

A hand holding a rolled-up document in front of solar panels. The background shows a grid of solar panels under a blue sky. The hand is wearing a black leather jacket and a striped shirt cuff. The document is white and rolled up. The overall image is a cover for a report.

## Trade Law Implications of Procurement Practices in Sustainable Energy Goods and Services

September 2012  
ICTSD Global Platform on Climate Change, Trade and Sustainable Energy

By Alan Herve and David Luff



International Centre for Trade  
and Sustainable Development

A joint initiative with



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International Centre for Trade and Sustainable Development (ICTSD)  
International Environment House 2  
7 Chemin de Balexert, 1219 Geneva, Switzerland

Tel: +41 22 917 8492                      Fax: +41 22 917 8093  
E-mail: [ictsd@ictsd.org](mailto:ictsd@ictsd.org)                      Internet: [www.ictsd.org](http://www.ictsd.org)

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Programme Officer:                      Mahesh Sugathan

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ICTSD welcomes feedback on this document. These can be forwarded to Mahesh Sugathan, [smahesh@ictsd.ch](mailto:smahesh@ictsd.ch)

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**About the Global Green Growth Institute, [www.gggi.org](http://www.gggi.org)**

The Global Green Growth Institute (GGGI) is a new kind of international organisation that has been established to accelerate “bottom up” (country- and business-led) progress on climate change and other environmental challenges within core economic policy and business strategies. The Institute provides an international platform for evidence based learning and policy innovation that helps to illuminate practical opportunities for progress on the twin imperatives of economic development and environmental sustainability, while deepening cooperation among developed and developing countries, the public and private sectors, and practitioners and scholars. Founded in June 2010 and established in Seoul, GGGI is committed to help developing and emerging countries pioneer a new “green growth” paradigm, and is scheduled to be converted into an international organisation in October 2012.

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# Abbreviations and Acronyms

APEC	Asia-Pacific Economic Cooperation
EC	European Commission
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GGGI	Global Green Growth Institute
GPA	Government Procurement Agreement
GPEG	Government Procurement Expert Group
ICTSD	International Centre for Trade and Sustainable Development
KACA	Korean Airport Construction Authority
MFN	Most-Favored-Nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
PIIE	Peterson Institute for International Economics
PPM	Process and Production Method
SEGS	Sustainable Energy Goods and Services
SETA	Sustainable Energy Trade Agreement
SETI	Sustainable Energy Trade Initiative
TBT	Technical Barriers to Trade
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organisation

# Foreword

Climate change is an unprecedented challenge facing humanity today. As fossil fuel-based energy use is the biggest contributor to anthropogenic greenhouse gas (GHG) emissions, a rapid scale up and deployment of renewable or sustainable energy sources could significantly reduce the emissions responsible for climate change. From a development perspective, developing countries face the enormous challenge of reducing carbon intake while ensuring people's access to energy and powering rapid economic growth. Most countries are also seeking ways to enhance their energy security by reducing their reliance on fossil-fuel imports. Developing sustainable energy through a switch to cleaner, low-carbon transport fuels and technologies along with greater energy-efficiency measures could make a positive contribution toward achieving these goals.

Efforts to scale up sustainable energy require generation costs to be as low as possible. Relatively high capital costs associated with renewable energy investments, the non-consideration of environmental and health externalities in fossil-fuel pricing, and the enormous levels of subsidies still granted to fossil fuels make this a challenging proposition. Alternatively, renewable energy costs are enduring a rapid global decline that will likely continue for some time. In certain locations renewable energy generation has already attained 'grid-parity,' equalling the cost of fossil fuel-based power generation.

While incentives such as feed-in tariffs and tax breaks help, lowering the costs of equipment and services used to produce sustainable power can facilitate the scale-up process, enabling economies of scale and cost optimisation for renewable energy projects. Addressing barriers to trade in sustainable energy goods and services can also contribute to scale economies and cost-optimisation, as trade in sustainable-energy goods can be hampered by tariffs, subsidies, diverse or conflicting technical standards, and lack of harmonisation or mutual recognition efforts.

In striving to lower production costs, policymakers often seek to promote domestic manufacturing of renewable energy equipment and the provision of services, with many policymakers viewing the sustainable energy sector as a potential engine for job creation. These factors could potentially induce sustainable energy policies designed with protectionist intent and trigger trade disputes in the sector. Canada and Japan are in the midst of the World Trade Organization's (WTO) first ever trade dispute over renewable energy feed-in tariffs and local content measures. Moving forward, the urgency of addressing climate change will require, among other policy responses, a clear and coherent governance regime for sustainable energy and related goods and services supported by trade rules and robust markets. The current stalemate in the WTO's Doha negotiations, particularly in efforts to liberalise environmental goods and services, has prevented action to address barriers to trade in sustainable energy goods and services. Even a successful conclusion of the round would leave a number of trade-related rules pertaining to sustainable energy –including government procurement of SEGs– unclarified, given the Doha mandate's lack of a holistic perspective on energy.

With such a scenario, sustainable energy trade initiatives may present worthwhile alternatives. These possibilities include a Sustainable Energy Trade Agreement (SETA), a stand-alone initiative designed to address barriers to trade and enable a trade policy-supported energy governance regime to advance climate change mitigation efforts and increase sustainable energy supply.

This agreement might be pursued initially as a plurilateral option – either within or outside the WTO framework – and eventually be "multilateralised." It could serve to catalyse trade in sustainable energy goods and services and address the needs and concerns of participating developing countries, many of which may not be in a position to immediately undertake ambitious liberalisation in sustainable energy goods and services. A SETA could also help clarify existing



ambiguities in various trade rules and agreements as they pertain to sustainable energy and provide focalised governance through effective, operational provisions.

One such policy tool where greater clarity in trade rules will be required is the use of government procurement as a means to create demand for clean energy as well as goods and services relevant to clean energy and energy-efficiency. The government as an entity is often the largest consumer of goods and services, in both developed and developing countries and it can leverage its purchasing power to create or further expand existing markets for goods and services. At the same time, procurement policies can also discriminate against foreign suppliers by favouring domestic suppliers either explicitly or implicitly. Many governments prefer to use procurement policies as a tool for promoting domestic sustainable energy capacities and industries. While this is understandable, it also means that countries may not be able to choose the most competitively priced equipment and services globally available. Thus on one hand there is a need for trade rules to be supportive of government efforts to foster sustainable energy using procurement as a tool as well as greater clarity on the extent to which they can do so without discriminating against their trading partners.

This paper discusses existing international regulations on public procurement including the recently revised GPA that improves upon the previous agreement in terms of market access gains. The gains result from a significant extension of the coverage of the agreement and the setting of lower thresholds –the value above which individual procurements are covered by the Agreement. Expanded coverage includes addition of new sectors (including services sectors) as well as new government entities to the existing Parties' current Appendix I Annexes . The paper then presents the policy landscape and context surrounding the promotion of SEGs in public procurement, with an overview of the field's existing policies and instruments. It goes on to assess the compatibility of those policies and practices with existing international instruments, with an emphasis on the Government Procurement Agreement (GPA). and finally concludes with an examination of how a SETA could make procurement practices more supportive for the massive scale-up of renewable energies.

According to the paper, a SETA could provide an opportunity to change current approaches concerning the issue of SEGs in public procurement. In addition to ensuring non-discriminatory treatment for the same SEGs as far as parties to a SETA are concerned, a SETA could also enable more proactive approaches to foster sustainable energy through procurement particularly if it also implies discriminating against less-sustainable products. The authors acknowledge that this may be challenging given the stance of various WTO Members on process and production methods (PPMs). However they also point out that the revised GPA specifies that sustainable procurement should be one of the subjects for future GPA negotiations. Such negotiations could result in provisions linked to a future SETA Agreement, and conversely – in case a SETA is negotiated first – future GPA provisions could also refer to those SETA provisions.

This paper was conceived by the International Centre for Trade and Sustainable Development (ICTSD) and written by Alan Herve, Senior Academic Assistant, College of Europe (Natolin campus) and David Luff, Visiting Professor at the College of Europe and Partner at Appleton Luff International Lawyers.

The paper is produced as part of a joint initiative of ICTSD's Global Platform on Climate Change, Trade and Sustainable Energy, the Global Green Growth Institute (GGGI) and the Peterson Institute for International Economics (PIIE).

The concept of the research has been informed by ICTSD policy dialogues, in particular a dialogue organised in Washington, DC in November 2011 by the PIIE with support of the Global Green Growth Institute (GGGI) and ICTSD; a high-level Roundtable in Geneva organised on

16 December 2011 on the occasion of the Eighth Ministerial Conference of the WTO that was attended by a number of high-level representatives from WTO missions and capitals; and at a session organised at the Global Green Growth Summit 2012 in Seoul, Korea. As a valuable piece of research, it has the potential of informing innovative policy responses on sustainable energy trade initiatives and will be a valuable reference tool for policymakers involved with procurement as well as trade negotiators. We hope that you will find the paper to be a thought-provoking, stimulating, and informative piece of reading material and that it proves useful for your work.



Ricardo Meléndez-Ortiz  
Chief Executive, ICTSD

# Executive Summary

Competition is growing among countries that hope to capture important new markets for clean energy technologies and products. One policy tool used to create demand for clean energy – as well as for goods and services relevant to clean energy and energy-efficiency – is government procurement. Governments, as large consumers of goods and services, can leverage their purchasing power to create, or further expand, existing markets for goods and services. Sustainable or green procurement provides an opportunity to mitigate over-exploitation of scarce resources. The promotion of sustainable energy goods and services (SEGS) within public procurement also provides a means of complying with international obligations imposed by the Framework Convention on Climate Change and the Kyoto Protocol. Simultaneously, however, procurement policies can discriminate against foreign suppliers by favouring domestic suppliers in either a “de jure” or a “de facto” manner.

Existing international instruments address the tension between the promotion of sustainable energy goods and services (SEGS) in public procurement and its discriminatory effects. One of the most important of these is the WTO Government Procurement Agreement (GPA), which contains rules that provide a useful framework for openness, non-discrimination, and transparency.

## **Government Procurement: Regulatory Frameworks, Issues and WTO Disputes**

At the international level, several instruments regulate public procurements.

The Model Law on Procurement of Goods, Construction and Services, negotiated within the United Nations Commission on International Law (UNCITRAL) and based upon best government procurement practices, provides a template for the design and development of regulations on public procurement. The main objective of the Model Law is to create standardised approaches to public procurement, while helping states achieve domestic procurement objectives of value for money, efficiency, probity, and other objectives. Though not a legally binding instrument, it allows the enacting state to pursue both domestic policy objectives, such as promoting economic development through the support of SMEs, and environmental goals.

In addition to the Model Law, regional non-binding instruments have been developed in recent years. These include the non-binding principles on procurement developed in 1995 by the Government Procurement Expert Group (GPEG) of the Asia-Pacific Economic Cooperation Forum (APEC) to encourage voluntary liberalisation of procurement markets in the Asia-Pacific region.

The WTO Government Procurement Agreement (GPA), which came into effect on January 1, 1996, also provides a framework for procurement issues. The GPA was initially intended to apply to all WTO members but this proved impossible. As such, the GPA constitutes one of the few plurilateral agreements within the WTO legal framework, creating obligations and rights only for WTO members that have signed it. In December 2011, parties meeting at the ministerial level in Geneva formally approved a revised version of the GPA. The recitals of the revised GPA remain silent with respect to environmental or social objectives that could be pursued through public procurement.

The real scope and coverage of the GPA depend largely on the entities covered in the parties' annexes to Appendix I of the agreement. Each party to the GPA must specify which central and sub-central government entities (and other entities) will be covered by the obligations imposed by the agreement. There are as many commitments, entities covered, and goods and services subject to the GPA as there are parties to it. It is recommended, therefore, to check each schedule individually, as a general synthesis is almost impossible. Relevant commitments with respect to SEGS are those concerning, for instance, all renewable energy products, such as alternative fuel vehicles, pre-

construction power plant services, design and engineering services, energy performance contracting services, or smart buildings using renewable energy or renewable materials.

In addition to the GPA, almost all WTO members – and many non-members – are parties to various bilateral and plurilateral free trade agreements (FTAs). These FTAs contain “WTO plus” obligations – rules and disciplines on which the full membership of the WTO cannot agree on under the single undertaking principle. Public procurement is one of the items on which the major players, such as the United States and the EU, seek additional liberalisation and disciplines.

### **Policy Context and Landscape**

An increasing number of countries have recognised the potential benefits of “sustainable procurement” and, particularly, SEGS promotion in procurement. Procurement promoting SEGS can drive innovation, providing industry with real incentives for developing green products and services – particularly in sectors where public purchasers represent a large share of the markets (such as public transport or construction). Moreover, in many cases sustainable procurement provides a stimulus for local business, which will often have greater capacity to fulfil energy-saving criteria and benefit from the promotion of domestic product and services.

Developed economies have long realised the opportunity to maintain their competitive advantage through sustainable procurement. For instance, in 2009, President Obama signed an executive order which states that federal agencies must immediately increase energy efficiency, reduce their greenhouse gas emissions from direct and indirect activities, conserve and protect water, eliminate waste, and recycle and prevent pollution. In this effort, very detailed and precise objectives are given to the agencies.

Furthermore, the European Union, through its two major directives dealing with public procurement, expressly allows the development of selection procedures and requirements, technical specifications (including standards and eco-labels), and award criteria that permit the promotion of SEGS.

Developing and emerging economies have also chosen to promote SEGS in government procurements. In China, the promotion of sustainable procurement is part of a general strategy aimed at reducing pollutant emissions and stimulating green innovators. In the last decade, several Chinese regulations have called upon central and local administrations to promote sustainable products in procurement. The Chinese policy, however, is still hampered by several constraints – legal (lack of objective “green standards”), institutional (multiplication of the agencies and competent authorities, non-implementation at the local level), and economic (lack of resources).

Actual examples of the use of public procurement include the UK government’s development of a carbon capture and storage (CCS) pilot power plant and a Global Rural Electrification programme developed in Morocco. Both examples illustrate the importance of public-private partnership in the development of sustainable procurements and, particularly, SEGS procurement. The development of SEGS necessitates not only a strong political drive at the highest level but also large cooperation networks established at national and local levels.

