



GW Law Faculty Publications & Other Works

Faculty Scholarship

2023

Deploying the WTO Agreement on Government Procurement (GPA) to Enhance Sustainability and Accelerate Climate Change Mitigation

Robert D. Anderson

Antonella Salgueiro

Steven L. Schooner

George Washington University Law School, sschooner@law.gwu.edu

Marc Steiner

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications

 Part of the [Law Commons](#)

Recommended Citation

32 *Public Procurement Law Review* 223 (2023)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

Deploying the WTO Agreement on Government Procurement (GPA) to Enhance Sustainability and Accelerate Climate Change Mitigation

Robert D. Anderson*

Antonella Salgueiro**

Steven L. Schooner***

Marc Steiner****

☞ Climate change; International trade; Public procurement; World Trade Organization

Abstract

Mitigating climate change and promoting sustainability are defining challenges of our time. Public procurement has a vital role to play in responding to the current crises. This article makes the case that the World Trade Organization's (WTO) Agreement on Government Procurement (GPA), and specifically the Work Programme on Sustainable Procurement that has been initiated pursuant to the Agreement, can serve as important instruments to promote sustainable approaches to public procurement internationally, consistent with the goals of climate change mitigation. The Work Programme, which was established at the time of the GPA's modernization in 2012 and on which important work has already been done but which has recently been relatively dormant, mandates the Organization's Committee on Government Procurement to study, inter alia, "the ways in which sustainable procurement can be practiced in a manner consistent with Parties' international trade obligations" and to prepare a report that sets out best practices concerning relevant measures and policies. This provides an essential and attractive platform for responding to the crisis. The article sets out important related background, including with respect to: (i) a "change of mindset" with respect to environmental sustainability which is already embodied in the amended GPA text adopted in 2012; (ii) existing GPA provisions that provide windows of opportunity for the advancing of related objectives; and (iii) importantly, ongoing developments in key GPA Parties and at the international level that both: (a) point the way toward meaningful change; and (b) suggest, in our view, a need for a modest degree of international coordination to avoid conflict and ensure continuing market

* Honorary Professor, School of Law, University of Nottingham (UK) and formerly Senior Counsellor and Team Leader for Government Procurement and Competition Policy, World Trade Organization (WTO) Secretariat, Geneva, Switzerland, RobertDAnderson54@gmail.com.

** Attorney and former WTO Young Professional, Government Procurement and Competition Policy Division, World Trade Organization (WTO) Secretariat, antonella.salgueiro@icloud.com.

*** Nash & Cibinic Professor of Government Procurement Law, The George Washington University Law School, sschooner@law.gwu.edu.

**** Judge at the Swiss Federal Administrative Court, and formerly expert of the Committee on the Internal Market and Consumer Protection of the European Parliament, marc.steiner@bvger.admin.ch.

An early version of this article was presented at the Conference on Energy, Sustainability, and International Economic Law sponsored by the International Economic Law Interest Group (IECLIG) of the American Society of International Law, at Texas A&M Law School, Fort Worth, Texas, on 22–24 September 2022. Helpful comments received at the conference and related conversations with Sue Arrowsmith, Anna Maria La Chimia and Christopher Yukins are gratefully acknowledged.

openness. These developments portend a rich agenda of possibilities for further discussions in the WTO Work Programme.

I. Introduction: envisioning a role for the WTO Agreement on Government Procurement (GPA) in promoting sustainability and climate change mitigation

Mitigating and adapting to climate change are rapidly evolving into defining challenges of our time. As observed by Hoesung Lee, Chair of the United Nations Intergovernmental Panel on Climate Change (IPCC):

The cumulative scientific evidence is unequivocal: climate change is a grave and mounting threat to human wellbeing and the health of the planet We are not on track to achieve a climate-resilient sustainable world [Climate] change is intersecting with a number of other challenges including biodiversity loss and inequity to increase threats to ecosystems and people [Exceeding] warming of 1.5°C, even temporarily, will result in additional severe impacts, some of which are irreversible. Urgent action is required to adapt to climate change at the same as making rapid deep cuts in greenhouse gas emissions.¹

Multiple extreme heat waves in India and Pakistan² in addition to many other countries, and deadly flooding in diverse regions of the world,³ highlight the gravity of the situation and the resulting burdens that are likely to fall on countries that are least able to absorb them.⁴

Public procurement—the purchasing by governments from non-governmental sources of goods, services, and public works—can play a central role in responding to the current crises.⁵ Because public procurement constitutes on the order of 13–15% of gross domestic product (GDP) worldwide,⁶ how states choose to conduct procurement has an appreciable impact on the global sustainability agenda. Equally, public procurement is directly implicated in many of the actions necessary for the world to respond to and (to the extent possible) mitigate climate change and related ecological disasters. Sustainable procurement’s scope is broad, varied, and rapidly expanding, including not just obvious investments, such as erecting wind turbines to facilitate a transition to green energy sources; increasing access to electrical charging facilities for the emerging new generation of automobiles; expanding mass transit cycling and other infrastructure; and building seawalls and upgrading sewer systems to deal with the (rapidly) rising sea level; but a dizzying array of related activities, such as rethinking food and diet, streamlining and shortening inefficient and vulnerable supply chains, seeking alternatives to single use plastics and incentivizing reuse, recycling, and composting, and the mitigation of waste and environmental degradation associated with infrastructure procurement, generally. All these elements are directly relevant to avoiding the most dire outcomes of the climate crisis for humankind.

¹“Opening Remarks by the IPCC Chair at the IPCC-SBSTA Special Event on the Working Group II Contribution to the Sixth Assessment Report” (IPCC, 6 June 2022), <https://www.ipcc.ch/2022/06/06/ipcc-chair-remarks-ipcc-sbsta-special-event-wgii-ar6/>.

²“India Heatwave: High Temperatures Killing More Indians Now, Lancet Study Finds” (26 October 2022), [bbc.com, https://www.bbc.com/news/world-asia-india-63384167](https://www.bbc.com/news/world-asia-india-63384167).

³Rebecca Hersher, “Climate Change Likely Helped Cause Deadly Pakistan Floods, Scientists Find” (19 September 2022), <https://www.npr.org/2022/09/19/1123798981/climate-change-likely-helped-cause-deadly-pakistan-floods-scientists-find>.

⁴See, Mark Nevitt, “Climate Justice and Loss and Damage in the Pakistan Flood Crisis” (2022), <https://www.lawfareblog.com/climate-justice-and-loss-and-damage-pakistan-flood-crisis>.

⁵See, e.g. Steven L. Schooner, “No Time to Waste: Embracing Sustainable Procurement to Mitigate the Accelerating Climate Crisis” (2021) 61 *Contract Management* 24; World Economic Forum, in collaboration with the Boston Consulting Group for the Mission Possible Partnership, White Paper, *Green Public Procurement: Catalysing the Net-Zero Economy* (2022); Nathaniel Green and Christopher Yukins, “Feature Comment: The Inflation Reduction Act: A New Role for Green Procurement?” (2022) 64 *The Government Contractor* 33; and Richard Baron, “The Role of Public Procurement in Low-carbon Innovation”, Background Paper for the 33rd Round Table on Sustainable Development (Paris: OECD Headquarters, 12–13 April 2016).

⁶OECD, “Government at a Glance” (Paris: OECD Publishing, 2019); World Trade Organization, “WTO and Government Procurement” (5 April 2019), https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm.

A growing body of evidence suggests that successfully avoiding imminent global climate catastrophe and transitioning to a greener future will involve significant “network effects” spanning diverse economic sectors, countries and market participants.⁷ Government investments in greener products, services and infrastructure can change behavior by stimulating markets for new solutions in line with sustainability goals, driving down prices (over time) and making relevant products more affordable for consumers generally.⁸ Public leadership, conversation and consensus building are essential.⁹ Again, procurement policy and related international discussion fora have essential roles to play.

Meeting the relevant challenges entails a major paradigm shift for (often already overworked and under-resourced) public procurement agencies and professionals. As one of us has observed, the profession must:

“... rethink the value proposition, particularly with regard to factoring in the social costs of continuing to rely on solutions that generate greenhouse gasses (GHGs) with regard to public health, our quality of life, national security, and global stability. We need to think in terms of life-cycle cost (or total cost of ownership) analysis, which accounts for externalities or effects such as the social cost of GHGs—rather than focusing on and celebrating low purchase prices.... Ultimately, we need acquisition professionals to apply their considerable knowledge, expertise, energy, ingenuity, and public service ethic to help governments adapt to, and mitigate the harms associated with, climate change.”¹⁰

While individual states must prepare for the expected adverse outcomes, meaningful mitigation of climate change and the promotion of environmental sustainability in the global commons also requires collective action by governments on an unprecedented scale.¹¹ In many respects, relevant work is already under way.¹² For example, the UN Conference(s) of the Parties (COP) have played a crucial role in international efforts to set limits on greenhouse gas emissions—notwithstanding that the results achieved thus far have fallen well short of what is needed.¹³ Such limits do not constitute public procurement policy as such; still, procurement policy and implementation can contribute importantly to their successful achievement.

More than a generation of experience suggests, in any case, that international cooperation in the domain of public procurement policy itself can play a vital role in global government action to mitigate climate change and enhance sustainability. The 2030 Agenda for Sustainable Development recognizes the determination of UN Member states to “take the bold and transformative steps which are urgently needed to shift the world onto a sustainable and resilient path”. Goal 12.7 specifically aims to “promote public procurement practices that are sustainable, in accordance with national policies and priorities”.¹⁴ Beyond this, across the developing world, governments have drawn upon the United Nations International Trade

⁷ As just one example, a systematic transition to electric vehicles by consumers is likely to require massive investment by governments in charging stations.

⁸ Examples include public investments in bicycle infrastructure in the Netherlands, the coming offering of free train service to particular classes of consumers in Spain and public investments in bike-sharing facilities in cities from Paris and Rome to Washington, DC. (“As of 2021, there were over 3,000 [bike sharing] programs across the world and that number has continued to grow”). See, e.g. Katerina Im, “Bikeshare Around the World” (30 July 2022), <https://gobiki.org/biki-leaks/bikeshare-around-the-world/>; see also, PBSC Urban Solutions, “The Meddin Bike-Sharing World Map” (27 October 2021), <https://www.pbsc.com/blog/2021/10/the-meddin-bike-sharing-world-map>, full report (Mid-2021 Report, October 2021), https://bikesharingworldmap.com/reports/bswm_mid2021report.pdf.

⁹ See, generally, Katharine Hayhoe, *Saving Us: A Climate Scientist's Case for Hope and Healing in a Divided World* (Atria/One Signal Publishers, 2021). See also Professor Hayhoe's TED talk, available at: https://www.ted.com/talks/katharine_hayhoe_the_most_important_thing_you_can_do_to_fight_climate_change_talk_about_it?language=en.

¹⁰ Schooner, “No Time to Waste: Embracing Sustainable Procurement to Mitigate the Accelerating Climate Crisis” (2021) 61 *Contract Management* 24.

¹¹ David Kitchen, *Global Climate Change: Turning Knowledge into Action* (Abingdon: Routledge, 2013).

¹² See, generally, UNEP, “Sustainable Public Procurement: 2022 Global Review (Parts I and II)” (16 December 2022), <https://www.oneplanetnetwork.org/knowledge-centre/resources/sustainable-public-procurement-2022-global-review-parts-i-and-ii>.

¹³ Gordon H. Hanson and Matthew J. Slaughter, “How Commerce Can Save the Climate: The Case for a Green Free Trade Agreement” *Foreign Affairs* (March/April 2023).

¹⁴ UNEP, “SDG — 12.7 Target and Indicator on Sustainable Public Procurement implementation”, <https://www.unep.org/explore-topics/resource-efficiency/what-we-do/sustainable-public-procurement/sdg-12-7-target-and-ind>.

