is not absolutely realised due to political difficulties, which means that trade conditions are not perfect. The result is that compensating losses is not always easy. Consequently, to optimise liberalisation, it is better the trading partners could also open market access to make the compensation possible.

¹⁰⁴ Stephanie J Rickard and Daniel Y Kono, 'Think Globally, Buy Locally: International Agreements and Government Procurement' (2014) 9 *The Review of International Organizations* 338. See also Hoekman and Kostecki, 'The Trading System in Perspective' (n 26) 26.

It is also the reason why the expansion of the GPA signatories and their entity coverage schedules would make the GPA more beneficial for the signatories. The bigger the market is, the more probable it is that the trading will find compensation for their losses caused by the removal of protectionist policies. If the number of GPA signatories increased, trade in the government procurement market would be more comprehensive. For example, most of the GPA signatories at present are developed countries, their economic structure is similar, and most of the state-owned enterprises have been privatised. In developing countries, however, state-owned enterprises still have a substantial presence in the national economies. Hence, in the current GPA, developing countries find it difficult to obtain compensation for losses originally obtained from preferential government procurement policies, through the SOEs. The difficulty in achieving reciprocal compensation is part of the reason why developing countries are not interested in the GPA.

3.4. Discriminatory Government Procurement as a Non-tariff

Trade Barrier

A non-tariff barrier could be ‘any policy that reduces world income below its highest potential level since such a policy would likely have some effect on the volume or commodity composition of international trade’.¹⁰⁵ In the Kennedy Round of trade negotiation (1963-1967), the major industrial nations agreed to cut tariffs substantially.¹⁰⁶ After the substantial cut in tariffs, both private traders and government official came to recognise that non-tariff barriers can be highly restrictive.¹⁰⁷ Since then, the reduction of non-tariff barriers to international trade has become a dominant issue of commercial policies.¹⁰⁸ If the effect of non-tariff barriers is

¹⁰⁵ This definition is based on the understanding that such measures would cause the goods, services and resources would be allocated in a way that reduces potential real-world income, which is that level attainable if resources and output were allocated optimally. One case of this efficient allocation is the circumstance of perfect competition, and free-market structure in the world economy. See further, Baldwin (n 66) 5.

¹⁰⁶ After the Kennedy Round (1963-1967), average tariffs were reduced by 37 per cent, and some 33,000 tariff lines bound; after the Tokyo Round (1973-1979), the average tariff was reduced by 33 per cent to 6 per cent on average for OECD manufactured imports; and after the Uruguay Round (1986-1994), the average tariff was reduced by 38 per cent. See the table 4.1 in Bernard M Hoekman and Michel M Kosteci, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn., Oxford University Press 2009) 133.

¹⁰⁷ The significant reduction of tariffs in the multilateral negotiation forum catalysed the use of nontariff distorting measures. Most of the measures were aiming at easing balance of payment difficulties brought by the reduction of tariffs. For example, in 1968, France brought into use export subsidies and import quotas. In 1967, the UK introduced export rebates prior to its devaluation in autumn and introduced an import deposit scheme in 1968. Another explanation is that the reduction of tariffs injures the companies and works relying on importing industries, and that, in order to assist them, nontariff barriers take their place. See further Alan V. Deardorff and Robert M Stern, *Measurement of Nontariff Barriers* (Ann Arbor: The University of Michigan Press, 1999) 1.

¹⁰⁸ The success of the tariff negotiation since the Kennedy Round has understandably shifted the focus more and more to other implements. Although the Kennedy Round neglected nontariff trade distortions, progress was

reduced and prevent new barriers, the trade liberalisation efforts in the multilateral negotiations would not be impaired. The overall trade-distorting impacts of non-tariff barriers have been recognised and studied in Robert Baldwin's works since the 1970s, and have been proved by empirical evidence.¹⁰⁹

As one of the non-tariff barriers to market access, government procurement discrimination could be *de jure* or *de facto*.¹¹⁰ *De facto* discrimination happens in situations where procuring governments have discretion. In those situations, the discretion is necessary to accommodate diverse kinds of government procurement, but it also provides the leeway to set barriers to market access.¹¹¹ The heavy reliance on selective and single tendering procedures provides a good example of this point. It is known that the principal government tendering procedures are usually public tendering, selective tendering and single tendering. Usually, single tendering would be used only when other procedures were inapplicable or inappropriate. It would be employed because discrimination can be easier to apply under selective and single tender procedures than under public tendering. However, in practice, data for Norway and the Netherlands indicate that selective tendering procedures account for 50 per cent and 75 per cent respectively of the total government procurement contracts; and in the UK, the public tendering procedure accounts for only 1 per cent of total government procurement contracts.

De jure discrimination is often conferred by national legislation, which give advantages to domestic suppliers, small and medium Enterprises, or suppliers promoting national policies (e.g., green procurement policies).¹¹² The World Bank's 2017 Benchmarking Public

nonetheless made. After the Kennedy Round negotiations (1963-1967), agreements were reached on non-tariff barriers for customs valuations and anti-dumping measures. After the Tokyo Round (1973-1979), voluntary codes of conduct were agreed for all non-tariff issues except safeguards; and after the Uruguay Round (1986-1994), the majority Tokyo Round Codes on nontariff barriers were extended to all WTO members. Hoekman and Kostecki, *Polit. Econ. World Trading Syst. WTO Beyond* (n 106) 133.

¹⁰⁹ Generally, Baldwin analyses non-tariff barriers from certain aspects. Firstly, he pointed out that trade-distorting effects should be evaluated on the basis of an assessment of the combined effects of all existing trade distortion. Secondly, the evaluation should take world income as criteria for evaluating trade-distorting measures, because particular measures may have varying effects on world income, depending on whether the country concerned is developed or developing. Finally, Baldwin asserts that the effect of nontariff measures would not be restrictive with regard to trade. Moreover, it could have effects outside the commercial field, such as in monetary or fiscal regimes. See the representative work of '*Nontariff Distortions of International Trade*'. See Baldwin (n 66). 6-10. The empirical evidence of non-tariff barriers has been thoroughly examined by Deardorff and Stern (n 107) 1.

¹¹⁰ Federico Trionfetti, 'Discriminatory Public Procurement and International Trade' (2000) 23 *The World Economy* 64.

¹¹¹ See Baldwin (n 66) 60.

¹¹² See generally, the World Bank Group, 'Promotion of SMEs/Local Content in Public Procurement Laws and Regulation' <<https://ppp.worldbank.org/public-private-partnership/promotion-smes-local-content-public-procurement-laws-and-regulation>> accessed 26 August 2019.

In Australia, for example, the Victorian Industrial Participation Policy Act mandates the government to create a policy that promotes and incentivises small and medium enterprises in public projects and procurements financed

Procurement report, which surveys 180 economies, shows that 47 per cent of countries provide SME specific preference in public procurement. Those kinds of *de jure* preference are also extensively applied in government procurement procedures in sub-Saharan Africa, Australia and New Zealand. Among all kinds *de jure* discrimination, the ‘buy national’ legislations are prominent examples.¹¹³ ‘Buy national’ discrimination not only restricts trade between countries, but it also provokes trade partners to apply similar discriminations. In a report after the financial crisis of 2008, the WTO Trade Policy Review found that the inclusion of ‘buy local/national’ clauses in government procurement packages is increasing.¹¹⁴ For example, under pressure to adopt similar measures by the Buy American Stimulus Bill (2009), China reinforced its ‘Buy Chinese’ requirement,¹¹⁵ and Canada adopted similar ‘Buy Canadian’ measures.¹¹⁶

or launched partially or wholly by the State. See Version No. 003 Victorian Industry Participation Policy Act 2003 No. 72 of 2003 Version as at 24 April 2012.

In Section 11 of the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006, India put in place government procurement policies to support micro-small enterprises and to ensure a fair market share for such entities. The existing dispensation measures are price preference, reservation of product exclusively purchased by micro-small enterprises, and so forth. See Tim Dalgleish and others, *Government Procurement in India: Domestic Regulations & Trade Prospects* (CUTS International 2017) 47-48.

South Africa’s Preferential Procurement Policy Framework Act (PPPFA 2017) is the crucial instrument utilised to achieve socio-economic objectives through government procurement. All institutions wishing to implement preferential treatment during the awarding of tenders must do so in terms of the PPPFA. See the overview and study in EY, ‘Overview of Government Procurement Procedures in Sub-Saharan Africa’ 1-54 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/431557/Overview_of_government_procurement_procedures_in_sub-Saharan_Africa.pdf> accessed 25 October 2018.

¹¹³ For example, the US restricts market access through the American Recovery and Reinvestment Act of 2009 (ARRA), the Berry Amendment, the Buy American Act of 1933, the Small Business Act of 1953, US-flag vessel requirements and Sub-central procurement not covered by trade agreements. The EU has also created barriers to market access through giving favourite status to EU firms; diverse national and local practices; unavailability of procurement statistics; and local content requirement in the bid (at least 50 per cent European). See the summary in Stephen Woolcock and Jean Heilman Grier, ‘Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations’ (2015) 16-17.

¹¹⁴ WTO Trade Policy Review Body, ‘Overview Of Developments In The International Trading Environment’ WT/TPR/OV/M/7 3 March 2010 para 28. WTO, ‘Overview of Developments in the International Trading Environment: Annual Report by the Director-General’ WT/TPR/OV/12 of 18 November 2009 para 140.

¹¹⁵ On May 26, 2009, the Chinese authorities (National Development and Reform Committee, NDRC) issued a notice on tightening government supervision of tenders and bids in connection with government-invested projects. The notice orders the purchase of domestic products in government-invested projects. Commentators believe that this order is a retaliation against ‘Buy American’ stimulus provisions, since the order imposed a requirement for its stimulus projects to use domestically made goods. See Rick Benedict, ‘Beijing Issues “Buy China” Order’ *The Daily Reporter* (17 June 2009). See also Laney Zhang, ‘China: Order to “Buy China” in Government-Invested Projects’ *Global Legal Monitor The Law Library of the Congress* (1 July 2009).

¹¹⁶ On 5 August 2009, Ken Lewanza, president of CAW, (the Canadian Auto Workers union), advised Canada’s premier that ‘Canadian governments should increase and speed up funding for public infrastructure projects and attach ‘Buy Canadian’ conditions to the funding as a response to the ‘Buy American’ policy.’ The rejection of the ‘Buy American’ policies catalysed the negotiation between the US and Canada. In the US-Canada Agreement on Government Procurement, which entered into force on 16 February 2010, Canada derogated from the ‘Buy American’ policy (ARRA 2009). See Canadian Auto Workers Union, ‘Premiers Must Reject Federal Proposals That Would Deepen NAFTA, CAW President Says’ <<http://caw.ca/en/7728.htm>> accessed 26 August 2019. See also the ‘U.S.-Canada Agreement on Government Procurement’.

Despite the existence of trade agreements, discrimination against foreign suppliers still exists under the GPA. For example, Montenegro derogates its utility procurement from non-discrimination obligations in notes 2, 3, 6 of Annex 3. Liechtenstein derogates its energy procurement from non-discrimination obligation in Notes 4 of Annex 3. Similar derogations also exist in the coverage schedules of Korea, Norway, and New Zealand. Even though the EU and the US, the two major of the GPA, have exchanged extensive commitments for market access by the EC-US Bilateral Agreement on Government Procurement of 1993,¹¹⁷ derogations from the obligation of non-discrimination still exist in their respective GPA General Notes.¹¹⁸

Although discrimination has been significantly reduced under the GPA, the latter's effectiveness is still limited. The empirical literature on the impact of international procurement has provided evidence that the presence of discrimination or favouritism in government procurement markets is significant.¹¹⁹ As observed previously, the GPA signatories are always

¹¹⁷ On April 1994, EU-US Bilateral Agreement on Procurement was reached. The total value of the contracts covered by the bilateral agreement was in the order of US \$100 billion on each side: (for the whole of the GPA, the figure is around US \$350 billion). See Gerard De Graaf and Matthew King, 'Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round' (1995) 29 *The International Lawyer* 451. For the detailed coverage of the EU and the US, see also Andrew Halford, 'An Overview of EC-United States Trade Relations in the Area of Public Procurement' (1995) 1 *Public Procurement Law Review* 46-55.

¹¹⁸ For example, Note 2 of the EU Annex, 1, 2 and 3, states that the EU will discriminate against suppliers (i.e., small or medium-sized enterprises) from Japan, Korea and the US until those signatory countries no longer operate discriminatory measures in favour of certain small domestic and minority businesses. In Note 2 of Annex 2, it is stated that the entities covered in the Annex may apply preferences or restrictions associated with programmes promoting the development of distressed areas, or businesses owned by minorities, disabled veterans, or women. In Note 1 of Annex 3, the US also derogates its Rural Utilities Services with respect to its financing or power generation and telecommunications projects. See details in the coverage schedules https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm#revisedGPA accessed 26 August 2019.

¹¹⁹ Kutlina-Dimitrova and Lakatos established a modelling analysis, based on the data from the EU Member States, and found that most governments have a low tendency to award government contracts cross-border, and especially local governments, which have the lowest propensity). See further Zornitsa Kutlina-Dimitrova and Csilla Lakatos, 'Determinants of Direct Cross-Border Public Procurement in EU Member States' (2016) 152 *Review of World Economics* (Weltwirtschaftliches Archiv) 524.

Shingal (2011) examined the foreign scouring of service by the GPA signatories Japan and Switzerland, finding evidence of discrimination against foreign bidders in the government procurement service markets. This finding was further developed through a sector-level dataset on the government procurement of Japan and Switzerland from abroad in the period 1990-2003. See Anirudh Shingal, 'Econometric Analyses of Home Bias in Government Procurement' (2015) 23 *Review of International Economics* 188. Anirudh Shingal, 'Services Procurement under the WTO's Agreement on Government Procurement: Whither Market Access?' (2011) 10 *World Trade Review* 527.

Richard and Kono analysed discriminatory procurement in a gravity model of trade, and found that government spending is significantly and negatively linked to bilateral imports. Stephanie J Rickard and Daniel Y Kono, 'Think Globally, Buy Locally: International Agreements and Government Procurement' (2014) 9 *Review of International Organizations* 333, 338.

Trionfetti made a comparison between the government import shares of the OECD countries and those of private companies in thirteen manufacturing sectors. The finding that the import share of governments is systematically lower than that of the private companies suggests the existence of discriminatory policies. Marius Brühlhart and Federico Trionfetti, 'Industrial and Public Procurement: Specialisation Theory and Empirical Evidence' (2001) 16 *Journal of Economic Integration* 106. and Marius Brühlhart and Federico Trionfetti, 'Public Expenditure, International Specialisation and Agglomeration' (2004) 48 *European Economic Review* 851.

trying to circumvent the non-discrimination obligation.¹²⁰ Only a small percentage of government contracts were directly awarded to foreign suppliers from other GPA signatories. For example, in the EU, only 3-4 per cent of the value of the contracts above the GPA thresholds were awarded to other GPA signatories.

Similarly, in Japan and Switzerland, the national government procurement markets, which are practically available to foreign competitors, are far lower than it should have been awarded contracts to foreign suppliers.¹²¹ Among the GPA non-signatories, especially developing countries, discriminatory government procurement is much more overt.¹²² With regards to *de jure* price favouritism, Kuwait applies a 10 per cent price preference to local suppliers; Paraguay applies a 20 per cent price preference to local suppliers; the Philippines applies a 50 per cent countertrade requirement; Qatar applies a 10 per cent price preference to local suppliers, and Venezuela applies a 5 per cent price preference to domestic suppliers), etc.¹²³

3.4.1 Are the Effects of Discriminatory Government Procurement Positive?

Discriminatory procurement measures generally belong to two categories: discriminatory measures with eliminating effects on competition (*exclusionary discrimination*), which exclude the participation of foreign suppliers.¹²⁴ The measures may include failure to provide adequate information concerning bidding opportunities,¹²⁵ selective tendering or single-source bidding

¹²⁰ See examples like those derogations immediately above this paragraph. According to Hoekman and Mavroidis, the ‘public interest consideration’ (Article XV Revised GPA: Treatment of Tenders) and the ‘appropriateness-test’ (Article X: 2 Technical Specification) are loopholes in the GPA, because the GPA does not define the ‘public interest’ and the appropriate test is too descriptive and without an existing international standard. Those loopholes potentially motivate signatories to apply discrimination in the procurement process. See further, Bernard M Hoekman and Petros G Mavroidis, ‘The World Trade Organization’s Agreement on Government Procurement: Expanding Disciplines, Declining Membership?’ (1995) Policy Research Working Paper Series from The World Bank No 1429, 7, 8.

¹²¹ See Shingal, ‘Services Procurement under the WTO’s Agreement on Government Procurement: Whither Market Access?’ (n 119).

¹²² See examples (India, Argentina, and Africa) in note 112, 127, 129.

¹²³ Jean Heilman Grier, ‘2017 Trade Barriers Report: Government Procurement’ *Perspectives on Trade* (12 April 2017). Fernando Branco, ‘Favoring Domestic Firms in Procurement Contracts’ (1994) 37 *Journal of International Economics* 65. See also Chiara Carboni, Elisabetta Iossa and Gianpiero Mattera, ‘Barriers To Public Procurement : A Review and Recent Patterns In The EU’ (2017) Working Paper No. 92 May 2017 4.

¹²⁴ For example, based on the 2016 amendments to Russia National procurement Law, Russia created a registry of Russian software and approved a three-year plan to switch government agencies to Russian office software. It has also imposed a general ban on over 100 types of foreign-made radio-electronic products and components. See United State Trade Representative, ‘2017 National Trade Estimate Report on Foreign Trade Barriers’ (2017).

¹²⁵ It happens in many ways. For example, the announcement of a government’s procurement intentions may not be widely publicised or may be placed in publications that are not well known to most foreign suppliers, or that may not provide the necessary information (such as the place) to interested bidders. Foreign participation could also be excluded if governments arbitrarily fix a very short time limit for bid submissions, so that this condition becomes a major barrier to foreign concerns.

procedures, and so forth. Then there are discriminatory measures that restrict the effects of competition, by favouring domestic suppliers (*favouritism discrimination*), and by measures such as foreign content ceilings on successful bids;¹²⁶ special technical specifications not directly relevant to the performance, but which indirectly grant the preferred suppliers privilege,¹²⁷ and so forth. Price preference is the most common policy of this kind. The ‘Buy American Act 1933’, for example, specified preference of 6 per cent to domestic suppliers, 12 per cent to small-sized suppliers and 50 per cent to military procurement.¹²⁸ Discrimination through eliminating effects is too overt as a distinct trade barrier so that under international government procurement agreements, governments’ discriminatory procurement often takes the covert forms. Whether discrimination is overt or covert, the typical effect is granting domestic suppliers a more significant chance to win and creating barriers to further international trade liberalisation.

3.4.1.1. Effects on Imports

At *Prima facie*, discriminatory policies should favour domestic suppliers having the same effect with tariffs, such as avoiding or decreasing imports and encouraging the growth of domestic output. A fundamental idea behind this expectation is the historically classical mercantilism reflecting a kind of ‘do-it-yourself’ economics.¹²⁹ In a system based on mercantilism, exports are an advantage to the economy because they increase the inflow of gold, while imports decrease the gold supply, which is bad. Similarly, governments believed that if procurement contracts are reserved for domestic suppliers, domestic supply will be

¹²⁶ For example, the India government requires that the minimum local content should be 50 per cent. See Article 4 *Public Procurement (Preference to Make in India)*, Order 2017, No. P-45021/2/2017-B.E.-II. To take other example: Canada maintains a local content requirement in Hydro-Quebec’s wind-energy projects; and the Brazilian National Petroleum Agency established local content requirements for Petrobras, the state-controlled oil company. See Heller Redo Barroso and Marcos Macedo, ‘Local Content in Brazilian Oil Industry’ (2013) 28 T&B Petroleum 64.

¹²⁷ For example, in Western Australia, when comparing compliant bids, public authorities grant a 20 percent preference, applied as a 20 per cent impost on the non-Australian and non-New Zealand value of the tendered price (imported content). See Government of Western Australia, ‘Buy Local Policy: A Western Australian Government Commitment to Supporting Local Businesses’ (2001) 8. Government of Western Australia (Department of Finance), ‘Addendum to the Buy Local Policy October’ (2018).

¹²⁸ There are other examples, such as Argentina, which applies a price preference of 5 per cent to 7 per cent for domestic products and mandates a minimum 33 per cent local content for every public project. J David Richardson, ‘The Subsidy Aspects of a “Buy American” policy in Government Purchasing’, the Economics of Federal Subsidy Programs: A Compendium of Papers PT.2 International Subsidies 220. See Jean Heilman Grier (n 96).

¹²⁹ Under mercantilism, policies such as high tariffs, bans on the export of gold and silver, subsidies on exports, restricting domestic consumption through non-tariff barriers to trade etc., are prevailing. See further David Henderson, *Innocence and Design: The Influence of Economic Ideas on Policy* (Blackwell 1986).

encouraged, and national output will rise, while imports will decline, or at least the import of government procurement will decline.

This logic seems direct and straightforward. However, the relationship between government demand (of which government procurement is a part), domestic supply, and imports are an actively balancing act.¹³⁰ Baldwin and Richardson (1970) argued that when government demand does not exceed domestic supply, under perfectly competitive market conditions,¹³¹ and if the goods are homogeneous,¹³² a discriminatory procurement policy affects neither domestic supply nor imports.¹³³ Miyagiwa (1989) extended this conclusion to the oligopolistic setting; and although the results are ambiguous in some cases, the proposition that discriminatory procurement policies are ineffective in increasing domestic supply or reducing imports is generally confirmed,¹³⁴ and even reinforced. Specifically, if governments apply

¹³⁰ Assuming that: **Total Demand = Total Supply; Total Supply = Domestic Supply + Imports; Total Demand = Government Demand + Private Demand; Private Demand = Domestic Supply + Imports; Total Imports = Government Import + Domestic Import.**

¹³¹ A perfectly competitive market is a hypothetical market where competition is at its highest possible level. In a perfectly competitive market, competitors are too numerous to measure. If the products are homogeneous and other production conditions are identical, there should be no barriers to the market.

¹³² Assuming that purchasing goods are perfect substitutes, and not different from each other, it means here that there is no difference to the extent that it does not influence imports.

¹³³ When the government demand does not exceed domestic supply. Under the condition of a **perfectly competitive market**, where domestic products and foreign supplies are perfect substitutes for one another (**homogeneous supply**), and demands originated from both the private and governments sectors, in a situation in which *government demand falls short of the total domestic supply*, the government needs imports. Governments would prefer to exclude foreign competition. Due to the exclusionary discrimination against foreign sourcing, government demand would be satisfied exclusively from the total domestic supply (due to the exclusionary discrimination against foreign suppliers). Subsequently, *private demand has to seek satisfaction by importing at a volume needed to satisfy the non-satisfied additional demand*, because domestic supply is insufficient to meet the total demand. Briefly, in this situation, excluding foreign suppliers for domestic sourcing is merely a process of replacement (i.e. government imports are replaced by private imports). In sum, discriminatory government procurement is ineffective in decreasing the level of imports, which is contrary to the first assumption. Robert E. and Baldwin, 'Trade Policies in Developing Countries' in Ronald W Jones and Peter B Kenen (eds.), *Handbook of International Economics*, vol 1 (North-Holland 1984) 571-619. Robert E Baldwin and J David Richardson, 'Government Purchasing Policies and NTBs, and the International Monetary Crisis' in HE English and Keith AJ Hay (eds.), *Obstacles to Trade in the Pacific Area: Proceeding of the Fourth Pacific Trade and Development Conference* (Carleton School of International Affairs 1972) 253-254.

¹³⁴ Situation 2: The total demand is totally satisfied by imports. In the case of a **foreign oligopoly**, where only foreign suppliers sell products both to the government sector and to the domestic private sector, governments usually adopt favouritism government procurement policies as a tool to nurture domestic producers (as infant industries). The preference by means of favouritism will secure competition opportunities for domestic suppliers. If price favouritism to domestic suppliers is sufficiently high, domestic suppliers could bid away foreign bidders and keep profits for the domestic suppliers. However, favouritism cannot entirely bid away foreign suppliers from the competition, because private demand may still seek supply from the low-cost foreign suppliers (imports). Furthermore, in the long run, price favouritism contains no incentive for domestic suppliers to reduce cost, and by no means can it secure the entry and survival of the domestic suppliers in international competition. Even if the preferential treatment is sufficiently reasonable to make the domestic suppliers enter into duopoly profitably, it will still not necessarily have the effect of reducing imports (thinking of the Situation 1). Kaz Miyagiwa, 'Oligopoly and Discriminatory Government Procurement Policy' (1991) 81 *American Economic Review* 1326. See also Florence Naegelen and Michel Mougeot, 'Discriminatory Public Procurement Policy and Cost Reduction Incentives' (1998) 67 *Journal of Public Economics* 359.

favouritism discrimination, and grant domestic suppliers premium *ad valorem* (proportional to the price) to the import price, imports will even increase.¹³⁵ This conclusion has also been confirmed in the theoretical literature by Evenett and Hoekman (2005). They suggest that exclusionary discrimination is particularly distortive because there are barriers to competition in domestic markets that absolutely prevent foreign competitors from entering.¹³⁶

Empirical researches generally support the above theoretical conclusion. Lowinger (1976),¹³⁷ and also Deardorff and Stern (1983),¹³⁸ compared the actual import profile of government purchases with that of the private sector for the 1970s and concluded that trade benefits increase if the country does not apply discrimination against foreign suppliers.¹³⁹ Francois, Nelson, and Palmeter (1996)¹⁴⁰ investigated the issue focusing on the US, and found that government procurement discrimination is of high relative importance in the service sectors, (such as the utility sectors), especially in the defence-related sector.¹⁴¹ In those sectors, state ownership/supervision/intervention has a significant presence. As a result, discrimination has a significant presence in those sectors. This is also true of the GPA, where most of the defence procurements, utility services and entities with state ownership/supervision/intervention are

¹³⁵ If the domestic supply and foreign supply are imperfect substitutes (**heterogeneous supply**), In order to meet domestic demand, governments cannot exclude foreign supplies completely. Otherwise, governments prefer to take domestic supplies. *When domestic supply cannot fully satisfy government demand, under a price favouritism policy, government demand (including the part satisfied from import) is shifted to the price-favoured domestic supply.*

*Consequently, private demand has to seek supply by imports (because government demand for domestic supply is increased due to the favouritism policy and the original equilibrium of demand and supply is broken). Furthermore, due to the high demand of the domestic supply, the equilibrium (a state where the supply and demand are balanced) prices after price favouritism would be higher than they were prior to price favouritism. More intricately, if a specific price premia (a fixed price preference) was granted to domestic suppliers, government demand would seek satisfaction from domestic suppliers instead of imports. However, this shifting affects neither the total output nor the equilibrium price; if the government pays domestic suppliers a premium *ad valorem* (proportional to the price) to the import price, discriminatory procurement results in increased imports. See Miyagiwa (n 134) 1321-1325.*

¹³⁶ Evenett and Hoekman (n 100).

¹³⁷ See further Thomas C. Lowinger, 'Discrimination in Government Procurement of Foreign Goods in the U. S. and Western Europe' (1976) 42 Southern Economic Journal 451-460.

¹³⁸ See further Alan V. Deardorff and Robert M Stern, 'Economic Effects of the Tokyo Round' (1983) 49 Southern Economic Journal 605.

¹³⁹ Lowinger analyses the US data and estimates that preferences cost the government \$121 million in 1963 and predicts that imports by the US government in the mid-1960s would have increased by a factor of 7 if preferences had been eliminated. See Thomas C. Lowinger (n 137).

¹⁴⁰ Francois et al. evaluated the effects of the GPA based on U.S. data disaggregated by sector and procuring agency from 1992 to 1993, and compared government demand and private demand in 85 industrial categories and commodities. See further Joseph F Francois, Douglas Nelson and N David Palmeter, 'Public Procurement: A Post-Uruguay Round Perspective' (1996) CEPR Discussion Paper Series No. 1412.

¹⁴¹ They found that non-defence federal procurement and State procurement rarely exceed 10 per cent of total demand. The small size of the government's demand with respect to private demand leads them to argue that discriminatory procurements are likely to have only marginal effects on domestic supply and trade flow. See Francois, Nelson and Palmeter (n 140).

still subject to derogations in each General Notes. Therefore, it is argued that the GPA rules still need further development on the aspects of scope and coverage. Trionfetti (2001) refined Baldwin's theory with empirical evidence supporting the conclusion that the same discriminatory practice, applied to different sectors of the economy, produced different results.¹⁴² Given that it is difficult to determine which discriminatory policy is optimal, in practice, the rule of thumb would be not to discriminate, since favouritism is expected to be much more costly than non-discrimination.¹⁴³

3.4.1.2. Effects on Social Welfare¹⁴⁴

Governments promote social welfare through all kinds of policies, of which procurement policy is one. Therefore, another theoretical argument against the GPA is that prohibition of discriminatory government procurement precludes the pursuit of optimal social welfare.¹⁴⁵

McAfee and McMillan (1989) conclude that price favouritism can increase social welfare if preferential government procurement policy is based on domestic advantages with foreign suppliers. More precisely, they conclude that a smaller price preference should go to the

¹⁴² For example, due to different market structures of different sectors, the same discriminatory procurement policy may increase domestic output and reduce imports in specific economic sectors, while having completely inconsequential effects on trade and specialisation in other sectors. In order to verify this assumption, Trionfetti makes a theoretical and empirical analysis between the economic sectors characterised by CRS-PC (respectively constant returns to scale and perfect competition) and other sectors by IRS-MC (increasing returns to scale and monopolistic competition). In sectors characterised by IRS-MC, if government demand is sufficiently large, a discriminatory policy will affect international specialisation and will most likely reduce the volume of trade. In sectors characterised by IRS-MC (such as electrical goods sector), domestic supply will have to increase, and foreign supply will have to decrease. See Trionfetti (n 110).

¹⁴³ In many situations, the information required to judge whether divergence from non-discrimination is beneficial will not be available (because of the characteristics of specific sectors, the relative significance of government demand, the substitutability of domestic and foreign supply, market structure and the manner in which procurement price is determined). Non-discrimination has therefore been commended as a good rule of thumb. See further Hoekman (n 66). See also Aaditya Mattoo, 'The Government Procurement Agreement: Implications of Economic Theory' (1996) 19 *The World Economy* 702.

There is also literature in support of discrimination. Most of that literature has evolved from the literature above, but put in a specific context to explain that discriminatory government procurement could under certain conditions contribute to fulfilling the government's domestic objectives. See generally Shingal, 'Econometric Analyses of Home Bias in Government Procurement' (n 119). In a comparative advantage context, see R Preston McAfee and John McMillan, 'Government Procurement and International Trade' (1989) 26 *Journal of International Economics* 291.

¹⁴⁴ Social welfare consists of the surplus of domestic suppliers and surplus of the customers (generally the taxpayers), minus government expenditure.

Social Welfare = Surplus of Domestic Suppliers + Surplus of Customers - Government Expenditure

In this equation, in order to increase the left side, the government can either increase the surplus of the domestic supplier or/and the surplus of customers, or decrease government expenditure, or both. When a price preference is granted to the domestic supplier, the surplus of domestic suppliers increases. However, due to the rise in prices brought by the policy, the surplus of customers decrease and government spending increase. The increase in social welfare can only be realised when the surplus of domestic suppliers can totally offset the increased price as a result of the preference.

¹⁴⁵ Mattoo (n 143) 702.

industries with comparative advantages, while more significant price preference should go to the industries with no comparative advantages.¹⁴⁶

In contrast to the economic conclusion, governments in practice usually grant favouritism to industries without comparative advantages or even exclude foreign competitors in order to support infant industries. *Prima facie*, this kind of favouritism is rational and can win support from its constituency. However, the negative effects of the policy may have even worse effects on total social welfare than general favouritism or discrimination. The reason is that a relatively larger number of bidders means a large number of competitors and stronger competition in the market. The negative price preference effect on welfare outcome will be diminished, to some extent, through stronger competition.¹⁴⁷ Once again, in contrast to the optimal choice of keeping a large number of bidders, governments in practice usually minimise the number of bidders to reduce procurement costs, because a bigger number of competitors immediately demand an increase in procurement costs, and constitutes a significant proportion of the procurement budget.¹⁴⁸ Due to political considerations (domestic bidders are part of their constituencies), governments are more likely to exclude foreign bidders to restrain the procurement budget. Thus, the adverse effects of a bad discriminatory procurement policy would be amplified.

Lowinger (1976) and Deardorff and Stern (1983) provide empirical evidence to support the argument that substantial welfare gains would derive from non-discrimination procurement

¹⁴⁶ McAfee and McMillan express doubt as to whether a discriminatory government procurement policy has positive effects when comparative advantages can be observed, and meanwhile favouritism applies to the industries with comparative advantages. 'Zero' preference is not the benchmark to examine whether or not the effect of government procurement regulation is positive. Optimal favouritism is that with which the discrimination effect may have positive effects on overall social welfare. Generally excluding foreign suppliers is clear-cut but have no good to welfare. Therefore, the international regulations applying non-discriminatory policies seems to be justified only 'when it presents no comparative advantages or when governments just care for consumer surplus.' See further McAfee and McMillan (n 143) 291-299. Naegelen and Mougeot (n 134) 357.

¹⁴⁷ The number of participants in the bidding is irrelevant to an optimal policy for government procurement. However, it would not be true to say that an insignificant decrease in the number of bidders would have no impact at all on the final welfare outcome. When the number of bidders increases, the visibility of the preferential policy decreases significantly. See further McAfee and McMillan (n 143) 302.

Branco (1994) and Vagstad (1995) further examined the price preference in another example, which was that in a situation where the price preference to domestic suppliers induced them to raise their bidding price (for larger profits), and a foreign supplier bid a lower price, and thereby won the contract, government expenditure will be reduced. In this situation, discrimination may be the optimal proposal, simply because foreign profits do not play a part in domestic welfare. See Branco (n 123). Steinar Vagstad, 'Promoting Fair Competition in Public Procurement' (1995) 58 Journal of Public Economics 283.

¹⁴⁸ Thomas G Noordewier, George John and John R Nevin, 'Performance Outcomes of Purchasing Arrangements in Industrial Buyer-Vendor Relationships' (1990) 54 (4) Journal of Marketing 80-93.

policies.¹⁴⁹ Evenett and Delta (1997) examined the distribution effect of discriminatory procurement and concluded that price favouritism in procurement brings in marginal welfare, as increased procurement costs ultimately offset the benefits from shifting profits to domestic suppliers.¹⁵⁰ The corollary is that discriminatory procurement is beneficial under a producer's welfare standard (based on the producer's surplus rather than the total social welfare surplus). In economies in which government procurement policies mainly pursue industrial growth, and in countries that have political ambitions to promote international competition of national champion enterprises, price favouritism is especially common to see. Empirical evidence garnered from many developing countries has established that there is an industrial and political will to promote discriminatory government procurement policies.¹⁵¹

Evenett and Hoekman (2005) extended the work of Baldwin (1970) and Baldwin and Richardson (1972) and considered the implications of market entry for other competitors. They showed that, in a situation where discrimination against foreign bidders limits market access, the long-term impact on national welfare depends on the prevalence of local (natural and policy-induced) barriers to competition, i.e., procurement bans and price preference.¹⁵² The empirical study by Kutlina-Dimitrova and Lakatos (2016) further predicts that the impact of discriminatory government procurement on prices and domestic welfare is contingent upon national competition policy, including the market regulation affecting the scope of public enterprises, regulatory protection of existing providers and barriers to foreign indirect investment.¹⁵³

Both the theoretical and empirical studies here indicate that in order to restrain the negative effect on social welfare brought about by discriminatory government procurement, the concept

¹⁴⁹ Lowinger estimated that imports by the US government in the mid-1960 would have increased by six or seven times more than their actual level at that time. Deardorff and Stern argued that welfare gains from liberalising government procurement under the Tokyo Round Code on Government Procurement would be greater than the gain from tariff reduction by industrial countries, and, the liberalisation effect on US economic welfare would be positive. See further Deardorff and Stern (n 138) 620. Thomas C. Lowinger (n 137).

¹⁵⁰ Simon J Evenett and George Deltas, 'Quantitative Estimates of the Effects of Preference Policies' in Bernard M Hoekman and Peter Mavroidis (eds.), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (Ann Arbor: University of Michigan Press 1997) 73-89. See also OECD, *The Size of Government Procurement Markets* (OECD Publishing 2012) 16.

¹⁵¹ See examples (India, Argentina, and Africa) in note 115, 130, 131. More examples, such as Kuwait (10 per cent price preference for local suppliers), Paraguay (20 per cent price for local suppliers), Philippines (50 per cent countertrade requirement), Qatar (10 per cent price preference for local suppliers), Venezuela (5 per cent price preference for domestic suppliers), etc. See further, Jean Heilman Grier (n 96).

¹⁵² Evenett and Hoekman (n 100).

¹⁵³ The prediction is built on a modelling analysis of panel data of the direct cross-border procurement award in the EU Member States for the years 2008 to 2012). The finding is that local governments have the lowest tendency to award contracts to foreign suppliers and that utility contracts have the highest tendency to be awarded to cross-border bidders. Kutlina-Dimitrova and Lakatos (n 119) 524.

of market access, or more broadly, the concept of competition, must be introduced into the regulation of government procurement, especially in the GPA. (This idea will be examined further, particularly in Chapter 7). The underlying rationale of promoting competition is that it can stimulate domestic industry, and promote innovation, whereas market distortion reduces economic efficiency.¹⁵⁴ More dangerously, since the country taking the initiative to distort competition enjoys the first-mover-advantages, such as nurturing infant industries or avoiding adjustment in old industries, its trade partners would then respond by introducing similar discriminatory practices, engendering a ‘race to the bottom’.

Assessing the implication of current policies and the likely consequences of changes in policies for economic welfare is an important task for policymakers. All policy-makers expect that their policies eventually increase national welfare. The process of policy implementation reflects the different priorities of different interested groups. Thus, governments will never end up with an outcome of maximised welfare. If the gains accrued to the favoured groups are not sufficient to offset the loss of other groups, and cannot even the increased government expenditure, the discrimination policy will be inefficient.

Similarly, it is not rational to insist on discrimination against opening international market competition. Import reductions and welfare increases are complicated mechanisms influenced by various factors (such as the market structure, national competition policies, comparative advantages, etc.). All those factors may have unexpected outcomes. If lacking transparency, the information of those factors could be incomplete, or even not available or insufficiently reliable to enable governments to formulate optimal discriminatory procurement policies. Therefore, instead of a policy that merely favours certain groups of suppliers, and which may not bring about the anticipated effects, it would be better to adopt a rule of thumb policy of non-discrimination against all competitors.

¹⁵⁴ Preferential price policies shift profits to domestic firms, but increasing procurement costs ultimately offset these benefits. See also Working Party on GATS Rules, ‘Government Procurement of Services, Communication from the European Communities and Their Member States’ (n 88) para 3.

3.4.2 Why Continue to Discriminate?

Although the above literature concludes that discriminatory government procurement has no positive effect on reducing imports or increasing social welfare,¹⁵⁵ the question which arises is, why is discrimination still prevalent in the field of government procurement?

It is commonly believed that discriminatory government procurement is motivated by protectionism. As the analysis of Baldwin and Richardson indicates, the aggregate effects of discrimination on imports are likely to be small. As an instrument of protection, the cost of discriminatory government procurement is likely to be expensive and to yield little in terms of social welfare. In order to win the support of voters, governments usually make efforts to spend a minimum and to yield maximum results. Therefore, costly as it is, protectionism is not the most likely reason, at least not the only reason, for discriminatory policies.¹⁵⁶

Besides the economic concerns, there are non-economic aspects of discriminatory government procurement policies. Government procurement is not purely an international trade topic; it is also a politico-economic tool. It involves political considerations and economic policy priorities. One of the main differences between 'pure' international trade theory and political economy theory is whether the government decision is solely based on welfare maximisation or whether it also takes into account the interests of campaign contributors, voters, and special interest groups. The dual characteristics of government procurement provide us with another perspective to explain discrimination—the political perspective.

In a democracy, interested groups, be they individuals, groups, or organisations in the private sector, such as trade associations, professional associations, and business firms or companies, are actively involved (with various objectives and beliefs) in all aspects of the public procurement system. The involvement can take various forms, such as lobbying legislative bodies to pass or alter procurement statutes influencing budget authorisation appropriations

¹⁵⁵ There is also research that recommends discrimination as a way of lowering the procuring cost of services, whether these are verifiable or unverifiable. See the 'incomplete contract' (contracts whose terms, while observable by the signing, cannot be verified by third and are, therefore, legally unenforceable) perspective from Albert Breton and Pierre Salmon, 'Are Discriminatory Procurement Policies Motivated by Protectionism?' (1996) 49 *Kyklos* 47.

¹⁵⁶ Besides, if protectionism is the motivation for discrimination, and makes sense in the international competition context, then why do differently motivated states also discriminate? In conclusion, Breton and Salmon state that the motivation has other explanations. See Breton and Salmon (n 155) 50, 51. Also Baldwin and Richardson (n 133). For sceptics with regard to the government budget mechanism perspective see, e.g. Timothy Besley and Anne Case, 'Incumbent Behavior: Vote-Seeking, Tax-Setting, and Yardstick Competition' (1995) 85 *The American Economic Review* 25.

process. In this democratic environment, these interest groups form a coalition with policy-makers and bureaucrats, putting intense pressure (thinking about the defence procurement) on government procurement officials.¹⁵⁷ Those pressures on government procurement systems could force the government to make procurement decisions that favour those interested groups.¹⁵⁸

Furthermore, from the perspective of international trade, the political dimension still brings some explanation of discriminatory government procurement. Trade benefits are not always distributed evenly. Sectors, industries or groups of people without comparative disadvantage *immediately* (not ultimately) suffer a loss during liberalisation.¹⁵⁹ The disadvantaged industries may face immediate decline when competing with relatively stronger foreign competitors. Unemployment rates in these industries (especially in labour-intensive industries) can rise quickly when cheaper goods or labours are available.¹⁶⁰ Although the comparatively disadvantaged industries could theoretically obtain compensation in other ways, this takes time, but social impacts, such as high unemployment rates, social inequality, and the restructuring of the domestic industry, are immediate. If governments fail to satisfy the lobby effects of these interested groups or fail to mitigate the negative impacts engendered by international competition, they may lose domestic support in the next election.

The literature above has demonstrated that discriminatory government procurement is insufficient to gain a total social welfare surplus, but it still brings partial benefit to the favoured domestic supplier, because the immediate discrimination effect is to shift opportunities for profit to domestic suppliers.¹⁶¹ Governments have strong incentives to insist on domestic

¹⁵⁷ Thai called this relationship 'the iron triangle', in which the three angles are the legislative body, the interest groups and bureaucrats. See further Khi V. Thai, 'Public Procurement Re-Examined' (2001) 1 *Journal of Public Procurement* 35.

¹⁵⁸ The beneficiaries of trade liberalisation are likely to be a much less powerful political force, even though the total of these benefits of liberalisation outweighs the costs.

¹⁵⁹ Instead, from a long-term point of view, liberalisation could push industrial upgrading and spur innovation. Therefore, overall, trade liberalisation would drive the increase of trade benefits.

¹⁶⁰ It is commonly believed that protectionism saves jobs in the protected industries only because it costs jobs in other unprotected industries. However, this is not the whole story. According to the US International Trade Commission's studies of barriers to trade, reducing trade barriers would not lead to an *overall* increase of the unemployment rate. Protectionism or discrimination reshuffles jobs from industries without import protections to industries that are protected from imports, but it does not create more jobs. Moreover, as a tool for saving jobs, protectionism or discriminations has turned out to be very expensive. See Jagdish N Bhagwati, 'Shifting Comparative Advantage, Protectionist Demands, and Policy Response' in Jagdish N Bhagwati (ed.), *Import Competition and Response* (University of Chicago Press 1982) 165-179.

¹⁶¹ See, immediately above, an analysis of the 'effect on social welfare'. A corollary of the conclusion by Evenett and Delta (1997) that 'price favouritism in procurement brings in marginal welfare, as the benefits from shifting profits to domestic suppliers', is that, although discriminatory government procurement has no benefit to the total social welfare surplus, it does increase the domestic suppliers' welfare surplus.

favouritism in exchange for political voting support. Considering that the negative domestic political impacts on government brought about by opening market access is immediate, governments are less motivated to adopt what are, from a long-term perspective, beneficial non-discriminatory public procurement policies. Governments typically prefer a preferential procurement policy with immediate effects, at least within their terms of office.

This decision process happens especially in countries with comparatively small trading power in international trade, where the compensation is not likely to be obtained in the short term.¹⁶² Thus, although the economic benefit from non-discriminatory government procurement policies is predictably positive and non-political, for national politicians, the negative political impacts brought about by non-discrimination are immediate. Moreover, the cost of establishing a non-discriminatory procurement mechanism could also increase the government spending budget (even though this reform cost is a one-off). Not surprisingly, governments prefer discriminatory practices for their immediate outcome, rather than non-discrimination for the more remote benefits of non-discriminatory trade competition.

Domestic businesses are not the only source of incentive on governments to impose discrimination against foreign outsourcing. Citizens of countries also believe that governments should keep the contract within the domestic borders to strengthen the home economy and to bring other benefits, such as greater employment opportunities. One case in point is the Bay Bridge Project in California, United States. Instead of marvelling at the design of the bridge, cities directed their criticism at the award of the contract to erect the central tower and the two 1,500 feet steel road decks to a Chinese supplier. It was said that the 100 per cent of foreign steel outraged every Californian taxpayer. The critics insisted that this contract should have been reserved to San Francisco in order to generate thousands of American manufacturing jobs.¹⁶³

Nevertheless, government procurement applies discrimination for non-economic motives. As discussed in Chapter 2, section 6.2 (non-economic goals), government procurement has multi-layered objectives. Striking a balance between non-discriminatory trade and other policy objectives in the context of international trade (including government procurement) involves political considerations, and is also of significant concern in any trade agreement under the

¹⁶² The domestic market structure of countries having little trading powers (usually developing countries and countries in transition) is usually not perfect. The inherent weaknesses of domestic markets cannot guarantee a surplus in international trade: on the contrary, it is more likely to produce adverse effects.

¹⁶³ Scott Cohn, 'Bay Bridge Project: Lost Opportunity for US Jobs' *CNBC* (New Jersey, 1 June 2012).

WTO. For example, it has to be decided whether the United States must ban tuna fishing in a way that is ‘dolphin-unfriendly’;¹⁶⁴ and whether the European Union should exclude ‘hormone-treated’ beef on health grounds.¹⁶⁵ Similarly, under the GPA, the extent of discrimination out of secondary objectives (non-economic objectives) is always of concern to those advocating an increase in GPA signatories.

3.5. Conclusion

The development of trade since the disasters of the First and Second World Wars taught the lesson that discriminatory policy produces negative effects, both economically and politically. Free trade is not for a single country’s welfare, but for the welfare of the entire world, whereas discriminatory ‘beggar-thy-neighbour’ policies cannot secure continuous or sustainable prosperity for any country. Continuous sustainable growth of the world economy requires cooperation in reducing trade barriers, of which non-tariff barriers (such as discriminatory government procurement), are the most obvious since the reduction tariffs in the GATT era.

Thanks to multilateral efforts since the GATT, most explicit trade barriers have been subject to WTO Agreements. The WTO has proved to be a successful platform for countries to negotiate trade concerns. However, multilateral negotiations on government procurement seem not as successful as those involving other non-tariff barriers, such as subsidies and countervailing measures. Since the first multilateral initiative in the Tokyo Round, negotiation efforts on government procurement have achieved no progress in multilateral liberalisation (currently the GPA is still plurilateral). For political and economic reasons, government

¹⁶⁴ In the *Tuna Fish Case* (the GATT Tuna-Dolphin I and Tuna-Dolphin II disputes), the US banned Mexico’s exports of tuna to the US because Mexico could not prove to the US authorities that it met the dolphin protection standards set out in the US law (i.e. The US Marine Mammal Protection Act. The latter sets dolphin protection standards for the domestic American fishing fleet and for countries whose fishing boats catch yellowfin tuna in that part of the Pacific Ocean. The reason is that in eastern tropical areas of the Pacific Ocean, schools of yellowfin tuna often swim beneath schools of dolphins. When tuna are harvested with purse seine nets, dolphins become trapped in the nets and often die unless they are released.) See Report of the Panel, ‘United State —Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products’ WT/DS381/R 15 September 2011. and Report of the Panel, ‘United States — Restrictions on Imports of Tuna’ DS29/R 16 June 1994.

¹⁶⁵ This dispute the one of the most controversial issues since the establishment of the WTO. In 1989, the EU banned the importation of meat that contained artificial beef growth hormones approved for use and administered in the US. In 1998, the WTO Appellate Body ruled that the EU ban on importation of hormone meat was not based on a risk assessment within the meaning of Article 5.1 and 5.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures and was therefore inconsistent with the requirement of Article 5.1. See Report of the Appellate Body, ‘European Communities Measures Concerning Meat and Meat Products (Hormones)’ WT/DS26/AB/R WT/DS48/AB/R 16 January 1998 para 208.

procurement liberalisation in the foreseeable future will continue to employ the less effective plurilateral approach.

Trade liberalisation in the field of government procurement has been frustrated by countries' discriminatory *de jure* and also *de facto* practices and policies. Governments promote discrimination by flagrant exclusionary measures, such as general exclusions of foreign bidders, and latent measures, such as price favouritism, are rampant. No matter whether exclusionary discrimination or favouritism, their motivation is the same, namely keeping the contract opportunities within the domestic borders (in the interest of reduction of imports and increases in social welfare). Governments believe that awarding contracts to domestic economic operators keeps the benefit inside the country and contributes to national prosperity. The logic seems to be intuitively right. However, abundant economic theoretical analyses and empirical evidence indicate that discriminatory government procurement policy is an ineffective way of frustrating imports and fails to increase the total social welfare surplus, because the surplus of the domestic suppliers accrued by discrimination and favouritism produces negative impacts on other economic components, such as consumers' surplus.

Furthermore, privileged domestic suppliers have the motivation to bid up the equilibrium price. The higher equilibrium price decreases consumer welfare, as well as pushing up government procurement costs. Worse still, if a government applies general exclusionary discrimination against foreign suppliers, the lack of sufficient competition amplifies the adverse impact on government procurement. That is why, economically, the GPA requires expansion in the number of signatories (as competitors), and a reduction in derogations (as called for exceptions to non-discrimination obligation) in the 'General Notes'.

Despite the inefficient outcomes proved by economists and empirical studies, governments still insist on discrimination in the field of government procurement. The typical justifications for discrimination can be explained from a political aspect. The first and most commonly encountered is the industrial argument. The government may have the incentive to make discriminatory decisions arising from the lobbying of vested- interest groups, i.e. for reasons of 'political economy'?¹⁶⁶ A wish to protect infant industries could also motivate them, and they reflect an attempt to offset the higher input cost of domestic bidders.

¹⁶⁶ Hoekman (n 66) 263.

From a functional perspective, if government procurement law takes economic efficiency as the sole priority, eschewing political and social judgments, then it would be better for government procurement regulations to reflect economic conclusions rather than consider too many political factors. However, economic efficiency is not the sole and exclusive basis for national procurement legislation and policy. Non-economic values are also a major concern for national government procurement regulations. Thus, in order to increase the signatories and to promote the reduction of discriminatory practices, the author argues that the GPA must promote non-discrimination as an international government procurement regulation and, also, must incorporate specific national non-economic objectives.

The government inevitably considers an evaluation of those non-economic objectives in deciding whether to intervene and how to exercise discretion. The political dimension associated with social values and social welfare seems to imply that any public procurement definition and rules must blend political, economic and jurisprudential rules harmoniously. In other words, it is submitted that the claims of derogation/exclusion/justification from the non-discrimination principle,¹⁶⁷ be they based on political considerations, or economic expertise, always need to be balanced in a government's procurement definition.

¹⁶⁷ Article IV: 1 & 2—General Principles: Non-Discrimination, the Revised GPA.

CHAPTER 4 THE ENTITY COVERAGE OF THE GOVERNMENT PROCUREMENT AGREEMENT

4.1. Introduction

The economic literature on discriminatory government procurement demonstrates that promoting competition in the government procurement market brings more benefits than applying discriminatory measures or practices.¹ Eliminating discrimination and trade liberalisation are the main aims and purposes of the Government Procurement Agreement (hereinafter referred to as the ‘GPA’). In order to achieve these objectives, the GPA has made continual efforts to gain more signatories and to expand its scope and coverage. However, it is argued that the current GPA ‘entity coverage’ approach has more disadvantages than merits for future GPA expansion. In this chapter, an attempt will be made to explain why the current GPA entity coverage approach is problematic and what the gist of the GPA entity coverage is. The conclusion of this chapter will be a preliminary premise of the discussion of subsequent chapters 5 and 7.

To achieve the above purpose, the first part of this chapter presents a historical overview of the evolution of the GPA, from the OECD’s works on Government Procurement, the General Agreement on Tariff and Trade (GATT) Tokyo Round Code on Government Procurement (1979) and the WTO/GPA (1994) to the Revised GPA (2012). It is important to note that entity coverage has expanded from the central government level (annexe 1) to sub-central level (annexe 2) as well as ‘other entities’ (annexe 3). If entity coverage is expected to expand further and the purpose of the GPA is to be achieved through an expansion to its signatories, future GPA negotiations will have to draw lessons from its negotiation history. One key lesson to draw from the failure to negotiate a multilateral agreement on government procurement is that attempts to reduce barriers of discriminatory government procurement will fail without sufficient co-efficient negotiation for opening the procurement markets of developing countries to international trade. Therefore, the future GPA expansion should further recognise and incorporate the concerns of developing countries, among which the entity coverage of State-owned enterprises is one of the big concern in accession negotiations.

¹ See the economic evidence and analysis in Chapter 3 Section 4.1.

In the second part of this chapter, the author criticises the current GPA entity coverage approach because of the limitations it possesses to trade liberalisation in international public procurement markets. The continual expansion of entity coverage has produced a ‘list approach’, which means listing all covered entities in each Party’s coverage schedules. It is important to note that ‘plurilateral nature’ and ‘stringent reciprocity’ are the two main features of this approach, and these two features have complicated the accession negotiations. Under the plurilateral negotiation, most-favoured-nation obligation does not equally/generally applies to each party. The trade commitment is made bilaterally among Parties, which is limited compared with the trade commitment made under a general most-favoured-nation obligation in multilateral WTO agreements. In addition, stringent plurilateral reciprocity has led to many country-specific derogations in each Party’s coverage schedules. Those country-specific derogations allow *de facto* intra-discrimination, which is not consistent with the aims and purposes of the GPA. The GPA opt-out mechanism of any listed entity reveals that the current entity coverage approach neither encourages acceding Parties to provide a ‘wider’ range of entity coverage nor provides legal certainty to facilitate the GPA Parties’ coverage modification. In order to avoid these drawbacks, a definition of the covered entity is desirable and necessary.

In the third part of this chapter, the author conducts a reflection of the GPA legal text and the Parties’ coverage schedules with an attempts to grasp the gist of GPA entity coverage and find out the implied consensus among the Parties. The first consensus is that government ‘control’ is a crucial feature of ‘government entity’. The second consensus is that the Parties commonly take the criteria of whether an entity ‘compete’ in the market as a general reference to decide whether the entity is subject to the GPA.

4.2. The Evolution of the GPA

4.2.1. The OECD Works on Government Procurement 1970

The significance of the government procurement in the OECD countries at all levels of government is greater than that of other countries. According to OECD statistics, among the 5550.6 billion US dollar contract value of government procurement, OECD countries account for 86.1 per cent.² This hugely significant factor motivates the efforts to eliminate trade barriers

² Julien Gourdon and James Messent, ‘How Government Procurement Measures Can Affect Trade’ (2017) OECD Trade Policy Papers, No. 199, OECD Publishing, Paris, 1. See also OECD, *The Size of Government Procurement Markets* (OECD Publishing 2012) 16.

in the international government procurement market.

The initial initiatives for negotiations to open up public procurement market to international trade were negotiated by the OECD in 1970 through its Guideline on Public Procurement. Consequently, a discussion of that Guideline and OECD's early work on public procurement is integral to our understanding the evolution of the GPA, including its entity coverage.

Efforts towards the establishment of the 1970 OECD Guideline on GP commences in July 1962, when the OECD Council recommended its members to review their domestic administrative and technical regulations in order to eliminate inessential provisions that were 'harmful to trade'.³ In late 1967, as a consequence of the review, the OECD Secretariat drafted a 'guideline text on government procurement' and circulated it among the member countries.⁴

Following consultation among the OECD countries, the OECD guideline on Government Procurement was published in 1970. The OECD guideline covered almost all the issues that would have to be confronted if an international government procurement code was to be adopted.⁵ Given the trade significance of government procurement market,⁶ at that time,

³ Challenge procedures on such trade barriers were established. Thus, if any member considered that other members had the kind of trade policy that had direct or indirect discriminatory effects on trade, that member could refer its complaint to the OECD. Belgium and UK had requested a consultation with the trade Committee of the OECD regarding the US 'Buy American' policy. This complaint led to a comprehensive examination of discriminatory government procurement policies among OECD members. A government procurement working group of the OECD's Trade Committee began to investigate 'the fairest possible government procedure, seeking to limit discrimination against foreign suppliers'. The review report showed that the United States was not the only country granting preference to domestic suppliers. These discrimination practices can be visible, as in the US statutory price preferences included in the Buy American Act; or invisible, as in the administrative measures, practices, and procedures of most other countries. Therefore, the focus of the investigation shifted to a general review of government procurement procedures of all OECD members. OECD: 'Administrative and Technical Regulations: The Lesser Known Obstacles to Trade' (OECD Observer, 1963). OECD Trade Committee, 'Legislation and Regulation Regarding Government Contracts--Note by the Secretariat' OECD Doc. TC (60) 30 29 October 1962 para 2. OECD, *Government Purchasing in Europe, North America and Japan: Regulations and Procedures* (21th edn., OECD publishing 1966) 116.

⁴ The 'guideline' was opposed by the United States on the grounds that the opening bidding and award procedures in other OECD members were inadequate. In 1969, the United States proposed its own draft and submitted it to the Secretariat. Later on, the American draft guideline was quickly accepted by the OECD. See Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (Oxford University Press 2007) 204.

⁵ Although this guideline was not binding, however its content was very comprehensive. It is noteworthy that the OECD guideline included the principles of non-discrimination and transparency. However, the negotiations on application scope, ex-post publicity, procedure of dispute settlement and the threshold value came to a standstill. These divergences were irreconcilable. The OECD 'Draft Instrument on Government Policies, Procedures and Practices' solved a lot of the problems and framed future discussions in the multilateral forum. See Richard Woodward, 'Global Monitor: The Organisation for Economic Co-Operation and Development (OECD)' (2009) 9 *New Political Economy* 122.

⁶ For example, the ratio of government procurement in the GDP can be as high as 19.27 per cent for South Asia and 14.91 per cent for Sub-Saharan Africa. See further Federica Saliola Simeon Djankov, Asif Islam, 'How Large Is Public Procurement in Developing Countries? PIIE Realtime Economic Issues Watch Report (7 November 2016).

developed countries are quite willing to invite developing countries to open their government procurement to international competition. The OECD, however, is a club for wealthy countries, and not an appropriate locus for discussion of the best interests of developing countries.⁷

It is useful to note that as discussed below, the notes made by the OECD during its negotiation on the 1970 OECD Guideline on Government Procurement provided some direction for the GATT Agreement on Government Procurement which pre-existed the WTO GPA.

4.2.2. The GATT Agreement on Government Procurement (Tokyo Code 1979)

At the opening of the Tokyo Round multilateral negotiation (1973-1979), a special working group was established under the GATT as a response to the emergence of non-tariff barriers to international trade, including discriminatory government procurement practices and other barriers, such as quantitative restrictions and technical barriers to trade.⁸ At the end of 1977, the GATT Secretariat integrated the OECD notes⁹ into a draft, the ‘Draft Integrated for

⁷ Although the United States’ draft of the OECD Code on government procurement proposed certain derogations for developing countries, without the presence of developing countries in the negotiation, these derogations could not be considered as being a legitimate reflection of the possible consideration that developing countries might wish to protect. Therefore, the OECD draft did not encourage developing countries to join the government procurement market.