### **Trade Implications of Procurement Policies and Instruments for SEGS**

The promotion of sustainable goods and services with respect to public procurement policies bears the intrinsic risk of discriminating amongst potential suppliers. Such situations may arise when authorities use standards and eco-labelling to define the characteristics of goods and services to be procured, and such standards and eco-labels are already met by a clearly identifiable category of operators, to the exclusion of others. Furthermore, standards and eco-labelling are potentially trade-restrictive when they are based on process and production methods (PPMs) not apparent from the product itself. The PPMs require a party to a trade agreement to adopt the manufacturing

processes of the procuring party in order to benefit from its rights accruing under the agreement. The discriminatory nature of PPM is still a sensitive and unresolved issue.

### **Compatibility with Multilateral Rules**

The existing non-binding international and regional instruments on government procurement are sufficiently flexible to allow SEGS promotion. The UNCITRAL Model Law on Public Procurement has recently incorporated several provisions that can be interpreted as encouraging states to favour the use of SEGS in public procurement.

Regarding the WTO, if the procuring country is not a party to the GPA, a challenge against possible discriminations in favour of SEGS in public procurement is rather difficult. Japan and the EU recently brought a case against Canada to the WTO's Dispute Settlement Body related to the province of Ontario's local content requirements in a feed-in tariff (FIT) procurement scheme. The FIT program allows buying renewable energy (solar and wind electricity) at an above market price, in order to compensate for the higher production costs. The complainants base their claims on the GATT National Treatment, the Agreement on Trade Related Investment Measures (TRIMs), and the Agreement on Subsidies and Countervailing Measures (SCM). This case may have systemic consequences regarding SEGS procurement policies and measures as well as the scope of applicability of the GPA.

If the procuring country is a party to the GPA and if the procurement is covered by its list of GPA commitments, discriminations favouring SEGS in public procurement can be successfully challenged under the GPA. In this case, several situations must be identified.

Regarding the *choice of procedure*, the provisions of the GPA leave the parties room for manoeuvre provided that the tendering procedures are applied in a non-discriminatory manner. The discrimination may occur when a restricted procedure or a competitive dialogue is applied by a purchaser which wants to select only those domestic suppliers that appear to have the technical capacity and experience to provide SEGS.

*Regarding the use of technical specifications*, the GPA encourages the use of international standards (where they exist) or "technical regulations" and "regional standards." Technical specifications may include labels or other non-mandatory instruments. Moreover, the revised version of the GPA contains two new provisions suggesting that process and production methods requirement can be included in standards or labels. This would be particularly useful, for instance, when a standard or a label specifies that a good or a service must be produced through energy-saving methods.

*Regarding the use of sustainable and award criteria*, through the concept of the "most economically advantageous tender" instead of the single "lowest price" tender, procuring entities may take into account secondary policy objectives when awarding the contract.

Finally, despite the provisions above, should the promotion of SEGS in procurement procedures be considered to discriminatory, justification can be sought under the "general exceptions" of the GPA agreement. To be justified, the procurement cannot *constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade and it must be necessary to protect...safety, human, animal or plant life or health...* This provision mirrors the general exception provision of the GATT Article XX. Case law has repeatedly asserted the principle that unilateral PPMs do not meet the conditions related to the lack of *arbitrary or unjustifiable discrimination* unless the member adopting them has proactively engaged into prior consultations with the other members whose trade interests are affected.

Considering the general reluctance of the WTO system to accept unilateral measures based on prescriptions which are deemed discriminatory – including PPMs which do not sufficiently differentiate

among the products and services – recourse to an international agreement addressing the issue could be useful. This presents a potential issue to be addressed by a Sustainable Energy Trade Agreement (SETA), where the exception provision of the GPA would be interpreted so as to give effect to the SETA.

In this context, the contents of the SETA relating to public procurement and interface with WTO rules, both in terms of contents and dispute settlement procedures, should be clearly specified.

A SETA could provide an opportunity to change the current approach concerning the issue of SEGS in public procurement. At the international level, and especially within the WTO, this is still a controversial issue, as SEGS and sustainable procurement can most often be justified only as exceptions to the multilateral trade rules. This demands a response to this issue through a positive and proactive approach that would encourage and facilitate tender requirements based on SEGS. The revised GPA specifies that sustainable procurement should be one of the subjects for future GPA negotiations. These negotiations could result in provisions linked to a future SETA Agreement, and conversely – in case a SETA is negotiated first – future GPA provisions could also refer to those SETA provisions.

A recommendation would be to try to avoid forum shopping among the various agreements. The inclusion of the SETA within the WTO may be the best option in this regard. The enforceability of procurement-related provisions of a SETA could vary. Soft-law provisions, for instance, could adequately address SEGS-related requirements and the exchange of best practices between the parties to the SETA. In other areas, quantitative objectives could be imposed on the parties to the agreement. For instance, a SETA could require certain proportions of SEGS-certified products in some key sectors (building, construction, transport, etc.), and it could assess such objectives through a peer review mechanism. The requirements could vary based on the level of development of the contracting parties, encouraging broad participation in a SETA.

# Introduction

Competition is growing among countries hoping to capture important new markets for clean energy technologies and products. Meanwhile, domestic policy measures in this area often attempt to address multiple policy goals, including job creation.

Countries are now often turning to government procurement as a means of creating demand for both clean energy and goods and services related to clean energy and energy efficiency. Governments, as large consumers of goods and services, can leverage their purchasing power to create or further expand existing markets for goods and services. At the same time, procurement policies can discriminate against foreign suppliers by favouring domestic suppliers in either a *de jure* or *de facto* manner. Many governments use procurement policies as a tool for promoting domestic sustainable energy capacities and industries; while this aids domestic industry, it also means that countries might not be choosing among the most competitively-priced equipment and services available globally.

Existing international instruments address the tension between the promotion of Sustainable Energy Goods and Services (SEGS) in public procurement and its discriminatory effects. One

of the most important of these instruments is the WTO Government Procurement Agreement (GPA), which contains rules that provide a useful framework for openness, non-discrimination, and transparency. Given its fragmented nature, however, the international framework fails to address the existing issues raised by national policies promoting SEGS.

This raises the need for effective incentive schemes that encourage clean energy solutions. This paper suggests that a Sustainable Energy Trade Agreement (SETA) would provide an opportunity to actively promote SEGS in public procurement while ensuring that they will not be used simply to give preference to domestic suppliers.

Section 2 of this paper discusses the existing international regulations on public procurement. Section 3 presents the policy landscape surrounding the promotion of SEGS in public procurement, with an overview of the field's existing policies and instruments. Section 4 assesses the compatibility of those policies and practices with existing international instruments, with emphasis on the GPA. Finally, Section 5 examines how a SETA could improve procurement practices.

# Chapter 1

## Government Procurement: Regulatory Frameworks, Issues and WTO Disputes

### 1.1 What constitutes Government Procurement

The term “government procurement” generally refers to government purchases of goods and services for the government’s own use. Such goods and services range from office equipment, transport vehicles, and cleaning and transport services to advanced technology goods such as weapons systems. The terms “public procurement” and “government contract or public contract,”<sup>1</sup> used by the US, describe the same activity. The United Nations Commission on International Trade Law (UNCITRAL) defines government procurement as “the acquisition of goods, construction and services by a procuring entity.”<sup>2</sup> Article III.8 of the GATT defines it as “procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.”

In the present study, the terms “public procurement” and “government procurement” will apply to all acquisitions by any means of goods, works, or services by public procuring entities, such as central government ministries, municipalities, public schools, hospitals, or even state enterprises. The suppliers are generally from the private sector, although in some cases a procuring entity may purchase goods and services from another public body related to the state (for example, a state-owned enterprise).

Public authorities are major consumers of goods and services both in developed and developing countries. According to the European Commission, European public authorities spend approximately two trillion Euros each year (equivalent to 19 percent of the entire EU Gross Domestic Product).<sup>3</sup> In most countries, public procurement accounts for a significant proportion of GDP: around 10 to 15 percent in OECD countries, up to

25 percent in developing countries, and even more in countries in transition.<sup>4</sup>

Traditionally, governments have used public procurement as a policy tool – mainly to favour domestic industry, to foster development of certain regions, or to create jobs. Discriminatory practices take a wide variety of forms, from explicit requirements that domestic suppliers be preferred over foreign suppliers to procurement procedures that are *de facto* discriminatory.<sup>5</sup> This favouritism towards internal suppliers constitutes an obvious barrier to trade, one that has been partially addressed by international regulation, especially within the WTO framework.

### 1.2 Existing Government Procurement Regulatory Frameworks at the Regional and International Levels

#### 1.2.1 Non-Binding international and regional instruments regulating public procurement

The Model Law on Procurement of Goods, Construction and Services, negotiated within the United Nations Commission on International Trade Law (UNCITRAL), provides a template for the design and development of public procurement regulations based upon best practices in government procurement. Initially designed to provide guidelines to developing countries, the Model Law has inspired the procurement legislation of various Central and Eastern Europe countries and has lately showed increasing influence on Asian and African states.

The UNCITRAL Model Law was revised by the UN General Assembly in July 2011.<sup>6</sup> This revision was prompted mainly by new technological developments – most notably, the use of electronic communication in public procurement. Despite these developments,



the basic features of the Model Law have not changed.

The Model Law's main objectives are to create standardised approaches to public procurement and to help states to achieve domestic procurement objectives, including value for money, efficiency, and probity, among others. Unlike the GPA, the UNCITRAL Model Law is not a legally binding instrument. It is intended simply to provide a regulatory blueprint for public procurement, for adoption by individual countries as they choose.

The Model Law contains procedures addressing "standard procurement, urgent or emergency procurement, simple and low-value procurement, and large and complex projects," stating that all procedures should be subject to rigorous transparency mechanisms and should promote competition and objectivity. It also provides that potential suppliers should be able to challenge "all decisions and actions taken in the procurement process." As noted by the UNCITRAL, "while government purchasers should have discretion to decide what to purchase and how to conduct the procurement, that discretion is subject to safeguards that are consistent with other international standards – notably, those imposed by the United Nations Convention Against Corruption."<sup>7</sup> The Model Law allows the enacting state to pursue its domestic policy objectives, such as promoting economic development through the support of SMEs, as well as environmental goals, as discussed below.

In addition to the Model Law, other regional non-binding instruments have been developed in recent years. In 1995, the Government Procurement Expert Group (GPEG) of the Asia-Pacific Economic Cooperation Forum (APEC) was created to encourage voluntary liberalisation of procurement markets in the Asia-Pacific region. The GPEG developed a set of non-binding procurement principles, which included transparency, "value for money," fair dealing, accountability, and due process.<sup>8</sup> These non-binding principles do not contain specific rules concerning types of contracts or entities. The APEC countries

decide for themselves how to implement the principles in their own domestic systems.<sup>9</sup>

## **1.2.2 The WTO government procurement agreement**

### *1.2.2.1 Presentation of the revised GPA*

The WTO Government Procurement Agreement (GPA) came into effect on January 1, 1996, one year after completion of the Uruguay Round. It was intended initially to apply to all WTO members but this proved impossible; thus, the GPA constitutes one of the few plurilateral agreements within the WTO legal framework. It is not included in the Uruguay Round's "Single Undertaking," under which the signatories are required to assume the rights and obligations arising from all the Agreements contained in Annexes 1 to 3 of the WTO Agreement. The GPA creates obligations and rights only for those WTO members that have signed it.<sup>10</sup>

Only 42 of the WTO's 157 members have signed the GPA, with developed countries constituting the majority of the GPA's parties. Nine countries are currently in the process of acceding to the agreement. Of these nine, the accession processes of China,<sup>11</sup> Jordan, and Ukraine are currently the most active. The accession process requires negotiations on coverage issues (in particular, regarding the entities to be covered and other aspects of coverage described below) and on verification that the acceding party's national legislation is consistent with the agreement.

In accordance with Article XXIV (7b) of the GPA, the parties negotiated a revision in consideration of special and differential treatment for developing countries, "with a view to improving this Agreement and achieving the greatest possible extension of its coverage among all parties on the basis of mutual reciprocity."<sup>12</sup> These negotiations "were not part of the Doha Round negotiations in the WTO, which are multilateral rather than plurilateral and which are related to a range of different topics (agriculture, non-agricultural Market Access, services, intellectual property...)." <sup>13</sup>

In December 2006, the parties reached a provisional agreement on the text of a revised

agreement to replace the existing one.<sup>14</sup> The revised GPA text, however, could not enter into force until the parties had reached a final agreement on the issue of coverage. In December 2011, this revised version was formally approved by the parties meeting at the ministerial level in Geneva, and it has now been submitted to the parties to the GPA for internal ratification. The revised text “entails a complete revision of the Agreement to simplify its structure, modernize the text and make it easier to understand and more user-friendly.”<sup>15</sup> According to the WTO, it constitutes “a historic opportunity to improve the disciplines for this key sector of the economy and expand market access coverage, valued at between 80 to 100 billion dollars a year.”<sup>16</sup> Moreover, “the negotiations have resulted in a significant extension of the coverage of the Agreement (which will be effective after the entry into force of the revised Agreement). These gains in market access result from lower thresholds and the addition of new entities and sectors to the existing Parties’ current commitments.”<sup>17</sup> Therefore, the scope of the commitments from the parties is significantly extended to new sectors, including local government and sub-central entities, services, and other areas of public procurement activity in the current agreement. The discussion in this paper reflects the revised version.<sup>18</sup>

The GPA provides the principal contractual obligations determining how governments frame and implement procurement legislation and regulations. The stated aims of the agreement are “the establishment of a multilateral framework for government procurement, with a view of achieving greater liberalisation and expansion of, and improving the framework for, international trade” in order to eliminate discriminatory treatment favouring domestic suppliers, goods, and services.

Whereas the former GPA tended to focus merely on eliminating discrimination in public procurements, the revised GPA included in its preamble new provisions referring to other goals.

In this respect, the third recital now states:

Recognizing 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;

Moreover, the preamble now refers to a set of other horizontal policy objectives, including the need to account for the development, financial, and trading needs of developing countries, especially least developed countries. It emphasises the importance of transparency and the fight against corruption in public procurement. As noted by Anderson and Arrowsmith, “the GPA now pursues not only the objective of non-discrimination but also best value for money (the ‘efficient and effective management of public resources’) and the avoidance of corruption and conflict of interest – and moreover, these objectives are pursued in their own right and not merely as ancillary to trade objectives.”<sup>19</sup> However, the recitals of the revised GPA remain silent with respect to environmental or social objectives that could be pursued through public procurement.