Commission (UNCITRAL) Model Law on Public Procurement of the in framing their own national procurement laws.¹⁵ Organizations such as the World Bank, the Organization for Economic Co-operation and Development (OECD) and the European Bank for Reconstruction and Development (EBRD) are directly involved in supporting green procurement initiatives. Moreover, the World Trade Organization (WTO) Agreement on Government Procurement (GPA),¹⁶ and navigating the Agreement's accession process, are increasingly recognized as powerful tools to, and experiences that, shape national procurement policies and leverage needed reforms.¹⁷ The full potential of the latter instrument (i.e. the WTO GPA) to serve as an instrument of climate change adaptation and the promotion of sustainability remains, however, to be realised.

Beyond the urgent need to deploy every available tool (including the GPA) to encourage progress toward greener national procurement policies and climate change mitigation, international mediation, including in the WTO, is critical to avoid potentially conflicting national policies in this area.¹⁸ For example, and as will be noted below, while recent United States' (US) legislation including the "Bipartisan Infrastructure Law"¹⁹ and, especially, the "Inflation Reduction Act",²⁰ clearly embody major progress toward greater emphasis on sustainability and climate change mitigation in US public policy, their strong emphasis on Buy American and US sourcing requirements poses concerns for US trade partners and the stability of the international trading system.²¹ Ultimately, comprehensive discussions between the US and its major trade partners, including in fora such as the WTO, will be needed to ensure harmonious progress toward sustainability objectives while avoiding a clash of approaches.²²

To be clear, we are *not* suggesting that WTO rules on non-discrimination be privileged over the essential struggle to save the planet. As the Nobel Prize-winning economist, Paul Krugman, has recently observed, "We don't want to find ourselves saying, 'Well, we cooked the planet, but at least we preserved the rules of the World Trade Organization'".²³ Rather, the suggestion is that efforts are needed to ensure that progress

¹⁵ See the text of the 2012 UNCITRAL Model Law on Public Procurement, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2011-model-law-on-public-procurement-e.pdf>.

¹⁶ See the text of the 2012 Revised Agreement on Government Procurement, WTO website, available at: https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

¹⁷ As noted by Anderson and Sporysheva: "Increasingly, new GPA accession candidates [attribute] their interest in joining the Agreement by reference not only to 'mercantilist' considerations (i.e. export market opportunities) but to the utility of the GPA as an instrument for motivating, guiding and 'locking in' policy reforms and initiatives, including anti-corruption campaigns". See Robert D. Anderson and Nadezhda Sporysheva, "The Revised WTO Agreement on Government Procurement: Evolving Global Footprint, Economic Impact and Policy Significance" (2019) 28 P.P.L.R. 71. See also Robert D. Anderson and Nadezhda Sporysheva, "WTO Accession, Accession to the WTO Agreement on Government Procurement (GPA) and Economic Reform in the Eurasian Region: a Tale of Synergies" in Alexei Kireyev and Maika Oshikawa (eds), *Eurasian Perspectives on Trade and the WTO* (Cambridge: Cambridge University Press, forthcoming 2022/23); and, more generally, Sue Arrowsmith and Robert D. Anderson, (eds) *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press and the World Trade Organization, 2011).

¹⁸ The potential contribution of international trade policy to climate change mitigation is emphasised in "Integrate Trade into Climate Strategies, DG Okonjo-Iweala says at Africa Adaptation Summit" (5 September 2022), https://www.wto.org/english/news_e/news22_e/dgno_05sep22_e.htm and in Thomas Cottier, Olga Nartova and Sadeq Z. Bigdeli, *International Trade Regulation and the Mitigation of Climate Change* (Cambridge University Press for the World Trade Forum, October 2009). Surprisingly, however, the GPA and the WTO's role in public procurement are not given significant play in these sources.

¹⁹ See H.R.3684—Infrastructure Investment and Jobs Act, 117th Congress (2021–2022), Public Law No.117-58 (15 November 2021), <https://www.congress.gov/bill/117th-congress/house-bill/3684/text>.

²⁰ H.R.5376—Inflation Reduction Act of 2022, 117th Congress (2021–2022), Public Law No.117-169 (16 August 2022), <https://www.congress.gov/bill/117th-congress/house-bill/5376/text>.

²¹ As Hanson and Slaughter observe: "How Commerce Can Save the Climate: The Case for a Green Free Trade Agreement" *Foreign Affairs* (March/April 2023), "[The] Inflation Reduction Act provisions have provoked fury in many European capitals. The European Union is now claiming that several key parts of the IRA, including tax credits and subsidies, violate WTO rules on discrimination against imports. Many EU leaders are now demanding not just a WTO investigation but retaliatory measures against the United States. In December 2022, Ursula von der Leyen, the president of the European Commission, seemed to hint at a tit-for-tat response: 'We also need to act to ensure the European Union keeps its global leadership in the clean-tech sectors'. See, for further insights and background, Jean Heilman Grier, "Domestic Content Requirements: Contrasting Treatment" *Perspectives on Trade* (3 May 2023), <https://trade.djaghe.com/?p=7678>; "America's Green Subsidies are Causing Headaches in Europe" *Economist*, 1 December 2022, <https://www.economist.com/europe/2022/12/01/americas-green-subsidies-are-causing-headaches-in-europe> and Thieß Petersen and Thomas Schwab, "Europe and the IRA: How a Green Subsidy Race Could Both Help and Hurt" Bertelsmann Stiftung (24 March 2023), <https://globaleurope.eu/globalization/europe-and-the-ira-how-a-green-subsidy-race-could-both-help-and-hurt/>.

²² The relevant concerns are not at all limited to public procurement policy. See Hanson and Slaughter, "How Commerce Can Save the Climate: The Case for a Green Free Trade Agreement" *Foreign Affairs* (March/April 2023).

²³ Paul Krugman, "How to Think About Green Industrial Policy" *New York Times*, 9 May 2023, <https://www.nytimes.com/2023/05/09/opinion/climate-inflation-reduction-act-biden.html>.

on sustainability and climate change mitigation is not impeded by inefficient policy conflicts at the multilateral level. Ideally, relatively free trade in green technology—including in the area of government procurement—will expedite necessary inventions and lower the cost of green products, while fostering investment in environmental industries.²⁴

Even currently, and perhaps contrary to conventional wisdom,²⁵ the GPA does *not* constitute a significant barrier to the use of public procurement as a tool for the promotion of sustainability objectives.²⁶ Much more can, however, be done. Specifically, the *Work Programme of the WTO Committee on Government Procurement on Sustainable Government Procurement*, which was established at the time of the GPA’s modernisation in 2012 and on which important work has already done but which recently has been dormant,²⁷ mandates the Organization’s Committee on Government Procurement to study “the ways in which sustainable procurement can be practiced in a manner consistent with parties’ international trade obligations” and to identify related measures and practices. This provides an essential and attractive platform for responding to the crisis. As detailed below, a new “Transatlantic Initiative on Sustainable Trade” work programme of the European Union (EU) and the US provides new hope that related work in the WTO’s Committee on Government Procurement can now move forward with due urgency.²⁸ Additionally, experience has shown that the WTO Secretariat’s technical assistance and related programmes concerning public procurement policy and the GPA can serve as a valuable tool to facilitate informal discussions on related issues among interested officials from countries around the globe.²⁹

The remainder of this article is organised as follows: Part II briefly reviews the nature and origins of the WTO GPA, highlighting what we perceive as a paradigm shift already embodied in the 2012 revision to the Agreement. Part III examines specific provisions of the Agreement relevant to the promotion of sustainability and climate change resilience. Part IV outlines the above-mentioned GPA Work Programme on Sustainable Procurement which was mandated in the 2012 amendments to the Agreement, and which arguably provides an ideal platform for further elaboration of the Agreement as a tool of sustainability and climate change mitigation. Part V outlines related developments in the European Union, Switzerland, the United States of America and other jurisdictions that are GPA parties, and reflects on what we see as encouraging trends in addition to an evident need for a further degree of international transparency/coordination in this area. Part VI reviews other important developments at the international level, notably the above-mentioned EU-US “Transatlantic Initiative on Sustainable Trade” work programme in addition to Target 12.7 of the UN’ Sustainable Development Goals and relevant ISO International Standards. Part VII concludes with a call to action.

II. Background and progress to date: the “change of mindset” embodied in the 2012 amendments to the WTO GPA

The WTO Agreement on Government Procurement is a binding international treaty that establishes and provides support for mutual market opening, transparency, and fair procedures in the government procurement sectors of the 48 WTO member governments that are currently bound by the Agreement. The Agreement is administered by the WTO Committee on Government Procurement, a body composed

²⁴ See, generally, Hanson and Slaughter, “How Commerce Can Save the Climate: The Case for a Green Free Trade Agreement” *Foreign Affairs* (March/April 2023). As the latter observe, freer migration of workers with relevant skills is another important ingredient of the necessary solutions.

²⁵ See, e.g. Greenpeace, “How Free Trade Hypocrisies Are Hurting Our World” (2018), <https://www.greenpeace.org/international/story/15676/how-free-trade-hypocrisies-are-hurting-our-world/>.

²⁶ Marc Steiner, “The WTO Government Procurement Agreement: Assessing the Scope for Green Procurement” (2015) 9 *BIORES* 10.

²⁷ See, for pertinent details, Part IV, below, and references cited therein.

²⁸ See Part VI(c), below, and references cited therein. See also Jean Heilman Grier, “US-EU Green Public Procurement Initiative” (15 June 2023), available at: <https://trade.djaghe.com/?p=7782>.

²⁹ We say this as persons who have participated in such programmes around the globe. See also Anderson and Sporysheva, “The Revised WTO Agreement on Government Procurement: Evolving Global Footprint, Economic Impact and Policy Significance” (2019) 28 *P.P.L.R.* 71.

of the representatives of participating WTO Members and serviced by the WTO Secretariat.³⁰ The GPA is a plurilateral as opposed to a fully multilateral agreement, meaning that not all WTO members are parties to the Agreement. At present, the Agreement has 21 parties comprising 48 WTO members (the EU and its 27 Member States are formally counted as a single Party). Thirty-five WTO members/observers participate in the Committee on Government Procurement as observers to that Committee. Among these, 10 are in the process of acceding to the Agreement.

The GPA is composed of two main parts: the text of the Agreement and parties' market access schedules ("Appendix I Annexes" or "coverage commitments"). The text of the Agreement establishes rules requiring that open, fair, and transparent conditions of competition be ensured in government procurement. The market access schedules set out pertinent details concerning the parties' coverage of the Agreement, including lists of covered procuring entities at the central and sub-central government levels, other covered entities (e.g. public utilities or state-owned enterprises) and covered goods, services and construction services (public works) and relevant exceptions. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values must be conducted pursuant to the rules of the Agreement.³¹

The GPA grew out of decades of prior advocacy, experimentation and policy development, beginning with proposals for the international regulation of government procurement by an "International Trade Organization" that were championed by the United States during and in the immediate aftermath of World War II but which failed to come into force.³² An important early benchmark was the "Tokyo Round Code on Government Procurement" that was signed in 1979 and entered into force in 1981.³³ Subsequently, pursuant to negotiations held by the Code's parties, the GPA 1994 was signed in Marrakesh on 15 April 1994 and entered into force on 1 January 1996. The GPA 1994 fleshed out the rules of the Tokyo Round Code and expanded significantly upon the Code's scope of application, to cover services as well as goods and procuring entities at the sub-central in addition to the central government level.³⁴

The current (2012) version of the GPA marked a significant further evolution of the Agreement.³⁵ In addition to multiple textual changes intended to streamline and modernise the text to adapt it, for example, to the widespread use of e-procurement tools, the revised Agreement embodied a significant expansion of the parties' market access commitments. Furthermore, significant new weight was placed on 'good governance' objectives relating to the prevention of conflicts of interest and corrupt practices.³⁶ Moreover, and directly relevant to the themes of this article, specific new language was incorporated in the Agreement relating to the protection of the environment.³⁷

³⁰ See the text of the 2012 Revised Agreement on Government Procurement, WTO website, available at: https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

³¹ See the text of the 2012 Revised Agreement on Government Procurement, WTO website, art.II, available at: https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

³² See Annet Blank and Gabrielle Marceau, "The History of the Government Procurement Negotiations Since 1945" (1996) 4 P.P.L.R. 77 and Robert D. Anderson and Sue Arrowsmith, "The WTO Regime on Government Procurement: Past, Present and Future" in Arrowsmith and Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (2011), Ch.1, pp.3–58.

