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ABSTRACT

Public procurement is a highly effective tool for amplifying governments' macro-protectionist policies. But precisely because of this flexibility, public procurement can also be used to promote other objectives, while preserving competition. At a time when sustainable public procurement policies are spreading throughout the world, experience shows that it is possible to reconcile these objectives with an efficient and competitive public procurement system.

Les marchés publics constituent un outil très efficace pour amplifier les politiques macro-protectionnistes des Gouvernements. Mais, précisément en raison de cette flexibilité, les marchés publics peuvent également être utilisés pour promouvoir d'autres objectifs, tout en préservant la concurrence. A l'heure où les politiques de marchés publics durables se répandent dans le monde entier, l'expérience montre qu'il est possible de concilier ces objectifs avec un système de marchés publics efficace et concurrentiel.

1. For public procurement, the pendulum of trade policy seems to be swinging back towards protectionism. Protectionism is a policy tool typically used by governments to restrict international trade and thus protect their domestic industries. When a nation adopts protectionist measures—for example, non-tariff measures (NTMs)—the government generally seeks to maximize economic gains for its private sector. This effect is redoubled when the nation reshapes its own purchasing policies for protectionist ends, as governments and other public entities play a major role in their own economies through public procurement.

2. Public procurement is estimated to be worth USD 13,000 billion worldwide; in the European Union, for example, it accounts for roughly 15% of gross economic output, and in developing countries, government contracting is often the main growth engine. As a result, governments can have a profoundly important impact on their home economies when they raise direct barriers to foreign competition and boost protectionism by imposing rules that restrict foreign companies' access to the governments' public bidding opportunities. Not only can nations define protectionist policies, but the economic effects of these will be amplified in the field of public procurement, which directly confers purchasing power, and therefore the power to act on the market, to governments. In sum, public procurement can play an important (and amplifying) role in leveraging the economic impact of protectionist policies.

3. Protectionism must, though, wrestle with globalization. As part of the postwar international trade order, most countries around the world agreed over many decades to open their public procurement markets, per a framework of bilateral, regional and plurilateral agreements. Recent protectionist efforts by major economic powers, including the United States (I.) and the European Union (II.), suggest a new world order—of new import and export barriers, tight technology controls and “friend-shoring” to limit public procurement trade to a closed circle of aligned nations. Will this be the new economic order in public procurement?

4. This piece argues not. Open international trade in procurement was not a historical accident or a quixotic adventure; instead, the current legal order reflects the economics of globalization and geopolitical realities: demand for emerging technologies from abroad, the need for strategic interoperability, and information technology that reduces transaction costs and thus opens borders. At the same time, the costs of a restructured and restrictive legal order—pervasive technology transfer controls, for example, or a seemingly infinite series of bilateral agreements to accommodate shifting power relationships—could well be unsustainable. On balance, it seems that the arc of history does not point towards overt (what we will call “macro”) protectionism in public procurement.

5. This paper will also demonstrate, though, that protectionism in public procurement can take various forms and have diverse outcomes, including “macro” or “micro” (less overt but still impactful), cyclical or structural, and direct or

indirect effects (III.). Indeed, the question of a new kind of protectionism in public procurement is being raised by novel public policies, such as the implementation of the United Nations' Sustainable Development Goals—goals for “sustainability” (social, economic and environmental advancement) in human affairs, played out through public procurement, which can in practice be quite protectionist. In the current global context, sustainability requirements challenge the traditional neoliberal belief in maximizing competition in procurement. Drawing in part on the U.S. experience over many decades with accommodating social and economic goals in public procurement, the paper will argue that the apparently contradictory goals of competition and sustainability can, in fact, be reconciled in the law. In this respect, and without becoming a mere pawn of protectionism, public procurement law can provide viable solutions for reconciling competition with the new demands of sustainability (IV.).

I. A new economic order: Political “macro-protectionism” in U.S. public procurement

6. We begin with the example of “macro” protectionism in the U.S. system, in an effort to search out the fissures in the new monolith of overt protectionism. Protectionism has surged recently for a variety of reasons, ranging from the pandemic to politics.¹ And protectionism is not always obvious; many sharply restrictive measures can be presented as patriotic, or environmentally sensitive. But what is clear is that these measures are multiplying—metastasizing, some might say—and they threaten the postwar order that emphasized free trade in public procurement.

7. The postwar liberalism in procurement trade grew slowly out of the ashes of World War II, and the pre-war protectionism across the industrialized world that helped fuel the war. “*Deutsche Woche. Deutsche Ware. Deutsche Arbeit*” (roughly translated, “German week, German goods, German work”) read one famous German poster from the 1930s, calling for the purchase of German goods over those from other nations. Read another: “*Hitler baut auf – Helft mit ... Kauft Deutsche Ware*”—“Hitler is building up, help him, buy German goods.”

8. After the war—and despite U.S. pressure to include government procurement in a new liberalized trading regime—the General Agreement on Tariffs and Trade (GATT) largely overlooked public procurement, which was still considered to be a sovereign domain outside the international trade order. Efforts were first made under the Organisation for Economic Co-operation and Development (OECD) to include government procurement under international trade rules; those efforts to liberalize government procurement trade were carried, in turn, to the GATT Tokyo Round of trade negotiations in 1976.² In the United States, meanwhile, government procurement was being assimilated into a massive regional trade arrangement, the North American Free Trade Agreement (NAFTA), which was finalized between Mexico, the United States and Canada in 1994.³ At the same time, the European Community was developing its own directives, to frame basic requirements that its Member States would need to meet in their public procurement in a common market.⁴ This postwar order calling for free trade in procurement was, at its core, in many ways, a reflexive response to the destructive power of xenophobia. The first agreement on government procurement (GPA) was signed in 1979, and its scope and coverage were extended in 1994, before the current (revised and updated) GPA came into force in 2014.⁵

9. To make sense of the current wave of protectionism, several strands from this postwar history are worth highlighting. First, while from the first days after the war it was often the United States (due in part to its firms' interest in foreign sales) that led the march to open government procurement markets, the European nations in time joined that march, partly because open public procurement markets were a key part of Europe's own plans for its integration through open trade. Second, the impulse for open markets was stronger than the supporting regimes—the march towards free trade in procurement traversed different supporting institutions and structures (OECD, GATT, etc.). Finally—and this point deserves careful focus—those leading the push for open procurement markets had a sophisticated understanding of procurement's mechanics; while the agreements could simply have called for non-discrimination, the agreements went beyond to address “non-tariff” barriers buried in procurement, such as tendering processes that close too quickly to allow for effective foreign competition. That deeper understanding integrated the procurement communities themselves into the free trade arrangements, and in time the free trade agreements became a means for exchanging ideas and best practices on government procurement. Taken together, these strands created a durable postwar fabric to support free trade in public procurement, one now at risk from the “new” protectionism.

1 L. Folliot Lalliot and C. Yukins, COVID-19: Lessons learned in public procurement. Time for a new normal?, *Concurrences* No. 3-2020, art. No. 95667, pp. 46–58.