The two main legal measures aimed at abolishing discriminatory trade practices are the Most-Favored-Nation (MFN) and National-Treatment (NT) obligations. Those principles, also embodied in the other main WTO agreements, are adapted to the proper rationale of government procurement. The signatories are authorised to make explicit derogations from the non-discrimination principles vis-à-vis other parties if the latter do not grant similar access to their own markets. While ensuring strict reciprocity of rights and obligations, this provision constitutes a significant derogation from the traditional MFN obligation, as it gives to the GPA “an appearance of a series of bilateral arrangements under a common umbrella rather than a genuine bilateral agreement.”<sup>20</sup> Therefore, this reciprocity limits the benefits of concessions only to the parties that are able to make offers of interest to others.

According to certain authors, reciprocity-based obligations contribute to the extension of the coverage of the GPA, since the classical application of the MFN treatment would have limited the commitment of the parties to the lowest common denominator.<sup>21</sup> Conversely, other authors consider that the inability of a

party to grant reciprocity to another party might exclude it in practice from the benefits of the agreement in a given economic sector. As such, developing countries, especially those with a small procurement market that have often been unable to formulate offers of interest to developed countries, have *de facto* been barred from (or have chosen not to participate in) the negotiations. This could be different if the GPA's existing parties reduced the thresholds or coverage to smaller-sized contracts, so developing countries would have the capacity to make offers and benefit from reciprocal concessions.<sup>22</sup>

The real scope and coverage of the GPA depend largely on the entities covered in

the parties' annexes to Appendix I of the agreement. Each party to the GPA must specify which central and sub-central government entities (and other entities) will be covered by the obligations imposed by the agreement. Three other annexes refer to the coverage of goods, services, and construction services. To this point, a negative approach has been followed concerning the coverage of goods, meaning that all goods are covered unless listed in the annexes. The approach with respect to services is positive, meaning that only services scheduled in the annexes are covered. The scope of coverage of the GPA is therefore narrower for services than for goods.

### Box 1: Sectors for Sustainable Energy Goods and Services Procurements potentially covered by the revised GPA<sup>23</sup>

Sectors	Coverage under the revised GPA <sup>24</sup>	Examples of SEGSSs
Goods	Above 130,000 SDRs. All goods are covered except those expressly mentioned by the Parties.	All kind of renewable energy products such as alternative fuel vehicles.
Services	Above 130,000 SDRs. Services are listed positively and negatively by the Parties.	Pre-construction power plant services, design and engineering services, energy performance contracting services... <sup>25</sup>
Construction	Above 5 million SDRs.	Smart buildings using renewable energy or renewable materials.

Some parties to the GPA expressly maintained non-application provisions with regard to domestic policy considerations in their annexes and general notes. These include set-asides for small and minority business, single tendering procurement and set-asides for small and medium-sized enterprises (SMEs), and contracts to be awarded to cooperatives or associations.<sup>26</sup> No party seems to have included in its schedule explicit non-application provisions for the promotion of sustainable energy goods and services. In this respect, reference must be made to the sectors, sub-central authorities and other agencies that are still excluded from the respective parties' commitments and to the general exception provisions of the GPA pertaining to horizontal policy objectives.

For instance, Annex 3 of the US commitments mentions *"the waiver of Buy American restrictions on financing for all power generation projects."*<sup>27</sup> Canada excludes from its commitments *"urban rail and urban transportation equipment, systems, components and materials incorporated therein"* whereas this potentially constitutes one important sector for SEGSS promotion.<sup>28</sup> The European Union's schedule is extremely diversified, as each EU Member State has filed different commitments and exclusions. The EU, however, expressly covers in its schedule the *"making available or exploitation of fixed networks destined to supply a service to the public in the field of production, transportation or distribution of electricity or the supply of electricity to these networks."*<sup>29</sup> There are as many commitments, entities covered,

and goods and services subject to the GPA as there are parties to it. It is recommended, therefore, to check each schedule individually, as a general synthesis is almost impossible.

Article III of the revised GPA allows parties to derogate from their commitments based on national security considerations or on a number of general exceptions. Coupled with Article II.3, this new language incorporates exclusions to coverage, which until now had been contained in the annexes of the individual parties, sometimes in different ways. The ability to derogate from the general provisions of the GPA is particularly relevant with respect to the promotion of SEGS and will be discussed in detail below.

The GPA also outlines a set of procedural disciplines aimed at implementing the principle of transparency. To this end, the GPA provides a large number of detailed rules on the conduct of award procedures. These procedural requirements cover a number of matters, including the publication of information on the procurement system and detailed notices of intended procurements, information on the conditions for participation in a procurement, qualifications of suppliers, technical specifications and tender documentation, time-limits for tender and delivery, treatment of tenders and awarding contracts, transparency for procurement information, disclosure of information and domestic review procedures.

Finally it is worth mentioning that the final provision of the revised GPA refers to the commitment of the Members of the Committee on Government Procurement to pursue negotiations concerning the future treatment of “sustainable procurement” following the entry into force of the new legal framework.<sup>30</sup>

#### *1.2.2.1 GATT/WTO Disputes involving the GPA*

Given its effectiveness and quasi-judicial nature, the WTO Dispute Settlement system could have played an important role in the interpretation of the GPA. However, only three out of the more than 400 complaints filed with the WTO have involved the GPA, and only one of these led to the adoption of a panel

report.<sup>31</sup> Moreover, no complaint involving the GPA has been filed with the WTO since 1999.

The small number of cases surely results in part from the limited number of parties to the GPA. Additionally, the economic importance of Government Procurement notwithstanding, the parties to the agreement have until now made few commitments, thus limiting the possibility of challenging discriminatory measures in this field. Finally, given its delays and the fact that compensation for past harm is unavailable, dispute settlement may be of little value in the context of government procurement.

The first complaint involving the GPA 1994 was brought by the European Communities, triggered by a procurement tender published by the Ministry of Transport of Japan for the purchase of a multi-functional satellite for Air Traffic Management. The EC contended that the specifications in the tender were not neutral, as they referred explicitly to US specifications. This meant, according to the EC, that European bidders were effectively barred from participating in the tender. The EC alleged that the tender was inconsistent with Annex I of Appendix I of Japan's GPA commitments and violated Articles VI.3 and XII.2 of the GPA.<sup>32</sup> As mentioned previously, a panel finding of a GPA violation would not have provided compensation to the potential European suppliers. Therefore, the “mutually satisfactory arrangement” eventually signed by the parties to this dispute was unquestionably the best option for both sides.<sup>33</sup>

The second complaint involved the famous Myanmar case. In 1997, both Japan and the European Communities requested consultations with the United States, following the adoption of a local law by the State of Massachusetts that essentially prohibited the public authorities of Massachusetts from procuring goods or services from anyone doing business with Burma.<sup>34</sup> This was the first and, so far, only WTO case involving secondary policy objectives pursued in connection with the award of public contracts. The ECs and Japan, concerned that other US states might pass similar legislation,

argued that the Massachusetts law limited market access for European and Japanese companies and was inconsistent with several provisions of the GPA. Interestingly, the main arguments raised in the request for consultations were based on the possibility of introducing policy objectives as part of the conditions imposed on tendering companies. The WTO panel did not have an opportunity to rule on the validity of secondary policy objectives in public procurement, as its work was suspended following a ruling by the US Supreme Court that the Massachusetts law was incompatible with the Commerce Clause of the US Constitution.<sup>35</sup>

The third case – the only one that led to the adoption of a panel report – involved a US complaint against the procurement practices of the Korean Airport Construction Authority (KACA), relating to qualifications for bidding as a prime contractor, domestic partnering, and the absence of access to challenge procedures.

The main issues before the panel were 1) whether the procuring entity for the project at issue was covered by Korea's list of commitments, 2) whether the procurement practices were compatible with the GPA agreement, and, finally, 3) whether the benefits reasonably expected to accrue under the GPA, or in the negotiations resulting in Korea's accession to the GPA, were nullified or impaired by measures taken by Korea (whether or not in conflict with the provisions of the GPA) within the meaning of Article XXII:2 of the GPA.

The panel emphasised that each country's schedule of commitments formed an integral part of the GPA, and was therefore to be interpreted in the same way as the latter,<sup>36</sup> in accordance with the *Vienna Convention on the Law of Treaties*. The panel concluded that the procuring entity was not expressly included in Korea's schedule of GPA commitments. The issue, then, was whether an entity not expressly mentioned in the list of commitments of a party to the GPA could be subject to the agreement because it was controlled by other entities that were included in the schedule. After a thorough analysis of

the history of the Korean accession to the GPA, the panel concluded that the KACA was not sufficiently related to a covered entity to be subject to the rules of the GPA.<sup>37</sup>

In section 4, we will address the current *Feed in Tariff case*.<sup>38</sup> This case is not yet settled. While it predominantly involves other WTO Agreements than the GPA, it could have a systemic relevance concerning the WTO-compatibility of measures aimed at promoting SEGs.

### 1.3 Free Trade Agreements and Government Procurement

Almost all members of the WTO – as well as many non-members – are parties to various bilateral and plurilateral free trade agreements (FTAs). More than 300 FTAs are currently in effect, and, due in part to the apparent failure of the WTO's Doha Round, many more are in the discussion or negotiation process. These FTAs contain "WTO plus" obligations – rules and disciplines on which the full membership of the WTO cannot agree on under the single undertaking principle. Public procurement is one of the items on which the major players, such as the United States and the EU, seek additional liberalisation and disciplines.

The North American Free Trade Agreement (NAFTA) – concluded in 1992 between the United States, Canada, and Mexico – contains a chapter dealing with public procurement. This chapter, whose provisions are practically identical to those of the 1996 GPA, follows a "negative list" approach, meaning that all goods and services are covered except for those specifically exempted by the parties. The coverage is also based on the principle of reciprocity.<sup>39</sup>

Besides exceptions allowed in the field of national security procurements, NAFTA authorises the parties to adopt or maintain measures "necessary to protect human, animal or plant life or health" provided 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 trade between the Parties."<sup>40</sup> In relation to the GPA, therefore,

NAFTA allows through its exceptions the possibility to promote secondary policy objectives, though it remains difficult to include SEGS-related procurement within these exceptions.

Central entities are covered widely by NAFTA; sub-central entities, however, usually remain outside the scope of application of the agreement.<sup>41</sup> Goods and services are all covered by the agreement except some limited exceptions. Exclusions in the services sector are more important than in goods. There are exclusions in some sectors which are particularly relevant for the development of sustainable procurements such as “services with reference to transportation equipment.”<sup>42</sup>

More recent US FTAs contain rules that are closer to the revised GPA. They also tend to encourage secondary policy objectives, including environmental initiatives. The FTA signed with Morocco in 2004, for instance, takes the “negative” list approach and indicates that the article on technical specification *“is not intended to preclude a procuring entity from preparing, or applying technical specifications to promote the conservation of natural resources or to protect the environment.”*

FTAs recently completed by the EU also contain provisions on public procurement. The EU-Korea FTA, for instance, stresses the commitment of the parties to liberalise public procurement and promote the application of the revised GPA, and it creates a joint committee aimed at fostering cooperation in the field of government procurement. Because both countries are also party to the GPA, however, the FTA states that:

Nothing in this Chapter shall be construed to derogate from either Party’s rights or

obligations under the GPA 1994, or from an agreement which replaces it.

The FTAs concluded by the EU with states not party to the GPA contain much more detailed provisions. For instance, Title VI of the FTA between the EU and its member states and the members of the Andean community (Colombia and Peru) provides a detailed framework under which each signatory, including its procuring entities, shall accord – immediately and unconditionally – treatment on goods, services, and suppliers of other signatories no less favourable than treatment accorded to domestic goods, services, and suppliers. As in the GPA, this liberalisation of government procurement is based upon both a positive and a negative list approach. Moreover, like the provision of the GPA whose discussion ensues, exceptions to this part of the agreement can be justified on the ground of the necessity “to protect human, animal or plant health.” The EU-Colombia and Peru FTAs explicitly added to this sentence the words “including the respective environmental measures.”

Finally, a limited number of the south-south FTAs also contain provisions on government procurements. Those provisions are usually limited to promoting the liberalisation of public procurements as an objective, but without coverage commitments.<sup>43</sup>

These FTAs, particularly those signed with non-parties to the GPA, pave the way for future accession to the GPA. They also allow for the introduction of “GPA plus” provisions, which raises the possibility of promoting SEGS in government procurement. The provisions of the SETA could indeed be integrated within future FTAs which would then pave the way for a progressive “multilateralisation” of this agreement.

# Chapter 2

## Policy Context and Landscape

### 2.1 Motivation for Procurement Practices for SEGS

Governments cannot be considered simply as market participants. Purchasing entities play an active part in the markets as important consumers, significantly influencing markets through both their actions and inactions. That is why “sustainable procurements” (also called “green procurements”) and, specifically, the acquisition of Sustainable Energy Goods and Services (“SEGS”) in public procurements can fulfil a set of secondary environmental and sustainable policy objectives.

Sustainable or green procurements provide a tool to limit the impact of procurement on human health and the environment, providing an opportunity to mitigate over-exploitation of scarce resources. The promotion of SEGS within public procurements also provides a means of complying with the international obligations imposed by the Framework Convention on Climate Change and the Kyoto Protocol.

As major consumers, governments can influence the development of private markets. Public sector demand can be used strategically to influence the behaviour of private actors in the production of sustainable goods and services. Procurement promoting SEGS can be “a major driver for innovation, providing industry with real incentives for developing green products and services – particularly in sectors where public purchasers represent a large share of the markets,”<sup>44</sup> such as public transport or construction. Governments have an important role to play by offering green innovators a guaranteed market for their products, thereby generating economies of scale and lower costs.

Sustainable procurements offer a more comprehensive approach to the costs and outcomes associated with procurement decisions. A narrow approach based solely on prices fails to take account of the full life-

cycle cost of a contract. For instance, low-energy products will, in the long run, allow significant reductions of utility bills. Use of the lowest price as the sole criterion is to be replaced by concept of the “best value for money.”<sup>45</sup>

Social benefits can also be expected from sustainable procurements. Even if the phenomenon remains difficult to assess quantitatively, health benefits can be expected from procurements promoting SEGS.<sup>46</sup> Moreover, in many cases sustainable procurements provide a good stimulus for local business, which will often have greater capacity to fulfil energy-saving criteria and benefit from the promotion of domestic products and services.