³³ See Blank and Marceau, "The History of the Government Procurement Negotiations Since 1945" (1996) 4 P.P.L.R. 77 and Anderson and Arrowsmith, "The WTO Regime on Government Procurement: Past, Present and Future" in Arrowsmith and Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (2011), Ch.1, pp.3–58.

³⁴ See Anderson and Arrowsmith, "The WTO Regime on Government Procurement: Past, Present and Future" in Arrowsmith and Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (2011), Ch.1, pp.3–58.

³⁵ See Robert D. Anderson, "The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement: What it Means for the Agreement and for the World Economy" (2012) 21 P.P.L.R. 83; Robert D. Anderson, Steven Schooner and Collin Swan, "Feature Comment: The WTO's Revised Government Procurement Agreement: An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets" (2012) 54 *The Government Contractor* 1–6; and Marc Steiner, "The 2012 Revision of the WTO Government Procurement Agreement" (Elgar Online, 2017), <https://doi.org/10.4337/9781784713546.234>.

³⁶ See, for elaboration, Robert D. Anderson and Anna Caroline Müller, "The revised WTO Agreement on Government Procurement (GPA): key design features and significance for global trade and development" (2017) 48 *Georgetown Journal of International Law* 949, preliminary text available at: https://www.wto.org/english/res_e/reser_e/ersd201704_e.pdf.

³⁷ See, for details and explanation, Part III, below.

Before proceeding to an analysis of relevant provisions of the GPA text, it is important to note that, especially when considering the 2012 version of the Agreement, the objectives of the GPA are *not* limited to market access per se. Rather, in addition to language emphasising the “need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization . . . and improving the framework [and] conduct of international trade”, the Preamble to the Agreement notes specifically that:

“the integrity and predictability of government procurement systems are integral to the *efficient and effective management of public resources*, the performance of the Parties’ economies and the functioning of the multilateral trading system”.³⁸ [Emphasis added].

This manifests a clear hope/intent on the part of the Agreement’s parties that the GPA will serve as a tool of good procurement policy and public financial management, in addition to its market access objectives.

Moreover, and as already mentioned, the 2012 GPA also incorporates clear language recognizing the Agreement’s significance as a tool of good governance, emphasising:

“ . . . the importance of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption”.³⁹

For our present purposes, the foregoing language is a clear signal that the objectives of the GPA extend well beyond traditional market access concerns, to encompass those of good governance and the efficient and effective management of public resources. As such, the revision also reflects a significant ‘change of mindset’ from the previous version of the Agreement.⁴⁰

III. Existing GPA provisions as windows of opportunity for the advancing of sustainability and climate change mitigation objectives

The scope for advancing sustainability and climate change mitigation objectives and the related “change of mindset” concerning sustainability issues embodied in the 2012 amendments is—unlike the prevention of corruption—*not* reflected explicitly in the Preamble to the Agreement. It is, however, manifested in related policy statements and speeches⁴¹ and, most importantly, in specific substantive provisions of the Agreement. These include (most significantly) the GPA’s provisions relating to technical specifications and tender documentation; award criteria; and general exceptions to the Agreement. This part of the article reviews these provisions from the standpoint of its overall themes.

(1) A new development explicitly referencing environmental concerns: revised language on technical specifications and tender documentation

The most explicit examples of new language incorporated in the 2012 GPA text that references environmental concerns are found in art.X of the Agreement regarding technical specifications and tender documentation in bidding processes. To begin with, art.X:6 of the 2012 text provides as follows:

³⁸ See the text of the 2012 Revised Agreement on Government Procurement, WTO website.

³⁹ See the text of the 2012 Revised Agreement on Government Procurement, WTO website.

⁴⁰ See Steiner, “The 2012 Revision of the WTO Government Procurement Agreement” (Elgar Online, 2017).

⁴¹ See, for an important example of the latter, “Lamy notes rising interest in WTO Government Procurement Agreement” Opening speech at the WTO Symposium on the Agreement on Government Procurement (11 February 2010), https://www.wto.org/english/news_e/sppl_e/sppl147_e.htm. In the course of his discourse, Pascal Lamy, then Director-General of the WTO, observed that: “The revised text of the GPA already clarifies the scope for application of technical specifications to promote the conservation of natural resources and protect the environment.” Further, he looked forward to further work on “the question of sustainable procurement more widely and how it can best be promoted consistent with international rules.”

Technical Specifications

6. For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications *to promote the conservation of natural resources or protect the environment*. [Emphasis added.]

Furthermore, art.X:9 of the 2012 text provides as follows:

Tender documentation

9. The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, *environmental characteristics* and terms of delivery. [Emphasis added.]

The intent of these provisions is plain enough. Article X:6 makes clear that the GPA parties/their procuring entities may employ technical specifications to promote the conservation of natural resources or protect the environment. While arguably this was not forbidden even under the 1994 Agreement, the forthright new language sends a useful signal to the parties and their entities. As such, nothing forbids environmental considerations from being woven into the technical specifications through the formulation of terms relating to (i) recognised standards or equivalent (through the use of labels or equivalent, when these relate to the subject matter of the contract, e.g. “ecolabels” that deal with environmental performance); (ii) terms of performance or functionality (by focusing on the function of what is being acquired or describing desired results and quality output (not input or method), i.e. an energy efficient government building, in the form of a building that is energy self-sufficient through the use of on-site renewable energy); and (iii) production processes and methods (referencing processes or methods of production, or the life-cycle of the goods or works that are the object of the contract, i.e. purchasing organically produced food, or electricity produced from renewable sources, furniture produced from recycled materials, or biodegradable packaging).

Article X:9 provides the additional helpful clarification that environmental characteristics together with quality, technical merit, price and other cost factors may be included in the evaluation criteria that are set out in tenders governed by the Agreement. Arguably, the specification of criteria may also reference specific sub-criteria and partial criteria that explicitly reflect environmental considerations, for example CO2 performance, the use of reduced packaging, the use of green vehicles and/or the application of environmental management systems. Also, environmental labels can be used to distinguish environmentally friendly or sustainable products and services.

Related to the above, the 2012 GPA also incorporates a helpful new definition of the term “technical specification”. In particular, art.I(u) specifies as follows:

Article 1 Definitions

...

- u) technical specification means a tendering requirement that:
 - i. lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the *processes and methods for their production or provision*;] ... [Emphasis added.]

This is significant in that specifications concerning production processes or provision can be important tools to reflect environmental concerns relating to the performance of the contract. Such requirements or also contract clauses can address environmental considerations at the performance stage, provided they are published in the call for competition or procurement documents and are linked to the subject-matter of the contract. Relevant clauses may also specify that goods are to be supplied or services as well as

works performed in a way that minimizes environmental impact. It should be noted, in this context, that consumer choice for public entities is different from regulations affecting private supply chains or import bans. Therefore, the well-known debate on dealing with PPMs according to general WTO law does not necessarily apply in the same way in the area of public procurement. In EU legal parlance, the WTO GPA should be considered as *lex specialis* on PPMs.⁴²

Environmental clauses may be included, for example, in the terms of delivery by having the product delivered in the appropriate quantity or a bulk delivery, as this will be more environmentally efficient in terms of transport impact; requiring that the supplier takes back (and recycles or reuses) any packaging that comes with the product; or requiring the supplier to report regularly on the greenhouse gas emissions caused in delivering the product, and on measures taken to reduce these emissions over the course of the contract). Contract performance clauses for works or service contracts can also consider how the service or work is performed; the training of contractor staff (on the environmental impact of their work); or the disposal of used products or packaging. Overall, considerations relating to the method of production are likely to be highly relevant, for example, concerning the transition to green energy and to green procurement of energy, generally.⁴³

Also reinforcing the text's new language quoted above, the *Checklist of Issues for Provision of Information Relating to Accession to the Revised Agreement on Government Procurement*⁴⁴ that the Committee on Government Procurement has adopted to facilitate deliberations concerning the admission of new parties to the Agreement, sets out the following related request:

- 5.4. In the light of Article X:6 of the Agreement, please specify whether there is any measure in your procurement system to allow procuring entities to prepare, adopt or apply technical specifications to promote the conservation of national resources or protect the environment.

By this means, the Committee is effectively reminding prospective new parties of the possibilities available to them to use such specifications to advance environmental sustainability objectives.

- (1) A further critical element reinforcing the scope for addressing environmental concerns: the GPA's broad language concerning contract awards.

Of possibly even greater significance than the foregoing, the GPA 2012's language concerning the critical issue of contract award criteria, while not referring specifically to environmental concerns, unambiguously provides appropriate scope for them to be taken into account. Specifically, art.XV:5 of the 2012 Agreement provides as follows:

Article XV Treatment of Tenders and Awarding of Contracts

...

Awarding of Contracts

5. Unless a procuring entity determines that it is not in the public interest to award a contract, the entity shall award the contract to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the *evaluation criteria specified in the notices and tender documentation*, has submitted:
 - a) the *most advantageous tender*; or
 - b) where price is the sole criterion, the lowest price. [Emphasis added.]

⁴²Steiner, "The WTO Government Procurement Agreement: Assessing the Scope for Green Procurement" (2015) 9 *BIORES* 10; see on the difference between TBT and GPA, Rika Koch, *Green Public Procurement under WTO Law* (New York: Springer, 2020), p.89.

⁴³See, on the latter point, Kitchen, *Global Climate Change: Turning Knowledge into Action* (2013).

⁴⁴Committee on Government Procurement, *Checklist of Issues for Provision of Information Relating to Accession to the Revised Agreement on Government Procurement* (GPA/132 of 14 October 2015).

Several related observations are pertinent. First, the reference in art.XV:5 to “evaluation criteria specified in the notices and tender documentation” clearly implicates the set of possible criteria referenced in art.X:9 (discussed above) which, as we have seen, include possible “environmental characteristics”. As such, the evaluation of submitted bids on the basis of predetermined environmental criteria may be facilitated by the application of a price-quality ratio, where environmental advantages are considered as a part of the quality of the intended good or service. On this basis, there can be no doubt that the GPA provides broad scope for contracts covered by the Agreement to be awarded on the basis of environmental characteristics or criteria.

More generally, it should be noted that the GPA in no way privileges or favours the award of contracts based on lowest price. This is important in that the awarding of contracts based solely on lowest price is clearly a practice that can undervalue environmental considerations in the acquisition process.⁴⁵ The alternative concept of “most advantageous tender” is clearly intended to permit a broader approach.⁴⁶

(2) A further source of flexibility: the GPA’s provisions concerning conditions for participation and selection procedures

The GPA’s provisions concerning both conditions for participation and contractor selection procedures provide significant authority to procuring entities to screen out suppliers that are not considered likely to perform well. For example, procuring entities are *not* precluded from excluding suppliers on the basis of conditions relating to the legal and financial capacities and the commercial and technical abilities of suppliers to undertake the relevant procurement.⁴⁷ Likewise, the provisions concerning registration systems and selection procedures provide ample scope for the screening of suppliers’ capabilities to ensure that they have the capacity to perform and deliver, subject to appropriate transparency and fairness considerations.⁴⁸

Likewise, the provisions on conditions for participation allow the exclusion of potential suppliers on the following grounds:

Article VIII Conditions for Participation

- ...
- (4) ...
- c) significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;
 - d) final judgments in respect of serious crimes or other serious offences;
 - e) professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier;

In light of the above, participants might be excluded, for example, where there is evidence that suppliers did not comply with minimum environmental law standards or committed environmental violations (pollution of water, disposing waste illegally), or there were deficiencies in past contractual performance.