⁸ In order to discipline non-tariff trade barriers, various voluntary ‘codes’ were negotiated to supplement the GATT’s basic rules on trade in products, including disciplines on non-tariff barriers, such as subsidies and countervailing measures—interpreting GATT Articles 6, 16 and 23, technical barriers to trade, import licensing procedures, government procurement, customs valuation (interpreting GATT Article 7), anti-dumping (interpreting Article 6). The codes also replaced the Kennedy Round Code on bovine meat and dairy, Bovine Meat Arrangement, International Dairy Arrangement, Agreement on Civil Aircraft enter into force on the multilateral level.

See WTO, ‘The GATT Years: From Havana to Marrakesh’

<https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm> accessed 15 August 2019.

⁹ Those notes were made during the OECD negotiation on government procurement. This note reflected the logic, scope, fruits and evolution of the past 15 years of negotiation on government procurement codes. Although the attempt to seek a regulation on ‘buy national preferences’ made no progress on the OECD platform, some members (the European Community, Japan, Canada, etc.) were still keeping alive efforts to push forward the liberalisation of the government procurement market. As regards to whether the next step went to the Tokyo forum or proceeded on at the OECD level, the countries had different ideas. The European Community considered that the work of the OECD should be continued and the GATT could have parallel complementary activities, whereas the United States considered that the OECD had solved the problems where it was able. There were still other problems which had no positive results. Consequently, the negotiation came to the multilateral level. Japan had no interest in opening a new forum and insisted on moving current work forward in the OECD. Canada considered that the OECD has done what it could and that it was the time to terminate the standstill and transfer the tasks to the Tokyo Round. (The workings of the OECD came to a standstill at the end of 1975, and negotiations were not resumed until 1976.) In October 1976, the OECD prepared a note that included principal unsettled questions and submitted it to the Tokyo Sub-Committee. See further Annet Blank and Gabrielle Marceau, ‘The History of the Government Procurement Negotiations Since 1945’ (1996) 5 Public Procurement Law Review 96. Arwel Davies,

Negotiations on Government Procurement'. After the circulating the draft, an intensive round of negotiations and consultations among the GATT Parties took place in the 1970s on both bilateral and plurilateral levels.¹⁰

At the time of negotiation, with the increasing role of governments in national economies, it was criticised that a multilateral discipline on government procurement would infringe too closely upon sovereignty.¹¹ Meanwhile, it was hardly possible to obtain the required majority to amend the GATT itself for extending its free-trade obligations (mainly regarding most-favoured-nations and national treatment) to the government procurement field.¹² As a result, a multilateral discipline on government procurement failed to agree upon among the Parties. Instead, a *plurilateral* Code on government procurement was added as a supplementary document after the GATT text, and subsequently signed on 12 April 1979.

Under the Tokyo Round Code on Government Procurement, any obvious bias, such as a clearly stated preference or covert favouritism, were prohibited. In the body of the Code, tendering procedures and a dispute resolution mechanism were introduced in the interest of, transparent, equitable and reasonably competitive government procurement.¹³

Due to its plurilateral nature, the Tokyo Round Code on Government Procurement was only binding on the 25 (GATT) Contracting Parties who had the intention of joining, including Austria, Canada, the European Economic Community (EEC as one Party), Finland, Japan,

'The GATT Article III:8(a) Procurement Derogation and Canada - Renewable Energy' (2015) 18 Journal of International Economic Law 547.

¹⁰ See further, Gilbert R Winham, *International Trade and the Tokyo Round Negotiation* (Princeton University Press 2014) 19. See also, GATT Multilateral Trade Negotiations Group 'Non-Tariff Measures' Sub-Group, 'Draft Integrated Text for Negotiation on Government Procurement' MTN/NTM/W/133/Rev.1 30 March 1978.

¹¹ See further John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn, Cambridge Massachusetts: MIT Press 1997) 225. See also Peter Trepte, 'The Agreement on Government Procurement' in Macrory Patrick F.J., Arthur E Appleton and Michael G. Plummer (eds.), *the World Trade Organization: Legal, Economic and Political Analysis*, vol I (1st edn., Springer 2005) 1129.

¹² Amendments, other than those to Part I of the GATT 1947 (Most-Favoured-Nation and the tariff bindings), Article XXIX (The Relation of this Agreement to the Havana Charter), and the amending article itself, Article XXX (Amendments), could become effective '... in respect of those Contracting Parties which accept them, upon acceptance by two-thirds of the Contracting Parties and thereafter for each other contracting party upon acceptance by it. See Article XXX: 1 GATT 1947. See further Mary E Footer, 'The Role of Consensus in GATT/WTO Decision- Making' (1997) 17 Northwestern Journal of International Law & Business 660-661.

¹³ The Tokyo Round Code consisted of a preamble, nine major articles, four annexes and two notes. The predominant tenor of the Tokyo Code is anti-discrimination in government procurement legislation and practice. In the preamble, the Parties mutually consented to establish institutions of legislation, policy, practice and procedure to eliminate discrimination against foreign suppliers. In the OECD workings, there was no agreed dispute settlement body or procedure for the surveillance of the application of the tendering process. The dispute settlement mechanism of the Tokyo Round Code on Government procurement was the biggest reform to the OECD draft. See further Annet Blank and Gabrielle Marceau, 'The History of the Government Procurement Negotiations Since 1945' (1996) 5 Public Procurement Law Review 97.

Norway, Singapore, Sweden, Switzerland, the United Kingdom on behalf of Hong Kong, and the United States. The negotiations on this Code took place mainly among the original OECD countries and was for the most part dominated by the EEC (now the EU) and the US, which accounted for a substantial market share of the government procurement contracts.¹⁴ Due to the high threshold value (30,000 SDR¹⁵), developing countries were even less interested in negotiating the Code, let alone signing it.¹⁶

The coverage of the Code was limited to goods procurement by central government entities agreed through *quid pro quo* negotiations.¹⁷ Thus, not all central government entities were generally covered, as the Code only applied to those government entities which the Parties had ‘contributed’ to the Code, as listed in Annex I.¹⁸ Also, a large portion of product procurement by departments of defence of the Parties was generally excluded on national security grounds. At the time of the signing of the Code, it was expected to cover a contract value of thirty-five billion USD of government purchasing annually. However, statistics show that, due to the unclear coverage and high threshold value, the outcome was far from satisfactory.¹⁹ In 1987 it

¹⁴ Jeffrey J. Schott, *Uruguay Round: An Assessment* (Peterson Institute for International Economics 1994) 68.

¹⁵ The term SDR is short for ‘Special Drawing Rights’. It is a form of international money, created by the International Monetary Fund in 1969, and is defined as a weighted average of various convertible currencies. See International Monetary Fund, Special Drawing Right (SDR), <<https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/14/51/Special-Drawing-Right-SDR>> accessed 25 August 2019.

¹⁶ Developing countries were scarcely represented during the negotiations of the Code. Only three developing countries signed the Code: Singapore, and the United Kingdom on behalf of Hong Kong and Israel. In 1979, in response to calls from developing countries, a government procurement negotiation Working Group was established as a part of the Tokyo Round negotiation, together with other specific groups. As the structure was kept linear with the OECD, ‘the substance of the negotiation itself ensured that the inherent conflict between the developed and developing countries could be fractionated over the whole span of the negotiation’. See further Bernard M Hoekman and Petros G Mavroidis, ‘The World Trade Organization’s Agreement on Government Procurement: Expanding Disciplines, Declining Membership?’ (1995) Policy Research Working Paper Series from The World Bank No 1429, 7, 8. Gilbert R Winham, *International Trade and the Tokyo Round Negotiation* (Princeton University Press 2014) 19.

¹⁷ The procurements that were covered were defined by four basic parameters: the contract value, the type of goods, the origin of goods, and the procuring entities. The covered procurements were listed in Appendix I, and furthermore, the application of Article VIII exempted certain purchases by a covered entity.

¹⁸ Article I: 1(c), the Tokyo Round Code on Government Procurement.

¹⁹ For example, the value of Japan’s offer was estimated at 6.9 billion USD, however, the Code-covered contract in 1981 was only slightly over 1 billion USD; The Canadian procurement opportunity opened foreign competition accounts of only 8.6 per cent of its total procurement by all levels of government. Although thirty-three billion USD trade was opened for international competition, the Tokyo Code’s economic impact was significantly restricted. See Arie Reich, ‘The New GATT Agreement on Government Procurement’ (1997) 31 *Journal of World Trade* 128-129.

was revised (namely, the Revised Tokyo Round Code on Government Procurement 1988).²⁰ However, the revised Code did not make any extension on entity coverage.²¹

4.2.3. The WTO Agreement on Government Procurement (GPA 1994)

The GPA 1994 (which came into force in 1996) was an *independent* plurilateral agreement of the WTO, not a complementary Code after the GATT.²² As stated in the preamble, the GPA aimed to ensure equal treatment and competition, to eliminate trade discrimination, and to enhance transparency.²³ While the achievement of the most significant extension of entity coverage and the addition of signatories from developing countries was a ‘built-in’ mandate of the GPA,²⁴ it is important to note that during the Uruguay Round (1986-1994), the coverage negotiation avoided the contentious issue of ‘what is government procurement?’ Instead, the original Parties determined the ground they wanted to cover, and the Informal Working Group²⁵ categorised each Party’s applicable entities into groups A, B, C, D respectively in the GPA Appendix I. After each Party’s coverage schedules, the Parties could include ‘*general notes*’ making derogation from non-discrimination obligation.

²⁰ After a long working session in October 1986, in February 1987, the Committee on Government Procurement concluded its work with a ‘Protocol of Amendments to the 1979 Code’. The Parties still could not reach consensus on the remaining issues, such as the ex-post publication of awarding information, the threshold value, and whether leasing contracts by governments should be subject to the Code. See Article I: 1, the Revised ‘Tokyo Round Code on Government Procurement (1988)’.

²¹ The revision mainly related to extending the scope of ‘procurement’. In the Revised Tokyo Round Code 1987, keeping in line with the panel’s view on the dispute of *Sonnar Mapping*, Article I: Scope and Coverage, the word ‘procurement’ replaced the word ‘purchasing’. Not only purchasing activities but also relevant commercial activities, such as lease, rental and hire-purchasing were subject to the Agreement. See Report of the Panel (GATT), ‘United States - Procurement of a Sonar Mapping System’ (1992) GPR.DS1/R 23 April 1992 Article I: 1 (a) the Revised ‘Tokyo Round Code on Government Procurement (1988)’.

²² After the Revised Tokyo Code entered into force in 1988, Parties tabled further negotiation to extend the scope and coverage of the GPA in parallel with the Uruguay Round (1986-1994). The separate negotiations on government procurement, concurrent with WTO negotiation in 1993, ultimately led to the creation of the GPA.

²³ See further the Preamble of the GPA, See also Hoekman and Peter Mavroidis (eds.), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (Ann Arbor: University of Michigan Press 1997) 64.

²⁴ Article XXIV: 7 Reviews, Negotiations and Future Work (GPA 1994): ‘...the Parties shall...improving this Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to the developing countries...avoid introducing or prolong discriminatory measures or practices which distort open procurement and ...seek to eliminate those discriminations.’

²⁵ An Informal Working Group was established in May 1985 by the Committee on Government Procurement. It mainly worked on the drafting of texts on less controversial issues and narrowing down the differences on more controversial issues, so as to make improvements to the Agreement. The Informal Working Group set its own working calendar and procedures and the Parties were free to take part in their meetings. The Informal Working Group had an administrative and monitoring function, aimed at the ‘improvement’ of the Agreement. However, the substantive issues, such as threshold value and the qualification of entities, had to be determined through negotiation among Parties. The Informal Working Group had no say in these issues.

The four groups were as follows:

A: central government entities,

B: regional or local government entities,

C: other entities whose procurement policies are substantially controlled by, dependent on, or influenced by central, regional or local government, and

D: other entities whose procurement policies are not substantially controlled by, dependent on, or influenced by the central, regional or local government.

This negotiation taxonomy was later on accepted in the GPA 1994. Under the latter, the schedule of each party contained only five annexes:

Annexe 1: central government entities

Annexe 2: sub-central government entities

Annexe 3: other entities

Annexe 4: services

Annexe 5: construction services

With this new coverage schedule, the economic impact of the GPA significantly increased, because entity coverage was further expanded to include sub-central government entities and other entities.²⁶ It is notable that, for the first time, the GPA opened the possibility for the inclusion of private entities or quasi-public entities within its coverage under the Annex 3 on other entities.²⁷ Importantly, Annex 3 constituted a miscellaneous category that included any procuring entity under effective government control or influence.

Generally, each Parties coverage on the central government entities level (Annex 1) reached the level of the most-favoured-nation obligation, in accordance with the GATT. However, there were still myriad derogations from the most-favoured-nation treatment, based on strict

²⁶ The GPA 1994 coverage was extended to sub-central and other entities, as well as to the service contracts. The European Commission estimated that the value of opening public contracts access to international government procurement market brought by the GPA 1994 was 450 billion Euros every year, which represents approximately a tenfold increase compared to the GPA 1979. The total purchases by all entities subject to the GPA amounted to sixty-two billion US dollars in 1992, compared to thirty-two billion US dollars in the period 1983-1985.

²⁷ Han-young Lie and Dukgeun Ahn, 'Legal Issues of Privatisation in Government Procurement Agreements: Experience of Korea from Bilateral and WTO Agreements' (2003) 9 International Trade Law & Regulation 60.

reciprocity, as stipulated in Annex 2 and 3.²⁸

Although the overall entity coverage of the GPA expanded significantly,²⁹ the trade liberalisation impact of the GPA was mainly concentrated among developed countries. Due to the plurilateral nature of the GPA, the openness of the government procurement market did not take place equally on every Party. The expansion of entity coverage was mainly due to EU-US bilateral coverage expansion,³⁰ and the other Parties' government procurement market access was not as expansive as that of the EU and the US.

Furthermore, the attempt to expand the number of signatories failed. The GPA is still criticised for its limited membership and as a 'rich man's club'.³¹ There were only 25 signatories at the time the GPA came into force on 1 January 1996, which was pretty much the same as the number of signatories to the Tokyo Code on Government Procurement.³²

Regarding the entity coverage negotiations, while some Parties, such as the members of the European Union, were keen to extend the coverage, for example, by including utility sectors in the coverage, (see Annex 3: other entities). On the other hand, some other Parties such as Japan

²⁸ See the criticism of these derogations in Section 3.2 of this Chapter. See also Gerard De Graaf and Matthew King, 'Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round' (1995) 29 *The International Lawyer* 446.

²⁹ According to statistics of the Organization for Economic Cooperation and Development (OECD) report on 'the Size of Government Procurement Market', 'the total economic benefits created by world procurement amounted to approximately 5.5 trillion USD, the ratios of total expenditure, at the general government level, are estimated at 19.96 per cent, or 4733 billion US dollars, for OECD countries and 14.48 per cent, or 816 billion US dollars, for non-OECD countries. This world total procurement estimate was roughly equivalent to 82.3 per cent of the world merchandise and commercial services exports in 2012. See OECD, *The Size of Government Procurement Markets* (n 3).

³⁰ The momentum for the conclusion of the GPA 1994 originated in the bilateral negotiations on liberalising procurement that took place between the European Community and the US in April 1993, and consisted of the majority of government procurement markets among the Parties. The United States' negotiation target was to achieve unrestricted access to electrical and telecommunications procurement sectors of the European Union. On the other hand, the European Union was seeking to obtain access to strategic sectors categorised by 'buy American' favouritism, such as transportation (federal-aid highway funds, federal transit administration grants, airport improvement program grants, waste-water state revolving fund grants, rural electrification administration, electric and telephone loans.) and utilities. In April 1993, 'to facilitate the agreement to a new Code', the two Parties reached an agreement in the form of a Memorandum of Understanding, in which the EU agreed to open electricity markets, whereas other utility regimes, such as water, energy, transport and telecommunication, remained in need of further negotiation. The US agreed to seek voluntary coverage of federal entities. See Article IX 6, 'Council Decision 93/323/EEC of 10 May 1993 Concerning the Conclusion of an Agreement in the Form of a Memorandum of Understanding between the European Economic Community and the United States of America on Government Procurement OJ No L 125 of 20. 5. 199'. See further, Graaf and King (n 28) 435.

³¹ Reich (n 29) 134. Andrew Halford, 'An Overview of EC-United States Trade Relations in the Area of Public Procurement' (1995) 1 *Public Procurement Law Review* 39-56. Schott (n 14) 73.

³² Singapore and Hong Kong, the original signatories of the GPA 1979, decided not to accede to the new Agreement at the end of the Uruguay Round. See further, Sue Arrowsmith, 'Reviewing the GPA: The Role and Development of the Plurilateral Agreement after Doha' (2002) 5 *Journal of International Economic Law* 768-771.

and Korea strongly opposed this suggestion.³³ Part reason of the opposition is that privatisation happened in Japan and Korea was forced by globalisation, in the form of the spread of Anglo-American corporate governance to East Asia, but the result was that this process of privatisation of public enterprises happened in very different ways from that of the western Europe and the US (by transferring ownership to private hand).³⁴ For example, in Korea, utility corporations were illustrative of crucial industries that greatly influence the national economy in which the Korean government retained minority of the share ownership and the majority of share ownership was transferred to citizen share ownership, which is ‘partial’ privatisation’.³⁵ Therefore, due to the different understanding of ‘government entity’, especially the diversity of ‘public enterprise/government enterprise/utilities enterprise’, and no shared definition of a ‘government entity’, disagreements of this sort persisted throughout the negotiations.³⁶

These difficulties would become an even thornier issue when the GPA invited more developing countries to join its ranks. Because State-owned enterprises are still central to deliver essential public services to citizens in important economic sectors such as utilities, finance, and natural resources, especially in developing countries such as the BRIC countries.³⁷ Consequently, the absence of a common understanding of what ‘other entities’ includes was an inevitable obstacle to the attainment of an agreement between Parties with different types of economy.

³³ See further Annet Blank and Gabrielle Marceau, ‘The History of the Government Procurement Negotiations Since 1945’ (1996) 5 Public Procurement Law Review 105.

³⁴ In Korea and Japan, the process of privatisation demonstrate the interaction between the State, corporations, investors and shareholders, which characterised with the existing understandings and ideologies in East Asia. See further Christina L. Ahmadjian and Jaeyong Song, ‘Corporate Governance Reform in Japan and South Korea: Two Paths of Globalization’ (April 2004) Columbia Business School APEC Study Centre Discussion Paper Series Paper No. 23 17.

³⁵ According to the Korea’s 1988 plans for privatisation, government enterprises were scheduled for five categories of privatisation: managerial change, complete, sequential, partial, and functional readjustment. Only public enterprise that had fulfilled their original purposes, as well as those whose functions overlapped significantly with functions of private firms were scheduled for ‘complete’ privatisation. Government enterprises that operated in utilities sectors were scheduled for ‘partial’ privatisation. For example, the Korea Electric Company, the Korea Telecommunication Corporation, and the Pohang Iron and Steel Company. See further In Chul Kim, Mahn-Kee Kim and William W. Boyer, ‘Privatization of South Korea ‘s Public Enterprises’ (2018) 28 Journal of Developing Areas 163.

³⁶ With regard to the negotiation history see further Arie Reich, ‘The New GATT Agreement on Government Procurement’ (1997) 31 Journal of World Trade 125-151.

³⁷ BRIC is the acronym for an association of five major emerging national economies: Brazil, Russia, India, and China. See further Kyoungsun Heo, ‘Effects of Corporate Governance on the Performance of State-Owned Enterprises’ (2018) World Bank Policy Research Working Paper Series No. 8555 2.

4.2.4. The Revised WTO/GPA (GPA 2012)

A revised GPA was adopted on 30 March 2012.³⁸ It added over 200 new contracting entities at both central and sub-central levels.³⁹ The provisional estimate of the re-negotiation suggests that annual market access gained in the region of 80-100 billion USD.⁴⁰ This is particularly significant as the number of GPA signatories increased from 22 to 47.⁴¹ Despite this increased market access, the coverage negotiation on the revised GPA is still fraught with difficulty. Despite the slow progress, as at September 2019, 48 WTO members have signed the revised GPA only a two-thirds majority of the Parties had signed at the time the revised GPA text was adopted.

All covered entities of each Party are attached in Annex 1, 2 or 3 to Appendix I.⁴² While some Parties apply a *definitional approach*, such as ‘entities governed by public law’, in Annex 3 of the European Union, and ‘all legal persons governed by public law particularly State or

³⁸ As agreed in Article XXIV: 7 (b) in the GPA 1994, Parties started further negotiation shortly after the GPA entering into force. At its second formal meeting during this time, the Committee agreed to undertake an early review, starting in 1997. The principal objective of the review was to expand coverage, and to encourage the accession of other WTO Members, especially those from developing countries. By June 2003, a draft that consolidated opinions on revising GPA text issues was submitted. It was agreed that the negotiation on coverage expansion was to be postponed until 16 July 2004, when the Parties adopted ‘Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practice’. In December 2006, Parties of the GPA 1996 reached a provisional agreement with the consent. But it stipulated that the revised text would not come into effect until when the coverage negotiations came to a conclusion in order to facilitate new accessions. See Committee on Government Procurement, ‘Report of the Committee on Government Procurement (July 2003 -November 2004)’ GPA/82 11 December 2006. Committee on Government Procurement, ‘Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices’ GPA/79 19 June 2004; Robert D Anderson and Kodjo Osei-Lah, ‘The Coverage Negotiations under the Agreement on Government Procurement: Context, Mandate, Process and Prospects’, *The WTO Regime on Government Procurement: Challenge and Reform* (2011) 163. Robert D Anderson and Sue Arrowsmith, ‘The WTO Regime on Government Procurement: Past, Present and Future’ in Robert D Anderson and Sue Arrowsmith (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (1st edn., Cambridge University Press 2011) 21. See further Sue Arrowsmith, ‘The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions’, *The WTO Regime on Government Procurement: Challenge and Reform* (2011) 285.

³⁹ Apart from the entity coverage extension, the scope of contracts also expanded. The coverage of service among Parties expanded by different degrees, particularly with respect to telecommunication. All categories of construction service were subject to the Agreement. See European Commission, ‘Proposal for a COUNCIL DECISION on the Conclusion of the Protocol Amending the Agreement on Government Procurement’ COM/2013/0143 final-2013/0086 (NLE), 22 March 2013 para 2.2.

⁴⁰ WTO, ‘The Re-Negotiation of the Agreement on Government Procurement (GPA)’ <https://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm> accessed 5 August 2019.

⁴¹ Chinese Taipei became a party on 15 July 2009; Armenia acceded on 7 December 2010; China launched accession negotiation in December 2007, and Russia became an observer to the Committee on Government Procurement on 29 May 2013.

⁴² Article II 4 states: ‘Each Party shall specify their offers in its annexes to Appendix I. Annex 1, the central government entities; Annex 2, the sub-central government; Annex 3, all other entities that procure in accordance with the provisions of this agreement; Annex 4, the goods covered by this Agreement; Annex 5, the services, other than construction services, covered by this Agreement; Annex 6, the construction services covered by this Agreement; and Annex 7, any General Notes.’

community non-commercial (non-profit) organisation' in Annex 3 of Armenia.⁴³ Most Parties, such as Chinese Taipei, Singapore and the US, use a list approach whereby the name of the covered entities are listed.⁴⁴

Under the revised GPA, the schedule of each party contains seven annexes:

Annexe 1: central government entities

Annexe 2: sub-central government entities

Annexe 3: other entities

Annexe 4: goods

Annexe 5: services

Annexe 6: construction services

Annexe 7: general notes.

To put it simply, only procurement by a covered entity purchasing covered goods, services or construction services of a contract value above the relevant threshold, and not specifically exempted in the notes to the coverage schedules, are subject to the rules of the revised GPA. Although the revised GPA proposed full coverage at the central/sub-central government level, not all sub-central government entities of the GPA Parties are covered. The 'other entities' include a limited number of state-owned enterprises, utility companies and other entities.

The revised GPA contains a myriad of exceptions to the coverage in Annex 7 (General Notes). Most of those derogations in Annex 7 were not in the interest of protecting national security or other general justifications/exceptions stipulated in the GPA.⁴⁵ Since the GPA specifies requirements for the application of exceptions, it can be inferred that the GPA prohibits other kinds of unfair derogations. It is therefore argued that those derogations in the entity coverage Annexes run counter *de facto* to the ultimate goal of progressively reducing and eliminating discriminatory measures and practices. In Section 4.4, the drawbacks of those derogations in Annex 7 will be critically examined.

⁴³ For other examples, see the coverage schedules of Liechtenstein, Republic of Moldova, Montenegro, Norway, and Ukraine. See WTO, Coverage schedules

https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm#revisedGPA accessed 23 August 2019.

⁴⁴ See the coverage schedules of Israel, Japan, Korea, New Zealand, Chinese Taipei, Singapore, and the US.

⁴⁵ Article III Security and General Exceptions, the Revised GPA. The permitted derogations are those that are necessary to protect national security or national defence purposes or 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 those relating to goods or services by persons with disabilities, philanthropic institutions or prison labour.

4.3. Lessons from the Negotiation History

Generally, trade negotiation modalities on government procurement could be of three kinds: single-issue based multilateral negotiation; multilateral, multi-issue single undertakings; and single-issue based plurilateral negotiation. These are explained as below.

4.3.1. Single-Issue Based Multilateral Negotiation

The Agreements under the WTO are typical of this modality.⁴⁶ Noticeably, except for the Tokyo Round Code on Government Procurement, the five Tokyo Round Codes first negotiated during the Tokyo Round Negotiation (1973-1979) were subjected to multilateral disciplines, a notable exception being the Code on Government Procurement.⁴⁷ However, the single-issue based multilateral negotiation on government procurement under the GATS, the WTO on government procurement,⁴⁸ and the OECD initiative, all failed. A lesson to be learned from that failure is that, without the involvement of both developed countries and developing countries, a truly international government procurement instrument cannot be reached by means of a multilateral modality.⁴⁹

⁴⁶ The complete set consists of about 30 agreements and separate commitments (called schedules) made by individual members in specific areas, such as lower customs duty rates and services market, specifically, to the Agreement on Agriculture; the Agreement on the Application of Sanitary and Phytosanitary Measures; the Agreement on Textiles and Clothing; the Agreement on Technical Barriers to Trade; the Agreement on Trade-Related Investment Measures; the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; the Agreement on Preshipment Inspection; the Agreement on Rules of Origin; the Agreement on Import Licensing; the Procedures Agreement on Subsidies and Countervailing Measures; and the Agreement on Safeguards.

⁴⁷ They are the Anti-Dumping Code, the Subsidy Code, the Standard Code, the Custom Valuation Code and the Import Licensing Code.

⁴⁸ See Chapter 3 Section 3.1. The two multilateral initiatives on government procurement refer to one formulated during the five Ministerial Conferences that have taken place since 1996 and the other during the GATS negotiation in 1995. See Working Party on GATS Rules, 'Negotiation on Government Procurement: Report by the Chairperson of the Working Party on GATS Rules' (2001) S/WPGR/11 30 June 2003 para 6. A further reference is to be found in footnote 80, Chapter 3.

⁴⁹ 'The OECD had envisaged that any truly international procurement instrument should contain special provisions for developing countries with the presence of the developing countries on the forum for formulating such provisions.' See further Sue Arrowsmith, *Government Procurement in the WTO*, vol. 12 (Sue Arrowsmith ed., 1st edn., Kluwer Law International 2003) 36. For a similar reason - developing countries' lack of interest in negotiation, the multilateral initiatives on government procurement under the GATS also failed See Working Party on GATS Rules, 'Negotiation on Government Procurement: Report by the Chairperson of the Working Party on GATS Rules' (n 49).

4.3.2. Multilateral, Multi-Issue Single Undertaking

The Tokyo Round negotiation (1973-1979), the Uruguay Round negotiation (1986-1994), and the Doha Round negotiation (2001-) are of such a negotiation modality. It seems that the multilateral initiative is not an effective means of achieving consensus in controversial areas (such as government procurement) due to its tendency to end in deadlock.⁵⁰ The stagnation of the Doha Round⁵¹ and the failure of multilateral initiatives on government procurement⁵² are the evidence of this point. Both of them offer lessons to be learned by future trade negotiators.

The multilateral initiatives on government procurement, one of the Singapore issues in 1996,⁵³ were proposed and actively promoted by the OECD countries, the EU and the US being the main protagonists, and the negotiations directly reflected the interests of these ‘major players’, whose share of the trade/domestic supply in the total trade/government procurement market was sufficient for their interests to make a difference in trade liberalisation. The reason that the Doha negotiation was launched just two years after the Seattle debacle (1999)⁵⁴ is that developed countries felt the provisions in Uruguay Round Agreements on the service and agriculture were unsatisfactory and that further negotiations on other cross-issues and competition policy were necessary. The governments of several developing countries, however, were not convinced that negotiations on Singapore issues (1996) were in their interest and took the view that the new round of negotiations did not offer the opportunity for/possibility of a balanced ‘fair’ Agreement.⁵⁵ Most developing countries argued that the Uruguay Round Agreement did not increase economic opportunities in developing countries, but did give rise

⁵⁰ See generally, Amrita Narlikar, Martin Daunton and Robert M Stern, *The Oxford Handbook on The World Trade Organization* (and Robert M Stern Martin Daunton, Amrita Narlikar eds, Oxford University Press 2012) 1-28.

⁵¹ The Doha Round began in November 2001, and is still making slow progress.

⁵² See Chapter 3 Section 3.1. The two multilateral initiatives on government procurement refer to the one during the Singapore Ministerial Conference in 1996 and the other under the GATS negotiation in 1995. See Working Party on GATS Rules, ‘Negotiation on Government Procurement: Report by the Chairperson of the Working Party on GATS Rules’ (n 49). More reference under footnote 80 in Chapter 3.

⁵³ The Singapore issues consisted of four subjects: competition, investment, government procurement and trade facilitation.

⁵⁴ The Seattle Ministerial meetings began in 1999 and involved 135 WTO members. The meetings set the agenda for the launch of new multilateral trade negotiations to discuss major issues, including developing countries’ concerns over the implementation of the Uruguay Round; modalities of agricultural liberalisation. Proposals for negotiations on competition, investment, trade-environment, and labour standards. However, the meeting ended up with a failure to agree on a multilateral trade negotiation or on a work programme. The members pursued only the ‘built-in’ agenda inherited from the Uruguay Round.

⁵⁵ Arvind Panagariya, ‘Preferential Trade Liberalization: The Traditional Theory and New Developments’ (2000) 38 *Journal of Economic Literature* 287-331.

to high implementation costs and diverted negotiation resources and political focus away from the market access concerns that were of most interest to them.

The cost and benefits were also of concern to developing countries in the GPA negotiation. As stated previously in note 10, only three developing countries signed the GPA.⁵⁶ Other developing countries participated as observers.⁵⁷ Commentators have opined that developing countries suspect that the GPA generates more costs than benefits hence their reluctance to accede the Agreement.⁵⁸ As a result, while the number of observers to the GPA is growing (including developing country observer countries), the accession negotiations for new Parties including developing countries such as China are lengthy and continue to move slowly.⁵⁹ In

⁵⁶ Among the signatures of the GPA 1994, only Israel and Korea were developing countries. In the revised GPA (2012), only three more developing countries signed, namely, the Taiwan Province of China (signed on 15 June 2009), Hong Kong, China (signed on 19 June 1997) and Singapore (signed on 20 October 1997).

⁵⁷ Currently, all the 29 observers are developing countries or economies in transition. The imbalance of trade benefits may be one of the reasons why the developing countries showed limited interest to accede to the GPA. According to the observation of Hoekman, In large players of the GPA like the EU, the US, and Japan, the share of the domestic firm in total procurement covered by the GPA was virtually unchanged after their signatories, however, for the smaller countries, in contrast, the share of the domestic procurement declined after the signatories. However, the author doubted this result. Although the Committee on Government Procurement collects annual statistics report on procurement by covered entities from Parties, however, this information exchanging mechanism does not function as it is expected. Due to lack of transparency, as well as lack of motivation, Parties does not fully report as expected, especially in small countries, the transparency and information collection system is not as sound as the 'major Parties'. Therefore, the statistic based on those annual reports is not that reliable. All the signatories of the GPA have recognised that a huge effort should be made to collect much better data on the openness of government procurement market. see Robert D Anderson, 'The Conclusion of the Renegotiation of the World Trade Organization Agreement on Government Procurement: What It Means for the Agreement and for the World Economy' (2012) 21 Public Procurement Law Review 83-93. As Chapter 3 has concluded, in the long run, opening procurement market can bring benefits for national government procurement.

See WTO, 'Parties, Observers and Accessions (GPA)'

<https://www.wto.org/English/tratop_e/gproc_e/memobs_e.htm> accessed 6 August 2019.

⁵⁸ Developing countries suspect that 'their share of government procurement market is very small at this moment, and the gains from exports that would flow from membership of the agreement are therefore likely to be marginal in the case of most developing countries at least in the foreseeable future'. Bernard M Hoekman and Petros C Mavroidis, 'Multilateralizing the Agreement on Government Procurement' in Bernard M Hoekman and Petros C Mavroidis (eds), *Law And Policy In Public Purchasing: The Wto Agreement On Government Procurement* (Ann Arbor: University of Michigan Press 1997). Besides, GPA accession requires legal compliance and possible institutional reform and legislation adjustment. Those reforms could bring costs on national governments. Thus, considering those costs, it is suspect that developed countries benefit more from the entry of developing countries, whereas developing countries may have burdens more than benefits from the GPA accession. See Changfa Lo, 'The Benefits for Developing Countries of Accession to the Agreement on Government Procurement: The Case of Chinese Taipei' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (1st edn, Cambridge University Press 2011) 140. See also Vinod Rege, 'Transparency in Government Procurement: Issues of Concern and Interest to Developing Countries' (2001) 35 Journal of World Trade 495. Moreover, each party has different possibilities to achieve the potential benefits of the on-going GPA activities. Hilde Caroli Casavola, 'The WTO and the EU: Exploring the Relationship between Public Procurement Regulatory Systems' in Edoardo Chiti and Bernardo Mattarella Giorgio (eds), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (1st edn, Springer-Verlag Berlin Heidelberg 2011) 300.

⁵⁹ For example, shortly after India was accepted as an observer on 10 February 2010, India submitted an offer and expressed intention of accession. Immediately following India, Philippines and Chile informed the committee about joining on September 1997. However, at the time of writing they were still observers.

order to push forward future negotiation, *the first lesson to be learned is that a balance of developed and developing countries must be maintained throughout the negotiations*. There is an emerging consensus that trade negotiations should be complemented by incorporating the particular concerns of developing countries, in dealing with the implementation costs of legal compliance associated with specific GPA rules and the possible institutional adjustment of governments, thereby reducing the political pressure that results from opening the government procurement market.⁶⁰ The tortuous negotiations on government procurement indicate that the expansion of the GPA must be assisted by developing countries and incorporate the latter's particular concerns.

First of all, the 'power balance' in the WTO is changing: the trading capacity of developing countries has expanded, and the weight they carry in WTO negotiations has steadily increased, especially with the accession of China in 2001. The GPA accession negotiations depend on bargaining power, rather than any sensible moral, legal, or economic criteria.⁶¹

Under the power-driven approach, developing countries with relatively small trade power (which mean less bargaining power) are under the pressure to join the GPA as the precondition of WTO membership (although membership of the WTO is not conditional on GPA acceptance), for example, in the case of the GPA accession of Chinese Taipei.⁶² Developing countries with relatively bigger trade power, for example, China, which is not fully prepared to accept the offer requested by the GPA Parties, especially from the EU and the US, can resist the pressure and negotiate based on their own trade needs.⁶³ As the GPA negotiations depend

⁶⁰ Bernard M Hoekman and Michel M Kostecki, 'Developing Countries and Economics in Transition', *The Political Economy of the World Trading System: the WTO and Beyond* (3rd edn., Oxford University Press 2009) 532.

⁶¹ Daniel E Schoeni, 'A Hidden Statutory Bar to Private Causes of Action for Breaches of the WTO's Agreement on Government Procurement' (2015) 37 University of Pennsylvania Journal of International Law 322.

⁶² During the negotiation for accession to the WTO, government procurement was one of the concerns of the current GPA parties. Some of the trading partners requested Chinese Taipei to become a signatory to the GPA. As a result, Chinese Taipei became committed to acceding to the GPA in the Working Party Report for its accession to the WTO. See further Working Party on the Accession of Chinese Taipei, 'Report Of The Working Party On The Accession Of The Separate Customs Territory Of Taiwan, Penghu, Kinmen And Matsu' WT/ACC/TPKM/18 5 October 2001 para 164, 166. Lo (n 59) 141.

⁶³ China applied for accession to the GPA on 28 December 2007, honouring its commitment to initiate GPA accession negotiations made in the course of its accession to the WTO in 2001. Its initial market access offer was circulated to the Committee in January 2008 and, since then, five further offers have been circulated by China. Discussions dedicated to China's accession have taken place on multiple occasions over the last 10 years. See Working Party on the Accession of China, 'Report of the Working Paper on the Accession of China' WT/ACC/CHN/49 1 October 2001 para 337, 341. And WTO Ministerial Conference Four Session, 'Report of the Working Party on the Accession of China' WT/MIN(01)/3 10 November 2001. In paragraph 341: 'the representative of China responded that China would become an observer to the GPA upon accession to the WTO Agreement and would initiate negotiations for membership in the GPA by tabling an Appendix 1 offer as soon as possible. The Working Party took note of these commitments.' A list of references to the Committee's previous

so much on bargaining power and negotiating tactics, since 2007, China has submitted five negotiation offers not giving up bargaining on the coverage of ‘other entities’, especially the coverage of its SOEs.⁶⁴ This negotiation is still undergoing a power-driven approach.

The power-driven approach has been proved successful in the context of the 20th century when the negotiation is dominantly lead by the wining countries represented by the US and the EU.⁶⁵ However, in the 21st century, with economic development, developing countries have increased interests to participate in trade rule-making in the WTO. They seek to put more of their trade concerns on the negotiation table. In the changed power-balance in the international trade market, including the government procurement market, the author argues that *a rule-based approach would obtain more consensus and a larger following in future trade negotiations*. A rule-based negotiation is not only a wish but also the necessity to gain further trade liberalisation among the WTO members.

Secondly, the GPA negotiations coincided with a boom in international trade that accompanied the establishment of the WTO. The boom was partly driven by trade liberalisation undertaken unilaterally by many countries, including major emerging markets. The benefit of the boom in international trade enabled many countries to gain benefits from the current liberalisation, and these countries have no interest in ‘cracking a tough nut’ like government procurement. In general, after the Tokyo Round and the Uruguay Round, trade liberalisation achieved great success, and therefore the governments of many countries had less interest and fewer incentives to invest political resources in trade talks. Political support is needed to conduct deep reform of the domestic government procurement system, or to open negotiations on reciprocal government procurement market access. In this context, *unless the common trade concerns are respected and reflected in the rule-based approach*, developing countries will have no political motivation to reform their domestic government procurement systems for the GPA accession.

Annual Reports the Committee on China’s accession is provided in Committee on Government Procurement, ‘Report of the Committee on Government Procurement’ GPA/141 29 November 2017 para 3.4, footnote 49.

⁶⁴ Sue Arrowsmith and Robert D Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011) 92-116.

⁶⁵ In the 20th century, trade negotiations usually processed under a ‘power-driven’ approach. The negotiations were usually initiated and driven by one or two protagonists that has huge trade power such the EU, the US, Japan, Canada and so forth. Consequently, the negotiation on the established WTO and a series of multilateral trade agreements (such as the GATT and GATS) was successful.

A key lesson to be learned from the failure of the OECD to negotiate a multilateral agreement on investment in 1995⁶⁶ is that attempts to reduce barriers to trade and investment will fail without broad-based domestic support for open markets.⁶⁷ This lesson is also true in the multilateral negotiation on government procurement that took place one year later at the Singapore Ministerial Meeting (1996). Given that the major developing countries spanned a wide-ranging set of economies, the insistence on indiscriminately, including all state-owned enterprises makes it hard for developing countries to confront protests from domestic state sectors. *Without a rule for co-efficient negotiation on the including/exempting entities such as state-owned enterprise*, it is predictable that either the marginalisation of developing countries' concern in the rule-making within the GPA or the asymmetric pressures from within the WTO would further frustrate developing countries' interest in the GPA accession.⁶⁸

4.3.3. Single-Issue Based Plurilateral Negotiation

The constraint of multilateral modality and the ascendancy of emerging powers increased the number of regional trade agreements (see the figure below, which illustrated that between 1993 to 2018, regional trade agreements had increased to over 500 with peaks in regional trade agreement negotiation in the period between 2006 to 2015). The number of plurilateral trade agreements is also increasing.⁶⁹

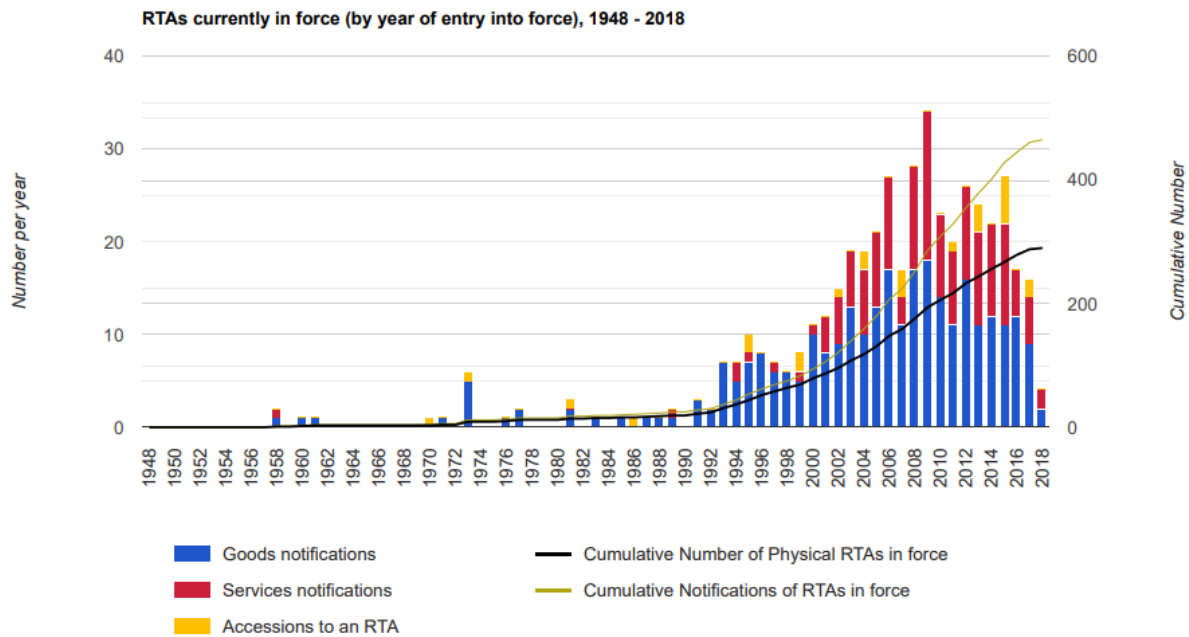
⁶⁶ Negotiations on a proposed multilateral agreement on investment were launched at Ministerial level in May 1995. Negotiations were discontinued in April 1998 and will not be resumed. See OECD, 'Multilateral Agreement on Investment'

<<http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm>> accessed 5 August 2019.

⁶⁷ Kenneth Heydon, 'Plurilateral Agreements and Global Trade Governance: A Lesson from the OECD' (2014) 48 *Journal of World Trade* 1039.

⁶⁸ Heydon (n 68).

⁶⁹ Possible areas for plurilateral agreements in the future are: 1) Tariffs: expansion of product coverage of ITA; 2) Services: Sectoral initiatives based on the approach used for Financial / Basic Telecommunications Services Agreements; 3) Government procurement: addition of participating members; 4) Electronic commerce: suspension/elimination of custom duties; 5) Trade and investment: important topic for both developed and developing economies; 6) Trade and competition: oligopoly/monopoly of natural resources markets, etc. 7) Standards and conformance, and TBT Focal area of behind-the-border measures International standards, mutual recognition, good regulatory practices, etc. 8) Rules of origin: preferential rules of origin. See further, Michitaka Nakatomi, 'Plurilateral Agreements: A Viable Alternative to the World Trade Organization?' (2013) ADBI Working Paper Series No. 439 October 2013 13-14.



Note: Notifications of RTAs: goods, services & accessions to an RTA are counted separately. Physical RTAs: goods, services & accessions to an RTA are counted together. The cumulative lines show the number of notifications/physical RTAs currently in force.

Source: WTO Secretariat - December 19, 2018

Statistics from the WTO show that other trade instruments, such as preferential trade agreements, are also proliferating.⁷⁰ The influence of those regional/plurilateral/preferential trade agreement over world trade has risen during the past five years from approximately 40 per cent to over 50 per cent of WTO agreements. In contrast to negotiations on the multilateral level, bilateral or plurilateral negotiations on a single-issue basis involve a coalition of the willing from a small number of countries. Thus, it incurs less domestic political resource minds and allows like minds to focus on common trade concerns.⁷¹

The GPA has kept its plurilateral nature since the Tokyo Round Code on Government Procurement 1979. As a result of the plurilateral modality, the entity coverage of the GPA is a collection of preferential bilateral agreements among Parties.⁷² Generally, the effects on trade

⁷⁰ According to WTO statistics, the number of PTAs has surged since 1993 (12). Their number rose as high as 19 in 2009, and the mega PTAs, such as NAFTA and the Transatlantic Trade and Investment Partnership will further dominate the landscape of the trade map. During the past five years, five other PTAs have been ratified: duty-free treatment for LDCs-Chile (28 February 2014); duty-free treatment for LDCs-Thailand (09 April 2015), Generalized System of Preference s-Armenia (06 April 2016); trade preferences for Nepal (provided by the US on 30 December 2016); duty-free treatment for LDCs-Montenegro (01 January 2017). For the reasons why PTAs are thriving, and why PTAs should be supported as an option for the integration of the government procurement market and its effects it will have on the GPA, see the analysis of Bernard M Hoekman and Petros C Mavroidis, 'WTO "à La Carte" or "Menu Du Jour"? Assessing the Case for More Plurilateral Agreements' (2015) 26 European Journal of International Law 324. See also the WTO PTAs Database. <http://ptadb.wto.org/ptaList.aspx> accessed on 12 April 2019.

⁷¹ Beginda Pakpahan, 'Deadlock in the WTO: What Is Next?' (WTO)

<https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/art19.htm> accessed 5 August 2019.

⁷² See further, Reich (n 20) 127.

of the plurilateral approach are restricted because the number of Parties is limited,⁷³ and Parties are free to accept or derogate decisions. In accordance with Annex 7 (General Notes) of the GPA, each Party can make derogations from non-discrimination obligations through bilateral negotiations with other GPA Parties. The plurilateral nature reflects the disparity between the Parties. Among all the disparities, the entity coverage issue is one of the most fundamental. Although the plurilateral modality effectively pushes coverage negotiation into reaching a compromise, in a longer perspective, it has disadvantages.

4.4. Drawbacks of Current Entity Coverage

The current entity coverage approach derives some features from the OECD discussion on government procurement but has also developed its features compared with that of the GPA 1994. On the one hand, it was settled in the OECD forum that entity coverage would be based on a specific list of entities,⁷⁴ which States accepted as providing reciprocal levels of coverage between parties. The Tokyo Round Code on Government Procurement, the GPA 1994 and the revised GPA retain the list approach. Since the GPA 1994, the covered entities of each Parties' lists are categorised into three groups scheduled under the revised GPA: Annex 1: central government entities; Annex 2: sub-central government entities; Annex 3: other entities.

⁷³ There are 160 WTO members, but only 42 are signatories of the GPA. Among the GPA parties, most are developed countries. The GPA Parties are as follows: Armenia, Canada, the European Union (with regard to its 28 member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia, Bulgaria and Romania, Croatia), Hong Kong, China, Iceland, Israel, Japan, Korea, Republic of, Liechtenstein, Moldova, Republic of, Montenegro, Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine, United States. Among the 19 Parties (47 members of the WTO), most are developed countries, and only four are developing countries. These are Korea, Singapore, Hong Kong and Israel. However, the latter four are so-called new industrialised countries, not typical developing countries. Among the current Parties, half are EU members, and the rest are in North America and Asia. All 27 observers are developing countries in Asia, South America and Africa, except Australia and New Zealand, which are OECD countries in Oceania. Current Parties, especially the large players, such as the EU and the US, are trying to persuade countries with a large state sector to join the GPA while seeking WTO membership. Among observers who have started negotiating accession, China is of primary interest to the current GPA Parties, not only because of its high growth rate and the large size of its economy, but also due to its historically dominant role and its large number of different levels of government.

⁷⁴ At the time, with respecting the different nature of national constitutions, On the whole, the OECD countries favoured at that time a system of *listing* all the purchasing agencies, thereby avoiding the difficulty with regard to the different nature of national constitutions. A footnote of the Code stated: 'given the differences in constitutional, administrative and economic structures between countries, the questions concern the purchasing entities which would be directly submitted to the instrument for each signatory, ..., as well as the meaning of the 'best endeavours' clause, ..., for the other public entities, taking into account the objective of a satisfactory balance of concessions.'

On the other hand, the GPA has dropped the idea of general definition suggested by the OECD.⁷⁵ The current entity coverage depends, to a large extent, on the political will for reciprocal trading concession exchanges from other countries. In the political power-driven entity coverage negotiation, trade commitments on procurement entities are made based on *quid pro quo* reciprocity. This approach leads to specific derogations in each Party's coverage schedule. Although achieving the broadest possible coverage is a built-in mandate,⁷⁶ those derogations diminish the possible coverage. The question of the covered entities to which the GPA could apply was crucial for the effective application of the GPA and its principles of non-discrimination and national treatment.⁷⁷ Therefore, in the below, the author examines the drawbacks of the current entity coverage negotiation.

4.4.1. The Weaknesses of the Plurilateral Nature of the GPA

As previously mentioned, as a plurilateral trade agreement, the GPA is not in the WTO 'single undertaking' approach, meanwhile countries are not required to assume the obligations as a condition for joining the WTO. However, in practice, this is not the case. For developing countries with small trade power, WTO membership is conditional on GPA accession.⁷⁸ What

⁷⁵ At the time of OECD discussion on government procurement code, the EEC (since 2008 called the EU) suggested a general definition for use in its procurement directives, which referred to 'the State, the regional and local authorities, and other legal persons constituted under public law'. See OECD, 'Report of the February 2-6, 1970 Meeting' OECD Doc. TFD/TD/564.

⁷⁶ This principle has been established since the Article 4(a) OECD Code on Government Procurement and it is always a mandate in the GPA 1994 (Article XXII: 7) and the revised GPA (Article XXII: 7). 'the Parties shall undertake further negotiations, with a view to improving this Agreement, progressively reducing and eliminating discriminatory measures, and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, taking into consideration the needs of developing countries.'

⁷⁷ The issue of covered entities was linked directly to the amount of the threshold value. Generally, the threshold value of the procurement by central government entities is lower than that of the sub-central government entities, and the threshold value of 'the other entities' is higher than the central and sub-central government entities.

⁷⁸ The Kyrgyz Republic applied for accession to the GPA in May 1999, honouring its commitment to initiate GPA accession negotiations made in the course of its accession to the WTO in 1998. See Committee on Government Procurement, Report of the Committee on Government Procurement (2017) GPA/145 16 November 2017. para 3.1.2. And Working Party on the Accession of the Kyrgyz Republic, Report of the Working Party on the Accession of the Kyrgyz Republic, WT/ACC/KGZ/26 31 July 1998. In paragraph 120: 'The representative of the Kyrgyz Republic stated that the Kyrgyz Republic would initiate negotiations for membership in the Government Procurement Agreement upon accession by tabling an entity offer at that time. He also confirmed that, if the results of the negotiations were satisfactory to the Kyrgyz Republic and the signatories of the Agreement, the Kyrgyz Republic would complete negotiations for membership in the Agreement by 31 December 1999. The Working Party took note of this commitment.'

Tajikistan applied for accession to the GPA in February 2015, to honour its commitment to initiate GPA accession negotiations made in the course of its accession to the WTO in March 2013. See Working Party on the Accession of the Republic of Tajikistan, 'Report of the Working Party on the Accession of the Republic of Tajikistan' WT/ACC/TJK/30 6 November 2012. In paragraph 244: 'The representative of Tajikistan confirmed Tajikistan's willingness to accede to the WTO Agreement on Government Procurement. Tajikistan would become an observer to the Agreement upon accession, and would submit an application for membership with a coverage offer within one year after accession to the WTO. The Working Party took note of these commitments.'

is off-putting to developing countries is the plurilateral nature of the GPA whereby membership is only invited if an efficient ‘membership fee’, i.e. entity coverage, is being offered, and the offer should reach a level commensurate with the Parties’ current trade commitments.⁷⁹

The risk is that without a general definition for guidance, the gap between the entity coverage offer from an acceding party and the expectation of current Parties could lead to the stagnation of the accession negotiations. During accession negotiation, both the acceding Party and current Parties carefully calculate whether the level of entity coverage is desirable (for the current Parties) and whether the value of potential contract opportunities outweighs the cost of accession (for the acceding Party).⁸⁰ Their respective evaluation results may have gaps. In the case that the acceding party is not convinced of the benefits from accession and is concerned about the administrative costs of compliance, and therefore will not improve the offer to meet the current Parties’ expectation, while from the other side, the current Parties’ entity coverage is wider than the offer, and therefore are not willing to accept the acceding party’s offer, the accession negotiation will run into a deadlock. Such deadlock happened in negotiations between the EU and the US and was a significant obstacle to the achievement of the GPA 1994.⁸¹

The recent accession negotiations of China is a typical case in point. China applied for the GPA accession in 2007 and submitted a fifth revised offer in December 2014. Although GPA Parties acknowledged the improvements made in the fifth offer, these Parties have been unwilling to accept it. Moreover, at the meeting of the WTO Committee on Government Procurement in February 2015, China said that it would, in principle, not be willing to make significant further

During the end November 2016 through mid-November 2017, five WTO Members made provisions regarding accession to the Agreement in their respective Protocols of Accession to the WTO: these were Afghanistan, Kazakhstan, Mongolia, Saudi Arabia and Seychelles. See Working Party On Accession Of The Islamic Republic of Afghanistan, Report of The Working Party On The Accession of The Islamic Republic of Afghanistan WT/ACC/AFG/36 13 November 2015 paragraph 199; WT/ACC/KAZ/93, dated 23 June 2015, paragraph 949; WT/ACC/MNG/9, dated 27 June 1996, paragraph 59; WT/ACC/SAU/61, dated 1 November 2005, paragraph 231; WT/ACC/SYC/64, dated 5 November 2014, paragraph 322. See the previous example of Chinese Taiwan in note 56.

⁷⁹ WTO, Decision on accession to the agreement on government procurement para 1(d)

https://www.wto.org/english/docs_e/legal_e/52-dproc.pdf accessed in 14 September 2019.

⁸⁰ Robert D Anderson and others, ‘Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and an Evaluative Framework for Individual WTO Members Considering Accession’ (2012) 21 Public Procurement Law Review 113.

⁸¹ The coverage negotiations between the United States and the European Community in the GPA 1994 ran effectively a deadlock in early 1992 over the coverage of ‘other entities’ between the United. Both sides wanted to achieve balanced coverage. For the statistics and negotiation history, see Gerard De Graaf and Matthew King, ‘Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round’ (1995) 29 The International Lawyer 432.

additions to its market access offers included in its fifth revised version.⁸² Up to the latest meeting of Committee on Government Procurement, this accession negotiation has to remain delayed due to the China-US trade conflict since 2018. Currently, the US also criticised China's developing countries position in the WTO, and due to the significant divergence on those concerns, the two Parties have no appetite to embark new negotiation on government procurement.

Plurilateral agreements are negotiated on a case-by-case basis between the new acceding Party and the current Parties. Each accession negotiation is different from the previous depending on its offers. Compared with a 'single undertaking approach' whereby the agreement applies to all Parties cross the board without option, the political cost of signing a plurilateral negotiation is more. For example, as a WTO member, it is obligatory to accept all the multilateral trade agreement in the WTO from Annex 1, 2, 3 to GATT 1994, which means the State does not need to launch negotiations for those agreements additionally. Whereas since the GPA is optional for WTO members if acceding to the GPA, the governments have to divert political resource and support from domestic supports (such as the votes in the Parliament). Such huge costs could reduce the attraction of new Parties because the cost is immediate, whereas the benefits from opening the government procurement market are not immediate and impressive.⁸³

Furthermore, the lack of a common approach on 'government entity' (as some GPA Parties use list approach and some use general approach) and extensive derogations gains the complexity of the entity coverage.⁸⁴ Evidence of the ineffectiveness stemming from the complexity can be found in the WTO adjudicatory body's proceedings on disputes concerning government procurement. Even though the number of those disputes is small (only four), three of them

⁸² See 'WTO, 'Committee on Government Procurement Moves Ahead on Multiple Accessions', WTO News Item 2015 <https://www.wto.org/english/news_e/news15_e/gpro_11feb15_e.htm> accessed 4 December 2018.

⁸³ The complexity of the reform of domestic government procurement and the paucity of technical expertise in the government procurement system could also frustrate the potential acceding counties. See further David A Collins, 'Canada's Sub-Central Coverage Under the WTO Agreement on Government Procurement' (2008) 9 Public Procurement Law Review 23, 25. Martin Dischendorfer, 'The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO' (2000) 1 Public Procurement Law Review 28.

⁸⁴ Kenneth Heydon, 'Non-Tariff Barriers: Commercial Instruments, TBT/SPS and Public Procurement' in Kenneth Heydon and Stephen Woolcock (eds.), *The rise of bilateralism: comparing American, European and Asian approaches to preferential trade agreements* (1st edn., United Nation University Press 2009) 46-88.

ended with a consultation.⁸⁵ It is also significant to note that the dispute concerning effective entity coverage could not be resolved through consultation, so had to be taken before a panel.⁸⁶

Due to the expansion in the coverage and the broader membership of the GPA after 1996, the dispute on government procurement started to increase, and the disputes on government procurement are usually not reconcilable. Because according to the WTO Dispute Settlement Procedure, and also practically considering the process of saving time and avoiding detrimental consequence of stimulating counterclaims as well as the negative impact non-trade areas (such as defence cooperation) brought by retaliation, WTO members would firstly seek bilateral consultations (out-of-court agreement) for resolution,⁸⁷ rather than request the DSB to establish panel to examine the matter. The only consultation among disputing WTO members fail to produce a mutually agreed solution, or there is a need to interpret the ‘agreement’, the Parties will bring the dispute before the WTO adjudicatory body. The record of the dispute on government procurement reflects the fact that Parties’ agreement on entity coverage is not clear, and the issue of entity coverage is so substantial that there is hardly room for consultation. It is therefore argued that the need exists for clarity and legal certainty on the concept of ‘government entity’ as this would clarify entity coverage under the GPA.

4.4.2. The limitation Imposed by Stringent Reciprocity

A fundamental concept used in the GPA entity coverage negotiation is reciprocity. Loosely defined, reciprocity is the practice of making an action conditional upon an action by a counterpart.⁸⁸ Reciprocal negotiation ensures that the market access granted by one party is frequently balanced against the market access granted simultaneously by its trading partner.