### 2.2 Overview of Procurement Practices and Instruments for SEGS

The following discussion focuses on the European and Chinese promotion of SEGS. Among the developed countries, the EU and its Member States have, for more than a decade, developed a set of political instruments and incentives aimed at promoting sustainable procurements (usually called “Green Procurements” within the EU). China developed a sustainable procurement policy more recently.

#### 2.2.1 SEGS Promotion in developed countries: the EU and its member states

##### 2.2.1.1 The EU legal framework

Public procurements at the EU level are regulated by two main directives: the Public Sector Directive<sup>47</sup> (Directive 2004/18/EC<sup>48</sup>), which defines the procedure for awarding most major contracts by public bodies (national governments, regional and other public entities) and the “Utilities Directive” (Directive 2004/17/EC<sup>49</sup>), which regulates

the procedures for awarding major contracts by bodies engaged in certain activities in the sectors of water, transport, energy and postal services. The principle of transparency and equal treatment of bidders, best value for money, and free movement of goods and services form the basis of both directives. These instruments allow the application of sustainable procurement principles but do not force the European procuring entities to do so.

The provisions concerning sustainable procurements contained in both instruments are quite similar. Both directives, for example, require major contracts to be advertised through the EU's official journal, to publicise the contracts to all interested parties and to regulate the criteria that can be used to tender and award contracts. Several recitals of Directive 2004/18 illustrate the EU's approach towards sustainable procurements and the way in which environmental considerations can be taken into account by European purchasers.<sup>50</sup>

Following these directives, the European Commission adopted a proactive approach toward sustainable procurements through regular communications and staff working documents. Its recently updated handbook on green procurements, "Buying Green," provides useful guidelines for public purchasers who want to introduce sustainable considerations into their tendering procedures.<sup>51</sup> SEGS can be promoted at different stages of the European procurement procedures.

#### **When deciding which procedure is applicable:**

The preparatory stage of a public procurement is crucial, especially when it comes to choosing the procedures which can be appropriate for the introduction of sustainable development. For instance, an *open procedure*, in which any operator may submit a tender, allows access to the maximum choice of environment-friendly solutions but does not require tenders to be selected solely on the basis of environmental considerations. In a *restricted procedure* (with a limited number of operators invited to tender) or through a *negotiated and competitive dialogue* (used in particularly complex procurements), the environmental technical capacity of the tenders may be assessed at an early stage.

#### **When defining the contract requirements:**

Once the subject of a contract is defined (with a possible reference to the use of sustainable energy), technical specifications, which are included in the contract notice or tender documents, are crucial when it comes to introducing sustainable considerations. Within the Union, technical specifications may be formulated by reference to European, international, or national standards, as well as in terms of performance or functionality (Article 23 of the Directive) or in terms of environmental performance levels of a material, product, supply or service.<sup>52</sup>

*Technical Specifications by Reference to Standards.* Environmental standards influenced by characteristics such as energy use may be included in the specifications. The procurement directives refer to European or national standards as means by which specifications can be defined. Indeed, "standards are useful in public procurements as they are clear, neutral, and usually developed using a process which includes a wide range of stakeholders, including national authorities, environmental organizations, consumer associations and industry."<sup>53</sup>

*Technical Specification by Reference to Performance or Functional Requirements.* A performance specification describes the desired result in terms of the outputs that are expected – for example, with respect to quality, quantity, and reliability. The bidding documents ask the tenderers to achieve certain results but do not specifically address how they should be achieved, thus allowing more scope for market creativity. For instance, in the construction sector, a purchasing authority may indicate that the heating system should guarantee a constant temperature of twenty degrees. In that case, "suppliers may opt for innovative heating and ventilation systems which reduce dependence on fossil fuels."<sup>54</sup>

Under the procurement directives, technical specifications can include references to sustainability-related materials and production.<sup>55</sup> All technical specifications, however, should be related directly to the subject matter of



the contract, including only requirements pertaining to the production of the goods or services purchased. This also holds when specific production and process methods are required; a tender, for instance, may indicate that electricity should be produced from renewable resources. In line with the GPA, EU law is aimed at avoiding discrimination by prohibiting purchasing authorities from insisting upon a production method that is proprietary or available only to one supplier, unless such a requirement appears to be justified by exceptional circumstances and is accompanied by the words “or equivalent.”

Finally, Article 23.6 of Directive 2004/18 encourages the use of European *eco-labels* in the tender documents.<sup>56</sup> An eco-label can be used to facilitate the assessment of compliance with technical specifications, but given the voluntary nature of eco-labels, tenderers cannot be required to register under a certain eco-label scheme. Equivalent means, also, must always be accepted by the purchasing entities when it comes to assessing compliance with the requirements relating to the products or services being acquired.

#### **When selecting the suppliers and awarding the contract:**

Selection criteria focus on a tenderer’s capacity to perform the contract. During the selection of the suppliers, the European purchasers are allowed to take into account their experience and competence related to environmental matters.<sup>57</sup>

*Award criteria* indicate the characteristics that will enable the purchaser to make its choice. They must be distinguished from the selection criteria and also from the technical specifications mentioned above, whose aim is to indicate a set of minimum requirements. The EU legal framework allows considerable scope for the use of environmental criteria, as the award of the contract can be chosen not only on the basis of the “lowest price” but also on the “most economically advantageous tender.”<sup>58</sup> This last notion allows the introduction of secondary policy objective criteria, including sustainability.

#### *2.2.1.2 Implementation policies*

With its legislation and policy aiming at encouraging green procurement, the EU provides an interesting study in the promotion of sustainable energy goods and services in public procurement. The European Commission strongly encourages the creation of networks and the exchange of good practices at the national and the local level, such as the ICLEI (Local Governments for Sustainability), which is dedicated to introducing new instruments, mechanisms, and tools for municipal management in order to ensure the implementation, effective monitoring, and continual improvement of sustainable development policies.<sup>59</sup> Other initiatives include the Local Authority Environmental Management Systems and Procurement (LAEP), which established a toolkit and developed a suite of tools and guidance for public authorities to deal with green procurement as part of an Environmental Management System.<sup>60</sup>

Although a complete analysis of the policies of the various EU member states is beyond the scope of the present study, it may be noted that several have recently set ambitious targets with a strong emphasis on sustainable energy goods and services. In 2008, the EU Commission noted that “the Dutch Government has set a 100% Sustainable Procurement target to be reached by 2010; the Austrian Government has identified different targets to be met by 2010 for five product groups: IT: 95%; electricity: 80%; paper: 30%; cleaning products: 95%; and vehicles: 20%. In France, 20% of the vehicles purchased by the central government should consist of ‘clean’ vehicles, 20% of new construction should be compliant with HQE16 standards or equivalent, and 50% of all wood products should be sustainable by 2010. In the UK, the Sustainable Procurement Action Plan is closely linked to a series of sustainable operations targets for the Government office estate, including a pledge to become carbon neutral by 2012 and to reduce carbon emissions by 30 per cent by 2020.”<sup>61</sup>

Some studies, however, are less optimistic about sustainable procurement on the part of European institutions and member states. The

“Green Public Procurement in Europe 2006 Report,” produced by four NGOs and supported by the European Commission, assessed the state of green public procurement in the then 25 EU member states.<sup>62</sup> The report identifies the main barriers to the development of green procurement as the high cost of green products, the lack of environmental knowledge on the part of purchasers, the absence of managerial and political support, and the lack of information and appropriate training of the bidders. Other studies conducted within EU member states, such as Sweden, confirmed this conclusion regarding the factors that limit tenderers from promoting SEGS.<sup>63</sup>

### 2.2.2 SEGS in China

In the past decade, China, in parallel with its economic development, has officially introduced a set of concrete initiatives designed to achieve energy conservation and emission reduction. In 2006, the 11th Five-Year plan for National and Economic Development set binding targets for the period from 2006 to 2010, directing the GDP unit target consumption to be reduced by 20 percent and the total sum of the main pollutant emissions to be cut down by 10 percent. The Chinese State Council published a Decision for Strengthening the Work on Energy Conservation with a series of measures and policies to promote energy conservation and emission reduction. In November 2009, it made a decision that includes concrete targets for reduction of the emission of greenhouse gases.<sup>64</sup>

However, despite increasing references to sustainable procurement in the Chinese regulations, the country still faces important problems that limit the implementation of this policy and the promotion of SEGS in procurement.

#### 2.2.2.1 The Chinese legal framework

The liberalisation of Chinese public procurement started in the early 1980s, after which China passed two primary laws on public procurement – the Bidding Law in 1999<sup>65</sup> and the Government Procurement Law in 2002.<sup>66</sup> These laws were supplemented by a series

of implementing measures taken by different government agencies.<sup>67</sup>

Sustainable procurement is not a legal concept as such within Chinese law. Still, in recent years, a great number of laws were enacted to implement sustainable policies in public procurement.<sup>68</sup> Article 9 of the Chinese Government Procurement Law states that “government procurement shall be conducted in such a manner as to facilitate achievement of the economic and social development policy goal of the state, *including but not limited to environmental protection* [...]” And the Chinese Bidding Law, despite its lack of secondary policy objectives, implicitly allows the consideration of sustainable development policies at different stages of the procurement (such as the qualification process, technical specifications, and award stage).<sup>69</sup>

The Clean Production Promotion Law of the People’s Republic of China of 2002 indicates that “governments at all levels, in their procurement, *should give priority to the products that are environment friendly and resource-conserving.*” This law also states that “*all levels of government should use advocacy and education to encourage the public to purchase and to use environment friendly and resource-conserving products.*”<sup>70</sup>

A third important legal provision is the Circular Economy Law of the People’s Republic of China, Article 47 of which provides that entities and individuals purchasing goods with public funds should give preference to energy-saving, water-saving, material-saving, and environmentally-friendly and recycled products.<sup>71</sup>

This set of legal instruments refers to two lists that have a critical impact on the use of sustainable products and of labels that specify exactly which products should be preferred for environmental reasons:

- The *Labeling List* (established in 2006 by the Ministry of Environmental Protection) lists products quality-verified by third-party verification agencies, who attest inter alia that they are energy-efficient or contain recyclable material. This system of green labelling is voluntary, and suppliers are

allowed to give other kinds of evidence aside from the label to attest that their products are compliant with the green technical requirements and specifications of a public contract. The list contains 21 categories of products, such as light vehicles, photocopiers, computers, water-based paints, and furniture.

- The *Energy-saving* list covers both *energy-saving* and *water-saving* products. It is promulgated by the Government Procurement Supervision and Administration Department under the Central Government, or at the provincial level jointly with the provincial department.<sup>72</sup> It contains more than 25 categories of energy-saving products, such as air conditioners, refrigerators, water heaters, computers, and seven categories of water saving products, such as toilets, showers, and faucets.

Chinese regulation also requires that the State Council and provincial governments give priority to products and equipment that have an attestation certificate for energy conservation in preparing the lists.<sup>73</sup> The list and accreditation system is crucial for suppliers, as the eligibility for a green procurement contract is entirely dependent on them. In this respect, the 2008 Chinese Law on Energy Conservation requires *all* public entities to procure products and equipment that are on the energy-saving list.<sup>74</sup> Moreover, procurement of energy-consuming products and equipment that have been explicitly eliminated by the state is prohibited. A public institution that considers procuring energy-saving products and equipment but fails to procure a product or equipment included in the lists is subject to sanctions.<sup>75</sup>

#### 2.2.2.2 Difficulties in implementing Chinese sustainable procurement policies

The Chinese promotion of sustainable procurement is still affected by a set of legal, institutional, and socio-cultural constraints.

*First, the Chinese legal environment could be considerably improved.* Too often, Chinese laws

only consist of general statements, lacking precise rules and regulations concerning the way sustainable procurement policy should be implemented. For example, Y. Qiao and C. Wang observe that “the ninth provision of Government Procurement Method states that government should give priority to high-tech products and eco-friendly products, but it does not define eco-friendly products and does not specify the importance of green products.”<sup>76</sup> Another example is the absence of provisions giving the purchaser the opportunity to provide performance-based specifications, which can play a crucial role in green energy market innovation.<sup>77</sup> Finally, the provisions of existing Chinese regulations on public procurement do not explicitly cover construction and services, though these sectors are potentially of crucial importance to sustainable procurement efforts. This said, the 2008 Chinese Law on Energy Conservation requires *all* public entities to procure products and equipment that are on the energy-saving list.

*From the institutional perspective,* the Chinese sustainable procurement policy suffers from a lack of unity. China “does not have a single designated agency that is charged with managing green procurements. Several agencies and ministries are involved in green procurement management, including the Environment Protection Ministry, the Finance Ministry, the National Development and the Reform Committee, as well as the various procurement centers at the provincial and local levels.”<sup>78</sup> Different, often rival, actors pass regulations “either jointly, or on their own, causing policy overlaps, management duplication, and even conflicts amongst agencies.”<sup>79</sup>

*China still lacks a real market for sustainable procurement.* Technological investments in this field are low and many barriers to trade still impede access to the Chinese market. The priority given in Chinese law to national products and suppliers certainly limit the purchasing entities’ choice of sustainable goods and services.<sup>80</sup> The compulsory and exclusive nature of the energy-saving list is in part responsible for this phenomenon.

*The development of sustainable procurement in China is affected by the weak human and financial resources of the public authorities. As noted by Qiao and C. Wang, “the government does not have trained green procurement professionals. Those involved in green procurement are from the finance department or are management personnel. Many of them do not have procurement experiences and know very little about market analysis, procurement cost control, supplier assessment and management, procurement contract management, negotiation, or communication. They have even less understanding and knowledge about green procurement ... Therefore they tend to use their subjective judgment in deciding the bid.”*<sup>81</sup> Coupled with insufficient funds appropriated by public procurement, Chinese purchasers logically tend to award procurement solely on the “lowest price approach.”

## 2.3 Concrete Illustrations of SEGS Procurements

SEGS-related procurements are increasing in many developed and developing countries. While an exhaustive overview of such practices falls beyond the scope of the present paper, some concrete cases are addressed.