⁴⁵ Steven Schooner and Markus Speidel, “Warming Up’ to Sustainable Procurement” (2020) 60 *Contract Management* 32, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697429; see also, Schooner, “No Time to Waste: Embracing Sustainable Procurement to Mitigate the Accelerating Climate Crisis” (2021) 61 *Contract Management* 24.

⁴⁶ Steiner, “The WTO Government Procurement Agreement: Assessing the Scope for Green Procurement” (2015) 9 *BIORES* 10; see also, Marc Steiner’s contribution to the 2017 WTO Symposium on Sustainable Public Procurement, available at: https://www.wto.org/english/tratop_e/gproc_e/gp_symp_22feb17_e.htm.

⁴⁷ GPA art.VIII.

⁴⁸ GPA art.IX .

(3) *A further assurance (if needed): the General Exceptions to the Agreement*

While the foregoing provisions unambiguously (in our view) provide broad scope for advancing environmental objectives in the context of normal procurement operations covered by the 2012 GPA, governments or citizens might still be concerned that extraordinary measures may be needed to address specific outcomes of climate change. For example, governments often resort to direct award of contracts (without normal competitive tendering processes) in times of emergencies or threats to public safety (e.g. flooding; wildfires; the aftermath of hurricanes; or disease outbreaks).⁴⁹ In such circumstances, recourse may be had to the General Exceptions of the Agreement.

The GPA's General Exceptions provide, *inter alia*, as follows:

Article III Security and General Exceptions

.....

2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:
 - a) necessary to protect public morals, order or *safety*;
 - b) *necessary to protect human, animal or plant life or health*; [Emphasis added.]

The GPA's "General Exceptions" broadly track exceptions found in other WTO Agreements and provide significant scope for governments to take measures that are required in times of public health emergencies or other dire circumstances.⁵⁰ For example, in responding to the COVID-19 pandemic, GPA parties and/or their procuring entities have had frequent recourse to direct awards and other expedited procedures. No objections were made regarding these procedures pursuant to the GPA. This is not to suggest that the widespread resort to exceptional procedures in times of emergency is necessarily good policy—on the contrary, such procedures are often associated with waste and inefficiency.⁵¹ Even in the context of a pandemic or other emergency, there can be benefits to adhering, at least whenever possible, to minimum standards regarding non-discrimination, transparency, and procedural fairness.

To summarise, the foregoing provisions of the 2012 GPA provide broad scope for the advancement of sustainability and climate change mitigation objectives in the implementation of public procurement policies by participating WTO Member governments. At the very least, it cannot be reasonably maintained that the present Agreement constitutes a barrier to the taking of appropriate measures by governments. Conversely, given the scope of the looming crises, it is important to ask whether the Agreement and its implementation by the parties could go further to encourage or incentivise green public procurement policies, or provide explicit guidance on related measures. The remainder of this article examines related possibilities, suggesting that they could, and should, do so.

IV. The WTO Work Programme on Sustainable Procurement as a platform for change

The negotiations to revise the GPA that culminated in 2012 also resulted in the adoption, by the WTO Committee on Government Procurement, of an important package of work programmes⁵² and a built-in

⁴⁹ See, generally, Sue Arrowsmith et al. (eds), *Public Procurement Regulation in (a) Crisis?: Global Lessons from the COVID-19 Pandemic* (Oxford: Hart Publishing, 2021).

⁵⁰ See, for discussion, Robert D. Anderson and Anna Caroline Muller, "Keeping Markets Open While Ensuring Due Flexibility for Governments in a Time of Economic and Public Health Crisis: The Role of the WTO Agreement on Government Procurement (GPA)" (2020) 29 P.P.L.R. 189.

⁵¹ Arrowsmith et al, *Public Procurement Regulation in (a) Crisis?: Global Lessons from the COVID-19 Pandemic* (Oxford: Hart Publishing, 2021).

⁵² See, for additional details, "Work Programmes" WTO website, https://www.wto.org/english/tratop_e/gproc_e/gpa_wk_prog_e.htm. See also Anderson, "The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement: What it Means for the Agreement and for the

mandate for further negotiations/possible amendments “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.”⁵³ This mandate offers an attractive and flexible vehicle for addressing issues concerning the nexus of public procurement with sustainability and climate change mitigation.

The GPA Committee’s Decision on Sustainable Procurement specifically mandates a systematic review of the objectives of sustainable procurement; of the ways in which the concept of sustainable procurement is integrated into national and sub-national procurement policies; of the ways in which sustainable procurement can be practiced in a manner consistent with the principle of “best value for money”; and of the ways in which sustainable procurement can be practiced in a manner consistent with parties’ international trade obligations.⁵⁴ Further, it directs the Committee to identify measures and policies that it considers to be sustainable procurement practiced in a manner consistent with the principle of “best value for money” and with parties’ international trade obligations and prepare a report that lists the best practices of the measures and policies.⁵⁵ This is in our view also a clear call for guidance on how the GPA 2012 should be interpreted. Together, these elements comprise a solid basis for pro-active work to further strengthen the GPA’s role and relevance as a tool of sustainability and climate change mitigation.

The Committee’s Work Programme on Sustainable Procurement is not strictly limited to the environmental aspects of sustainability; rather, it potentially also encompasses the “social dimensions” of sustainability envisioned by the UN Sustainable Development Goals (SDGs). Nevertheless, a higher degree of convergence has generally been manifested with respect to the former aspects (i.e. the environmental dimension of sustainability).

As a contribution to the Committee’s Work Programme on Sustainable Procurement, in February 2017 the WTO Secretariat organized, at the Committee’s request, a major Symposium on the topic of sustainable procurement.⁵⁶ The Symposium featured contributions from diverse non-governmental experts in addition to national experts and representatives of other international organisations. While the presentations at the Symposium were explicitly without prejudice to the views of the participating GPA parties, the event nonetheless manifested widespread interest in the issue among the delegates present and showcased a rich set of related perspectives.⁵⁷

In summarising the Committee’s overall progress to date concerning its Work Programme on Sustainable Procurement, its latest Annual Report notes as follows:

- 4.3. Since the initiation of this Work Programme in 2014, significant work has been undertaken by the Committee. In 2019, the Committee agreed, in small-group format, to pause work, for the time being, on the drafting of a final report in order to further examine measures and policies related to social considerations in government procurement. The small-group discussions continued on the basis of an informal reflection paper that identified areas and potential questions for further examination.
- 4.4. During the reporting period, work continued in a small-group format on the basis of written submissions by Parties under Areas 1 (‘Defining the objectives of social procurement’) and 2 (‘Translating the concept of social procurement into national measures and policies’) of

World Economy” (2012) 21 P.P.L.R. 83 and Anderson, Schooner and Swan, “Feature Comment: The WTO’s Revised Government Procurement Agreement: An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets” (2012) 54 *The Government Contractor* 1–6.

⁵³ See the text of the 2012 Revised Agreement on Government Procurement, WTO website.

⁵⁴ Decision of the Committee on Government Procurement of 30 March 2012 (Annex E to Appendix 2 of GPA/113, of 2 April 2012).

⁵⁵ Decision of the Committee on Government Procurement of 30 March 2012 (Annex E to Appendix 2 of GPA/113, of 2 April 2012).

⁵⁶ See, for pertinent details, Committee on Government Procurement, “Key Take-Aways from the Committee’s Symposium on Sustainable Procurement”, Report by the Secretariat (GPA/W341 of 30 May 2017), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/PLURI/GPA/W341.pdf&Open=True>.

⁵⁷ Committee on Government Procurement, “Key Take-Aways from the Committee’s Symposium on Sustainable Procurement”, Report by the Secretariat (GPA/W341 of 30 May 2017).

the informal reflection paper. Additionally, work was initiated on the theme of ‘Consistency with the principle of ‘best value for money’, the GPA and other international trade obligations (Area 3 of the informal reflection paper).⁵⁸

Most recently, the new EU-US “Transatlantic Initiative on Sustainable Trade” work programme provides new hope that related work in the WTO’s Committee on Government Procurement can now move forward with due urgency.⁵⁹

To summarise, in broad terms, the above-outlined Work Programme has still to fulfill its promise. Work was stalled during the past year when the Committee was, unusually, without a Chairman. Thankfully, that situation has now been remedied with the very recent selection of Mr Martin Zbinden of Switzerland as the Committee’s incoming Chair.⁶⁰ Resumption of work on the Work Programme on Sustainable Procurement is urgently needed to fulfill the Committee’s original mandate to identify measures and policies that the Committee considers appropriate to promote sustainable procurement in a manner consistent with the principle of “best value for money” and with parties’ international trade obligations. Beyond this, if it chooses to do so, the Committee could usefully consider how a global transition to sustainability and climate change resilience could be encouraged through the process of accessions to the Agreement and/or mandated negotiations to further modernise the Agreement and expand its related market access commitments.⁶¹ Eventually, the parties’ commitment to the global struggle for sustainability and climate change adaptation/mitigation could be enshrined in a further revised version of the Agreement.

V. Pertinent developments in key GPA parties: the European Union, the United States, Canada and Switzerland

This section of the article provides a (highly) selective overview of recent developments concerning the introduction and strengthening of sustainable procurement policies in four influential GPA parties: the European Union, the United States, Canada and Switzerland. The intention is not at all to provide a comprehensive survey or global account.⁶² Rather, it is to suggest and support two central propositions that underlie our call for renewed dialogue at the multilateral level, particularly in the context of the WTO GPA Work Programme on Sustainable Procurement: first, after significant hesitations and initial missteps, major (in some cases, even aggressive) efforts are under way in each of these jurisdictions to employ public procurement policy as a tool for the promotion of sustainability and climate change adaptation/mitigation. To a large extent, these efforts share the same objectives. This, by itself, provides a critical mass of activity for purposes of stock-taking and mutual learning at the multilateral level.

Second, enhanced dialogue is needed to ensure that the green procurement strategies and legislation of the world’s governments respect, as far as reasonably possible, international norms of transparency and non-discrimination. As has already been noted, while recent US legislation including the “Bipartisan Infrastructure Law”⁶³ and, especially, the Inflation Reduction Act,⁶⁴ clearly embody major progress toward greater emphasis on sustainability and climate change mitigation in US public policy, their strong emphasis on Buy American and/or US sourcing requirements poses concerns for US trade partners and (potentially)

⁵⁸ Annual Report (2021) of the Committee on Government Procurement (GPA/AR/4, 12 November 2021), paras 4.3 and 4.4.

⁵⁹ See subsection VI(c) below and references cited therein.

⁶⁰ See “The WTO Committee overseeing the plurilateral Government Procurement Agreement (GPA) selected Martin Zbinden from Switzerland as its new chair today”, https://www.linkedin.com/posts/world-trade-organization_wtogpa-activity-7064617760131051520_mM9/?utm_source=share&utm_medium=member_ios.

⁶¹ See the GPA, art. XXII: paras 6–8.

⁶² See, for a far more comprehensive and relatively recent global survey, UNEP, “Sustainable Public Procurement: 2022 Global Review (Parts I and II)” (16 December 2022).

⁶³ See H.R. 3684—Infrastructure Investment and Jobs Act, 117th Congress (2021–2022), Public Law No. 117-58 (15 November 2021).