2 J. Heilman Grier, *The International Procurement System: Liberalization & Protectionism*, Dalston Press, Washington, D.C., 2022, ch. 1.

3 *Ibid.*, ch. 5.

4 S. Arrowsmith, The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?, *Pub. Cont. L.J.*, Vol. 35, No. 3, 2006, pp. 337–384.

5 Heilman Grier, *supra* note 2, ch. 1.

1. Evolving protectionism: The United States

10. Over the latter half of the twentieth century, the accepted understanding of protectionism evolved and narrowed. In the United States, for example, while the Buy American Act of 1933 was enacted as a sweeping effort to block foreign competitors from the government market, by the 1950s the Eisenhower administration had scaled back the Buy American Act to make it a relatively minor price preference, and as noted by the end of the century the United States had helped put in place the WTO Government Procurement Agreement (GPA)—a free-trade plurilateral agreement which, in the U.S. procurement system, largely displaced the Buy American Act from the 1930s.

11. By the beginning of this century, there were three main components to the U.S. regime relating to trade policy and government procurement:

- A series of explicitly protectionist statutory measures that can be traced to 1933 with the Buy American Act and today stand as a confusing hodgepodge of “Buy American”-type barriers.⁶ Although these measures can impose price preferences (as the original Buy American Act does), these protectionist statutes can also bar items with specific materials (such as iron or steel), or even bar certain types of products outright (for example, when the U.S. government banned Huawei products because of a perceived espionage risk).
- A less clearly defined array of statutory and regulatory measures with a protectionist effect, such as the Small Business Act, which mandates that roughly a quarter of all federal procurement dollars be reserved for small businesses. Because those small businesses are (almost always) located in the United States (they need to contribute in some way to the U.S. economy to qualify), the small-business preference in practice creates a domestic preference in federal procurement. Many other aspects of the procurement system, such as U.S.-drafted cybersecurity requirements and tens of billions of dollars in non-transparent procurement under framework agreements, have a similarly protectionist effect.
- While they do not resolve this web of protectionism, the many trade agreements that the United States has joined do help. The most important, as noted, is the GPA, which includes 49 member states, from the EU and much of the industrialized world. The GPA’s

annexes define the agreement’s coverage in terms of agencies, goods, services, etc., and can (with other members’ agreement) explicitly reserve longstanding preferences, such as the U.S. preference for small businesses noted above. The United States has also entered into regional and bilateral free trade agreements with Canada and Mexico (originally NAFTA, now renegotiated as the U.S.-Canada-Mexico Agreement (USMCA)), Peru and many other countries, which include government procurement; many of these agreements are modeled on the GPA. Finally, the United States has expanded free trade to defense markets as well through “reciprocal defense procurement agreements”; these bilateral executive agreements with U.S. allies (arguably a model for the “friend-shoring” discussed below), though often overlooked, have been vitally important in removing all barriers to trade among allies in defense materiel and services. Taken together, these various trade agreements put in place after World War II reflect the United States’ strong commitment to free trade in procurement.

12. It is important to stress that these various elements of the U.S. trade regime in procurement evolved over time, and they generally work together. The U.S. social and economic preferences for small and minority-owned businesses that emerged at mid-century, for example, are often (as noted) specifically reserved in trade agreements, and those same trade agreements often exempt environmental measures, even if they are protectionist in effect. Similarly, new laws that raise protectionist barriers (such as Section 1605 of the 2009 American Recovery and Reinvestment Act, which imposed a severe domestic preference in fiscal stimulus spending) often defer explicitly to international trade agreements. And the trade barriers that rise out of the mechanics of the procurement system—the barriers, for example, that emerge from national initiatives in social justice, economic growth and environmental protection (from “sustainable” government policies, to use the modern term)—are often resolved through practical solutions (an opportunity to meet with agency officials to explain a foreign cybersecurity solution, for example) or through outright cooperation between U.S. and foreign officials (such as occurred when the U.S. government rewrote its procurement standards for technologies accessible to persons with disabilities). The U.S. procurement system that grew up after World War II, in other words, accommodated domestic social, economic and environmental needs at the same time it honored international trade agreements that opened procurement markets to an extent unimaginable before the war.

13. Much of that changed, of course, with Donald Trump. President Trump rode to power on a type of populism really not seen in mainstream politics in the United States since the 1930s—a populism deeply steeped in nativism. Isolationism became the order of the day, and protectionism its handmaiden. Nor did things change fundamentally with Joe Biden; facing a likely electoral challenge from Trump in November 2024, the Biden administration has steered away from centrist Democratic free

6 E.g., C. Yukins and S. Schooner, Incrementalism: Eroding the Impediments to a Global Public Procurement Market, *Geo. J. Int’l L.*, Vol. 38, 2007, pp. 529–576; C. Yukins and A. Green, International Trade Agreements and U.S. Procurement Law, in *The Contractor’s Guide to International Procurement*, M. Peterson and E. L. Felix (eds.), ABA Book Publishing, Chicago, 2018. Some barriers to the U.S. market are even more ancient. For over a hundred years, for example, Congress has required that dredging in U.S. waters be done only by U.S.-registered vessels. That preference may have stemmed from the role that dredging played in the country’s early defense and development. Today, the U.S. government still excludes dredging from U.S. free trade agreements, despite massive shifts in the economy and despite pressure from trading partners to open federal dredging contracts to foreign competition.

trade policies and towards a protectionist industrial policy that also had, until recently, largely fallen out of fashion in the United States.

14. These recent shifts—examples of what we might call “macro-protectionism”—can be understood through the prism of two Biden-era major policy developments in U.S. procurement: the rise of “friend-shoring” (an industrial policy of trading first with friendly nations, and perhaps excluding adversary nations) and new “Buy American” requirements in laws such as the Inflation Reduction Act (IRA). In contrast to the Trump administration’s protectionism, which was opportunistic and thus remarkably predictable,⁷ these new measures from the Biden administration demand a closer look to understand their sources—amalgams of social justice, political calculation and geopolitical ambition—and potential vulnerabilities. Notably, while these Biden administration policies grew out of the same popular protectionism, in practical effect they are strikingly different from President Trump’s policies, and those differences point to critical weaknesses in the new protectionism.

2. Friend-shoring in current U.S. policy

15. “Friend-shoring” emerged as a policy theme during the Biden administration, and gained currency when the White House issued a report on “Building Resilient Supply Chains” in June 2021. The report was a follow-up to an executive order issued by Biden in his first month of office that called for studies of global supply chain risks; public awareness of those risks had grown acute during the pandemic, as the United States faced critical shortages of life-saving materiel from abroad to battle the Covid-19 virus.⁸ To temper those risks, the June 2021 report called for “ally and friend-shoring (. . .) along with investments in sustainable domestic production and processing.” Treasury Secretary Janet Yellen—who is broadly credited with coining the term—helped make “friend-shoring” a central theme of Biden administration trade policy.