### 2.3.1 US Strategies developed at the federal and state levels

The US has recently developed several initiatives to promote SEGS-related procurement, following the historical willingness of the American authorities to use public procurement as a tool for developing strategic policies.<sup>82</sup>

At the federal level, President Obama signed an Executive Order in 2009 aimed at establishing “an integrated strategy towards sustainability in the Federal Government and to make reduction of Greenhouse gas emission a priority for federal agencies.”<sup>83</sup> The executive order states that federal agencies must immediately increase energy efficiency, reduce their greenhouse gas emissions from direct and indirect activities, conserve and protect water, eliminate waste, recycle, and prevent pollution, among other initiatives. To

that end, very detailed and precise objectives are given to the agencies. For example, Section 2h of the executive order directs heads of agencies to advance sustainable acquisition by ensuring that 95 percent of new contract actions are purchased through green-certified and labelled programmes.

Moreover, several initiatives have been taken at the sub-federal level. In the field of electricity supply, for instance, 29 states and the District of Columbia have implemented the so-called mandatory renewable portfolio standards (RPS), i.e. standards that encourage production of energy from renewable energy sources, including wind, solar, biomass, and geothermal.<sup>84</sup> Although their designs differ considerably from one state to another, RPS policies usually imply an obligation for utilities or load serving entities<sup>85</sup> to procure a certain proportion of renewable energy by a specific date. Most renewable portfolio standards requirements carry through to 2020 or even longer.

### 2.3.2 Other examples of SEGS procurements in the UK and Morocco

There are myriad other national and local examples of public procurement involving SEGS. The UK Government, whose aim is to be a leader in the EU strategy for sustainable procurement, formally recognised that sustainability should be a core component of public procurement.<sup>86</sup>

Several ongoing projects promote both SEGS and innovation.<sup>87</sup> The UK government has used public procurement for the development of a carbon capture and storage (CCS) pilot power plant.<sup>88</sup> The aim was to help private developers overcome technical and commercial risks and uncertainties in the development and deployment of CCS technologies. The issued tender contains funding for research on CCS technology and the arrangement of pilot CCS sites. Clearly defined criteria include a provision that the pilot plants should use post-combustion capture technology and store the sequestered CO<sub>2</sub> in offshore geological sites. This technology should be able to sequester 90 percent of CO<sub>2</sub> and to cover the whole project cycle (capture, transport, and storage)

by 2014, while reaching an electrical output of at least 300 MW. Finally, the project should be built in the UK.

In the area of stimulating green transport innovations, it was estimated that in 2007 the Department for Transport spent £5 million per year on grants designed to support UK based low-carbon road vehicle technologies at the research and pre-competitive development stages.<sup>89</sup> The Department for Transport also provides grants for the testing and demonstration of infrastructure for alternative fuels and vehicles, including infrastructure for biofuels, electric vehicles, and hydrogen. In 2007 grant funding for infrastructure projects was estimated at around £0.5m per annum.<sup>90</sup>

The UK also launched a “hydrogen fuel-cell and carbon abatement technology fund” in 2006.<sup>91</sup> Technology demonstration of fuel cell and hydrogen technologies received £15m of this fund, and part of this funding is allocated to transport-related applications. The UK Government also provides “funding of an initial £20m to support a new programme aimed at accelerating the market penetration of lower carbon vehicles and reducing the barriers faced by companies in moving from prototype demonstrations of lower carbon technologies to full commercialisation. This programme provides financial support for the public procurement of fleet demonstrations of lower carbon vehicles” (and, where appropriate, supporting infrastructure).<sup>92</sup> An additional £10m research and development fund, designed to accelerate growth in low-carbon transport technologies and support the emergence of green auto manufacturers in the UK, was launched in March 2011. The new fund was part of a package of government measures intended to encourage domestic entrants into the low-carbon vehicle sector and overcome the financial difficulties experienced by a number of green car start-ups.

Recently, the UK decided to extend this strategy to the energy procurement of schools and higher education establishments, “until now a sector which had not moved from a fixed price, fixed term contract, to a flexible, risk-managed contract as recommended by the British government.”<sup>93</sup> It is noted that,

“15% of public sector carbon emissions arise from activities in the English schools system and about a third of this is directly from energy usage in school buildings. In light of this, the Government aims to make all schools ‘sustainable schools’ by 2020, by not just promoting sustainability through teaching methods but also by encouraging schools to participate in local authority carbon reduction commitment opportunities and other initiatives in order to reduce their energy consumption.”<sup>94</sup>

Schools face a problem of expertise in this field and are thus encouraged to collaborate with experts in energy procurement, often from the private sector.

This latter example illustrates the importance of public-private partnership in the development of sustainable procurements and, particularly, SEGS procurement. A recent report by Colverson and Pereira has recently addressed this issue.<sup>95</sup> One of the case studies in their report concerns a global rural electrification programme developed in Morocco.<sup>96</sup> With the aim of “improving the living conditions of its rural population, the Moroccan Government set itself the target of improving access to electricity from its level of 12 percent in 1994 to 97 percent by 2007/2008.”<sup>97</sup> The National Electricity Office (ONE) made the choice to utilise photovoltaic (PV) solar power, “for the more remote households physically beyond connection to the grid,”<sup>98</sup> about 10 percent of the rural population. TEMASOL,<sup>99</sup> successful in its application after a call for tenders, signed a service contract with ONE in 2002 “to supply solar power to 16,000 homes across four provinces.”<sup>100</sup> In 2004, this joint venture added obtained a new procurement for 42,500 homes across 25 provinces. Moreover, “the contract included not only the supply and installation of the PV kits but also their operation and maintenance over the 10-year life of the customer contracts.”<sup>101</sup> The whole project was financed mainly through public and donor funds and a reduced contribution from user fees. In the beginning, the French furnisher “experienced some problems with late payment of fees,”<sup>102</sup> caused by the low income of the consumers. TEMASOL considered that it did not receive financial returns proportional

to its investments, particularly in some difficult geographic areas. The consortium was finally confronted with lack of knowledge regarding solar energy in Morocco and the difficulty to find expertise in this field at the local level at all stages of the operation (sales, installation, and service).<sup>103</sup> These difficulties were eventually overcome thanks to a strategy based on the involvement of local employees, regional branches, and local authorities – not only in collecting fees, but also in dealing with the capacity and knowledge gap.<sup>104</sup> The project eventually became profitable by 2008, and the outcome seems to be positive overall. A developing country like Morocco draws non-quantifiable but obvious social benefits from increased access to renewable energy, including benefits in public education.

These cases exemplify that the development of SEGS necessitates not only a strong political drive at the highest level but also large cooperation networks established at national and local levels. Additionally, if an efficient regulatory framework establishing clear guidelines and securing the use of SEGS in public procurement is essential, proactive cooperation of the private sector, experts, and the public also conditions the success of public procurement policies in SEGS.

This paper now looks at the question of potential trade distortions caused by SEGS and related procurement policies. Equilibrium must be found between the promotion of SEGS and the requirement of non-discrimination in international trade.

# Chapter 3

## Trade Implications of Procurement Policies and Instruments for SEGS

### 3.1 Trade-Distortions Caused by GP practices

The promotion of sustainable goods and services with respect to public procurement and policies intrinsically bears the risk of discriminating amongst potential suppliers. Non-sustainable products or services will be excluded from the different stages of the procurement process (through specifications, selection criteria, the timing of awarding the contract, and contract performance clauses that integrate environmental concerns). *De jure* and *de facto* discriminations can be identified in the European and the Chinese legal instruments and policies with respect to public procurement.

The compulsory nature of the energy-saving list imposed on the tendering entities by the 2008 Chinese Law on Energy Conservation, for example, clearly excludes suppliers that cannot be registered under this list. Moreover, the compulsory list excludes other certification agencies (among them international organisations). Thus, non-Chinese as well as Chinese suppliers may be excluded from tenders without being able to demonstrate the sustainable characteristics of their products.

In practice, measures promoting sustainable procurement have the potential to be *de facto* discriminatory, as countries do not expressly state the required country of origin for green products and services or the nationality of the qualified service supplier. The major issue of contention concerning the practices and policies promoting the use of sustainable goods and services is whether the latter constitute “non-tariff barriers,” (i.e. non-tariff measures that have protectionist intent). Such situations may arise when authorities use standards and eco-labelling to define the characteristics of goods and services to be procured, and such standards and eco-labels are already met by

a clearly identifiable category of operators, to the exclusion of others.

Furthermore, standards and eco-labelling are potentially trade-restrictive when they are based on process and production methods (PPMs) which are not apparent from the product itself. Although crucial when it comes to assessing the likeness of SEGS with other products or services, the discriminatory nature of PPM is still a sensitive and unresolved issue.<sup>105</sup>

### 3.2 Compatibility with Multilateral Rules

The existing non-binding international and regional instruments on government procurement are sufficiently flexible to allow SEGS promotion, but the compatibility of the previously described practices with the WTO GPA is more uncertain.

#### 3.2.1 The compatibility of practices and measures promoting SEGS-related procurement with multilateral and regional guidelines

The UNCITRAL Model Law on Public Procurement has recently incorporated several provisions that can be interpreted as encouraging states to favour the use of SEGS in public procurement.

Though the preamble of the Model Law does not refer to green procurement or to the protection of resources, Article 2 refers to “social-economic policies” which covers, *inter alia*, environmental policies.

Concerning SEGS-related procurement more specifically, Article 11 of the Model Law indicates that evaluation criteria related to procurement may include “the characteristics of the subject matter, and the terms of payment and of guarantees in respect to the subject matter of the procurement, such as the

functional characteristics of the subject matter.” By the same token, Article 11 of the Model Law allows a margin of preference for the benefit of domestic suppliers of domestically-produced goods. Local producers or service suppliers, therefore, who may be more efficient energy consumers than their foreign counterparts, may benefit from positive discrimination at the award stage of the procurement procedures.<sup>106</sup>

Another SEGS-friendly provision is found in Article 43.3 of the Model Law, which introduces the concept of the “most advantageous tender” (as opposed to the “lowest tender price” concept) in the examination and evaluation of tenders. The notion of “best value for the money” – which allows the introduction of sustainable selection criteria and development-related specifications in tenders – is also encouraged in regional organisations, including the APEC 1999 Non-Binding Principles on Government Procurement discussed previously.

### **3.2.2 WTO compatibility of practices and measures promoting SEGS-related procurement**

Whether procurement practices and policies promoted by countries are WTO-compatible raises several questions.

#### *3.2.2.1 Is the country a party to the GPA?*

If a country is not party to the GPA, the compatibility of the measure with WTO rules must be assessed with respect to the GATT and the GATS. Public procurement appears to be excluded from the scope of application of these agreements.

First, GATT Article III:8(a) (National Treatment or NT) and Article XVII(2) (State Trading Enterprises) include an explicit exception with respect to public procurement. GATS Article XIII(1) also exempts “law, regulations and requirements governing the procurement by governmental agencies or services” from the GATS disciplines on MFN treatment, market access, and national treatment. These exemptions in the GATT and GATS Agreement apply only to purchases for governmental purposes and not to purchases of goods or services for resale, as is done by state trading

enterprises who sell products or services on a commercial basis, or for the production of goods for resale.

In short, for non-parties to the WTO GPA, discriminations favouring SEGS in public procurement cannot, in principle, be successfully challenged before the WTO.

Japan and the EU, however, recently initiated two WTO disputes – DS412 and DS426, respectively – against Canada in relation to the province of Ontario’s local content requirements in a feed-in tariff (FIT) procurement scheme. This case may have systemic consequences regarding SEGS procurement policies and measures not covered by the GPA. The complainants indeed base their claims on other provisions of the WTO agreements, namely the GATT National Treatment, the TRIMs, and the SCM agreement.

The case concerns the Ontario Green Energy and Economy Act (OGEA), which empowers the Ontario Power Authority (OPA) to develop programs to encourage the use of renewable energy. Under this regime, the OPA has developed a FIT Program that allows buying renewable energy (solar and wind electricity) at an above market price in order to compensate for the higher production costs. In order to benefit from this incentive programme, the OPA has set domestic content requirements (for solar, initially 40 to 50 percent of the costs to develop a project, rising to 60 percent for projects after 2011; and for wind, initially 25 percent, rising to 50 percent after 2012).<sup>107</sup>

Japan and the EU argue that Ontario’s feed-in tariff (FIT) procurement scheme unfairly discriminates against foreign renewable-energy products through its “domestic content” clause.<sup>108</sup> They argue the FIT scheme is a subsidy under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) and that domestic content requirements are prohibited under Article 2 of this agreement. The complainants also argue that the measures violate the national treatment clause of Article III of the GATT and the Agreement on Trade-Related Investment Measures (TRIMs Agreement). According



to Canada, the FIT programme is instead a government procurement scheme intended only to promote use of clean energy in Ontario. Therefore, the programme would not be covered by the GATT national treatment provision and the TRIMS Agreement. According to Canada, the WTO SCM agreement would not apply either, because the purchase is not conferring a benefit, in the sense of the agreement, to the producers of renewable energy. Canada considers that the only relevant WTO agreement is the GPA, and since the Ontario Power Authority (OPA) is not inscribed in Canada's schedule, it is not subject to the GPA provisions. The main issue of the case seems to be whether the purchases of clean energy under the FIT scheme above market prices of electricity in general could qualify as a subsidy.<sup>109</sup>

*3.2.2.2 If the country is party to the GP, is the procurement covered by its schedule of commitments?*

Whether the procurement is covered can be analysed based on the methodology laid down by the WTO panel that decided the previously mentioned *Korea* case.<sup>110</sup>

a) The Procurement is Not Covered by the GPA List of Commitments

In such cases, the procurement is exempt from the GPA obligations, and the general provisions of the GATT 1994 and the GATS exempting public procurement will be applicable. The current Canada feed-in tariff case, however, shows that the application of other WTO agreements, such as the SCM agreement and the TRIMs agreement, may have to be considered.

b) The Procurement is Covered by the GPA List of Commitments

In order to properly assess the compatibility of measures taken by a party to the GPA, reference is made to the way SEGS can be promoted by purchasers. For ease of reference, the European legal framework and practices will serve as the basis of the assessment. This section also addresses the non-discrimination requirement as laid down in the revised GPA and its possible conflict with SEGS policies.