⁶⁴ H.R. 5376—Inflation Reduction Act of 2022, 117th Congress (2021–2022), Public Law No. 117-169 (16 August 2022).

the stability of the international trading system.⁶⁵ The overriding goals of climate change mitigation and an environmentally sustainable world will not be well served either by old-fashioned protectionism or by a fracturing of related approaches at the national level. To avoid these outcomes, at a minimum, dialogue is needed.⁶⁶

The European Union: a pioneering approach

In the EU, public purchasing is already well established as a key market-based instrument to be used to achieve a smart, sustainable, and inclusive growth while ensuring an efficient use of public funds. The 2014 Public Procurement Directives (hereinafter: the Directives)⁶⁷ also sought to provide new opportunities to promote social inclusion through public procurement. Relevant provisions seek to ensure greater inclusion of common societal goals in the procurement process, including environmental protection, innovation, combating climate change, and other environmental considerations. Public procurement is perceived as a mean to achieve the sustainability goals of the EU; this approach is called “strategic use of public procurement”.⁶⁸

Under the Directives, competition based on quality, sustainability and innovation became decisive factors for contract awarding. Article 67 of Directive 2014/24 gives a signal that the costs are more than just what you pay when you buy something. Article 68 of Directive 2014/24 emphasises the importance of life-cycle costing.⁶⁹ At the same time the idea is promoted that “price-quality-ratio” should prevail over the “lowest price only” approach when defining the most economically advantageous offer.⁷⁰ Thus, the concept of the Directives on award criteria is more quality-oriented compared with the more flexible set in art.XV of the GPA, which as a minimal standard does not prevent a signatory from expressing a preference for the lowest price bid.⁷¹ It is all about a more comprehensive use of award criteria.⁷² Member States are explicitly covered by the Directives when expressing an even clearer preference for the best price-quality-ratio and therefore reducing awards based on the lowest price only. Another step is about to be made in the context of the “Net Zero Industry Act”.⁷³ Article 19 of this regulation proposal strictly excludes—concerning some relevant goods for the energy transition such as “solar photovoltaic and solar thermal technologies”—an award based on the lowest price only. At the same time sustainable public procurement is an obvious and important contribution to the EU Circular Economy Action Plan.⁷⁴

In addition to the Directives (see, for relevant provisions, Box 1 below), the European Commission has developed a series of guides and tools to help public procurers make more cost-effective and environmentally friendly decisions. In a Communication entitled Public procurement for a better environment, it has defined Green Public Procurement (GPP) or green purchasing as:

⁶⁵ Jean Heilman Grier, “Domestic Content Requirements: Contrasting Treatment”, *Perspectives on Trade* (3 May 2023), <https://trade.djaghe.com/?p=7678>, and Hanson and Slaughter, “How Commerce Can Save the Climate: The Case for a Green Free Trade Agreement” *Foreign Affairs* (March/April 2023).

⁶⁶ Hanson and Slaughter, “How Commerce Can Save the Climate: The Case for a Green Free Trade Agreement” *Foreign Affairs* (March/April 2023), posit a need for negotiation of a new WTO Agreement on Green Technology, modelled broadly on the existing WTO Information Technology Agreement (ITA). While they do not refer, in their proposal, to procurement policy issues, such issues could (in our view) potentially be included in such a negotiation. Alternatively, they could be addressed in parallel negotiations under the GPA.

⁶⁷ Directive 2014/24 on public procurement [2014] OJ L94/65 and Directive 2014/25 on procurement by entities operating in the water, energy, transport, and postal services sectors [2014] OJ L94/243.

⁶⁸ Recitals 2, 47 and 91 of Directive 2014/24.

⁶⁹ See, Marta Andhov, Roberto Caranta and Anja Wiesbrock (eds), *Cost and EU Public Procurement Law—Life-Cycle Costing for Sustainability* (Abingdon: Routledge, 2020).

⁷⁰ “New EU-Procurement Rules to Ensure Better Quality and Value for Money” European Parliament press release (15 January 2014).

⁷¹ See, Steiner, “The WTO Government Procurement Agreement: Assessing the Scope for Green Procurement” (2015) 9 *BIORES* 10.

⁷² Roberto Caranta and Albert Sanchez-Graells (eds), *European Public Procurement—Commentary on Directive 2014/24/EU* (Cheltenham: Edward Elgar, 2021) (art.1 to art.67).

⁷³ Proposal for a Regulation [...] on establishing a framework of measures for strengthening Europe’s net-zero technology products manufacturing ecosystem COM(2023) 161 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0161>.

⁷⁴ See, European Commission, “Circular Economy Action Plan”, https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en; see also, Tünde Tátrai and Orsolya Diófási-Kovács, “European Green Deal — the way to Circular Public Procurement” (2021) 22 *ERA Forum* 523.

“a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured.”⁷⁵

GPP can be applied to contracts both above and below the threshold for application of the Procurement Directives. For this purpose, the Commission has published a handbook outlining the possibilities to pursue GPP under the relevant directives.⁷⁶ The handbook is the Commission’s main guidance document to help public authorities buy goods and services with a lower environmental impact and it is a useful reference for policy makers and companies responding to green tenders. As such, today, though GPP is an important tool to achieve environmental policy goals,⁷⁷ it remains largely a voluntary instrument in the sense that Member States and public authorities can determine the extent to which they implement it.⁷⁸

Interpreting the EU’s legislation and accompanying shift towards giving greater weight to environmental concerns in public procurement, the European Court of Justice found in the case *EVN AG and Wienstrom GmbH* that the possible environmental aspects are not limited to non-economic effects that are in favor of the procuring entity itself but that other globally positive aspects can equally be taken into consideration.⁷⁹ This marks an evolution from a previous already progressive decision by the Court⁸⁰ which confirmed the possibility of taking into consideration environmental award criteria when assessing the most economically advantageous tender *but* only under certain conditions.⁸¹ This change may, eventually, have possible repercussions for the elaboration of future policies in the WTO Committee on Government Procurement, given the importance that the EU attaches to the GPA and the two-way relationship that exists between the EU directives and the GPA concerning the evolution of policies in this area.⁸²

Box 1 Relevant provisions in the directives in terms of green procurement

- *Recitals 47 and 95*: Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.
- *Defining the requirements of a contract*: Defining technical specifications is guided through art.42 and Annex VII of Directive 2014/24; and art.60 and Annex VIII of Directive 2014/25.
- *Use of labels*: Conditions for using labels are laid out in art.43 of Directive 2014/24; and art.61 of Directive 2014/25.
- *Lowest price award and life-cycle costing (LCC)*: Awarding public contracts on the basis of the most economically advantageous tender is provided as part of art.67 of Directive 2014/24; and art.82 of Directive 2014/25.
- *Innovation partnerships*: Where a contracting authority wishes to purchase goods or services, which are not currently available on the market, it may establish an innovation partnership with one or more partners. This allows for the research and development (R&D), piloting and subsequent purchase of a new product, service, or work, by establishing a structured partnership. The procedure for establishing an innovation partnership is set out in art.31 of Directive 2014/24.
- *Consulting the market*: The procurement directives specifically allow for preliminary market consultation with suppliers in order to get advice, which may be used in the preparation of the procedure. Article 40 of Directive 2014/24.

⁷⁵ COM(2008) 400, published on 16 July 2008.

⁷⁶ European Commission, *Buying green! A Handbook on Green Public Procurement*, 3rd edn (2016), available at: <https://ec.europa.eu/environment/gpp/pdf/Buying-Green-Handbook-3rd-Edition.pdf>.

⁷⁷ Including in relation to climate change, resource use and sustainable consumption and production.

⁷⁸ European Commission, “What is Green Public Procurement”, available at: https://ec.europa.eu/environment/gpp/what_en.htm. Aura Iurascu, “How Will the Adoption of Mandatory GPP Criteria Change the Game?” (2023) 18(1) *European Procurement & Public Private Partnership Law Review* 6–16, <https://eppl.lexion.eu/article/EPPPL/2023/1/4>.

⁷⁹ *EVN AG v Austria* (C-448/01) EU:C:2003:651; [2004] 1 C.M.L.R. 22 at [34]; see also Steiner, “The WTO Government Procurement Agreement: Assessing the Scope for Green Procurement” (2015) 9 *BIORES* 10.

⁸⁰ *Concordia Bus Finland Oy Ab (formerly Stagecoach Oy AB) v Helsingin Kaupunki* (C-513/99) EU:C:2002:495; [2003] 3 C.M.L.R. 20 at [69]; Roberto Caranta, “The Changes to the Public Contract Directives and the Story they Tell About How EU Law Works” (2015) 52(2) C.M.L. Rev 414.

⁸¹ European Commission, “Green Public Procurement”, case law, https://ec.europa.eu/environment/gpp/case_law_en.htm.

⁸² Hermann Pünder, “Völkerrechtliche Vorgaben für das öffentliche Beschaffungswesen, insbesondere im Government Procurement Agreement”, in Müller/Wrede, *Kompendium des Vergaberechts*, 2nd edn (Reguvis Fachmedien, 2013), p.92; see also, Steiner, “The WTO Government Procurement Agreement: Assessing the Scope for Green Procurement” (2015) 9 *BIORES* 10.

Source: European Commission, EU Public Procurement Directives. Available at: https://ec.europa.eu/environment/gpp/eu_public_directives_en.htm.

The United States: an evolving, cautiously optimistic case study

The US offers a complex, decidedly mixed case study. At the federal level, where more than \$600 billion a year in federal (or central government) spending ensures that the procurement regime is heavily scrutinised, sustainable procurement remains largely absent from the everyday concerns that animate and bedevil procurement professionals. Moreover, to a casual observer, the lion's share of the regulatory mandates and guidance found in Federal Acquisition Regulation (FAR)⁸³ remain out of date, inconsistent, and largely ignored. Nor has sustainable procurement yet gained significant traction as core competencies or fundamental skills for the purposes of procurement professional training, development, or certification.⁸⁴ Conversely, innumerable initiatives are underway, powerful tools have been and continue to be developed, isolated examples of sustainable procurements can be found, and many states⁸⁵—including by not limited to California⁸⁶ and Massachusetts⁸⁷—have launched high-profile, impactful, sustainable procurement initiatives.

Sustainable (or “green”) public procurement is not, in fact, a novel concept in the US.⁸⁸ The 1990s saw important progress achieved towards a more environmentally conscious approach to government procurement, including a mandatory source selection factor⁸⁹ for negotiated procurement. Unfortunately, subsequently, momentum stalled as ambitious aspirations proved more complex and difficult to implement than anticipated, dramatic shifts in priorities turned attention in other directions, and hyper-populism peaked with the Trump-Pence Administration climate science denial and the Administration's petulant and improvident withdrawal from the Paris Agreement.

Fortunately, following the 2020 Presidential election, the Biden-Harris administration has re-asserted strong leadership messaging in this arena,⁹⁰ restoring the US Government commitment to addressing climate change and increasingly devoting additional resources to enable the federal procurement system to assist efforts to adapt to and mitigate the effects of climate change.⁹¹ Furthermore, it has rejoined the Paris Climate Agreement⁹² and issued a steady stream of executive orders signaling a commitment to a

⁸³ Title 48 of the Code of Federal Regulations, official version at <https://www.acquisition.gov/browse/index/far>. See, generally, FAR Pt 23 (which is in the process of being significantly reorganised and updated, as discussed below).

⁸⁴ For example, sustainable procurement topics and skills are largely absent from the revised, harmonized training and certification standard currently being implemented by the major procurement agencies. See, e.g. “Empowering the Workforce: Back to Basics”, <https://www.dau.edu/back-to-basics>.

⁸⁵ Readers may recall that, by analogy, only two-thirds of the fifty states are covered, at least in part, by the US commitments under the WTO GPA. See Annex 2 of the US GPA coverage, available at: <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=UnitedStates&AnnexNo=2&ContentCulture=en>.

⁸⁶ State of California, “Buying Green Guide”, <https://www.dgs.ca.gov/PD/Resources/Find-EPP-Goods-and-Services>.

⁸⁷ Commonwealth of Massachusetts, “Environmentally Preferable Products (EPP) Procurement Program”, <https://www.mass.gov/environmentally-preferable-products-epp-procurement-program>.

⁸⁸ Steven L. Schooner and Evan Matsuda, “Sustainable Procurement: Building Vocabulary to Accelerate the Federal Procurement Conversation” Briefing Papers No.21-10 (Thomson Reuters, 2d Series, 2021), <https://ssrn.com/abstract=3943341>.

⁸⁹ Compare FAR 15.605(b)(1)(iv) Evaluation Factors and Subfactors (1996) prior to the FAR Pt 15 re-write (mandatory factors included price/cost, past performance, quality, and environmental objectives) with the current FAR 15.304, Evaluation Factors and Significant Subfactors (2020) (mandatory factors included price/cost, quality, past performance, and small business subcontracting).