⁸⁵ Request for Consultation, ‘Japan —Procurement of a Navigation Satellite’ WT/DS73/5 3 March 1998. This request for consultation, dated 36 March 1997 is in respect of a procurement tender published by the Ministry of Transport of Japan to purchase a multi-functional satellite for Air Traffic Management. Request for Consultation, ‘United States — Measure Affecting Government Procurement’ WT/DS88/6, WT/DS95/6 14 February 2000. This request concerned the fact that an Act enacted by the Commonwealth of Massachusetts on 25 June 1996, entitled ‘Act regulating State Contracts with companies doing Business with Burma (Myanmar)’ affected the balance of right and obligation under the GPA.

⁸⁶ See Reports of the Panel, ‘Korea - Measures Affecting Government Procurement’ WT/DS163/R 1 May 2000. This dispute focussed on the issue of whether certain procurement practices of the Korean Airport Construction Authority (KOACA), and other entities concerned with the procurement of airport construction in Korea should be covered under the GPA.

⁸⁷ See Article 4.5, 6 *Understanding on rules and procedures governing the settlement of disputes*, Annex 2 of the WTO Agreement. The member firstly raise all solutions under consultation. If no mutually agreed solutions to settle the dispute after 60-day period, the complaining party may request establishment of a panel.

⁸⁸ Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn., Oxford University Press 2009) 161.

Instead of uniformly opening all listed procurement opportunities to all the GPA signatories, as in the Tokyo Round Code, the GPA negotiations have been conducted bilaterally based on stringent reciprocity. In the GPA, Parties negotiate for *item-for-item* balance respectively at each purchasing entity level (central, sub-central, or other entities) and the entity coverage applies country-specific derogations. Part of the reason for the stringent reciprocity on each level is that central level entity coverage applies a lower threshold value than the sub-central and other entities, and sub-central entity coverage applies a lower threshold than the ‘other entities’. The author argues that despite this convenience, stringent reciprocity has many disadvantages.

Firstly, stringent reciprocity is hard to reach on the sub-central level and on the level of ‘other entities.’ The term ‘sub-central level entities’ refers to local governments in a unitary system or States in a federal system. In a unitary system, local governments and their policies are primarily controlled by the central governments and can be modified by the central government on a national basis. If the local government applies any discriminatory policies against the GPA, it must be approved by the Japanese national agency that oversees local governments. For example, in a unitary Japan, once Japan became a GPA signatory, the GPA obligation applied to the country as a whole, as stated in Annex 2, ‘all prefectural governments covered by the local Autonomy Law, entitled ‘*To*’, ‘*Do*’ and ‘*Ken*’ (Japanese expression), and all designated cities entitled ‘*Shitei-toshi*’, are included as sub-central government entities’.⁸⁹ In a unitary system, the entity coverage offer on the sub-central depends entirely on the decision of the central government’s decision, whereas in a federal system the national government distributes power to local/state governments to decide whether or not to accede to the GPA or not. For example, the US has a federal system, and its states are more autonomous than local governments in a unitary system. The US has joined the GPA, and so the obligation applies to the federal level, whereas the federal government needs to gain the consent of local states before subjecting a state government entity to the GPA. Up to date, only 37 of 50 US states have agreed to subject part of their government entities to the GPA.⁹⁰

⁸⁹Japan - Sub-Central Government Entities - Annex 2 <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=Japan&AnnexNo=2&ContentCulture=en> accessed 2 December 2018.

⁹⁰ United States of America - Sub-Central Government Entities - Annex 2 <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=UnitedStates&AnnexNo=2&ContentCulture=en> accessed 15 February 2017.

Under these circumstances of differences between the unitary and the federal systems, the *quid pro quo* reciprocity negotiations on the sub-central level lead to a minimum denominator rather than maximum openness. Theoretically, in a unitary system, all the sub-central government entities are eligible government entities under the GPA. In practice, if a federal State (as a GPA Party) fail to gain the consent of all its local/state governments) and not put all its local/state governments in the coverage schedule, the unitary State (as a GPA Party) will reduce its coverage of sub-central government to the commensurate level with the Federal State.

Consequently, the total market openness in practice is less than it could be theoretically. For example, Norway has put ‘all sub-central government entities operating at the regional (counties) or local (municipalities) level, all bodies governed by public law and all associations formed by one or several of those covered entities’. Norway’s entity coverage is a good example of inclusivity. However, in the note to Annex 2, Norway makes derogations to the US by stipulating that procurement by those entities, with regard to supplies, services and service from the US, are not subject to the GPA unless Norway agrees that the US has provided satisfactory reciprocal access to the US procurement market.⁹¹ Iceland has also made similar derogations to the US and Canada, due to the lack of reciprocity in their sub-central government market access.⁹²

Secondly, due to different degrees of government involvement in national economies, the item-for-item reciprocity on the ‘other entities’ negotiation is tortuous and controversial. For example, in cases where goods and services are produced and delivered by state-owned entities covered by the GPA in one country, while in the other country they are produced and delivered by privately-owned entities under private contract law, a parallel commitment on the part of the state-owned entities and the privately-owned entities could be a problem in the reciprocal market access negotiation. A case in point is the passenger rail services. All the public railway services in the EU (except those in the UK) are publicly-owned, whereas, in Japan, some 70 per cent of public railway services are delivered by three privately-owned and economically healthy operators (Japan Railway-East, Japan Railway-Central and Japan Railway-West). Those three operators were publicly-owned but privatised after the reciprocity negotiation.

⁹¹ Norway - Sub-Central Government Entities - Annex 2 <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=Norway&AnnexNo=2&ContentCulture=en> accessed 2 December 2018.

⁹² Iceland - Sub-Central Government Entities - Annex 2 <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=Iceland&AnnexNo=2&ContentCulture=en> accessed 2 December 2018

Japan has notified its intention to delist the three from the coverage schedule.⁹³ However, this delisting is controversial, and both the EU and the US have objected this proposal.

Similarly, in the case of the Japan National Aerospace laboratory,⁹⁴ the objections resulted in market access to the procurements by those entities continuing to be derogated from the EU and the US, respectively. Another case in point is China's accession negotiations. While acknowledging the significant improvements contained in the fifth revised offer from China, the EU and the US considered that the gaps in the level of the sub-central government entities and SOEs were still significant compared with their expectations.⁹⁵ In those situations, the item-for-item reciprocity leads to myriad derogations in the Parties' coverage schedules.

Besides, even if one Party makes an extensive coverage offer, that could not encourage other Parties to make an offer of the equivalent degree of openness. Adversely, the more 'opened' party are dragged down the 'openness' to the commensurately low level. It is particularly evident in the negotiation on utility sectors, which heavily depend on government contracts, where some Parties even shift to bilateral or regional trade forums to *gain more comprehensive coverage* on government procurement as, for example, in the US-EU bilateral trade agreement.⁹⁶ In Annex 3—other entities, Parties usually offer State-owned enterprise/public enterprise/public-private-mixed enterprise and enterprise operating utilities. For example, the EU has placed all the contracting authorities and public undertakings and undertakings with special or exclusive rights operating utility sectors in its Annex 3.⁹⁷ The EU expects other Parties to include equivalent entities in their coverage.

Currently, except the EU, the EEA countries (such as Norway, Iceland, and Liechtenstein)⁹⁸ countries influenced/connected by/to those area (such as Moldova, Montenegro and Armenia

⁹³ The withdrawal of the East Japan Railway Company, the Central Japan Railway Company and the West Japan Railway Company, notified by Japan in December 2001, and was objected by the EU and the US. The US had withdrawn its objection to Japan's proposed modification with respect to the three railway entities in 2006. The EU had withdrawn its objection in 2014 in the framework of the GPA 1994. See Committee on Government Procurement, 'Minutes of the Meeting Held on 8 December 2006' GPA/M/31 29 January 2007 para. 26.

⁹⁴ See Japan - Other Entities - Annex 3 notes 6.

⁹⁵ See details contained in the Summary of the Informal Plurilateral Discussion on Accessions to the Agreement on Government Procurement, 23 February 2017, as contained in RD/GPA/49, dated 2 June 2017.

⁹⁶ And other similar bilateral agreements such as the Agreements between US-Singapore, US-Australia, US-Korea, EU-Vietnam, etc.

⁹⁷ Specifically, the utility sectors of water, electricity, airport, port, public transportations. See European Union - Other Entities - Annex 3.

⁹⁸ for example in the Coverage Schedules Annex 3 of the Norway, Iceland, Liechtenstein, it states that 'all procuring entities whose procurement is covered by the EEA utilities directive which are contracting authorities or public undertakings are covered', and the same with the EU directive, this general coverage is followed by an indicative list of Other Entities (Utilities) follows.

which have an interest of obtaining EU membership)⁹⁹ to align with the EU procurement directives, take a general coverage on utilities entities, most of other GPA Parties take a list approach, with regard to the coverage of the utility entities, such as Japan, Korea, Israel, Hong Kong, Canada, New Zealand, Australia, and the US.¹⁰⁰ Generally, the consensus on the question of utility entities as regard their coverage between GPA signatories is still absent. Part of the reason is that in the European countries, most of the utility sectors, the so-called ‘network industries’ have been privatised since the 1980s.¹⁰¹ However, in other economies, and especially in developing countries, state-controlled or state- influenced enterprises still have a significant presence in the utility sectors.¹⁰² The asymmetric situation in the utility sector makes the EU’s expectation of a ‘more open’ market in utility sectors difficult to fulfil in the case of countries with large state sectors such as China, United Arab Emirates, Russia and Vietnam.

⁹⁹ In the Annex 3 of the Moldova and Montenegro, they generally covered all legal entities that are governed by public law and not having an industrial or commercial character. This general coverage is quite similar with that of the EU procurement directives. As these two countries (possible) accession to the EU on the current Agenda for future enlargement. in order to keep their law in consistency with that of the EU, there public procurement law is assimilating with the EU procurement directives. (Montenegro is expected to join before 2025 and Moldova has signed the Moldova-EU Association Agreement committing to cooperate on economic, judicial and financial reforms to converge its policies and legislation to those of the EU). See further European Commission, ‘Strategy for the Western Balkans: EU Sets out New Flagship Initiatives and Support for the Reform-Driven Region’ https://ec.europa.eu/neighbourhood-enlargement/news_corner/news/strategy-western-balkans-eu-sets-out-new-flagship-initiatives-and-support-reform_en accessed 13 September 2019. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, Official Journal of the European Union, 30 August 2014. See also European Commission, ‘EU Advances Membership Talks for Montenegro, Serbia’ (*EURACTIV*) <<https://www.euractiv.com/section/enlargement/news/eu-advances-membership-talks-for-serbia-montenegro/>>. Accessed 14 Jun. 19. See also Moldova–European Union Association Agreement (1 July 2016) Comprehensive and Enhanced Partnership Agreement between the European Union and the Republic of Armenia (24 November 2017).

¹⁰⁰ See the their Annex 3 in the Coverage Schedules after the GPA text.

¹⁰¹ To take the electricity industry as an example, since the European Union’s First Electricity Directive, which entered into force on 19 February 1996, the European electricity industry has started a process of electricity market liberalisation in the Member States. In September 2007, the major focus of the electricity market liberalisation was transferring the ownership from government hand to the private hand. Since May 1999, the domestic power market in the UK has been open to market competition. The electricity distribution network is owned and maintained by regional companies. At the end of 2013, there were 37 major private power producers in the UK. The power market in the UK is highly competitive and dispersed. Germany’s domestic electricity market was fully liberalised in 1998. In 2013, more than 900 DSOs (distribution system operators) were operating in Germany. See [Deloitte, ‘European Energy Market Reform Country Profile the UK \(2014\)’](https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/gx-er-market-reform-netherlands.pdf) <<https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/gx-er-market-reform-netherlands.pdf>>. Deloitte, ‘European Energy Market Reform Country Profile: Germany (2014)’ <<https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/gx-er-market-reform-netherlands.pdf>>.

¹⁰² See the analysis of modern SOEs in Chapter 5 of this Thesis. Although privatisation programmes have been in place for decades in EU countries, and the UK and the US since the 1970s, privatisation in Latin America and Eastern Europe began in the 1990s. SOEs in Africa and South Asia are of more recent provenance, especially in economies supported by socialism in Asia countries such as China. See further Saul Estrin and Adeline Pelletier, ‘Privatisation in Developing Countries: What Are the Lessons of Experience?’ (2016) IZA Discussion Papers No. 10297 15.

Consequently, the coverage is significantly more limited than could be achieved under a general most-favoured-nation obligation. Although the general coverage from the EU is considerably inclusive, under the item-for-item reciprocity approach in order to keep the same level of market openness, the EU made derogations to other Parties on the ‘other entities’ level. For example, the EU derogates the obligation to open procurement opportunities by entities in the port, airport, and public transportation field from the US, derogate obligations to open procurement opportunities by entities in the field of electricity industry from Japan, Korea and Israel.¹⁰³ Whereas, in the bilateral agreement between the EU and the US, the coverage is broader than under the GPA. One of the reasons why the actual market access is much more limited than may appear at first glance is that, with a stringent reciprocity approach, there is no possibility of cross-sector exchanges or exchanges between different levels of entities, which contribute to a significant reduction of potential coverage.¹⁰⁴

The consequence of this approach is not only that coverage is significantly more limited than expected, but more importantly, that the GPA, in fact, embrace an intra-discriminatory trade regime among its signatories. As noted above, the EU has included a long and complicated list of derogations in its coverage of ‘other entities’,¹⁰⁵ and similar derogations also exist in other Parties’ coverage schedules, such as those of Iceland and Canada. All these exceptions are accompanied by declaring that procurement by those entities will not be subjected under GPA obligation until the respective signatory give commensurate access to their procurement

¹⁰³ As indicated in the Notes in Annex 3 of the EU, it included extensive derogations for many GPA Parties. Other derogations included procurement by entities operating in the field of water supply; airport facilities; maritime or inland ports; public transportation from New Zealand; and derogation of procurement by entities operating in the field of railway transport in Armenia; Canada; Japan; the United States; Hong Kong, China; Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. See further European Union-Other Entities-Annex 3.

¹⁰⁴ The potential reduction of coverage is more obvious when it is combined with the adverse effect of sectoral reciprocity in Annex 4, because the degrees of government involvement are different in various economic sectors. The positive list is appropriate to the extent of clarity since many services are not suitable for international regulation because of the limited scope for efficient cross-border supply, or because Parties are simply unwilling to subject many services to regulation. As a result, the actual opening of service sectors is much more limited than it is supposed to be. See further John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn., Cambridge Massachusetts MIT Press 1997) 125. Sue Arrowsmith, John Linarelli and Don Wallace Jr., ‘International Free Trade Agreements’ in Sue Arrowsmith, John Linarelli and Don Wallace Jr. (eds.), *Regulating Public Procurement, National and International Perspectives* (1st edn., Kluwer Law International 2000) 199. There is also similar criticism by Arrowsmith, who argues that a rigid application of the reciprocity principle is to the detriment of maximising the achievement of optimal trade, for the reason that because derogations in one sector cannot be ‘compensated’ by another sector, total market access in fact decreases, therefore narrowing the whole coverage. See Sue Arrowsmith, ‘Coverage of the GPA’ in Sue Arrowsmith (ed.), *Government Procurement in the WTO*, vol 12 (1st edn, Kluwer Law International 2003) 110.

¹⁰⁵ The EU has stated in Notes 6 and 8 of the covered entities that ‘the following shall not be considered as covered procurement: ...until such time as the EU has accepted that the Parties concerned provide satisfactory access or fully open its procurement to the EU suppliers, supplies, service providers and services to their own procurement markets’. See European Union - Other Entities - Annex 3.

market.¹⁰⁶ As a result, a GPA Party can still practice discrimination against other Parties in cases where other Parties' government procurement does not fall within the Party's coverage schedules, even though the GPA enshrines the principle of national treatment and non-discrimination. This situation allows trade barriers to continue to flourish and distort trade between WTO members.¹⁰⁷

Another interesting point is that although those Parties made extensive derogations in the GPA, they expand more extensive coverage on government procurement in their bilateral preferential trade agreement. It is argued that although the GPA is the most important trade agreement on government procurement under the WTO, its influence may be dwarfed with the increasing use of bilateral FTAs to achieve access to other countries' government procurement market. Taking the EU preferential trade agreement as an example, on 13 February 2019, the EU-Singapore Free Trade Agreement was approved by the European Parliament. In the EU-Singapore Free Trade Agreement, generally, the Parties have extended their coverage on the level of a central government entity, utilities and other entities, contracts of public-private-partnership and services. EU gives Singapore access to nearly 200 central entities that it withholds under the GPA, and Singapore lists 54 entities in contrast to its GPA coverage of 23 entities.¹⁰⁸ In the EU-Canada Free Trade Agreement implemented in October 2017, the EU expanded its coverage, especially concerning sub-central and other entities.¹⁰⁹ Similarly, in the EU-Japan Economic Partnership Agreement which entered into force on 30 January 2019, the coverage has been expanded in particular to the railways sector and sub-central coverage.¹¹⁰ Furthermore, the EU and the US have also issued proposals on the scope of their planned

¹⁰⁶ Similar long and complicated derogations are also made by Iceland in notes 6 Annex 3, with similar statements regarding the conditions for satisfactory reciprocal access condition. See Iceland - Other Entities - Annex 3. See also in the Korea General Notes—Annex 7, which states that: 'Korea will not extend the benefits of this Agreement as regards procurement by the Korea Railroad Corporation and the Korea Rail Network Authority, to the suppliers and service providers of Norway and Switzerland, until such time as Korea has accepted that those countries give comparable and effective access for Korean undertakings to their relevant markets.' Canada directly derogated its Annex 3 from the European Union, Iceland and the Principality of Liechtenstein (in notes 3 Annex 3). See Canada - Other Entities - Annex 3.

¹⁰⁷ According to the empirical study on the ratio of EU public demand to the public demand of its three main trading partners (US, Japan, and China), the relative size of public procurement markets between EU and its three main trading partners declined between 1995 and 2011. Furthermore, only part of the government procurement contracts is subject to non-discrimination (which only applies to purchasers, products, services and supplies of other Parties to the GPA). As we will see, government procurement market access is not open to non-signatories of the GPA, and it is also partly closed to signatories. The potential trade distortion is therefore great. See further Patrick A Messerlin, 'How Open Are Public Procurement Markets?' (2015) Robert Schuman Centre for Advanced Studies Global Governance Programme-204 EUI Working Paper RSCAS 2015/89 12.

¹⁰⁸ European Commission, 'European Union-Singapore Trade and Investment Agreements' (2018) 16

¹⁰⁹ European Commission, 'CETA Chapter Nineteen-Government Procurement' (2018).

¹¹⁰ European Commission, 'EU-Japan Economic Partnership Agreement: Chapter 10 Government Procurement' (2019).

negotiations to expand the reciprocal level in market access to each other's government procurement market.¹¹¹

Thirdly, as previously stated, these reciprocity negotiations on a bilateral level result in a kaleidoscope of reciprocal arrangements between Parties.¹¹² In practice, the entity coverage negotiations and their implementation present complicated difficulties, due to the drastic differences in relation to different suppliers, purchasers, types of goods and services, and threshold values. As previously mentioned, *Korea—Measures Affecting Government Procurement* is a case in point. This dispute focused on the issue of whether the procurement of the Korean Airport Construction Authority (KOACA) and other entities concerned with the procurement of airport construction in Korea should be subject to the GPA. The issue on entity coverage was so substantial that the dispute could not be resolved through consultation, and had to be brought to the WTO adjudicatory body.¹¹³

4.4.3. The Ineffectiveness of the Opt-Out Mechanism

Another drawback of the current entity coverage approach is in relation to the 'opt-out' mechanism whereby a listed entity can get rid of the GPA obligation if it is no longer qualified as 'government entity'. Pursuant to Article XIX 'Modification and Rectification to the Coverage', a Party can propose to withdraw entities from Appendix I (hereinafter referred to as 'modifying Party') if the 'government control or government influence' was eliminated.¹¹⁴ However, this proposed withdrawal does not happen automatically based on the evidence provided by the modifying Party. The Parties whose rights under the GPA are affected by the withdrawal proposal (hereinafter referred to as 'affected Party') have the right of 'objection'.¹¹⁵

Since there is no consensus on the standard for 'effective elimination of government control or influence', and no specific criteria serves as the grounds of the 'objection', it is argued that this

¹¹¹ United States Trade Representative, 'United States-European Union Negotiations: Summary of Specific Negotiation Objectives' (2019) <https://ustr.gov/sites/default/files/01.11.2019_Summary_of_U.S.-EU_Negotiating_Objectives.pdf> accessed 19 February 2019 12

¹¹² Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press 2004) 375.

¹¹³ Reports of the Panel (n 84).

¹¹⁴ Article XIX — Modifications and Rectifications to Coverage, the revised GPA. This procedure is to improve the predictability with respect to modification of coverage and it gives other Member encouragement and confidence to accede to the Agreement.

¹¹⁵ Article XIX: 2 reads as follows: *Objection to Notification* - Any Party whose rights under this Agreement may be affected by a proposed modification notified under paragraph 1 may notify the Committee of any objection to the proposed modification. Such objections shall be made within 45 days from the date of the circulation to the Parties of the notification and shall set out reasons for the objection.

present difficulty for a modifying Party to invoke this Article to delist a no-longer-qualified entity. Further, in order to keep the original reciprocal coverage schedule, the affected Party can object to the delisting process, and the modification procedure could then take an excessively long period. For example, in August 2001, Japan expressed the intention to delist the East Japan Railway Company, the Central Japan Railway Company and the West Japan Railway Company from Japan's Annex 3, on the grounds that the three entities had undergone privatisation, thereby effectively eliminating government control. The European Union and the United States objected to the proposal because they doubted that Japanese government control or influence on the entities had ceased.¹¹⁶ Due to lack of common criteria on whether there had been an effective elimination of control or influence by the government, as well as developed arbitration procedures under the revised GPA, Japan's modification proposal regarding the three entities had taken thirteen years to become effective.¹¹⁷

Even if there are no objections or no malicious time delay, a further problem is presented by procedural issues related to approvals for the modification proposal. This arises because the Committee on Government Procurement holds its meetings only three times a year at most, while the modification decision often takes several months. The prolonged process is not only unfair for the modifying Party but also has a 'chilling effect' (to put a limited offer). In this way, considering the threat of a long and tortuous delisting process, acceding Parties will not be ready to provide a 'more inclusive' entity coverage offer, which is also inconsistent with the built-in mandate to 'achieve the greatest possible extension of the GPA coverage'.¹¹⁸

From the perspective of the affected Party, if the modifying Party unilaterally withdraw an entity from the coverage schedule, the affected Party has no other solutions but the right of objection. If the objection fails to prevent modification, the only remedy for the affected Party is to retaliate by withdrawing equivalent coverage. This remedy can be obtained before the arbitration procedure, but by no means has a deterrent effect. If Parties abuse the toothless modification procedure by conspiracies, the modifying Party and the affected Parties can withdraw the entity coverage by conspiracies, which will diminish the GPA coverage. On an

¹¹⁶ Committee on Government Procurement, 'Minutes of the Formal Meeting of 22 December 2014' Restricted GPA/M/57 22 December 2014 para 3.

¹¹⁷ See Committee on Government Procurement, 'Minutes of the Formal Meeting of 29 December 2014' (n 115) para 3.1-3.5.

¹¹⁸ See Article XXII: 7 Future Negotiations and Future Work Programmes, the revised GPA.

extreme assumption, the modification is very likely to fall into a vicious circle.¹¹⁹ The outcome would definitely be detrimental to the extension of GPA coverage, let alone further growth.

4.5. A Reflection of the GPA Entity Coverage

Throughout this work, the author contends that a wide entity coverage with a minor exception can limit the leeway for discrimination and favouritism among the GPA Parties. Therefore, to avoid the drawbacks of the current entity coverage approach, a definition of ‘government entity’ is desirable. For this purpose, the author examines the GPA texts and the Parties’ coverage schedules with an attempt to find the gist of the GPA entity coverage.

4.5.1. Control Doctrine

‘Control’ has featured in the determination of entities to be covered by the GPA. This is illustrated first by the 1970 OECD Guideline on Government Procurement where during the negotiations on the Guideline, the EU (formerly the EEC at the time) suggested a general coverage definition for use in its procurement directives, which referred to ‘the State, the regional and local authorities, and other legal persons constituted under public law’.¹²⁰ As a result, The OECD Guideline on Government procurement referred to a list of entities to be agreed upon and added to Section I (2): ‘These entities are the national government agencies or the entities entirely or substantially *controlled* by national governments in respect of their purchasing policies.’¹²¹

In the GATT Tokyo Round Code on Government Procurement and its revised amendments, the definition of a government entity that was established was based on the ‘control doctrine’. The footnote to Article 1 of the Tokyo Round Code, which is similar to the language used by OECD Guideline, states that ‘entities’ include agencies, *no matter whether the agencies had independent legal personality or not.*¹²² Article I:1(c) of the Revised Code provided that

¹¹⁹ Wang Ping, ‘Coverage of the WTO’s Agreement on Government Procurement: Challenges of Integrating China and Other Countries with a Large State Sector into the Global Trading System’ (2007) 10 Journal of International Economic Law 887.

¹²⁰ See OECD, ‘Report of the February 2-6, 1970 Meeting’ (n 73).

¹²¹ This consensus has been kept in line with the US draft guidelines of the OECD Code on government procurement 1969, where in Part I 1. (c)(1) it is stated that: ‘A government procurement entity is defined as an agency of the national government or an entity directly or substantially *controlled* by the national government with respect to its *management, financing, or authority* to do business.

¹²² Article I stated that the Agreement applied to the procurement of products by the entities subject to the Agreement. See GATT, Tokyo Round Code on Government Procurement, https://www.wto.org/english/docs_e/legal_e/tokyo_gpr_e.pdf accessed 13 August 2019.

government procurement refers to procurement by ‘the entities *under the direct or substantial control* of Parties and other designated entities, with respect to their procurement procedures and practice...the entity coverage listed subject to the further negotiation’.¹²³

The ruling of the dispute *United States—Procurement of a Sonar Mapping System* concluded that the wording of Article I: 1(a) suggests that the entity shall have ‘some form of *controlling influence* over the obtaining of the product such as payment by government, government use of or benefit from the product, government possession etc.’.¹²⁴

Since the GPA 1994, a list approach has completely replaced the general ‘control doctrine’, although the subsequent GPA negotiations. The WTO/GPA 1994 and the revised WTO/GPA 2012 did not define government procurement, as suggested by the OECD Guideline.¹²⁵ As noted previously, the parties moved to an approach whereby all the covered entities are referred to in Annex 1, 2, 3 of Appendix I. Article I of the GPA 1994 states that ‘This Agreement applies to ... any procurement by entities covered by this Agreement, as specified in Appendix I’. The revised GPA Article II states that ‘...covered procurement means a procurement *for governmental purposes*...by a procuring entity and that is not otherwise excluded from coverage schedules of each Party’s annexes to Appendix I’.¹²⁶

Although the term ‘control’ ceased to explicitly feature the legal text of the GPA, the author submits that each Parties’ entity coverage have *de facto* applied the ‘control’ doctrine.¹²⁷ For example, in Armenia’s Annex 3, it particularly included three groups of legal persons *governed by public law*: state or community non-commercial (non-profit) organisations; commercial organisations with over 50 per cent of *government or community shareholding*; and legal persons providing public service.¹²⁸ In the same way, Ukraine employs similar descriptions in

¹²³ Article I: 1 (c) Tokyo Round Code on Government Procurement.

¹²⁴ ‘The Panel concluded that, in the light of the *Government’s payment for, ownership and use of* the sonar mapping system and given the extent of *its control over* the obtaining of the system, the acquisition of the sonar mapping system was government procurement within the meaning of Article I:1(a), first sentence, and not ‘private’ procurement outside the Agreement as proposed in the alternative by the European Community.’ See Report of the Panel (GATT) (n 22) para 4.13, 4.5, 4.7.

¹²⁵ Because most countries were of the opinion that the definition provided in the Article III: 8 of the GATT (procurement derogation from national treatment obligation) was sufficient. However, this assumption of sufficiency is mistaken. The aim of Article III: 8 is anti-circumvention of national treatment obligation, and did not have the intention of defining government procurement.

¹²⁶ See Article II Scope and Coverage, the revised GPA.

¹²⁷ In addition to the examples of Armenia and Ukraine, examples could be found in the entity coverage of the EU, Liechtenstein and Montenegro

¹²⁸ See Armenia - Other Entities - Annex 3 <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=Armenia&AnnexNo=3&ContentCulture=en> accessed 14 December 2018.

the footnote to its Annex 3. It states that a covered entity must meet one of the following criteria: ‘the public authorities, authorities of Crimea, local self-governance bodies or other administrators of *public funds* have more than 50 per cent in its authorized capital, or a *majority of the votes in its supreme governing body*, or have the *right to appoint more than half of its executive or supervisory body*, or in possession of *special or exclusive rights granted by the authorities*.’¹²⁹

4.5.2. Commercial/Competition Doctrine

In addition to the criteria of ‘controlled by the government’, each Party’s coverage schedules contain specific exceptions which indicate the negative factor that exempts the entity from the GPA application. As indicated by the Parties, this relates to ‘commercial/competition’ characteristics of the entities. For example, in Armenia’s Annex 3, it clearly states that the covered entity shall be a *non-commercial/non-profit* legal person.¹³⁰ Moldova, with the same intention, states in its Annex 3 that the entities should be legal entities governed by public law and *not having an industrial or commercial character...*¹³¹ Besides, some Parties make a similar exception in the notes after the covered entities. The EU, Liechtenstein, and Montenegro state in the notes that even though an entity was generally a public body, if its procurement in pursuit of listed activity was *exposed to competitive forces in the market concerned*, the public body shall not be covered by the GPA.¹³² Similarly, Norway states that when *directly exposed to competition on the market to which access is not restricted*, the procurement by the entity shall not be subject to the GPA.¹³³

The author argues that the competition doctrine derives from the general aims and purpose of the GPA. The reason for subjecting procurement by government entities to the GPA is that those entities apply discriminatory measures or practices that reduce competition opportunities. From a global efficiency perspective (see the conclusion of chapter 3), any procuring entity applying discriminatory measures with the effect of restricting or reducing competition

¹²⁹ See footnote 1 of Ukraine - Other Entities - Annex 3 <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=Ukraine&AnnexNo=3&ContentCulture=en> accessed 14 December 2018.

¹³⁰ See Armenia - Other Entities - Annex 3

¹³¹ See Moldova, Republic of - Other Entities - Annex 3 <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=Moldova&AnnexNo=3&ContentCulture=en> accessed 14 December 2018.

¹³² See the footnote 1 of Annexes 3 of the EU, Liechtenstein and Montenegro.

¹³³ See Norway - Other Entities - Annex 3 <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=Norway&AnnexNo=3&ContentCulture=en> accessed 14 December 2018.

opportunities in the government procurement market must be subject to the GPA.¹³⁴ Therefore, if any evidence indicates that the entity is committed to a policy of open, fair and non-discriminatory procurement and in practice had procured in the market where competition is indiscriminately open to any suppliers, irrespective of its nationality, the entity should not be subject to the GPA, because that entity does not restrict competition opportunity.

Based on the examine of the legal texts and the coverage schedule, the author preliminary find out that there is a consensus among the GPA Parties that ‘control’ factor is a substantial constituent to recognise a government entity, and they have agreed that the formal identity of the purchaser has no relevance. Moreover, the Parties have commonly identified the existence of ‘control’ by referring to aspects of ownership, financial source, managerial and personnel influence. Furthermore, GPA Parties have another consensus that only when a controlled ‘entity’ is not exposed to market competition, it will subject to the GPA obligations. Otherwise, it is not covered by the GPA. The author submits that the consensus on the factor of ‘control’ and ‘competition’ reflected from the GPA legal text and Parties’ coverage schedules are the gist of the definition of a government entity under the GPA.

4.6. Conclusion

The evolution of the GPA can be traced back to its OECD origins. In 1970, the OECD Guideline on government procurement was published. It is important to note that the OECD Code supplied many references on government procurement regulation to the Tokyo Round negotiations, which produced a *plurilateral* Code on government procurement. The Tokyo Round Code has limited coverage to only goods procurement by *central government entities* based on *quid pro quo* negotiations. Although revised in 1987, the Tokyo Round Code on Government Procurement has no expansion of the entity coverage and failed to attract membership from developing countries.

The establishment of the WTO in 1993 created a new forum on negotiations on international government procurement regulation. Subsequently, the GPA 1994 expanded the coverage of government procurement to ‘sub-central government entities’ and ‘other entities whose

¹³⁴ Arie Reich, ‘Summary and Conclusion: What’s Next?’ in Arie Reich (ed.), *International Public Procurement Law: the Evolution of International Regime on Public Purchasing*, vol 12 (1st edn., Kluwer Law International 1999) 342.

procurement policies are/are not substantially controlled by, dependent on, or influenced by central, regional or local government'. The revised GPA of 2012 adopted the same approach with GPA 1993: the entity coverage of GPA is referred to each Party's schedules in Annex 1, 2, 3 of the GPA Appendix I. Although there are 47 signatories to the revised GPA, this is a relatively small number, given that there are now 164 WTO members. Importantly only three developing country-Parties have signed the GPA.

Based on the observation of the failure of Doha multilateral negotiation, the negotiation on the GPA provides lessons for expanding GPA to more developing countries. First, the participation of both developed countries, as well as developing countries, must be ensured. Otherwise, a truly multilateral government procurement instrument was impossible. Second, the interests of both developed and developing countries must be balanced. Otherwise, future GPA negotiations cannot make substantive progress. Third, the common concerns of developing countries in the GPA negotiation must be respected and reflected in a rule-based approach. Otherwise, developing countries would have no political motivation to make legislative and institutional reform to keep compliant with the GPA.

Combining with the fact that the major developing countries spanned a differentiated set of economies, the insistence on including all State-owned enterprises, irrespective of those differences, makes it harder for developing countries to confront antagonists against GPA accession within their own domestic state sectors. The author submitted that GPA must introduce a definition of 'government entity', which can provide a reference to coverage negotiation on State-owned enterprises.

Before instructing a new approach to define 'government entity', in this chapter, the author attempts to explore and avoid drawbacks and grasp gist of the current GPA entity coverage approach.

First, the author finds out that the plurilateral negotiations on entity coverage have more drawbacks than merits. Undeniably, the plurilateral negotiation is flexible to accommodate differences in trade needs. However, the cost of the negotiation doubles and the complexity of the coverage schedules and derogations make it challenging to ascertain the adequate coverage of the GPA. Moreover, irrespective of whether the country is ready to negotiate opening its government procurement market the obligations of GPA accession negotiation has become a *de facto* condition for joining an international agreement such as the WTO. Therefore, there is

often a gap between the entity coverage offer from acceding party and the expectation of current Parties. That gap could result in the a stagnation of negotiation.

Second, the author finds out that GPA Parties take a list approach based on strict reciprocity negotiation. Parties negotiate for an *item-for-item* balance respectively at each purchasing entity level (central, sub-central, or other entities) and the entity coverage applies country-specific derogations. This approach has led to many reciprocity-based exceptions being included in the GPA annexes. Those country-specific derogations discourage Parties from providing more comprehensive coverage offer.

Specifically, due to the difference of political systems and the different degrees of government involvement in economies, stringent reciprocity is hard to reach on the sub-central level and the level of ‘other entities’. Moreover, in cases where, in one country, goods and services are produced and delivered by state-owned entities covered by the GPA, while in another country they are produced and delivered by privately owned entity under private contract law, a parallel commitment on the state-owned entities and the private-owned entities could not be ‘matched’ for reciprocity.

In another case, even if one Party positively covered more entity under the GPA, there is no effect of encouraging other Parties to do so. In order to keep the commensurate level of coverage with the ‘less offered’ Party, the entity coverage of the ‘more opened’ Party would be dragged down to the same with the ‘less opened’ Party. This leads to the actual GPA entity coverage smaller than it could be. This phenomenon engendered by the reciprocity principle is particularly evident in negotiations on utility sectors, which depend heavily on government contracts.

Besides, strict reciprocity on a bilateral level results in a kaleidoscope of reciprocal arrangements between Parties. The exceptions in coverage schedules are significantly more than it would have been under a general most-favoured-nation obligation.

The author also argued that the stringent reciprocity, in fact, harbours an intra-discrimination among its signatories. This situation allows trade barriers to continue and flourish, thus distorting trade between WTO members. Although those Parties made extensive derogations in the GPA, they expand larger coverage on government procurement in their bilateral preferential trade agreement. It is argued that although the GPA is the most crucial trade agreement on government procurement under the WTO, it is at risk to be marginalised.

Last but not least, the current entity coverage approach does not favour the operation of the GPA coverage modification mechanism. In practice, since there is no specific standard for ‘effective elimination of government control or influence’, yet no specific criteria for the grounds of objection, it is difficult for the modifying Party to invoke this Article to delist a no-longer-qualified entity. From the standpoint of the affected Party, if the modifying Party unilaterally modified the coverage, the affected Party has no solution other than the right of objection. If the objection fails to prevent the modification, the only remedy then is for the affected Party is to retaliate by withdrawing equivalent coverage. If Parties abuse this toothless procedure by conspiracies, the modification is very likely to fall into a vicious circle, and the final outcome would certainly be detrimental to the existing extensions of GPA coverage and also to further growth.

Besides the drawbacks of the GPA coverage negotiations and the author also grasps the gist of the GPA entity coverage for the purpose to propose a rule-based negotiation on entity coverage: a definition of ‘government entity’.

Based on the examination of the legal texts and the coverage schedule, the author preliminarily finds out that there is a consensus among the GPA Parties that ‘control’ factor is a substantial constituent to recognise a government entity, and they have agreed that the formal identity of the purchaser has no relevance. Moreover, the Parties have commonly identified the existence of ‘control’ by referring to aspects of ownership, financial source, managerial and personnel influence. Furthermore, GPA Parties have another consensus that only when a controlled ‘entity’ is not exposed to market competition, it will be subject to the GPA obligations. Otherwise, it is not covered by the GPA. The author submits that the consensus on the factor of ‘control’ and ‘competition’ reflected from the GPA legal text and Parties’ coverage schedules are the gist of the definition of a government entity under the GPA.

CHAPTER 5 STATE-OWNED ENTERPRISES IN THE WTO LEGAL REGIME

5.1. Introduction

This chapter will explore the concept of ‘State-owned enterprises’ (SOEs) in the WTO regime. As discussed in the previous chapter 4, what kind of government entities should be put in annexe 3—other entity is one of the big concerns in accession negotiation, especially what State-owned enterprise should be covered as ‘government entities’ under the GPA. Thus, this chapter examines the nature of SOEs in the context of State capitalism, and critically evaluates the definitions of similar notions in WTO trade agreements.

In the first part, a brief review of the evolution of SOEs provides the context for the discussion. Firstly, ‘nationalisation’ and ‘privatisation’ are explained in the contexts that match the trade disciplines on SOEs at each stage. Secondly, this review brings us to the new context—‘State capitalism’ to understand the development of SOEs in the 21st century.

In the second part, the author conducts a doctrinal analysis of similar notions in the WTO multilateral trade agreements, such as the General Agreement on Tariff and Trade (GATT), the General Agreement on Trade in Service (GATS) and the Agreement on Subsidies and Countervailing Measures (SCM). The analysis of the legal texts of each agreement is accompanied by a case study on the adjudicatory report focusing on the interpretations of related notions such as ‘State enterprise’, ‘enterprise granted with special or exclusive rights’, ‘public bodies’ and so forth. The doctrinal analysis supplies us with the rationales behind those definitions and criticises those definitions in the new context as laid out in the first part of the chapter.

In the third part, the author examines the most recent Free Trade Agreements (FTAs) to highlight the development of the SOE definitions. It has been observed that the most recent FTAs have incorporated the new context into their definitions and SOEs are treated in a functional way, rather than relying on their formal legal status.

The fourth part is the conclusion. Based on the analysis of the previous WTO trade agreements and relevant adjudicatory reports, as well as the examination of the development in the most recent trade agreements, the author concludes that, generally, SOEs engaging in commercial activities on a commercial basis and SOEs performing public functions under government control or influence must be differentiated based on the purpose of the trade discipline.

5.2. SOEs in Context

5.2.1. Nationalisation (1920s-1980s)

At the first half of the 20th century, Governments intervened in attempts to resolve the basic market failures that had led to the 1929 stock market crash and its disastrous aftermath.¹ The policy of bailing out failed industries became integral to government policy in Europe, Latin America, and Africa after the Great Depression. With the upheaval of World War I and the subsequent social tensions, wide-scale nationalisation took place in European countries, such as France, Britain, Italy and Germany.² At this stage, rescuing the national economy was the principal aim of SOEs, and the transfer of ownership to the State was frequently a product of nationalisation (as a form of bailout).

In many industrialised countries, particularly in the UK³ and France,⁴ nationalisation happened in important infrastructure enterprises. In the period from the 1930s to the 1960s, State interventions and nationalisation efforts in the provision of utility services were promoted with the apparent economic intention of eliminating sectoral imbalances and strengthening the public interest and social welfare.⁵ Those extensive social welfare provision and far-reaching State intervention were the main characteristics of national economies.⁶ However, political and

¹ For a general historical perspective see. e.g., Pier Angelo Toninelli, 'From Private to Public to Private Again: A Long-Time Perspective on Nationalization' (2008) XLIII 4.^o *Analise Social* 675. Robert Millward, 'Public Enterprise in the Modern Western World: An Historical Analysis' (2011) 82 *Annals of Public and Cooperative Economics* 375.

² For example, in the 1930s, as a consequence of the financial crisis, Italian government intervene in economic crises to bail out the financial system by creating a public body—Institute for Industrial Reconstruction, which is the owner not only of the three most important Italian banks, but also control a variety of other Italian Industrial companies. See further Costanza A Russo, 'Bank Nationalizations of the 1930s in Italy: The IRI Formula' (2012) 13 *Theoretical Inquiries in Law* 407, 408.

³ Britain took the lead in establishing a national oil corporation as a State-owned enterprise for the production and distribution of North Sea oil. The shipbuilding and aircraft industries and the road haulage industries were also partially nationalised. Other examples include the nationalisation of the British Broadcasting Corporation (1926) and the creation of a 'Central Electricity Board'. See, e.g. Richard Pryke, 'Public Enterprise in Practice: The British Experience of Nationalisation during the Past Decade' in William J Baumol (ed.), *Public and Private Enterprise in a Mixed Economy: Proceedings of a Conference held by the International Economic Association in Mexico City* (Palgrave Macmillan UK 1980) 215-229.

⁴ In France, the first major wave of nationalisation took place in 1936-1937. Besides utility services, nationalisation extended to parts of the oil producing and refining industry, the chemical industry, the aeronautical construction industries, and the banking and financial sectors. See e.g. Pryke (n 3) 198-207.

⁵ Governments applied direct State management, and even ownership, on companies and strategic industries, such as electricity, transportation, and telecommunication. See further Millward (n 1) 381.

⁶ Other efforts at national economic planning were also promoted for reconstruction, such as the 1942 Beveridge Report on *Full Employment in a Free Society* in England, a document that mapped out Britain's welfare State. see Robert Leaper, 'The Beveridge Report in Its Contemporary Setting' (1992) 45 *International Social Security Review* 17. and Jean Monnet's 1945 *Plan de Modernisation et d'Equipeement* in France. See Frances MB Lynch, 'Resolving the Paradox of the Monnet Plan: National and International Planning in French Reconstruction' (1984) 37 *The Economic History Review* 229. At the time, many intellectual elites were still suspicious of any State

ideological powers were the main driving force for the nationalisation programmes of western countries in the post-war period.⁷ It is be argued that, at this stage, SOEs were political tools for regulating certain natural monopolies, rather than acting as market players that fostered economic growth.

The political attributes of SOEs diminished in the 1970s and early 1980s, meanwhile the economic attributes of the SOEs increased. With the background, industrialised countries took the lead turned SOEs into market players rather than a political tool. From the beginning of the 1960s, SOEs had played an essential role in rejuvenating European economies.⁸ State ownership proliferated and reached its 'golden age'.⁹ However, since the 1970s, SOEs' contribution to national economy reduced to 20 per cent of GDP in France; 12 per cent in Italy and Spain; 11 per cent in Germany; and 10 per cent in the UK. In 1980, SOEs produced almost 11 per cent of output in Germany, which has been the EU's largest national economy.¹⁰

In the post-war period, with the rise of socialism (in the Soviet Union, Eastern Europe, Southeast Asia and parts of Latin America), socialist countries increased their participation in the economic recovery by creating large-scale SOEs on a wide scale. Nationalisation in those

intervention in the markets. See for example Philip Harling, 'The Limits of the Laissez-Faire State, 1815-1880', *The Modern British State: An Historical Introduction* (Polity Press 2001) Chapter 6.

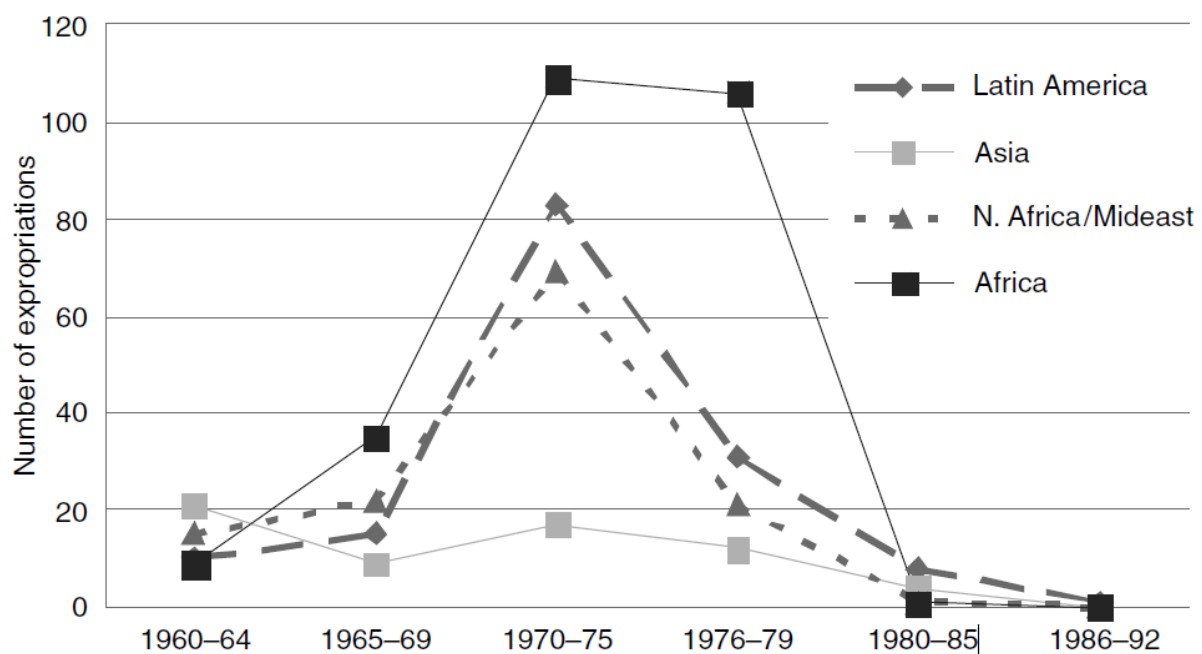
⁷ Ideologically speaking, it was believed that enlarging public properties and activities would bring significant change to the distribution of social power. This political and ideological belief was the basis of the nationalisation programmes, mainly in socio-economies such as France, Austria, Britain and Holland. The nationalisation programmes that were driven by the belief that SOEs were an instrument for the achievement of autarky and for forcing both the economy and society toward its 'superior' destiny, were mainly concomitants of the fascist regimes in Italy, Spain, and Germany. In the realm of political motivations, France, for example, promoted nationalisation to protect itself from the globalisation of the economy and from competition from EEC enterprises. See Toninelli (n 1) 678.

⁸ the impact on German economy, see Hans K Schneider and Walter Schulz, 'Market Structure and Market Organisation in the Electricity and Gas Public Utility Sector of the Federal Republic of Germany' in William J Baumol (ed.), *Public and Private Enterprise in a Mixed Economy: Proceedings of a Conference held by the International Economic Association in Mexico City* (Palgrave Macmillan UK 1980) 71-92. See the impact on French economy see Marcel Boiteux, 'Public Enterprise and Advanced Planning Techniques: The Experience of Electricité de France' in William J Baumol (ed.), *Public and Private Enterprise in a Mixed Economy: Proceedings of a Conference held by the International Economic Association in Mexico City* (Palgrave Macmillan UK 1980). 97-111. See the impact on Spanish economy in Tomás Galán, 'Thoughts on the Role of Public Holdings in Developing Economies: INI's Experience in Spain' in William J Baumol (ed.), *Public and Private Enterprise in a Mixed Economy: Proceedings of a Conference held by the International Economic Association in Mexico City* (Palgrave Macmillan UK 1980). 116-134. See the impact on Hungarian economy in Rezső Nyers and Márton Tardos, 'Enterprises in Hungary Before and After the Economic Reform' in William J Baumol (ed.), *Public and Private Enterprise in a Mixed Economy: Proceedings of a Conference held by the International Economic Association in Mexico City* (Palgrave Macmillan UK 1980) 161-193.

⁹ Millward (n 1) 387.

¹⁰ See generally Pier Angelo Toninelli, 'The Rise and Fall of Public Enterprise: The Framework' in Pier Angelo Toninelli (ed.), *The Rise and Fall of State-Owned Enterprise in the Western World* (1st edn., Cambridge University Press 2000) 21. See also Mikko Rajavuori, 'Governing the Good State Shareholder: The Case of the OECD Guidelines on Corporate Governance of State-Owned Enterprises' (2018) 29 *European Business Law Review* 103.

developing countries began around the beginning of the 1960s (see the graph below). SOEs were established to achieve national industrialisation. One of the differences between the large SOEs in the industrialised countries and those in developing countries was that the SOEs in industrialised countries continue to operate as commercial entities for profits, often in a competitive environment,¹¹ while developing countries usually protected SOEs as a part of the national industrial plan.¹²



Number of Nationalisations (Expropriations) in Developing Countries (1960-1992).

Source: Aldo Musacchio and Sergio G Lazzarini, *Reinventing State Capitalism: Leviathan in Business, Brazil and Beyond* (Harvard University Press 2014) 31.

5.2.2. Privatisation¹³ (1980s-2000s)

Spiralling price and wage inflation throughout the early 1970s created a series of social and economic crises in developing countries. The two OPEC oil shocks, (1973-74 and 1979-80),

¹¹ See further Robert Millward, *Private and Public Enterprise in Europe: Energy, Telecommunications and Transport, 1830-1990* (Cambridge: Cambridge University Press 2005) 169-170.

¹² Aldo Musacchio and Sergio G Lazzarini, *Reinventing State Capitalism: Leviathan in Business, Brazil and Beyond* (Harvard University Press 2014) 33.

¹³ In the literature, the term 'privatisation' has been understood as the transfer of ownership and control from the public to private sector. However, due to the complexity and dissimilarities within privatisation, the terms were defined differently. Layne refers to it as a process involving the whole or partial sale of a State-owned enterprise. See Judy Layne, 'An Overview of the Privatization Debate: Recently, Privatization Has Been Proposed as a Way to Solve Government's Complex Problems' (2001) 30 *The Journal of Public Management* 20-25. Marin refers to

exposed some of the problems of political intervention in SOEs. Those crises indicated that the economic growth engendered by SOEs was unsustainable. As a response to those crises, from the late 1980s and early 1990s onwards, State intervention went into decline.¹⁴ Governments and multilateral organisations shifted the focus from State ownership control to ‘managerial incentives on enterpreunerial SOEs.’¹⁵ Accordingly, the role of SOEs shifted from multi-political to ‘entrepreneurial’. States contemplated a major adjustment about the policy of promoting national economy by SOEs.

Since then, there were two waves of privatisation to reduce the role of SOEs in national economy. The first started around 1988-2000, and the second after 2003. In the mid-1980s, the privatisation trend spread from industrialised countries (where the UK took the lead) to Asia. In emerging markets,¹⁶ governments were slow to privatise SOEs in the 1980s. In Eastern Europe, privatisation was part of the transition from a command economy into capitalism, and privatisation itself increased political support for the new reformist governments.

Most privatisation in developing countries in the 1990s implied a *full* transfer of ownership. The first wave of privatisation was realised mainly through structural reform programmes.¹⁷

it from the perspective of the role, responsibilities, priorities and authorities of the State, rather than as a simple transfer of ownership; See for example, Brendan Martin, *In the Public Interest? Privatisation and Public Sector Reform* (Zed Books in association with Public Services International 1993) Chapter 2, 3, 4. Kent asserts that privatisation refers to ‘the transfer of functions previously performed exclusively by government, usually at zero or below full-cost prices to the private sector at prices that clear to the market and reflected the full cost of production.’ See Calvin A Kent, ‘Privatization of Public Functions: Promises and Problems’ in Calvin A Kent (ed.), *Entrepreneurship and the privatizing of government* (New York: Quorum Books 1987) 4.

¹⁴ In order to save governments from failure, State intervention was reduced drastically. The ‘hollowing out of the State’ process undertaken by Margaret Thatcher’s Conservative Administration was the beginning of this trend. At the time, the previously popular Keynesian economics, which were the theoretical foundation of State intervention, were rejected. During the 1930s, Keynesian economics was a theory that advocated increased government expenditure and lower taxes to stimulate demand. It is considered as a ‘demand-side’ theory that focuses on changes in the economy over the short term. Alan Booth, ‘New Revisionists and the Keynesian Era in British Economic Policy’ (2001) 54 *Economic History Review* 346. See also Bruno Palier, ‘The French Welfare Reform Trajectory: From Keynesian to Supply-Side Social Policies’ in Bruno Palier and others (eds), *Wohlfahrtsstaatlichkeit in entwickelten Demokratien. Herausforderungen, Reformen und Perspektiven* (Frankfurt: Campus Verlag 2009) 375-394.

¹⁵ The ideology behind those policies is that the State’s intervention in the market ought to be minimal and cost-effective. See further Raymond J Friel, ‘Blair’s Third Way-Thatcher’s Enduring Legacy’ (2000) 48 *University of Kansas Law Review* 861, 882. Naim Kapucu, ‘New Public Management: Theory, Ideology, and Practice’ in Ali Farazmand and Jack Pinkowski (eds), *Handbook of Globalization, Governance, and Public Administration* (1st edn, New York: Taylor & Francis 2006) 889-892. P Pettit, ‘Freedom and the State: Nanny or Nightwatchman?’ (2015) 129 *Public Health* 1055-1060.

¹⁶ The term ‘emerging markets’ refers to markets in transformation from a dictatorship to a free-market-oriented-economy, with increasing economic growth, and gradual integration with the global marketplace. Some examples are Brazil, Chile, China, Colombia, Czech Republic, Egypt, Hungary, India, Indonesia, Malaysia, Mexico, Morocco, Peru, Philippines, Poland, Russia, South Africa, South Korea, Taiwan, Thailand, Turkey, United Arab Emirates, Hong Kong, and so forth. See further, Vladimir Kvint, *The Global Emerging Market: Strategic Management and Economics* (New York: Taylor & Francis 2009) Chapter 2, 76-105.

¹⁷ The policies of privatisation, deregulation and new public management theories introduced the concept of ‘competition’ to the public sphere through the provision of goods and services by public enterprises and the

The second wave can be explained for the most part as the *partial* privatisation of firms in China and some former Soviet countries. Unlike the first wave of privatisation, which transferred control from government to the private sector, the second wave of privatisations after 1999 included more concessions, leases and sales of smaller blocks of shares, without necessarily transferring control to the private sector.¹⁸ Consequently, despite the significant value of total privatisation, governments still retained substantial power over SOEs.¹⁹

Furthermore, the privatisation of SOEs faced intense political opposition, and gradually changed from transferring ownership and control to obtaining revenue, by allowing SOEs to ‘go public’ in the stock market. Governments did not sell their assets or shares but instead retained minority stakes through various channels, such as public investment or pension funds, State-owned banks, or State-holding companies.²⁰ Governments’ success in collecting revenue from SOEs by way of ‘initial public offering’ (IPOs) in the stock market indicates that they did not need to give up control of SOEs to raise large amounts of money.²¹ After 2006, partial

procurement of goods and service by public bodies. State control over industries and activities decreased, so as to make them more responsive to market forces. In order to adapt to those reforms, SOEs were corporatised, and their assets were transferred to the private sector. The presumed efficient market replaced the inefficient hierarchical bureaucracy. The literature on this process is abundant. See, for example, Mark R Freedland, ‘Government by Contract and Public Law’ (1994) Public Law 86; See also Jean-Bernard AUBY and others, *The Public Law/ Private Law Divide Une Entente Assez Cordiale? La Distinction Du Droit Public et Du Droit Privé: Regards Français et Britanniques*, vol 2 (Mark Freedland and Jean-Bernard Auby eds., 1st edn., Hart Publishing 2006) 151,152. Robert Baldwin and Christopher McCrudden, *Regulation and Public Law* (London: Weidenfeld and Nicolson 1987) 24. The term ‘New Public Management’ was proposed in the late 1980s to denote the importance of management in public service delivery, and was often linked to the doctrines of economic rationalism. New Public Management embraced the idea that ‘private is better than public’. See for example, Christopher Hood, ‘The “new Public Management” in the 1980s: Variations on a Theme’ (1995) 20 (2/3) *Accounting, Organizations and Society* 93. It is argued that the neo-liberalism, New Public Management has hollowed out the State and the division between public and private procurement blurred and mixed. The term ‘New Public Management’ was proposed in the late 1980s to denote the importance of management in public service delivery, often linked to the doctrines of economic rationalism. Under this idea, it was believed as the practice idea that ‘private is better than public in industries’. See e.g. Christopher Hood, ‘The “new Public Management” in the 1980s: Variations on a Theme’ (1995) 20 (2/3) *Accounting, Organizations and Society* 93.

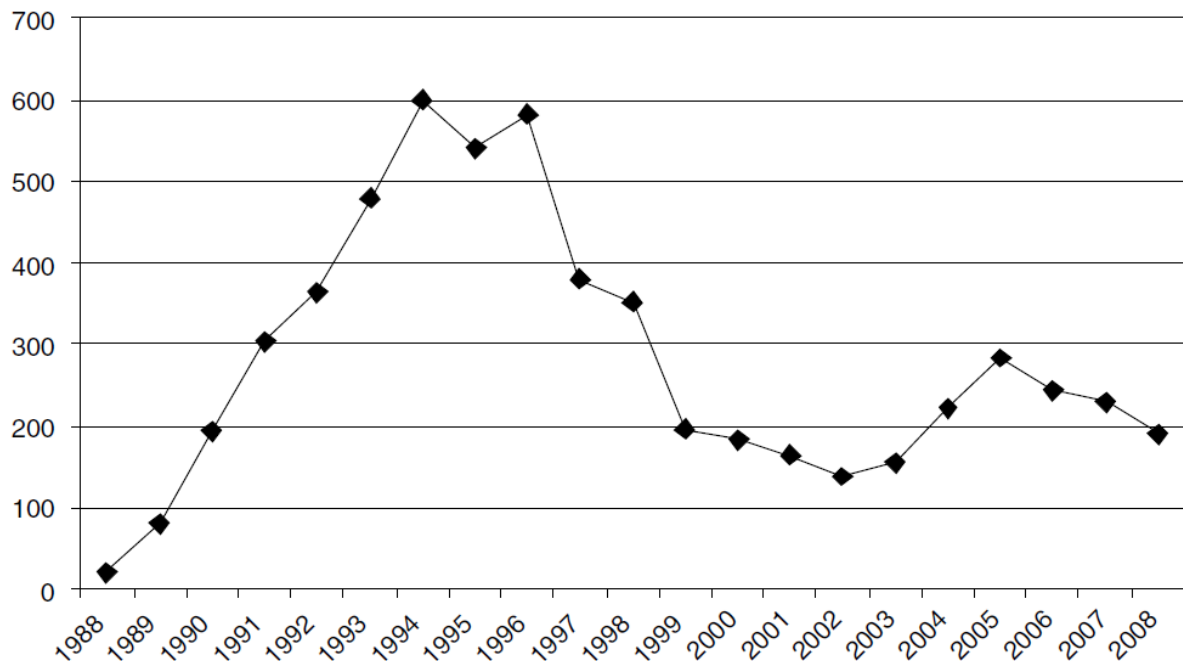
¹⁸ Governments have often separated ownership and control in privatised companies by leveraging the voting power associated with their investments, such as pyramids, and by means of special powers, such as the power to veto acquisitions, granted to the State. See Bernardo Bortolotti and Mara Faccio, ‘Government Control of Privatized Firms’ (2009) 22 *Review of Financial Studies* 2907, 2908.