16. “*The traditional conception of free trade,*” Secretary Yellen wrote in 2022, “*emphasizes the efficiency of trade governed by comparative advantage. That’s the economic theory that suggests that each national economy should produce what it is comparatively best at*”—the classic economic theory of comparative advantage propounded by Scottish economist Adam Smith in *The Wealth of Nations* in 1776, the year the United States was born—which “*explains the efficiency gains of international trade and specialization.*” But, wrote Secretary Yellen, “*we have learned that we must also account for the reliability*

of trade,” which means planning against the “*vulnerabilities that result from over-concentration, geopolitical and security risks, and violations of human rights.*” Through this “*approach called ‘friend-shoring,’*” she wrote, “*the Biden administration aims to maintain the efficiencies of trade while promoting economic resilience for the United States and its partners.*”

17. Secretary Yellen thus laid bare the central strands of “friend-shoring”—to intertwine supply chain resilience with the U.S. government’s goals on the global stage. When applied to public procurement, the two strands can strain and conflict. Making supply chains more reliable is neither new nor controversial; indeed, it is a mainstay of both public and private procurement. What is novel is to gauge the security of the supply chain—especially, for our purposes here, the security of the public supply chain—by its fidelity to a nation’s political and diplomatic goals, and so to divert procurement away from adversaries and towards “friends.”

18. The first problem with this is transience, because a nation’s “friends” change over time. The British statesman Lord Palmerston famously noted, in a speech of the House of Commons in March 1848, that Britain has “*no eternal allies, and we have no perpetual enemies.*” Instead, he said, Britain’s “*interests are eternal and perpetual, and those interests it is our duty to follow.*” Nations’ “friendships” swell and sour from one administration to the next, sometimes due to something as petty as one leader’s dislike for another, and sometimes (as in the case of China and the United States) because of a titanic shift in a global rivalry.

19. A second and related problem with “friend-shoring” is structural. The free trade regime in procurement that grew up after World War II is, as noted, one defined by a web of trade agreements, including the World Trade Organization’s GPA, a plurilateral agreement which, at least in principle, any member of the WTO can join if the existing members of the GPA agree. “Friend-shoring” could distort that nominally non-discriminatory governance structure, especially if (as is likely) the United States works to block geopolitical rivals such as Russia and China from joining the GPA’s free-trade network. Over time, “friend-shoring” could result in a closed circle of trading partners, aligned with the United States on a political basis, but with predictable risks to public supply chains that are not naturally defined by politics, and with potentially catastrophic impacts on the existing trade agreements regime.

20. These structural issues—the web of trade agreements related to procurement that limit the United States’ ability to discriminate against perceived opponents—have a peculiar practical effect on “friend-shoring,” and illustrate why the existing trade regime could stumble under the weight of “friend-shoring.” The existing trade agreements bar discrimination in any number of ways, such as technical requirements. Trade agreements thus make it more difficult for the United States to discriminate broadly, say against all goods that contain any components from “unfriendly” countries; as a result,

7 C. Yukins, Assessing the Trade Agenda for Government Procurement in the Biden Administration, 2020 *Gov. Contr. Year in Rev. Conf. Briefs* 77 (Thomson Reuters, Feb. 2021) (citing prior assessments during the Trump administration).

8 E.g. R. Handfield, A. Patrucco, Z. Wu, C. Yukins and T. Slaughter, A New Acquisition Model for the Next Disaster: Overcoming Disaster Federalism Issues Through Effective Utilization of the Strategic National Stockpile, *Pub. Admin. Rev.*, Vol. 84, Issue 1, 2023, pp. 65–85.

discriminatory measures must be defensible based on exceptions in the trade agreements, such as those for national security. This could force the United States to make overly aggressive use of those exceptions, for example by striking every product or component from an “unfriendly” nation with the same “national security” hammer—in time, making nonsense of the exception and destroying the integrity of the trade agreement.

21. The third problem is one of cost and complexity. Beyond the obvious costs of “Buy American” protectionism—one academic study estimated that eliminating “Buy American”-type protections could save 300,000 U.S. jobs—there are the costs of unwinding an increasingly complex supply chain. Political rhetoric assumes that there are purely “American” goods sold by “American” suppliers, but the reality is much less tidy. As the European Commission has shown in a series of studies on cross-border procurement, suppliers from abroad have penetrated the EU Member States’ public procurement markets much more effectively as suppliers and subcontractors than as prime contractors. This suggests that if the U.S. goal is to tear all products and components from “unfriendly” nations out of U.S. public procurement markets, root and branch, it will be necessary for U.S. agencies and their prime vendors to make costly and complex efforts to “screen” the items sold to the government.

22. The concept of “security of supply” at the core of “friend-shoring” is not new to public procurement; indeed, Adam Smith himself noted in the *Wealth of Nations* that countries might well draw exceptions to free trade where needed to protect military supplies in anticipation of war. But realigning the entire public supply chain to reflect a nation’s alliances abroad faces serious hurdles, which makes it less likely this sort of “macro-protectionism” will survive.

3. Politics and protectionism in the U.S. system: The meaning of “BABA”

23. “Friend-shoring,” discussed above, reflects an effort to align the U.S. government’s purchases with its foreign alliances. The protectionism of the recent “Build America, Buy America” (BABA) Act, in contrast, reflects an effort to align procurement with domestic politics—and also offers insights into how that more purely political protectionism can undo itself.

24. The “Build America, Buy America” Act is part of the Infrastructure Investment and Jobs Act (IIJA). Under BABA, a new domestic preference applies to federal financial assistance (i.e., grants, or what might be called “State aid” in the EU) for infrastructure provided by federal agencies to state and local entities.⁹

⁹ For more details, see the workshop and materials on Implementation Issues Under BABA, on the Public Procurement International website.

25. The domestic content procurement preference imposed by BABA means that whenever federal assistance is used in a project, all iron and steel used in the project must be produced in the United States, and the manufactured products and construction materials purchased for the project must be produced in the United States—with special, more stringent requirements for the construction materials, discussed below.

26. This preference applies beyond the billions of dollars of infrastructure projects funded by the IIJA, to reach presumptively all infrastructure projects supported with federal financial assistance to non-federal entities. In other words, under BABA, the federal government has harnessed tens of billions of dollars in federal infrastructure spending annually to create an expansive new domestic preference, one that reaches beyond the federal government into state and local procurement as well.

27. While the domestic preferences for U.S. “green” industries under the IRA have gained more notoriety in Europe, BABA’s preferences are probably more important for public procurement markets in the United States—and highlight the frailties inherent in a politically driven preference.

28. To understand BABA, we need to look back to February 2023, when President Biden addressed Congress in his State of the Union address and offered his own political perspectives on domestic preferences, echoing themes he had raised before. Speaking of the BABA preference, he said:

“And when we do these projects — and, again, I get criticized about this, but I make no excuses for it — we’re going to buy American. We’re going to buy American.”