⁹⁰ See, Executive Order No.14008 on Tackling the Climate Crisis at Home and Abroad (27 January 2021), 86 Fed. Reg. 7619 (1 February 2021), <https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf>; Executive Order No.13990 on Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis (20 January 2021), 86 Fed. Reg. 7037, <https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis>; Executive Order No.14027 on Establishment of the Climate Change Support Office (7 May 2021), 86 Fed. Reg. 25,947, <https://www.federalregister.gov/documents/2021/05/12/2021-10139/establishment-of-the-climate-change-support-office>; Executive Order No.14030 on Climate-Related Financial Risk (20 May 2021), 86 Fed. Reg. 27,967 (25 May 2021), <https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk>; Executive Order No.14037 on Strengthening American Leadership in Clean Cars and Trucks (5 August 2021), 86 Fed. Reg. 43,583 (10 August 2021), <https://www.federalregister.gov/documents/2021/08/10/2021-17121/strengthening-american-leadership-in-clean-cars-and-trucks>.

⁹¹ Schooner, “No Time to Waste: Embracing Sustainable Procurement to Mitigate the Accelerating Climate Crisis” (2021) 61 *Contract Management* 24.

⁹² White House, “Paris Climate Agreement” press release (20 January 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement>.

far more sustainable agenda and future. Conversely, President Biden recently frustrated many climate advocates by approving one of the largest domestic oil drilling projects in decades.⁹³

In December 2021, an Executive Order of President Biden encouraged the use of government procurement to model sustainable, environmentally sound purchasing to reduce greenhouse gases and other forms of pollution.⁹⁴ Although the Order is a significant step towards environmentally sustainable procurement, according to some observers it potentially raises questions encompassing issues of technical responsiveness, past performance, and responsibility in addition to international trade standards, in light of US participation in the GPA.⁹⁵

In the course of COP27, the Biden-Harris Administration announced historic regulatory initiatives to address greenhouse gas emissions and protect the Federal Government's supply chains from climate-related financial risks. The proposed Federal Supplier Climate Risks and Resilience Rule⁹⁶ would require major Federal contractors, as an eligibility predicate, to assess and publicly disclose their GHG emissions and climate-related financial risks and set science-based emissions reduction targets. Many in the sustainability community lauded the effort. Sarah O'Brien, Chief Executive Officer of the Sustainable Purchasing Leadership Council (SPLC)⁹⁷ effused:

After 20 years of working with passionate advocates to leverage procurement's power to drive positive environmental and social impact, I find it truly thrilling to see a US president call out Federal procurement on a global stage as a key driver in driving climate progress.⁹⁸

But the rule also embodies significant strategic decisions and dramatic concessions. Among other things:

- by focusing on inventorying, and by limiting the requirement to set emission reduction targets only to major contractors, the proposed rule at least marginally neutralises the quantity and vehemence of opposition, particularly from the powerful and actively engaged small business community;
- the proposed rule squarely places the implementation burden of action on the private sector; in other words, the perennially overworked acquisition workforce requires almost no additional training; and
- it buys time—and provides valuable procedural insights—for the FAR Council to develop more ambitious and complex follow-on rules⁹⁹ that might potentially be dead on arrival if proposed today.

The 2022 Inflation Reduction Act (IRA) potentially marks a further major advancement in US environmental policy, providing substantial additional funds for climate change abatement and the promotion of green energy. The Act includes significant provisions on federal purchases of environmentally sound building products, reflecting a shift towards an environmental procurement strategy based on

⁹³ Oliver Milman, "Biden's approval of Willow project shows inconsistency of US's first 'climate president'", *The Guardian*, 14 March 2023, <https://www.theguardian.com/environment/2023/mar/14/biden-president-approved-alaska-willow-project>.

⁹⁴ See, "Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability" (8 December 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/08/executive-order-on-catalyzing-clean-energy-industries-and-jobs-through-federal-sustainability/>.

⁹⁵ See, Christopher Yukins, "Understanding Biden's 'Green' Federal Procurement Order" *Bloomberg Law*, 7 January 2022, <https://news.bloomberglaw.com/environment-and-energy/understanding-bidens-green-federal-procurement-order>.

⁹⁶ FAR Disclosure Rule (Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk (14 November 2022) 87 Fed. Reg. 68,312, <https://www.federalregister.gov/documents/2022/11/14/2022-24569/federal-acquisition-regulation-disclosure-of-greenhouse-gas-emissions-and-climate-related-financial>.

⁹⁷ Sustainable Purchasing Leadership Council, available at: <https://www.sustainablepurchasing.org/>.

⁹⁸ The White House, "What They Are Saying: Business and Climate Leaders Applaud President Biden's Proposed Plan to Protect Federal Supply Chain from Climate-Related Risks" (17 November 2022), <https://www.whitehouse.gov/ceq/news-updates/2022/11/17/what-they-are-saying-business-and-climate-leaders-applaud-president-bidens-proposed-plan-to-protect-federal-supply-chain-from-climate-related-risks/>.

⁹⁹ See, generally, OIRA (Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President), "Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions", <https://www.reginfo.gov/public/do/eAgendaMain>.

directed spending rather than indirect “green” preferences in procurement.¹⁰⁰ A key thrust of the legislation will concern the promotion of wind-based energy—a focus that potentially raises thorny questions of trade policy, in that the US’ capacity for the manufacture of wind turbines is currently limited, whereas the EU is a market leader in this area. At the same time, the promotion of US-based manufacturing is an overarching concern of the IRA and the Biden Administration generally, hence, it seems likely that the US will want to take measures to promote domestic manufacture of turbines and related equipment.¹⁰¹

Overall, while it would be far-fetched to consider the US the pre-eminent global leader on these issues, and despite broader trends reflected by politically-induced shifting winds, significant progress has been made on numerous fronts. The US Government has created (and offers) a number of avenues and helpful tools for acquisition professionals to drive more sustainable solutions. For example (and, to be clear, this represents the proverbial “tip of the iceberg”):

- In terms of helpful resources for procurement professionals seeking resources, the General Services Administration’s Sustainable Facilities Tool (SFTool) and Green Procurement Compilation serve as data-rich repository of information and guidance.¹⁰² Focused primarily on the construction industry or, in this context green facilities, this is a well-designed website containing a broad array of sustainable procurement resources, including learning tools, project planning tools, and interactive virtual walkthroughs of sustainable buildings. The content of this powerful and informative tool ranges from basic vocabulary definitions to in-depth case studies of lessons learned.
- For more than fifteen years, the GSA has embraced and promoted Leadership in Energy and Environmental Design (LEED) facility certification for the construction of public buildings as “the most credible rating system available to meet GSA’s needs”. More recently, “GSA has increased its minimum requirement for new construction and substantial renovation of Federally-owned facilities [from LEED Silver] to LEED(r) Gold....”¹⁰³
- In terms of ecolabels,¹⁰⁴ the US Environmental Protection Agency’s (EPA’s) Energy Star program is widely recognised and effective in terms of procurement of appliances and building products, from air conditioners to refrigerators and washing machines to information technology (IT) hardware.¹⁰⁵
- The GSA is also experimenting with easy-to-use green catalog portals such as *GSA Advantage!’s* Environmental Program Aisle (GSA): *GSA Advantage!*, the central electronic commercial purchasing portal for federal agencies, has a special shopping area dedicated to green products and services. Purchasers can search by product category and environmental program or certification.¹⁰⁶
- The Administrator of the General Services Administration launched an Acquisition Policy Federal Advisory Committee’s (GAP FAC), charged with advising the GSA Administrator on emerging acquisition issues, challenges, and opportunities to support its role as America’s buyer, placed an ‘initial focus on driving regulatory, policy, and process changes to embed climate and sustainability considerations in federal acquisition. This includes recommending

¹⁰⁰ See, Green and Yukins, “Feature Comment: The Inflation Reduction Act: A New Role for Green Procurement?” (2022) 64 *The Government Contractor* 33.

¹⁰¹ See, “America’s Green Subsidies are Causing Headaches in Europe” *Economist*, 1 December 2022.

¹⁰² GSA, SFTool, available at: <https://www.sftool.gov>; Green Procurement Compilation, available at: <https://sftool.gov/greenprocurement>.

¹⁰³ GSA, “LEED Building Information” (2022), <https://www.gsa.gov/real-estate/design-and-construction/design-excellence-program-overview/sustainability/sustainable-design/leed-building-information>; US Green Building Council, “LEED” (2021), <http://leed.usgbc.org/>.

¹⁰⁴ EPA, “Introduction to Ecolabels and Standards for Greener Products”, <https://www.epa.gov/greenerproducts/introduction-ecolabels-and-standards-greener-products>.

¹⁰⁵ Energy Star, available at: <https://www.energystar.gov/>.

¹⁰⁶ GSA, “Welcome to the GSA Environmental Program Aisle on GSA Advantage”, https://www.gsaadvantage.gov/advantage/ws/search/special_category_search?cat=ADV.ENV.

steps GSA can take to support its workforce and industry partners in ensuring climate and sustainability issues are fully considered in the acquisition process.¹⁰⁷

In any event, experts acknowledge that there is much work ahead, and that innumerable political, legal, and practical hurdles may continue to impede progress related to further developing green government procurement. Among other things, the learning curve remains steep.¹⁰⁸ Nor is it encouraging, from an implementation standpoint, that relevant agencies such as the Office of Federal Procurement (OFPP), were not included in the National Climate Task Force, a federal coalition tackling climate change and seeking environmental justice.¹⁰⁹ In addition, and as already noted, aspects of the Biden Administration's current policies and initiatives relating to green energy potentially raise issues in relation to US commitments under international trade agreements. These considerations highlight the importance and potential contribution of enhanced dialogue and transparency on related issues at the international level.

Canada

In Canada, sustainability considerations are an increasingly important consideration in government procurement and present both opportunities and challenges. Recently, supportive public policy for social enterprises¹¹⁰ has emerged at the federal, provincial, and municipal levels. Canada, a Party to the GPA since 1996, has enacted a series of texts and initiatives which integrate provisions and directives on green procurement. These include Canada's Federal Sustainable Development Strategy, the Greening Government Strategy, the Policy on Green Procurement and the Directive on the Management of Procurement. The latter requires best value to be considered in the procurement process.¹¹¹

Additionally, through its Greening Government Strategy, the Government of Canada is working to integrate sustainability and life-cycle assessment principles in procurement policies and practices, including in the Government's supply chain. The government aims to transition to a net-zero, circular economy through green procurement that includes life-cycle assessment principles and the adoption of clean technologies and green products and services by:

- Including criteria that address GHG emissions reduction, sustainable plastics and broader environmental benefits into procurements by departments for goods and services that have a high environmental impact;
- Incentivising major suppliers to adopt a science-based target in line with the Paris Agreement, and to disclose their GHG emissions and environmental performance information;
- Supporting departments in adopting clean technology and undertaking clean technology demonstration projects;
- Eliminating the unnecessary use of single-use plastics in government operations, events and meetings;

¹⁰⁷ GSA, "GSA Announces Inaugural Acquisition Policy Advisory Committee Members" (22 September 2022), available at <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-inaugural-acquisition-policy-advisory-committee-members-09222022>. In the spirit of full disclosure, Professor Schooner proudly serves as a member of this committee, <https://www.gsa.gov/policy-regulations/policy/acquisition-policy/gsa-acquisition-policy-federal-advisory-committee>.

¹⁰⁸ Schooner, "No Time to Waste: Embracing Sustainable Procurement to Mitigate the Accelerating Climate Crisis" (2021) 61 *Contract Management* 24, bemoans that, although, in 2021, the Federal Acquisition Regulatory (FAR) Council published an advance notice of proposed rulemaking on "Minimizing the Risk of Climate Change in Federal Acquisitions", the FAR Council appeared to mostly be soliciting and gathering information rather than promulgating the necessary changes to face medium to long-term environmental challenges.

