

Working Party on GATS Rules

MAIN APPROACHES TO THE UNDERTAKING OF COMMITMENTS ON GOVERNMENT PROCUREMENT IN ECONOMIC INTEGRATION AGREEMENTS: SUMMARY OBSERVATIONS

Note by the Secretariat¹

I. INTRODUCTION

1. At the Working Party's meeting of 20 September 2004, the Secretariat was asked to prepare a Note summarizing main approaches taken in economic integration agreements with respect to commitments on government procurement, including scheduling issues. The summary observations in the next section were prepared after examining the relevant provisions in the economic integration agreements (EIA) reviewed in S/WPGR/W/49.² Part II is thus not intended to provide a description of approaches followed in each agreement, but to highlight some of the main trends. Further details on the scope of particular agreements, or their annexes, might best be provided by parties to such agreements.

II. SUMMARY OBSERVATIONS

A. GENERAL STRUCTURE

2. At the outset, it should be pointed out that government procurement provisions in EIAs typically do not refer to such terms as commitments or schedules, which are used in the GATS. Rather, the application of liberalizing obligations (e.g., the sectors to which they apply) is generally determined by the Article relating to the scope or coverage of the whole set of government procurement provisions. In most agreements, the scope and coverage (e.g., in terms of thresholds, sectors, procuring entities) is further defined through annexes.

3. Both goods and services are included within the scope of the government procurement provisions of all agreements reviewed.³ Relevant obligations (non-discrimination, award procedures, etc.) typically apply across the sectors covered, although a few exceptions exist in specific cases.⁴

¹ This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

² See Table 1 on page 5 of S/WPGR/W/49. With respect to the EC, this Note focuses, unless indicated otherwise, on the recent EC Directive 2004/18/EC. Given their close relationship with EC Directives, the EEA and the Europe Agreements with Bulgaria and Romania are not examined in Part II.

³ While EC Directive 2004/18/EC has broader coverage, EC Directive 2004/17/EC applies specifically to contracts awarded by entities in such sectors as water, energy, transport and postal services sectors. Such contracts can, however, involve the supply of goods or services.

⁴ For example, the EC Directive sometimes make distinctions (e.g., Article 31 "Cases justifying the use of the negotiated procedure without publication of a contract notice").

B. SERVICES COVERED

4. Most agreements specify, in an annex, the service sectors that are subject to procurement provisions. While the EFTA-Mexico, EC-Mexico, EC-Chile and EFTA Agreements, as well as the EC Directive, list the service sectors that are covered (i.e., positive-list approach)⁵, the NAFTA, US-Chile and US-Singapore Agreements use a negative-list approach (i.e., all relevant service sectors are covered except those listed). The Japan-Singapore Agreement specifies that all services listed in each country's relevant GPA annex (which is based on a positive list of services sectors for these countries) are covered except for certain sectors which are mentioned in its annex. The Republic of Korea-Chile Agreement provides that all service sectors referred to in the Services Sectoral Classification List (MTN.GNS/W/120) are covered. Other agreements do not have country-specific annexes specifying sector coverage.

C. ENTITIES COVERED

5. Most agreements limit the scope of the provisions to procurement by specified entities. The relevant lists are often structured by type of entity, e.g., central government entities, sub-central government entities, government enterprises. In addition, the annexes on entities in the US-Singapore and Japan-Singapore Agreements refer to entities included in relevant annexes of the Government Procurement Agreement (GPA), which also follow a positive-list approach. In contrast, the Chile-El Salvador and Chile-Costa Rica Agreements use a negative-list approach. The Australia-New Zealand and New Zealand-Singapore Agreements do not contain lists of entities; the entities covered are those captured by the definition of government procurement.⁶ The definition of contracting authorities in the EC Directive includes, in addition to State, regional or local authorities, bodies governed by public law, which themselves are further defined (see Article 1(9)). A non-exhaustive list of bodies and categories of bodies governed by public law is annexed to the Directive.

D. THRESHOLDS

6. Agreements also typically limit the scope of the provisions to procurement above a certain threshold value. Thresholds often differ between types of entity (e.g., central government entities versus sub-central government entities) and also vary between goods, construction services and other services (thresholds are generally higher for construction services than other services). Apart from construction, however, agreements do not have different thresholds across services sectors or similar types of entities. The Australia-New Zealand, Singapore-Australia, Chile-Costa Rica and Chile-El Salvador are the only agreements that do not have specific thresholds.

E. CLASSIFICATION

7. Agreements that include lists of service sectors (either those covered or those excluded) tend to make reference, at least in part, to either the provisional CPC and/or the Services Sectoral Classification List. Exceptions are the NAFTA (where the US and Canada refer to the Common Classification System)⁷ and the US-Chile Agreement (where the Common Classification System is used by both signatories).

⁵ While the EC-Chile Agreement uses a positive list approach for the EC, the relevant annex for Chile's sectoral coverage provides that no services from the universal list of services (W/120 and relevant CPC categories) are excluded.

⁶ Article 48(e) of the New Zealand-Singapore Agreement and clause 1(e) of the Australia-New Zealand Government Procurement Agreement (Revised 1997).

⁷ See Appendix 1001.1b-2-B of Annex 1001.1b-2 of NAFTA for more information. For construction services, the Common Classification System is based on CPC Division 51. Mexico's temporary schedule of services refers to the CPC. Canada's schedule refers to the Common classification system, but notes that the appropriate CPC definitions will continue to be applied until such time as definitions under the NAFTA classification system are mutually agreed upon.

F. COUNTRY-SPECIFIC RESERVATIONS

8. While the agreements reviewed do not provide for the inscription of limitations or reservations to particular liberalization obligations, many provide for country-specific exclusions from the coverage of the set of provisions. These typically take the form of Notes in annexes, which typically exclude, for example, certain forms of procurement or certain services. They do not specifically permit price preferences or other discriminatory measures, although Mexico has reserved certain rights in that regard in the agreements to which it is party. The extent to which country-specific derogations are included in agreements might depend on the scope of common exceptions or derogations that parties have agreed to (typically found in the text of the agreement), as well as on the comprehensiveness of an agreement.

9. Examples of country-specific derogations include: (a) a derogation regarding contracts for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time (for EFTA States in the EFTA Mexico Agreement); (b) a derogation allowing Mexico to impose certain local content requirements for particular types of projects (in NAFTA, the EFTA-Mexico, and EC-Mexico Agreements); (c) a derogation for contracts awarded under an international agreement and intended for the joint implementation or exploitation of a project by signatory States and for contracts awarded under the particular procedure of an international organization (for EFTA States in the EFTA-Mexico Agreement); and (d) a derogation for set asides for small and minority businesses (for the US and Canada in the NAFTA).

G. MODAL COVERAGE

10. The agreements reviewed generally do not make distinctions between different modes of supply. The only mode-specific derogations that could be identified in the context of this study are the following: Article 16.02(4)(c) of the Chile-El Salvador and Chile-Costa Rica Agreements which exclude cross-border financial services from the chapter's coverage; and Article 2(2)(e) of Chapter 6 of the Singapore-Australia Agreement which excludes from coverage the procurement of goods and services outside the territory of the procuring Party, for consumption outside this territory.