Folks — and it’s totally — it’s totally consistent with international trade rules. Buy American has been the law since 1933. But for too long, past administrations — Democrat and Republican — have fought to get around it. Not anymore.

Tonight, I’m also announcing new standards to require all construction materials used in federal infrastructure projects to be made in America. Made in America. I mean it. Lumber, glass, drywall, fiber-optic cable.

And on my watch, American roads, bridges, and American highways are going to be made with American products as well.

Folks, my economic plan is about investing in places and people that have been forgotten. So many of you listening tonight, I know you feel it. So many of you felt like you’ve just simply been forgotten. Amid the economic upheaval of the past four decades, too many people have been left behind and treated like they’re invisible.

Maybe that’s you, watching from home. You remember the jobs that went away. You remember them, don’t you?

The folks at home remember them. You wonder whether the path even exists anymore for your children to get ahead without having to move away.

Well, that's why — I get that. That's why we're building an economy where no one is left behind.

Jobs are coming back, pride is coming back because of choices we made in the last several years.

You know, this is, in my view, a blue-collar blueprint to rebuild America and make a real difference in your lives at home.”

29. The speech reflected President Biden's core political themes.¹⁰ He was speaking to those Americans who feel dispossessed by economic change (including globalization)—the American middle-class voters at the heart of the battle between Biden and Trump. Biden's solution for those voters is a domestic preference that would build opportunity for working-class Americans.

30. What Biden said was also important for understanding BABA's technical particulars; the legislation was already over a year old, and Biden's speech reflected policy decisions embedded in his administration's strategy for BABA's implementation.

31. For example, although many states that use federal infrastructure funding for their own procurement long ago committed to follow U.S. free trade agreements—and thus those states are, in many instances, bound to open their federally funded procurement to foreign competitors—Biden simply shrugged off those commitments by arguing (erroneously) that “*Buy American has been the law [of the land] since 1933.*” The Buy American Act of 1933 does not apply to state or local government procurement; even if it did, as was noted above, international agreements entered into since World War II have largely displaced the 1933 Act and opened procurement markets in the United States. President Biden essentially ignored that history.

32. Biden also signaled that few waivers would be granted from BABA coverage. When he spoke in April 2023, it was not yet clear what that would mean for foreign vendors. In August 2023, however, the U.S. Office of Management and Budget (part of the White House) issued final guidance saying that even where an international agreement has opened a state market to foreign competitors, the state government must still seek a waiver from the federal government before bypassing BABA's domestic preferences. In other words, a state's commitment to open procurement under a foreign trade agreement would no longer be a commitment, but just a first step in an uncertain waiver process. This created a real risk that other nations would retaliate by smothering free trade obligations using similar stratagems.

33. Finally, Biden's words anticipated BABA's skewed implementation. The traditional price preference under the Buy American Act of 1933 applies to “construction materials,” which include all the materials delivered to a work site. Biden's speech, however, signaled a much narrower regulatory definition of the same term (“construction materials”), to include only a small handful of goods, including (in Biden's words) “[l]umber, glass, drywall, fiber-optic cable.” To the casual observer, Biden's speech suggested that the new BABA domestic preferences would apply to all construction materials (under a broad, traditional definition of the term); in fact, however, President Biden was naming essentially all of the very few products that would be covered by BABA's much more rigorous domestic content requirements. Biden's speech, in other words, promised exactly what the Biden administration delivered—which, in fact, was less than it seemed.

34. As Biden's speech reflected, the new BABA domestic content requirements were honed by specific, highly political goals. The BABA requirements offer helpful insights, therefore, into the points of vulnerability when protectionism is defined closely by politics.

35. First, the BABA requirements confirmed that where politics and trade obligations collide, politics may prevail. Although the BABA statute deferred to foreign trade agreements, in implementing that statute, the Biden administration largely ignored the access guaranteed to foreign vendors by trade agreements. BABA shows how politically driven protectionism can be dangerously corrosive to a trade regime. While in the short run, that conflict between politics and trade agreements can be destructive, in the long run, it makes politically driven protectionism less sustainable, because succeeding administrations with different political perspectives are less likely to be willing to sacrifice trade guarantees for a prior government's political goals. Binding protectionism closely to politics, in other words, arguably makes protectionism as transient as politics itself.

36. Second, the BABA requirements show how, handled deftly, politically informed protectionist measures can appear to carry much more impact than they actually do. BABA sets very onerous domestic content requirements for “construction materials,” but refines them to include only a small number of products. Protectionist voters were pleased, but the actual impact was in reality narrower than it appeared. Political rhetoric in short can distort protectionism, which in turn makes that protectionism less sustainable and secure.

37. Finally, by loading a new “Buy American” definition onto an established body of rules—and leaving the old rules in place—the new BABA requirements made industry compliance and government enforcement much more difficult. Industry and enforcement officials must now struggle with a confusing welter of sometimes overlapping rules—is, for example, a particular good covered by the Buy American Act or BABA, and is that good a “construction material” under the old law or the new law, because the definitions are not the same? The new

¹⁰ The transcript is a remarkably intimate window into President Biden as a person and as a politician—the transcript even reflects the stammer that he has struggled with since he was a child.

BABA law thus illustrates the perils of protectionism etched by politics: the protectionist measures may prove much harder to follow and enforce, which mutes their effectiveness.

38. These two recent examples of surging protectionism in the United States—“friend-shoring” and BABA—illustrate critical weaknesses in the new wave of protectionism internationally, weaknesses that suggest that the new protectionism may not endure. “Friend-shoring” assumes that a nation’s geopolitical goals can be enduringly aligned with its procurement supply chains; practical experience suggests, however, that this is not sustainable. And the Biden administration’s BABA initiative, a type of protectionism carefully honed around a political goal, also appears unsustainable—it strains against established trade and compliance regimes, and stands vulnerable to a shift in the political landscape. Taken together, these examples from the United States suggest that over-protectionism may not, in fact, prove the “new normal.”

II. European Union: Growing protectionism, inside and out

39. As the discussion above reflected, protectionism has been an ingrained part of the U.S. procurement system for over a century. In the European Union, in contrast—in a union founded on free trade—protectionism has long been anathema. More recently, however, the EU has been more willing to meet protectionism abroad with protectionist measures of its own, though, as the discussion below shows, those measures have been more tactical and defensive than structural. At the same time, like the United States, the European Union is accommodating new goals in sustainability—social justice, economic development and environmental protections—in its procurement regime, tempered by the EU’s overarching goal of competition and economic integration.