**Table 1: Main Measures Promoting SEGs in EU Procurement Policies and Relevant WTO Provisions**

Stages of the Procurement Procedure promoting SEGs	Means of Promoting SEGs	Relevant Provisions of the GPA WTO Agreement (GPA 1994 and Revised GPA)
<b>Choice of the procedure applicable</b>	Restricted procedure or negotiated and competitive dialogue selecting suppliers able to provide SEGs	Article VII, X, XIV and XV of the GPA 1994 Article VII, XII and XIII of the revised GPA
<b>Definition of the requirements of the contract</b>	<i>Technical specifications:</i> - By reference to standards related to SEGs - By reference to performance or functional requirements related to SEGs - Through Eco-Labels	Article VI of the GPA 1994 Article X of the revised GPA
<b>Selection of the suppliers and service providers</b>	Selection criteria mentioning SEGs Award criteria mentioning SEGs	Article XIII of the GPA 1994 Article XV of the revised GPA
<b>General exception under the GPA</b>		Article XXIII of the GPA 1994 Article III of the revised GPA

### **The existence of a set of SEGs procurement friendly provisions**

*Choice of procedure (especially restricted procedure and negotiated dialogue).*

The provisions of the GPA – both the 1994 GPA and the revised GPA – leave the parties room to manoeuvre concerning the choice of the applicable procedure, provided that the tendering procedures are applied in a non-discriminatory manner or, following the formulation of the revised GPA, in a way that “protects domestic suppliers.” The discrimination may occur when a restricted procedure or a competitive dialogue is applied by a European purchaser who wants to select only those European suppliers that appear to have the technical capacity and experience to

provide SEGs. In such a case, the measures may fall within one of the General Exceptions existing under the GPA, especially in its revised version (see below).

*Use of technical specifications.*

Difficulties may arise from the contractual requirements and the possible use of technical specifications related to sustainable energy goods and services. The technical specification stage constitutes a key feature of procurement, providing an opportunity for public purchasers to include eco-friendly requirements for the goods and services demanded through reference to environmental standards or eco-labels. Technical specifications can refer to the product or service itself at the consumption level, or to the process and methods of production.

Article X of the revised GPA (Article VI of the 1994 GPA) regulates the use of technical specifications in relations to goods, services, and their processes. It requires procuring entities to respect the principles of non-discrimination and transparency, stating that:

A procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade.<sup>111</sup>

The GPA encourages the use of “standards” in the technical specifications related to goods and services.<sup>112</sup> More precisely, parties are encouraged to refer to international standards (where they exist) or to “technical regulations” or “regional standards.” Technical specifications may also include labels or other non-mandatory instruments. Article X: 2 a) of the revised GPA specifies that:

Where design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfill the requirements of the procurement by including words such as ‘or equivalent’ in the tender documentation.

Moreover, the revised version of the GPA contains two new provisions facilitating the inclusion of specifications related to SEGS.

First, Article I of the revised GPA stipulates that a standard

means a document approved by a recognized body that provides for common and repeated use, rules, guidelines or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a good, service, process or production method.

Therefore, process and production methods requirement can be included in standards or labels.

Second, Article X:6 of the revised GPA indicates that:

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.

Both provisions help to facilitate the use of specifications related to the sustainability of a product or service, especially when it comes to process or production methods (PPMs). This would be particularly useful, for instance, when a standard or a label specifies that a good or a service must be produced through energy-saving methods.

*The use of sustainable and award criteria.*

Through the concept of the “most economically advantageous tender” instead of the single “lowest price” tender, procuring entities may take into account secondary policy objectives when awarding the contract. This practice seems compatible with the GPA, confirming the possibility of selecting not only the lowest price tender but that which is to be considered as the “most advantageous” depending on the specific evaluation criteria set forth in the tender notice.<sup>113</sup>

### **SEGS-related procurement versus non-discrimination**

Non-discrimination is one of the major principles laid down in the revised GPA. Article IV states the following:

With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:

- (a) domestic goods, services and suppliers; and

- (b) goods, services and suppliers of any other Party.

With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:

- (i) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or
- (ii) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.

The main question concerning SEGS-related procurement is whether regulatory provisions allowing such procurement could be considered to be introducing de facto discrimination between local and foreign suppliers of goods and services. A SEGS-related provision, for instance, could possibly indirectly favour regional suppliers of renewable-energy and related goods and services.<sup>114</sup>

A parallel exists, in this regard, between Article IV of the revised GPA and the national treatment rules described in GATT Article III:<sup>115</sup> and TBT Article 2.1.<sup>116</sup> The main issue under these provisions, however, relates to the ordinary meaning of the term “like product,” and unlike these provisions, Article IV of the revised GPA does not contain any reference to likeness. This concept does not fit well with the rationale of public procurement provisions, which are mostly addressed to suppliers and procuring entities of countries. This does not necessarily mean that no difference should be made between products and services. An argument could be made, for instance, that energy provided by a supplier through solar photovoltaic is very different from the one provided through a traditional thermal power station. In this case, treating them differently would not amount to discrimination. A dispute involving article IV of the GPA, therefore, would necessarily have to deal with a likeness criterion. Some lessons about this can be drawn from recent case law related to the TBT Agreement.

In a recent report dealing with article 2.1 of the TBT agreement, the appellate body used a methodology based predominantly on the competitive relationship between the two products in order to establish ‘likeness’. In the *Clove Cigarettes* case, Indonesia was the complainant against a US provision of the Family Smoking Prevention Tobacco Control Act of 2009 that bans clove cigarettes. Indonesia alleged that Section 907, signed into law on 22 June 2009, prohibits US production or sale of cigarettes containing certain additives, including clove, but does not ban the production and sale of cigarettes with other additives, such as menthol. The appellate body disagreed with the panel that “like products” in Article 2.1 of the TBT Agreement should be interpreted based on the regulatory purpose of the technical regulation at issue. It ruled that the determination of whether products are “like” within the meaning of Article 2.1 of the TBT Agreement is a determination about the competitive relationship between the products, based on an analysis of the traditional “likeness” criteria – namely, physical characteristics, end-uses, consumer tastes and habits, and tariff classification. Further, according to the appellate body, the regulatory concerns underlying a measure – such as the health risks associated with a product – may be relevant to the determination of “likeness” to the extent they have an impact on the competitive relationship between the products. Based on this interpretation of the concept of “like products,” the appellate body agreed with the panel that clove cigarettes and menthol cigarettes were to be considered as “like products” within the meaning of Article 2.1 of the TBT Agreement.<sup>117</sup> Hence, in a case involving public procurement, the main criteria to be used to establish discrimination in a given sector is the one based on the competitive relationship between the products and the services at issue.

Should the promotion of SEGS in procurement procedures be considered to be discriminatory, justification can be sought under the “general exceptions” of the GPA agreement:

Subject to the requirement that such measures are not applied in a manner

which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect...safety, human, animal or plant life or health...

This provision mirrors the general exception provision of the GATT Article XX. A WTO panel would, therefore, undoubtedly refer to the case law developed on the basis of that article (in particular, the “chapeau” conditions and the necessity test). In this context, a dynamic interpretation of the expression “necessary to protect safety, human, animal or plant health” can be proposed in order to justify the promotion of “sustainable energy goods and services.” Examples of similar dynamic interpretations, which also referred to sustainable development, are found in the *U.S.-Gasoline*<sup>118</sup> and *U.S.-Shrimp*<sup>119</sup> cases, and despite the tenuous link between SEGS and the protection of human, animal, or plant safety, a possible justification under this exception could exist. A difficulty, however, would arise due to the requirement that SEGS prescriptions based on process or production methods (PPMs) *are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade*. PPMs do require a party to the GPA to adopt the manufacturing processes of the procuring party in order to benefit from its GPA-outlined rights. Case law has repeatedly asserted the principle that unilateral PPMs do not meet the conditions related to the lack of *arbitrary or unjustifiable discrimination* unless the member adopting them has proactively engaged into prior consultations with the other members whose trade interests are affected. These consultations must be conducted with the view to accommodate respective trade and environmental interests.<sup>120</sup>

This stated, given the lack of clear WTO case law addressing sustainable procurement

policies, it is worth examining how they are handled by the Court of Justice of the European Union.

### **3.2.3 Justification on the basis of developmental/environmental grounds in national policies: the example of the case law of the Court of Justice of the European Union**

Since the end of the 1990s, several cases have been decided by the European Court concerning secondary policy objectives in public procurement. While stressing the necessity to respect the principles of EU law – in particular, the principles of fair treatment and non-discrimination flowing from the right of establishment and the freedom to provide services – the Court held that social and environmental objectives in procurement decisions were not, as such, contrary to EU Law.<sup>121</sup>

The *Concordia Buses* judgment<sup>122</sup> clearly demonstrated the possibility of promoting SEGS within the EU legal system. The Helsinki City Council had specified in a tender for buses for the Helsinki urban bus network that the selection would be based on the “most economically advantageous tender,” reflecting several criteria. One of these criterion was the quality of the vehicle fleet, and points were awarded for the use of buses with low nitrogen oxide emissions and low noise levels. The European Court faced the decision of whether this provision was compatible with EU legislation relating to procedures applying to the award of public service contracts.<sup>123</sup>

In response, the European Court considered that the EU Directive “was to be interpreted as meaning that where 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;
- they do not confer an unrestricted freedom of choice on the authority;

- they are expressly mentioned in the contract documents or the tender notice,
- they comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.<sup>124</sup>

In that case, the criteria related to the nitrogen oxide emissions were considered to be effectively linked to the subject of the contract.<sup>125</sup> Furthermore, the point system used to measure the extent to which environmental criteria had been applied did not confer unrestricted freedom of choice on the contracting authority, since it had required tenderers to meet specific and objectively quantifiable environmental requirements.<sup>126</sup>

The case law of the Court of Justice of the European Union is, as in this instance, often quite straightforward.

That is not the case of the WTO. Considering the general reluctance of the WTO system to accept unilateral measures based on prescriptions which are deemed discriminatory, such as PPMs, and also because WTO rules do not sufficiently differentiate the products and services subject to government procurement based on environmental criteria, recourse to an international agreement addressing the issue could prove useful. This issue could be addressed by a Sustainable Energy Trade Agreement (SETA).

# Chapter 4

## Addressing Trade-Restrictive Practices Within a Sustainable Energy Trade Agreement (SETA) Mindful of Sustainable Development Objectives

The objectives listed in the Preamble to the WTO Agreement, as well as the substantive provisions of the WTO Agreements, especially those of the GPA, do not explicitly authorise the promotion of Sustainable Energy Goods and Services by public purchasers. WTO panels and the Appellate Body might consider such promotion to constitute indirect discrimination that limits trade in an unjustifiable and arbitrary manner. However, if a party could rely on the existence of a proper international definition of SEGS and the appropriate standards to be applied in tenders, potentially discriminatory measures could perhaps be justified under the existing exception to the rules on public procurement. A Sustainable Energy Trade Agreement could constitute an appropriate framework to define SEGS in an objective and neutral way.

Moreover, the negative effects of the multiplicity of FTAs and the dispersion of rules governing public procurement could be contained by such an agreement. States wishing to pass laws allowing SEGS promotion could use the SETA framework as a relevant international standard when negotiating the provision of FTAs.

A SETA could also provide an opportunity to change the current approach to SEGS in public procurement. At the international level, and especially within the WTO, this is still a controversial issue, as SEGS and sustainable procurement can most often be justified only as exceptions to the multilateral trade rules. This demands a response to this issue through a positive and proactive approach that would encourage and facilitate tender requirements

based on SEGS. The revised GPA specifies that sustainable procurement should be one of the subjects for future GPA negotiations.<sup>127</sup> These negotiations could result in provisions linked to a future SETA Agreement, and conversely – in case a SETA is negotiated first – future GPA provisions could also refer to those SETA provisions.<sup>128</sup>

Furthermore, the relationship between government procurement and SEGS – not only from an “enabling environment” perspective but also from a “promoting” perspective<sup>129</sup> – may merit examination. A SETA could constitute the legal basis to both allow and promote SEGS-related procurement. An advance group of ‘like-minded’ parties to the SETA could, for instance, agree to liberalise sustainable procurement on a reciprocal basis to develop an international market in this field. Such a proposal, of course, is potentially highly controversial and against the current tendency of promoting undiscriminated free trade. As observed above, however, liberalisation in the field of public procurement has so far been conditioned by reciprocity. To this end, a SETA could outline the principle of reciprocity for the liberalisation of SEGS, while the parties to the GPA would translate this principle into their respective schedules. Similarly, SEGS-related procurement could then get a much stronger legal ground than is currently the case.<sup>130</sup>

Finally, the contents of the SETA as they relate to public procurement and the interface with WTO rules, both in terms of content and dispute settlement procedures, should be clearly specified.

**Table 2: SEGS prescriptions based on PPMs and Gaps in the Current Multilateral Trade Law**

Gaps in the current multilateral trade law	Can the SETA fill the gap?
Legitimate SEGS are not defined in any WTO Agreement.	A SETA should provide a definition of SEGS.
SEGS prescriptions based on process or production methods can be considered as discriminatory if they do not sufficiently relate to the physical characteristics of the products concerned.	A SETA could contain an acknowledgment by its parties that products and services complying with SEGS requirements that are consistent with the SETA are different from the products and services not complying with these prescriptions.
If considered discriminatory, SEGS prescriptions based on process or production methods cannot be <i>“applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.”</i>	The SETA could specify that SEGS prescriptions that are consistent with the SETA are assumed not to be <i>“applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.”</i>
Traditional case law is not sympathetic to unilateral PPMs that have not been negotiated beforehand with the affected trade partners.	

A recommendation would be to try to avoid forum shopping among the various agreements. The inclusion of the SETA within the WTO may be the best option in this regard.<sup>131</sup>

The enforceability of procurement-related provisions of a SETA could vary. Soft-law provisions, for instance, could adequately address SEGS-related requirements and the exchange of best practices between the parties to the SETA. Existing standards and labels related to SEGS in the technical specifications and in the awards of the parties to the agreement could be developed and promoted similarly, as this requires flexibility and should

not limit private sector innovation. In other areas, quantitative objectives could be imposed on the parties to the agreement. For instance, a SETA could require certain proportions of SEGS-certified products in some key sectors (building, construction, transport, etc.), and it could assess such objectives through a peer review mechanism. The requirements could vary based on the level of development of the contracting parties, encouraging broad participation in a SETA.