¹⁹ From 1984 to 1996, most of the assets under State ownership were transferred to private enterprises subject to market competition, and the average share of SOEs in industrial production decreased from 8.5 per cent to 5 per cent. The tendency for States to retain control of privatisation is illustrated by the Italian government’s power over its SOEs. The Italian government, as an influential shareholder in many privatised firms, can veto strategic decisions and acquisitions in fully privatised companies. such as Telecom Italia. See Bortolotti and Faccio (n 18) 2908.

²⁰ Musacchio and Lazzarini (n 12) 45

²¹ One of the prominent examples of ‘corporatisation’ is China. In 2014, \$73.6 billion and through August 2015, more than \$133.3 billion of public assets were ‘privatised’. See William L Megginson, ‘Privatization Trends and Major Deals in 2014 and Two-Thirds 2015’ (2015) *Privatisation Barometer Report 2014-2015* 5. The typical form of ‘corporatisation’ is that of a minority share traded in the stock market and merged into a large State-owned conglomerate, which is the controlling shareholder. See Chang-Tai Hsieh and Zheng (Michael) Song, ‘Grasp the Large, Let Go of the Small: The Transformation of the State Sector in China’ (2015) NBER Working Paper No.

privatisation became the norm, and privatisation was characterised by the sale of equity without a proportional transfer of control.²² (see the first privatisation wave in the 1990s and the second privatisation in 2000s in the line chart below)



Number of Privatisation Operations per year (1988-2008)

Source: Musacchio, A., & Lazzarini, S. G. *Reinventing State Capitalism: Leviathan in Business, Brazil and Beyond*. (Harvard University Press 2014) 44.

The literature on SOEs studies often employs a standard definition of privatisation, whereby privatisation refers to replace political control with private control by outside investors, or that privatisation is the process changing a public entity to private control or private ownership.²³ However, the empirical research on the outcome of privatisation indicates that occurred at this stage, governments retained more control after privatisation, by means of proportional rules and with centralised political authority.²⁴ It is therefore argued that privatisation does not necessarily imply the retreat of government control. In other words, simply the private legal

21006 1 Another example of privatisation is the United Kingdom. By transferring ownership, the UK government has privatised \$17.2 billion of State assets during 2014 and \$14.6 billion from January to August 2015. See Megginson, 'Privatization Trends and Major Deals in 2014 and Two-Thirds 2015' 2.

²² Bortolotti and Faccio (n 18) 2908.

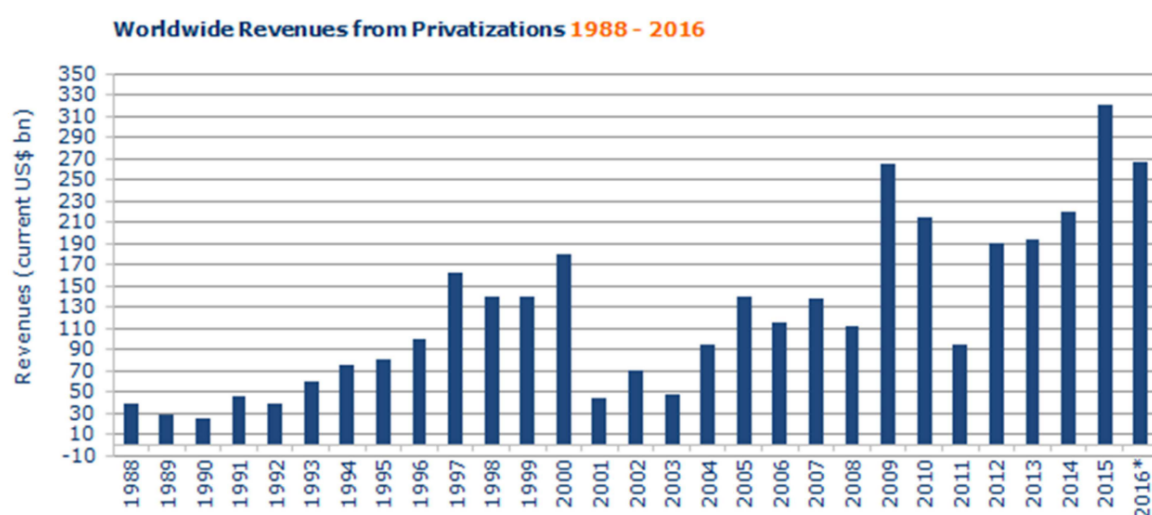
²³ Andrei Shleifer and Robert W Vishny, 'A Survey of Corporate Governance' (1997) LII Journal of Finance 737-783.

²⁴ Bortolotti and Faccio (n 18) 2935.

status or private ownership does not necessarily imply that the SOE is not under government control or influence.

5.2.3. State Capitalism (the trend since 2008)

The extensively large-scale privatisation throughout the world since the 1980s seems to suggest that SOEs are destined to become relics of history. However, the fact is that the two waves privatisation in the 1980s-1990s is not completed in the worldwide. Privatisation continued even after 2000, and in some years even accelerated. The statistics indicate that the total value of global privatisation during 2015 reached unprecedented levels, exceeding \$300 billion for the first time, and the 2016 total was the second-highest (see the worldwide revenue bar chart from 1988-2016 below, especially in 2015 and 2016).²⁵ In addition, governments announced major divestment plans of SOEs, which indicate that in the long term, privatisation will remain a central issue in both western and emerging markets.²⁶



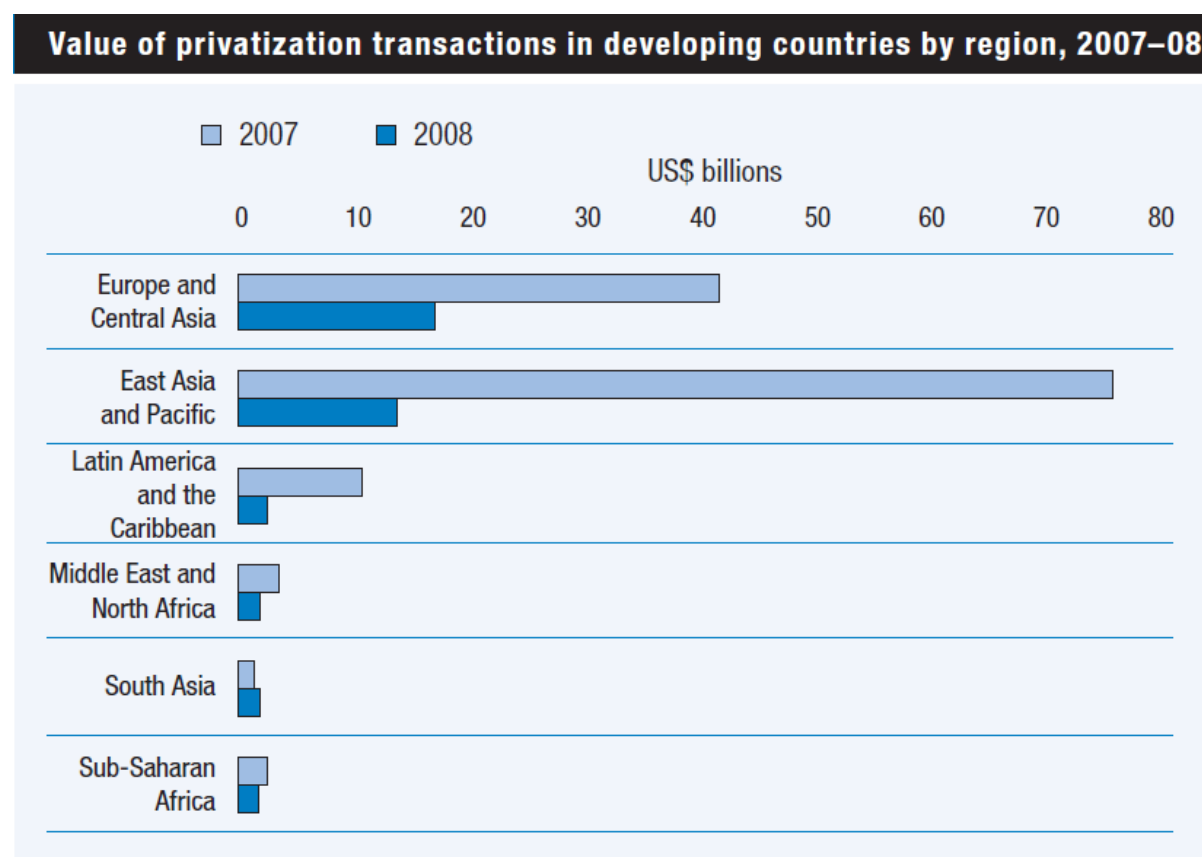
Source: William L. Megginson, 'Two Record Herald an Ongoing Privatization Wave: the Privatisation Barometer Report 2015/2016' (Privatization Barometer).

Although the significant privatisation happened in the last century, State control, counter-intuitively, has not been reduced accordingly. On the contrary, the ideology of 'State capitalism' has risen to prominence with the resurgence of State investment in the enterprises after 2008. In order to respond to the 2008 financial crisis, many developing countries have halted the

²⁵ As observed, during the years 2015 and 2016, total privatisation sales were \$319.9 billion and \$266.4 billion, which total exceeds the total value of privatisation between 2001 and 2006.

²⁶ William L Megginson, 'Two Record Herald an Ongoing Privatization Wave' The Privatisation Barometer Report 2015-2016 1.

long-term trend toward reducing State ownership (see the contrast of privatisation before and after 2008 in developing countries as demonstrated in the diagram below). For example, the Russian government is disposed of State ownership as the means of production.²⁷



Source: World Bank Group, Privatization Database.

Even developed countries such as the US and the UK increased State capitalism to control ‘Fannie Mae’ and ‘Freddie Mac’²⁸ and took a 68 per cent share of the Royal Bank of Scotland.²⁹ Government interventions in developed countries in this period were primarily in the form of

²⁷ See further F. Joseph Drensen, ‘The Role of State Corporations in the Russian Economy’ Kennan Institute Wilson Center Economic and Globalisation Report 1 October 2012. Ian Bremmer and Nouriel Roubini, ‘Expect the World Economy to Suffer Through 2009’ *Wall Street Journal* (23 January 2009).

²⁸ ‘Fannie Mae’ refers to the US Federal National Mortgage Association. ‘Freddie Mac’ refers to the US Federal Home Loan Mortgage Corporation. In September 2008, they were taken over by the US Treasury and placed into the conservatorship of the government-sponsored enterprises (public company). See US Department of the Treasury, ‘Statement by Secretary Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers’ <<https://www.treasury.gov/press-center/press-releases/Pages/hp1129.aspx>> accessed 10 August 2019.

²⁹ Examples include Iceland, which has nationalised all its major banks. Germany has approved a law that allows the government to nationalise banks. See JSL McCombie and M Spreafico, ‘Could the Icelandic Banking Collapse of 2008 Been Prevented? The Role of Economists in Its Unfurling’ (2014) Cambridge Centre for Economic and Public Policy CCEPP WP07-14. Myra MacDonald, ‘Economy: Germany Approves Law on Bank Nationalization’ *WELT* (18 February 2009). Silvio Contessi and Hoda El-Ghazaly, ‘Different Responses to Banking Crises around the World’ *Federal Reserve Bank of St. Louis* (1 April 2011). Landon Thomas Jr., ‘Across the Atlantic, Echoes in R.B.S.’s Bid to Survive’ *The New York Times* (23 February 2009).

a temporary rescue of distressed financial institutions, rather than a permanent takeover of the private sector.³⁰ Notwithstanding, in many countries, particularly in the EU, the power of the State remains much higher than before the financial crisis in industries or companies that are too important to fail (such as banking and car manufacturing), and the State's role has fundamentally expanded.³¹

To date, SOEs represent approximately 10 per cent of global gross domestic product, and more than 10 per cent of the world's largest enterprises are State-owned (including three of the world's Top Five: State Grid, Sinopec, China National Petroleum).³² Besides the growth in the number, their influence over the international market also should not be underestimated. For example, the fluctuation of global oil prices is manipulated by national oil companies wholly owned by States such as Russia, Iran and Venezuela.³³ As in international trade and foreign investments, the value of SOE sales in total represents up to 19 per cent of the value of the global flow of goods and services.³⁴

Since 2009, in contrast to the divestments represented by the European privatisations, emerging market countries such as Turkey, Brazil, Russia, India and especially China have retained control over vital national economic assets through SOEs. For example, China has more than 150,000 SOEs with nearly 40 per cent of China's industrial assets.³⁵ Among those SOEs, the central government SOEs have undertaken 3,116 projects under the Belt and Road Initiatives,

³⁰ Sunita Kikeri and Matthew Perault, 'Privatization Trends: A Sharp Decline but No Widespread Reversals in 2008' (World Bank Group 2010).

³¹ See further Geoffrey Owen, 'Industrial Policy in Europe since the Second World War: What Has Been Learnt?', Vol 2 The European Centre for International Political Economy (LSE), ECIPE Occasional paper 41-46. William L Megginson, 'Privatization, State Capitalism, and State Ownership Of Business in the 21st Century' (2017) 11 Foundations and Trend in Finance 1.

³² In the 21st century, SOEs have grown to become international giants in many instances. Their aggregate share of the world trade has been sharply increasing. The proportion of SOEs among the Forbes© Global 500 has grown from 9 per cent in 2005 to 23 per cent in 2014. See 'Fortune Global 500 List 2018: See Who Made It' <<http://fortune.com/global500/>> accessed 21 February 2019. Among the world's largest 2000 public companies listed in Forbes© Global 2000, 204 have been identified as majority SOEs in the business year 2010-2011 with ownership spread across 37 different countries, of which China takes the lead (291 SOEs), accounting for more than 10 per cent of the world's merchandise exports in 2010, followed by India (30), Russia (9). See also PWC (Public Sector Research Centre), 'State-Owned Enterprises: Catalysts for Public Value Creation?' (2015) <<https://www.pwc.com/gx/en/psrc/publications/assets/pwc-State-owned-enterprise-psrc.pdf>> 9.

³³ The oil price rose from below \$25 per barrel in 2004 to a high of \$147 per barrel in 2008 and an average of over \$100 per barrel for 2010-2014, and now there is period-average global production of about 90 million barrels per day. See 'A Recent History Of Oil Prices! And Causes of the Violent Movements | OilPrice.Com' <<https://oilprice.com/Energy/Oil-Prices/A-Recent-History-Of-Oil-Prices-And-Causes-Of-The-Violent-Movements.html>> accessed 11 February 2019. See also David Sheppard and Anjli Raval, 'Nervous Oil: Five Factors Driving Price Swings' *Financial Times* (5 November 2018).

³⁴ Dick K Nanto, 'The Global Financial Crisis: Foreign and Trade Policy Effects', CRS Report for Congress No. R40496 17.

³⁵ See Leaders, 'China's State Enterprises Are Not Retreating, but Advancing—Unnatural Selection' *The Economist* (20 July 2017).

taking up to 50 per cent of the infrastructure projects already underway or in the pipeline.³⁶ As a competing model of business ownership and organisation, China's successful experience of driving economic development through its national champion SOEs in crucial industries³⁷ has been imitated by nations such as Brazil, India, and Singapore. Those countries are rising to global prominence with business sectors that are government-dominated, government-controlled, or heavily influenced by governments.³⁸ Besides the BRICS countries,³⁹ State ownership of business assets has increasingly taken the form of 'portfolio equity investment by governments and State-owned investment funds, rather than direct ownership/operation of State-owned enterprises'.⁴⁰ The United Arab Emirates is the most prominent example of this case. The United Arab Emirates successfully drives economic diversification through its sovereign wealth funds.⁴¹

As observed, a number of developing countries have increasingly invested in and controlled SOEs rather than in privatisation. It is also common to see States that allow SOEs to be listed on the stock market. In this way, governments raise private capital by selling newly-issued primary shares to investors, thus diluting State ownership only indirectly by increasing total shares outstanding, rather than having the State sell its existing shareholdings directly to

³⁶ Zhiqiang Liu, 'China's Central SOEs Running over 3,000 Projects under BRI' *People's Daily Online* (14 November 2018).

³⁷ Among the increasing portions of SOEs in international economy, China accounts for the largest portion. In 2005, China SOEs accounted for only 3 per cent whereas, in 2014, they accounted for 15 per cent. See further Przemyslaw Przermslaw Kowalski and others, 'State-Owned Enterprises: Trade Effects and Policy Implications' [2013] OECD Trade Policy Paper No. 147 30. Among the increasing portions, China accounts for the largest. In 2005, China SOEs accounted for only 3 per cent whereas, in 2014, they accounted for 15 per cent. In 2000, China's GDP at market price was \$1.21 trillion, and represented only 3.6 per cent of world GDP; by 2017 these values had increased to \$12.1 trillion and 17.52 per cent, respectively. See PTI, 'China's GDP Rose to USD 12.1 Trillion in Last Five Years: Xi' *The Economic Times* (18 October 2017).

³⁸ Megginson, 'Privatization, State Capitalism, and State Ownership Of Business in the 21st Century' (n 31).

³⁹ The acronym 'BRICS' stands for the largest developing countries: Brazil, Russia, India, China and South Africa.

⁴⁰ Megginson, 'Privatization, State Capitalism, and State Ownership Of Business in the 21st Century' (n 31) 5.

⁴¹ 'Sovereign Wealth Funds' are government owned and managed and are commonly established out of balance of payments surpluses. SWFs are expected to invest in more diversified portfolios and in riskier assets than traditional reserve holdings. SWF investments might not be driven by purely commercial interests and could also have national strategic goals. Indeed, in recent years, SWF portfolios typically involve more diversified asset allocations than traditional reserves holdings, with considerable stakes in equities and wide geographical dispersion. See Gawdat Bahgat, *Sovereign wealth funds in the Gulf - an assessment*. Kuwait Programme on Development, Governance and Globalisation in the Gulf States (16) (2011) The London School of Economics and Political Science, London, UK 3-5.

Since the early 2000s, a number of SWFs have been established., Thee Mubadala Development Company, for example, was established in in the 2000s, and invested in energy, industry, aerospace, information and communication technology, services ventures, real estate and hospitality, infrastructure and healthcare. In 2007, the Emirates Investment Authority was established to diversify the UAE government's asset exposure. See Bahgat (n 41) 31, 32. Dubai has emerged as the world's largest hub for international air travel, surpassing London Heathrow. See further Alissa Amico, 'The Rise of State Capitalism 2.0' *Japan Times* (Saudi Arabic, 6 Septemb 2018).

investors.⁴² The statistics indicate that, in 2009, governments actually acquired more assets through stock purchases (\$1.51 trillion) than they sold through share issue privatisation and direct sales (\$ 1.48 trillion).⁴³ (see below the line chart demonstrate the worldwide privatisations and sales, nationalisation and investments in 1988-2011).

⁴² Megginson, 'Privatization Trends and Major Deals in 2014 and Two-Thirds 2015' (n 21) 7.

⁴³ In China, eight competitive sectors launch IPOs for about US\$21 billion in the stock market in 2009. In India, the IPOs of the National Hydroelectric Power Corporation and Oil India Corporation was launched for US\$1.18 billion; in Turkey, there were two electricity sales of US\$1.8 billion. India has made it mandatory for all profitable SOEs to offer at least 10 per cent of shares in the stock market. See further, Kikeri and Perault (n 30). Megginson, 'Privatization, State Capitalism, and State Ownership Of Business in the 21st Century' (n 31).

Worldwide Sales of State-owned Enterprises and Assets (Privatizations and Sales) and Purchases of Privately-owned Stock by Governments (Nationalizations and Investments), 1988-2011.



Source: *The Economist*, Setting out the Store (January 11, 2014).

<http://www.economist.com/news/briefing/21593458-advanced-countries-have-been-slow-sell-or-make-better-use-their-assets-they-are-missing>

It is argued that although the SOEs introduced private ownership, government control or influence has never retreated. Traditional SOEs with high levels (over 50 per cent) of government ownership, and correspondingly high levels of control, still exist.⁴⁴ Besides, public

⁴⁴ For example, Coal India Limited (78.32 per cent ownership by the government of India, 89.65 per cent controlled by the President of India), Aeroflot Russia (51 per cent State ownership), Alaska Railroad Corporation (covered by U.S. federal government ownership and exclusively and completely controlled), Caisse des Dépôts et Consignations (French Public financial institution: Sovereign Bonds account for 52 per cent), Coal India Limited (CIL), 'Corporate Structure' <<https://www.coalindia.in/en-us/company/structure.aspx>> accessed 13 February 2019. Aeroflot, 'Structure of Company' <https://www.aeroflot.ru/gb-en/about/structure_of_company> accessed 13 February 2019. 'Alaska Railroad at a Glance' <<http://www.alaskarails.org/ARR-at-a-glance.html>> accessed

and private mixed-ownership/control are the dominant ownership/governance structure of SOEs.⁴⁵ With share-holding by the State, SOEs' activities are hard to tell apart from the policies of the State. A State could either support or control the SOEs directly or indirectly (through soft budget constraint)⁴⁶ or by government-controlled institutions (such as State-owned banks or other SOEs).

On the one hand, it is argued that the government ownership does *not necessarily equate to or relate to* government control unless it is the ownership of 'key shares' that grant the State special powers and statutory constraints on privatised SOEs. The literature on SOEs has tended to view State ownership in black-and-white terms: that is to say, an enterprise is regarded as either State-owned or privately owned.⁴⁷ The situation facing SOEs today is more complex than it was. In the current setting, the control is still in the government's hands, but the State influence behind a transaction is not as explicit as the ownership structure suggests, although ownership may be related to the degree of State influence.⁴⁸ The 'ownership' cannot sufficiently define the SOEs. Other aspects of government control must also be considered, such as special powers, including the right to appoint key personnel; the right to consent to or

13 February 2019. Sovereign Wealth Center, 'Caisse Des Dépôts et Consignations (State-Owned Investor)' <<https://www.sovereignwealthcenter.com/fund/95/caisse-des-dépôts-et-consignations-state-owned-investor.html#.XGQk2lz7Suk>> accessed 13 February 2019.

⁴⁵ Garry D. Bruton, Mike W. Peng, David Ahlstrom, Ciprian Stan and Kehan Xu, 'State-Owned Enterprises Around the World as Hybrid Organizations' (2015) 29 Academy of Management Perspectives 92, 104, 107.

⁴⁶ The term 'soft budget constraint' is an economic lexicon pertinent to the realm of socialist and transition economies, although now the definition goes beyond that. The soft budget constraint occurs if one or more supporting organisations are ready to cover all or part of the deficit. In the case of SOEs, the supporting roles are played by one or more organs of the State, and undertake actions such as 'support', 'rescue' and 'bailout'. See further János Kornai, Eric Maskin and Gérald Roland, 'Understanding the Soft Budget Constraint' (2003) 41 Journal of Economic Literature 1095 1098.

⁴⁷ Despite extensive analysis of SOEs, there is little agreement on the definition of the term itself. As observed, most of the studies on SOEs are framed by Western theories of public enterprise, and conclusions were drawn on the assumption that these theories hold, (theories such as agency theory, property rights, public choice, and neoliberalism). In agency theory, the relationship between the State and the SOE is that of principal-agent. In the property rights theory, the SOEs are regarded as State property, but their access and use are managed and controlled by a government agency or an organisation that has been granted such authority. Public choice is also called non-market decision making. According to the public choice theory, the justification of SOEs (and/or State-ownership, or State-management, is the avoidance of 'moral hazard', efficiency costs imposed by monopolies, or the contestability of the market. Under this theory, SOEs show their presence in areas of public goods such as utility sectors and the national defence sector. 'Neo-liberalism' promotes free market and minimal State interference. The State limits itself to regulating the market mechanism, while progressively withdrawing from provision of social welfare and public goods. Consequently, under neo-liberal sovereignty, SOEs constitute a State-capitalist sector within the market economy. Those theories try to explain the justification and management of the SOEs at that time. The literature review on SOEs from 2000-2014 see Garry D Bruton and others (n 45) 93. See further, Ravi Dharwadkar, Gerard George and Pamela Brandes, 'Privatization in Emerging Economies: An Agency Theory Perspective' (2000) 25 Academy of Management Review 650 -669. See further Garrett Jones, *The New Palgrave Dictionary of Economics* (Macmillan Publishers Ltd ed., 3rd edn., Palgrave Macmillan UK 2018) 10894. See further, William J Baumol, 'Toward a Theory of Public Enterprise' (1984) 12 Atlantic Economic Journal 13. See also Chua Beng Huat, 'State-Owned Enterprises, State Capitalism and Social Distribution in Singapore' (2016) 29 Pacific Review 499.

⁴⁸ Kowalski and others (n 37) 39.

to veto the acquisition of relevant interests in privatised SOEs, the right to give consent to the transfer of subsidiaries, dissolutions of the SOEs etc., or the statutory constraints in aspects of ownership limits, voting caps and national control provision.⁴⁹

On the other hand, in the current setting, SOEs' commerciality and competitiveness are growing.⁵⁰ The governments of emerging economies explicitly pursue the internationalisation of their SOEs in the interests of advancing their international trade power and national strategic goals.⁵¹ It can be seen that, as a result, SOEs have engaged more frequently in international competition. Among the multinational SOEs, those of China account for a significant portion.⁵² It has been observed that China's accession to the WTO has significant implications for trade agreement negotiations, not only because of the country's considerable market size, but also because of the effect of its accession as a precedent that is relevant to other countries with large State sectors, such as Singapore, Vietnam, Malaysia, India, Canada, New Zealand, and Korea.⁵³ The SOEs in those countries no longer operate solely within their domestic markets, but also actively engage in international trade.⁵⁴ With their growing role in international trade, it is argued that the international regulation on SOEs must also be developed. Specifically, in the WTO law, there should be a developed approach to identify what kind of SOEs should be subject to non-discrimination obligation.

5.3. SOEs in the WTO Legal Regime

Due to the de-nationalisation happened in the 1970s and 1980s in western countries, SOEs were supposed to be of a minor role in international trade. Moreover, as the multilateral rounds

⁴⁹ Bortolotti and Faccio (n 18) 2918.

⁵⁰ Today, some modern SOEs are among the largest and fastest expanding multinational companies. They engaged in wide variety of industrial sectors such as finance, public utilities, manufacturing, shipping, mining, and energy. They are also increasingly compete with private companies for resources and markets in in both domestic and international wide. See OECD, *State-Owned Enterprises as Global Competitors: a Challenge or an Opportunity?* (OECD Publishing, Paris 2016) 20, 21.

⁵¹ And as a result of pursuing non-commercial or strategic objectives, SOEs may involve anti-competitive effects for their trading partners. See e.g. William E Kovacic, 'Competition Policy and State-Owned Enterprises in China' (2017) 16 *World Trade Review* 693. Kowalski and others (n 37) 5.

⁵² Of the top 10 global companies ranked by Forbes, China takes fifth place. All of the top Chinese companies are State-owned banks, led by the Industrial and Commercial Bank of China (SOE) and the China Construction Bank (SOE). Overall, China accounted for 291 of the world's 2000 largest companies in 2018, among which the top 12 biggest companies are all government owned. See Kenneth Rapoza, 'China's Largest Companies Prove Why It's The World's No. 2 Economy' *Forbes* (6 June 2018). Scott Cendrowski, 'China's 12 Biggest Companies Are All Government-Owned' *Fortune* (20 July 2015).

⁵³ Eduardo Pérez Motta, 'Competition Policy and Trade in the Global Economy: Towards an Integrated Approach' (2015) E15 Expert Group on Competition Policy and the Trade System Policy Options Paper 11.

⁵⁴ For example, public sector undertakings in India, State-owned enterprises in China), Crown corporations in Canada, Crown entities in New Zealand, Japan Post Group, Korea SOEs in national oil, land and house, electric power, broadcasting, metro, rail, airports, and so forth.

of trade negotiations are led or driven mainly by those developed countries,⁵⁵ GATT Article XVII only subject State trading enterprises to non-discrimination obligation.⁵⁶ although there is no general definition of SOE in the WTO multilateral agreements, there are related concepts in WTO law, such as ‘State-trading enterprise’, ‘public monopoly’, ‘public body’, and so forth. Besides, the WTO Dispute Settlement Body has constantly interpreted these similar notions in a different context. In this section, the author is going to analyse those similar notions and jurisprudence to find out the approach by which the WTO defines SOEs.

5.3.1. General Agreement on Tariffs and Trade (GATT)

The International Trade Organisation (‘ITO’) Sub-Committee’s report states that the aim of GATT Article XVII (‘State trading enterprise’) was to limit adverse trade effects and to ensure that State trading enterprises operated *on the basis of commercial considerations*, and in a non-discriminatory manner, without eroding or nullifying the value of negotiated tariff concessions.⁵⁷ The Panel’s Statement of the aims of GATT Article XVII implied that GATT had no intention of having a workable definition of SOEs.

The provision dealing with SOEs in GATT progressed further after the failure of the ITO. In the first paragraph of Article XVII: 1(a) GATT 1994, it is stipulated that State trading enterprises cover three types of enterprises: ‘**State enterprises**’, ‘**Enterprises granted special privileges by the State**’(for example, a subsidy or subsidy equivalent), and ‘**Enterprises granted exclusive privileges**’ (i.e. a monopoly in the production, consumption or trade of certain goods).⁵⁸ A ‘Panel on Subsidy and State Trading’ explains that the word ‘enterprise’ ‘refers to either an *instrumentality* of government which has the power to buy or sell or to a

⁵⁵ At the time of the establishment of the WTO (1993), trade agreement negotiations were power-driven, and thus were quite western-centric. The Trade liberalisation after the Second World War was initiated by industrialised countries and they had dominant power over the conclusion of international agreements, such as the GATT.

⁵⁶ State trading enterprises are defined as governmental or non-governmental enterprises that are authorised to deal with trading (exporting and/or importing) and are owned, sanctioned, or otherwise supported by governments. State trading enterprise also includes marketing boards. Article XVII of GATT 1994 is the principal provision dealing with State trading enterprises and their operations. See WTO, State trading enterprises, <https://www.wto.org/english/tratop_e/statra_e/statra_e.htm> Accessed 6 August 2019.

⁵⁷ Negotiating Group on GATT Articles, ‘Article XVII (State Trading Enterprises): Note by the Secretariat’ MTN.GNG/NG7/W/15 11 August 1987. See also, WTO, ‘State Trading Enterprises: Technical Information’ <https://www.wto.org/english/tratop_e/statra_e/statra_info_e.htm> accessed 6 August 2019. As a compliment to the illustration of the general rule to define State trading enterprises, the Working Party on State trading enterprise developed an illustrative (but not exhaustive) list to help explain the relationship. The illustrative list includes statutory marketing boards, export marketing boards, regulatory marketing boards, fiscal monopolies, canalising agencies, foreign trade enterprises, and boards of nationalised industries.

⁵⁸ Emphasis Added.

non-governmental body with such power, and to which the government has **granted exclusive or special privileges**'.^{59 60}

It is argued that the theoretical basis of this definition is the principle of 'State responsibility'.⁶¹ Under this principle, State enterprises are presumed to be an 'instrumentality' of government, with its conduct attributable to the State. Because they enjoy governmental authorisation, direction or statutory powers (such as certain taxes preference, loan privilege for its participation in the profits of the entity) so that the entities when conducting purchases or sales, could be treated as an agent or instrument. Thus the entity's purchase or sale could also be attributed to the State.

This rationale is further clarified by the working definition of State trading enterprise contained in the Understanding on the Interpretation of Article XVII of GATT 1994, which refers to three types of entities:

- 1) A governmental or non-governmental entity, including marketing boards;
- 2) The granting to the enterprise of **exclusive or special rights or Privileges**; and
- 3) A resulting influence, through the enterprise's purchases or sales, on the level or **direction** of reports or exports.⁶²

We have attempted to discover whether there is case law concerning this provision. However, the provision is so broad that it has rarely been invoked before the WTO adjudicatory body.⁶³

⁵⁹ In 1959-1960, a Panel on Subsidies and State Trading examined the notifications made under Article XVII:1(a). The 1960 final report of this group on 'Notifications of State-Trading Enterprises' discusses the scope of paragraph 1(a)t explains the word 'enterprise'. See GATT Panel of Subsidies and State Trading, 'Report by the Panel on Subsidies and State Trading' L/970 17 April 1959 para 16. WTO, 'Text Of Article XVII, Interpretative Note And Article XVII And Uruguay Round Understanding On Interpretation Of Article XVII' <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art17_e.pdf> accessed 6 August 2019 para 473-475 (Emphasis Added).

⁶⁰ The article is not technically clear and formal. Instead, there are notes and explanations attached to the article providing an indicative list. In the 'Understanding and Interpretation' of this definition, State-owned enterprises, marketing boards, enterprises controlled by a signatory, import monopolies, privately-owned enterprise enjoying special or exclusive privileges, and governmental agencies entrusted with the power to buy or sell are all within the remit of Article XVII. See, for example. *Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994*, General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.

⁶¹ Article 5 of the International Law Commission on State Responsibility provides: 'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.'

⁶² WTO, 'Text Of Article XVII, Interpretative Note And Article XVII And Uruguay Round Understanding On Interpretation Of Article XVII' (n 59) 472-474. (Emphasis Added)

⁶³ Just as the WTO concedes that the entire rule is left without bite: 'Throughout the history of Article XVII, a significant lacuna has been the absence of any clear definition of what a State trading enterprise is, or what State trading is. Many attempts were made at such a definition, but all of them failed. Needless to say, this was a severe handicap in the efforts to enforce the transparency obligation under Article XVII. How can you make a notification when you do not understand what it is you are supposed to be notifying? Thus, it is likely that many State trading enterprises of many countries went unreported for years. To further complicate this already unsatisfactory

In the litigation related to State trading enterprises, the WTO adjudicatory body took an incremental approach, confining its reasoning to the specific issue, rather than working further to devise a clear guideline applicable to all cases.⁶⁴ This is illustrated by the case discussed below.

5.3.1.1. Case study: United States—Procurement of a Sonar Mapping System
(GATT)

On 12 July 1991, the European Community (the EU after 2008) requested the Committee on Government Procurement to establish a Panel to examine a complaint concerning the procurement of a sonar mapping system by the United States National Science Foundation (NSF), a listed US government agency under the GPA. In October 1989, the NSF concluded a six to a ten-year contract with the Antarctic Support Association (ASA), a private company, to provide services and products in support of government research programmes in the Antarctic. In May 1991, ASA was tendering to purchase a sonar mapping system. One of the issues the Panel had to examine was whether the acquisition of the sonar mapping system was a procurement by a covered entity.

Since there is no definition of government procurement in the GPA, the Panel referred to Article XVII: 2 (State trading enterprise) and Article III: 8(a) (non-discriminatory treatment) of the GATT, noting that ‘government use’, and ‘government purpose’ and procurement by government agencies are commonly considered as factors to indicate government procurement.⁶⁵ The reference supported the Panel’s opinion that the word ‘by’ suggests that the entity must be under a **controlling influence** with regard to the acquisition of the product.⁶⁶ If an entity purchases a product on behalf of a government entity, for government purposes, or

situation, very few contracting parties to GATT complied with the notification requirement to make a notification annually, even where there were no STEs to report’ see WTO, ‘State Trading Enterprises: Technical Information’ (n 57). See also Kowalski and others (n 37). Report of the Appellate Body, ‘Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain’ WT/DS276/AB/R 30 August 2004. Report of the Appellate Body, ‘Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef’ WT/DS161/AB/R WT/DS169/AB/R 11 December 2000.

⁶⁴ Minwoo Kim, ‘Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements’ (2017) 58 Harvard International Law Journal 237.

⁶⁵ Report of the Panel (GATT), ‘United States - Procurement of a Sonar Mapping System’ (1992) GPR.DS1/R 23 April 1992 para 4.6.

⁶⁶ Such as payment by the government, government use of, or benefit from, the product, government possession and other kinds of government control over the acquisition of the product, such as the conclusion or cancellation of the purchasing contract. See Report of the Panel (GATT) (n 65) para 4.5, 4.7, and 4.11. Article II Scope and Coverage. For the purposes of this Agreement, covered procurement means procurement for governmental purposes by a procuring entity. (Emphasis Added)

if the government is the ultimate beneficiary, then no matter whether the entity is governmental or not, the purchasing can be considered as government procurement.

The Panel held that the controlling influence could be recognised where the goods (1) are paid for out of government funds; (2) are for government use or benefit; (3) become the property of a government agency after the transaction; and (4) where the selection of the goods by the private company is subject to the final approval of a governmental agency.⁶⁷ If a body fulfils the four conditions, its purchasing could be regarded as government procurement, and it would, therefore, fall within the scope of the GPA rules. The Panel tried to explain the ‘controlling influence’ on the purchase by means of a literal interpretation, but it had no interest in defining the term ‘government entity’.

According to the literal interpretation and the negotiation history on the ‘State trading enterprise’ provision (Article XVII GATT), this provision aims to capture measures that might bring about discrimination between the domestic and imported products under government control or influence. Once it is determined that there are ‘government measures’ at issue, it is not generally of legal relevance which ‘government entity’ is applying the measures, be it a State trading enterprise or another similar entity.⁶⁸

It is argued that under the GATT, it is the nature of the ‘governmental measures’ that is at issue, rather than the nature of the ‘body’ that applies the measures. This is the difference between the GATT and the GPA. Under the latter, the obligations fall on certain parts of government entities, and thus whether an entity is ‘governmental’ or not is the key question to answer with regard to the GPA. Accordingly, under the GATT, ‘government measures’ is defined, whereas there is no attempt to define ‘government body’. That is also why a definition of a government entity is essential for the GPA application, and the reason why following the GATT, GATS to take a list approach of coverage under the GPA is not suitable.⁶⁹

⁶⁷ Report of the Panel (GATT) (n 65) para 4.9—4.12. See also Martin Dischendorfer, ‘The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO’ (2000) 1 Public Procurement Law Review 18.

⁶⁸ See Report of the Panel, ‘Korea – Measures Affecting Government Procurement’ (2001) WT/DS163/R 1 May 2000 para 7.56.

⁶⁹ On the discussion of the list approach see Chapter 4 Section 4.2 Drawbacks of the Current Entity Coverage.

5.3.2. General Agreement on Trade in Services (GATS)

The GATS does not refer to State enterprise, State trading enterprises or State-owned enterprises. The only similar notions in the GATS that are related to SOEs are ‘monopolies and exclusive service supplier’.

Article XXVIII:(h) GATS defines ‘monopoly supplier of service’ with three criteria include: (1) any person, public or private, (2) with member’s authorisation, or (3) established by the member *de jure/de facto* in the relevant market.⁷⁰ The second and third criteria clearly expressed the existence of government authorisation and governmental establishment purpose, which imply that direct government involvement is an essential criterion to subject one monopoly under the GATS rules. With regards to the definition of ‘exclusive service supplier’, Article XXVIII:(h) also refers to ‘government authorisation’ and ‘government purpose’. These two factors in the provision are intended to specify whether the provision of a service is consistent with the non-discrimination obligations and the market access commitment, and not to define the purchasing entity.

The Panels view on *China-Electronic Payment Services* also supports this contextual interpretation. It states that ‘a monopoly supplier is a sole supplier authorized or established formally or in effect by a (WTO) Member, whereas an exclusive service supplier is one of a small number of suppliers in a situation where a Member authorizes or establishes a small number of service suppliers, either formally or in effect, and **that Member substantially prevents competition among those suppliers.**’⁷¹

The interpretation given here aligns with the present author’s conclusions with regard to the GATT State trading provision. i.e., that GATS does not attempt to define the trading entity itself. Additionally, the relevant GATS adjudicatory reports always employ the criteria of ‘government authorisation and government purpose’ when deciding whether the action of the entity in question is attributable to the State, and consequently whether the transaction is subject to GATS.

It is argued that all those WTO provisions and adjudicatory interpretations focus, not on the actions of the trading entity, but discriminatory actions of the State. The GATT, GATS and the

⁷⁰ Article XXVIII (h) GATS states that “monopoly supplier of a service” means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service.

⁷¹ Report of the Panel, ‘China-Certain Measures Affecting Electronic Payment Service’ WT/DS413/R 16 July 2012 para 7.587. (Emphasis Added)

WTO jurisprudence has been based on ‘State responsibility’, where trading entities were treated as a part of the State, or as the apparatus of the State, in international trade. Those WTO trade rules were correspondingly made in 1993 when SOEs underwent privatisation.⁷² Thus, those trade rules match the SOEs at that time. However, our criticism is that in the age of State capitalism, SOEs, on the one hand, are separate from States and operate as independent commercial entities and, on the other hand, are not exempt from government control or influence. As a result, not all SOEs operate solely in accordance with public mandate policies. On the contrary, SOEs are more frequently seen undertaking solely commercial activities or performing public policy functions while also engaging in commercial activities.

In addition to the absence of specific direct discipline on the SOEs in the GATS, we find Article I: 3(b) of the GATS exempts from the scope of GATS ‘services provided in the exercise of governmental authority’. Article I: 3(c) of the GATS defines ‘a service supplied in the exercise of governmental authority’ as ‘services supplied by a supplier neither on a commercial basis nor in competition with one or more service suppliers’. It is clear that from this definition that ‘**commercial basis**’ and the ‘**competition condition**’ are the core identifying factors of the exercise of governmental authority.⁷³ On the basis of the above adjudicatory report of *China-Electronic Payment Services*⁷⁴ and Article I: 3 of the GATS, it is argued that the ‘**substantial impact on competition**’ is the ultimate concern behind the legal text. The causality between ‘government authorisation and government purpose’ with ‘substantial impact on competition’ is evident and necessary.⁷⁵

However, the interpretation of Article I: 3(b) (c) of the GATS on the interpretative method of the Vienna Convention of the Law of Treaties is by no means clear.⁷⁶ It is argued that a definition of the term ‘on a commercial basis’ should take into account the market price paid, enabling the supplier to make a profit. Moreover, an understanding of the term ‘competition’ should depend on the question of whether the same service, or a comparable service, is provided and on the scope of the targeted market, and these elements need to be decided on a

⁷² See the discussion on the second wave of privatisation happened in the industrial countries in Chapter 5 Section 2.2.

⁷³ Emphasis Added.

⁷⁴ Report of the Panel, ‘China-Certain Measures Affecting Electronic Payment Service’ (n 31) para 7.587.

⁷⁵ Markus Krajewski, ‘Public Services and the Scope of the General Agreement on Trade in Services (GATS)’ (2001) Center for International Environment Law (CIEL) Research Paper, Geneva 2001 10-12. (Emphasis Added)

⁷⁶ The Annexes, schedules of specific commitments of the GATS, subsequent practice, subsequent agreements, and other rules of international law and preparatory work do not provide additional information concerning the meaning of Article I: 3(b) (c). See further Krajewski (n 75) 9-17.

case-by-case basis.⁷⁷ Both factors must be defined in accordance with the particular circumstance of the relevant market. For example, the market must have more than one player (i.e., there must not be a monopoly) and more importantly, the market must not be so concentrated that the players cannot compete effectively.

5.3.3. Agreement on Subsidies and Countervailing Measures (SCM)

Article 1 of the SCM states that a subsidy is ‘a financial contribution by a government or any public body within the territory of a WTO member.’ However, what does the term ‘public body’ refer to? The question is relevant to recognise whether a subsidy should be regulated under the WTO/SCM Agreement, especially when an SOE is a subject to give subsidy (for example a State-owned bank or financial company), whether the subsidy issued by this SOE should be regulated under the SCM depends on whether the SOE is a public body or not. The only certainty about the term ‘public body’ is that no clear meaning of the term has ever been given throughout the negotiation history of the SCM.⁷⁸

Some direction on the term “public body” can be discerned from disputes arising from the SCM Agreement. For instance, in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products From China (US-AD & CVD (China))*, the US Department of Commerce argued that some hot-rolled steel provided by several China State-owned manufacturers to the producers of certain products constituted actionable subsidies. The US Department of Commerce also submitted that the loans provided by the China State-owned commercial banks to those producers constituted actionable subsidies.⁷⁹ The US Department of Commerce reasoned that those SOEs were ‘public bodies’ within the meaning of Article 1.1(a)(1). The Department took the position that ‘any entity controlled by a government via *majority State ownership*’ is a public body under Article 1.1 (a)(1).

⁷⁷ The dictionary meaning of ‘commercial’ refers to the exchange of goods or services for money or a monetary equivalent. Here the market price must cover the cost of the supplier even below the market price. In order to establish the competition condition, firstly, there must be a market in which the suppliers are not the only supplier of the same or comparable service; Secondly, the market must be large enough for the suppliers to compete with each other. See further Krajewski (n 75) 10-13.

⁷⁸ Ru Ding, “‘Public Body’ or Not: Chinese State-Owned Enterprise” (2014) 48 *Journal of World Trade* 169-173. Ding analysed the negotiation history of the SCM and rebutted the opinion that the issue of non-market economies in transition was a consideration when adding the term ‘public body’ to the definition of subsidy. Ding refers to the analysis of the three negotiators (Michel Cartland, Gérard Depayre and Jan Woznowski), suggesting that the negotiation history is too ambiguous to be reliable. The ambiguous negotiation itself can only tell us that there is no consensus on the meaning of the term ‘public body’ and can offer no clear explanation of this term.

⁷⁹ Report of the Appellate Body, ‘United States – Definitive Anti-Dumping And Countervailing Duties On Certain Products From China’ WT/DS379/AB/R 11 March 2011 para 356.

The US position represented the ‘government control approach’. It posited that government ownership or the holding of a majority State share in the entity sufficed to establish the presence of ‘control’. The Appellate Body (*US-AD & CVD (China)*) acknowledged the Panel’s Statement that the relevant investigating authority might have been entitled to treat a 100 per cent government-owned entity as a public body. The Panel (*EC—Countervailing Measures on DRAM Chips*) had made a similar statement, that is, a 100 per cent government shareholding indeed establishes an ‘enterprise’ as a public body.

However, both Panels (*EC—Countervailing Measures on DRAM Chips* and *US-AD & CVD*) rejected the idea of taking ‘ownership’(unless 100 per cent ownership) as the only criterion for the recognition of a ‘public body’. The Panel (*EC—Countervailing Measures on DRAM Chips*) pointed out that ownership does not positively imply that the government exercised control over the SOEs in a particular way.⁸⁰ The author argues that in the context of State capitalism, ownership is not necessarily equivalent to control.⁸¹ If government ownership was taken as the criterion for subjecting an entity to the definition of a ‘public body’ under Article 1, most of the SOEs around the world would fall into the subsidy discipline. The risk of **over-inclusion** brought by the ‘ownership’ criterion must be avoided.

Moreover, the Panels further developed the reasoning that for the application of Article 1 SCM, it is necessary that not only that the entity itself has a public nature but also that its action at issue must be *outside of* government control or influence (the **causality**). Moreover, the factor of ‘control’ is relevant but not sufficient to define the entity as a ‘public body’ under Article I SCM.⁸² The Appellate Body overruled the Panel (*US-AD & CVD*) stating that: ‘*The determination of whether particular conduct is that of a public body must be made by evaluating the core features of the **entity** and its relationship to government in the narrow sense. That assessment must focus on the evidence relevant to the question of whether the entity is **vested with or exercises governmental authority.***’⁸³

To put it clearly, there are two requirements to be a ‘public body’ under Article 1.1(a) (1). First, the entity itself must bear a core public feature (such as authority); and secondly, the body must

⁸⁰ Report of the Panel, ‘European Communities – Countervailing Measures On Dynamic Random Access Memory Chips From Korea’ WT/DS299/R 17 June 2005 para 7.29.

⁸¹ See immediately above Chapter 5 Section 2.3.

⁸² Report of the Panel, ‘European Communities – Countervailing Measures On Dynamic Random Access Memory Chips From Korea’ (n 80) para 7.119.

⁸³ Report of the Appellate Body, ‘United States – Definitive Anti-Dumping And Countervailing Duties On Certain Products From China’ (n 79). para 318, 345. (Emphasis Added) See further Thomas J Prusa and Edwin Vermulst, ‘United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through’ (2013) 12 World Trade Review 197, 199.

exercise government authority in the case at issue. Both requirements must be satisfied at the same time.⁸⁴ Unlike the GATT and the GATS,⁸⁵ the Panel examined the nature of the ‘entity’ itself rather than the ‘action’ of the entity. The appellate body (*US—Countervailing Duty Investigation on DRAM*) further decided that the ‘actions of State-owned corporate entities are *prima facie* private, and thus presumptively not attributable to a Member under Article 1.1 of the SCM Agreement’.⁸⁶ Here we can see another difference from the GATT and the GATS. The appellate body pointed out that the SOEs are first and foremost ‘enterprises’ and their commercial character should be considered as primary, but instead that they should not be primarily treated as a ‘State apparatus’. The author observes that this idea is coherent with the context of State capitalism, where SOEs operate commercially.

In the case study of the subsection, the author will pick the case *Korea—Measures Affecting Trade in Commercial Vessels* as an example to illustrate the WTO adjudicator bodies’ reasoning on how to define a public body under the SCM. The arguments of both sides of the adjudicatory report could bring reference for the defining GPA government body.

5.3.3.1. Case study: Korea—Measures Affecting Trade in Commercial Vessels (SCM)

In 2002, the European Community (the EU after 2008) asked for the establishment of a Panel, claiming that Korea was providing and had provided, export subsidies through the Advance Payment Refund Guarantee and the Pre-shipment Loan programmes, established by the Korea Export-Import Bank (‘KEXIM’), in violation of Article 3.1(a) and 3.2 of the SCM Agreement. Before turning to the examination of whether or not the programmes constituted subsidies, a key issue had to decide, that is, whether KEXIM was public body, since a subsidy exists if there is a ‘financial contribution’ by a government or public body (or a private body entrusted or directed by the government) that confers a benefit.⁸⁷ To support the following analysis, it is necessary first of all to state the complete definition:

Article 1: Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

⁸⁴ Although, in this case, the appellate body took a careful approach towards understanding the notion of a ‘public body’, the appellate body was still reluctant to extend the boundaries of government further, even if this mean that it left the new issues raised by SOEs unaddressed. Kim (n 64) 235.

⁸⁵ See immediately above analysis in Chapter 5 Section 3.1 and 3.2.

⁸⁶ Report of the Appellate Body, ‘United States – Definitive Anti-Dumping And Countervailing Duties On Certain Products From China’ (n 79) para 8.1.

⁸⁷ Article 1.1(a) (1) (i), SCM Agreement.

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”)

The European Community argued that KEXIM is a public body because (1) it was created and operates on the basis of a public statute giving the Government of Korea control over its decision-making (legal status); (2) it pursued a public policy objective (operational purpose), and (3) it benefits from access to State resources (privilege to State resources).⁸⁸ In short, the European Community examined the ‘public’ nature from the aspects of legal status, operational purpose and special privilege. It is argued that the European Community emphatically examined the **formal** legal status of the body.

First of all, the fact that an entity is established based on a public statute does not always necessarily indicate that the entity is a public body. For example, the privatisation of some SOEs is finalised through public statute, but it is no longer a public body.⁸⁹ In practice, some SOEs could operate under a private legal form, and their legal status is separate from governments, while they are nonetheless fulfilling government policies as part of their operation.⁹⁰ In this situation, if only relying on the formal legal status of an entity, some incorporated SOEs apply Company Law with a private status, but which undertake part of government responsibilities would not be subject to laws/rules that apply to the general government sector as ‘government or public bodies’. In addition, an entity is also not necessarily a public body if it pursues public policy objectives, as is the case, for example, with some private philanthropic institutions and other non-governmental organisations.

Unlike the European Community’s criteria for the recognition of formal legal status, Korea defined its criterion as the dynamic status of the entity. Korea asserted that KEXIM was not a public body, as (1) it was not acting in an official capacity on behalf of the people as a whole, or engaged in government functions as a public prosecutor.⁹¹ (2) it was established to meet the needs of an industrial or commercial nature and competed with other public and private operators based on market-oriented principles (commerciality).⁹² It should be noted that Korea complementarily defined the entity from a functional perspective: its relationship to

⁸⁸ Report of the Panel, ‘Korea – Measures Affecting Trade in Commercial Vessels’ WT/DS273/R 7 March 2005 para 7.32.

⁸⁹ Report of the Panel, ‘Korea – Measures Affecting Trade in Commercial Vessels’ (n 88) para 7.55.

⁹⁰ According to the report of the OECD, for example, in Lithuania, SOEs receive funding from State budget to fulfil ‘special obligation’; in Norway, SOEs receive subsidies from government each for public policy objectives. See further OECD, ‘Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices’ (2018) 40.

⁹¹ Report of the Panel, ‘Korea – Measures Affecting Trade in Commercial Vessels’ (n 88) para 7.37.

⁹² Report of the Panel, ‘Korea – Measures Affecting Trade in Commercial Vessels’ (n 88) para 7.27.

government authority and its commercial competitiveness. Korea did not deny that the entity had some public law status. However, the decisive substance of ‘public body’ is whether the entity employs its public legal status to operate on a non-commercial basis.

Korea supported its position by asserting that, according to the International Law Commission’s Article 5 on State responsibility, the defining factor is ‘the substance of what an entity is required to do rather than on the questions of form, such as whether a statute is a ‘public statute’ or not.’⁹³ Similarly, Korea refers to paragraph 5(c)(i) of the GATS Annex on Financial Service, which states that the term ‘public entity’ does not include ‘an entity principally engaged in supplying financial service on **commercial** terms’.⁹⁴

The Panel rejected Korea’s assertion that a body with public features that carry out activities in a wholly-competitive market is equivalent to a private entity if the entity’s public obligation ultimately governs that activity.⁹⁵ The Panel Stated that **in all cases**, ‘an entity will constitute a public body if the government or other public bodies control it’.⁹⁶ However, the Panel did not elaborate further on how the existence of control by the government (or another public body) is to be determined.⁹⁷

The Panel criticised the European Community’s idea that, although those four criteria often indicated the public features of an entity, this was not always the case. The Panel also criticised Korea’s approach by stating that according to its arguments, the same entity could be both a public and private body, depending on how that entity was conducting itself in the market.⁹⁸ According to the Panel, it asserted that different rules for governing the same conduct would immediately raise the issue of how one would determine whether or not an entity was engaging in activities on a commercial basis, and that these uncertainties surrounding the issue gave rise to more questions than answers.

Indeed, neither of the two approaches, in the case of the European Community *vs* Korea, are so comprehensive that they could form a definition that included public bodies and yet avoid the inclusion of entities that could not possibly apply measures that had an adverse effect on

⁹³ Report of the Panel, ‘Korea – Measures Affecting Trade in Commercial Vessels’ (n 88) para 7.39.

⁹⁴ Report of the Panel, ‘Korea – Measures Affecting Trade in Commercial Vessels’ (n 88) para 7.43. (Emphasis Added)

⁹⁵ Report of the Panel, ‘Korea – Measures Affecting Trade in Commercial Vessels’ (n 88) para 7.48.

⁹⁶ Report of the Panel, ‘Korea – Measures Affecting Trade in Commercial Vessels’ (n 88) para 7.50.

⁹⁷ Because the KEXIM is 100 per cent owned by the Government of Korea as a ‘special governmental financial institution’, the Panel considered that the public nature of KEXIM was confirmed, and therefore the issue had been solved, and there was no need to elaborate further on the definition of ‘public body’. See further Report of the Panel, ‘Korea – Measures Affecting Trade in Commercial Vessels’ (n 88) para 7.50, 7.54, 7.55.

⁹⁸ Report of the Panel, ‘Korea – Measures Affecting Trade in Commercial Vessels’ (n 88) para 7.45.

trade. However, the two perspectives combined could give us a more holistic definition of a ‘public body’. The European Community’s criterion provides us with a formalist method of defining the static features of a public body, while Korea’s approach provides us with a functional way to pinpoint the kind of public body that should be subject to trade disciplines from the perspective of non-discrimination and trade liberalisation. Although the Panel has denied that, in the SCM Agreement, the functional approach cannot serve to justify any entity. Nonetheless it has implications for the definition of ‘government entity’ in the GPA. (See Chapter 7)

5.3.4. Government Procurement Agreement (GPA)

There is no definition of ‘government entity’ in the GPA legal text, let alone a reference for the SOEs. All the entities covered, including SOEs, are listed in each Parties Annex after the GPA legal text. SOEs are usually placed in Annex 3, the so-called ‘other entities’ annexe, which consists mainly of utility entities, SOEs and quasi-government bodies.⁹⁹

Due to the absence of a definition of ‘government entity’ and a common understanding of SOEs, the coverage negotiation on ‘SOEs’ has been an issue.¹⁰⁰ In developed countries, most of the SOEs have been privatised, while in developing countries, many government functions are carried out by entities that are legally separate from the traditional State, and are usually SOEs.¹⁰¹ Those SOEs typically have a private legal form and engage in commercial-type activities, although they are wholly or partly under State ownership. The conceptual problem is in deciding which SOEs should be subject to the GPA.

The Parties are not to be blamed for lacking a definition of a government entity. Moderate vagueness allows sufficient elasticity to adapt to new situations through the interpretations of the adjudicatory body. New unforeseen situations may raise more questions, and a certain degree of vagueness will be allowed and retained in the GPA as compromises of parties’ opinion, as well as out of consideration for the progress of the Agreement.

However, the author argues that the inclusion of SOEs should not be too broad, for then it could discourage developing countries with large State sectors from joining the GPA. Also, it should

⁹⁹ SOEs often have strategic or dominant positions in national industries, especially in the utility sectors. See Antonio Capobianco and Hans Christiansen, ‘Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options’ (2011) OECD Corporate Governance Working Papers No. 1 OECD Publishing 9, 10.

¹⁰⁰ See Chapter 4 Section 4.1-4.3. the drawbacks of the current GPA entity coverage approach.

¹⁰¹ Sue Arrowsmith, John Linarelli and Don Wallace Jr., ‘The Coverage of Public Procurement Rules’, *Regulating Public Procurement, National and International Perspectives* (1st edn., Kluwer Law International 2000) 324.

not be too narrow, for that could result in reduced coverage, or encourage the Parties to circumvent the trade obligations and undermine the effectiveness of the GPA.¹⁰²

Up to date, there is only one WTO appellate body report on trade measures affecting ‘government procurement’. This adjudicatory report raised the question on the coverage of an entity under governmental control and provide a reference to clarifying the notion of ‘government entity’ in the GPA.

5.3.4.1. Case study: Korea—Measures Affecting Government Procurement (GPA)

On 17 March 1999, the United States requested the Dispute Settlement Body to establish a Panel to examine certain procurement practices of entities concerning the procurement of airport construction for Incheon International Airport (IIA) in Korea, pursuant to Article XXII of the GPA. Three entities were responsible for the IIA procurement: KAA, KOAC, and ILAC.¹⁰³ One of the debated issues was whether the entities that had had procurement responsibility for the project since its inception were ‘covered entities’ under the GPA.¹⁰⁴

The US argued that a ‘control’ test must be applied to determine whether the unlisted entity should be subject to the Agreement. If the unlisted entity was controlled by a listed entity, it must apply the GPA rules. ‘Direct or substantial control’ is intended to encompass not only governmental entities but also quasi-governmental purchasing agents.¹⁰⁵ Korea contested the proposed test, arguing that there was no normative rule relating to direct control, either in the Korean Schedule or in the GPA’s provisions. The question was further narrowed to whether there were some criteria exogenous to the Schedules that could serve as a normative rule for providing direct guidance on what is covered by a GPA signatory’s commitments and for defining the scope of legitimate expectation.¹⁰⁶

The Panel did not adopt the US position that a ‘control test’ should be read into the GPA. However, the Panel accepted that ‘control’ of one entity over another could be a relevant criterion for determining the coverage of the GPA, and could also be relevant to the determination of which is ‘governmental entity’.¹⁰⁷

¹⁰² Report of the Panel, ‘Korea – Measures Affecting Government Procurement’ (n 68) para 7.58.