1. Within the EU: Cross-border procurement and the single market

40. To understand protectionism in the European Union, it is important to recognize that in the EU, public procurement law is intertwined with competition law. Since the 1970s, the EU has enacted a series of legal instruments (Directives) to regulate public procurement and promote the construction of the internal market by harmonizing tendering rules among Member States. The last package was published in 2014, covering both public procurement contracts per se and concessions contracts. Even for contracts excluded from the scope of

the Directives, such as those below the EU thresholds, or concessions at that time, the Court of Justice of the European Union (ECJ) decided, in its seminal *Telaustria* ruling, that those contracts remain subject to the “*fundamental rules of the Treaty*,” such as transparency, equal treatment, and non-discrimination based on nationality. This extensive implementation of the EU’s competition policy in public procurement explains why setting aside contracts for small and medium-sized enterprises (SMEs) (to match the U.S. small business preferences under the Small Business Act), even if restricted to European SMEs, was never accepted despite demands from several Member States. However, starting with its 2005 *Coname* ruling, the ECJ has increasingly emphasized the need to scale the opening up of intra-European competition for a public procurement contract to its “*definite cross-border interest*.” In other words, to warrant aggressive measures to open competition across borders, the contract must, among other criteria, be of sufficient economic importance to attract foreign competition.

41. Despite these longstanding efforts in the European Union to link competition and public procurement, the European Court of Auditors recently published a special report (28/2023), which criticized the decline of competition in public procurement in the EU from 2011 to 2021. Additionally, the report raised questions about the efficiency of the 2014 public procurement Directives in stimulating a free EU market for European companies. Despite efforts by European authorities, regional and sectoral differences in public procurement practices persist not only between Member States but also within them. The report suggested that the 2014 Directives, which contemplated the division of public contracts into lots (portions) to attract SMEs, may in practice be of greater interest to large companies, and the ease of entering into direct agreements may have ultimately reduced competition. To promote innovation and cross-border cooperation, the report complained, too few initiatives are launched such as the platform “Big Buyers Working Together,” and at the same time market concentration is deterring open bidding processes.

2. Outside the EU: “Friend-shoring” and the new reciprocity requirement

42. For a long time, EU trade policy, sometimes criticized as too naïve, encouraged free competition, and access (with notable exceptions in the utilities’ directive, which contemplates domestic content requirements) and defense (where special preferences are allowed because of the unique demands of national security). But since then, the EU agreement signed with Korea in 2011, and the so-called new generation European agreements (Comprehensive Economic and Trade Agreement (CETA), Japan-EU Free Trade Agreement (JEFTA) since 2019, and soon MERCOSUR), also seek to reduce other barriers to trade (“non-tariff barriers”), including access to public procurement opportunities.

43. In 2022, in a striking move after years of almost unconditional opening of its Member States' public procurement contracts, the EU switched to a restrictive policy aligned with the “*open, sustainable and assertive EU trade policy*” launched by the Commission on February 2021. Two major steps marked this shift.

44. On June 23, 2022, after ten years of discussions, Europe adopted a new trade regulation (the International Public Procurement Instrument (IPPI)) which restricts access to its public procurement contracts and concessions for operators and products from third countries that do not afford access to their own public procurement markets.¹¹ This regulation is based on the requirement for reciprocity in access to European public procurement markets. The regulation aims to dampen the interest of operators that would otherwise be attracted by the EUR 2,400 billion in annual public contracts in Europe. Some of these operators come from countries with closed or difficult-to-access domestic markets for European companies, such as Chinese companies that engage in “dumping”—pricing in the EU below their home market price—with the support of Chinese politics and economics. The Commission presented this regulation not only as a direct protective measure but also as a means to promote international fair trade. It should induce third countries to negotiate and open their bidding opportunities to European firms, ensuring reciprocal access for their own companies.

45. To avoid being excluded from European procurement contracts, candidates must demonstrate that their country of origin offers reciprocal or equivalent access to European operators, goods, and services, or has concluded a trade agreement with reciprocal terms, or qualifies for a specific exception such as being a least developed country benefiting from the “Everything But Arms” regime as set out in Annex IV to Regulation (EU) No. 978/2012 of the European Parliament and of the Council.

46. Currently, the IPPI regulation applies only to contracts with a value of at least EUR 15 million (excluding VAT) for works and concessions, and at least EUR 5 million (excluding VAT) for goods and services. The regulation also prohibits subcontracting more than 50% of the contract to a foreign operator, with limited exceptions, and it includes an exception for small municipalities (with less than 50,000 inhabitants).

3. Assessing reciprocity

47. The new IPPI regulation is based on the identification of non-tariff barriers to EU operators or products in the public procurement markets of third countries. However, this latter category is not homogeneous, since it includes countries that have not concluded a trade agreement with

the EU (apart from the “protected” countries mentioned above), as well as those that have concluded a trade agreement but may not reciprocally cover the subject of the public contract or public-private partnership (PPP) in question. For the latter, the European Parliament has recommended the use of the dispute settlement procedure specific to the trade agreement concerned, which (in the case of the GPA) would refer a dispute to the WTO Dispute Settlement Body (DSB). As a result, it is not enough to have a trade agreement with the EU to be protected from IPPI measures: at best, the third country could benefit from a favorable presumption, but that presumption could collapse if the Commission proved that there is no full reciprocity of access (depending upon the criteria of size, sector or subject matter of the contract). In the end, this new mandatory regulation “*marks a hardening, even a reversal, of European competition policy in terms of access to its public procurement contracts.*”¹² (Authors' translation)

4. Foreign Subsidies Regulation: Leveling the playing field

48. Later the same year, the EU enacted the well-known Foreign Subsidies Regulation (FSR), 2022/2560 (14 December 2022). The FSR works against the backdrop of the EU's “State aid” regime, under which the EU controls market distortions by limiting Member States' ability to provide subsidies in their home economies. The FSR turns this concept outward to ensure that foreign competitors cannot gain an unfair advantage in EU public procurement markets thanks to subsidies from foreign governments.¹³ In the area of public procurement, the FSR addresses foreign companies that may be supported by non-EU governments through direct subsidies, which would undercut competition. The new Regulation creates an *ex ante* obligation for public procurement procedures where (i) the contract value is at least EUR 250 million and (ii) the bidder has received a foreign financial contribution of at least EUR 4 million per non-EU country. Below these thresholds, the Commission will also be able to request ad hoc notifications if it suspects that foreign subsidies may have been involved in the transaction and the transaction is not yet concluded.

49. On February 16, 2024, the European Commission announced its first in-depth investigation under the Foreign Subsidies Regulation targeting CRRC Qingdao Sifang Locomotive, a Chinese bidder in a public procurement procedure held by Bulgaria's Ministry of Transport and Communications, concerning the provision of

11 For a 2022 workshop and resources on the IPPI and related measures in the EU, see New Protectionism in International Public Procurement, on the Public Procurement International website.

12 L. Folliot-Lalliot, Commerce international : Le Parlement européen et le Conseil adoptent un nouveau règlement de politique commerciale restreignant l'accès à ses marchés publics et concessions par les opérateurs et produits en provenance de pays tiers, *Concurrences* No. 3-2022, art. No. 108195, pp.189–191.

13 E.g., P. Friton, M. Klasse and C. Yukins, The EU Foreign Subsidies Regulation: Implications for Public Procurement and Some Collateral Damage, *Gov. Contractor*, Vol. 65, No. 11, Mar. 22, 2023, ¶ 63.