The following table is designed to summarise different options with respect to provisions on procurement that could be included in a SETA.<sup>132</sup>



**Table 3: Possible Options for Procurement-Related Provisions of a SETA**

Characteristics of the SETA Provisions on Government Procurement	Pros	Cons
<b>Type of Agreement</b>		
Within the scope of the WTO	<ul style="list-style-type: none"> <li>- Greater legal certainty</li> <li>- Non-discriminatory nature of sustainable procurement could be promoted with respect to all the WTO Members</li> <li>- Avoid forum shopping</li> <li>- Could facilitate coordination with the Committee on Public Procurement Activities and the current negotiations on Public Procurement</li> <li>- More efficient when it comes to the justification of SEGS procurement before the WTO adjudicatory bodies</li> </ul>	<ul style="list-style-type: none"> <li>- Exclude non-WTO members</li> <li>- Difficulties deriving from the limited membership to the GPA will not necessarily be solved</li> </ul>
Outside the scope of the WTO	<ul style="list-style-type: none"> <li>- Can include non-WTO members</li> <li>- Negotiations of the provisions will not be suspended until resolution of other WTO issues</li> <li>- May provide useful lessons which will be replicated later within the WTO</li> </ul>	<ul style="list-style-type: none"> <li>- Risk of forum shopping</li> <li>- Possible conflicts between the GPA and the SETA provisions (especially before the WTO adjudicatory bodies)</li> </ul>
<b>Membership</b>		
Universal	Could allow a universal promotion of SEGS in public procurement	<ul style="list-style-type: none"> <li>Long negotiation</li> <li>Limited results</li> </ul>
Limited	Could allow a group of like-minded countries to develop tools aiming at promoting public procurement	The obligations contained in the agreement could preclude other parties from accepting them

**Table 3: Possible Options for Procurement-Related Provisions of a SETA**

Characteristics of the SETA Provisions on Government Procurement	Pros	Cons
<b>Scope and Content</b>		
Soft promotion of SEGS in public procurement (with exchange of good practices)	Allow a proactive approach regarding SEGS in procurement instead of the current defensive approach	Weak added value considering that non-binding instruments and recommendations already exist at the international level
Quantitative objectives imposed on the states (varying with development levels), e.g. 50% of developed-country procurement should use SEGS by 2020	Real incentive to develop SEGS in public procurement that is still lacking at the international level	Resistance from the States could limit membership.  Difficulty of establishing subjective criteria on which to determine quantitative objectives.  Requires a proper legal definition of SEGS
<b>Link with the Other SETA Provisions</b>		
Provision on public procurement binding on all SETA Members	Greater coherence of the entire agreement	Future SETA Members could advocate for limited provisions concerning public procurement, stressing their discriminatory nature
Provision on public procurement binding for some SETA Members (SETA à la carte approach)	Could allow a group of like-minded countries to develop an efficient and detailed legal framework	Difficulties inherent to limited membership

# Endnotes

- 1 S. Arrowsmith (ed.), *Public Procurement Regulation: an Introduction*, (2010) EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, available at: <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf>, p.1. All the websites quoted in this article were visited in March 2012.
- 2 UNCITRAL Model Law on Public Procurement, Official records of the General assembly, 66th session, Supplement No 17 (A/66/17), Annex I, 07.2011, article 2 j).
- 3 The European Commission also emphasises that for most public authorities, construction and renovation works and running cost of buildings represent a major share of annual expenditure, in some case over 50%. EU Commission, *Buying Green! A Handbook on Green Public Procurement*, 2nd ed., 9.2011, available at: <http://ec.europa.eu/environment/gpp/pdf/handbook.pdf>.
- 4 C. McCrudden, "Using Public Procurement to Achieve Social Outcomes," *Natural Resources Forum*, 28 (2004) 257.
- 5 M. Dischendorfer, "The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO," 1 (2000) *Public Procurement Law Review*, 1.
- 6 UNCITRAL Model Law on Public Procurement, Official Records of the General Assembly, 66th session, Supplement No 17 (A/66/17), Annex I, 07.2011.
- 7 [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2011Model.html?&lang=en\\_us&output=json](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html?&lang=en_us&output=json)
- 8 See <http://www.osec.doc.gov/ogc/occic/apec.html>.
- 9 *Ibid.*
- 10 M. Dischendorfer, "The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO" see above, note 5.
- 11 China is scheduled to submit a new offer by the end of the year 2012 as part of its efforts to join the GPA.
- 12 See S. Arrowsmith, "Reviewing the GPA : the Role and Development of the Plurilateral Agreement after Doha" (2002) 5 *Journal of International Economic Law* 761; R. D. Anderson, "Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations," 16 (2007) *Public Procurement Law Review* 255.
- 13 R. Anderson & S. Arrowsmith, "The WTO regime on Government Procurement" in R. Anderson & S. Arrowsmith (ed.) *The WTO regime on Government Procurement – Challenges and reforms*, Cambridge University Press, 2011, 3, at 21.
- 14 Report of the WTO Committee on Government Procurement to the General Council, GPA/89, 11.12.2006.
- 15 R. D. Anderson, "Renewing the WTO Agreement on Government procurement: progress to date and Ongoing Negotiations," *op. cit.* at.19.

- 16 [http://www.wto.org/english/thewto\\_e/minist\\_e/min11\\_e/brief\\_gpa\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min11_e/brief_gpa_e.htm).
- 17 *Ibid.*
- 18 Ministerial Level Meeting of the Committee on Government Procurement (15.12.2011), Decision on the Outcome of the Negotiations Under Article XXI:7 of the Agreement on Government Procurement, GPA/112.
- 19 R. Anderson & S. Arrowsmith, “The WTO regime on Government Procurement” *op. cit.* at 13.
- 20 M. Dischendorfer, “The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO”, *op. cit.* p. 23.
- 21 G. de Graaf and M. King, “Towards a More Global Procurement market: the Expansion of the GATT Government Agreement in the Context of the Uruguay Round,” 29 (1995) *International Lawyer* 435, 446.
- 22 V. Guimareas De Lima e Silva, “The Revision of the WTO Agreement on Government Procurement: to What Extent Might it Contributes to the Expansion of Current Membership?” 2 (2008), *Public Procurement Law Review* 61, 75. See also R. D. Anderson and K. Osei-Lah, “Forging a Global Procurement Market: Issues Concerning Accessions to the Agreement on Government Procurement” in R. Anderson & S. Arrowsmith (ed.) *The WTO regime on Government Procurement – Challenges and reforms*, *op. cit.* at. 61. The authors also point out two structural problems for developing countries aiming to join the GPA. Namely the sensitive issue of state-owned enterprises (indeed, the question of whether or not the purchasing of state-owned enterprises should be seen as ‘government procurement’ is currently one of the most important issues in the GPA accession of China) and, secondly, the belief that GPA accession could potentially conflict with existing social and policy programmes (such as Black economic empowerment in South Africa or the preferences accorded to indigenous minorities in Malaysia). This paper will discuss this latter issue below (see section 4.2).
- 23 This table is based on information collected in the lists of commitments of the Parties to the GPA. *Special drawing rights* (SDRs) are the supplementary foreign exchange reserve assets defined and maintained by the International Monetary Fund (IMF).
- 24 The coverage also depends on the entities (central and sub-central) mentioned in the Parties’ commitments. When concluding the revised GPA, the Parties generally accepted to extend the scope of the GPA to sub-central entities.
- 25 See also J. Monkelbaan, “Sustainable Energy Services in a SETA”, ICTSD paper.
- 26 See R. D. Anderson and K. Osei-Lah, “Forging a Global Procurement Market: Issues Concerning Accessions to the Agreement on Government Procurement” *op. cit.* at. 159. See for instance the US General Notes to appendix 1 of the revised GPA which states that “*Notwithstanding the above, this Agreement will not apply to set asides on behalf of small and minority business*”, WT/Let/672, 19 March 2010. The Canadian General Notes contains a similar exclusion.
- 27 See WT/Let/672, 19 March 2010
- 28 See WT/Let/454, 9 December 2003.
- 29 See Annex 3 of EU’s Schedule, doc. WT/Let/330, 1st March 2000.

- 30 This clause appears in Article XXII:6 of the revised GPA.
- 31 See *Japan – Procurement of a Navigation Satellite*, Request for Consultations by the European Communities, DS73/1, 26.03.1997; *United States – Measures Affecting Government Procurement (Massachusetts State Law prohibiting contracts with firms doing business with or in Myanmar)*, Request for Consultations by the European Communities (DS88/1, 20.06.1997) and *Japan (DS95, 18.07.1997)*; *Korea – Measures affecting Government Procurement (procurement practices of the Korean Airport Construction Authority)*, Panel Report, WT/DS163/R, 1.05.2000.
- 32 See [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds73\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds73_e.htm).
- 33 See the Notification of Mutually-Agreed Solution, WT/DS73/5, 3.3.1998. “[T]he European Commission and the Ministry of Transport of Japan have reached a settlement through the establishment of cooperation between the European Tripartite Group (consisting of the European Commission, the European Space Agency and Euro control) on the one hand and the MOT on the other in the field of interoperability between MSAS and European Geostationary Navigation Overlay Service (EGNOS). This cooperation is aimed at jointly contributing to the implementation of a global seamless navigation service for aeronautical end-users through the interoperability among MSAS, EGNOS and other equivalent systems. It has also been agreed that the requirements for interoperability will be mentioned in MSAS and EGNOS documentation for all future procurement in and after 1998, on condition that both sides reach the conclusion that the interoperability is feasible.”
- 34 *United States - Measure Affecting Government Procurement*, Request for Consultations by the European Communities, WT/DS88/1, 26.06.1997.
- 35 See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).
- 36 See *Korea – Measures affecting Government Procurement (procurement practices of the Korean Airport Construction Authority)*, Panel Report, WT/DS163/R, 1.05.2000, § 7.9.
- 37 *Ibid.* § 7.89. The United States also failed to demonstrate that benefits reasonably expected to accrue under the GPA, or in the negotiations resulting in Korea’s accession to the GPA, had been nullified or impaired by measures taken by Korea.
- 38 DS412 (Japanese complaint) and DS 426 (EU complaint).
- 39 The text of NAFTA Chapter 10 is available at <http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpilID=140#An1001.1a-3>.
- 40 See NAFTA article 1018.
- 41 See Annex 1001.1a-3 of NAFTA Chapter 10.
- 42 See Annex 1001.1b-2 of NAFTA Chapter 10.
- 43 See R. Anderson (et al.), “Government Procurement Provisions in Regional Trade Agreement: a stepping stone to GPA accession?” in *The WTO Regime on Government Procurement: Challenges and Reform*.
- 44 See Commission, *Buying Green! A Handbook on Green Public Procurement*, 2nd ed., 9.2011, available at: <http://ec.europa.eu/environment/gpp/pdf/handbook.pdf>.

- 45 The concept of “best value for the money” was first developed by the UK Treasury, which defined it as “the optimum combination of whole life cost and quality (or fitness for purpose) to meet the customer’s requirement” ([http://www.hm-treasury.gov.uk/d/government\\_procurement\\_pu147.pdf](http://www.hm-treasury.gov.uk/d/government_procurement_pu147.pdf)). As noted by Bramer and Walker, “through the focus on whole life cost, the definition of the best value of money gives scope to public bodies to take social and environmental policy objectives into account in their procurement activities.” S. Brammer and H. Walker, “Sustainable Procurement Practice in the Public Sector: An International Comparative Study”, 2007, available at <http://opus.bath.ac.uk/281/>.
- 46 Long terms health benefits can be expected for instance reducing carbon emissions. From the social point of view, the promotion of sustainable procurement is a way to stimulate the private sector and make an economy more innovative and competitive.
- 47 The Treaty on the Functioning of the European Union (TFEU) defines Directives as instruments having a binding legal nature with respect to the Member States (Article 288 TFEU).
- 48 Directive 2004/18/EC of the European Parliament and of the Council on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts (OJ L 134, 30.4.2004, p. 114).
- 49 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).
- 50 See in particular the 1st, 5th, 29th, 44th, 46th recitals of the EU Directive 2004/18. The same can be observed concerning the so-called Utility Directive 2004/117. For a deeper analysis, see S. Arrowsmith and others, *EU Public Procurement law: an Introduction*, (2010) EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, available at: <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf>; Moreover, several rulings from the European Court of Justice deal with the issue of sustainable procurement. See for instance Case C-448/01, *EVN AG and Wienstrom GnbH v. Austria* (“EVN”) [2003] ECR I-14527.
- 51 See Commission, *Buying Green! A Handbook on Green Public Procurement*, see above, note 44.
- 52 The European Commission give the examples of a computer that should not consume more than a certain amount of energy per hour, and a vehicle that does not emit more than a certain quantity of pollutant.
- 53 European Commission, *Buying Green! A Handbook on Green Public Procurement*, op. cit. p. 26. See also COM (2004)130, Integration of Environmental Aspects of European Standardization.
- 54 European Commission, *Buying Green! A Handbook on Green Public Procurement*, op. cit. p. 27.
- 55 See Annex VI of the Directive 2004/18/EC and Annex XXI of the Directive 2004/17/EC.
- 56 The European Ecolabel is a voluntary scheme, established in 1992 to encourage businesses to market products and services that are environmentally friendly. Products and services awarded the Ecolabel “carry the flower logo, allowing consumers - including public and private purchasers - to identify them easily. Today, the EU Ecolabel covers a wide range of products and services, with further categories being continuously added.

Covered categories include cleaning products, appliances, paper products, textile and home and garden products, lubricants and services such as tourist accommodation. Unlike standards, Eco-Labels are voluntary”. See the Communication on “Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan,” COM(2008) 397 final, 16.7.2008, p.4.

57 Operators who have violated environmental laws can be excluded. See Article 45.2 c) of Directive 2004/18/EC and Article 54.4 of Directive 2004/17/EC.

58 This concept applies the “best value for the money” approach at the award stage.

59 <http://www.iclei-europe.org/index.php?id=procurement>.

60 <http://www.leap-gpp-toolkit.org/>.

61 See the Commission’s Communication “Public Procurement for a Better Environment,” COM/2008/0400 final, 2.07.2008. Examples of the promotion of SEGS in the UK will be presented below.