¹⁰³ KAA stands for Korea Airports Authority; KOACA stands for The Korea Airport Construction Authority. ILAC stands for The Incheon International Airport Corporation.

¹⁰⁴ Report of the Panel, ‘Korea – Measures Affecting Government Procurement’ (n 68) para 2.1.

¹⁰⁵ Report of the Panel, ‘Korea – Measures Affecting Government Procurement’ (n 68) para 7.54.

¹⁰⁶ Report of the Panel, ‘Korea – Measures Affecting Government Procurement’ (n 68) para 7.29.

¹⁰⁷ Report of the Panel, ‘Korea – Measures Affecting Government Procurement’ (n 68) para 7.56, 7.57.

It was argued that, if an automatically broadly ‘control’ test revealing the nature of the control structure of the entity was applied, the Parties might have no access to provide evidence claiming a violation of the GPA obligation. Transparency would be a further problem. Also, if the judgement of ‘control’ were made by referring to national laws, parties could be burdened with disputes over the understanding or interpretation of rules. Thus, if ‘control’ criteria were included in the GPA as one of the determinants, but not determinative to the GPA coverage, the criteria must be clear and avoid too abstract normative notions (see further elaboration on the criteria of ‘control’ in Chapter 7).

5.4. SOEs in the ‘Slowbalisation’ Era

Economists have observed that trade tensions have rendered the trade map more complex since the financial crisis of 2008-2009. Since the Trump Administration came to office in 2016, the trade tension between China and the US, especially in 2018, has profoundly reshaped the global economy and the trade spill-over effect has reached more and more countries (including the EU, Japan and Vietnam), and has also affected trade policies, such as those regarding investment, financial regulation and intellectual property).¹⁰⁸ Trade and investment have all been shrinking or stagnating, relative to world GDP.¹⁰⁹ For example, Germany has toughened investment regulations to limit the ratio of foreign investment (from 25 per cent non-EU investment to 15 per cent non-EU investment) in key sectors, such as defence and energy.¹¹⁰ The EU has scheduled negotiations with Japan, Singapore, Canada, Malaysia and Vietnam, as a response to the changing trade relationships of the past two years, such as the stagnation of *Transatlantic Trade and Investment Partnership (TTIP)* negotiation, the US exit of *Trans-*

¹⁰⁸ The China-US trade war brought the economic relationships between EU and Asian countries closer together. This point can be proved by the series of new free trade agreement between the EU and Japan, Vietnam and Singapore. In addition, more FTAs between EU and other Asian countries have been signed since 2017/2018. See the European Commission, ‘Overview of FTA and Other Trade Negotiations: The Ongoing Bilateral and Regional Negotiations’ (2019) <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf> accessed 19 February 2019. Chunding Li, Chuantian He and Chuangwei Lin, ‘Emerging Markets Finance and Trade Economic Impacts of the Possible China-US Trade War’ (2018) 54 *Emerging Markets Finance and Trade* 1557.

¹⁰⁹ In 2018-2019, there was low growth across the world economy. For example, during 2017/2018, US imports stagnated, and the EU’s growth had significant downside risks. See more statistics from the UN Economic Analysis and Policy Division, Department of Economic and Social Affairs ‘World Economic Situation and Prospects: Monthly Briefing’ (2018) Monthly Briefing on the World Economic Situation and Prospects No. 118 <<http://www.bit.ly/wespbrief>> accessed 19 February 2019.

¹¹⁰ The draft law on toughening the rules on foreign investment in key sectors has been approved by Germany. It gives the German government the right to scrutinise and potentially block investment in sensitive industries in which a non-EU company acquires more than 10 per cent of German business. See Tobias Buck, ‘Germany Toughens Investment Rules as China Concerns Build | Financial Times’ *Financial Times* (19 December 2018) <<https://www.ft.com/content/568183dc-038e-11e9-99df-6183d3002ee1>> accessed 19 February 2019. Holger Hansen and Michael Nienaber, ‘With Eye on China, Germany Tightens Foreign Investment Rules’ *Reuters* (19 December 2018).

Pacific Partnership (TPP), the China-US trade tension, and the replacement of *NAFTA* into *US-Mexico-Canada Agreement (USMCA)*.¹¹¹ Globalisation has given way to a new era of sluggishness that has been called ‘slowbalisation’.¹¹²

The WTO legal rules purport to embrace ‘SOEs’ scattered in multilateral agreements, such the GATT, GATS, and SCM, discussed above. These rules were provoked in the situation where SOEs had independent legal status from the government, but their conduct was still attributable to the State. However, as analysed in the previous Section 2, in the 21st century, more and more SOEs are carrying out commercial activities based on commercial considerations.

The author submits that there is a grey area which emerges from the State capitalism concerns whether modern SOEs (after 2008) should be subject to WTO non-discrimination obligation that applies to the general government sector. In a number of cases, GPA rules do not generally apply to SOEs, given their private law legal status. Some GPA Parties have voluntarily put their SOEs or similar entities in their coverage schedules. However, there is no explicit rule on the coverage of SOEs in the GPA.

Meanwhile, overall, the above analysis concluded that the multilateral trade agreement does not attempt to provide sufficient definitions specifically on modern SOEs. Correspondingly, with the trend towards ‘slowbalisation’, country-based trade agreements (Regional/ Bilateral FTAs) have proliferated. Moreover, In those more recent FTAs, there have been attempts to formulate more precise definitions of SOEs and to fill the gaps in the existing multilateral rules and jurisprudence by providing certain related concepts, such as ‘commercial considerations’.

5.4.1 Recent developments in Free Trade Agreements (FTAs)

From the early days, the primary users of FTAs have been the United States and the European Union, which are the major players of world trade.¹¹³ They have made attempts to regulate the behaviour of SOEs through free trade agreements.

¹¹¹ See European Commission, ‘Overview of FTA and Other Trade Negotiations: The Ongoing Bilateral and Regional Negotiations’ (n 103).

¹¹² The term ‘Slowbalisation’ was coined in 2015 by Adjiedj Bakas, a Dutch trend-watcher, who describes the reaction against globalisation. See Elfren S. Cruz, ‘Rise of Anti-Elitism: Slowbalisation vs Globalisation’ *Philstar Global* (3 February 2019). See also Tobias Buck, ‘Germany Toughens Investment Rules as China Concerns Build’ *Financial Times* (19 December 2018). ‘Slowbalisation: The Steam Has Gone out of Globalisation’ *The Economist* (24 January 2019) 9.

¹¹³ The EU has undergone negotiation or has proposed to negotiate FTAs containing definitions of SOEs with many countries in the past decade. For example, in the recommendation of the EU—New Zealand FTA, the council is recommended to include provisions on State trading enterprises, designated monopolies and enterprises granted special rights or privileges, and to assess any possible distortion to competition and barriers to trade that

From a macro-perspective, it is noticeable that in recent FTAs, the provisions for SOEs are mostly put in the chapters concerning the ‘competition policies’ in those agreements. The intention is obviously to discipline the adverse effect on the ‘condition of competition’ in the trade market brought by the special powers or privileges that SOEs/State enterprises/government enterprises/public undertakings enjoy. For example, in the *US—Australia FTA*, State enterprises are regulated under the competition policy. Article 14.4.1 states that both parties shall ensure that State enterprise operates in a manner that does not create obstacles to trade.¹¹⁴ In the *US—Korea FTA*, State enterprises are also regulated under competition-related matters. Under Article 16.3.1, the obstacles to free competition consist of special powers to ‘expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges’.¹¹⁵ In the *EU—Singapore FTA* (Chapter 11:competition and related matters), Article 11.3.3 states that the parties shall ensure undertakings entrusted with special or exclusive rights do not use their special or exclusive right to engage with...including with common ownership, in *anti-competitive practices*....¹¹⁶ In addition, the *Singapore—Australia FTA* has extensive references to ‘competition law’ by stipulating that ‘competitive

this could create. ‘European Union-New Zealand Free Trade Agreement Outline of Ambition and Scope of Future Negotiations’ <<https://www.mfat.govt.nz/assets/FTA-Publications/EU-FTA/EU-NZ-FTA-Scoping-Summary-and-Q-A-May-2017.pdf>> accessed 17 February 2019.

And European Commission, ‘Recommendation for a Council Decision Authorising the Opening of Negotiations for a Free Trade Agreement with New Zealand’ (2017) COM/2017/0469 final <<https://eur-lex.europa.eu/legal-content/ga/TXT/?uri=CELEX:52017PC0469>> accessed 17 February 2019.

In the *EU—Vietnam FTA* Chapter 11, State ownership and control of management are the criteria for the definition of SOEs.

See European Commission, ‘EU-Vietnam Trade and Investment Agreements (Authentic Text as of August 2018) - Trade - European Commission’ (2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 17 February 2019.

The EU and Mexico reached a deal on a new trade agreement. In this new deal, the EU and Mexico agreed rules on State-owned enterprises to ensure that private companies could compete on a level playing field with public ones. See European Commission, ‘Key Features of the EU-Mexico Trade Agreement - Trade - European Commission’ (2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1831>> accessed 17 February 2019. Section 12 Ensuring Fair Trade and Business Conditions.

See also in the *EU—Vietnam FTA* Chapter 11 Article 11. 1(g), which clearly States that ‘State-owned enterprises mean an enterprise in which a party hold...50 per cent ownership or the voting rights...or can appoint more than half of the board of directors...or can control over the strategic decisions of the enterprise.’ European Commission, ‘EU-Vietnam Trade and Investment Agreements (Authentic Text as of August 2018) - Trade - European Commission’.

¹¹⁴ Australia Department of Foreign Affairs and Trade, ‘Australia--United States FTA’ (2017) <https://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Documents/Final_text_ausfta.pdf> accessed 17 February 2019 Article 14.4.1.

¹¹⁵ United State Trade Representative, ‘U.S. - Korea Free Trade Agreement’ (2012) <https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file193_12715.pdf> accessed 17 February 2019 Article 16.3.1.

¹¹⁶ European Commission, ‘European Union-Singapore Trade and Investment Agreements’ <http://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157684.pdf> accessed 19 February 2019 Article 11.3 Public Undertakings and Undertakings Entrusted with Special or Exclusive Rights’.

neutrality must be ensured, so that governments do not provide any competitive advantages to any SOE'.¹¹⁷

From a micro-perspective, it is clear that free trade agreements usually take ownership as the dominant criteria for the recognition of an SOE, although sometimes a government's managerial control over the enterprise or the combination of the ownership factor and the managerial control factor, are taken into account. For example, in the *US - Singapore FTA*, a government enterprise was considered by the United States to be an enterprise owned or controlled through ownership by the State while, for Singapore, government enterprise referred to an enterprise over which the State has effective influence.¹¹⁸ Under Article 12.8.5, if government own more than 50 per cent voting rights of the entity or 'own 50 per cent or less but more than 20 per cent of the voting rights in the entity and own the largest block of voting rights', the entity is presumed to be under the effective influence of a government or of a government enterprise.¹¹⁹ In the *US-Australia FTA*, an SOE was deemed to be 'an enterprise owned, or controlled through ownership interest, by government'.¹²⁰ The EU free trade agreements also take government ownership or/personnel control/managerial control as a criterion for the definition of SOEs. In *EU-Vietnam Trade and Investment Agreement*, SOEs were classified as enterprises in which the State has '50 per cent ownership, or appointment power of more than half of the board of directors, or exercise control over the strategic decision'.¹²¹

Although ownership and government authorities are not abstract, those requirements are largely beyond the information-gathering capacity of an individual enterprise.¹²² They fail to give a guidance *ex ante* as to which entity qualifies as an SOE, and this has significant relevance

¹¹⁷ Australian Government Department of Foreign Affairs and Trade, 'Singapore-Australia Free Trade Agreement' (2019) <<https://dfat.gov.au/trade/agreements/in-force/safta/official-documents/Pages/default.aspx>> accessed 19 February 2019 Chapter 12 Competition Policy- Article 4 Competitive Neutrality.

¹¹⁸ United States Trade Representative, 'United States-Singapore Free Trade Agreement' (2003) <https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf> accessed 17 February 2019 Article 12.8.6: 'government enterprise means: (a) for the United States, an enterprise owned, or controlled, through ownership interests, by that Party; and (b) for Singapore, an enterprise in which that Party has effective influence.'

¹¹⁹ United States Trade Representative (n 118) Article 12.8.5 The US—Singapore FTA also refers to a 'public entity as a central bank or monetary authority...owned or controlled by a Party that is principally engaged in carrying out government functions or activities for a governmental purpose. United States Trade Representative (n 118) Article 10.20.12 public entity.

¹²⁰ US—Australia FTA, Article 14.12.9: definitions: State enterprise.

¹²¹ European Commission, 'EU-Vietnam Trade and Investment Agreements (Authentic Text as of August 2018) - Trade - European Commission' (n 113) Chapter 11 Article 11.1(g).

¹²² See Minwoo Kim, 'Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements' (2017) 58 Harvard International Law Journal 255.

for making decisions and strategies with regard to entering and maintaining certain foreign markets. Nowadays, there are several ways to circumvent these rules, such as, for example, by designing a special ownership structure that is too complex to recognise, or by exercising government authority under without transparency, so that it will not be revealed.¹²³

Furthermore, by making careful comparisons with the FTAs before 2008 (such the *US-Singapore FTA 2003* and the *NAFTA 1994*), we discover that the most recent FTAs (such as the *EU-Singapore 2019*, *EU-Vietnam 2018*, the *USMCA 2018*¹²⁴ and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) 2018*¹²⁵ have reflected the most recent developments in world trade.

The author observes that those more recent FTAs do not deny or prevent SOEs from carrying out national public policies, but instead, they differentiate an SOE's commercial activities from its public policy roles. For example, in the *USMCA*, the US used a combination of two criteria: **commerciality and government ownership/managerial control**.¹²⁶ Article 22.1 states that:

A State-owned enterprise is an enterprise that is principally engaged in commercial activities, and in which a Party:

¹²³ According to the self-reporting of the State enterprise ownership from 28 jurisdiction in 2015, governments have various approaches to expressing their State ownership rationale, some of them are explicitly expressed in specific legislation (e.g. Germany, Slovenia Estonia), decisions, regulations, or decree (e.g. Finland, Hungary, Norway, Switzerland), policy statements(e.g. Israel, Ireland and Netherland), or combination (Portugal, Czech Republic), but some of the State ownership structure is implicit by way of SOE-specific measures(e.g. Canada, Italy, Japan), overall legal framework (Mexico, Turkey, Slovak Rep.), or even no formal criteria(e.g. Belgium, New Zealand, UK). It is considered that under the implied State ownership rationale, governments could establish, adjust or terminate State ownership without explicit report or immediate transparency. As a result, the ownership model of the SOEs can be designed according to the changing of government policies or public purpose but at the same time circumvent rules generally applying to government sectors, such as GPA rules. See further the State ownership rationales and models in OECD, 'Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices' (n 90) 20-31.

¹²⁴ The US, Canada, and Mexico signed a trade deal to replace NAFTA on 30 November 2018. It was known as the United States-Mexico-Canada Agreement or USMCA. See United States Trade Representative, 'Agreement between the United States of America, the United Mexican States, and Canada Text' <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>> accessed 20 February 2019.

¹²⁵ Despite the US withdrawal, the CPTPP, (which came into force on 30 December 2018), continues without the US (the US withdrew on 23 January 2017) The 11 signatory parties make up roughly 13.5 per cent of the world GDP. The CPTPP was touted as a 'model' agreement that would shape trade politics in the future, because the CPTPP would strengthen standards in critical areas, such as intellectual property, labour rights, anti-corruption, environmental protection, digital trade, SOEs and so forth. The CPTPP introduced a stand-alone chapter on the discipline of SOEs. This chapter provides a theoretical and practical context that led to the development of a new set of SOE rules. Tom Chodor, 'The Rise and Fall and Rise of the Trans-Pacific Partnership: 21st Century Trade Politics through a New Constitutionalist Lens' (2019) 26 *Review of International Political Economy* 232-255. 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)' <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng>> accessed 15 February 2019. OECD, 'OECD Welcomes CPTPP Agreement' <<http://www.oecd.org/trade/oecd-welcomes-cptpp-agreement.htm>> accessed 16 February 2019.

¹²⁶ Emphasis Added.

- (a) directly or indirectly owns more than 50 per cent of the share capital;*
- (b) controls, through direct or indirect ownership interests, the exercise of more than 50 per cent of the voting rights;*
- (c) holds the power to control the enterprise through any other ownership interest, including indirect or minority ownership; or*
- (d) holds the power to appoint a majority of the members of the board of directors or any other equivalent management body.*¹²⁷

The definitions of an SOE in the *CPTPP* is precisely the same as that in the *USMCA*.¹²⁸ Firstly, both definitions take State ownership and the concept of effective government control as the criteria for a State enterprise. Secondly, and more importantly, the opening words of both documents refer to SOEs being ‘principally engaged in commercial activities, thus confirming that the principal purpose for the establishment of an SOE is that it should operate commercial activities.

Another point worthy of note is that in the most recent FTAs (namely those agreed in 2018), **SOEs are subject to trade disciplines only when they are engaged in commercial activities based on commercial considerations.**¹²⁹ The author argues that this is in contradistinction to the previous WTO disciplines analysed above, which aim at regulating the State enterprises/State trading enterprises/public bodies/SOEs as the apparatus or agent of the State. The focus on the SOEs’ commercial activities aims at ‘addressing the trade distortion that

¹²⁷ See United States Trade Representative, ‘State-Owned Enterprises and Designated Monopolies’ <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/22_State-Owned_Enterprises.pdf> accessed 15 February 2019 Chapter 12.

¹²⁸ ‘Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)’ (n 125). At the end of Article 17.1 CPTPP, a State-owned enterprise is defined as follows:
State-owned enterprise means an enterprise that is principally engaged in commercial activities in which a Party:
(a) directly owns more than 50 per cent of the share capital;
(b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or
(c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.

¹²⁹ See the EU-Vietnam Trade and Investment Agreement, which states that ‘the discipline on SOEs only applies to its commercial activities’. Article 11.2.2 European Commission, ‘EU-Vietnam Trade and Investment Agreements (Authentic Text as of August 2018) - Trade - European Commission’ (n 113). Article 12.8.8 and Annex 11-A of the EU-Vietnam Trade and Investment Agreement state that ‘all the government enterprise much conduct based on commercial consideration like a normal privately-held enterprise’. See also United States Trade Representative (n 118) Chapter 11 Competition and Related Matters, Article 11.3 dealing with public undertakings and undertakings entrusted with special or exclusive rights and State monopolies. See also European Commission, ‘EU-Singapore Trade and Investment Agreements (Authentic Texts as of April 2018) - Trade - European Commission’ (2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 17 February 2019. The Australia-Singapore FTA States that competition obligations only apply to SOEs’ commercial activities. See further Chapter 12 competition policy Article 4 on competition neutrality. Australian Government (n 117).

favours SOEs engaged in commercial activities and ensures that such activities are based on commercial activities, in particular addressing discrimination and trade-distorting subsidies'.¹³⁰

Furthermore, in the *CPTPP*, *USMCA*, *EU-Vietnam Trade and Investment Agreement*, 'commercial activities' are clearly defined as 'activities which an enterprise undertakes with an orientation toward **profit-making** and which result in the production of a good or supply of a service that will be sold to a consumer in the relevant **market** in quantities and at prices determined by the enterprise.'¹³¹

The meaning of 'commercial considerations' was questioned in *the Canada Wheat Board* case under GATT Article XVII (State Trading enterprises).¹³² The Panel adopted (the US position) that the 'commercial consideration' requirement obliges State trading enterprises to transact business 'on terms which are economically advantageous for themselves and/or their owners, members, beneficiaries' and prohibits them behaving as 'political actors'.¹³³ Furthermore, the Panel suggested that transactions following commercial consideration might also include anti-competitive behaviour, such as reducing the transaction price to deter competitors from entering the market.¹³⁴

In an appeal hearing with regard to the understanding of 'commercial consideration' and 'acting commercially', the Appellate Body avoided further interpretation of the term by stating that the Appellate Body's responsibility was to inquire into the discriminatory behaviour, and

¹³⁰ Canada Government, 'What Does the CPTPP Mean for State-Owned Enterprises?' <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/sectors-secteurs/state_owned-appartenant.aspx?lang=eng> accessed 16 February 2019.

¹³¹ As further explained in the footnote, 'profit-making' means that the enterprise must operate on a 'profit' and 'cost-recovery' basis, (which means that not-for-profit enterprises, such as public transport systems, are not SOEs under the CPTPP. Measures that apply generally to the relevant market would not be construed as giving exemption to the SOEs, and therefore, activities would not be recognised as having any discriminatory effect on other competitors. 'Consolidated TPP Text – Chapter 17 – State-Owned Enterprises and Designated Monopolies' <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/17.aspx?lang=eng>> accessed 15 February 2019. Article 17.1. Footnote 1, 2. (Emphasis added)

¹³² The *Canada Wheat Board* case dealt with Canada's state-owned buying entity, which purchased wheat from Canadian farmers and sold it in overseas markets. The US and the EU complained that Canada Wheat Board had the monopoly of both purchase and sales, and was not subject to the requisite 'commercial considerations', and that this was a violation of GATT, since GATT Article XVII (b) provides that the non-discrimination obligation, as provided in paragraph (a), applies to State trading enterprises which are under an obligation to purchase or sell solely in accordance with commercial considerations. See Reports of the Panel, 'Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain' WT/DS276/R 6 April 2004.

¹³³ Reports of the Panel (n 132) para 6.87 and 6.94.

¹³⁴ Reports of the Panel (n 132) para 6.102 and footnote 183 in the report.

that it had no basis for interpreting that provision as imposing comprehensive competition-law-type obligations on State trading enterprises.¹³⁵

Although the Panel and the Appellate Body were trying to prevent the introduction of competition concepts, the debate on the term ‘commercial considerations’¹³⁶ illustrates the role of competition policy as it applies to public sector companies. This is a recurring issue within the WTO, and not only with regard to State trading enterprises as in the *Canada Wheat Board* case. The author submits that it is also a factor in the interpretation of a ‘public body’ under the SCM Agreement,¹³⁷ as well as in the definition of a ‘government entity’ under the GPA.

Since 2008, SOEs have undeniably grown and operated in international competition acting in accordance with commercial consideration, like private companies. Meanwhile, due to a growth supported by State capitalism, it is equally manifest that SOEs are still an important tool for national public policies. It may be argue that SOEs could be categorised into ‘**public SOEs**’ and ‘**commercial SOEs**’.¹³⁸ The former category refers to government enterprises with government authorisation/control/monopoly, carry out activities of public nature without commercial freedoms, and therefore do not compete fairly and on a level playing field as a private enterprise in markets. The latter refers to enterprises that under a certain degree of government control, such as the government-invested/-influenced, but still can operate on a commercial basis without anti-competition practices or effects.

It can also be argued that market mechanisms and competition rules are referred to as discipline SOEs’ trade practice. The implications for GPA definitional issue is that the former type of SOEs are supposed to be subject to the GPA non-discrimination obligation while, with regard to the commercial SOEs, a close examination of its effects on the market and competition opportunities in international trade is necessary to determine whether the SOEs should be subject to the GPA.

¹³⁵ See Report of the Appellate Body, ‘Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain’ (n 63) para 145.

¹³⁶ In the appeal hearing of the *Canada Wheat Board* case, Australia and China supported the Panel’s interpretation of ‘commercial consideration’, and China further pointed that gaining market share is a better indicator of commercial considerations than replacement value. The EC was also in agreement with the Panel, but added that the sole benchmark for interpreting the term ‘commercial consideration’ involves determining the ‘market behaviour of an STE in accordance with normal private behaviour’. See Report of the Appellate Body, ‘Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain’ (n 31) para 65, 71.

¹³⁷ See Chapter 5 Section 3.3 and the most recent Appellate Body’s report on the interpretation of ‘public body’ in Report of the Appellate Body, ‘United States – Countervailing Duty Measures on Certain Products from China Recourse to Article 21.5 of the DSU By China’ WT/DS437/AB/RW 16 July 2019.

¹³⁸ Emphasis Added.

5.5. Conclusion

Since the establishment of State-owned enterprises in the early 20th century, the role of State-owned enterprises varied according to the period. Between the 1920s-1980s, SOEs were government tools for the application of industrial policies or the provision of social services. At this stage, governments controlled SOEs through ownership. Between the 1980s and the 2000s, most SOEs were privatised to reduce government intervention and improve their performances. Trade agreements concluded in the 20th century were inclined to take ‘ownership’ as the decisive factor in defining SOEs. After the financial crisis of 2008 and 2009, there was a resurgence of State ownership, and the ideology of ‘State capitalism’ rose to prominence. In order to respond to the 2008 financial crisis, many developing countries halted the long term trend toward reducing State ownership. In many countries, State power significantly increased in the wake of the financial crisis, and its role has fundamentally expanded. Since 2009, a number of developing countries have increasingly invested in and taken control of SOEs. States allow SOEs to be listed on the stock market. Governments raise private capital by selling newly issued primary shares to investors, thus diluting State ownership only indirectly, by increasing the total of outstanding shares, rather than by selling their existing shareholdings directly to investors. With State shareholdings, SOEs, on the one hand, are engaged in commercial activities more frequently while, on the other hand, their actions are difficult to distinguish from the policies of the State. Also, SOEs no longer operate solely within the domestic market and actively engage in international trade. Given the significance of the role of SOEs in the international economy, international disciplines with regard to the SOE’s trade practices should incorporate SOEs most recent features.

There is no reference to the term SOE in the WTO, but there are related concepts in WTO law, such as ‘State-trading enterprise’, ‘enterprise granted special or exclusive privileges’, ‘public monopoly’, ‘public body’, etc. The WTO Dispute Settlement Body has constantly interpreted these similar notions. In the GATT, ‘State enterprise’ and ‘enterprises granted special or exclusive rights’ are presumed as ‘instrumentalities’ of government, so that their conduct or measures taken can be attributed to the State. It is argued that under the GATT, it is the nature of the ‘governmental measures’ at issue that matters, rather than the nature of the ‘body’ that applies the measures. Accordingly, under the GATT, the term ‘government measures’ is defined, whereas there is no attempt to define ‘government body’. This is different from the GPA, where the obligations fall on a certain part of the government entities. Thus, with regard to the GPA, the key question is whether or not an entity is ‘governmental’.

The only similar notion in the GATS that relates to SOEs is that of ‘monopolies and exclusive service supplier’. GATS does not attempt to define the trading entity itself. Additionally, the relevant GATS adjudicatory reports always make judgements based on ‘government authorisation and government purpose’, and on whether the act of the entity at issue can be attributed to the State so that the transaction could be subject to GATS. The rationale behind this interpretation is precisely the same as that of the GATT. The GATT, GATS and the WTO jurisprudence was created on the basis of ‘State responsibility’, where trading entities were treated like a part of the State, or the apparatus of the State, in international trade. These WTO trade rules were made in 1993 when SOEs had undergone privatisation. Thus, those trade rules were consonant with the SOEs at that time. However, we have criticised the situation that exists in the age of State capitalism, whereby SOEs, on the one hand, are separate from the State and operate as independent commercial entities while, on the other hand, they do not escape government control or influence. As a result, not all SOEs operate solely for public mandate policies.

On the contrary, it is more common to see SOEs take on commercial activities, or to engage in commercial activities while at the same time performing public policy functions. Article I: 3(c) of the GATS defines ‘a service supplied in the exercise of governmental authority’ as ‘services supplied by a supplier neither on a commercial basis nor in competition with one or more service suppliers’. It is clear that in this definition ‘**commercial basis**’ and the ‘**competition condition**’ are the core identifiers of such service.¹³⁹ It is argued, on the basis of the above adjudicatory report of *China-Electronic Payment Services*, and Article I: 3 of the GATS, that ‘**substantial impact on competition**’ is the ultimate concern behind the legal text.¹⁴⁰ Notwithstanding, the interpretation of Article I: 3(b) (c) of the GATS on the interpretative method of the Vienna Convention of the Law of Treaties does not provide a clear meaning with regard to the term ‘on a commercial basis’.

The notion of a ‘public body’ under the SCM has been the subject of much debate. It has been agreed that the ‘control’ over the public body must be and can be examined from aspects of ‘legal status’, ‘operational purpose’, ‘special privileges’, and ‘government authority’. However, these factors alone do not suffice to make the body subject to the SCM rule. A causal connection between those factors and non-commercial operation must be proved. Furthermore, in the adjudicatory reports under the WTO Dispute Settlement Body, SOEs are firstly

¹³⁹ Emphasis Added.

¹⁴⁰ Emphasis Added.

‘enterprises’, and their commercial character should be regarded as of primary importance: they should be treated, first and foremost, as commercial characters, rather than ‘State apparatus’. This idea is coherent in the context of State capitalism, where SOEs operate commercially.

The GPA does not define the term ‘government entity’ nor is there a common understanding of the term ‘SOEs’. According to the appellate body, that ‘control’ of an entity over another can be a relevant criterion for determining the coverage of the GPA. It is argued that for greater transparency, the ‘control’ criteria must be clear on the one hand, and the other, that the criteria must avoid being too abstract. Based on the analysis of the three multilateral trade agreements under the WTO, it is argued that the previous ‘State apparatus’ idea is obsolete and cannot apply to all SOEs. **In the context of State capitalism, both the ‘control’ and ‘commerciality’ characters should be incorporated into the normative rules of modern SOEs.**¹⁴¹

In the most recent FTAs, it was observed that there were two trends in the disciplines of SOEs. First, SOEs are mostly subject to ‘competition discourse’. This implies that international trade disciplines have renewed the premise of the disciplines on SOEs. It has been recognised that, since the financial crisis of 2008/2009, SOEs have frequently operated in the market in the same way as private enterprises. Therefore, in the post -2008 FTAs, and especially in the most recent *CPTPP* and *USMCA*, there are clear definitions of ‘SOEs’. Those definitions only define the commercial activities of SOEs and the control or special powers over them granted by governments for the concern of fair competition. The author argues that in those new trade and investment agreements, it is not denied that SOEs applies public policies like governments. However, SOEs also operate like private enterprises, out of commercial considerations. In this situation, **SOEs must be identified based on their activities, rather than on their legal form.**¹⁴² Thus, to bring SOEs fully under trade liberalisation, the definition of SOEs must take into account the differentiation brought about by their compact to trade. The legal forms of the SOE (no matter whether they have the status of public law or private law); authorization over the SOEs; the special or exclusive privilege of the SOE; or its ownership structure, could reflect the *static* relationship between the SOE and the State, but do not necessarily prove that the SOE would definitely impact on trade. Therefore, those factors are relevant for the definitional

¹⁴¹ Emphasis Added.

¹⁴² Emphasis Added.

purpose, but not final. A further test of dynamic impact on trade of SOEs must also be undertaken.

CHAPTER 6 ENTITY COVERAGE OF THE EU PUBLIC PROCUREMENT DISCIPLINE

6.1. Introduction

Of the entity coverage schedules of the GPA parties, that of the EU is the most inclusive. Its coverage takes a general approach, by which each of the covered entities is referred to the definition in the EU Public Procurement Directive. Without the restriction of strict reciprocity, the EU's entity coverage would be more significant than it is in the schedule. This chapter will examine the EU public procurement rules finding similarities between the EU and the WTO generally. Notably, the chapter will also scrutinise the definition of each of the contracting bodies under the EU Public Procurement law closely, with the aim of seeking some answers to the GPA definitional issue of 'government entities.' This chapter will highlight three parallels in a comparative study of the two most highly developed government procurement regulation systems on the supranational level.

The first parallel between the EU and the WTO is on a general level and is considered from the aspect of the economic context and the legal context. The EU is highly integrated under the general economic aims of the Internal Market and the promotion of competition. Both the EU and the WTO aim to eliminate trade barriers in government procurement. However, in contrast to the high level of political will in regulating the public market under EU law, the WTO acts purely as a trade organisation, on the basis of consensus among its members. The WTO itself has no authority to take initiatives in trade policy-making or legal harmonisation. Considering this difference, it is no wonder that the EU public procurement law is more ambitious and developed. It also sets an appropriate example for future GPA development.

The second parallel is between public State-owned enterprises (hereinafter referred to as 'SOEs') and bodies governed by public law. The author put forward the notion of public SOEs in chapter 5 and referred to SOEs carrying out activities of a public nature without commercial freedom. This notion is very similar to 'bodies governed by public law' under Directive 2014/24/EU. The definition of 'bodies governed by public law' can provide some inspiration to defining public SOEs with regard to GPA coverage, which is, that if a public SOE carries out activities under government control or influence, as a result of which the public SOE loses its commercial freedom, then the SOE has such a high risk of distorting market competition that it must be covered by the GPA.

The third parallel is between commercial SOEs and public undertakings, and undertakings with special or exclusive rights. The reason to regard these as parallel is that all of them, in the first instance, must be treated as commercially free participants in the market. It is only when they are publicly controlled or influenced to the extent that they lose their commercial freedom that they do not compete in the market, that they should subject to government procurement rules.

The conclusion that can be drawn from these three parallels is that, in both the EU and the WTO regulations on government procurement markets, the existence of public control on the contracting entity must be established. Also, the immediate and decisive causal link between the controlled/influenced body and the resulting loss of commercial freedom/market competition must be proved.

6.2. The Context of the Development of EU Public Procurement Discipline

Before analysing the specific provisions of the public procurement rules, it is indispensable to have a thorough knowledge of the general aims and purposes behind the development of EU public procurement discipline. Likewise, a comparison of the general aims and purposes of EU public procurement and that of the WTO/GPA can help us to understand why both public authority bodies governed by public law, public undertakings and undertakings with special or exclusive rights are subject to the EU public procurement discipline.

6.2.1. The Economic Context: Competition in the Internal Market

The Treaty of Rome, which established the European Economic Community, organised the economic systems of the Member States into a broader discipline and intended to base the Community on free-market principles, under which the undertakings would operate through competition.¹ Generally speaking, free-market principles require the removal of traditional barriers to the integration of the Internal Market (the ‘Four Freedoms’ provision). The very

¹ It is believed that competition guarantees the maximum and highest possible degree of freedom and efficiency in market decisions. However, this system does not exclude State interventions for ensuring the undistorted and unhindered functioning of the free competition mechanism. As Walter Hallstein, one of the founders of the Community stated the matter: ‘a free market economy is a basic principle of the Treaty of Rome. Such a liberal economic system does not exclude State intervention. On the contrary, it presupposes that the State provides a framework for the operation of such a system; for only an appropriate framework allows each section of the economy to exercise its freedom of action, in fact, compels it to exercise that freedom.’ See further, Werner Bonefeld, ‘European Economic Constitution and the Transformation of Democracy : On Class and the State of Law.’ (2015) 521 *European Journal of International Relations* 867.

notion of an internal market thus manifests a direct connection to free competition. This view has been accepted by the Community institutions, particularly by the Commission, which has made it the foundation of EU competition policies.

The *Single European Act* represented a conceptual foundation for the development of EU-wide public markets.² On the one hand, it can be argued that the EU public procurement law under the Internal Market is a rule of non-discriminatory trading that opens EU public markets to the other Member States. On the other hand, it can also be argued that the EU public procurement law also serves as a competition rule, which maintains a healthy competitive public market within the EU. At the interface of market access and competition, the definition of the EU public procurement contracting bodies attempted to encompass all entities that could set market barriers or distort market competitions. This view was expressed in the words of EU Public Procurement Directives and also served as the basis of the relevant jurisprudence of the Court of Justice of the EU (hereinafter referred to as the CJEU). These two points will be explored in the subsections dealing with each of the covered entities in EU public procurement law.

6.2.1.1. A Parallel with WTO Trade Liberalisation

The WTO/GPA faces the same situation: their members have a collective will to achieve refined regulations to reduce or eliminate trade barriers in the international/EU government procurement market. The difference is that the EU began with the common economic goal of a competitive Internal Market, and it has achieved more integration in legislation and policy coordination in public procurement markets. Thanks to the high level of political will and the unique sense of ‘community’ among the EU Member States, the EU has been able to promulgate trade integration policies within the Internal Market Framework efficiently and to ensure that policies implemented by the Member States are consistent with the EU law.

Although the WTO shares the goal of eliminating trade discrimination, it is, unlike the EU, a pure trade organisation based on the consensus of its members. The WTO itself has no authority to take initiatives in trade policymaking or trade agreement negotiations. Besides, the Dispute Settlement Body is supposed to use only treaty texts, customary international law, and general

² When first introduced by the Single European Act in 1986, the notion of an Internal Market was promoted as an economic concept. The principle of the customs union was reinforced as the foundation of the common market. The traditionally sensitive and protected sectors, such as banking, insurance and public procurement (especially in the critical sectors of power generation and telecommunications), found themselves increasingly exposed to effective competition. Since the Act was introduced, public procurement regulation has been identified as one of the economic and legal measures supporting the achievement of an integrated public market in the European Union.

principles of international law, which have less competence in law-making than EU legislators. When there is a lack of strong political consensus among its Members, trade negotiations can be lengthy and may stagnate. The negotiation of an agreement on fishery subsidies³ and the recent Appellate Body Crisis⁴ are perfect examples of the way that political consensus determines the progress of trade regulation.

6.2.2. The Legal Context: Teleological Interpretation

Member States have discretion on how to transpose procurement directives into their respective national procurement legal systems. Consequently, divergences among national laws on the understanding of the procurement rules are inevitable. For legal certainty, as well as flexibility in the implementation of procurement legislation, the CJEU has, by way of teleological interpretation, ensured an integrated understanding of procurement legislation.

The wording of a legal provision is the primary starting point of any interpretative activity, and any legal interpretation must be consistent with the literal meaning of a legal provision. However, legal interpretation is not limited to the wording of the law.⁵ For example, the CJEU has stated that ‘effective competition constitutes the essential objective of the (procurement)

³ The negotiation on an agreement on fisheries subsidies is one of the cases in point. The WTO negotiation on fisheries subsidies was launched in 2001 at the Doha Ministerial Conference. The current (23 May 2019, Paris) negotiation progress on fisheries subsidies still has no successful outcome, due to a political conflict among parties and different standpoints regarding proposed rules among the WTO members. It is argued that a political consensus on the gaps in interest among negotiation State parties is the key to the negotiation impasse. See further Kwanghyuk Yoo, ‘Fisheries Subsidies Negotiations in the WTO Framework: Trend and Prospect’(2018) 18 Hofstra Journal of International Business & Law 18.

⁴ The Appellate Body is the WTO dispute resolution mechanism. It is composed of seven ‘judges’ and the decisions made by the Appellate Body are binding and final. The WTO members have failed to negotiate updates to the rules on dispute settlement (and other WTO rules). Consequently, the Appellate body is increasingly asked to decide cases on ambiguous and incomplete WTO rules. As those decisions will be precedents in future trade dispute settlement among WTO members, it will negatively affect WTO members’ attempts to revise WTO law, which means WTO members may have to fulfill obligations upon which they did not agree, on the basis of national sovereignty. Appeals must be heard by three judges, which means the Appellate Body can only function with at least three judges. Since summer 2017, the US has blocked appointments of new Appellate Body judges to put pressure on WTO members to negotiate an updating of the rules concerning US trade needs and to curb the judicial activism. Since 30 September 2018 Shree Baboo Chekitan Servansing completed his term, there have been only 3 judges. On 10 December 2019, Ujal Singh Bhatia and Thomas R. Graham will complete their terms, which means only one member will remain. The Appellate Body will have to shut down if WTO members are unable to find a solution by December 2019. See further, Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J Schott, ‘The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures’ (2018) Peterson Institute for International Economics Policy Brief 18-5 1-14.

⁵ It is incumbent on the Court to interpret the statutes in a literal and ordinary sense and to construe the written legal text to find out the meaning of its language. See William Baude and Stephen E Sachs, ‘The Law of Interpretation’ (2017) 130 Harvard Law Review 1079. The crucial point of legal interpretation is not the plain meaning of the words but ‘what do the legal sources and authorities, taken all together, establish’. See John Finnis, *Philosophy of Law: Collected Essays* (Oxford: Oxford University Press 2013) 18.

directives, but that objective, as important as the objective is, cannot lead to an interpretation that is contrary to the clear terms of the directive'.⁶

However, where there are no relevant or concrete rules to which it can refer, it is usually necessary for the Court to employ other methods of legal interpretations to clarify the law or to fill a *lacuna*. Specifically, in the public procurement law area, awareness of the inadequacy of the definition of procuring bodies in EU public procurement law has come to light through CJEU case-law.⁷

In a Common Law system, judges and lawyers are expected to supplement statutory law by referencing Common law to fill the *lacuna*, while in a Civil Law system, the statute is intended to be comprehensive, so that the Court and lawyers are prohibited from filling any gaps but are instead, obliged to elucidate/clarify the legislation.⁸ EU law, which is influenced by the Civil law tradition, both in its drafting and in its interpretation, places more weight on the objective of the legislation than on the wording.⁹ In particular, CJEU draws very heavily on a teleological approach for its interpretation of EU law by looking at the whole social, economic, and political context of legislation.¹⁰ The CJEU has employed the doctrine of **functionalism**¹¹ as one of the most crucial legal interpretation techniques. The CJEU states that 'the (public procurement) directive must be interpreted in the light of the directives' aims and purposes. The objectives and context set out in the preambles in the EU treaties and EU secondary legislation are intended to aid legal interpretation.¹²

⁶ Case C-95/10 *Strong Segurança SA v Município de Sintra and Securitas-Serviços e Tecnologia de Segurança* (2011) ECR I-01865 para 37.

⁷ The CJEU has ruled a large number of cases with regard to the understanding of procuring bodies in the public procurement Directives, especially the definition of 'body governed by public law'.

⁸ This significant difference is in relation to the separation of powers between a civil law country and a common law country. Taking France example, in Article 4 and 5 of the French Civil Code, judges do not engage in legislative activity and are prohibited from law-making, but have the duty to rule a case when the legislation is obscure or insufficient. On the other hand, taking the UK as an example, judges have openly acknowledged and carefully defined the role of law-making. See further Gerard Carney, 'Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions' (2015) 36 *Statute Law Review* 46, 48.

⁹ This is because the EU law has been influenced more substantially by the civil law tradition than by the common law tradition (since the original Member States in 1957 were civil law countries, namely France, Germany, Italy and the Benelux countries.). Accordingly, EU law features a large amount of civil law tradition in its legislation and interpretations.

¹⁰ With regards to the legal method in the CJEU interpretation of EU legislation, see further Sue Arrowsmith and Paula Bordalo Faustino, *EU Public Procurement Law: An Introduction* (2010) 34.

¹¹ In each case, words may have descriptive meanings as well as a conventional force. Functionalists attempt to discover the conventional implication behind the descriptive meaning. See further Michel S. Moore, 'A Natural Law Theory of Interpretation' (2013) 58 *Southern California Law Review* 278, 302, 303.

¹² It is easy to find out the aims and purposes of public procurement legislation in the recitals of the relevant Directives. They are used by the CJEU to develop and apply the broad Treaty rules and secondary EU Public Procurement Directives. See e.g., Case C-138/08 *Hochtief AG and Linde-Kca-Dresden GmbH v Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság* (2009) ECR I-09889 paras 45-48. In this case, with regards to the question

Since public procurement itself is an efficient tool for achieving national public policy objectives, such as maintaining employment, supporting economic development, and so on,¹³ Public authorities have a natural tendency to favour national undertakings to realise national economic and non-economic objectives. Consequently, EU public procurement legislation must harmonise those preferential national public procurement policies under the EU *Internal Market* objective.¹⁴ The CJEU has expressly confirmed in its settled case-law that the Internal Market and competition are the guiding principles for interpreting EU public procurement legislation.¹⁵ For example, in paragraph 73 of the judgement of *Case C-283/00 Spain*, the CJEU

of whether Article 22(2) of Directive 93/37 is applicable to the negotiated procedure for the award of public works contracts, the CJEU states that, although the broad logic of that article refers only to contracts awarded by restricted procedures, it should be observed, as is apparent from the 10th recital in the preamble to the Directive 93/37, that the purpose of that Directive is to develop effective competition in the field of public works contracts. Thus, even though there are no provisions analogous to Article 22(2) with regard to the negotiated procedures, in order to meet the objective of developing effective competition, a contracting authority that can resort to negotiated procedures must nonetheless ensure effective competition; *Case C-220/05 Jean Auroux and Others v Commune de Roanne* (2007) ECR I-00385 para 48-53. In this case, with regard to the calculation of the value of the contract in order to establish whether the threshold has been reached, Article 6 of Directive 93/37 does not lay down any rule on the bases for calculating the threshold, the CJEU stated that according to the 2nd and 10th recitals, Directive 93/37 aims to ‘abolish restrictions on freedom of establishment and the freedom to provide services in respect of public works contract in order to open up such contract to genuine competition’. Therefore, an understanding of the threshold laid down in Article 6 serves to ensure that public contracts with a sufficiently high value to justify intra-community participation are notified to all potential tenders, thus the threshold should be calculated from the tenderer’s perspective; Joint Cases C-285/99 *Impresa Lombardini SpA - Impresa Generale di Costruzioni v ANAS - Ente nazionale per le strade and Società Italiana per Condotte d’Acqua SpA* and C-286/99 *Impresa Ing Mantovani SpA against ANAS - Ente Nazionale per strade and Ditta P* (2001) ECR I-09233 paras. 82-84. In this case, based on the objective of Directive 93/37 to facilitate free competition between all tenders and for the development of effective competition in the area of public contracts, the CJEU stated that public authority is required to take into consideration all the explanations put forward by the tenderers before rejecting a tender as being abnormally low. Although Article 30(4) of the Directive sets out particular justification for not excluding tenders as abnormally low, those shall be regarded as mere examples of the justifications rather than an exhaustive list of justifications.

¹³ See the analysis of ‘why is government procurement difficult to subject to international discipline’ in Chapter 2 Section 6. This section overviewed the economic goals and non-economic goals pursued by national governments through procurement activities.

¹⁴ See for example,., *Case C-213/07 Michaniki AE v Ethniko Simvoulío Radiotileorasis and Ipourgos Epikratias* (2008) ECR I-09999 para 39-43. In this case, the CJEU stated that it was apparent in the 2nd and 10th recitals in the preamble of Directive 93/37 that promoting freedom of service and effective competition in public works contracts is the guiding principle of Article 24 of Directive 93/34, which means the first paragraph of this article must be read as listing exhaustively the ground for excluding contractors from participation; Joint Cases C-285/99 *Impresa Lombardini SpA - Impresa Generale di Costruzioni v. ANAS - Ente nazionale per le strade and Società Italiana per Condotte d’Acqua SpA* and C-286/99 *Impresa Ing. Mantovani SpA against ANAS - Ente Nazionale per strade and Ditta P* (n 12) para. 34, 35. In this judgement, the CJEU clearly stated that the primary aim of Directive 93/37 is to open public contract to competition, and to avoid the risk of public authorities applying favouritism in public procurement policies. Besides, the Europe 2020 Strategy has emphasised several EU goals on growth and jobs for the current decade, namely ‘smart’, sustainable, and inclusive growth, improving competitiveness, and developing a sustainable social market economy. See further European Commission, ‘Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth’ (2010). The Internal Market is an overall goal, and is the basis for other values. In order to ensure the Internal Market and Competition, the EU public procurement law also applies other principles, such as the principle of equal treatment and transparency.

¹⁵ *Case C-454/06 presstext Nachrichtenagentur GmbH v Republik Österreich (Bund) and Others* (2008) ECR I-04401 para 31. The CJEU states that ‘to ensure the Free Movement of services and the opening-up to undistorted competition in all the Member States’ is the principal objective of the EU public procurement rules. The two-fold objectives are set out in the 2nd, 6th and 12th recital in the preamble to Directive 92/50. *Case C-244/02 Kauppatalo*

stated that the concept of contracting authorities must be interpreted as functional, as it can be seen in a broad light as opening up competition and ensuring the transparency required by Directive 89/665/EEC.¹⁶ In earlier judgments, the CJEU has taken a teleological approach to interpret the concept of a ‘body governed by public law,’ based on the aims and purposes of the Directive 2004/17/EC in the cases of *C-31/87 Beentjes*¹⁷ Also, later in *C-393/06 the Ing. Aigner*.¹⁸ It has been argued that the functional interpretation of EU law under the general aims and purposes of the Internal Market and competition not only facilitates the legal integration among the Members States¹⁹ but also impacts profoundly on European and member state policy-making.²⁰

6.2.2.1. A Parallel with the WTO Textualism Interpretation

In contrast to the active role of the CJEU in EU integration, when there is a *lacuna* in the rules or policy governing a trade agreement, the WTO adjudicatory body is not allowed to actively harmonise its members’ trade policies or to redefine the meaning of the rules, as the creative interpretation may go beyond the delegated authority of the Appellate Body, and this would be contrary both to democratic legitimacy and to wise policy development in members with

Hansel Oy v Imatran kaupunki (2003) ECR I-12139. In paragraph 32 of this Order, the Court (Second Chamber) expressly interpreted Article 12(2) of Directive 92/50 in the light of the two-fold objective of competition and transparency and held that public authorities must ensure a minimum level of transparency in the contract-awarding procedure, and hence compliance with the principle of equal treatment.

¹⁶ Case C-283/00 *Commission of the European Communities v Kingdom of Spain* (2003) ECR I-11697 para. 73.

¹⁷ Case 31/87 *Gebroeders Beentjes BV v State of the Netherlands* (1988) ECR 04635. In paragraph 11 and 12 of this judgement, the Court held that, pursuant to the objective of Directive 71/305/EEC to ensure the Free Movement of service and establishment, the term ‘the State’ must be interpreted in functional terms to include a body whose composition and functions are laid down by legislation, whose members are appointed by the authorities and whose financial source of the public works contracts are from the authorities, even though it is not part of the State administration in formal terms.

¹⁸ Case C-393/06 *Ing Aigner, Wasser-Wärme-Umwelt, GmbH v Fernwärme Wien GmbH* (2008) ECR I-02339. In paragraph 37, 41 and 45, regarding the question of whether an entity such as Fernwärme Wien (who supply heating for an urban area by means of an environmentally-friendly process in the City of Vienna) is to be regarded as a body governed by public law within the meaning of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18, the CJEU stated that the concept of a ‘body governed by public law’ must be interpreted in functional terms. Since Fernwärme Wien enjoyed a virtual monopoly in that sector (the two other undertakings operating in that sector were of negligible size and accordingly could not constitute actual competitors), Fernwärme Wien does not carry out its activities in a situation of competition. Thus, it might be guided by non-economic considerations in the contract-awarding process so that it should be regarded as a ‘body governed by public law’.

¹⁹ Due to its non-political role, the CJEU has been able to influence European integration with less political obstacles from the Member States. Thus, the CJEU has long been praised as an independent motor of European integration. With regards to the role of CJEU in European integration, see further Domitilla Sartorio, ‘The European Court of Justice : A Catalyst for European Integration’ (2015) 1 *International Journal of European Studies* 19-23.

²⁰ The EU treaties are a conglomeration of specific policy goals. As the language of the treaties language is broad, the CJEU’s legal interpretation of the Treaties has complementarily ensured the integral implementation of the EU law and policies. See further Michael Blauburger and Susanne K Schmidt, ‘The European Court of Justice and Its Political Impact’ (2017) 40 *West European Politics* 907.

different priorities in their values or interests.²¹ The CJEU, however, plays an active role in EU integration. In the absence of flexible interpretations to fill *lacunae* or to clarify vagueness, it is argued that the GPA definition must be based on the common consensus of the current Parties entity coverage, while at the same time avoiding the risk of over-inclusion. On the other hand, the EU's functional interpretation of the definition of a contracting entity in the EU Public Procurement Directives provides a good example of comprehensive entity coverage. The GPA must draw experience from the EU definition, and attempt to encompass those entities that could set trade barriers.

6.3. Legal Framework Of EU Public Procurement Discipline ²²

EU public procurement law has three pillars, namely the primary treaty provisions, secondary legislation (directives) and finally, the case-law of the CJEU.

6.3.1. The Treaty on the Functioning of the European Union (TFEU)

6.3.1.1. Free Movement Obligations & Public Procurement

Although the Treaty of Rome did not include an express provision on public procurement,²³ it did set out general principles for the then Common Market. (the forerunner of the Single European Market, also known as the Internal Market, which came into full effect in 1992) by introducing the notion of Free Movement of Goods, Services, Labour, and Capital within the Community.

As a primary source of European Union law dealing with trade matters, the TFEU sets out general obligations to eliminate trade restrictions and promote trade competition within the European Union. The TFEU's provision of guiding principles applicable to all trade matters is

²¹ See, for example, J Patrick Kelly, 'Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint' (2002) 22 *Northwestern Journal of International Law and Business* 353.

²² The literature on this topic is huge. See, for example, Marc Schattenmann, 'Government Purchasing: The Persistence of Protectionism' in James N Rosenau (ed.), *States of Liberalisation: Redefining the Public Sector in Integrated Europe* (1st edn, Albany, State University of New York Press 2005) Chapter 5. Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, vol I (Sue Arrowsmith ed., 3rd edn., Sweet & Maxwell 2014) Chapter 4 & 6. Christopher H Bovis, *EU Public Procurement Law* (2nd edn., Cheltenham: Edward Elgar Publishing Limited 2012) 17-63.

²³ On 25 March 1957, the Treaties of Rome gave birth to the European Economic Community and European Atomic Energy Community and the European Coal and Steel Community. The Treaties of Rome (1957) were primarily seeking economic co-operation after the Second World War and they set up the three 'European Communities' that were the origins of the EU. From the perspective of public procurement, the most important of the three is the European Economic Community (EEC) (which was established under the Treaty of Rome in 1957 and was replaced by the Treaty of Lisbon in 2009). See David Phinnemore, 'The European Union: Establishment and Development' in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds.), *European Union Politics* (5th edn., Oxford University Press 2016) 12.

legi generali, and Public Procurement Directives serve as *lex specialis*, which expressly specify the relevant definitions and procedures.

Generally, the ‘Four Freedom’ obligations effectively rendered illegal any conduct of any regulated entities that discriminated against, directly or indirectly, contractors based on nationality. The public procurement market has always been subject to the general objectives of the Treaties.²⁴ Under Title II (Free Movement of Goods), Title IV (Free Movement of Persons, Services and Capital), and Article 34 (Prohibition of Quantitative Restriction between the Member States), any measure that had a discrimination effect against imported products or which gave advantages to domestic products in a discriminatory fashion became contrary to EU law.

The obligations in the Treaty have long been regarded as imposing ‘negative obligations’ (including non-discrimination): i.e., they prohibit measures restricting access to the public market.²⁵ However, the CJEU has gone further, and interpreted the EU Public Procurement Directives in the spirit of the Free Movement provisions, such that the EU’s public procurement regime also imposes certain ‘positive obligations’, e.g., the requirement to comply with the transparency obligation in tender-awarding procedures.²⁶ The transparency obligation is an ‘infusion’ into the public contracts awarding procedures, and it includes a degree of advertising sufficient to enable the service market to be opened up to competition, thus enabling it to combat possible discrimination against foreign contractors on the ground of nationality.²⁷

²⁴ The Free-Movement principles are fundamental to the principles and rules underpinning the EU. They are set out in two core Treaties, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union, (TEFU). The two treaties set out the institutional framework of the EU for the fulfilment of the specific aims and principles of the Union. The Treaty on the Functioning of the European Union has greater relevance to our research, since it deals with trade matters within the Union.

²⁵ This terminology is not used by the European CJEU itself. According to the definition by Sue Arrowsmith, the ‘negative obligations’ refer to the rules that prevent the Member States imposing restrictions on access to markets, including, but not limited to, restrictions based on nationality (such as price preference for domestic tenders); the concept of ‘positive obligation’ covers the obligation to organise public procurement procedures in a particular way to ensure transparency and the obligation to conduct procedures in a transparent manner. For a critical analysis of the transparency obligation under Article 34, see Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK* (n 22) 252.

²⁶ Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*, joined party: *Herold Business Data AG* (2000) ECR I-1074. In this judgement (para 60), one of the CJEU’s rulings was that contracting authorities are bound to comply with fundamental rules such as the principle of non-discrimination and, in particular, to comply with an obligation of transparency. See also Case C-91/08 *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (2010) ECR I-02815. In this judgement (para 70-71), it was stated that the principle of equal treatment and non-discrimination on grounds of nationality, enshrined in Article 43 EC and Article 49 EC, and that the obligation of transparency also applied to public procurement contracts. See further, Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK* (n 22) 26.

²⁷ Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*, joined party: *Herold Business Data AG* (n 26) para 62, operative part 2, 3.

The prohibition of discrimination was first established in *Case 45/87 Commission of the European Communities v Ireland*. It was ruled that public procurement measures that affect equivalent to favouring domestic products are not compatible with Article 30 of the EEC Treaty (Free Movement of Goods-Prohibition of Quantitative Restrictions).²⁸ In the *Case C-263/85 Commission v Italy*, the CJEU ruled that Italy's requirement on public bodies to purchase vehicles of domestic manufacture failed to fulfil the obligation set out in Article 30 of the EEC Treaty.²⁹ Consequently, any practice or conduct which had restrictive effects on trade opportunities for the supply of imports into an EU government market will also be subject to Article 34's prohibition.

The obligations under Title II (Free Movement of Goods) and Title IV (Free Movement of Persons, Services and Capital) have similar effects (though they are not always identical) to the non-discrimination obligations of National Treatment and Most-Favoured-Nation treatment under the WTO. All those rules were made to secure trade opportunities and to avoid discrimination among the Members. As a specialised trade agreement under the WTO, the GPA is always trying to expand trade opportunities and to promote fair competition among suppliers from the signatory nations. In this sense, some parallels exist between the coverage of Article 34 and the coverage of the GPA rules.

²⁸ *Case 45/87 Commission of the European Communities v Ireland* (1988) ECR 04929. In this case, the Irish public authorities required in the contract specification that certain pipes to be used in the construction work should comply with an Irish national standard. Although the specification was a general requirement for all the bidders, it would, in practice, have the effect of favouring Irish suppliers since it was more likely that Irish suppliers would manufacture products that met an Irish national standard.

²⁹ *Case C-263/85 Commission of the European Communities v Italian Republic* (1991) ECR I-02457.

6.3.1.2. The Entity Coverage of the EU's Free Movement Rules (Article 34³⁰, Article 49³¹ and Article 56³²)

Generally, Article 34 TFEU is an obligation applying only to 'public bodies' and not to ordinary private entities.³³ The entity coverage of Article 49 and Article 56 is the same as that under Article 34.

'Public bodies' include traditional government bodies, such as central, sub-central, local government bodies and bodies established and wholly controlled and funded by those traditional government bodies. However, the situation is more doubtful with regard to bodies beyond the 'traditional' institutional arrangements, such as autonomous bodies emerging from the hiving-off trend³⁴ experienced in modern States; and with State organs assuming certain of the functions of private operators, primarily functions not strictly relying on State force and which can be fulfilled by the market, such as some elements of public transportation, public education, and so on. 'Public bodies' are involved in economic activities more than ever before. Not only in national economic activities have 'public bodies' had multifaceted involvement in cross-border trading in various forms. For the public market, the conceptual issue of 'public body' is more salient. CJEU case law has tried to develop a general concept of those hiving-off bodies under the EU procurement rules. In the following sections, the author will explore the bodies contained within that concept.

³⁰ Article 34 is concerned with 'Freedom of Goods'. This provision prohibits measures with quantitative restriction and measures that have an equivalent effect: this is the central provision of 'Freedom of Goods'. Other relevant articles, including Article 35, contains similar prohibitions relating to exports, Article 36 provides an exception that allows States to place restrictions on the movement of goods. See further, Paul Craig and Gráinne de Búrca, 'Free Movement of Goods: Quantitative Restrictions', *EU Law: Text, Cases, and Materials* (6th edn., Oxford University Press 2015) Chapter 16.