20 electric “push-pull” trains as well as related maintenance and staff training services, with an estimated value of the contract of around €610 million.

50. Going beyond these macro-protectionism approaches, countries can also promote a tailored protectionist stand in public contracting—some EU Member States, for example, have moved independently to exclude vendors from nations that do not agree to open their procurement markets¹⁴—and, as the discussion below reflects, this growing movement now extends from developed countries to countries from the “Global South.”

III. Customizing protectionism in public procurement

51. Different types and forms of public procurement rules illustrating protectionist impacts can be spotted in domestic legislation, the world over. The discussion below proposes a categorization of examples, keeping in mind that different measures may coexist at the same time. It is more and more common that a procurement regime must balance multiple protectionist measures; as the U.S. and EU experiences outlined above confirm, however, it is possible to coordinate these sorts of “conjunctural” measures, even in times of crisis.

1. “Conjunctural” protectionism in public procurement

52. Most governments have enacted post-Covid provisions following the extraordinary and unprecedented competition between countries to purchase emergency health products for their populations. Emergency situations or exceptional circumstances, such as Covid-19, could be cases for preferences due to time constraints, exceptions that were already justified under trade agreements.¹⁵

53. Paradoxically, this exceptional period of frantic global public purchasing demonstrated the value of maintaining the possibility of buying goods from abroad, despite any previous restrictions.¹⁶ New innovative techniques were designed, such as joint procurement

to buy vaccines, collaborative purchasing, cross-border sourcing, and supply monitoring—all of which balanced against the “new protectionism” emerging worldwide.

54. Nor were these imperatives for open trade limited to the health crisis. In the defense sector, the war situation on Europe’s doorstep recently prompted the European Commission to call for joint procurement with the aim of strengthening the industrial defense base. On March 5, 2024, the European Defense Industrial Strategy (EDIS) called for the EU Member States to procure at least 40% of defense equipment in a collaborative manner by 2030, in order to prevent future supply crises of defense products.

55. After the Covid crisis, in addition to implementing and securing emergency procedures for vital purchases, countries with well-developed private sectors have adopted attractive industrial policies to relocate supply chains and prevent potential shortages of public health supplies, and other goods. This movement has extended to other justifications for emergency purchases: supply difficulties in the energy sector, threats of war, economic and inflationary crisis, climate crisis or even (as discussed above, regarding “friend-shoring” in the United States) a political discourse on sovereignty.

56. Government contracts are also a prime area for the implementation of international sanctions regimes, such as transaction restrictions and embargoes. These are commonly decided within the framework of the UN sanctions regime, or the lists of persons sanctioned by the EU Council, as part of the Common Foreign and Security Policy. This was exemplified by the full prohibition against the participation of Russian nationals and entities in procurement contracts under the EU sanctions, and the termination of ongoing contracts.¹⁷

2. Structural protectionism in public procurement

57. Precisely because public procurement has demonstrated its flexibility and effectiveness as a public policy tool, more changes are emerging more rapidly in public procurement laws—fragmenting and proliferating special regimes to accommodate a range of new public policy imperatives. To better understand the reality of protectionist policies and outputs in public procurement, one needs to go deeper in the analysis and look beyond appearances. Protectionism in public procurement can take various forms, including the complete closure of a market, sector, or a specific invitation to tender through direct contracting. It can also mandate certain conditions, such as qualification criteria for selecting the candidates, or technical specifications, or conditions of contract, or award criteria, or procedural rules deterring free and open competition.

¹⁴ For a detailed summary, see M. Bowsher, P. Friton, P. Lalonde, A. Sundstrand and C. Yukins, *International Procurement Developments in 2022: New Perspectives in Global Procurement*, 2022 *Gov. Contr. Year in Rev.* 59, at 62 (Thomson Reuters, 2023) (summary by Dr. Friton).

¹⁵ E.g., P. Trepte, *The Rise of Resilience in Addressing COVID-19 Procurement Challenges and the Impact of International Trade-Related Instruments on Countries’ Freedom of Action*, in *Public Procurement Regulation in (a) Crisis?*, S. Arrowsmith, L. R. A. Butler, A. La Chimia and C. Yukins (eds.), Hart Publishing, Oxford, 2021.

¹⁶ E.g., S. Evenett, *Tackling COVID-19 Together: The Trade Policy Dimension*, *Global Trade Alert*, Mar. 23, 2020.

¹⁷ Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine, OJ L 111, 8.4.2022, p. 1, Art. 5k.

58. To make sense of this kaleidoscope of instruments, in 2017 the OECD proposed a taxonomy of measures affecting trade in government procurement processes that can impact cross-border public procurement.¹⁸ The OECD study was performed in conjunction with the United Nations Conference on Trade and Development (UNCTAD), which had worked since 2006 on a global project to classify NTMs. The project was supported by a Multi-Agency Support Team (MAST), of which the OECD, as a member, volunteered to chair the working group on government procurement classification.

59. The result was a methodology based on two main groups of direct and indirect barriers in public procurement. The main category of direct measures covered several subcategories: “upfront” market access restrictions, domestic price preferences, local content requirements, collateral restrictions or restrictive effects imposed by other legislation (such as investment law restrictions PPPs). Indirect measures included several subcategories: the conduct of procurement proceedings, qualification criteria for selecting companies, evaluation criteria applied against offers, whether review and complaint systems are open for foreign companies, transparent requirements, and the effectiveness of ethics and integrity systems. In all, more than 57 measures were identified, which showed the variety of procurement barriers to trade at the disposal of governments.

60. Based on this taxonomy, well-known protectionist policies such as the Buy American Act fall within the ensemble of “direct measures” as a local content requirement. Empirical analysis shows that many countries are now clarifying, with direct measures, their commercial policies regarding foreign candidates’ access to their tenders. This clarification helps to highlight protectionist tendencies that may actually not be new but were previously more ambiguous.

61. Some countries that have not joined major global agreements (such as the WTO Government Procurement Agreement) or regional trade agreements covering access to public procurement, such as the BRICS countries, are now officially proclaiming protectionist government procurement policies. This trend is echoed in China’s long-closed government procurement market, in a protectionist stance which is now joined by Brazil. The “Make-in-India” policy is a good example of this trend. In South Africa, Section 217(2) of the Constitution provides for “*categories of preference in the allocation of contracts*” and “*the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination,*” the legal foundation for the “Broad-Based Black Economic Empowerment” (B-BBEE, formerly Black Economic Empowerment) preferential policy in public procurement.

62. Other countries are following this path of protectionism. Algeria’s Law No. 23-12 of August 5, 2023, for example, sets out general rules for public procurement that maintain very limited foreign access, and allow for sole-source contracts (Art. 41) “*when it is necessary to promote national production and/or production tools.*” (Authors’ translation) The Algerian law reflects one of the most common grounds for protectionism: to protect and nurture national industry.