¹⁰⁹ The White House, "Readout of the First National Climate Task Force Meeting" (11 February 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/11/readout-of-the-first-national-climate-task-force-meeting/>.

¹¹⁰ Defined by Canada's Ministry of Innovation, Science and Economic Development as "an enterprise that seeks to achieve social, cultural or environmental aims through the sale of goods and services".

¹¹¹ See, text of the relevant Directive, available at <https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32692> and concerning the international context, Liesbeth Casier, "Canada's International Trade Obligations: Barrier or opportunity for sustainable public procurement?" (2019) IISD Report.

- Promoting the procurement of sustainable plastic products and the reduction of associated plastic packaging waste;
- Strengthening support for green procurement, including guidance, tools, and training for public service employees.¹¹²

Further examples of initiatives, actions and collaborations are found in Box 2, below.

Box 2 Actions to foster green public procurement in Canada

Canada's Centre for Greening Government is collaborating with departments and agencies to green their procurement and meet the commitments of the Greening Government Strategy and the Policy on Green Procurement by:

- Implementing the procurement elements of existing greening government initiatives and commitments (e.g. the Low Carbon Fuel Procurement Program, the purchase of clean electricity, the purchase of zero-emission vehicles, and the retrofitting of buildings to zero or low-carbon).
- Estimating the *embodied carbon footprint of the goods and services* bought by Canada's central procurement organisations.
- Developing new procurement requirements for the categories of goods and services with high embodied carbon footprint.
- Promoting other environmental considerations such as reduction of waste, and circular procurement.
- Encouraging departments to green their procurement in various ways as reflected in their Departmental Sustainable Development Strategies.
- Forming coalitions with other major public buyers both nationally and international, including the Greening Government Initiative, a new international community of practice on greening procurement co-chaired by Canada and US.
- Promoting green procurement and clean technologies through the Greening Government Fund and by making linkages to other federal initiatives.

Source: Government of Canada, Green Procurement, available at: <https://www.canada.ca/en/treasury-board-secretariat/services/innovation/greening-government/green-procurement.html>.

Beyond domestic measures, in partnership with the United States, Canada has co-launched the Greening Government Initiative (GGI), an international platform for country representatives to share information and best practices, showcase innovation and success, and develop collaborative relationships with one another to accelerate national efforts to green national government operations and build climate resilience in the public sector. The scope of the GGI is limited to national government operations, including increasing government's use of renewable energy, transitioning national government buildings and fleets to net-zero emissions, enhancing the resilience of government buildings, and establishing governmental sustainable procurement policies, and identifying nature-based solutions.¹¹³ Potentially, as an innovative tool at the binational level, the approaches embodied in the GGI merit consideration also in the context of renewed deliberations in the WTO GPA Committee.

Switzerland

As already mentioned, Switzerland's experience is of interest, inter alia, in that it clearly shows the influence that deliberations in the WTO or GPA framework can have on the evolution of policies at the national level. In fact, access to government procurement markets in Switzerland evolved from an earlier (not formally declared) "Buy Swiss" and even inside Switzerland "Buy local" approach to a gradual opening of the market in the 1990's when Switzerland became a Party to the GPA (in 1996). At the time, accession was conceived by the Government as a market access tool incentivising enhanced competition but for the

¹¹² Government of Canada, "Greening Government Strategy: A Government of Canada Directive", <https://www.canada.ca/en/treasury-board-secretariat/services/innovation/greening-government/strategy.html#toc3-5>.

¹¹³ The Greening Government Initiative, available at: <https://www.sustainability.gov/ggi/index.html>.

purpose of obtaining better prices, being the economic factor the main reason for initial procurement liberalisation.¹¹⁴

Prompted in significant part by the revision of the GPA in 2012 and also considering the entry into force of the new EU Public Procurement Directives in 2014 and their implementation in the law of the Member States Switzerland saw the opportunity to improve its own procurement framework legislation.¹¹⁵ In time, the adoption of the 2019 Swiss Federal Act on Public Procurement reflected a shift from the “most economically advantageous” tender criterion for contract awarding to the “most advantageous” one,¹¹⁶ promoting quality as a deciding factor as well as innovation and sustainability factors. This shift from competition based on price to competition based on quality can, in the view of an informed observer, be seen as both a pre-condition and an incentive for the further development of green public procurement in Switzerland.¹¹⁷ The more courageous and purpose-oriented use of the discretion by the public buyers when defining and weighting the criteria is seen as a procurement culture issue that has to be explicitly addressed.¹¹⁸ The Swiss regulation goes so far as to include sustainability—covering both ecological and social considerations—as a goal of the regulation when referring to its goal of pursuing value for money.¹¹⁹ A second important achievement is the harmonization of the regulation for all levels of government. The new Intercantonal Agreement on Public Procurement (IAPP) covering cantons and municipalities is almost identical with the Federal Act on Public Procurement (PPA).¹²⁰

The new legislation provides a legal basis for the exclusion of bidders not respecting the legal (social and environmental) minimum standards described in art.12 PPA. Furthermore the new law explicitly allows—following the model of art.68 of Directive 2014/14—to internalise green externalities as part of the award criterion life-cycle costs.¹²¹ In addition to this, the award criterion “sustainability” can—very similar to art.67 of Directive 2014/24—not only mean the environmental performance, but also social aspects especially related to fair trade issues.¹²² Public procuring entities of all levels of government (and especially on federal level) are expected to behave as a role model (for enterprises and individuals) on sustainable procurement (“Vorbildfunktion”).¹²³ This perception of the role of public entities also underpins the Climate and Innovation Act, on which the Swiss electorate has voted on 18 June 2023.¹²⁴

To summarise, the developments flagged in this section are of interest for multiple reasons. First, they provide an indication of how seriously procurement policy is being taken in leading GPA jurisdictions, as a tool for promotion of sustainability and climate change mitigation. This reinforces the importance of the issue and, therefore, of the discussions mandated in the WTO Work Programme on Sustainable Procurement (and elsewhere). Second, as all four countries under discussion are GPA parties and have already undertaken/are implementing far-reaching policy changes, they show the extent to which parties

¹¹⁴ See, presentation delivered by Marc Steiner on “The Paradigm Shift from Competition Based on Price to Competition Based on Quality in Swiss Public Procurement Law—A Pre-condition for Green Public Procurement and Innovation?”, <http://www.marc-steiner.ch/pdf/Public%20Procurement%20Switzerland%20March%202021%20final.pdf>.

¹¹⁵ Marc Steiner and Desirée Klingler, “The Revised Swiss Public Procurement Law: More Quality and Sustainability” (2023) 1 *European Public Procurement & Public Private Partnership* 87; see also Marc Steiner, “Is there a Swiss Approach towards Sustainable Public Procurement?” (2013) 8 *E.P.P.L.R.* 73, http://www.marc-steiner.ch/pdf/EPPL_1-13_Swiss_Approach_Sustainable_Public_Procurement.pdf.

¹¹⁶ Article 41 of the 2019 Swiss Federal Act on Public Procurement.

¹¹⁷ See Steiner and Klingler, “The Revised Swiss Public Procurement Law: More Quality and Sustainability” (2023) 1 *European Public Procurement & Public Private Partnership* 87.

¹¹⁸ Empfehlungen / Faktenblätter / Leitfäden (admin.ch); “Faktenblatt Neue Vergabekultur”.

¹¹⁹ See, art.2 of the 2019 Swiss Federal Act on Public Procurement: “Aim and purpose of the law shall be: (a) Economic and the from an (overall) economic ‘volkswirtschaftlich’), ecological and social perspective sustainable use of public funds.” These developments were not entirely unanticipated. Already in 2011, the Swiss Federal Procurement Commission issued based especially on the revised (federal) Ordinance on Public procurement (see *Ämtliche Sammlung* (Official Compilation) 2009 6149) a relevant brochure on recommendations for the federal procurement offices on Sustainable Procurement. See Steiner and Klingler, “The Revised Swiss Public Procurement Law: More Quality and Sustainability” (2023) 1 *European Public Procurement & Public Private Partnership* 87.

¹²⁰ See Steiner and Klingler, “The Revised Swiss Public Procurement Law: More Quality and Sustainability” (2023) 1 *European Public Procurement & Public Private Partnership* 87.

¹²¹ Article 29 of the 2019 Swiss Federal Act on Public Procurement; see also Dispatch on the PPA, Swiss Federal Gazette (BBI 2017 1943).

¹²² Dispatch on the PPA, Swiss Federal Gazette (BBI 2017 1943).

¹²³ Dispatch on the PPA, Swiss Federal Gazette (BBI 2017 1885).

¹²⁴ Climate and Innovation Act (admin.ch).

believe they can already go in promoting sustainability and related values without risking challenge under the Agreement. Third, as noted, the experience of Switzerland clearly shows the influence that deliberations in the GPA framework can have on the evolution of policies at the national level. Fourthly, aspects of the developments noted illustrate the continuing relevance of the fundamental principles of non-discrimination and transparency (i.e. the core principles of the GPA and the WTO itself, also central to the EU's founding agreements) and the potential for concerns to arise if sustainability is pursued without due regard to these principles.

VI. Other related developments at the international/multilateral level

Apart from the foregoing developments and policy initiatives at the level of individual GPA parties, other important developments have already occurred at the international level. While these are not, in our view, a substitute for the work that can be done and the recommendations/new international rules that can emanate from the above-described WTO Work Programme, they serve as important potential inputs to that work. Indeed, one such development, the new EU-US “Transatlantic Initiative on Sustainable Trade” work programme which is profiled below in subsection (c), explicitly references the WTO Work Programme and may well provide fresh impetus to that work.¹²⁵

(1) The SDGs: measuring Target 12.7

Building on the Millennium Development Goals, the 2030 Agenda for Sustainable Development—adopted by all the United Nations Member States in 2015—reflects the determination of Member states to take the necessary steps towards a more sustainable and resilient path.¹²⁶ Public procurement is a highly relevant lever in the hands of governments to achieve the SDGs.¹²⁷ Indeed, goal 12 addresses the need to ‘ensure sustainable consumption and production patterns’ through a set of targets. One of these targets, Target 12.7, recognises the particular need to “promote public procurement practices that are sustainable, in accordance with national policies and priorities”.¹²⁸

Progress towards this target is tracked by indicator 12.7.1, designated as the “Number of countries implementing Sustainable Public Procurement policies and action plans”. To measure achievement, the United Nations Environment Programme (UNEP) collects data from national governments on the status of their implementation efforts on a biennial basis. Relevant information, obtained via a questionnaire, includes data from countries on their sustainability policies and action plans, implementation measures, and monitoring efforts. In particular, the methodology, building from international best practices, seeks to evaluate the degree of sustainable public procurement implementation through the appraisal of the following six main factors:

- Sustainable public procurement policy—whether a sustainable public procurement policy, action plan or equivalent legal instrument has been approved. This includes related components or targets which may be included in overarching policies (such as a Sustainable Development Policy, Public Procurement National Strategy, etc.).
- Public procurement legal framework—whether the public procurement legal framework is deemed conducive to sustainable public procurement: (i) by allowing for the inclusion of sustainability requirements at different stages of the procurement cycle; and (ii) by mandating

¹²⁵ See subsection (c) below and references cited therein. See, Grier, “US-EU Green Public Procurement Initiative” (15 June 2023), available at: <https://trade.djaghe.com/?p=7782>.

¹²⁶ UNEP, “SDG — 12.7 Target and Indicator on Sustainable Public Procurement implementation”.

¹²⁷ See, for further discussion, the very relevant work of the Sapiens Network on GPP, available at: <https://sapiensnetwork.eu/>.

¹²⁸ UNEP, “SDG — 12.7 Target and Indicator on Sustainable Public Procurement implementation”, Goal 12.7.

the procurement of sustainable alternatives for at least certain categories of products or services.