³¹ Article 49 TFEU is concerned with 'Freedom of Establishment'. This provision covers measures that hinder individuals or companies from establishing a business in the other Member States, or that hinder their business in other Member States once they are established. The measures generally relate to market access but can also include measures that restrict access to public markets by non-nationals, such as measures that require bidders to have a specific nationality.

³² Article 56 TFEU is concerned with the Free Movement of Services. This provision aims to ensure that companies can provide services in other Member States temporarily, without establishing a permanent office or branch there. Just like the other Free Movement rules, the Free Movement of Services provision applies to all measures restricting market access, and it can apply to any government contracts involving services.

³³ Peter Oliver, *Free Movement of Goods in the European Union* (Peter Oliver ed., 5th edn., Hart Publishing 2010). 4.21-4.26. Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (n 22) 286.

³⁴ The hiving-off trend refers to the trend by which public functions or duties traditionally performed by traditional central, sub-central or local government and other public bodies are 'exported' to more or less autonomous entities or bodies which are more flexible than traditional State governments, to enable them to cope better with the new social and economic panorama of the 21st century. See further Marianne Antonsen and Torben Beck Jørgensen, 'The "publicness" of Public Organizations' (1997) 75 *Public Administration* 337.

6.3.1.2.1. Contracting Authorities and Bodies Governed by Public Law

As far as EU legislation and the CJEU jurisprudence are concerned, all ‘contracting authorities’ and ‘bodies governed by public law’ under the Directive 2014/24/EU are covered by Article 34. In the *Case C-91/08 Wall*, the CJEU states that public authorities are bound to comply with the fundamental rules of the EC treaty when concluding public procurement contracts, such as the principles of equal treatment and non-discrimination enshrined in Article 43 EC and Article 49 EC.³⁵

6.3.1.2.2. Undertakings

In general, bodies operating predominantly as ‘undertakings’ (meaning commercial operators carrying out economic activities)³⁶ are outside the scope of the Treaty’s Free Movement rules. With regards to an undertaking with mixed public and private capital, whether it could be equated to a public authority for the purposes of Free Movement obligations depends on two conditions. In the *Case C-91/08 Wall*, the CJEU, referring to the definition of ‘public authority’ in the Public Procurement Directives as guidance, sketched out the two conditions that need to be satisfied. First, the undertaking involved must be **effectively controlled** by the State or some other public authority,³⁷ and second, the controlled undertaking must **not compete** in the market.³⁸ The two conditions must be considered as a whole.

Even in cases where public bodies do not sufficiently control an undertaking, if there exists State involvement in the procurement process, such as order, direction, delegation, and so on, and the undertaking is entrusted or directed to carry out specific functions vested by

³⁵ *Case C-91/08 Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (n 26) para 3, 33-34.

³⁶ For an analysis of the definition of ‘undertaking’ see the sections immediately following.

³⁷ In *Case C-91/08 Wall*, three aspects require examination, including the financing appointment and supervision aspects, in order to see if the control is ‘effective’. The CJEU stated that holding a concession awarded by a regional or local authority, operating for public purposes and over 51 per cent owned by a public authority does not suffice for the undertaking to be bound by the obligation of transparency (deriving from Article 43 EC and 49 EC and the principle of equal treatment and non-discrimination on ground of nationality). The fact that the undertaking was operating in the market and only one quarter of the members of its supervisory board was appointed by public authority did not necessarily prove that the ‘control’ was effective (especially considering that three-quarters majority votes are needed for the undertaking’s board decision, while the public authorities had only one-quarter of the votes on the supervisory board). *Case C-91/08 Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (n 26) para 47-49, para 55-57. 60, operative part 2.

³⁸ With regards to the second condition: ‘competing in the market’: in the case of *Case C-91/08 Wall*, the CJEU ruled that if an undertaking derived a large part of its income from the activities carried out with public authorities, and meanwhile competed with private undertaking in the market, and also competed with other undertakings in bidding processes, it could be regarded as operating competitively in the market. In that circumstance, the ‘non-competitiveness’ condition was not satisfied. Therefore, an undertaking under the effective control of public authorities, which is qualified as a ‘public undertaking’, may still remain outside of the application of the Free Movement rules, only if the public undertaking operates competitively in the market. *Case C-91/08 Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (n 26) para 49.

governments, it can be regarded as the instrumentality of the State, and the activities it conducts are regarded as being carried out on behalf of, or under the direction of, or for the sake of, the State. Under the principle of ‘State responsibility’,³⁹ the undertaking is presumed to be an instrumentality or agent of the government (even when it does not satisfy the definition of a ‘public authority’) so that the conduct of the undertaking can be attributed to the State. The procurement of the undertaking can be assumed as the State’s, and therefore, it must comply with the free movement rules. In the *Case 249/81 Buy Irish*, the CJEU ruled that the ‘Irish Goods Council’ (a private company that conducted the ‘Buy Irish’ campaign) was a body funded, appointed or supervised by the State, regardless of whether there was more direct State involvement,⁴⁰ so that its decision in relation to procurement measures made by this kind of body could be regarded as a decision made by the State (the principle of State responsibility), and those measures should not infringe the prohibition against quantitative restrictions under Article 34 of the TFEU.

6.3.1.2.3. *A Parallel with Enterprises under the WTO*

Both under the EU treaty and the WTO agreements, if any conduct was entrusted to or directed by the State, the author of the conduct could be imputable as the State, no matter what legal forms the author of the conduct bore. Specifically, in the WTO multilateral trade disciplines, such as the GATT, GATS and SCM and their relevant jurisprudence, State trading enterprises, enterprises with special or exclusive rights or privileges, enterprises vested with or exercise governmental authority etc., are subject to non-discriminatory trade obligations, based on the principle of ‘State responsibility’.⁴¹ The Panel on Subsidies and State Trading examined sub-

³⁹ Article 5 of the International Law Commission on State Responsibility provides:

‘The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.’

⁴⁰ *Case 249/81 Commission of the European Communities v Ireland* (1982) ECR 04005. In the case, the Irish government introduced a 3-year ‘Buy Irish’ Campaign (1978) to promote Irish Products by providing a shoplink service and exhibition facilities. In 1982, although the shop link service and the exhibition facility support had been abandoned, the Irish Goods Council did not stop the advertising campaign (it advertised Irish products by publication of posters, pamphlets, press televisions and a ‘Guaranteed Irish’ symbol to make Irish consumers better acquainted with Irish products and to be aware the link between the marketing of Irish products and the unemployment problem in Ireland. Although the ‘Irish Goods Council’ was registered as subject to Irish Company Law, the European Commission questioned the status of the ‘Irish Goods Council’ as a ‘public authority’. This was because, first, according to the articles of association of the ‘Irish Goods Council’, the members of the management committee of the Irish Goods Council were appointed by the Minister for Industry, Commerce and Energy. (*para 12*) Second, the Irish Goods Council was financed by subsidies paid by the Irish State (which covered a significant part of its expenses). (*para 13*) Third, the aims and the broad outlines of the advertising campaign by the Irish Goods Council were defined by the Irish Government. (*para 15*).

⁴¹ See further the text analysis and case study on certain enterprises under the GATT, GATS and SCM in Chapter 5 section 3: ‘SOEs in the WTO Legal Regime’. In this section, the author analysed how those multilateral trade

paragraph (c) of Article XVII GATT: State Trading Enterprise. The Panel refers to the term ‘enterprise’ as either an instrumentality of government that has the power to buy (or sell) or to a non-governmental body with such power, and to which the government has granted exclusive or special privilege.⁴² In that circumstance, the body’s conduct can be imputable to the government and the body is regarded as an agent of the government.

6.3.2. Secondary Legislation

Since the Treaty did not impose positive or detailed obligations in the awarding of public contracts, the European legislators were keenly aware that it was necessary to adopt secondary legislation to put flesh on the Treaty provisions., Treaty provisions alone were insufficient to ensure an open market within the EU territory.

Just as there was diversity among members of the WTO, the EU Member States were also diverse in their legal traditions. That diversity among the Member States reflects significant differences in the structure of the relevant Member States’ public authorities. For example, some of the Members States, (for example, the UK and Denmark), had no procurement discipline, while others, such as France and Germany, had long public procurement legal traditions. Taking such diversity into consideration, the European Council initially adopted Directives for monitoring and enforcing the prohibition on discrimination, and for removing specific trade barriers. One of these was Directive 71/305/EEC. This legislation dealt with public works contracts. There was also Directive 77/62/EEC, which dealt with the supply of goods. The current EU Public Procurement Directives were the result of three stages of development, based on the social, economic and political needs of the Community’s evolution.

6.3.2.1 The Beginnings: the 1970s and the First Expansion in the 1980s

Various legal instruments were introduced between 1971 and 1988.⁴³ The entity coverage of public procurement discipline at that time was limited to **government departments, regional governments and local authorities, and certain other authorities of a public nature (i.e., legal persons governed by public law)**.⁴⁴

agreements regulate enterprise with government involvement and how the WTO Dispute Settlement Body interpreted those provisions on the basis of the principle of ‘State responsibility’.

⁴² WTO, ‘Text Of Article XVII, Interpretative Note Ad Article XVII And Uruguay Round Understanding On Interpretation Of Article XVII’ <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art17_e.pdf>.

⁴³ For example, Directive 80/767/EEC in July 1980. These original directives had been adopted in the 1970s and were often disregarded at the national level, and they did not apply to service contracts or contracts for most utilities.

⁴⁴ The concept of ‘authorities awarding contracts’ refers to State, regional or local authorities. ‘Legal persons’ governed by public law refer to a Community concept, and such bodies were listed in Annex I of the Directive as

The ‘contracting authorities’ include governments only narrowly. In practice, the Public Procurement Directives cannot apply other bodies that may take measures hindering the cross-border public procurement market. Consequently, the Directives proved to have little or no impact in practice.⁴⁵ Public procurement received little attention in the 1970s,⁴⁶ however, as a result of the *White Paper for the Completion of the Internal Market*,⁴⁷ A set of procurement directives were enacted in the late 1980s to stimulate tendering for public contracts.⁴⁸

Of significance was the extension of the Directives’ coverage to include utility services.⁴⁹ The Utilities Directive (1993) covered not only **public utilities but also utilities under State influence** that were at risk of engaging in discriminatory actions.⁵⁰ The Commission called for the introduction of competition and the pursuit of market integration in these excluded sectors. The updated Directives also underpinned the new Single European Market principle of giving interested parties enforceable rights when subjected to non-discriminatory treatment.

reference. Notwithstanding the periodical updating of the list of such bodies and persons, it quickly turned out to be impossible to follow the constant changes of public organisations. See Article 1(b) Directive 71/305/EEC (Public Works Contracts); Directive 77/62/EEC (Public Supplies Contracts). See also Sue Arrowsmith, John Linarelli and Don Wallace Jr., ‘The Coverage of Public Procurement Rules’, *Regulating Public Procurement, National and International Perspectives* (1th edn., Kluwer Law International 2000) Chapter 6.

⁴⁵ H Nijholt, ‘The Concept of a ‘Body Governed by Public Law’ in European Procurement Law’ (2005) 22 The International Construction Law Review 422, 423.

⁴⁶ Due to either the poor coverage or the ambiguity of its scope, the application of the public procurement rules in the Member States achieved a low level of cross-border penetration of public procurement markets. Besides the poor coverage, the complexity of the procurement rules also contributed to the failure of the application. Frequently those public procurement rules were purposely not sufficiently incorporated into national laws. Consequently, public contractors and economic operators were encouraged to circumvent Community procurement rules. Statistics indicate a minimal level of compliance with the directives. Commission of the European Communities, ‘White Paper from the Commission to the European Council on Completing the Internal Market’ (n 69) para 83.

⁴⁷ The European Commission released its *White Paper* preceding the Single European Act 1986. This provided the framework for specific legislative measures to improve the existing Directives. See Commission of the European Communities, ‘White Paper for the Completion of the Internal Market’ (COM) 85 310 final, Brussels, 14 June 1985 para 84-87.

⁴⁸ Namely, Directive 89/440/EEC, amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, and Directive 88/295/EEC amending Directive 77/62/EEC co-ordinating procedures for the award of public supply contracts. In due course, these new directives were consolidated in two new directives respectively on public supply contracts and public works contracts. Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts, OJ 1993 No. L199/1. Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts, OJ 1993 No. L 199/54.

⁴⁹ Through Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts, OJ 1992 No. L 209/1. Council Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1990 No. L 297/1. Furthermore, Remedies Directive 89/665/EC was adopted for more effective enforcement of the public sector rules. And Council Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993 No. L 199/84.

⁵⁰ The eventually reformed public procurement discipline consists of Directive 93/36/EC (Supplies), Directive 93/37/EC (Works) and Directive 92/50/EC (Service), Directives 89/665/EC and 92/13/EC1 (Remedy for public and utilities respectively).

6.3.2.2 Refinement in the 1990s, Integration in the Early 2000s and in 2014

From 1993, procurement Directive 93/37/EEC assumed greater significance with the adoption of the concept of ‘contracting entities’. The ‘contracting authorities’ were defined as **‘State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law’**.⁵¹ The notion of a ‘legal person governed by public law’ was replaced by a general definition, namely a ‘body governed by public law’.

With the coming into effect of the new procurement Directives 93/37/EEC, the scope and coverage of the EC Public Procurement Directives of the 1990s were considerably broadened, by bringing the new organisational tools and models (concessions and other forms of public-private partnership)⁵² used by traditional authorities to perform public functions or carry out activities for the public interest, within the Directives (and the scope of EU Law). Such entities would henceforth be themselves regarded as contracting authorities in the new definitions and were supplemented by indicative lists updated solely by way of examples. This concept ensured better coverage and prevented a wider range of bodies from circumventing EU law by outsourcing public tasks in their public procurement activities.

After the second round of reforms, the secondary legal framework on public procurement was quite fragmented and not altogether user-friendly for the participants in the market. This situation persisted until a more integrated system finally replaced the 1990s’ procurement Directives in 2004. Directive 2004/18/EC and Directive 2004/17 were adopted.⁵³ The definition of a **‘body governed by public law’** was confirmed by Directive 2004 and was used to include any entity established by public authorities, national, regional, or local, to carry out their own tasks regardless of their legal form.

⁵¹ Article 1 of the Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts. Nijholt (n 45) 422.

⁵² Article 3 of the Directive 93/37EEC.

⁵³ With the aim of increasing transparency and flexibility in the procurement discipline for achieving the Internal Market to boost cross-border public procurement between the Member States, the new procurement directives introduced competitive dialogue for complex projects and electronic procurement. The importance of information technology in the procurement process as a mean to promote market access and expand the public market was recognised, especially for small and medium-sized enterprises. In the 2004 Utilities Directive, the telecommunications sector was excluded from the 2004 Utilities Directive because the telecommunication sector had been liberalised for free market competition under the regulation of EU competition law. See further, Nijholt (n 45) 423. It has been argued that the objective of the simplification has been met to a large extent, especially with regard to the Public Sector Directive, which represents a notable example of codification of supranational administrative law. See further Bovis (n 22) 9.

To date, Directive 2014/24/EU is the primary legal basis for analysing the scope of contracting authorities, i.e., which ‘entities’ are to be subject to the public procurement rules. Directive 2014/25/EU applies to the utility sectors and expands the entity coverage to ‘**public undertakings**’ and ‘**private undertakings with special or exclusive rights**.’⁵⁴

As Bovis observed, the primary task of the EU procurement system is to safeguard market access and, for better market access, a positive approach is needed to regulate the public market. Just as EU competition law regulates the conduct of ‘suppliers’ in the ‘private’ market, EU public procurement law regulates the conduct of ‘demanders’ in the ‘public’ market.⁵⁵ It ‘brings the public contract market and relevant utilities contract market in parallel with the operation of the private market’.⁵⁶ In the following sections, the categories of ‘demanders’ subject to the EU public procurement law will be examined one by one to see whether the way that the EU defines entity coverage could inspire solving the same problem under the GPA.

6.4. The Definition Of Contracting Entities

A clear and comprehensive definition of the term ‘contracting authority’ ‘determines the effective application, and is probably the most important element of the EU public procurement legal framework’.⁵⁷ Generally, the entities subject to the EU public procurement discipline can be categorised as *contracting authorities (public authorities and bodies governed by public law), public undertakings, and private undertakings granted with special or exclusive rights*.

6.4.1 Contracting Authorities

As stipulated in Article 2(1) of the Directive 2014/24/EU: ‘contracting authorities’ *means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law*. The notion of ‘contracting authority’ does not belong to any specific national law or any specific legal

⁵⁴ On 11 February 2014, the European Council adopted a legislative package for ‘flexibilization’ of the EU public procurement regime.⁵⁴ The package consists of Directive 2014/24/EU on public procurement (which repealed Directive 2004/18/EC), Directive 2014/25/EU on procurement by entities operating in the water, energy, transport, and postal service sectors, (which repealed Directive 2004/17/EC and Directive 2014/23/EU on the award of concession contracts).

⁵⁵ Bovis takes the view that public procurement regulation draws support from neo-classic economic theories and that the promotion of competition in the public market would result in ‘optimal allocation of resources within the European industries, rationalisation of production and supply, promotion of mergers and acquisitions, elimination of sub-optimal firms and creation of globally competitive industries.’ See Bovis (n 22) 10.

⁵⁶ Bovis (n 22) 11.

⁵⁷ Christopher Bovis, *The Law of EU Public Procurement* (2nd edn, Oxford: Oxford University Press 2015). Chapter 7, subsection 1.

tradition. In order to maintain legal consistency in all the Member States, the term ‘contracting authority’ is defined with cumulative criteria abstracted from both legal concepts of Civil Law and jurisprudence in the Case Law tradition. Not only traditional authorities but also entities created by national governments for a particular purpose, and bodies adhered to or controlled by traditional public authorities, are included within the meaning of this definition of ‘contracting authorities.’ The CJEU has interpreted this definition according to its purpose (i.e., for the achievement of an integrated and competitive Internal Market) to give full effect to the principle of Freedom of Movement.

The words ‘public authority’ appears several times in the EU Public Procurement Directives, but the regulatory text of the European Union does not define a ‘public authority’. According to CJEU jurisprudence, the notion of a ‘public authority’ follows the same understanding as that of a ‘contracting authority.’⁵⁸ The CJEU has indicated that an entity must comply with two conditions for it to be considered as a ‘public authority’: ‘firstly, that the undertaking in question is **effectively controlled** by the State or by another public authority, and secondly, that it does **not compete in the market**.’⁵⁹ It is a pity that the two criteria are not directly inherited from the interpretation of ‘contracting authorities’. However, considering the former statement that the understanding of ‘public authority’ can be regarded as the same as that of ‘contracting authority’, it can be argued that the two criteria can also apply to ‘contracting authorities’.

6.4.1.1. Central and sub-Central Government Authorities

A formal, two-fold category of the authorities covered was introduced in Directive 2014/24/EU. These were the central government authorities, meaning the contracting authorities listed in Annex I, and their successor entities with corrections or amendments, and sub-central government authorities, which means all government authorities that are not central. As far as the concept of ‘contracting authorities’ is concerned, the new two-fold categories method

⁵⁸ ‘To establish whether a company with mixed public and private capital may be equated to a public authority bound by the obligation of transparency, some aspects of the definition of ‘contracting authority’ in Article 1(b) of Directive 92/50 on public service contracts should be taken as guidance, to the extent that they correspond to the requirements produced by the application to service concessions of the obligation of transparency flowing from Articles 43 EC and 49 EC.’ The idea behind this consideration is that only those entities that are not inspired by economic needs and thus can freely choose a contracting partner, should be subject to the principle of equal treatment and the principle of transparency. See Case C-91/08 *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (n 26) para. 47.

⁵⁹ Case C-91/08 *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (n 26) para 49.

(central vs sub-central) makes no difference to the three-fold distinction traditionally made under public law,⁶⁰ namely the State, regional and local authorities.

First of all, the notion of ‘government authorities’ includes those entities subject to constitutional laws, administrative laws and other public laws in the Civil Law Member States. Secondly, according to the functional interpretation of the concept of ‘State’ by the CJEU, all bodies whose composition and functions are laid down by legislation and largely depend on the public authorities must also fall within the notion of the State, even they are not formally part of the State administration.

The CJEU has confirmed that the term ‘State’ encompasses all the bodies that fulfil judicial, legislative and executive functions, and the same is true of bodies in a federal State.⁶¹ Although the State, regional and local authorities can easily find their definition in national laws, for the purpose of public procurement rules at the EU level, the State, regional or local authorities are not restricted to their relevant national public law definition, but instead must be interpreted broadly in ‘functional terms’ at the EU law level.⁶² All bodies that are not autonomous legal persons and that exercise legislative, executive or judicial powers are necessarily covered, and the lack of a formal connection with the central government is not relevant.⁶³ Functional

⁶⁰ Arrowsmith pointed out that the new classification has two functions: firstly, it is used to designate which threshold to apply to a certain type of contract, (the threshold of the contract of central government authority is lower (EUR 134,000) than that of the sub-central contracting authority (EUR 207,000)); and secondly, it introduced more flexibility in award procedures for sub-central contracting authorities. (for example, with regards to the requirement of a call for competition by means of a contract notice, where the contract is awarded by restricted procedure or competitive procedure with negotiation, sub-central contracting authorities may make the call for competition by means of a prior information notice.) Article 26.5 Directive 2014/24/EU. See further Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK*, vol I (Sue Arrowsmith ed, 3rd edn., Sweet & Maxwell 2014) 383.

⁶¹ Case C-323/96 *Commission of the European Communities v Kingdom of Belgium* (1998) ECR I-05063. para 27-29. The concept of the State is also inclusive of different political arrangements. For example, in the Federal Republic of Germany, besides the central contracting authorities, the Federal Chancellery and the Federal Ministries, the federal States and municipalities are also within the concept of the ‘State’ as sub-central contracting authorities. The definition of the authority was complemented with an Annex to give examples for better understanding. The examples in the Annexes are not exhaustive but dynamic, with reforms. They flexibly reflect institutional changes. See Annex I, Directive 2014/24/EU.

⁶² In the early Case 31/87 *Beentjes*, the Court held that that the definition of a ‘body governed by public law’ must be interpreted under the purpose of public procurement rules, which means that it not merely includes (part of) the State administration in formal terms. Under the objective of ensuring the effective attainment of Freedom of Establishment and Freedom of Service, a body, ‘whose composition and functions are laid down by legislation and whose members are appointed depending on the authorities’ decision, must be regarded as within the notion of the definition, even though it is not an integral part of the State administration in *formal terms* under national law. See Case 31/87 *Gebroeders Beentjes BV v State of the Netherlands* (n 35) para 8-12.

⁶³ In the Case C-323/96 *Commission of the European Communities v Kingdom of Belgium*, in para 28,29, the CJEU held that following the functional interpretation of *Case 31/87 Beentjes*, which although *Vlaamse Raad* (a legislative body of the *Vlaams Gewest*) was not an integral part of the State administration in formal terms, it did fall within the notion of ‘State’ because it exercises legislative power at the federal level. In addition, in para 27, the CJEU held that, as the local land consolidation committee in the case is bound to apply rules laid down by a central committee established by royal decree, and its members are appointed by the Crown, and the measures of

interpretation means literally to rely on the aims and purpose of the EU Public Procurement Directive as it was stated in the recitals, which were to eliminate the barriers between the public (procurement) market. In order to achieve the ‘Internal Market’, public influence or public control on the public market must be subject to the EU Public Procurement Market. Therefore, for this functional purpose, the CJEU emphasises the presence of *public control* with the argument that a body depending on public authority must be under its effective influence and therefore highly likely to apply discriminatory public procurement measures and must be subject to the EU Public Procurement Directives.

Compared with the formalisation interpretation, which relies on the traditional public law legal status, a functional interpretation focuses on its connection between the authority and the entity enjoyed in order to capture all entities that may apply measures not consistent with the principle of the Internal Market.⁶⁴ With the functional interpretation of the ‘State’, the understanding of ‘public authority’, on the one hand, can be equally incorporated into any national laws of the EU Member States. On the other hand, it could arguably facilitate the implementation of the policies on the EU level, especially the policy of the Internal Market.

6.4.1.2. Bodies governed by Public Law

According to the definition in Article 2 (4) Directive 2014/24/EU, only when three conditions were fulfilled simultaneously can a body be subject to the Public Procurement Directives as a body governed by public law. The three conditions are:

- i. *The body was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*
- ii. *The body has a legal personality; and*
- iii. *The body is financed, for the most part, by contracting authorities; or subject to management supervision by those authorities or bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the contracting authorities;*

In contrast to the Annex I of Directive 2014/24/EU, which is exhaustive, the definition of ‘bodies governed by public law’ was followed by a list in Annex III to the Directive 2014/24/EU, in which the Member States listed bodies considered to fall within the concept. It

the committee is financed and supervised by the State, the local land consolidation committee must be regarded as falling within the definition of ‘State’, otherwise, a formal interpretation of the ‘State administration’ would jeopardise the achievement of the aims of the Directive to ensure Freedom of Establishment and Freedom of Services. See Case C-323/96 *Commission of the European Communities v Kingdom of Belgium* (n 61) para 27. See also Sune Troels Poulsen, Peter Stig Jakobsen and Simon Evers Kalsmose-Hjelmborg, *EU Public Procurement Law: The Public Sector Directive, The Utilities Directive* (2nd edn, Denmark: DJØF Publishing 2012) 86. Case 31/87 *Gebroeders Beentjes BV v State of the Netherlands* (n 17) para. 12.

⁶⁴ Bovis (n 57) Chapter 7, 7.10.

is apparent from the jurisprudence of the CJEU that the list was neither exhaustive nor binding, but wholly illustrative, and the actual coverage depends solely on the general definition.⁶⁵ The category of ‘bodies governed by public law’ is supposed to embrace all entities that may be at risk of discrimination in procurement activities because of their close link to traditional public entities.

6.4.1.2.1. The First Condition

The ‘needs in the general interest’ indicate an appearance of traditional government functioning. There is a dividing line between ‘need in the general interest not having a commercial or industrial character’ and ‘need in the general interest having a commercial or industrial character’.⁶⁶ If an entity operates for the ‘needs in the general interest’ rather than for profit, like normal private entities, then it is very likely that the entity is under the influence of public control and therefore loses commercial freedom. The following condition further confirms the similarity: ‘Having no commercial and industrial character’. This is a restriction of the scope of ‘need in the general interest’. It contemplates a situation where entities that carry out activities for ‘needs in the general interest’ that in some way involve commercialities, such as running public galleries or public libraries, are not included in the coverage of the definition.⁶⁷ On the basis of this consideration, it is argued that the first condition defines the activities from two aspects: **(1) in relation to the public interest, and (2) having no commercial freedom.**

In *Case C-373/00 Truly*, the CJEU held that ‘need in the general interest’ is a Community law concept, independent of the law of Member States, and must be interpreted in the context of Community law.⁶⁸ It is important to notice that ‘needs in the general interest’ must be those

⁶⁵ The listed entities were only presumed to come within the definition, which meant that an entity was definitely covered only when it fell within the definition, whether it is in the list or not does not matter. See, e.g. *Case C-380/98 The Queen v HM Treasury, ex parte The University of Cambridge* (2000) ECR I-0803 para 20. In this case, the University of Cambridge requested the retention of Universities of the UK of Great Britain and Northern Ireland in the list of bodies governed by public law in Annex I to Directive 93/37. The request aroused the interpretation of the criterion of ‘financed for the most part by one or more contracting authorities’. See also Opinion Of Advocate General Mazák, delivered on 16 December 2008 *Case C-300/07 Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik v AOK Rheinland/Hamburg* (2009) ECR I-04779 para 30. See also Jennifer Lane, ‘Public Procurement Law, Public Bodies, and the General Interest: Perspectives from Higher Education’ (2005) 11 *European Law Journal* 491, 492.

⁶⁶ *Case C-360/96 Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* (1998) ECR I-06821 para 36.

⁶⁷ Jennifer Lane, ‘Public Procurement Law, Public Bodies, and the General Interest: Perspectives from Higher Education’ (2005) 11 *European Law Journal* 493. *Case C-360/96 Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* (n 66) para 32-35.

⁶⁸ In a broad sense, the general interests of the whole Union are trade, economic and social development. Besides, public order, social safety and public health are commonly recognised as general interests in every Member State of the European Union. See *Case C-373/00 Adolf Truley GmbH v Bestattung Wien GmbH* (2003) ECR I-01931 para 32, 36, 40. *Case C-18/01 Arkkitehtuuri-toimisto Riitta Korhonen Oy and Others v Varkauden Taitotalo Oy* (2003) ECR I-05321 para 45. From Lane’s point of view, the concept of the general interest is not concrete, so that the public service, the understanding of which is closely linked with the notion of general interest, is likewise

which the public authorities choose to provide, or over which the public authorities wish to retain a decisive influence,⁶⁹ and the requirements of both ‘need in the general interest’ and having no industrial or commercial nature’ much be fulfilled at the same time. This jurisprudence implies **immediate and decisive causation** between the public authority and the result of losing commercial freedom.

Furthermore, this criteria does not necessarily require that a given entity must generally be engaged in ‘activities having an industrial or commercial nature’, but ‘whether the entity’s specific and individual activity in question is to be considered economic or not’.⁷⁰ This is because a State or public body could exercise public power in some cases, while in other activities it may be carrying on economic activities of an industrial or commercial nature by offering goods or services on the market.⁷¹ To put it simply, the judgement on the activity is on a **case-by-case** basis, which allows a body the flexibility to carry out an activity, and at the same time, to avoid situations that are consistent with the general aims and purposes of Directive 2014/24/EU.

6.4.1.2.2. The Second Condition

The second condition requires that the body should have an independent legal status, but whether the legal form of the body is public or private is irrelevant.⁷² Even though the entity was established subject to private law, its private law status does not automatically exempt it from the public procurement rules.⁷³ This condition, on the other hand, makes a distinction between ‘bodies governed by public law’ and organs or departments of the State or government

no more concrete. Lane (n 65). Malaret Garcia argues that the ‘intuitive’ notion of public service is revealed by State supervision or control’, and she implicitly attributes to it a domestic or national dimension. See further E Malaret Garcia, ‘Public Service, Public Services, Public Functions and the Guarantees of the Rights of Citizens: Unchanging Needs in a Changed Context’ in M Freeland and S Sciarra (eds), *Public Service And Citizenship In European Law—Public And Labour Law Perspective* (Clarendon Press 1998) 57.

⁶⁹ Case C-360/96 *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* (n 66) para 47.

⁷⁰ Wolf Sauter and Harm Schepel, *State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009) 80.

⁷¹ For example, in the judgement of the Court of First Instance of *Case T-128/98 Aéroports de Paris*, the Court held that the although Aéroports de Paris (ADP) was a public corporation under the authority of the Ministry of Civil Aviation, it did not necessarily mean that it could not be regarded as an undertaking for the purpose of Article 86 of the Treaty. A distinction between ADP’s purely administrative activities, such as supervisory activities, and its commercial activities, such as management and operation, must be drawn. This separation idea was confirmed further in the *Aéroports de Paris* appeal, and was elaborated by the Court of First Instance in *SELEX*. See *Case T-128/98 Aéroports de Paris v Commission of the European Communities* (2000) II-03929 para 108. *Case C-82/01 P Aéroports de Paris v Commission of the European Communities* (2002) I-09297 para 75 et seq. *Case T-155/04 SELEX Sistemi Integrati SpA v Commission of the European Communities* (2006) II-4797 para 54.

⁷² *Case C-214/00 Commission of the European Communities v Kingdom of Spain* (2003) I-04667 para 55; *Case C-283/00 Commission of the European Communities v Kingdom of Spain (‘SIEPSA’)* (2003) I-11697 para 74.

⁷³ *Case C-214/00 Commission of the European Communities v Kingdom of Spain* (n 72) para 54-61.

or other entities having no independent legal status and imputable under the principle of State responsibility.

6.4.1.2.3. The Third Condition

The third condition comprises three (alternative) criteria of equal weight and emphasises a close dependency on a contracting authority.⁷⁴ All of the three alternative criteria specifically indicate that public authorities could have sufficient influence on the procurement activity.⁷⁵ It implies that any entity under demonstrable control or influence of public authority would satisfy the test for the application of the public procurement rules.⁷⁶

According to the jurisprudence on this condition, the ‘financial control’ for the purpose of this definition must be **crucial and decisive** (more than 50 per cent of the body’s total financing must be from public financing) to the extent that the **commercial freedom of the legal person is subject to the contracting authority’s will**.⁷⁷ A public authority can exert ‘management control’, either directly or indirectly. The manner and form of that managerial control or supervision do not matter.⁷⁸ What matters is whether the public control or influence on the body is **decisive** to its procurement decision. In other words, the body has a general dependency on a contracting authority, to the extent that the public authority can influence its decision on public contracts. In addition, it is argued that the public control over the entity’s procurement decision must not only be decisive but must also have **actual causation** regarding the result of losing commercial freedom, which means this control must influence the decision in relation to the award of the contract *prior to* or *at the time* when the decision is made.⁷⁹ The third

⁷⁴ Case C-380/98 *The Queen v HM Treasury, ex parte The University of Cambridge* (n 70) para 20.

⁷⁵ Case C-237/99 *Commission of the European Communities v French Republic* (2001) ECR I-00939 para 49.

⁷⁶ Case C-237/99 *Commission of the European Communities v French Republic* (n 75) para. 48, 59; Case C-373/00 *Adolf Truley GmbH v Bestattung Wien GmbH* (n 68) paras 69-70.

⁷⁷ Governments may financially support a private legal person for various purposes in various ways, such as capital injection, grant, guarantee, transfer payment, and so forth. Not all government financial supports are definable as ‘financial control’ for the purpose of the directive. In the case of *the Queen v HM Treasury (University of Cambridge)*, The CJEU laid down principles for this requirement that financial support served a specific purpose. It stated that payment as consideration for an individual transaction is not within the meaning of ‘financial control’. See *Case C-380/98 The Queen v HM Treasury, ex parte The University of Cambridge* (n 70) para 21.

⁷⁸ The public control can be in direct forms, such as a labelling requirement for the specification, detailed tendering standard or price instructions, etc. (or in indirect form, for example, requiring compliance with State policy or special conditions for contract awarding). An indirect form could be, for example, inspecting a legal person’s premises or facilities, but the review or inspection must enable the public authorities to influence the decision of the body in relation to public contracts. *Case C-373/00 Adolf Truley GmbH v Bestattung Wien GmbH* (n 68). para.70. In the Case of *Commission v Ireland*, for example, the State set up *Collte Teotanta* and entrusted it with a specific task (managing forests) and appointed its principal officials. The CJEU confirmed that merely indirect control based on general criteria over the award of the contract (e.g. requiring the body to comply with State policy, providing specific services or facilities) would also warrant the application of procurement rules. *Case C-353/96 Commission of the European Communities v Ireland* (1998) ECR I-08565 para 38-39.

⁷⁹ Case C-237/99 *Commission of the European Communities v French Republic* (n 75) para. 39, 48, 52; Case C-373/00 *Adolf Truley GmbH v Bestattung Wien GmbH* (n 68) para 70.

criterion on public control relates to the appointment of key personnel, i.e., those that have decisive power on the supervisory board. Usually, more than half of the supervisory board members is sufficient for a decisive influence. However, this criterion is defined on a case by case basis. Over fifty per cent is not a rigid percentage requirement. For example, if a decision can be made based on the voting of a qualified majority of the supervisory board, the public authorities must be able to appoint a qualified majority of the members of the supervisory board. ‘Over fifty per cent’ is merely a reference guide to establish whether public control or influence over the legal person’s procurement is decisive.

6.4.1.2.4. Functional Case-By-Case Interpretation

A large body of jurisprudence⁸⁰ has established that the term ‘bodies governed by public law’ must be understood and applied as a broader concept (in order to encompass all entities that might hinder the integration of the Internal Market) through autonomous and uniform teleological interpretation under the purpose and objectives of competition and transparency (which could also be understood as competition and non-discrimination).⁸¹

Whether the entity is within the definition of ‘bodies governed by public law’ is determined on a case-by-case basis. Only the activity carried out by the entity is relevant when identifying whether the latter should comply with public procurement rules.⁸² This approach respects the

⁸⁰ The CJEU strove for a stable and clear interpretation of the definition of a ‘body governed by public law’ underlining that the Member States may not automatically exclude commercial companies under public control from the application scope of the procurement directives. The concept of a ‘body governed by public law’ was interpreted in functional terms, *inter alia*, in Case C-44/96 *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH* (1998) ECR I-00073 para 20, 21; Case C-470/99 *Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.bH Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH* (2002) ECR I-11617 para 51-53; Case C-84/03 *Commission of the European Communities v Kingdom of Spain* (2005) ECR I-00139 para 27, 79; Case C-380/98 *The Queen v HM Treasury, ex parte The University of Cambridge* (n 70) para 16; Case C-237/99 *Commission of the European Communities v French Republic* (n 75) para 41; Case C-92/00 *Hospital Ingenieure Krankenhaus-Planungs-Gesellschaft mbH (HI) v Stadt Wien* (2002) ECR I-05553 para 43.

⁸¹ In the judgment of Case C-237/99 *Commission v France*, the Court emphasised that ‘in the light of objectives (to avoid the risk of favouring national tenders and the possibility that a body may choose to be guided by non-commercial considerations), ‘contracting entities’ including the ‘body governed by public law’ must be interpreted in functional terms.’ See Case C-237/99 *Commission of the European Communities v French Republic* (n 75) para 41, 42; Case C-380/98 *The Queen v HM Treasury, ex parte The University of Cambridge* (n 70) para 16, 17. See also Case C-237/99 *Commission of the European Communities v French Republic* (n 75) para 43. Case C-353/96 *Commission of the European Communities v Ireland* (n 78) para 36. In the Case C-373/00 *Wien*, the Court held that “given to the double objective of introducing competition and transparency, the concept of ‘body governed by public law’ must be interpreted as having a broad meaning”, so that all forms of contracting entities under the risk of anti-competition in the Internal Market must be subject to the procurement directive. See Case C-373/00 *Adolf Truley GmbH v Bestattung Wien GmbH* (n 68) para 27, 43, 79. Here Arrowsmith expressed a sceptical view of the Court ruling by saying that the basis of competition and transparency cannot support a broad interpretation and the decision is simply the CJEU’s preference for transparency above other interests. See Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK*, vol I (Sue Arrowsmith ed., 3rd edn., Sweet & Maxwell 2014) 346.

⁸² See immediately above footnote 80.

‘commercial freedom’ of the entity as well as ‘the effectiveness of national law,’⁸³ in avoiding the possibility of legal inconsistency between the EU public procurement rules and national laws. Besides, unlike ‘one hard rule fits all, a case-by-case assessment is sufficiently flexible to diminish political resistance. Respecting national law (the principle of sovereignty⁸⁴) and minimising political resistance (the principle of consensus⁸⁵) are the considerations of the GPA definition. With those considerations, the GPA definition could borrow from the experience of the EU, which demands a test on the **immediate and decisive causation** between public control/influence over the entity and on the trade distortion effect.

6.4.1.2.5. A Parallel with Public SOEs

As the author has argued in Chapter 5, SOEs must be treated differently from ‘public SOEs’ and ‘Commercial SOEs,’ on the basis of the public/commercial nature of the activities they carry out. Public SOEs generally refer to an enterprise that carries out activities of a public nature without commercial freedom, such as activities in relation to defence, aerospace, natural resources, and so on. There are similarities between public SOEs and bodies governed by public law. Thus, the definition of the latter could be borrowed as a reference for regulating procurement by public SOEs under the GPA.

A ‘body governed by public law’ is defined from two aspects: **the public control/influence over the body and the non-commerciality of its activities**. The first condition defines a body from the *non-commercial nature of the activities* carried out by the body. The third condition defines a body from *public control* over the body, which is characterised by three alternative forms of ‘close dependency’ on public authorities.⁸⁶ There is no doubt that the three indicators of ‘close dependency’ could also be used to prove the existence of public control/influence on public SOEs. As mentioned immediately above, public SOEs are usually government-invested

⁸³ As an entity established by national private law has commercial freedom to carry out whatever legal activities are within the bounds of national private law.

⁸⁴ The principle of sovereignty, which refers to the supreme authority within a territory, is a pivotal principle of modern international law. To be specific, it means that States have equal sovereign rights to exploit their own resources and to pursue their own policies in the areas of trade, commerce, investment, and development. States have equal sovereignty. See Article 38(1) of the Statute of the International Court of Justice. Article 2(1) of the UN Charter. See further Matthias Herdegen, *Principles of International Economic Law* (1st edn., Oxford: Oxford University Press 2013) 77-115.

⁸⁵ WTO is a consensus-based organisation, where the principle of consensus rests its legitimacy on a contractual foundation among its members. For analysis and criticism of WTO consensus-based rule-making, see Claus Dieter Ehlermann and Lothar Ehring, ‘Decision-Making in the World Trade Organization’ (2005) 8 *Journal of International Economic Law* 51. Also, Wenwei Guan, ‘Consensus yet Not Consented: A Critique of the WTO Decision-Making by Consensus’ (2014) 17 *Journal of International Economic Law* 77.

⁸⁶ Case C-44/96 *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH* (n 80). See also Lane (n 65) 48.

in the pursuit of public interest. The aims and purpose of their activities are to provide **public goods** and maintain **public welfare**, and they are usually regulated or supervised by governments, as a result of which commercial freedom is lost.

The aforementioned public good and public welfare should be understood in parallel to the ‘needs of general interest without commercial consideration’. The Court has considered both the characteristics of the marketplace where the entity operates and the commercial freedom of the body in question. In *Case C-223/99 Agorà*, the CJEU indicated that if an entity carries out an activity meeting general needs *in a competitive market*, competition with other private undertakings in the market would naturally force the entity to purchase on a commercial or industrial basis, there would, therefore, be a strong *indication* that the need is of a commercial or industrial nature.⁸⁷ It is argued from *Agorà* that the essence of the first condition of the definition of ‘bodies governed by public law’ rests on the examination of the **market competition** under which the body operates.

This assessment could infer the rules of competition law to examine the existence of competition. In *Case C-18/01 Korhonen*, the CJEU, after pointing out that whether or not the legal person carries out its activities *in a competitive situation* is the key to establishing a ‘body governed by public law’,⁸⁸ provided some general references to indicate the significance of market competition. It was proposed that the assessment of market competition consists of whether the legal person carries out its activities under normal market conditions, **aims at making profits and bears the losses associated with the exercise of its activities**.⁸⁹ Apparently, the factor of profit-driving and risk-bearing indicate the commercial inclination.

However, it is not always necessary that the entity aims to make a profit. In *Agorà*, the CJEU confirmed the point that an entity operating on a cost-effectiveness basis was not a ‘body governed by public law’, even if it was not profit-making.⁹⁰ With regard to ‘bearing the losses, governments may take various steps in practice to prevent a public entity from failing. It is not

⁸⁷ As such, ‘needs’ does not refer to a defined scope. The CJEU has not generally examined the nature of the ‘needs’ but focuses on whether the particular entity carries out activity on a commercial basis under market forces. Joined cases C-223/99 and C-260/99 *Agorà Srl and Excelsior Snc di Pedrotti Bruna & C v Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc coop arl* (2001) ECR I-03605. Case C-18/01 *Arkkitehtuuritoimisto Riitta Korhonen Oy and Others v Varkauden Taitotalo Oy* (n 68) para 49. See further, Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, vol I (Sue Arrowsmith ed., 3rd edn., Sweet & Maxwell 2014) 361. Case C-373/00 *Adolf Truley GmbH v Bestattung Wien GmbH* (n 68) para 65.

⁸⁸ Case C-18/01 *Arkkitehtuuritoimisto Riitta Korhonen Oy and Others v Varkauden Taitotalo Oy* (n 68) para 49-50.

⁸⁹ Case C-18/01 *Arkkitehtuuritoimisto Riitta Korhonen Oy and Others v Varkauden Taitotalo Oy* (n 68) para 51.

⁹⁰ Joined cases C-223/99 and C-260/99 *Agorà Srl and Excelsior Snc di Pedrotti Bruna & C. v Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc. coop. arl.* (n 68) para 43, 45.

clear to what degree of risk of failure is necessary for a body to be considered not to be a body governed by public law, and in practice, it is very difficult to assess the risk.⁹¹ Therefore, the factor of making a profit and bearing loss might be applicable in a specific case, but it is arguably not conclusive as a test of commerciality.

Furthermore, ‘the existence of competition in the market where a body operates does not itself permit the conclusion that there is no need in general interest not having an industrial or commercial character’.⁹² It is necessary to conduct a further assessment, taking account of all the relevant legal and factual circumstance, on whether **the competitiveness is sufficiently significant to ensure that the procurement has no risk of distorting competition**.⁹³ The reason is that the mere existence of competition in the market is not sufficient to avoid the risk of national preferences since the public entity might be willing to incur a loss to support such preferences. Thus, it can be argued, based on CJEU jurisprudence, that it is necessary to conduct an **assessment if there is an immediate and decisive causal link between the public control/influence over the body and the risk of competition distortion**. If a public SOE is subject to decisive public control and, as a result, loses commercial freedom and is at risk of distorting market competition, it must be regarded as a government entity, and subject to GPA obligations.

Determination of the condition of competition and the market situation is made by reference to EU competition law. It can further be argued that the risk of competition distortion may emerge from the legal restrictions of entering into the market, such as, for example, licensing and factual market circumstances, the concentration of the market, and the market power distribution of the competitor in this market. The author will further explore the distortions of market competition in Chapter 7.

⁹¹ See further Sue Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK*, vol I (Sue Arrowsmith ed., 3rd edn., Sweet & Maxwell 2014) 363.

⁹² Case C-373/00 *Adolf Truley GmbH v Bestattung Wien GmbH* (n 68) para 61.

⁹³ Case C-373/00 *Adolf Truley GmbH v Bestattung Wien GmbH* (n 68) para 66.

6.4.1. Public Undertakings and Entities with Special or Exclusive Rights

6.4.2.1 Regulating Utilities

Many utilities started off in the 20th as government departments or agencies, as States involved considerable investment in public undertakings to stimulate the national economy and provide public service.⁹⁴

In legal terms, the overall picture of the utility operators is a mosaic of different structures. Some governments created new legal personalities, such as government corporations;⁹⁵ Others became private corporations, but with governments retaining all, or a majority of, the shares. Whatever the structures were, the utility sector was subject to exceptional government control and regulation to ensure that it operated with due consideration for the public interest.⁹⁶ Owing to their close relationship with the government, utility companies were assumed to be not competing in the commercial market in the same way as other private companies in other markets.⁹⁷

⁹⁴ In the 20th century, influenced by the thought of Durkheim and Duguit, the continental legal tradition of ‘*service public*’ has been adapted for liberal markets as a response to the fragmentation of industrialisation. In practice, public undertakings and State inventions were means of influencing large parts of national economic structure. At the time, The State took control of most economies, and Europe experienced nationalisation during the post-WWII period, for example, in France (on a Constitutional basis) and the UK (during 1945-1951). State ownership was common in the essential industries. On the idea of ‘service public’ in the European continent See further, JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (1st edn., Oxford: Oxford University Press 1996) Chapter 4. Tony Prosser, *The Continental Tradition of Public Service* (1st edn., Oxford: Oxford University Press 2005) 98. With regard to ‘*Service Public*’, see further, Heike Schweitzer, ‘Services of General Economic Interest: European Law’s Impact on the Role of Markets and of Member States’ in Marise Cremona (ed.), *Market Integration and Public Services in the European Union* (Oxford University Press 2011) 13, 14. On the involvement of public authorities in national economies see further, Georges Rogissart and André Dumoulin, ‘Problems of Public Undertakings within The Common Market’ (1962) 33 *Annals of Public and Cooperative Economics* 234.

⁹⁵ For example, considering that the utilities have undergone economic rationalisation, there are a large number of public undertakings in the utility area. Some of the public services are even provided through State monopolies, such as defence industries, energy and raw material production. See further Jan Van Der Linden, ‘Network Industries: Main Issues, Definitions and Economic Significance’ in Henri Bogaert, Anne-Marie Sigmund and Robert Tolle (eds.), *Reforming network industries: experiences in Europe and Belgium* (Brussels: Highlights of Conference ‘the Lisbon Strategy: a Motor for Market Reforms of the Network Industries’ (Belgian Federal Planning Bureau, the European Economic and Social Committee and the Central Economic Council 2006) 20-23.

⁹⁶ The regulation and control of the utilities in the utility sectors take a variety of forms, financial, legislative, and managerial, either through advantageous measures or preferential policies or both. For example, it is, common in this area to protect utilities through public financing, or by protecting them against the competition through the grant of special or exclusive rights as a way to compensate for their service on the basis of non-commercial considerations (such as State aid, cross-subsidisation, and so forth).

⁹⁷ Macro CEJ Bronckers, ‘The Position of Privatized Utilities under WTO and EU Procurement Rules’ (1996) 1 *Legal Issues in European Integration* 145, 146.

State influence is a valuable tool to realise public policies, through various ‘buy national’ measures and influence exercised by, or over, public undertakings.⁹⁸ This kind of ‘public-private’ hybrid entity may also have a degree of market dominance and present particular difficulties for a free market. The necessity to extend the application of the procurement rules to utility sectors become more and more prominent.⁹⁹ Thus, regulating utilities was an attempt to find the right balance between the political pressures and economic considerations by imposing a framework that ensured flexibility.¹⁰⁰

6.4.2.2 Directive 2014/25/EU (Utilities Directive)

Due to its unique industrial nature, Directive 2014/25/EU indeed allows for more flexibility in the tendering procedure, and for the purpose of this research, broader coverage.¹⁰¹ The covered entities under Directive 2014/25/EU include *contracting authorities (Article 3)*, *public undertakings and private undertakings with special or exclusive rights (Article 4)* operating in the water, energy, transport and postal services sectors.¹⁰² The notions of ‘contracting authority’ and ‘bodies governed by public law’ in the Utility Directive remain unaltered, and the understanding of the concept elaborated upon by the CJEU case-law is also appropriate to apply to Directive 2014/25/EU.¹⁰³ In addition, the CJEU has taken the same teleological approach to interpreting the concept of procuring bodies, to ensure a genuinely open market, and competition in the procurement of utilities.¹⁰⁴

⁹⁸ In the mid-1980s, competition rules regulating private conduct were introduced and later were extended to State conduct. The influence of the EC law being pervasive, public undertakings have been subject to the scrutiny of EU competition law since that time.

⁹⁹ The companies providing public services are usually public controlled entities such as public undertakings that have high economic significance in sectors such as water, transport, energy, postal service, and so on. Due to the closed nature of utility markets, national authorities continued to be able to influence the behaviour of those entities operating utility sectors through participation in their capital and representation in the entities’ administrative, managerial or supervisory bodies. See Recital (1) Directive 2014/25/EU. Case C-283/00 *Commission of the European Communities v Kingdom of Spain* (n 16) para. 76.

¹⁰⁰ When public procurement first came under European Economic Community regulation in 1971, the four utility sectors were not covered under the community procurement regime. Even until 1992, most of the Member States tended to accord extraordinary political value to utilities. Due to the politically opposing pressures and the technical complexity of the utility sectors, it was difficult to harmonise procurement rules in this field. See further Simone Torricelli, ‘Utilities Procurement’ in Martin Trybus, Roberto Caranta and Gunilla Edelstam (eds.), *EU Public Contract Law Public Procurement and Beyond* (1st edn., Bruylant 2014) 225.

¹⁰¹ Directive 2014/25/EU overlaps with Directive 2014/24/EU in terms of the overall aims and purposes, as a result of which, the coverage and the procedure rules overlap (for example, both of the Directives require the covered entities to apply open procedures and restricted procedures) I. However, Directive 2014/25/EU does allow more flexibility. For example, the Utilities Directive placed the negotiated procedures on an equal footing with the open procedure and restricted procedure. For the questions of ‘why only regulate utilities?’ and ‘why regulate procurement?’ see Bronckers (n 99) 154. Poulsen, Jakobsen and Kalsmose-Hjelmberg (n 63) 143.

¹⁰² See Article 3 contracting authorities and Article 4 contracting entities in Directive 2014/25/EU.

¹⁰³ as confirmed in Directive 2014/25/EU recital (12).

¹⁰⁴ What is more, ensuring the effectiveness of the principles of the TFEU (particularly, the principles of Free Movement of Goods, Service and Establishment and other principles deriving therefrom). Directive 2014/25/EU

First of all, the notion of ‘public undertaking’ and ‘undertakings with special or exclusive rights’ are regulated primarily under the Treaty principles of Free Movement and by Article 106 TFEU,¹⁰⁵ which is concerned with the obligation for the Member States not to enact or maintain in force any measures in relation to State-owned/controlled entities (e.g. public undertakings) or entities which enjoy special privileges (e.g. special or exclusive rights) for the reason that this would contravene the Four Freedoms or the EU competition rules.

However, the TFEU does not define this concept of ‘undertaking’. Given the diverse and complex financial relations between the diverse forms of public undertakings in the Member States and the ramifications of their activities, the CJEU construed the meaning of ‘undertaking’ by a functional approach, without taking into account its possible meaning in the national law context.¹⁰⁶ Despite the early lead provided by the CJEU case law,¹⁰⁷ the CJEU did not give a clear statement of its functional definition until *Case C-41/90 Höfner*, in which it was stated that ‘the concept of an undertaking, encompasses **every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.**’¹⁰⁸ The developed criteria contain two elements: ‘entity’ and ‘economic activity’. ‘Entity’ includes any natural or legal person as well as State bodies, other public entities and private bodies. An entity is an undertaking if, and only if, it engages in economic activity. The concept of ‘undertaking’ in turn, is based on the question of whether the activities being carried out by the entity are ‘economic’.¹⁰⁹

recital (2). To ensure ‘a real opening up of the market and a fair balance in the application of procurement rules’ in the utility sectors, the entities are identified on a functional basis rather than according to their legal status. See Directive 2014/25/EU recital (19).

¹⁰⁵ Articles 106 TFEU: In the case of public undertakings and undertakings to which the Member States grant special or exclusive rights, the Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

¹⁰⁶ The CJEU held that the concept of ‘undertaking’ must be interpreted in functional terms as a concept of European Union law, serving to guarantee the uniform application of EU law across all Member States and economies. Otherwise, the effect of Article 106 would be diminished. Joined cases 188 to 190/80 *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* (1982) ECR 02545 para 2, 9. See also Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (5th edn., Oxford University Press 2014) 604. See also Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford: Oxford University Press 2006) 23-45.

¹⁰⁷ The approach was pioneered in the early case law of the 1960s in *Mannesmann v. High Authority* and *Klöckner v High Authority*. In the case, the Court stated that: ‘an undertaking is constituted by a single organisation of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim.’ Case 19/61 *Mannesmann AG v High Authority of the European Coal and Steel Community* (1962) 00357 para 371; and Joined Cases 17/61 and 20/61 *Klöckner-Werke AG and Hoesch AG v High Authority of the European Coal and Steel Community* (1962) ECR 00325 para 341. The European Commission expressed a similar view in the *Polypropylene* Decision. See European Commission Decision, *Polypropylene Cartel*, OJ 1986, L230/1.

¹⁰⁸ See the very first judgement on this point in Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* (1991) ECR I-01979 para. 21.

¹⁰⁹ Case C-35/96 *Commission of the European Communities v Italian Republic* (1998) ECR I-03851. With regards to the question of whether independent customs agents are undertakings, in paragraph 7 & 37, the Court stated

The CJEU has explored this in a series of cases and established that the characteristic feature of ‘economic activity’ ‘involves offering goods or service **in a marketplace**’ (or, in its weakest form, that could be subject to competition), or the ‘development of that activity **in a market context**,’¹¹⁰ for **payment**, while **assuming the financial risks** involved.¹¹¹ The two factors of ‘payment’ and ‘assuming financial risk’ are exactly the same as that of the two mentioned in *Case C-18/01 Korhonen*. These factors are non-inclusive references to assessment if the body has commercial freedom and is subject to competition.

Public procurement is purchasing for government purposes or social interest. Therefore, ‘undertakings’ do not generally fall under the definition of EU public procurement contracting bodies (because of the requirements of carrying out economic activities and not performing a public function). However, if an undertaking can be shown to be under **the public influence and, as a result, does not make decisions on a commercial basis**, the undertaking could qualify as a procurement entity in the EU procurement regime, (for example, under ‘public undertakings’ and ‘undertakings granted special or exclusive rights’).¹¹²

that the customs agents are undertakings: their activities have an economic character because they offer services for money, consisting in the carrying out of customs formalities, relating to importation, exportation, and transit goods and other services in monetary, commercial and fiscal area, and assume financial risks involved in carrying out those activities.

¹¹⁰ In the Joined cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* (2000) ECR I-06451. In paragraphs 74, 75, 76, the Court stated that any activity consisting **of offering goods and services on a given market** is an economic activity. Therefore, in the Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* (2001) ECR I-08089. In The Court confirmed this in paragraphs 20 and 21, by stating that a medical aid organisation that provides emergency transport services and patient transport services for remuneration **on the market (although less competitive than comparable services provided by other suppliers)**, was carrying out an economic activity under the rules of competition; See also, Albert Sánchez Graells, ‘EU Competition Law and Public Procurement: The Inability of EU Competition Rules to Rein in Anti-Competitive Public Procurement’ in Albert Sánchez Graells (ed.), *Public Procurement and the EU Competition Rules* (2nd edn., Oxford: Hart Publishing 2015) 136-140.

¹¹¹ See Case C-309/99 *J C J Wouters, J W Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervenier: Raad van de Balies van de Europese Gemeenschap* (2002) ECR I-01577. In paragraph 48-49, the Court stated that members of the Bar of the Netherlands provided legal services for money and bore the financial risks attaching to the performance of their legal services. Therefore, it was an undertaking carrying on an economic activity. Assumption of the financial risk means here that when there is an imbalance between the revenue and expenditure, the entity itself bears the deficit.

¹¹² This point was established in Case C-91/08 *Wall*. In this case, the CJEU stated that bodies predominantly operating as undertakings are generally not covered by the Free Movement rules (which set out obligations generally for the State), unless the bodies are effectively controlled by the State or another public authority *and* do not compete in the market, or if its conduct is imputable to the State. See Case C-91/08 *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (n 26) paras 47-49, 60.

6.4.3.2.1 Public Undertakings

According to Article 4 of Directive 2014/25/EU:¹¹³ ‘public undertaking’ means *any undertaking over which the **contracting authorities** may exercise directly or indirectly a **dominant influence** by virtue of their ownership of it, their financial participation therein, or the rules which govern it.* The dominant influence of the State is the key to the definition.

First of all, if a public undertaking has a close link with the State (to the extent that its conduct is imputable to the State), its procurement could be directly subject to EU procurement rules.¹¹⁴ Otherwise, if public undertakings carry out activities in the fully commercial market, it is not subject to EU procurement rules.¹¹⁵ When carrying out ‘essential public services’, which is a closed market and usually under government supervision,¹¹⁶ it is presumed that the dominant public influence would dampen the motivation for competition in the public service market. Consequently, public undertakings are likely to award a procurement contract as a result of public influence instead of commercial considerations. Considering this, the EU Directive 2014/25/EU specifically regulates the utility procurement contracts by public undertakings and undertakings with special or exclusive rights.

The dominant influence by a contracting authority is the only and ultimate element justifying the application of EU procurement rules.¹¹⁷ The definition of public undertaking lays down a presumptive rule for technically recognising the existence of dominant influence.¹¹⁸ The definition of dominant influence is assumed to exist where a public administration directly or indirectly controls either:

- i. the majority of the undertaking’s subscribed capital; or*

¹¹³ Directive (the Commission defined the concept of ‘public undertaking’ in Article 2 of the Transparency Directive, and the Utilities Directive adopted the same definition. See: Commission Directive on the Transparency of Financial Relations between the Member States and Public Undertakings as well as On Financial Transparency within Certain Undertakings [2006] OJ L318/17.

¹¹⁴ On the condition that the State actually exercises its dominant influence over the public undertaking’s procurement decision. See further Arrowsmith, *The Law of Public and Utilities Procurement : Regulation in the EU and UK* (n 22) 319.