3. Competition limited to specific value contracts

63. Very popular among national systems is the practice of limiting access of foreign bidders based on thresholds. National laws often open “international procurement procedures” only for the highest-value contracts. One example is Brazilian Law No. 14,333/2021: to participate in regular public opportunities, the operator must be duly constituted under Brazilian law, or it can be organized under foreign law only in the case of an international award procedure. On the other hand, countries may announce that their procurement is open by default, but reserve small-value public contracts to local SMEs.

64. These domestic measures may conflict with international trade obligations entered into by the state, which can create potential breaches with huge consequences. Not many in procurement workforces, especially in countries from the “Global South,” are fully aware of these international obligations when it comes to designing their procurement processes; the breaches, therefore, may come as a surprise even to the procuring agencies themselves.

65. The 2023 procurement regulation of Morocco, which is a party to bilateral trade agreements with the United States and the EU, is a rare example of a provision on “national preferences” crafted to avoid such conflict (Art. 147): “*Where competitors not established in Morocco tender for works, supply or service contracts, preference shall be given, in the evaluation of financial bids, to bids submitted by competitors established in Morocco, subject to compliance with commitments entered into under international agreements duly ratified by the Kingdom of Morocco.*”¹⁹ (Authors’ translation)

66. All these recent examples demonstrate how protectionism can be carried forward through tailored public procurement rules to promote domestic companies—and how that protectionism can be reconciled with international agreements that require open markets.

¹⁸ J. Gourdon, V. Bastien and L. Folliot-Lalliot, OECD taxonomy of measures affecting trade in government procurement processes, *OECD Trade Policy Papers*, No. 198, 2017, <https://doi.org/10.1787/5bfb44c3-en>.

¹⁹ Protectionist measures in recent U.S. legislation discussed above, such as the American Recovery and Reinvestment Act and BABA, also explicitly defer to standing trade agreements.

IV. Micro-protectionism and sustainable public procurement

67. The discussion above on current U.S. and EU positions addressed “macro” protectionist policy—general restrictions on foreign competition. Here, we will focus on “micro” protectionism—measures that are managed at the procurement level with a protectionist impact. Currently, one of the most important types of “micro” protectionism relates to sustainable procurement, which is public procurement reshaped to accomplish social justice, economic and environmental goals. As noted, those goals in sustainable procurement are often framed by the United Nations’ very modern Sustainable Development Goals (SDGs); the roots of these sustainable procurement policies, however, can be traced back for centuries.²⁰

1. SDGs as a new justification for protectionism?

68. Ironically, while the debate on whether competition undermines the SDGs is heating up in the field of international trade, public procurement may offer an interesting perspective on how SDGs and open markets can be reconciled. As protectionism re-emerges as an economic policy tool in trade relations (see above), public procurement rules around the world are evolving, again, as an effective public vehicle for the implementation of governments’ commitments under the SDGs. Indeed, the SDG sub-target 12.7 specifically focuses on public contracts. Thus, environmental and social criteria, including the protection of human rights, as well as affirmative actions in favor of SMEs for economic purposes—all illustrating the three pillars of sustainable development (economic, social and environmental)—are increasingly being integrated into legal frameworks with the emergence of “sustainable public procurement” (SPP).

69. Changes are proceeding quickly. Just a few years ago, the 2011 UNCITRAL Public Procurement Model Law hardly addressed socio-economic goals, but instead left them to implementing nations under a very sparse legal framework.²¹ And these goals or objectives were usually dismissed as “secondary policies” by the trade community, in contrast with primary objectives or principles of public procurement such as competition, transparency, equal treatment, non-discrimination and efficiency.

20 E.g., C. McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change*, Oxford University Press, 2007.

21 See United Nations Commission on International Trade Law (UNCITRAL), *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, October 2014, at 5–8.

However, it seems that the implied hierarchy between competition principles and the SDG objectives is now criticized, at least in the public procurement field.²²

70. Sustainable development goals tend to reshape public procurement, and the EU refers to them as “complementary objectives,” and the OECD calls them “secondary policies.” The change started years ago, with the ECJ case law: going beyond the EU public procurement directives of that time, landmark decisions made it possible to reconcile competition and social goals. In the ECJ’s 1988 decision in *Gebroeders Beentjes BV v. State of the Netherlands*, case 31/87, EU:C:1988:422, the Court wrote that a procurement “condition relating to the employment of long-term unemployed persons is compatible with the [EU procurement] directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community,” though an “additional specific condition of this kind must be mentioned in the contract notice.” The Court similarly reconciled competition and environmental goals in its 2002 decision in *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne*, case C-513/99, EU:C:2002:495, where it wrote that “in the context of a public contract for the provision of urban bus transport services, [if] the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.”²³

71. If proportionate and non-discriminatory, environmental (or “green”) criteria in public procurement can both satisfy the SDGs and comply with the competition principle. But some may ask if the fight against climate change could indirectly lead to the emergence of “environmental” or “green” protectionism. By requiring agencies to buy “green” or with environmental preferences such as those for a circular economy (in which consumption is planned, in turn, towards reuse and regeneration), and encouraging local purchases to limit transportation and greenhouse gas emissions, green public procurement (GPP) could be seen as a case study in transitioning from a traditional economy to a “greener” economy with (indirect) protectionist consequences.

22 R. Caranta and M. Trybus (eds.), *The Law of Green and Social Procurement in Europe*, DJOF, Copenhagen, 2010; R. Caranta, Sustainable Procurement, in *EU Public Contracts Law*, M. Trybus, R. Caranta and G. Edelstam (eds.), Bruylant, Brussels, 2013, ch. 7, at 166.

23 See also CJEC, 4 December 2003, *EVN AG and Wienstrom GmbH v. the Republic of Austria*, case C-448/01, EU:C:2003:651 (“The Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources.”).

72. In France, the Climate and Resilience Act, published on August 24, 2021, includes several provisions designed to take sustainable development more into account when awarding and executing public procurement contracts. From 2026, contracting authorities will have to include environmental technical specifications from the first stages of defining their needs. They will also have to include at least one environmental criterion for award.²⁴ In practice, this change will bar the use of price as the sole criterion for award. Purchasers will be required to include in their public procurement contracts performance conditions that take the environment into account. In addition, from 2030 onwards, there will be an obligation to use bio-sourced or low-carbon materials in at least 25% of all major renovations and new buildings commissioned by the public sector. In addition, France's Law No. 2023-973 of October 23, 2023, called for excluding those companies that have been convicted of environmental offenses or are not in compliance with environmental, social and governance (ESG) reporting obligations (based on the EU Directive 2022/2464, the "Corporate Sustainability Reporting Directive," in force since January 2024) from public procurement.