- Tools and support—whether support and tools are provided to procurement practitioners in the implementation of sustainable public procurement (provision of guidelines and training, knowledge-sharing and news updates, support through a sustainable public procurement helpdesk).
- Sustainability criteria—whether green public procurement criteria have been developed, whether social, economic and governance-related focus areas are considered or promoted in procurement practice, whether an impact assessment has been conducted prior to the selection of specific products/services as the main target of sustainable procurement and development of sustainable public procurement criteria.
- Monitoring and evaluation—scope of sustainable public procurement monitoring and measurement of sustainable public procurement outcome.
- Outputs/Outcomes—actual percentage of sustainable procurement in total procurement value.¹²⁹

A first review exercise in 2020 observed that: (i) data from European national governments reflects the EU’s long-standing efforts in the field of Green Public Procurement (GPP) policy implementation, though the grade of maturity and the degree of support and tools provided for SPP implementation differ in each country; (ii) in Latin America and the Caribbean there is a more moderate yet notable GPP effort; (iii) a similar trend was observed in the Asia-Pacific region, where GPP forerunners such as Japan, the Republic of Korea, and China have scaled up their efforts in the implementation and measurement of sustainable procurement; and lastly (iv) the monitoring exercise was limited in Africa and Western Asia. A second data collection is currently underway.¹³⁰

(2) Relevant ISO International Standards

Further consideration is also being given in the evaluation of public procurement tenders to relevant international standards that reflect environmental responsibility, as part of the qualification or award criteria. Multiple ISO certifications—such as the ISO 5001, ISO 9001, ISO 14067, ISO 14001, and ISO 20400—seek to improve business management, environmental standards, energy efficiency, investor appeal, and ultimately fight against climate change. These certifications can validate firms’ effort towards environmental sustainability, distinguishing it from pure “greenwashing” tactics. As such, they deserve the attention of the GPA Committee.

In the context of a procurement process including environmental considerations, bidders may reference, for example, ISO 14001 which sets out the criteria for an environmental management system and provides assurance to company management as well as external stakeholders that environmental impact is being measured and improved (see Box 3, below).

Also, ISO 20400 provides important guidance for organizations wishing to integrate environmental (as well as economic and social) sustainability into their procurement processes. The standard provides guidance for organisations of any size, sector, industry, or geographical location that needs to deliver sustainable outcomes through their supply chains. It is also relevant to anybody in an organization who contributes to procurement decisions and/or works with suppliers. An ISO 20400 certification allows businesses to improve their sustainable procurement system, acquire newfound expertise on the importance of economic, social, and environmental aspects, improve their supply chain management, improve resource

¹²⁹ UNEP, 2020/2021 Data collection for SDG Indicator 12.7.1—Main results and conclusions from the first reporting exercise, available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/37967/SDG.pdf>.

¹³⁰ UNEP, 2020/2021 Data collection for SDG Indicator 12.7.1—Main results and conclusions from the first reporting exercise.

management and improve the life-cycle of their products, carefully consider risk management, comply with new regulations, and gain international recognition.¹³¹

Box 3 ISO 14001 and the implementation of an Environmental Management System

An environmental management system helps organisations identify, manage, monitor and control their environmental issues in a holistic manner. ISO 14001 is an internationally agreed standard that sets out the requirements for an environmental management system, helping organisations improve their environmental performance through more efficient use of resources and reduction of waste, gaining a competitive advantage and the trust of stakeholders.

ISO 14001 is suitable for organisations of all types and sizes, whether private, not-for-profit or governmental. It requires that an organisation considers all environmental issues relevant to its operations, such as air pollution, water and sewage issues, waste management, soil contamination, climate change mitigation and adaptation, and resource use and efficiency.

Source: ISO 14001—Key Benefits. Available at: <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100372.pdf>.

It is worth recalling that standards developed by ISO are intended to be fully consistent with WTO rules and principles for the development of international standards. As such, standards can be an ideal tool to support trade agreements, to ensure that parties involved in trade agreements respect their obligations, and to provide confidence that existing requirements have global relevance and are accepted worldwide. The consistent use of international standards also means that policy and regulatory compatibility can extend to other countries that are not party to a bilateral or multilateral agreement, without artificially creating barriers to trade.¹³²

(3) The new “Transatlantic Initiative on Sustainable Trade” work programme of the European Union and the United States: an essential platform for renewed progress in the corresponding WTO Work Programme

Most recently, in a development directly relevant to the concerns articulated in this article, the EU-US Trade and Technology Council (TTC), a forum established by the two partner jurisdictions in 2021 for the purpose of deepening dialogue and, where possible, coordinating approaches to key global trade, economic, and technology issues,¹³³ has adopted a work programme to advance their “Transatlantic Initiative on Sustainable Trade” (TIST).¹³⁴ That Initiative, adopted in December 2022, applies to government procurement and a range of other practices that potentially impact on the environment.¹³⁵

The new work programme incorporates two important commitments relating to green public procurement.¹³⁶ First, the two trading partners have undertaken to publish, as early as this summer, a catalogue of best practices on green procurement. The aim of the catalogue is “to pave the way for better policies and practices for environmental considerations in government procurement that can make a substantive positive impact on achieving [the two jurisdictions’] common environmental goals”.¹³⁷ Second, the work

¹³¹ ISO 20400:2017(en) Sustainable procurement—Guidance, available at: <https://www.iso.org/obp/ui/#iso:std:iso:20400:ed-1:v1:en>.

¹³² See International Standards and Trade Agreements, available at: https://www.iso.org/files/live/sites/isoorg/files/standards/benefits_of_international_standards/WSC_International_Standards_%26_trade_agreements_2018.pdf.

¹³³ See “EU-US Trade and Technology Council”, available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/stronger-europe-world/eu-us-trade-and-technology-council_en.

¹³⁴ See, the “Transatlantic Initiative on Sustainable Trade” work programme in “Joint Statement EU-US Trade and Technology Council of 31 May 2023 in Lulea, Sweden”, Annex 1 (31 May 2023), available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_23_2992. See, for useful and timely analysis, Grier, “US-EU Green Public Procurement Initiative” (15 June 2023), available at: <https://trade.djaghe.com/?p=7782>.

¹³⁵ The Initiative’s objective is “to build a structured and long-lasting bilateral engagement to promote a more integrated and resilient transatlantic marketplace that will help accelerate the transition to a climate neutral and circular economy to the benefit of businesses, workers and consumers on both sides of the Atlantic”. See “Transatlantic Initiative on Sustainable Trade” work programme in “Joint Statement EU-US Trade and Technology Council of 31 May 2023 in Lulea, Sweden”, Annex 1 (31 May 2023).

¹³⁶ See “Transatlantic Initiative on Sustainable Trade” work programme in “Joint Statement EU-US Trade and Technology Council of 31 May 2023 in Lulea, Sweden”, Annex 1 (31 May 2023). See, for useful and timely analysis, Grier, “US-EU Green Public Procurement Initiative” (15 June 2023).

¹³⁷ See “Transatlantic Initiative on Sustainable Trade” work programme in “Joint Statement EU-US Trade and Technology Council of 31 May 2023 in Lulea, Sweden”, Annex 1 (31 May 2023).

programme commits the two partners to launch, at their planned fifth TTC meeting, a “joint EU-US initiative on green public procurement policies”. The initiative will build upon the joint catalog of best practices and related consultations which are foreseen with stakeholders. Its avowed aim is “to deepen the commonalities of [the two jurisdictions’] respective public procurement approaches with the aim of contributing to achieving our climate ambitions”. The announcement notes specifically that “this initiative could also inform discussions within the WTO Agreement on Government Procurement”.¹³⁸

VII. A call to action

Promoting environmental sustainability and mitigating/adapting to climate change are defining challenges of our times. An ever-increasing litany of dire warnings and related events, from flooding in India and Pakistan to unprecedented wildfires in North America, remind us that a failure to meet these challenges portends disastrous consequences for humankind. Moreover, while individual countries can do much to prepare for and adapt to these adverse outcomes, meaningful mitigation of climate change and the promotion of environmental sustainability in the global commons requires collective action by governments on an unprecedented scale.

As we have discussed, public procurement policy must play a central role in responding to the climate crises. Government purchasing of goods, services and, public works from non-governmental sources is directly implicated in many of the actions that are necessary for the world to adapt to and (to the extent possible) mitigate climate change and related ecological disasters. Meeting the challenge requires a significant paradigm shift for the global procurement community. Governments must rethink the value proposition to allow consideration of the social costs of continuing to rely on solutions that generate greenhouse gases with regard to public health, our quality of life, national security, and global stability. Increasingly, procurement professionals will be called upon to apply their expertise, ingenuity, and public service ethic to help governments adapt to, and mitigate the harms associated with, climate change. International public procurement policy discussions and cooperation among diverse organisations can facilitate and contribute to the needed changes.

This article has argued that, even currently, the GPA poses no significant barriers to the use of public procurement as a tool for the promotion of sustainability objectives. At the same time, more can be done. Given the scope of the looming crises, governments need to explore new measures to incentivise green public procurement policies and provide explicit guidance on related measures. The GPA, and the associated work of the Committee on Government Procurement, including in its related Work Programme on Sustainable Procurement, can contribute importantly to further progress on related issues. As well, a steady stream of developments in leading GPA jurisdictions illustrates the potential for concerns to arise if sustainability is pursued without due regard to the fundamental principles of non-discrimination and transparency. While the GPA and its related Work Programme are but two of the instruments that can potentially contribute at the global level, *the nature of the current crises is such that all available instruments must be employed to counteract them*. As noted above, the above-mentioned EU-US “Transatlantic Initiative on Sustainable Trade” work programme provides new hope that related work in the WTO’s Committee on Government Procurement can now move forward with the urgency and alacrity that it merits.

A strong focus on sustainability and climate change mitigation is a legitimate and important focus of the GPA Committee, the Agreement on Government Procurement, and the WTO itself. The Preamble to the Marrakesh Agreement Establishing the World Trade Organization refers explicitly to “the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to

¹³⁸ See “Transatlantic Initiative on Sustainable Trade” work programme in “Joint Statement EU-US Trade and Technology Council of 31 May 2023 in Lulea, Sweden”, Annex 1 (31 May 2023).

protect and preserve the environment¹³⁹ as a guiding principle of the system. The current warnings regarding the dire threat posed by global warming to humankind are *not* apocryphal; on the contrary, the need for action is acute and compelling. The work ahead should be addressed in this spirit.

Appendix I: Decision on Sustainable Procurement of the WTO Committee on Government Procurement¹⁴⁰

Decision on Sustainable Procurement

Decision of 30 March 2012

The Committee on Government Procurement,

Noting that Article XXII:8(a) of the Agreement on Government Procurement (Agreement) provides that the parties shall adopt and periodically review a Work Programme, including a Work Programme on sustainable procurement;

Recognising that several parties have developed national and sub-national sustainable procurement policies;

Affirming the importance of ensuring that all procurement is undertaken in accordance with the principles of non-discrimination and transparency as reflected in the Agreement;

Hereby adopts a Work Programme with respect to sustainable procurement:

1. Initiation of Work Programme on Sustainable Procurement:

At the first meeting of the Committee after the entry into force of the Protocol of Amendment to the Existing (1994) Agreement, the Committee shall initiate a Work Programme on Sustainable Procurement.

2. The Work Programme shall examine topics that include:

- i. the objectives of sustainable procurement;
- ii. the ways in which the concept of sustainable procurement is integrated into national and sub-national procurement policies;
- iii. the ways in which sustainable procurement can be practiced in a manner consistent with the principle of “best value for money”; and
- iv. the ways in which sustainable procurement can be practiced in a manner consistent with parties’ international trade obligations.

3. The Committee shall identify measures and policies that it considers to be sustainable procurement practiced in a manner consistent with the principle of “best value for money” and with parties’ international trade obligations and prepare a report that lists the best practices of the measures and policies.

¹³⁹ Preamble to the Marrakesh Agreement establishing the World Trade Organization, First Recital, available at: https://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

¹⁴⁰ Decision of the Committee on Government Procurement of 30 March 2012 (Annex E to Appendix 2 of GPA/113, of 2 April 2012).