¹¹⁵ All the provisions in relation to public undertakings in the TFEU aim to ensure that public undertakings operate subject to competition. The notion of a public undertaking can be found in several provisions of the TFEU. Articles 106, 123, 124 and 125 impose proscriptive obligations on public undertakings to compete in market conditions.

¹¹⁶ ‘essential public services’ is an undefined and evolving concept, although there is little consensus on what exactly the “essential” public services are among different countries, there do exist certain things which are considered as essential by citizens, such as water supply, electricity supply, collection of household rubbish, gas supply and so forth. See Steven Van De Walle, ‘When Is A Service an Essential Public Service ?’ (2009) 80 *Annals of Public and Cooperative Economics* 521-523.

¹¹⁷ Torricelli (n 100) 228.

¹¹⁸ The scope of public undertaking tries to be as comprehensive as possible to cover all contracting entities under the public influence for the purpose of the most effective application of the Utilities Directive. See further Poulsen, Jakobsen and Kalsmose-Hjelmberg (n 63) 145.

- ii. *votes attaching to shares issued by the undertaking; or*
- iii. *can appoint more than half of the undertaking's administrative, managerial or supervisory body.*

The definition illustrates the existence of dominant influence from the aspects of public co-ownership, public investment, management, and personnel appointment. Public ownership is one of the criteria, and not the sole and exclusive, criterion, for the establishment of a public undertaking, unless it amounts to 100 per cent in which case the wholly publicly owned company is definitely subject to the EU procurement rules. Otherwise, it could fulfil the conditions of 'bodies governed by public law' (if it operates for public needs without commerciality) or constitute a public undertaking (operating utilities under the dominant public influence), thus falling within the scope of the application of the Utilities Directive.

Those criteria are arguably the same as those in Article 2.1(4)(c) of Directive 2014/24/EU.¹¹⁹ However, compared with the definition of 'bodies governed by public law', this criterion for establishing a public undertaking is not final and is susceptible to an adaptable interpretation.¹²⁰ In other words, even if all conditions were satisfied, the application of Directive 2014/25/EU can still be rebutted, if the body can prove that it competes in the market, despite the dominance over it of public control or influence.¹²¹

6.4.3.2.2 Undertakings with Special or Exclusive Rights

Generally, the notion of an 'undertaking with special or exclusive rights' comes from Article 106(1) of the TFEU. Entities with such rights may or may not be public undertakings that have been granted special privileges in order to perform functions, which are regarded as important by the Member State governments.¹²²

The two terms, 'special' and 'exclusive' in this notion, are not synonymous but are separate concepts. It is easy to define an exclusive right: it means that the State confers a monopoly on

¹¹⁹ Which defines 'bodies governed by public law' from financial, managerial and personnel aspects.

¹²⁰ Torricelli (n 100) 228.

¹²¹ Torricelli (n 100) 228.

¹²² The Commission first used the concept of 'special and exclusive rights' in the 1988 Terminal Directive. It abolished such rights for telecommunications terminal equipment but did not define them. The Commission defined the terms 'special' and 'exclusive' under a single definition, later to be amended in the Service Directive 1990. The current definition incorporates general terms by an amendment in the Transparency Directive. See Articles 1 and 2 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (Terminal Directive) OJ 1988 L131/73 and Article 1, Commission Directive 90/338/EEC of 28 June 1990 on competition in the market for telecommunication services OJ 1990 L192/10, Article 1, Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/338/EEC in particular with regard to satellite communications (Satellite Directive) OJ 1994 L268/15.

a limited number of entities to engage in a particular economic activity. If a right is open to claims by everyone, without any condition at all, it cannot be regarded as a ‘special’ right.¹²³ The amended Service Directive developed a precise definition of ‘special rights’, which means ‘rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument’ ‘within a given geographical area’.¹²⁴ It limits to two or more of those undertakings that are authorised to provide a service or to undertake an activity. Alternatively, several competing undertakings are authorised or designated to provide a service or undertake an activity; or one or more undertakings are provided with legal or regulatory advantages, which substantially affects the ability of any other undertaking to provide the same service or to operate the same activity in the same geographical area under substantially equivalent conditions.¹²⁵

Granting special or exclusive rights by a public authority may artificially divide or restrict a market into two parts: the privileged and the competitive. The grant of a special right puts an undertaking in a stronger market position than it would have been without such rights; whereas the grant of exclusive rights suggests a more radical intervention that would often amount to the grant of a legal monopoly. Typically, the beneficiary of such a legal monopoly is sufficiently shielded to justify a conclusion that it also holds a monopoly, in the economic sense, in a well-defined market. In practice, the most common scenario seems to involve the Member States taking steps to **restrict the number of competitors in a market**, which may substantially affect the ability of other undertakings to engage in economic activity in the same geographical area under substantially equivalent conditions.¹²⁶

¹²³ For example, in the case of *ATAB*, the State indirectly gave manufacturers and importers of certain products the possibility to fix a lower compulsory selling price to the consumer than competing products of the same kind and quality, which distinguishes them from manufacturers and importers of other products. With regard to whether this retention of such special or exclusive right falls within the definition, the Court held that it does not fall within the definition of ‘special or exclusive right,’ because this possibility is generally open to all, including retailers, who become producers or importers of the manufactured products, which means an indefinite number of bodies. See Case 13-77 *SA GB-INNO-BM v Association des détaillants en tabac (ATAB)* (1977) ECR 0211 para 39-41.

¹²⁴ The definition of exclusive and special rights used in the Directive 2014/25/EU, alongside the definitions of public undertakings and dominant influence, was: ‘*the rights granted by a Member State or a public authority to one or more public or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity*’.

¹²⁵ What amounts to ‘special rights’ has been determined by the Court as a result of a series of challenges brought by the Member States to directives issued by the Commission under Article 106(3) in pursuance of its objective to liberalise the telecommunication market. See Article 1 of Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/338/EEC, in particular with regard to satellite communications OJ 1994 L268/15.

¹²⁶ For example, in the Case C-475/99 *Ambulanz Glöckner*, the CJEU indicated that special or exclusive rights consisted of protection. The Court held that the authorisation to provide an ambulance transport service had been given to the medical aid organisation by the competent authority constitute ‘a legislative measures on a limited number of undertakings that may substantially affect the ability of other undertakings to exercise the economic

6.4.2. A Parallel with Commercial SOEs

As discussed in Chapter 5 Section 4.1, besides the public SOEs, there are also commercial SOEs which retain commercial freedom, despite government investment in them. Commercial SOEs usually carry out commercial activities supplying goods or service in the normal market at prices determined by their own commercial considerations, and with an orientation towards profit-making. There are some similarities between commercial SOEs and public undertakings/undertakings with special or exclusive rights. First of all, commercial SOEs generally carry out economic activity. Secondly, commercial SOEs have a legal or *de facto* link with governments. For example, it may be the case that they are legally supervised or regulated by a government, or that a government invests or subsidises those commercial SOEs. The parallel between commercial SOEs with public undertakings and undertakings with special or exclusive rights carries implications for defining the coverage of some of those SOEs under the GPA.

To define the public undertaking and the undertaking with special or exclusive rights, it is necessary first of all to establish *the nature of the activity* carried out by the entity concerned.¹²⁷ To put it simply, it is necessary to identify the particular activity carried out by the entity in question by means of a case by case study, since an undertaking may carry out economic activities but also activities that are non-economic in nature.¹²⁸ Furthermore, a proven market competition whereby the activities were carried out is the key to distinguish an undertaking from a body governed by public law.¹²⁹

activity in question in the same geographical area under substantial equivalent conditions.’ see Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* (n 109) para 23-25.

¹²⁷ Case C-364/92 *SAT Fluggesellschaft mbH v European Organization for the Safety of Air Navigation (Eurocontrol)* (1994) ECR I-00043 para 19 et seq.

¹²⁸ For example, in Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (1999) ECR I-05751. In paragraph 3, the Court stated that ‘the concept of an undertaking for the purpose of the Article 85 et seq. of the EC Treaty covers all entities engaged in economic activities, **regardless of the legal status of the entity** and the way in which it is financed’. Therefore the questioned ‘pension fund’, which **operated with the principle of capitalisation** and engages economic activities **in competition** with insurance companies must be regarded as an undertaking, regardless of the fact that the pension fund is **non-profit-making** or **pursues a social objective**. Another example can also found in Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervenier: Raad van de Balies van de Europese Gemeenschap*. (n 110) para 51-53, 64. In this case, the Bar of the Netherlands did not carry out economic activities but it had regulatory power, granted by the Netherlands legislature, to ensure that individuals have proper access to the law and to justice (which is indeed performing a task in the public interest and is indeed a part of the essential functions of the State). Therefore, a body such as the Bar of the Netherlands, which exercises public authority, cannot be regarded as an undertaking, and in consequence does not fall within the competition rule (Article 85(1) of the EC Treaty).

¹²⁹ In other words, if a given entity carries out economic activities in a market, it constitutes an undertaking whose activities are subject to EU competition law, otherwise when the given entity carries out non-economic activities,

With regards to the ‘market competition’, the CJEU further held that carrying out economic activities in market competition must have a connection with ‘*offering goods or services on a given market for profits*’ but *not the acquisition of such things for public interest*, which means that if an entity exercises activities typical of a public authority or has an exclusively social function it does not constitute an undertaking, (but may constitute a ‘body governed by public law’ if without commercial features),¹³⁰ even if a public purchaser interacts with suppliers under market conditions.¹³¹ To put it another way, only if the entity is under public control or exercising a public authority or is carrying out activities of a purely public social nature (which are not ‘economic’), does it constitute an undertaking from the very beginning, let alone public undertakings or undertakings with special or exclusive rights. Commercial SOEs are an enterprise in the first instance, carrying out commercial activities in the normal market, which could be comparable to an ‘undertaking’ in EU law.

Secondly, any undertakings under the dominant influence of contracting authorities will fall within or at least be presumed to fall within, the EU procurement discipline. Undertakings other than public undertakings may also fall within the scope of EU procurement disciplines, as long as there is a close connection with a public authority, thus having a distorting or restrictive effect on competition. The presence of a dominant public control or influence on the

its procurement might be subject to EU Public Procurement Law (if the entity fulfils the definition of a body governed by public law).

¹³⁰ Case C-364/92 *SAT Fluggesellschaft mbH v. European Organization for the Safety of Air Navigation (Eurocontrol)* (n 126) para 18, 23-31. In this case, the Court held that Eurocontrol does not constitute an undertaking, as it collected the route charge levied on users of air space on behalf of the Contracting States, which involved the **exercise of public authority** (typically relating to the control and supervision of air space) and constituted a service **in the public interest** (e.g. protection of the users of air transport and the population affected by aircraft flying over them);

Joined Cases C-159/91 and C-160/91 *Christian Poucet v Assurances Générales de France (AGF) and Caisse Mutuelle Régionale du Languedoc-Roussillon (Camulrac) and Daniel Pistre v Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisan* (1993) ECR I-00637 para 14-22. In this case, the Court held that since the management of the Social Security Scheme in the proceeding was entrusted by statute to social security funds whose activities are subject to control by the State (namely, the Minister for Social Security, the Minister for the Budget, the Inspectorate General of Finance and the Inspectorate General for Social Security), **fulfils an exclusively social function** (i.e., providing cover against the risks of sickness, old age, death and invalidity), therefore, the activities are not economic activity and the organisations involved in the entrusted Social Security Scheme are not undertakings. Case law defined more precisely what constitutes an exclusively social function: compulsory participation and definition of benefits **based on solidarity rather than contributions or returns on investment are required**.

The question of which activities carried out by an entity are ‘typical of those of a public authority’ is determined by analysing their nature, aim, and the rules to which they are subject. See Sauter and Schepel (n 70) 85.

¹³¹ See further Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* (2003) ECR II-00357 para 37. See also Graells (n 109) 140.

performance of the activities is the basis for an assessment of whether the public undertaking is obliged to follow a procurement procedure under the Utilities Directive.¹³²

However, the presence of a dominant public control or influence will not automatically subject these privileged entities to procurement rules, unless the public control or influence is **exercised** over the specific utilities procurement provider, **as a result of which** competition distortion/insufficiency occurs. In order to balance the effective application of EU public procurement rules and the commercial flexibility of the public undertakings, jurisprudence has established that the dominant control or influence of government must have an **immediate and decisive causal link** to the outcome of competition distortion or insufficiency on the part of the public undertaking. Otherwise, merely bringing advantages to the undertaking does not necessarily make the privileged undertaking subject to the EU procurement directive.¹³³

Under the WTO regime, measures granting ‘special or exclusive rights’ are regulated, because such measures can bring about discriminatory treatment and distort the quality and efficiency of international trade.¹³⁴ However, measures that bring benefits to the enterprises, without detriment to external trade, would not be subject to WTO discipline.¹³⁵ It can be argued that with the general aim and purpose of anti-discrimination, either within the EU internal market or in the WTO free trade agreements (including the GPA), the **immediate and decisive** causal link must also be established, linking the public control/influence (whether it takes the form of government financial aid, government investment or legislative privilege, etc.), and trade distortion.¹³⁶

¹³² Poulsen, Jakobsen and Kalsmose-Hjelmberg (n 63) 143.

¹³³ It is noteworthy that ‘special or exclusive rights’ do not necessarily bring competition distortion/insufficiency. If the granting process is based on transparent and objective rules, designed to ensure that the ‘privileged’ position was obtained under normal competitive conditions, without limiting or excluding other economic operators, the basis for applying the Utilities Directive becomes non-existent. See Article 4.3, the Directive 2014/25/EU.

¹³⁴ The measures granting special or exclusive rights mentioned as regards the definition of ‘State trading enterprises’ in Article XVII GATT. This provision sets out the obligation that all State enterprises established or maintained by contracting parties shall act in accordance with the general principle of non-discrimination. In 1960, the *Final Report of the Panel on Subsidies and State Trading* noted that the application scope of the Article XVII covers not only State enterprises but also any enterprise with ‘exclusive or special privileges’. WTO, ‘Text Of Article XVII, Interpretative Note Ad Article XVII And Uruguay Round Understanding On Interpretation Of Article XVII’ (n 42) 469-474.

¹³⁵ WTO, ‘Text Of Article XVII, Interpretative Note Ad Article XVII And Uruguay Round Understanding On Interpretation Of Article XVII’ (n 42) 474.

¹³⁶ The ‘exclusive or special privilege’ granted to ‘government or non-governmental enterprises’ ‘includes not only statutory or constitutional powers but also powers in the exercise of which they influence through their purchases (or sales) the level or direction of imports or exports’. To take another example: considering the article of the *Charter on State trading during the Geneva Session of the Preparatory Committee*, the report of a Sub-Committee on the Uruguay Round records that ‘it was the understanding of the Sub-Committee that if a Member Government exempted an enterprise from certain taxes as a compensation for government participation in the profits of this enterprise, this procedure should not be considered as ‘granting exclusive privilege.’ See WTO,

6.5. Conclusion

As a supranational organisation, the European Union is unique in its legislation. Compared with the WTO, EU legislation provides a greater political will for further integration of trade and competition. In relation to regulated procurement, the EU procurement legislation on the conceptual issue of the procuring bodies is much more developed and provides experiences which offer useful lessons for the WTO/GPA.

The EU procurement regime is based on three pillars, namely the primary provisions as enshrined in the TFEU, the secondary legislation in the form of procurement directives and case law of the CJEU. The TFEU provisions and principles impose negative obligations which prohibit the Member States from discriminating against the other Member States and sets out positive obligations aimed at eliminating trade restrictions and promoting trade competition within the European Union. Specifically, these are achieved through the introduced the principles of Free Movement (Title II and IV), competition (Article 106), non-discrimination (Article 34). As the focus of the GPA is to liberalise international trade in government markets and to promote competition among suppliers from the signatory countries, two parallels can be discerned from the aims and purposes of the two instruments as well as the legal interpretation between the CJEU and the WTO DSB. The similarities and difference as analysed in the two parallels between the two instruments set out the context of the micro-comparison on entity coverage in procurement rules.

Generally, Article 34 TFEU, as a treaty obligation on the EU level, applies only to ‘State-level’ (public bodies) and does not apply to ordinary private entities. The entity coverage of Article 49 and Article 56 is the same as that under Article 34. ‘Public bodies’ include traditional government bodies, such as central, sub-central, local government bodies and bodies established and wholly controlled and funded by those traditional government bodies. However, there is less clarity regarding the status of bodies beyond the ‘traditional’ institutional arrangements, such as autonomous bodies emerging from the hiving-off trend experienced in modern States; and with State organs assuming certain functions with regard to private operators, especially functions not closely relying on the State and which can be fulfilled by the market, such as some of elements of the public transportation, public education, and so

‘Text Of Article XVII, Interpretative Note Ad Article Xvii And Uruguay Round Understanding On Interpretation Of Article XVII’ (n 42). 474. Also, UN Economic and Social Council, ‘Second Session Of The Reparatory Committee of the United Nations Conference on Trade and Employment: Report to Commission by Sub-Committee on Articles 31 & 32’, vol E/PC/T/160 (1947) E/PC/T/160 9 August 1947.

forth. Besides, as far as EU legislation and the CJEU jurisprudence is concerned, all ‘contracting authorities’ and ‘bodies governed by public law’ under the Directive 2014/24/EU are covered by Article 34. Regarding the undertakings, only undertakings that are effectively controlled by the State and do not compete in the market fall within the scope of application of Article 34. Otherwise, if the undertakings are commercial entities, Article 34 does not generally apply. However, in a scenario where, under the principle of State responsibility, the undertakings operate as an instrumentality of the State, so that the conduct of the undertaking could be attributed to the State, Article 34 will apply.

A parallel with State enterprises under the WTO can be found in the scenario mentioned under the principle of State responsibility. Multilateral trade agreements, such as GATT, GATS, and SCM, State trading enterprises, enterprises with special or exclusive rights or privileges, and enterprises vested with, or exercising governmental authority, and so on, will, like States, be subject to non-discriminatory trade obligations.

In contrast to the general principles of the TFEU, the EU Procurement Directives provide detailed rules and procedures. Among the issues of the Procurement Directives, the entity coverage of the Directive is possibly the most important because of its overall nature. In their evolution since their beginning in the 1970s and until 2014, the contracting bodies under the EU Public Procurement expanded to include ‘government authorities, bodies governed by public law, public undertakings and undertakings with special or exclusive rights operating in the utility sectors.’

This expansion of scope has developed under a unique economic and legal context, which is the integration of the EU Internal Market and the CJEU’s teleological legal interpretation of the EU law. The definitions of contracting bodies under the EU Procurement Directives have been developed under the general aim and purpose of eliminating market barriers between the Member States and promoting competition in the EU public market. The CJEU has interpreted the definition in a functional way so as to remain consistent with those general aims and purposes. It has been argued that the functional interpretation of EU law under the general aims and purposes of the Internal Market and competition not only facilitates legal integration among the Members States: it also impacts profoundly on European and member state policy-making.

Unlike the EU, which has a developed integration among its Member States, the WTO itself has no authority to take initiatives in trade policy-making or trade agreement negotiation. In

addition, the Dispute Settlement Body is supposed to use only treaty texts, customary international law and the general principles of international law, which has less competence in law-making than the EU legislators. In addition, where there is a lacuna in the policy or rule of a trade agreement, the WTO adjudicatory body is not allowed to actively harmonise its members' trade policies nor redefine the meaning of the rules. Without flexible interpretation to fill *Lacunae* or to clarify vagueness, the author of this thesis contends that the GPA definition should be based on the consensus of the current Parties' entity coverage and should avoid the risk of over-inclusiveness.

In the EU Procurement Directive, the entity coverage consists of three categories: government/public authorities, public undertakings, and other undertakings granted special or exclusive rights. The notion of 'government authorities' includes entities subject to constitutional laws, administrative laws and other public laws in the Civil Law Member States. Secondly, according to the functional interpretation of the concept of 'State' by the CJEU, the composition and functions are laid down by legislation, and largely depend on the public authorities also falling within the notion of the State, even if they are not formally part of the State administration. Unlike the formalisation interpretation, which relies on traditional public law formal legal status, a functional interpretation examines the authorities that an entity is granted. The functional approach can encompass all entities that could apply measures that are inconsistent with the principles of the Internal Market. With the functional interpretation of the 'State', the understanding of 'public authority' can likewise be incorporated into the national laws of any of the EU Member States. On the other hand, it could arguably facilitate the implementation of policies on the EU level, especially the policy of the Internal Market.

The category of 'bodies governed by public law' is supposed to embrace all entities that may be at risk of discriminating in procurement activities because of their close link to traditional public entities. Jurisprudence has implied that the first condition, (that the activities) 'meet needs in the general interest not having a commercial or industrial charter' requires an **immediate and decisive causal link** between the two phrases (the public interest purpose and the resulting loss of commercial freedom). Moreover, the judgement on an activity is on a **case-by-case** basis, which allows a body the flexibility carry out an activity while, and at the same time, avoiding situations that are consistent with the general aims and purposes of Directive 2014/24/EU.

The third condition comprises three (alternative) criteria of equal weight, emphasising a close dependency on a contracting authority. According to the jurisprudence on this condition, the dependency on a contracting authority must be **crucial and decisive**, to the extent that the **commercial freedom of the legal person is subject to the contracting authority's will**. In addition, the financial control, managerial control and the personnel appointment must cause the body to lose its commercial freedom.

A large body of jurisprudence has established that 'bodies governed by public law' must be understood and handled in accordance with a broader concept (in order to catch all entities that had previously fallen outside its definition), through an autonomous and uniform teleological interpretation, with the purpose and objectives of competition and transparency. Whether the entity is within the definition of 'bodies governed by public law' is determined on a case-by-case basis. Only the activity carried out by the entity is relevant in deciding whether the entity should comply with public procurement rules. Compared with one-hard-rule-fits-all, a case-by-case assessment is a flexible instrument for diminishing politically motivated opposition. Respect for national law (the principle of sovereignty) and minimising political resistance (the principle of consensus) are the main concerns of the GPA definition. Given these priorities, the GPA's definition could borrow from the experience of the EU, which demands a test of the immediate and decisive causation between public control/influence over the entity and its effect on trade distortion.

There are similarities between public SOEs and bodies governed by public law. Thus, the definition of the latter could be borrowed as a reference for regulating procurement by public SOEs under the GPA. It can be argued, based on CJEU jurisprudence, that it is necessary to conduct an assessment if there is an **immediate and decisive causation link between the public control/influence over the body and the risk of competition distortion**. If public SOEs are subject to decisive public control and, for that reason, lose commercial freedom and have the risk of distorting market competition, the public SOEs must be regarded as government entities, subject to GPA obligations.

The dominant influence of the State is the key to the definition of a 'public undertaking'. First, if a public undertaking has a close link with the State (to the extent that its conduct is imputable to the State), its procurement could be directly subject to EU public procurement rules. Otherwise, if public undertakings carry out activities in a fully commercial market, they are not subject to EU public procurement rules. Even when all conditions of a dominant public

control/influence are satisfied, if the public undertaking can rebut that it competes in the market, thus not apply Directive 2014/25/EU. To define a public undertaking and an undertaking with special or exclusive rights, firstly, it is necessary to establish *the nature of the activity* carried out by the entity concerned. Jurisprudence has established that the dominant control/influence from government must have an **immediate and decisive causal link** with the outcome of competition distortion or insufficiency by the public undertaking. Otherwise the advantages enjoyed by the undertaking do not necessarily subject it to the EU public procurement directive.

There are some similarities between Commercial SOEs and public undertakings/undertakings with special or exclusive rights. Commercial SOEs usually carry out commercial activities supplying goods or services in the market with a price determined based on their own commercial considerations, and with an orientation towards profit-making. In this sense, commercial SOEs are enterprises in the first instance, just like public undertakings and undertakings with special or exclusive rights, and must be treated as ‘undertakings’ carrying out economic activities under the EU competition law. The coverage of Commercial SOEs under the GPA could borrow the experiences of defining public undertakings/undertakings with special or exclusive rights under Directive 2014/25/EU. In the WTO regime, measures granting ‘special or exclusive rights’ are regulated, because such measures can bring about discriminatory treatment, thus distorting the quality and efficiency of international trade. However, measures simply bringing benefits to the enterprises, without being detrimental to external trade, would not be subject to the WTO discipline. It can be argued that with the general aim and purpose of anti-discrimination, either within the EU internal market or in the WTO free trade agreements, (including the GPA), the **immediate and decisive causation link** must also be proved between the public control/influence, (whether in the form of government financial aid, government investment or legislative privileges, etc.), and trade distortion.

CHAPTER 7 THE DEFINITION OF GOVERNMENT ENTITIES: SCOPE AND JUSTIFICATION

A government entity refers to an entity that is under effective government control to the extent that it does not compete in the market.

7.1. Introduction

With the support of the conclusions made in the previous chapters, the author will propose a conceptual framework to identify entities under effective government control to the extent that they do not compete in the market. The proposed definition will be based on the answers to three fundamental questions: (1) whether the premise of the dualism of ‘public vs the private’ still exists; and if so, what is the impact of that dualism on the definition of a ‘government entity’? (2) whether there is a general harmonisation of the entity coverage of the GPA, and how to accommodate divergence in the definition of ‘government entity’ (3) What is the nature of the ‘government entity’ as defined, and is it possible to introduce the concept of competition into the definition?

In the first part, the author examines the dualisms of ‘public’ and ‘private’, ‘national’ and ‘international’ in legal systems. These two dualisms are the foundations of the modern legal studies. The discussion concludes that the division lines of the two divisions are blurring, and this conclusion set the premise of proposing a ‘functional’ and ‘transnational’ definition of a ‘government entity’. The distinction between ‘public’ and ‘private’ is based on the relationship between the State and the market. The relationship evolved with the historical trend towards privatisation and the new trend of State capitalism that began after 2008. In the age of State capitalism, the State (the ‘public sector’) cooperates with enterprise (the ‘private sector’) in various ways, such as investment, regulation, partnership, and so on. This ‘cooperation’ complicates the relationship between the two. A sharp division between the ‘public’ and the ‘private’ is not possible and yet helps resolve difficulties. A formal division between the two must, however, be abandoned. An approach with clear national law or public law characteristics may over-include in the GPA entity coverage bodies that do not distort trade. A transnational and functional approach is recommended in order to respect the diversity of various economic structures while, at the same time, expanding the GPA entity coverage. The function is based on the general aims and purposes of trade liberalisation and non-discrimination, as demonstrated in Chapter 2.

In the second part, the author will attempt to discover which approach to rule-making would achieve maximum harmonisation among the GPA parties and avoid the drawbacks of the current GPA entity coverage issue. A general harmonisation on the trade rules needs broad and deep consensus in concern with the trade issue. The GPA has achieved this goal on the bidding procedures but not, as yet, on the entity coverage issue. Based on consensus and divergence (as analysed in Chapter 4), the definition of ‘government entity’ should set out a general scope that incorporates the consensus in the GPA Parties’ coverage schedules, and that introduces a justification whereby some entities could escape the GPA obligation. In Chapter 4, it was concluded that there is a consensus that the GPA could generally apply to public-controlled entities. From a functional perspective, if the public-controlled/-influenced entity competes in the market, it is unlikely to have a harmful effect on trade effect, and so there is no need for the entity to be covered by the GPA obligation.

In the third part, the author will argue that the GPA is, by its nature, on the interface between trade rules and competition rules. Moreover, there are also signs within the WTO, indicating that trade law and competition policies are converging. With this observation, the author submits that the GPA definition could introduce the competition concept to define situations in which an entity is not competing in the market. Those situations could be recognised based on the contestability of the market and the market power of the entity. It is evident that, in a situation where there is an exclusivity arrangement by the government, an entity with special or exclusive rights is non-competing, because the government arrangement excludes or limits other competitors in the market. Therefore, an entity with an exclusivity arrangement would fall within the definition of the GPA rules. In the second situation, where there is a public monopoly, the monopoly will very probably distort procurement decisions, and so should be covered by the GPA. In the third situation, where there is no monopoly, but the entity enjoys a dominant market position in a highly concentrated market, the entity is non-competing because it operates in a non-contestable market.¹ The entity is also very likely to distort procurement decisions and should be covered by the GPA. Furthermore, the procurement of the entity must be higher than the domestic supply; otherwise, even though the entity makes a discriminatory procurement decision, that decision will be unlikely to distort government procurement trade.

¹ A contestable market features no/low barriers to entry and exit, such as government regulation or high entry cost. In a contestable market, market players behave in a competitive manner in the market they operate in. In a contestable market, it is assumed that even a monopoly, or oligopoly, incumbents will act competitively when there is a lack of barriers. See further William J. Baumol, John C. Panzar, Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* (Harcourt Brace Jovanovich 1982) 510.

7.2. The General Premise: A Blurring of the Public and Private Divide

In the late 1930s, Carl Schmitt observed that there are two great dualisms in modern legal systems: the dualism of international law and domestic law, and the dualism of public law and private law.² Before analysing the distinction between the public and the private in the new situation, it would be advisable to know how that distinction has evolved, in order to examine whether the context and the theoretical basis of this dichotomy still exist.

After introducing the two dualisms, Carl Schmitt further argued that they were inherently based on the evolution of State theory and the *ius commune*.³ In the 19th century, the emergence of the market as a central legitimating institution brought the public-private dualism into the heart of legal discourse, wherein public law was distinguished as being a special area, carved out of private law.⁴ With the rising tide of privatisation during the 1980s-2000s and the trend towards State capitalism since 2008, the content of the regulatory States was subjected to criticism, and deregulation became mainstream, so that States participated in economic activities in diverse ways, such as through share-holding in private enterprises (such as SOEs, SWFs), directly, or by entrusting or introducing private enterprises to participate in public missions, such as the constructions of city infrastructure; the cloud service of government services; judicial foreclosure via e-commerce platforms, and so on. More liberal economic regulation gains the

² These two dualisms were among the most central conceptual debates of the last century and the literature on the issue is therefore vast. The literature in this section provide context for the analysis, not trying to be exhaustive. See generally, Morton J Horwitz, 'The History of the Public/Private Distinction' (1982) 130 University of Pennsylvania Law Review 1423. On the summary of public-private research and the development of theory, see James L Perry and Hal G Rainey, 'The Public-Private Distinction in Organization Theory: A Critique and Research Strategy' (1988) 13 The Academy of Management Review 185-190. Carl Schmitt, 'On the Two Great "Dualisms" of Today's Legal System (1939)', *Positions and concepts, in the struggle with Weimar - Geneva - Versailles 1923-1939* (4th edn, Duncker& Humblot 2014) 298.

³ Categorizing matters as either 'public' or 'private' in nature may be partly attributable to the rise of the theory of 'regulatory'. The distinction between public and private brought about movement in modern political thought, as (for example) in the emergence of the nation-State and the theory of sovereignty in the 16th and 17th century on the one hand, as well as the legal thought (e.g., parliaments assuming unrestrained power in reaction to the claims of monarchs. One of the central goals of 19th century legal thought was to distinctly separate public law (i.e. constitutional, criminal, and regulatory law) and private law (i.e., torts, contracts, property and commercial law). See Horwitz (n 1). and generally, Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press 2001) 35-116. Edward L Shleifer and Glaeser Andrei, 'The Rise of Regulatory State' (2001) NBER Working Paper 8650 1-36. Jean-Bernard Auby and others, *The Public Law/ Private Law Divide Une Entente Assez Cordiale? La Distinction Du Droit Public et Du Droit Privé: Regards Français et Britanniques*, vol 2 (Mark Freedland and Jean-Bernard Auby eds, 1st edn, Hart Publishing 2006) 162.

⁴ See further Dawn Oliver, *Common Values and the Public-Private Divide* (1st edn, Butterworths 1999) 15-16.

possibility of breaking the wall between the public and the private and creating significant forms of interconnection and interdependencies between the public and the private.⁵

As a result of the present-day interconnection/interdependencies between the public and the private, dualism is now more commonly understood as an attempt to separate private law from the rest of (public) law (unlike the dualism of earlier legal discourse, in which the role of public law was central).⁶ A prominent example of this shift of emphasis from the public to the private is to be found in the area of SOEs. SOEs were traditionally regulated as subjects of public law. Observations on the part of the author suggest, however, that some SOEs have been commercialised and transformed into subjects of private law.

As observed previously, this separation is not structurally based on the rationality of law, but is politically motivated,⁷ since public law is ‘a sophisticated form of political discourse, in another word, a political compromise between the State and the individual’. In this sense, the separation between the public and the private depends on the definition of the relationship between the State and the individual.⁸ If the theoretical and contextual understanding of this relationship has changed, the line between the public and the private must be re-examined.

This re-examination is necessary for the provision of different legal regimes for the performance of public functions and the orderly conduct of private activities.⁹ Woolf observes that a substantive public-private divide provides a foundation to differentiate the imputability

⁵ In the transition from regulatory State to State Capitalism, power in the regulatory State is seen to be increasingly fragmented, mixed between public, private and hybrid bodies. As a result of privatization and State capitalism, responsibility for the delivery of public services during the 1970s and 1980s was transferred from the government into the private hands, and the public and the private realms are much closer to one another than in the 1930s, when the concept of *laissez-faire* prevailed. From the second half of the 20th century and continuing into the present, public bodies such as governments have become increasingly involved in economic activities, especially in the public service market, through cooperation with private sectors. See further, Inger Johanne Sand, ‘Globalization and the Transcendence of the Public/Private Divide—What Is Public Law under Conditions of Globalization?’ in Cormac Mac Amhlaigh, Claudio Michelon and Neil Walker (eds), *After Public Law* (Oxford University Press 2013) 202. Patrick Birkinshaw, Ian Harden and Norman Lewis, *Government by Moonlight: The Hybrid Parts of the State* (1st edn, Unwin Hyman 1990) 352. See more literature and an analysis on the process of the transition from regulatory state to the trend of privatisation and the State capitalism in Chapter 5 section 2. See Jody Freeman, ‘The Contracting State’ (2001) 28 Florida State University Law Review 155-164. David Osborne, ‘Reinventing Government’ (1993) 16 Public Productivity & Management Review 349. Giandomenico Majone, ‘The Rise of the Regulatory State in Europe’ (1994) 17 West European Politics 77-103.

⁶ See further Dan Priel, ‘The Political Origins of English Private Law’ (2013) 40 Journal of Law and Society 481, 482.

⁷ See further Jr Alfred C Aman, ‘Politics, Policy and Outsourcing in the United States: The Role of Administrative Law’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing 2008) 218.

⁸ See Martin Loughlin, *Public Law and Political Theory* (Clarendon Press 1992) 4. There are other definitions of ‘public law’ from a general perspective. Inger-Johanne Sand, for example, asserts that public law is an institution and a way of thinking in law related to concepts of democracy, sovereignty, freedom, rights, constitutionalism and public government and administration. See Sand (n 4) 201.

⁹ See Peter Cane, *Administrative Law* (5th edn, Oxford University Press 2011) 5.

standards to which public bodies shall be required to confirm by the courts when performing public functions. Private bodies, however, are free to carry out their activities without *ex ante* authorisation by law.¹⁰

For example, the WTO law, as a part of public international law (a kind of public law), only applies to trade measures, practices, laws and the behaviour of its members, which are principally States. States usually pursue non-trade objectives, such as social, environmental, and political goals through taxation, imports and exports, subsidies and so forth, which may have adverse effects on the free trade promoted by the WTO. For the same reason, WTO rules do not apply to private actors, as they do not affect the trade market. With this rationale, the distinction between the public and the private is also a central issue under WTO law. More specifically, the GPA rules only apply to procurement by ‘government entity’. This raises the question of whether SOEs or State-invested enterprises or banks should be considered as ‘government bodies’. What criteria determine the answer to this question? Those questions are relevant to the effective expansion of the GPA. In order to answer this question, the distinction between the public and the private concerns at the first instance must be examined.¹¹

The author will argue that the line between the public and the private in the legal systems is becoming blurred. A black-or-white division between the two does not facilitate the GPA accession negotiations concerning entity coverage. A teleological division between the public and the private, however, would engage more entities in the task of fulfilling the aims and purpose of the GPA.

7.2.1. The Public-Private Divide in the WTO Context

The author submits that the public-private divide has been blurred due to the fragmentation of State power and asserts that in the future it may no longer be possible to restrict public functions to fall within the remit of public law only.¹² The WTO legal system, as the successor of the

¹⁰ The distinction between public law and private law has followed a complex course arising from public functions and private activities. See further Lord Woolf, ‘Droit Public - English Style’ (1995) Public Law 57, 61. For a developed idea about the justification for the public-private divide, see Oliver (n 3) 9-13.

¹¹ This concern is prevalent in the current negotiations for accession to the GPA among countries with large state sectors, such as China and Russia, as well as countries with giant Sovereign Wealth Funds, such as the UAE and Kazakhstan. See the analysis of those entities in the era of State capitalism in Chapter 5 Section 2.

¹² As a result of the development of administrative law and functional fields of law, such as consumer law, medical law, labour law and so on, administrative institutions and the concept of a public body have undergone significant changes arising from the process of globalisation and the near global phenomenon of privatisation. Consequently, public and private law are no longer considered to be strictly separate from each other, as they formerly were: they can now be seen rather as complementary to one another. See further Stephan W Schill, ‘Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization’ Jean Monnet Working Paper Series 05/13 2. Olha Cherednychenko, ‘The Public / Private Divide and Its Role Today’, *Fundamental*

GATT system, is established on the basis reflecting the State theory of the 20th century. However, that basis has changed, and the idea of a sharp division between the public and the private is both obsolete and normatively undesirable, as it misrepresents the way that power is now distributed and exercised.¹³

As explained in Chapter 5, Section 3, WTO law is often required to distinguish the boundary between the public and the private. WTO rules deal with the trade practices of public bodies because of their influence on trade liberalisation and competition. The WTO adjudicatory body has tried to distinguish the relationship between public and private in WTO multilateral agreements, such as the GATT, GATS or SCM.¹⁴ The WTO adjudicatory body relies heavily on the principle of State responsibility to make this distinction. Attempts have been made to attribute the responsibility to a non-State actor as an instrumentality of the State by referring to the principle of State responsibility in Article 5 of the International Law Commission.¹⁵ However, the author argues that Article 5 does not serve the purpose of identifying the scope of ‘government entity’; instead, it deals with situations in which entities exercise governmental authority, or situations in which State enterprises have been privatised, but retain public or regulatory functions.¹⁶

WTO is a consensus-based trade forum. The difficulty with the public-private division is that there is no consensus among the WTO members on the appropriate contours of the public-private relationship. This absence of consensus is partly due to the diversity of the legal and institutional differences among WTO members. It can, therefore, be argued that a clear and

Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions (Sellier European Law Publishers 2007) 23; and Mandhlase Mwanza, ‘The Public / Private Divide : An Outdated Concept of Governance in English Law’ (2013) 6 UCLan Journal of Undergraduate Research 1, 3.

¹³ Many authors even conclude that this division is no longer adequate, and should be totally abandoned. See the same conclusion with the Constantijn Van Aartsen, ‘The End of the Public-Private Divide’ *Maastricht University Blog* (14 September 2019).

¹³ See Chapter 5 Section 3. See above immediate above footnote Sand (n 4) 201. Nicholas Bamforth and Peter Leyland, *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing 2003) 272.

¹⁴ See Chapter 5 Section 3.

¹⁵ See Chapter 5 and the analysis of SOEs in a WTO context. Article 5 of the International Law Commission on State Responsibility provides: ‘The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.’

¹⁶ See the International Law Commission, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, vol II (A/CN.4/SER, 2001) 31-42. The commentary points out that Article 5 does not attempt to identify precisely the scope of ‘governmental authority’, because it depends on the particular society, history and traditions background, and not just on the content of the powers exercised by that entity.

uniform division between the public and the private would not mitigate the divergence, but would instead increase the difficulty of consensus and the possibility of disputes.

The author, therefore, argues that, in any discussion of the division between public and private, it is necessary to take into account the context¹⁷ The author does not attempt to provide a universal conceptual answer to this major normative question. A sharp and precise line drawn between the two would be of no help in solving any of the problems involved. In this thesis, the process of sorting out government entities from private enterprises must fit the context of trade liberalisation of the international government procurement market. Only in the specific context of promoting trade and competition in government procurement, is the distinction between ‘government entities’ and other bodies meaningful and feasible.

7.2.1.1 Transnationalism

The author also argues that a transnational norm would overcome the shortcomings of the current listing approach concerning the definitional issue of the GPA/WTO. The current GPA entity schedules consist of lists of central government entities, sub-central government entities and other entities. The first two categories are defined by national administrative law or national constitutional law, both of which are national public laws. However, an administrative framework, as a national concept, is no longer a desirable theoretical basis for the definition of a government entity under the GPA, (or at least, it is insufficient to encompass the ‘other entity’ which is neither a central government nor a sub-central government).¹⁸

Other bodies ride on the border between the public and the private. It is not always definable within traditional administrative structures. Because the traditional national administrative

¹⁷ In both common law and civil law, it is argued that, if a division is to be conducted the context of the division must be considered. The dichotomy is oversimplified if presented as a single binary distinction. Although a simplistic distinction may serve the purpose to simplify questions, it may instead obstruct attempts to analyze the relevant issues in their contemporary legal and societal contexts. See Gunther Teubner, ‘State Policies in Private Law? A Comment on Hanoch Dagan’ (2008) *American Journal of Comparative Law* 837. See further, Gerdy Jurgens and Frank Van Ommereen, ‘The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependant Divide’ (2012) 71 *Cambridge Law Journal* 172-199.

¹⁸ Some of the functions of State bodies, such as the provision of education, health care and pensions, could be undertaken by the private or voluntary sectors. Besides liberalising some former public services, the State engages in many activities in cooperation with the private sector, such as contracting, building, etc. Changes have also taken place in the private sector: some non-State actors are expected to engage in activities for public rather than private interests. Moreover, States no longer exert control in an entirely unilateral manner; to an increasing degree, they act cooperatively. There are growing numbers of ‘cooperative’ forms of administrative governance involving both government and enterprises. The privatisation of public functions and the rise of State-owned enterprise both reflect the rise of the cooperative paradigm in State-market relations. Consequently, there are ‘other bodies’ that ride the line between the traditional public law and private law, and these are hard to define within the traditional administrative structure. See further Chris Thornhill, ‘Public Law and the Emergence of the Political’ in Cormac Mac Amhlaigh, Claudio Michelon and Neil Walker (eds.), *After Public Law* (Oxford: Oxford University Press 2013) Chapter 14.

structure remains within a State-centred paradigm, it encompasses State governments and other entities that operate as an instrumentality of the State. However, it cannot encompass the full spectrum of interaction between public and private actors, and State-owned enterprises are an example of this point. State-owned enterprises have relations with the State but have sufficient freedom to carry out activities in the market.

In addition, the traditional concept of public law and the definition of domestic administrative law neglect the phenomenon that governments now carry out cross-border activities more frequently (for example, in international government procurement). Those international transactions must not only follow national law but, more importantly, must comply with international rules. Different national laws create various entities. How to keep consistency with international instruments and coordination with the new composition of international competitors (such as Sovereign Wealth Funds) could present a major challenge and may require harmonisation based on a common denominator.¹⁹

In order to meet the challenge of the growth of new international competitors, such as State-owned enterprise and Sovereign Wealth Funds, international regulation must build on a consensus of core concepts or standards that reflect the *status quo* of global economic regulation. Likewise, the definition of ‘government entity’ has to be adjusted to take into account the fact that State-owned enterprises are growing in the international government

¹⁹ To take the regulation of sovereignty wealth funds (SWFs) as an example: SWFs have increased their overseas investments and have become large concerns in the international community. This calls for the international regulation of such State-owned investment vehicles. The International Monetary Fund and the Organisation for Economic Cooperation and Development have promoted the adoption of some non-binding international instruments to harmonise the regulation of SWFs in a legal framework at the global level. The EU has also confirmed that SWFs are a global issue and that national regulation is not adequate, and thus the international community must develop a mutually agreed legal framework for the operation of SWFs. See, for example, International Monetary Fund, ‘Sovereign Wealth Funds—A Work Agenda’ (2008). International Working Group of Sovereign Wealth Funds (IWG), ‘Kuwait Declaration: Establishment of the International Forum of Sovereign Wealth Funds’ (2009) <<https://www.ifswf.org/santiago-principles-landing/kuwait-declaration>> accessed 15 July 2019. OECD Secretary-General To The International Monetary And Financial Committee, ‘Sovereign Wealth Funds And Recipient Countries - Working Together to Maintain and Expand Freedom of Investment’ (2008) <http://www.oecd.org/daf/inv/investment-policy/41456730.pdf> accessed 25 August 2019. OECD, ‘OECD Guidelines on Corporate Governance of State-Owned Enterprises’ (2015) 55. Scholars have also argued and compared particular models of national or international regulation or self-regulations on the operation and investment of SWFs, as being particularly necessary to avoid national protectionism and promote trade liberalisation and transparency. See further G Kratsas and J Truby, ‘Regulating Sovereign Wealth Funds to Avoid Investment Protectionism’ (2015) 1 Journal of Financial Regulation 95. See also Philippe Gugler and Julien Chaisse, ‘The regulation of sovereign wealth funds in the European Union: Can the supranational level limit the rise of national protectionism?’ in Karl P Sauvart, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds.), *Sovereign Investment* (Oxford University Press 2012) Chapter 18. Richard A Epstein and Amanda M Rose, ‘The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow’ (2009) 76 The University of Chicago Law Review 111.

procurement market. Thus, a transnational approach to defining ‘government bodies’ is preferable if the national-international divide on the issue of SOEs is to be overcome.

7.2.1.2 Functionalism

A transnational approach to the definition of a ‘government entity’ must be based on the common denominator of national rules on government bodies, so that the definition can serve the purposes of the GPA and is also consistent with the national laws of the GPA Parties.²⁰ The common denominator is the consensus of the GPA Parties and its reflection of the aims and purposes of the GPA/WTO.

Consequently, the question to ask is: what is the purpose of the definition? Also, what is the purpose of GPA discipline and, more generally, what is the ultimate purpose of the political and legal system that accommodates the discipline, and more specifically, what is the WTO? In chapter 1 and chapter 2, we looked into the national and international aims and purposes of government procurement regulation. The exploration of those aims and purposes has laid the foundation for this analysis. A conclusion drawn from that exploration was that free trade, trade liberalisation, fair trade and social objectives are the primary values pursued by the GPA/WTO.

Cottier observed that, trade liberalisation, at some point, inherently starts to require and rely upon a developed positive integration, i.e., free trade depends on common and shared standards and perceptions among the WTO members, and that positive integration is based upon mutual recognition of national or regional standards and the common understanding of the core concepts’.²¹ As an increasing part of global trade, government procurement market integration also needs mutual recognition on core concepts. This consensus is a cornerstone of the construction of across-the-board criteria for the definition of a ‘government entity’ under the GPA.

²⁰ It was mentioned in the section immediately above that the line separating the public and also the national and the international, has become blurred. Hard and fast lines drawn between the public and the private, as well as between national and international law do not reflect the reality of globalisation. In the new situation, international norms need to be designed on the basis of the common denominator of national rules, so as to become *ius communes* and acceptable to a large number of countries. The EU is an example of this point. In the EU procurement directives, the procurement bodies are not defined on the basis of any Member State’s administrative law or any national public law. Instead, the definition of public procurement bodies is a creation of supranational harmonisation. This approach to a large extent avoids judicial conflicts and generally wins political acceptance. See Hisashi Owada, ‘Problems of Interaction Between the International and Domestic Legal Orders’ (2015) 5 Asian Journal of International Law 246. Also Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, ‘From Public International to International Public Law: Translating World Public Opinion into International Public Authority’ (2017) 28 European Journal of International Law 115.

²¹ This statement was addressed the American Society of International Law in 2000. See Thomas Cottier, ‘Limits to International Trade: The Constitutional Challenge’ (2000) 94 Proceedings of the ASIL Annual Meeting 220-221.

A practical case in point of positive integration in the government procurement field is the EU functional definition of the purchasing entity under the EU procurement directives. The political will to gain EU public procurement market integration is realised through EU-wide procurement legislation, with a dynamic and functional interpretation by the CJEU. The functional understanding of the definition of purchasing bodies under the EU public procurement law enhances the integration process of the EU public procurement market.

It is submitted that the EU is significantly more ambitious than the WTO system in aspects of market integration and judicial harmonisation. Furthermore, since the WTO adjudicatory body does not have the same competency as the CJEU in legal interpretation,²² a functional legal definition with clarity and certainty is particularly imperative in the WTO regime.

7.3. The Definition Structure

WTO rule-making aims to bridge divergences among the members. If the divergence is over a technical standard or a procedural issue, WTO law will take a harmonising approach,²³ since these problems need minimum standards for the application of an integral rule. This creates a high level of efficiency and guarantees legal security in international trade. For example, the TBT (Agreement on Technical Barriers to Trade) Committee has developed a set of detailed recommendations and decisions regarding the notification of regulations, procedures for assessing conformity, and mechanisms for responding to information provided and requests regarding domestic regulatory programs.²⁴ Similarly, the SPS (Sanitary and Phytosanitary Measures) Committee has been developing a set of procedures to enhance the transparency of special and differential treatment in favour of developing countries.²⁵

The harmonisation approach aims to produce an integrated rule that applies to fewer exceptions. Despite the advantage of thoroughness by means of harmonisation, international rule-making,

²² WTO judicial system, (unlike the EU judicial system), has no competence to fill *lacuna* when there are no detailed measures or no specific rules to follow and it has to be very careful to avoid criticism of judicial activism. As a result, the WTO dispute settlement experts heavily rely on, and are bound by textualism, whereas in the CJEU, teleological interpretation is the prevailing adjudicatory approach.

²³ On the Harmonization approach, see DW Leebron, 'Lying down with Procrustes: An Analysis of Harmonization Claims' in J. Bhagwati and RE Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for free trade?*, vol I (Cambridge: MIT Press 1996) 41-117.

²⁴ See e.g. WTO, 'Decisions and Recommendations Adopted by the Committee since 1 January 1995: Note by the Secretariat' G/TBT/1/Rev.13 8 March 2017. See also Frieder Roessler, 'Diverging Domestic Policies and Multilateral Trade Integration' in Jagdish N Bhagwati and Robert E Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (reprint, Cambridge: MIT Press 1996) 21-56. (the Agreement on Technical Barriers to Trade is the first effort to harmonise, and demands are increasing.)

²⁵ See WTO Committee on Sanitary and Phytosanitary Measures, 'Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)' G/SPS/7/Rev.3 20 June 2008.

of which the WTO law is part, has to respect the sovereignty,²⁶ and thus it is not always easy to obtain across-the-board agreement on legal harmonisation.

If the divergence is immediately related to a specific trade commitment (for example, tariff reduction), negotiators implicitly or explicitly rely on an assessment of national market force to ensure that markets are nationally beneficial. In this situation, a second approach is preferable to moderate divergences between countries, such as bilateral trade agreements or regional trade agreements. Continuous bilateral ‘trades’ or ‘swaps’ generate trade creation in more extensive trade areas (where there is a lack of universal consensus in the overall WTO community), as a result of which it is possible for the divergences between signatories to be significantly narrowed.

Statistics prove that free trade agreements successfully lower tariff rates and reduce by 30-60 per cent non-tariff barriers in manufacturing industries, through the employment of bilateral tariffs and non-tariff barriers.²⁷ Moreover, free trade agreements are often signed by a smaller number of countries that share more extensive common interests. The extensive common concerns or interests enable a stronger sense of ‘community’, which lays the foundation for a broader consensus on tariffs, non-tariff barriers, intellectual property, labour standards, E-commerce, and so forth.

Particularly in cases of divergences in the GPA’ expansion of its coverage, an interesting phenomenon is that trade commitments made by GPA parties under the bilateral trade agreements are usually more generous than those made under the GPA. The history of GPA negotiation indicates a lack of consensus and even a lack of interest in a general harmonisation of government procurement like GATT or GATS.²⁸

²⁶ According to the principle of self-determination, A State has the freedom to decide to sign or quit a trade agreement on the basis of its social, economic or other national interests. This means that a State also has the freedom to self-determination on international rule-making. With regards to the principle of self-determination see, for example, Matthias Herdegen, *Principles of International Economic Law* (1st edn., Oxford University Press 2013) 67.

²⁷ Empirical studies found that by May 2012, around 500 free trade agreements under GATT Article XXIV (Regional Trade Agreement), and the enabling clause has contributed to a reduction of tariff rates by 2.1 per cent points and 1.5 per cent points respectively. The reason for the effectiveness of free trade agreements is that, compared with the most favoured nation rates required under the GATT/GATS (which represents the general harmonisation approach), bilateral trade agreements and regional free trade agreements usually apply lower preferential tariff rates. For statistics and empirical assessment of the contribution of free trade agreements, see Kazunobu Hayakawa and Fukunari Kimura, ‘How Do Free Trade Agreements Reduce Tariff Rates and Non-Tariff Barriers?’ (2014) Institute of Developing Economics 1-3.

²⁸ With regard to the GPA’s negotiation and expansion history see the review in Chapter 4 Section 2 on the evolution of the GPA.

However, a number of new free trade agreements have included provisions for more flexible or advanced government procurement procedures,²⁹ or even further trade commitments. For example, the EU has also signed a number of bilateral agreements providing more extensive coverage on government procurement than it made under the GPA.³⁰

In contrast to the general harmonisation approach, the second approach tries to obtain any possible consensus in a much smaller group, which is less ambitious but very practical. If general harmonisation is the ultimate goal, the second approach is preferable as a starting point for the achievement of further extended consensus in the future. Those consensuses in free trade agreements indicate that there could be improved rules or criteria that help to broaden the degree of harmonisation in the international government procurement market, at least practically, the trade commitment they made in bilateral agreement prove that they are willing and able to offer broader market access.

If consensus is rare and the divergence between the WTO members is difficult to reconcile (for example, in intractable trade topics, such as e-commerce, fishery subsidies, agriculture, and so forth),³¹ buffering/escape-clause mechanisms are a useful aspect of rule-making. This approach

²⁹ For example, in the recent Enhanced Partnership and Cooperation Agreement between the EU (EPCA 2017) and Kazakhstan and the EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA 2017), the provisions of standstill in the contracting stage (CEPA Article 271.6), the debriefing procedures (Article 134 EUEPCA Article 162 CEPA.), abnormally low tenders (EPCA Article 132.6) international labour standards (CEPA Article 274). See European Commission, Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (Official Journal L29 Volume 29). European Commission, 'Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and the Republic of Armenia, of the Other Part' (*JOIN(2017) 37 final*) <https://eeas.europa.eu/sites/eeas/files/eu-armenia_comprehensive_and_enhanced_partnership_agreement_cepa.pdf>.

³⁰ Taking the EU preferential trade agreement as an example: on 13 February 2019, the EU-Singapore Free Trade Agreement was approved by the European Parliament. In the EU-Singapore Free Trade Agreement, generally, the Parties have extended their coverage on central government entity, utilities and other entities, and public-private-partnership and services. The EU gives Singapore access to nearly 200 central entities that it withholds under the GPA, and Singapore lists 54 entities in contrast to its GPA coverage of 23 entities. In the EU-Canada Free Trade Agreement, implemented in October 2017, the EU expanded its coverage, especially with respect to sub-central and other entities. Similarly, in the EU-Japan Economic Partnership Agreement, entered into on the 30 January 2019, the coverage was been expanded, particularly in the railways sector and sub-central coverage. Furthermore, the EU and the US have also issued proposals on the scope of their planned negotiations to expand the reciprocal level in market access to each government procurement market. See future Chapter 4, Section 3.2.

³¹ For example, 76 WTO members (i.e., almost half of the total membership) have launched plurilateral negotiations on trade-related aspects of e-commerce, including the EU, the US, China and India. The issue has attracted a lot of attention and the discussion on this concern has been unceasing since the 1998 Ministerial Declaration. Scrutiny of the 25 separate e-commerce proposals reveals that there are still major divergences concerning data flow and data localisation. Developed countries have contended that data should move freely, while some developing countries, such as China and India, require foreign suppliers to establish a physical presence to benefit the domestic economy. The US has argued that data localisation would impose unnecessary costs and burdens on suppliers and consumers alike, while least-developed countries and developing countries argue that data should be reserved for domestic firms rather than flowing freely across borders and processed and sold to other domestic or international firms. See further, Amir Darsinouei Ebrahimi, *Understanding E-Commerce*

is based on the recognition that the world economy always consists of different economic systems. In order to push nations towards greater co-operation, the interface between different economies could be realised by institutional or legal means, seeking common ground while reserving difference.³² Where there is full consensus, general applicability of rules would be envisaged, while where there is substantial divergence, there would be an escape clause.

The buffering or escape clause mechanisms could result in justifiable exemptions from WTO obligations.³³ Apart from those exceptions, the WTO obligation should generally apply. Those exceptions could be included in a general rule as a justification (not falling within the scope of application of a general obligation). This mechanism could accommodate the disparities of national economies, and as a result, would be more likely to be accepted by more WTO

Issues in Trade Agreements: A Development Perspective Towards MC11 and Beyond (CUTS International, Geneva 2017) 10-24.

With regards to fisheries, in 2019 there were intensives meeting of the WTO to discuss the prohibition of certain forms of fisheries subsidies that contribute to overfishing. In the current negotiations on this issue there are still divergence on the balance of sustainable fishery and the interests of least-developed countries, and their special and differential treatment towards fisheries subsidies. See further Smriti Bahety and Julian Mukiibi, *WTO Fisheries Subsidies Negotiations: Main Issues and Interests of Least Developed Countries* (CUTS International, Geneva 2017) 6-21.

³² John Jackson has stated that the world economy will always consist of different economic systems, and that the world trade system should allow an interface between these systems. See further, John H Jackson, 'Global Economics and International Economic Law' (1998) 1 *Journal of International Economic Law* 21. Roessler (n 23) 41.

³³ One example of the buffering mechanism is the phrase-out mechanism for chlorofluorocarbons (CFCs) included in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. Under a general harmonisation approach, such as national treatments applicable to all WTO members, a sales licence could be applied to CFCs (to achieve the goal of their reduction). However, a proposal for a general licence for production of CFCs failed to gain the support of the chemical producers (because of the additional licensing burden on them). As a result, in order to achieve the political support for an agreement, the mechanism banned the import of CFCs by non-members and put quantitative limits on the production of CFCs. Consequently, the production of CFCs declined. This phrase-out mechanism was a kind of buffering approach. It added provisions permitting a certain kind of 'derogation' from the general obligation of non-discrimination on the basis of a legitimate domestic policy. See UN, Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987. Some scholars argued that an excessive number of this type of escape clause or buffering space would jeopardise the rule of law in the WTO and would be detrimental to future harmonisation. See e.g., Frieder Roessler, 'Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past' (1998) 19 *University of Pennsylvania Journal of International Economic Law* 524-526.

Another example of the general rule with a certain number of justifiable exemptions is the prohibition of subsidies. It is known that subsidies are detrimental to industrial competition and have an adverse effect on international trade. Therefore, the WTO has endeavoured to negotiate an international discipline on subsidies. However, divergences on the issue of subsidies are difficult to reconcile because they are very useful policy tools for national governments., The Agreement on Subsidies and Countervailing measures that was eventually introduced prohibited subsidies (such as export subsidies) and actionable subsidies. The actionable subsidies allowed space for domestic policies, thereby mitigating divergence on the subsidy issue and allowing the conclusion of a multilateral agreement on subsidies and countervailing measures. See Article 8 of Agreement on Subsidies and Countervailing Measures. Negotiating Group on Subsidies and Countervailing Measures, 'Problems In The Area Of Subsidies And Countervailing Measures. Note By The Secretariat' MTN.GNG/NG10/W/3.

members. Moreover, this mechanism would serve to moderate the ‘spaghetti bowl effect’ and progressively achieve general harmonisation under the WTO.³⁴

These three approaches are, of course, not mutually exclusive. In the case of the GPA rule-making, a general harmonisation has been realised in some aspects of the procedural rules, such as tendering procedures and other transparency notification obligations (since it is required that every acceding party ensures that its domestic government procurement law is consistent with the GPA rules).³⁵ With regard to the coverage and scope of the GPA, there are always divergences on whether a harmonised criteria on the sub-government entities and other entities should be adopted.³⁶ In the bilateral agreements between the WTO members, for example, the bilateral agreements between the EU and Singapore, Canada, the US, etc., the coverage of sub-government entities and other entities have been further expanded.³⁷ It is argued that the expanded entity coverage in the bilateral agreement concerning the government procurement market represents the possibility of further harmonisation on the issue of entity coverage among the GPA Parties.