73. In addition, social "protectionism" in public contracting could also result from the SDGs' implementation. For the past decade (and especially since the Covid-19 crisis encouraged governments to take steps to mitigate the pandemic's adverse effects), the European Union has been promoting public procurement policies that take social factors into account. The Commission has published several tools to encourage Member States to adopt the principles of socially responsible public procurement: Buying Social (a guide on taking account of social considerations in public procurement),²⁵ *Making Socially Responsible Public Procurement Work* (a collection of good practice cases),²⁶ and a social media group, Actors for Social Impact Procurement. The Commission promotes multiple social goals: "*By purchasing wisely, public buyers can promote employment opportunities, decent work, social inclusion, accessibility, design for all, ethical trade, and seek to achieve wider compliance with social standards.*" To do so, policies favoring socially responsible public procurement (SRPP) and GPP require agencies to compare prices of goods or services using life-cycle cost analysis that integrates all costs of production, sourcing, delivery and recycling.

74. As it matures, public procurement serves as a vehicle for a number of public social policies: job creation, compliance with labor regulations, gender equality policies, etc. In this social dimension, respect for human

rights, in the broadest sense of the term, thus becomes a condition of participation for bidders, which can obviously affect the participation of companies non-compliant with these human rights requirements. As a major step, not limited to public procurement, on March 15, 2024, the proposal for an EU Corporate Sustainability Due Diligence Directive was adopted by the Council. If approved by the EU Parliament, it will impose on 5,000 EU and non-EU companies, with a turnover of over EUR 450 million minimum, a civil liability regime for failing to carry out diligence in their supply chains. These requirements could be considered as having an indirect "protectionist" effect, for they erect complex new supply chain requirements that foreign competitors simply may not be prepared to meet.

75. Referring to the OECD's taxonomy on government procurement measures, discussed above, one should consider whether these SDGs' requirements implemented through public procurement rules are actually variations of indirect protectionist barriers because these requirements may deter competition from foreign companies, and even force them to modify their ways of doing business to compete in EU Member States' public procurement markets. In assessing this question, it is worth noting that these new requirements may also affect local companies' participation, as the requirements are not specifically related to the nationality of the candidate—the requirements' first and obvious purpose is not protectionism.

2. Preferences for SMEs, the economic pillar of SPP

76. As noted, in the past, SME preferences were regularly criticized as examples of protectionist economic policies. But they have now gained legitimacy, since SME preferences are considered crucial for implementing the economic pillar of the sustainable development objectives. (Notably, SME preferences can also advance the social justice pillar, for example when they are used to promote minority- or women-owned businesses.) Morocco, for example, with Decree 2023 – Article 148, said that a contracting authority "*is required to (...) reserve a percentage of thirty percent (30%) of the estimated value of the contracts they intend to award, for each financial year, for very small, small and medium-sized enterprises established in Morocco, including young innovative enterprises, cooperatives, cooperative associations and self-employed entrepreneurs.*" (Authors' translation) Similarly, the United Kingdom's post-Brexit Procurement Act of 26 October 2023 sets new procurement rules (divorced from the EU constraints) that offer greater opportunities for small businesses and social enterprises.

77. Significantly, the Methodology for Assessing Procurement Systems (MAPS), a global assessment tool developed jointly by a consortium of international organizations including the OECD, the World Bank and the United Nations, and used by governments to identify flaws in their domestic procurement

24 For similar initiatives in the European Union, the United States and Brazil calling for environmental planning in procurement, see workshops on the Public Procurement International website, EU and U.S. "Green Procurement" Strategies: A Comparative Assessment for the March 2024 FIDES Workshop, and Brazil's Public Procurement Market: New Opportunities, New Challenges, Oct. 7, 2021.

25 Eur. Comm., *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*, 2nd ed., C(2021) 3573 final, 26 May 2021.

26 P. Tepper, A. McLennan, R. Hirt et al., *Making Socially Responsible Procurement Work: 71 Good Practice Cases*, Publications Office of the European Union, Luxembourg, 2020.

systems, has just revised its supplementary module on SPP. Its 2023 version allows for “*preferences for certain categories of firms, if any, are adequate and justified and do not undermine the economy and efficiency of the system.*” However, the formulation is somewhat ambiguous, for it avoids specifying whether these preferences are limited to local SMEs. Reconciling preferences for SMEs with open competition is much more difficult if those set-asides are limited to local companies.

3. Localism and protectionism

78. This critical question—whether sustainability preferences should be focused only on local companies—carries well beyond MAPS, as we may be on the cusp of a major turn in public procurement. Sounding the themes of sustainable development—promoting local industries to advance social justice, foster economic growth and reduce environmental damage—new procurement rules often promote “localism.” Presented as a new mantra in the world of public procurement, the “local” requirement is indeed spreading, and in the process it is becoming another form of protectionism, a micro-protectionism with a geographical dimension. For the OECD, “*local content requirements (LCRs) are part of a broader set of ‘localisation’ policies that favour domestic industry over foreign competition, requiring companies and the government to use domestically-produced goods or services as inputs.*”

79. The concept of localism is becoming more elaborated, as countries apply it with different meanings, such as “local development,” “local companies” and “local employment.” From a spatial, or geographical, point of view, the concept can denote a global region, such as the West African Economic and Monetary Union (WAEMU), and so require preferences for “community companies” across a relatively large region. “Local” may also refer to states versus national governments in a federal system, or it may mean local governments. Subnational protectionism has developed, ranging from the municipal to the regional/county level, which has

led to layers of preferences. In Morocco, for example, Decree 2023 – Article 91 states: “*This preference is given, in order of priority, to the offer of the competitor operating within the territorial jurisdiction of the municipality, province or prefecture, or region.*” (Authors’ translation) Ultimately, this type of layered localism can create a maze of preference rules, leading to inefficient purchasing activities and unnecessarily lengthy and costly processes. But these provisions illustrate the malleability with which public procurement law can adapt to public policy, in this case, a decentralization objective. However, if these rules result in contracts being reserved for “local” candidates only, they clearly qualify as direct protectionist measures, with anti-competitive effects, even when confined to small contracts that are less attractive to foreign competitors.

V. Conclusion

80. Public procurement is a very efficient tool that can be instrumentalized to amplify macro-protectionist policies with political and economic objectives, as seen with “friend-shoring” and the BABA Act in the United States, and the BRICs’ closed markets. But, precisely because of that flexibility, public procurement can also be used to advance other goals while preserving competition. Sustainable public procurement policies that are gaining traction worldwide could serve as a model for reconciling social, economic and environmental goals with competition, as experience demonstrates that there is room for reconciling those goals with an effective, competitive procurement system. Measures need to be adjusted and proportioned, with tailored reciprocity and preferences, and—whenever possible—without national preferences for their own sake. Although these sustainable public procurement goals create more complexity, these measures can help shape sustainable public procurement in markets around the world. The question, then, will not be whether protectionism will prevail, but whether social, economic and environmental goals can be reconciled in a responsible way with competitive public procurement markets. ■

Concurrences est une revue trimestrielle couvrant l'ensemble des questions de droits de l'Union européenne et interne de la concurrence. Les analyses de fond sont effectuées sous forme d'articles doctrinaux, de notes de synthèse ou de tableaux jurisprudentiels. L'actualité jurisprudentielle et législative est couverte par onze chroniques thématiques.

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