62 The data for this study came from two sources. One was from 865 responses to 8787 questionnaires, and the other was from a survey of 1000 tender documents. See [http://ec.europa.eu/environment/gpp/pdf/take\\_5.pdf](http://ec.europa.eu/environment/gpp/pdf/take_5.pdf).

63 L. Carlsson and F. Waara conducted a survey in Sweden before the implementation of Directive 2004/18 through interviews with 29 procurement officers in eight Swedish municipalities, one county and one region in Sweden. Three types of limitations to the integration of environmental concerns were identified: *the lack of administrative resources* (including environmental know-how), *legal concerns* (suppliers refrained from using environmental related award criteria because it could result in bid protests from unsuccessful bidders) and *lean budget* (some purchasers considering that environmentally friendly goods and services are too expensive). See L. Carlsson and F. Waara, “Environmental Concerns in Swedish Local Government Procurement,” 2006, In: K.V. Thai and G. Piga (Ed.), *Advancing Public Procurement*, PrAcademics Press, Boca Raton, USA. Available at [http://www.ippa.ws/IPPC2/BOOK/Chapter\\_11.pdf](http://www.ippa.ws/IPPC2/BOOK/Chapter_11.pdf)

64 See [http://en.ndrc.gov.cn/hot/t20060529\\_71334.htm](http://en.ndrc.gov.cn/hot/t20060529_71334.htm). Among the many implementation activities involving SEGS in China were the Green Olympics. Green procurement was used in acquiring construction materials, designing the facilities, and providing services.

65 <http://www.lawinfochina.com/display.aspx?lib=law&id=1014>

66 [http://www.gov.cn/english/laws/2005-10/08/content\\_75023.htm](http://www.gov.cn/english/laws/2005-10/08/content_75023.htm)

67 See C. Fuguo, “China’s government procurement policy and Institutional Framework: History, structure and Operation” in Khi V. Thai (ed.), *International Handbook of Public procurement*, CRC Press, Florida, 2009, 325-349.

68 See, C. Fuguo, Y. Yuying and Z. Fen, “China Green Public Procurement Program: Issues and Challenges in its Implementation” (2011), available at <http://www.ippa.org/IPPC4/Proceedings/07GreenProcurement/Paper7-6.pdf>. See also M. Ju, L. Zhang, L. Zhan, H. Ren and Z. Yang, “Public Green Procurement in China: Development Course, Program Management and Technical Methods, Sustainable Public Procurement in Urban Administration in China: An Action under Europe Aid’s SWITCH-Asian Program Paper,” No. 02-EN/CH, 2009. [www.public-procurement.cn/English%20Document/Reports%201/Public%20Green%20Procurement%20in%20China.pdf](http://www.public-procurement.cn/English%20Document/Reports%201/Public%20Green%20Procurement%20in%20China.pdf).

- 69 C. Fuguo, "China's Government Procurement Policy and Institutional Framework: History, Structure and Operation," *op. cit.*, p. 329.
- 70 [http://english.mep.gov.cn/Policies\\_Regulations/laws/envir\\_elatedlaws/200710/t20071009\\_109966.htm](http://english.mep.gov.cn/Policies_Regulations/laws/envir_elatedlaws/200710/t20071009_109966.htm)
- 71 Standing Committee of the 11th National People's Congress (NPC) of the People's Republic of China, "Circular Economy Law of the People's Republic of China," 29 August 2008. <http://www.chinaenvironmentallaw.com/wp-content/uploads/2008/09/circular-economy-law-cn-en-final.pdf>
- 72 See Article 51 of the Chinese Law on Energy Conservation.
- 73 See *id.*, Article 64.
- 74 See Article 51 of the Chinese Law on Energy Conservation "When a public institution purchases energy-consuming products and equipment, it shall purchase those products and equipment that have been incorporated into the government procurement inventory of energy-saving products and equipment." An English translation of this law is available at <http://faolex.fao.org/docs/texts/chn76322E.doc>.
- 75 See *id.*, Article 81.
- 76 Qiao & Wang, "China Green Public Procurement Program: Issues and Challenges in its Implementation" (2011), available at <http://www.ippa.org/IPPC4/Proceedings/07GreenProcurement/Paper7-6.pdf>
- 77 See C. Fuguo, Y. Yuying and Z. Fen, "China Green Public Procurement Program: Issues and Challenges in its Implementation" see above, note 69.
- 78 *Ibid.*
- 79 Some authors therefore propose the creation of a unified "Green procurement agency" See Y. Qiao and C. Wang, "Issues and Challenges in Implementing China's Green Public Procurement Program," p. 1040.
- 80 The GPL implements a buy-national policy in Article 10, which provides that "the government shall procure domestic goods, works, and services except where: 1) Goods, works, or services to be procured are not available within the territory of People's Republic of China or though available, cannot be acquired on reasonable commercial terms and conditions. 2) Items to be procured are for use abroad 3) Otherwise provided by laws and administrative regulations."
- 81 See Y. Qiao and C. Wang, "Issues and Challenges in Implementing China's Green Public Procurement Program," p. 1041.
- 82 Beside the promotion of SME's already mentioned, one can observe that the US administration, particularly the US department of defense played a critical role in promoting R&D and innovation through public procurements. For instance, "in the 60s, when the technological options were far ahead of civilian applications in the semi-conductor business, the US defense sector represented the only customer for the American sector industry. With its high-level technological requirements, the public sector created a strong demand for innovation in order to satisfy the specifications imposed by military applications. Department of Defense willingness to pay almost any price for compact, lightweight electronics for its



missile programmes stimulated the infant semiconductor industry.” See L. Nyiri, D. Osimo, R. Özcivelek, C. Centeno and M. Cabrera, *Public Procurement for the Promotion of R&D and Innovation in ICT*, available at <http://ftp.jrc.es/EURdoc/eur22671en.pdf>.

- 83 Available at <http://www1.eere.energy.gov/femp/pdfs/eo13514.pdf>.
- 84 See C. E. Kreycik, T. D. Couture and K. S. Cory, *Procurement option for new Renewable Electricity Supply*, NREL, December 2011, available at: <http://www.nrel.gov/docs/fy12osti/52983.pdf>.
- 85 Load serving entities (LSEs) “provide electric service to end-users and wholesale customers. LSEs include the competitive retailers (CRs) that sell electricity at retail in the competitive market. A Competitive retailer may be (1) a retail electric provider, which contracts with qualified scheduling entities to provide scheduling services for their load customers, or (2) a municipally owned utility or co-operative that opts to offer customer choice (an opt-in entity). LSEs also include non-opt-in entities, which are electric cooperatives and municipally owned utilities that do not operate as CRs and do not plan to offer customer choice.” [www.ercot.com/services/rq/lse/](http://www.ercot.com/services/rq/lse/)
- 86 [http://www.hm-treasury.gov.uk/d/government\\_procurement\\_pu147.pdf](http://www.hm-treasury.gov.uk/d/government_procurement_pu147.pdf). See also V. Kenrick, “Sustainable Energy procurement Recommendations for Schools,” Environmental leader, 2011, available at <http://www.environmentalleader.com/2011/02/02/sustainable-energy-procurement-recommendations-for-schools/>.
- 87 For a deeper presentation of these projects see J. Braton, K. Dawar and Jan-Christoph Kuntze, Issues and tensions in public procurement of ‘green innovation’: A cross-country study, Working paper of the Center of Trade and Economic Integration, Geneva, June 2011, available at <http://graduateinstitute.ch/ctei/>.
- 88 UK Department for Business Enterprise & Regulatory Reform, Competition for a Carbon Dioxide Capture and Storage Demonstration, Project Information Memorandum, p. 8 (2007).
- 89 <http://www.energysavingtrust.org.uk/Transport>
- 90 *Ibid.*
- 91 *Ibid.*
- 92 *Ibid.*
- 93 V. Kenrick, “Sustainable Energy Procurement Recommendations for Schools”, 2011, available at [http://www.environmentalleader.com/2011/02/02/sustainable-energy-procurement-recommendations-for-schools/?lang=en\\_us&output=json](http://www.environmentalleader.com/2011/02/02/sustainable-energy-procurement-recommendations-for-schools/?lang=en_us&output=json)
- 94 *Ibid.*
- 95 See S. Colverson and O. Pereira, “Harnessing the Power of Public-Private Partnerships: The Role of Hybrid Financing Strategies in Sustainable Development,” IISD, 2012. The report is also illustrated by a set of instructive case studies related to the Public Private Partnership dimension of sustainable procurements, particularly in the field of SEGs. It draws several lessons from these practical experiences on the opportunity of involving private actors in the elaboration and implementation of project of public sustainable procurements. However, this critical question goes beyond the present study.

- 96 Data and information utilized by Colverson and Pereira were retrieved from the UNDP Growing inclusive database and can be found in the report TEMASOL: Providing Energy Access to remote Rural Households in Morocco (UNDP 2011).
- 97 *Ibid.*
- 98 *Ibid.*
- 99 TEMASOL is a joint venture between the French oil and electricity companies TOTAL and Électricité de France (EDF). It was created especially for this procurement. See <http://cases.growinginclusivemarkets.org/documents/61>.
- 100 See S. Colverson and O. Pereira, *Harnessing the Power of Public-Private Partnerships: The Role of Hybrid Financing Strategies in Sustainable Development*,” see above, note 95.
- 101 *Ibid.*
- 102 *Ibid.*
- 103 *Ibid.*
- 104 According to Colverson and Pereira, “Local staff were specifically chosen and trained to bridge the trust gap that inevitably exists between international private sector service providers and rural populations, and introduction of new technologies.” See their report above mentioned at 43.
- 105 A requirement concerning the way the product should perform or how the service should be delivered in terms of energy efficiency must be distinguished from a situation where a standard or an eco-label indicates how much energy was used and/or saved in producing the product or the service, or takes into consideration the type of energy used within the process (for example, if it was produced using a renewable source or a conventional fossil-based source). In the latter case, the standard or eco-label is directly imposing a PPM. See G-I. Malumfashi, “Green” Public Procurement Policies, *Climate Change Mitigation and International Trade Regulation: An Assessment of the WTO Agreement on Government Procurement* (University of Dundee, United Kingdom, 2010), p. 163-164.
- 106 See UNCITRAL Secretariat, *Revised Guide to Enactment to Accompany to UNICITRAL Model Law on Public Procurement*, A/CN.9/WG.I/WP.79 cong. (W. G. I), 13.06.2012, § 23-43.
- 107 This information was partly extracted from the EU Commission website at [http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc\\_134652.pdf?&lang=en\\_us&output=json](http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf?&lang=en_us&output=json)
- 108 See a first analysis of the case at <http://ictsd.org/i/news/bridgesweekly/129972/>.
- 109 At this stage, Consultations between Japan and Canada were held on June 2011, and Canada and the EU September 2011. Both consultations failed to result in a positive solution of the matter. Therefore, on September 2011 and on January 2012 the EU requested the establishment of a WTO panel in order to determine whether Ontario’s measures are consistent with WTO rules. The panels have been composed, and the three parties agreed that the panelists in dispute WT/DS412 would also serve as panelists in dispute WT/DS426. The Panel should conclude its work by the end of 2012.
- 110 See *Korea – Measures affecting Government Procurement (procurement practices of the Korean Airport Construction Authority)*, Panel Report, WT/DS163/R, 1.05.2000, § 7.9. For a description of this case, see section 2.2.2.1.

- 111 See Article VI of the GPA 1994 and Article X of the revised GPA.
- 112 See Article VI:2 of the GPA 1994 and Article X:2 of the revised GPA.
- 113 See Article XIII.4 b) of the GPA 1994 and Article XV.5 of the revised GPA.
- 114 See A. Davies, “The National treatment and Exceptions Provisions of the Agreement on Government Procurement and the Pursuit of Horizontal Policies” in *The WTO Regime on Government Procurement: Challenges and Reforms* op. cit., 431-443.
- 115 GATT article III:4 states the following “*The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use[...].*”
- 116 TBT Article 2.1 indicates that “*Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.*”
- 117 The competitive relationship between two products criteria has also been used as a tool to establish likeness by a Panel in *US – Tuna, WT/DS381/R*, 15 September 2011 and confirmed by the Appellate Body (*WT/DS381/AB/R*, 16.05.2012).
- 118 *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, *WT/DS58/AB/R*, 10.8.1998, § 144.
- 119 *United States - Standards for Reformulated and Conventional Gasoline*, 29.04.1996, *WT/DS2/AB/R*, p. 20-21. In these cases, the WTO Appellate Body found that clean air and turtles were “exhaustible natural resources” under Article XX (g).
- 120 See Above, footnote 73.
- 121 See especially, Case C-225/98, *Commission v France (“Nord-pas-de-Calais”)* [2000] ECR I-7445.
- 122 Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne (“Concordia Buses”)* [2002] ECR I-7213.
- 123 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209/1. Article 36(1)a) of this Directive dealing with “Criteria for the Award of Contracts” was indeed very similar to the now applicable Article 53 of Directive 2004/18.
- 124 See Paragraph 64 of the ruling.
- 125 See Paragraph 66 of the ruling.
- 126 See also C-448/01, *EVN AG and Wienstrom GmbH v Austria* [2003] ECR I-14527. In that case, the Austrian authorities required electricity suppliers to supply the Federal offices with electricity generated from renewable energy sources, subject to any technical specifications, and in any case, not knowingly supplying those offices with electricity generated by nuclear fission. The ECJ considered that these criteria were in conformity

with the EU legislation on public procurement, in the context of the assessment of the most economically advantageous tender.

127 See Article XX:8 a) i) of the revised GPA.

128 Concerning the general structure of a SETA, see *Fostering Low Carbon Growth: The Case for a Sustainable Energy Trade Agreement*, ITCSD paper, November 2011.

129 These expressions are those of one of the commentators to this article, Marie Wilke.

130 Non parties to the GPA but parties to the SETA could also participate in this reciprocal commitment for SEGS.

131 See *EC – Approval and Marketing of Biotech Products*, WT/DS291/R, 29.09.2006, § 7.76–7.89. See also M. Kennedy, “Legal Options for a Sustainable Energy Trade Agreement,” ICTSD paper, July 2012, p. 34-37.

132 Concerning the general structure of a SETA, see *Fostering Low Carbon Growth: The Case for a Sustainable Energy Trade Agreement*, ITCSD paper, November 2011.

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