It would scarcely be possible, in the immediate future, to achieve a multilateral consensus on the liberalisation of the international government procurement market.³⁸ The author argued in

³⁴ The ‘spaghetti bowl effect’ is the result of the multi-application of free trade agreements. It is another form of trade globalisation (an alternative to the WTO multilateral approach). It has been criticised, however, for increasing trade costs and counterproductive conflicts between trading rules. The buffering/escape clause would garner greater consensus and reduce burdens to the trading environment by use of a multilateral forum, which is better than scattered bilateral/regional trade agreements. See Jagdish Bhagwati, ‘U.S. Trade Policy: The Infatuation with Free Trade Areas’ Columbia University Department of Economics Discussion Paper Series No. 726 April 1995 19. WTO, ‘World Trade Report 2011 - The WTO and Preferential Trade Agreements: from Co-Existence to Coherence’ (2011) 5. Masahiro Kawai and Ganeshan Wignaraja, ‘The Asian “Noodle Bowl”: Is It Serious for Business’ (2009) ADBI Working Paper No. 136 Tokyo: Asian Development Bank Institute 4 -22.

³⁵ See the Committee on Government Procurement, ‘Checklist Of Issues For Provision Of Information Relating To Accession To The Agreement On Government Procurement’ GPA/35 21 June 2000 para 16-24.

³⁶ The delegates of each GPA party have raised (the concern about a harmonised criteria on sub-government entities and other entities in 2004 and this matter is still under negotiation. Matters of concern include ‘whether there should be a uniform level of coverage of the entities covered by the GPA’ and ‘whether there should be greater harmonisation of the way entities are described, in particular whether Annex 2 and Annex 3 should be structured on a uniform definition’. Committee on Government Procurement, ‘Modalities For The Negotiations On Extension Of Coverage And Elimination Of Discriminatory Measures And Practices’ GPA/79 19 July 2004.

³⁷ To take the EU preferential trade agreement as an example: on 13 February 2019, the EU-Singapore Free Trade Agreement was approved by the European Parliament. In the EU-Singapore Free Trade Agreement, generally, the parties extended their coverage of central government entities, utilities and other entities, public-private-partnership and services. The EU gave Singapore access to nearly 200 central entities that it withholds under the GPA, and Singapore lists 54 entities in contrast to its GPA coverage of 23 entities. In the EU-Canada Free Trade Agreement, implemented in October 2017, the EU expanded its coverage, especially with respect to sub-central and other entities. Similarly, in the EU-Japan Economic Partnership Agreement, entered into on 30 January 2019, the coverage was expanded, in particularly in the railways sector and in sub-central coverage. Furthermore, the EU and the US have issued proposals on the scope of their planned negotiations to expand the reciprocal level in market access to each government procurement market. See future Chapter 4, Section 3.2.

³⁸ See the analysis of the GPA in the near future in Robert D Anderson and Sue Arrowsmith, ‘The WTO Regiem on Government Procurement: Past, Present and Future’ in Robert D Anderson and Sue Arrowsmith (eds.), *The*

Chapter 4, Section 4.1-4.3 that the current plurilateral approach on the entity coverage of the GPA has proved to be problematic. Thus, it is very necessary to have a harmonised normative definition of ‘government entity’, and in particular to have a harmonised understanding of ‘other entities’.³⁹ The author here further argues that this harmonised definition is not only desirable but also practical, considering the expanded coverage in the bilateral agreements mentioned above.

In order to achieve further expansion of GPA entity coverage, a general harmonised criterion for the definition of a ‘government entity’ should be considered.⁴⁰ Given the diversity of the economies of the GPA parties, it is recommended that the general criterion should include a ‘justification’ clause, for excluding entities in a form that would not breach the non-discrimination obligation under the GPA. The ‘justification’ included in the definition of ‘government entity’ could accommodate new members with large State-owned enterprises or large Sovereign Wealth Funds or other similar kinds of large public-private mixed entities.

7.4. Trade Rule or Competition Rule?

It is recognized that the definition of a ‘government entity’ is inextricably linked to a fundamental question, that is: what is the primary function of the GPA for its Parties? The question is fundamental because there should always be a legislative purpose to guide the drafting of rules. To settle a general definition of ‘government entity’, it is very necessary to understand the purpose to which a ‘government entity’ is subject under the GPA obligation. Is it for the elimination of trade barriers? Is it for promoting competition? Or does it serve both purposes? We must understand that while trade-related rules seek to remove barriers to trade and ensure trade opportunities, competition-related rules focus on avoiding competition distortion and protecting the competitive process in the market.⁴¹ Whether the government

WTO Regime on Government Procurement: Challenge and Reform (1st edn., Cambridge University Press 2011) 21.

³⁹ See the analysis on the drawbacks of the current GPA entity coverage approach in Chapter 4 Section 3.

⁴⁰ In the previous discussion on the GPA entity coverage issues in Chapter 4 Section 4, the author devised two doctrines (the ‘control’ doctrine and the ‘competition’ doctrine) that were practically applicable to the evolutionary history of the GPA. Moreover, the two general doctrines have also been confirmed practically in the GPA Parties’ coverage schedules. According to the two doctrine, the general approach to defining a ‘government entity’ could settle the general scope on the basis of the control doctrine while, at the same time, generally excluding entities competing under normal market conditions. See Chapter 4 Section 4.

⁴¹ On the general distinction between competition rules and trade rules, see, for example, Leonard Waverman, ‘Competition and/or Trade Policy?’ in Einar Hope (ed), *Competition and Trade Policies: Coherence or Conflict*, vol 13 (1st edn, Routledge 1998) 26 et seq. Due to the great diversity across countries with respect to competition rules, most of the discussion on trade and competition has been rather general and conceptual. For a summary of some of the doubts raised, see Bernard M Hoekman, Patrick Low and Petros C Mavroidis, ‘Regulation,

procurement rules are ‘trade rules’ or ‘competition rules’ is conceptually, as well as practically, relevant.

From a practical perspective, the definition of ‘competition law’ must take into account an assessment of the impact of competition, be it potential or actual, and this demands a more refined and sophisticated set of rules. The OECD highlights the difference between ‘trade rules’ and ‘competition rules’ as follows:

‘At risk of some over-simplification competition policy emphasises a fact-specific, case by case approach...Similarly, competition policy often emphasises issues of actual competition in particular markets, while trade policy often focuses on issues of potential competition in the sense of safeguarding competitive opportunities...These differences may have implications for the means and mechanisms employed by both policies...’⁴²

This difference influences how the definitional norm will be agreed (on what functional basis) and how it will work (by which specific criteria and tests).

Here, the EU public procurement rules are a particular example of the difference between trade rules and competition rules. As an integrated part of the Internal Market’s rules, they serve to establish a ‘public market’, and it is self-evident that the EU public procurement rules primarily safeguard market access.⁴³ The definition of ‘procuring entities’ has adequately encompassed entities that could set trade barriers (for example, the bodies governed by public law). A large amount of CJEU jurisprudence has established a broader understanding of this concept in order to encompass all entities that could hinder the integration of the EU Internal Market.⁴⁴ In their general aims and purposes, the EU public procurement rules are trade-rules.

In the WTO legal regime, trade liberalisation is still at the heart of negotiation. The conventional idea, therefore is that the WTO rules aim at ensuring equal competition opportunities (in a liberalised trade market).⁴⁵ Article III GATT (which deals with the national

Competition Policy and Market Access Negotiations: Lessons from the Telecommunications Sector’, *Competition and Trade Policies: Coherence or Conflict*, vol 13 (Routledge 1998) 99.

⁴² See OECD Joint Group on Trade and Competition, ‘Consistencies and Inconsistencies between Trade and Competition Policies’ COM/TD/DAFFE/CLP(98)25/FINAL, 1999, OECD, Paris para 18.

⁴³ See Chapter 6 Sections 2.1 and 3.2 for a review of EU secondary legislation on public procurement, from its beginnings to its later refinement and its advanced development in 2014 in the general economic context of the Internal Market and the Four Freedoms of Movement.

⁴⁴ The definition of ‘bodies governed by public law’ refers to entities that are not part of government, but operate under public law with a general interest without commercial interests. CJEU case-law has established a functional interpretation in the spirit of competition and non-discrimination. See the analysis on the teleological interpretation of the CJEU and the analysis of the definition of ‘bodies governed by public law’ in Chapter 6 Section 2.2 and 4.1.2.

⁴⁵ In *Korea - Beef*, the appellate body focused on the dual retailer system and examined its effect on market access. The examination was obviously necessary in the interests of competition. The appellate body stopped there and

treatment of internal taxation and regulation) represents the most critical legal reference for securing this ‘equal competition’.⁴⁶ Government procurement is one of the non-tariff barriers that were intended to achieve the general aim of ‘equal competition conditions’.⁴⁷

The definition of ‘government bodies’ under the GPA is certainly compatible with the aim of general trade liberalisation, as was expressed in a mandate to expand the entity coverage of the GPA.⁴⁸ Similarly to the EU procurement rules, the GPA is supposed to have broader possible entity coverage to the extent that all entities that can set trade barriers are subject to the GPA (as concluded in Chapter 3 Section 4.1 and Chapter 6 Section 6.4). In other words, it is recommended that the general scope of ‘entity coverage’ should include all entities that set trade barriers in the international government procurement market.

The GPA has no general definition of its entity coverage. The author suggested in Chapter 4 that the GPA has generally confirmed that there exists a consensus in favour of subjecting entities under government control to GPA rules and still there is a convergence on the general

did not further examine the effect on the process of competition. The Appellate body put it that keeping consistent with the conventional idea that Article III GATT (non-discrimination) only protects the expectation of market access (namely, competition opportunities), whereas actual effects on trade flow and trade volume (namely, the trade) are not relevant. the appellate body stop further to analysis the dual retailer system’s impact on the competitors (namely, the effects on competition process). In acting this, the Appellate body only make it clear that Article III only protects expectation of market access (namely, competition opportunities between foreign supplies and domestic supplies), thus actual effects on the flow and the volume of trade (the actual impact on competition process) are irrelevant. See also, WTO, ‘The Interpretation and Application of Article III: National Treatment on Internal Taxation and Regulation’. Petros C Mavroidis, ‘Come Together? Producer Welfare, Consumer Welfare, and WTO Rules’ in EU Petersmann and J Harrison (eds), *Reforming the World Trading System—Legitimacy, Efficiency and Democratic Governance* (Oxford: Oxford University Press 2003) 277, 280.

⁴⁶ Both the legal text and consistent legal interpretation of Article III have clearly shown that ‘Article III protects expectations not of any particular trade volume but rather of the equal competition relationship between imported and domestic products.’ In *Japan — Taxes on Alcoholic Beverages*, the appellate body stated that ‘...toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions* for imported products in relation to domestic products...’ In other words, Article III of the GATT is mainly about safeguarding competitive opportunities. See Report of the Appellate Body, ‘Japan-Taxes on Alcoholic Beverages’ WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996 para 16. See also Report of the Appellate Body, ‘European Communities--Measures Affecting Asbestos And Asbestos-Containing Products’ WT/DS135/AB/R 12 March 2001 para 97.

⁴⁷ The main concern of the GATT is to eliminate or reduce through negotiation the most explicit and obvious governmentally imposed trade obstacles. Those refer to tariffs, quotas, and other border obstacles to market access. In the post-GATT age (the WTO age), the main concern is to eliminate non-tariff barrier. discriminatory government procurement policies and practices that establish non-tariff barriers. See Mitsuo Matsushita, Petros C Mavroidis and Thomas J Schoenbaum, *The World Trade Organization—Law, Practice, and Policy* (2nd edn, Oxford: Oxford University Press 2006) 259. With regard to the trade effects of discriminatory government procurement as non-tariff trade barriers and why they should be subject to international trade negotiation, see the analysis in Chapter 3 Section 4: discriminatory government procurement as a non-tariff trade barrier.

⁴⁸ In paragraph 7, Article XXII-Final Provision GPA 2012, it is stated that, no later than the end of three years from the entry into force of the GPA 2012, the Parties shall undertake further negotiation to improve the GPA, progressively reduce and eliminate discriminatory measures and achieve the greater possible extension of its coverage among all Parties on the basis of mutual reciprocity. See also the basic principles and elements of the GPA/WTO in the recital of GPA 2012. https://www.wto.org/english/tratop_e/gproc_e/gpa_1994_e.htm, accessed 24 July 2019.

inclusion of ‘other entities’. According to the current entity coverage schedules on ‘other entities’ and the evolutionary history of the GPA from the OECD drafts to the GPA 2012, there has always been an implied consensus on excluding entities from GPA obligations when they compete under normal market conditions.⁴⁹

There is no doubt that both the GPA/WTO and the EU public procurement law aimed at eliminating trade barriers. The author will argue, however, that they are **at the interface** of trade rules and competition rules, and that competition rule techniques could be introduced into the rule-making process, such as the assessment of the contestability of the market.

Bovis have mentioned the interplay of trade rule and competition rules in the government procurement market in the EU law context. He observes that whereas anti-trust laws maintain economic integration in a private market, the EU public procurement laws aim to establish a public market gradually; and a public market requires a positive regulatory approach in order to enhance market access. The EU procurement directives emphasise that contracts must be awarded under normal conditions of competition and that the tendering process must not give rise to any distortion of competition.⁵⁰

As stated in Chapter 6, EU procurement law also borrows from EU competition law in defining a ‘procuring entity’, particularly in its explication of ‘bodies governed by public law’, ‘public undertakings’ and ‘undertakings granted with special or exclusive rights,’ operating in utility sectors. These definitions elaborate detailed criteria on whether the procuring entity is under government control, and detailed tests to discern whether the control could lead to a loss of commercial freedom on the part of the entity to the extent that the latter entity may not make a procurement decision based on considerations of competition. Those tests require the existence of an immediate and decisive causal link between government control or influence over the

⁴⁹ In Chapter 4, the author reviewed the Havana Charter (the pre-GATT age), the OECD draft, which is the origin of the Tokyo Code on Government Procurement, the Tokyo Code on Government Procurement (the GATT age) and the GPA version after the establishment of the WTO (the WTO age), the conclusion was that there has always existed a spirit that entities under effective government control or government influence should be subject to government procurement regulation, but that if the entity at the same time proved to be competing under normal market conditions, it should not be subject to GPA obligations. See the analysis in Chapter 4 Section 4: the two doctrines in the GPA entity coverage, and Section 2 of the same chapter: the evolution of the GPA.

⁵⁰ The concept of ‘competition’ is mentioned over 100 times in the recital of Directive 2014/24/EU (for example, paragraph 1, 31, 32, 36 etc.) and Directive 2014/25/EU respectively (for example paragraphs (2), (39), (43), (44)). The spirit of ‘competition’, is expressed, for example, in the recital of Directive 2014/25/EU, which reiterates that the directive is to ensure the opening up to competition of procurement in the utility sectors, such as the water, energy, transport and postal services sectors and, in keeping with this policy, it is appropriate to provide a suitable set of rules to ensure that public undertakings and undertakings granted with special or exclusive rights must be subject to non-discriminatory and transparency tendering procedures and must not restrict or distort competition.

procuring body and the distortion of competition.⁵¹ These criteria of government control are specifically derived from managerial, financial, or personnel aspects, and the distortion of competition refers to the EU competition rules.⁵²

In the discussions of the WTO Working Group on the Interaction between Trade and Competition Policies, it was generally recognised that non-discrimination, transparency and procedural fairness are principles common to both competition law and the multilateral trading system.⁵³ The consensus on the interaction of trade policy and competition policy within the multilateral trading system provides a basis for the GPA to introduce a competition law concept to define a ‘government entity’.

The author contends that promoting equality of competitive opportunities for WTO Members requires that trade policies and competition policies are inextricably linked, and the boundaries between the two have to some extent merged.⁵⁴ Trade liberalisation policy and general competition policy co-exist, and the convergence of trade rules and competition rules in the two legal systems is increasing.⁵⁵

There are signs of this convergence in both the WTO and EU legal systems. For example, in the EU context, both Internal Market rules and Competition rules converge under the goal of liberalising the economic forces in the Internal Market. Thus, O’Keeffe and Bavasso note that

⁵¹ See the analysis on definition and the CJEU jurisprudence on ‘bodies governed by public law’, and ‘public undertakings’ and ‘undertakings granted special or exclusive rights’ operating in utilities sectors in Chapter 6 Section 4.1.2, Section 4.3.2.1, and Section 4.3.2.2.

⁵² See Article 2(4), Directive 2014/24/EU, and Article 4, Directive 2014/25/EU.

⁵³ The trade and competition policy issue has raised concerns within the WTO since 1996. See The WTO Working Group on the Interaction between Trade and Competition Policy, which was established at the Singapore Ministerial Conference in December 1996. The negotiation on the interaction between trade policy and competition policy is one of the four ‘Singapore Issues’, together with the issue of transparency in government procurement and the issues of trade facilitation and trade investment. However, due to lack of a confident sense of community regarding norms and procedures, this WTO proposal failed, and the working group is currently inactive.

Although the working group on competition policy is currently inactive, its previous work indicates some consensus between the members. With regard to the common consensus on introducing non-discrimination, transparency, and procedural fairness into the WTO competition policy. see communications from Hong Kong, Canada, the EU, Switzerland, Brazil, Japan, India, the US, and so forth in the WTO documents, issued in the series WT/WGTCP/- See also Working Group on the Interaction between Trade and Competition Policy, ‘Draft Report (1997) to the General Council’ WT/WGTCP/W/49 25 November 1997. Developing countries were worried that the implementation of competition law in the WTO would fail to reflect a broad set of members’ interests. See, for example, Philip Marsden, *A Competition Policy for the WTO: A Developing Country Perspective* (London: Cameron May 2003) 55-66.

⁵⁴ See the WTO documents WT/WGTCP/W/2, paragraph 7 and WT/WGTCP/M/3, paragraph 4. See also Eleanor M Fox, ‘Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade’ (1995) 4 Pacific Rim Law & Policy Association 1. Claus-Dieter Ehlermann, ‘The Contribution of EC Competition Policy to the Single Market’ (1992) Common Market Law Review 257-282. OECD Joint Group on Trade and Competition (n 41).

⁵⁵ See Kamiel Mortelmans, ‘Towards Convergence in the Application of the Rules on Free Movement and on Competition?’ (2001) Common Market Law Review 613.

‘the aim of creating an Internal Market constitutes a unifying thread or, at least, an interface between EU internal trade law and EU competition law’.⁵⁶ In this work, the author contends that because of related parallel between the GPA and the EU procurement rules (as discussed in Chapter 6 Section 2.1.1), this conclusion also applies to the GPA regime. In the new economic context, trade liberalisation and the principle of non-discrimination are compatible with the promotion of competition. Trade rules and competition rules could be applied consistently for the same purpose without conflicting with each other. Trade rules could introduce some competition rule methods.

In the next section, the author will introduce elements of competition law into the GPA definition of ‘government entity’ to avoid the over-inclusion of entities that compete under normal market conditions and thereby avoid the imposition of trade barriers in the international government procurement market.

7.5. The Elements of the Definition Structure

The thesis attempts to provide a conceptual framework for the identification of features and characteristics of government entities in procurement activities in the WTO legal system. This framework offers a benchmark for outlining the features of a government-controlled, non-competing entity that can serve as a reference for accession negotiations or adjudicatory analysis.

7.5.1. The General Scope: Government Control

In Chapter 3, the author proposed that, in order to secure the greatest mutual benefits from trade in the international government procurement market, a useful rule-of-thumb would be to ensure the maximum entity coverage under the GPA.⁵⁷ Furthermore, the author submitted in Chapter 4 that the current list approach to entity coverage had crippled its expansion.⁵⁸ In order to achieve greater entity coverage so that it at least reach the same level as was agreed by the

⁵⁶ David O’Keeffe and Antonio Bavasso, ‘Four Freedoms, One Market and National Competence: In Search of a Dividing Line’ in Mads Andenas and Duncan Fairgrieve (eds), *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (London: Aspen 2000) 541-543.

⁵⁷ In Chapter 3 Section 3.2, the author argued that discriminatory government procurement measure can neither reduce imports nor increase domestic welfare, and the optimal discriminatory government procurement varies from country to country, and from industry to industry within the same country. This is no single optimal government procurement policy that fits all countries or industries. However, an effective rule-of-thumb for maximising the wealth of all GPA Parties would be to open government procurement markets to introduce more competitors (and the more, the better).

⁵⁸ Because the GPA allows intra-discrimination with derogations in its General Notes and under the strict reciprocity principle, the GPA Parties have to align with the Parties that offer less entity coverage. See Chapter 4 Section 3 Drawbacks of Current Entity Coverage.

Parties in bilateral trade agreements,⁵⁹ a definition of ‘government entity’ is desirable. The definition should generally encompass all entities that are under government control.

When deciding whether an entity is under government control, a question that may arise is how to define ‘control’. Article XIX.1.a GPA 2012 expressly indicates the notion of effective control, but there follow no specific criteria.⁶⁰ As submitted in Chapter 6 Section 4.2, the control must be effectively exercised rather than being purely legal or formal. Thus a substantial and immediate causal link with the entities’ procurement decision is required.⁶¹ A formal approach to defining ‘control’ always takes into account the existing constitutional powers or political authority. However, there are other kinds of government control or influence that can determine an entity’s procurement decisions.

A government has a variety of ways to influence or control an entity, and no two governments exercise that influence or control in the same way. Thus, a multi-dimensional approach is desirable to identify the existence of government control. It should be borne in mind that a formal approach that regards one specific dimension, such as formal legal status or ownership, as essential to identifying government control is not reliable. The absence of an express legal status or statutory delegation of government authority does not necessarily preclude a finding that the entity is a public body or government body.⁶² Therefore, the existence of multi-dimensions may be relevant in demonstrating the existence of effective government control over an entity, while avoiding exclusive or unwarranted focus on one single core characteristic at the expense of neglecting other relevant characteristics.⁶³

⁵⁹ See Chapter 4 Section 3. To take the EU preferential trade agreement as an example: on 13 February 2019, the EU-Singapore Free Trade Agreement was approved proved by the European Parliament. In the EU-Singapore Free Trade Agreement, generally, the Parties extended their coverage on central government entity, utilities and other entities, and also public-private-partnership and services. The EU gives Singapore access to nearly 200 central entities which EU withholds some of them under the GPA, and Singapore list 54 entities, which is, in contrast to Singapore made under the GPA (only 23 entities). See European Commission, ‘EU-Singapore Trade and Investment Agreements (Authentic Texts as of April 2018) - Trade - European Commission’ (2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 17 February 2019.

⁶⁰ Article XIX is the clause dealing with the modification and rectification of coverage. It explicitly states that if government control or influence over the covered entity has been effectively eliminated, the Party can propose a modification and rectification of the coverage to the Committee on Government Procurement.

⁶¹ See the analysis of the EU definitions of ‘bodies governed by public law’ and ‘public undertakings’, and ‘undertakings granted with special or exclusive rights’ operating in utilities sectors in Chapter 6 Section 4.1.2, Section 4.3.2.1 and Section 4.3.2.2.

⁶² The Appellate Body has observed that ‘what matters is whether an entity is vested with authority to exercise government functions, rather than how that is achieved’. See Report of the Appellate Body, ‘United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India’ WT/DS436/AB/R 8 December 2014 para 4.10. Also Report of the Appellate Body, ‘United States – Definitive Anti-Dumping And Countervailing Duties On Certain Products From China’ WT/DS379/AB/R 11 March 2011 para 318.

⁶³ The proof of effective control can be found from dimensions such as ownership, decision-making structure, financing, physical configuration, and personnel’. See George Varna and Steve Tiesdell, ‘Assessing the

7.5.1.1. The External and Internal Tiers of Government Control

It has been established that there is little difference in the criteria employed to identify the existence of government control in the approaches of the US, the EU, UNCITRAL, and the WTO Committee on Government Procurement. The US and the EU are the most prominent players in the field of international government procurement, and the current GPA has evolved from the US initial proposals and is still heavily influenced by the EU procurement directives.⁶⁴ The UNCITRAL Model Law on Public Procurement has influenced the national procurement laws, of many governments, especially those of developing countries, on coverage (entities that should be covered by the Agreement).⁶⁵

The government procurement regulations in the four regimes mentioned above (namely, those of the US, the EU, the GPA and the UNCITRAL) generally identify the existence of government control in the form of two tiers:

(a) The External Tier. It includes legal and formal constraints over the entity, namely **legal statutes, hierarchical or bureaucratic supervision by governments, public financing; and provision of public goods**. For example, in the US government procurement law, an entity must be created for the public purpose, with public financing or funding, operate under public supervision, and so forth.⁶⁶ The Guide to the Enactment of the UNCITRAL Model Law on Public Procurement refers to the factors of creation for a public purpose, government financing, special status, or privileges granted by the government such as license, monopoly or quasi-

Publicness of Public Space: The Star Model of Publicness' (2010) 15 Journal of Urban Design 575. See also David Coursey and Barry Bozeman, 'Decision Making in Public and Private Organizations: A Test of Alternative Concepts of "Publicness"' (1990) 50 Public Administration Review 525. See also the arguments in Report of the Appellate Body, 'United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India' (n 61).

⁶⁴ The GPA is grounded in the OECD Code on government procurement, which was based on the US proposal, and after the GPA negotiations changed the code to an agreement, it was heavily influenced by the EU procurement directives. See the evolution history of the GPA in Chapter 4 Section 2.

⁶⁵ The UNCITRAL Model Law on Public Procurement has achieved high acceptance and has had an impact on global public procurement reform. It is one of the most important 'soft' laws in the international government procurement regulation field. See details in Chapter 2 Section 7.3 the objects of the UNCITRAL Model Law on Procurement of Goods, Construction, and Services.

⁶⁶ Jurisprudence on the US approach to the definition of 'control' is scarce. The *Motor Coach Industries* case decision is the original case relevant to this definition. *Motor Coach Indus. v. Dole*, 725 E2d 958, 960-62 (4th Cir. 1984) para 960-965. In this case, the Court explored whether a private entity shall be treated like a public entity. It decided that it depends on whether the entity has 'public instrumentality', and then examined from the following six dimensions to determine the 'total factual circumstances', viz: (1) the purpose of the entity's creation, (2) supervision of its operations, (3) its sources of finance and funding, (4) the public or private 'character' of the entity spearheading the agent's creation, (5) the beneficiary and administrators, and (6) the degree of control over disbursements. The court also ruled that no single dimension of the six is decisive (*id.* para 965). See also Skye Mathieson, 'Accessing China's Public Procurement Market: Which State-Influenced Enterprises Should the WTO's Government Procurement Agreement Cover' (2010) 40 Public Contract Law Journal 246-247.

monopoly.⁶⁷ The WTO Informal Working Group shares some similarities with the UNCITRAL Model Law on Procurement and also adds the factors of government ownership and other political pressures on the entity.⁶⁸ The EU has also taken government ownership and government financing as two of the factors that identify ‘bodies governed by public law’ and ‘public undertakings’.

(b) Internal Tier. It includes the **freedom of management and appointment of personnel**. Although all the four approaches cite these two factors, only the EU has elaborated further details. For example, in both the definition and in the relevant CJEU jurisprudence, the EU refers to a ‘body governed by public law’ and a ‘public undertaking’ operating in the utility sectors, and stipulates that half of the members of the administrative, managerial or supervisory board are appointed by a public authority. ‘Government control’ is easily recognisable among the above factors but, under the GPA obligation the simple existence of such control does not suffice: it must also be demonstrated that the causal link between the control and the outcome of loss of commerciality prevents competition under normal market conditions.⁶⁹ The author wishes to emphasise the significance of this point, especially in cases where recognition of the

⁶⁷ United Nations Commission on International Trade Law, ‘Guide to Enactment of the UNCITRAL Model Law on Public Procurement’ (2012) <<https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf>> Part two. Commentary on the text of the UNCITRAL Model Law on Public Procurement 58-59. With reference to the definition of procuring entity (definition(n) of the Model Law), the Guide to Enactment Article. 6 (a)-(f) refer State to consider the following factors: (a) Whether the Government provides substantial public funds to the entity, or a guarantee or other security to secure payment by the entity in connection with its procurement contract, or otherwise supports the obligations of the procuring entity under the contract; (b) Whether the entity is managed or controlled by the Government or whether the Government participates in the management or control of the entity; (c) Whether the Government grants to the entity an exclusive licence, monopoly or quasi-monopoly for the sale of the goods that the entity sells or the services that it provides; (d) Whether the entity is accountable to the Government or to the public treasury in respect of the profitability of the entity; (e) Whether an international agreement or other international obligation of the State applies to procurement engaged in by the entity; (f) Whether the entity has been created by special legislative action in order to perform activities in the furtherance of a legally-mandated public purpose, and whether the public law applicable to government contracts applies to procurement contracts entered into by the entity.

⁶⁸ In 1988, the Informal Working Group of the GPA Committee on Government Procurement was charged with the task of ‘broadening’ the scope of coverage by including public enterprise and utilities. For this purpose, the Informal Working Group outlined the factors that could be referred to in examining whether an entity could be included in the coverage of ‘government’ procurement. The factors include: (1) ownership or partial ownership, (2) financial assistance in the form of subsidies and capital investments, (3) government budget review (4) appointment of management personnel by the government, (5) special status and privileges in the form of statutory monopolies and rate regulation, the statutory relationship between the entity and the government, or (6) other political pressure. See Annet Blank and Gabrielle Marceau, ‘The History of the Government Procurement Negotiations Since 1945’ (1996) 5 Public Procurement Law Review 112-113. See also Skye Mathieson, ‘Accessing China’s Public Procurement Market: Which State-Influenced Enterprises Should the WTO’s Government Procurement Agreement Cover’ (2010) 40 Public Contract Law Journal 250.

⁶⁹ See the two parallels between the public SOEs, commercial SOEs with the ‘bodies governed by public law’ and ‘public undertakings’ and ‘undertakings granted special and exclusive rights’ operating in the utilities sectors, in Chapter 6 Section 4.2 and Section 4.4.

coverage of public SOEs and commercial SOEs under the GPA obligation is in question.⁷⁰ Both kinds of SOE match the characteristics from the external tier to the internal tier. However, it is not enough to distinguish their obligation under the GPA based only on the ‘control test’. With regard to the entity coverage, it is very necessary to have a further test to see whether the control is so ‘effective’, to the extent that the entity cannot compete under normal market conditions (presumably not setting trade barriers), and therefore it must be excluded from the GPA entity coverage.

7.5.2. The Justification: Compete in Normal Market

The competition paradigm is an accredited proxy frequently used to examine the economic effects of public or political influence over an entity.

As John Stuart Mill observed ‘only through the principle of competition has political economy any pretension to the character of a science’,⁷¹ government control/invention often bring positive effect only when the control/invention promotes competition instead of obstacle competition. Therefore, (as was seen in Chapter 5), privatisation in the 1990s tried to reduce government control and transfer the control of production to private hands in a number of ways, such as by selling State assets, contracting out State services to the private sector, and by progressive deregulation that allowed competition in the market and gave privileges (such as licenses) to private suppliers in specific services areas protected by a legislative monopoly.⁷²

However, in the 1980s and 1990s, privatisation in the interest of global liberalisation was a failure. As observed, those failures had some factors in common, for example, (1) bad

⁷⁰ The author has argued that under the trend of State capitalism and the age of ‘slowbalisation’, a new consensus has appeared in support of the idea that the regulation of SOEs distinguish between public SOEs and private SOEs because of their different impact on trade liberalisation. For detailed analysis see Chapter 5 Section 4.1. in addition, It must also recognised there is a hiving-off trend. It refers to the tendency of governments to delegate traditional state functions to separate bodies. In some civil law countries, administrative law constrains the activities and behaviour of the ‘classical’ forms of government body (namely, administrative bodies, legislative bodies, and judicial bodies), and the government participates in market activities without creating an exceptional entity. The trend towards detachment makes the legal status of the government no different from that of private entities when carrying out those activities. However, since they are not performing traditional prerogative functions, they are beyond the jurisdiction of traditional administrative law and treated as exceptional bodies in private law. See further, Pablo Olivera, ‘Defining the Scope of Covered Entities under the WTO Agreement on Government Procurement and the EC Procurement Rules’ (1997) Public Procurement Law Review 1, 2. Under the hiving-off trend, new forms of entities do not match the factors indicated above, although they actually fulfil the functions of government entities. It is to encompass these kinds of entity need to be encompassed by the GPA obligation when they set trade barriers. See the analysis of the hiving-off process in Olivera (n 69) 2.

⁷¹ John Stuart Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (William James Ashley ed, 7th edn, London: Longmans, Green and Co 1909) 16.

⁷² There are also other kinds of privatisation, and the examples here are not exhaustive. Corporatisation does not count as a kind of privatisation as it often merely converts public monopoly with regulation to private monopoly without regulation. See Chapter 5 Section 2.2: privatisation.

accounting for investment requirements, and then allowing political concerns to surpass economic concerns (as in the Dominican Republic's electricity privatisation); (2) allowing some sectors to remain closed to competition while others were exposed to competition, and then ensuring that that harmful anti-competitive effects did not spill over (as in the case of California Electricity and Mexico Telecoms); or allowing state aids to continue in newly privatised industries (as in case of China State-owned enterprises); or allowing monopolisation of an essential facility (as in the case of Mexico Telecoms).⁷³ The World Bank and a number of commentators have studied those failures and have emphasised the importance of introducing the concept of competition as a core concept with respect to privatisation.⁷⁴

With specific reference to the concerns of this research, the author argued in Chapter 4 Section 4.2 and Chapter 5 Section 3.4 & 4.1 that the coverage of 'other entities' is one of the main concerns in the definition of a 'government entity'. 'Other entities' usually refer to the utilities and SOEs. It is, therefore, appropriate to take competition as a central criterion in assessing whether government control is effective so that it leads the entity to apply the discriminatory or preferential practice in government procurement activities like governments do.⁷⁵

It has been established in Chapter 4 Section 5.2 that GPA Parties' coverage schedules indicate the consensus to take competition as a factor to describe entities in Annex 3.⁷⁶ The author has also established in Chapter 5 Section 4.1 that there is a trend in the most recent FTAs that an SOE will not fall into free trade obligation when it operates with commercial consideration and the commercial consideration can be identified by refer to the market mechanism and competition rules.⁷⁷

⁷³ Shanker Singham, *A General Theory of Trade and Competition: Trade Liberalisation and Competitive Markets* (Cameron May 2007) 33.

⁷⁴ The World Bank working paper has shown that privatisation brings benefits if it is a part of larger programme of reforms to promote efficiency and competitive markets. Privatisation must be accompanied by competition, and competition should be set as the crucial goal of privatisation. See Sunita Kikeri and John Nellis, 'Privatization in Competitive Sectors: The Record to Date' (2002) World Bank Policy Research Working Paper 2860 20, 21.

⁷⁵ Economists have demonstrated that discriminatory and preferential government procurement measures neither reduce imports nor increase the total welfare of countries. Their simple rationale is that these measures bring advantages, either by excluding foreign suppliers or by favouring domestic suppliers, whereby the number of competitors is reduced, the competitiveness of players in the market decreases, and the advantaged suppliers have little motivation for innovation to change the distorted competition. As a result, the government procurement under this market condition is of a low level of efficiency. See the economics' literature on the discriminatory and preferential government procurement in Chapter 3, Section 4.1: Is Discriminatory Government Procurement Positive?

⁷⁶ See Chapter 4 Section 5.2. the author has reviews the GPA Parties' annex 3, it is very common to see expressions such as 'not having industrial or commercial character', 'exposed to competitive forces in the market concerned', 'competition on the market' in Parties' annex 3.

⁷⁷ See Chapter 5 Section 4, the author analysis the most recent FTA, especially the definition of SOEs in the CPTPP and USMCA, it is concluded that if SOEs take commercial activities, it will not be subject to WTO free

Specifically, concerning Annex 3 ('other entities') of the GPA, the author argues that 'competition' can be a benchmark in the assessment of whether an entity can potentially make the same distorted procurement decisions as a central or sub-central government entity. If an enterprise competes in a contestable market, it will procure from any but the most competitive seller, and it is not likely to afford the unnecessary extra cost of procurement by applying discriminatory procurement measures. Thus, a non-competitive market would seem to be a necessary condition for a distorted procurement decision. The distortion could have two sources, the *de jure* distortion, namely through government regulation, or *de facto* distortion, namely anti-competitive practices on the part of enterprises enjoying significant market power.

With regard to the source of *de jure* distortion, the exclusivity arrangement has the most apparent impact on the contestability of the market. It usually comes from government regulatory policies, such as granting special or exclusive rights in the relevant market, or the as the licensing of pharmaceutical or tobacco products, and education. Due to its distortive effect on trade, the granting of special or exclusive rights is also subject to the disciplines of Article XVII: 1(a) GATT (State trading enterprise) and Article VIII:1 GATS.⁷⁸

Besides the exclusivity arrangement, anti-competition exists when the entity enjoys significant market power. There is no need for GPA disciplines to be applied on any entity that operates under the condition of competition because it is unlikely that such an entity will distort procurement decisions or that its procurement will have a negative effect on trade. However, any entities that operate in a non-competitive environment must be disciplined by the GPA. In deciding whether an entity is competing under normal market conditions, the structure of the market is the core indicator of its contestability.

Defining the relevant product and the geographical market is a crucial prerequisite of market analysis. However, the WTO appellate body avoids references to an economist's definition of

trade obligation. in the same section, the author also find in the WTO adjudicatory report that competition could be applied to examine public sector companies, such as SOEs, State trading enterprises, and public bodies.

⁷⁸ In the first paragraph of Article XVII: 1(a) GATT 1994, 'State enterprises', are defined as 'Enterprises granted special privileges by the State' (for example, a subsidy or subsidy equivalent), and 'Enterprises granted exclusive privileges'. The GATS does not refer to State enterprise, State trading enterprises or State-owned enterprises. The only similar notions in the GATS that are related to SOEs are 'monopolies and exclusive service suppliers'. Article XXVII:(h) defines 'monopoly supplier of service' as any person, public or private, with member's authorisation, or established by the member *de jure/de facto* in the relevant market. In addition, Article VIII:1 GATS, states that the notion of monopoly suppliers covers all enterprises that have been granted special or exclusive rights. The service supply activities of those monopoly and exclusive service suppliers must subject to the GATS obligation. See analysis in detail in Chapter 5 Section 3.1 and 3.2.

the market.⁷⁹ As the definition of a ‘market’ serves to support a specific legal analysis, therefore, the legal analysis of the market must take precedence over an economic analysis.⁸⁰ For the purpose of the rule-making, the relevant market should generally be decided in legal rather than economic terms. For that reason, the Appellate Body in *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft* indicated that under the SCM Agreement, the term ‘market’ is used to refer to particular Party, even if it is clear that there is a global market for the product at issue.⁸¹ Likewise, the relevant market here generally refers to the market of the GPA Parties. When it comes to a specific context, a specific refinement should be left the Parties of a specific dispute.

Market shares of an entity and the overall level of concentration in a market are normally of use when observing the entity’s competitive situation in a market. Generally, any entities with a dominant position may exercise their market power and distort competition. If a government-controlled entity has dominant market power in a concentrated market, it is highly likely that the entity will apply discriminatory or preferential measures in making government procurement decisions under government influence, rather than making procurement decisions based on commercial considerations.

⁷⁹ The economic definition of ‘market’ is ‘the area of economic activity in which buyers and sellers come together, and the force of supply and demand affects prices’. See Report of the Appellate Body, ‘United States – Subsidies on Upland Cotton’ WT/DS267/AB/R 3 March 2005 para 408.

⁸⁰ It should also clear that a specific definition of the ‘relevant market’ should not be the objective of WTO rule-making. From the client’s perspective, the WTO rule-making could blend economic concepts to achieve security and predictability whilst avoiding circumvention, but the rules must also be sufficiently general and flexible to accommodate the real-world examples. From the perspective of the Appellate Body, data collection is a problem for the WTO’s evidence-intensive economic analyses. From the perspective of the complainant Member, when a breach of a national treatment obligation is shown, the complainant would prefer a general legal rule rather than an overly specific rule with a requirement of economic evidence. From the third party’s perspective, the more a legal approach demands facts and evidence, the more likely it is that a third party may join the case or voice another complaint proceeding from the facts. Keeping this balance in mind, the author of this research will not simply use the economic terms, such as ‘market and competition’ as a general proxy, while leaving the economic analysis to the adjudicators. For further reasons why a legal rule with facts is more desirable than a specific economic criteria in WTO rule-making, see James Flett, ‘The Client’s Perspective’ in Marion Jansen, Joost Pauwelyn and Theresa H Carpenter (eds.) *The use of economics in international trade and investments Disputes* (Cambridge University Press 2017) 83-97.

⁸¹ SCM Agreement, Article 6.3(a) (The Market of the Subsidizing Member), and Article 6.3(b) (A Third Country Market). Report of the Appellate Body, ‘European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft’ WT/DS316/AB/R 18 May 2011 para 1117. The appellate body put it that ‘The manner in which the geographic dimension of a market is determined will depend on a number of factors: in some cases, the geographic market may extend to cover the entire country concerned; in others, an analysis of the conditions of competition for sales of the product in question may provide an appropriate foundation for a finding that a geographic market exists *within* that area, for example, a region. There may also be cases where the geographic dimension of a particular market exceeds national boundaries or could be the world market, even though Articles 6.3(a) and 6.3(b) would focus the analysis of displacement and impedance on the territory of the subsidizing Member or third countries involved.’

Under this rationale, public monopolies or entities that have a dominant market position in a highly concentrated market have a motivation to compete in the market;⁸² whereas a publicly controlled or publicly influenced entity operates in a highly concentrated market, and it is presumed that it does not compete in the market. The higher the concentration, the less the possibility that the entity competes in the market, and the higher the possibility that government control or influence can lead the entity to apply a discriminatory procurement policy.

To take the utility market as an example: because it is characteristically a network industry, the utility market is usually concentrated to have a large-scale economic effect. As a result of the market concentration, the competition in the utility market is unlike that of other private markets. Moreover, since the utilities serve the public interest, governments often maintain a certain degree of control or influence on the utility operators through public ownership, price-control, licensing, and so forth, in order to safeguard their functioning.⁸³ Therefore, as that degree of regulation limits access to the utility market, which means limit the possibility of introducing more competitors, the author argues that utility operators should be covered under the GPA.

An illustration of the extension of procurement rules to the utility sectors is presented by the EU, which regulates that regime through the Directive 2014/25/EU (as discussed in Chapter 6 Section 4.2.2). As discussed in Chapter 6 Section 4.2.1, due to the market concentration in the utility industries and the promotion of fair competition,⁸⁴ Directive 2014/25/EU specifically subjects the procurement in utility sectors by public undertakings and undertakings with special or exclusive rights to a non-discrimination obligation. This argument can also find supporting

⁸² In a high market concentration scenario, the dominant entity, which has a bigger market share, has much greater leeway to make irrational procurement decisions, because it faces little competitive pressure from its smaller competitors. See Mathieson (n 66) 263.

⁸³ For example, in Canada, the postal service and the production and distribution of electricity are operated by a Crown Corporation which is regulated by an independent administrative agency, and the postal service is regulated by federal government. See Treasury Board of Canada Secretariat, 'Review of the Governance Framework for Canada's Crown Corporations Meeting the Expectations of Canadians' (2005) <<https://www.tbs-sct.gc.ca/report/rev-exa/gfcc-cgse-eng.pdf>>. Edward M Iacobucci and Michael J Trebilcock, 'The Role of Crown Corporations in the Canadian Economy: An Analytical Framework' (2012) the School of Public Policy Research Papers No. 12-9 March 2012 26. For critics of the reform of the Canadian utility regulations, see Jean-Thomas Bernard, Mohamed Nouhi and Michel Roland, 'Impact of Regulatory Agencies on the Efficiency of Publicly-Owned Utilities' Université Laval Département d'économie Economic Papers 1999 1.

⁸⁴ Many utilities started off as government department or agencies. Some governments created government corporations with considerable government investment. Owing to their close relationship with government, utilities markets are assumed to be highly non-competitive, and unlike other private markets. As a result, the utilities operators have a degree of market dominance. See Chapter 6 Section 4.2.1 on why utilities are regulated. See also Heike Schweitzer, 'Services of General Economic Interest: European Law's Impact on the Role of Markets and of Member States' in Marise Cremona (ed.), *Market Integration and Public Services in the European Union* (Oxford University Press 2011) Chapter 2.

evidence in the entity coverage schedules of other GPA Parties, such as Liechtenstein and Montenegro.⁸⁵

Another condition for the invocation of the GPA obligation for procurement is that the procurement of the non-competing entity must be larger than the domestic supply in the non-discriminatory equilibrium. Under this condition, shifting the procurement of this non-competing entity towards domestic suppliers (by exclusionary or preferential government procurement measures) may have a trade effect, namely by increasing domestic supply and reducing imports. In Chapter 3, the economic analysis of Robert and Baldwin demonstrated that when government demand does not exceed domestic supply, and when domestic products and foreign suppliers are perfect substitutes for one another in a perfectly competitive market, the government needs to import from a foreign supplier. In this situation, excluding imports for domestic supply is merely a process of replacement (i.e., government imports are replaced by private imports). Therefore, if the procurement demands are smaller than domestic supply, discriminatory government procurement does not distort. The conclusion also applies to the situation when the procurement can also find supply from a foreign oligopoly, and when the domestic supply and foreign supply is heterogeneous.⁸⁶ Thus discriminatory government procurement would have a trade distortion effect, which of concern to the GPA.

7.6. Conclusion

In the late 1930s, Carl Schmitt observed that there are two great dualisms in modern legal systems: the dualism of international law and domestic law, and the dualism of public law and private law. The second dualism has a profound impact on the understanding of the fundamental concepts in law, such as the States, governments, government bodies, enterprises, and so forth. The author will argue that the line between the public and the private is blurring and that a black-or-white division between the public and the private does not facilitate GPA

⁸⁵ The EU, Liechtenstein, and Montenegro state in the notes that even though an entity was generally a public body, if its procurement in pursuit of listed activity was *exposed to competitive forces in the market concerned*, the public body shall not be covered by the GPA. See the footnote 1 of Annexes 3 of the EU, Liechtenstein and Montenegro. See also Chapter 4 Section 4.2 Competition Doctrine.

⁸⁶ See the detailed analysis in Chapter 3 Section 4.1.1 and footnotes 134, 135 and 136 of Chapter 3. For an economic analysis of the first situation, see Robert E Baldwin and J David Richardson, 'Government Purchasing Policies and NTBs, and the International Monetary Crisis' in HE English and Keith AJ Hay (eds.), *Obstacles to Trade in the Pacific Area: Proceedings of the Fourth Pacific Trade and Development Conference* (Carleton School of International Affairs 1972) 253. For analysis of the situation of foreign oligopoly and the situation of heterogeneous supply, see Kaz Miyagiwa, 'Oligopoly and Discriminatory Government Procurement Policy' (1991) 81 American Economic Review 1320. Florence Naegelen and Michel Mougeot, 'Discriminatory Public Procurement Policy and Cost Reduction Incentives' (1998) 67 Journal of Public Economics 349.

accession negotiations on entity coverage. A teleological division between the public and the private, however, would help to include an optimum number of entities to fulfil the aims and purpose of the GPA.

The public and private divide dualism debate is based on the theory of the State and evolved with the changing importance of the market in national society. In the 19th century, the public realm was distinguished as a portion carved out from the private, because, at that time, the society operated mainly through reliance on the market mechanism. Nowadays, the State trusts, invests in and cooperates with the private sector in diverse ways. More liberal economic regulation affords the possibility of breaking down the wall between the public and the private and of creating significant forms of interconnection and interdependencies between the two. As a result of interconnections and interdependencies between the public sectors and the private sectors, the dualism is now more commonly understood as an attempt to separate private law from the rest of the law (public law) (in contrast to the dualism of earlier legal discourse, in the role of public law was central).

A re-examination of the division between public and the private is necessary to the provision of different legal regimes for the performance of public functions and the orderly conduct of private activities. The distinction between the public and the private is also a central issue under WTO law because the GPA rules only apply to procurement by ‘government entity’. Are SOEs or State-invested enterprises or banks to be considered as ‘government bodies’? In order to answer this question, and to ensure the effective application of the GPA, we need to decide on the determinative criteria, since the distinction between the public and the private is of primary concern.

The blurred dividing line between the public and the private has also been shown to exist in the context of WTO law. Firstly, because the basis on which the WTO was established has changed, due to the privatisation trend in the 1990s and the emergence of state capitalism after 2008. Secondly, because the WTO adjudicatory body relies heavily on the principle of State responsibility and attempts to attribute responsibility to non-State actors as instrumentalities of the State, however, the principle of State responsibility in Article 5 of the International Law Commission does not serve the purpose of identifying the scope of a ‘government entity’. It deals only with situations in which entities exercise governmental authority or in which State enterprises have been privatised but retain public or regulatory functions.

WTO is a consensus-based trade forum. The difficulty with the public-private division is that there is no consensus among the WTO members on the appropriate contours of the public-private relationship. The absence of consensus is due to the diversity of the legal and institutional bodies among the members. It can be argued, therefore, that a clear and uniform division between the public and the private would not mitigate the divergence, but would instead increase the difficulty of consensus and heighten the possibility of disputes.

The division of the public and the private, therefore, is contextual and has the purpose of solving problems in a specific context. A sharp and precise line drawn between the two is of no use in solving problems that arise, and it is in any case impossible to draw such a line.

In order to meet the challenge of the growth of newly constituted international competitors, such as State-owned enterprises and Sovereign Wealth Funds, international regulation must build on a consensus of core concepts or standards that reflect the *status quo* of global economic regulation. Specifically in the field of international regulation on government procurement market, the definition of ‘government entity’ must take into account the fact that State-owned enterprises are growing in the international government procurement market; thus, in order to have a comprehensive coverage of international government procurement market regulation, the GPA has to take a transnational approach to define ‘government entity’. The transnational approach can harmonise and overcome the national-international divide to defining what ‘government entity’ is for GPA application based on the common denominator of national rules on government bodies so that the definition can serve the purposes of the GPA while respecting the national laws of the GPA Parties. Therefore, the definition must cover those entities that may distort the procurement decision and engender adverse trade effects.

The defining work must base on the two principles. Under the guidance of transnationalism, the definition must encompass the wide variety of national economic structures. Meanwhile, under the principle of functionalism, the definition must not be a formal public law concept that exists in any specific legal tradition; instead, it should be established to capture entities that may procure by applying discriminatory practices.

It is predictable that in the foreseeable future, the GPA cannot turn to a multilateral agreement applies to all WTO members due to lacking a broad and deep consensus on some key issues, of which a definition of ‘government entity’ is one pivotal concern. As the author has argued throughout the thesis, the current plurilateral approach to the entity coverage of the GPA must

be improved, to achieve trade liberalisation in the international regulated procurement market. Therefore, the author recommends that to improve the current problematic approach on entity coverage in the GPA; we should introduce a harmonised normative definition of ‘government entity’, and, in particular, a harmonised understanding of ‘other entities’. However, there is always divergence regarding a harmonised approach for the GPA entity coverage. With regards to WTO rule-making, if lacking consensus and the divergence seem almost irreconcilable (for example, in some trade topics, such as E-commerce, fishery subsidies, agriculture, and so on), then, in order to obtain further trade liberalisation, buffering/escape-clause mechanisms would be beneficial in achieving agreement. Specifically, regarding the GPA entity coverage issue, it is recommended that the general criteria should include a ‘justification’ clause in the definition of ‘government entity’ which would exclude entities that did not breach the non-discrimination obligation under the GPA. The ‘justification’ included in the definition of ‘government entity’ would accommodate new members with large State-owned enterprise or sizeable Sovereign Wealth Funds or other similar kinds of large public-private mixed entities, based on a case-by-case study of their effects on trade.

As there should always be a legislative purpose guiding rule-drafting, it is indispensable to understand the purpose of subjecting ‘government entities’ to GPA obligation. There is no doubt that both the WTO/GPA and the EU procurement laws aim to eliminate trade barriers. The author argues, however, that they are **on the interface** of trade-rules and competition rules, and that competition law should be introduced into the rule-making process, for example, by assessments of the contestability of the market. There are signs of this in both the WTO and EU legal systems. For example, in the EU context, both Internal Market rules and Competition rules are convergent under the goal of liberation of economic forces in the Internal Market. This conclusion can also apply to the GPA regime. In the new economic context, upholding liberalisation and the non-discrimination principle is compatible with the pursuit of competition. Trade rules and competition rules could be applied consistently for the same purpose since they are not in conflict. Trade rules could introduce some competition rule methods. In the next section, the author will introduce competition law elements into the GPA definition of ‘government entity’ to avoid the over-inclusion of entities that compete under normal market condition, thereby not setting trade barriers in the international government procurement market.

The author proposes a conceptual framework to describe the features of a government-controlled, non-competing entity, as a reference for future GPA accession negotiations. Firstly, it is proposed that the definition of ‘government entity’ will formulate a general scope, by which all entities under government control are encompassed within the non-discrimination obligation. The scope must be defined from *multiple dimensions of* political authority, rather than taking only one quality (such as legal status) as the core judging basis. The absence of an expressed legal status or statutory delegation of government authority does not necessarily preclude a finding that an entity is a public body or a government body, and the existence of government control can be identified from both the external tier and internal tier of the entity. The external tier refers to aspects of **legal statutes, hierarchical or bureaucratic supervision by governments, public financing; and provision of public goods**, whereas the internal tier refers to the aspects of **freedom of management and appointment of personnel**.

It is easy to recognise the existence of ‘government control’ from the above factors but, under the GPA obligation the simple existence of control of an entity does not suffice, because it is also necessary to prove that there is a causal link between the control and the loss of commerciality, and consequently an inability to compete under normal market conditions. The competition paradigm is an accredited proxy frequently used to examine the economic effects of public or political influence over an entity. For that reason, the author argues that it is appropriate to take competition as a central criterion in an assessment of whether government control is sufficiently effective to lead the entity to apply discriminatory or preferential practices in government procurement activities. The WTO adjudicatory bodies have also advanced the argument that the obligation of SOEs must be decided based on an assessment of its ‘commercial consideration’, which means that SOEs avoid falling under the WTO obligation only when they do not compete in the market.

If an enterprise competes in a contestable market, it will procure from any but the most competitive seller, and it is not likely to afford the unnecessary extra cost of procurement by applying discriminatory procurement measures. Thus, a non-competitive market would seem to be a necessary condition for a distorted procurement decision. The distortion could have two sources: *de jure* distortion, namely government regulation; or *de facto* distortion, namely anti-competitive practices by enterprises enjoying significant market power. In WTO law, the exclusivity arrangements of government, such as the grant of special or exclusive rights, have been recognised as a source of distortion. It is submitted that any entity granted an exclusivity

arrangement is presumed not to compete in the market and is to be regarded as a 'government entity' for GPA application.

A second criterion for identifying a non-competing entity is by establishing whether a government-controlled or governmentally-influenced entity is enjoying a monopoly or a dominant market position in a highly concentrated market. If a publicly controlled or influenced entity operates in a highly concentrated market, it presumably does not compete in the market. The higher the concentration, the smaller the possibility that the entity competes in the market, and the higher the possibility that the government control or influence can lead an entity to apply a discriminatory procurement policy. Utility entities offer a typical example of this situation.

Another condition should be considered when invoking the GPA obligation: it is that the procurement of the non-competing entity must be larger than the domestic supply in the non-discriminatory equilibrium. Shifting the procurement of this non-competing entity to domestic suppliers (by exclusionary or preferential government procurement measures) would increase domestic supply and reduce imports.

CHAPTER 8 CONCLUDING REMARKS

This thesis, as its title implies, has been an attempt to define the entities that are subject to the GPA. The author finds it useful to repeat the research question and the comparative method before considering briefly, what the results of this research are.

As highlighted in chapter 1, the motivation for this research came from the concern of the absence of a definition relating the GPA entity coverage, and investigation of what consequences such an absence brings to the GPA expansion. Chapter 1 also noted that a useful direction for investigation the GPA entity coverage is to look at a procurement regime that has considered and addressed the issue. The thesis selected the EU procurement directives to consider its definition approach. This choice is based on the fact that the EU procurement directives have experienced reform and refinement and elaborated a normative approach to defining entities covered by the regime. Although operating at different levels, one international and the other supranational, it was determined that the EU procurement regime is a suitable comparator with the WTO/GPA, because of the common aims and purpose underpinning the WTO and the EU legal systems. This is further reinforced by the historical linkage between the EU procurement directives and the evolution of the GPA (as discussed in Chapter 4 Section 2).

With the above observation, the central research question was formulated as *how to define 'government entities' covered by the GPA?* In order to answer this question, the author examines three subsidiary questions, namely: 'how is government control to be defined?' 'how is competition in the market is to be identified?' and 'what is the relationship between 'government control' and 'competition?'

In answering the central question, this thesis proposed that the legal definition of the 'government entity' in the context of the WTO/GPA should encompass all entities that are substantially under government control or is effectively influence by. This is the general scope of 'government entity'. However, if the 'substantially government-controlled or -effectively influenced' entity is exposed to market competition without the effect of trade barriers, the entity should be excluded from GPA application scope (as concluded in Chapter 4 Section 5, as well as elaborated in Chapter 7 Section 4). This conclusion is made based on the study of the analysis of the GPA text and Parties' coverage schedules (Chapter 4 Section 5), as well as

to incorporate flexibility in the definition to facilitate the GPA expansion.(as elaborated in chapter 7 Section 3 and 4).

On the question, ‘how is government control to be defined?’ As advanced in chapter 7 Section 5.1.1, based on the existing international government procurement regulations, the author proposed that government control can be recognised from both the internal and external relationship between the entity’s activity and the government intervention, such as perspectives of the financial sources, the purpose of the transaction, and appointment of board of directors.

Concerning the question, ‘how is competition in the market to be identified?’ As advanced in chapter 7 Section 5.2, this thesis proposes that the assessment of competition can refer to the examination of the market structure where the entity operates and the market power of the entity. In the scenario of a highly concentrated market, if the entity enjoys a dominant market position, the entity is presumed not likely carrying activities under competition consideration and should be covered by the GPA. In a scenario of a contestable market, if the entrance to the market is controlled by governments (for example, by granting special or exclusive rights), the market is presumed not competitive, thus, in such a market, an entity also not likely carries out activities competing for commercial purpose as other profit-driven market players do, and thus should be covered by the GPA.

On the third subsidiary question, ‘what is the relationship between government control and competition?’ This question is answered in chapter 6, Section 4.1.2.5 and 4.2. The author submitted that there must be an immediate and decisive causation link between the ‘government control’ over the entity and the risk of competition distortion. Namely, only when an entity carrying out activities, not in competition with other market players is the result out of the government control or influence over the entity, the entity will be covered by the GPA.

While it is argued that in the near future, the GPA negotiation will still progress based on power-driven approach, the contribution which this thesis makes to both current and future developments, is that with its proposal on the entity coverage issue would offer a conceptual framework for the GPA parties to have as a minimum consensus on what entities should be within the GPA coverage regime based more on definite rules around government control and market participation rather than on the negotiating power of the Party. This idea can be developed into more detailed by providing a benchmark for outline features and criterion that can be used for negotiations on entity coverage.

In the final summation, as the question of defining government entity is a recurring question in the WTO law, the thesis hopes that its approach has offered some directions based the need for legal certainty on the issue for current and prospective WTO/GPA Parties on this debate. As a minimum, it anticipates that the research has raised the need for further research and new perspectives on the unresolved issue of ‘what is a government entity under the WTO/GPA’ and ‘what mechanism can best address this determination beyond the current list approach based on negotiation power of a current or prospective GPA Party.

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