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Rika Koch

Green Public Procurement under WTO Law

Experience of the EU and Prospects for Switzerland

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Green Public Procurement under WTO Law

Experience of the EU and Prospects for Switzerland

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About the Author

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Abbreviations

ABR	Appellate Body Report
AS	Amtliche Sammlung des Bundesrechts
ASCM	Agreement on Subsidies and Countervailing Measures
ALT	Abnormally low tenders
BGBM	Bundesgesetz über den Binnenmarkt
BöB	Bundesgesetz über das öffentliche Beschaffungswesen
BTA	Border tax adjustments
CartA	Cartel Act
CDM	Clean Development Mechanism
CETA	Comprehensive Economic and Trade Agreement
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CTE	Committee on Trade and Environment
d-FLGP	Draft version of the Federal Law on Government Procurement
d-FOGP	Draft version of the Federal Ordinance on Government Procurement
DSU	Dispute settlement understanding
DSM	Dispute settlement mechanism
EC	European Communities
EEA	European Economic Area
EFTA	European Free Trade Agreement
EGA	Environmental Goods Agreement
EMS	Environmental Management System
EIP	Environmental Integration Principle
EPA	Environmental Protection Act
EU	European Union
ETS	Emission trading scheme(s)
FDI	Foreign direct investment
FLGP	Federal Law on Government Procurement
FLTBT	Federal Law on Technical Barriers to Trade
FOEN	Federal Office for the Environment
FOGP	Federal Ordinance on Government Procurement

FTA	Free trade agreement(s)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GBP	Pound sterling
GDP	Gross domestic product
GHG	Greenhouse gas(es)
GPA	Plurilateral Agreement on Government Procurement
GPP	Green Public Procurement
IAPP	Inter-Cantonal Agreement on Public Procurement
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
IPCC	Intergovernmental Panel on Climate Change
IPF	Investment Project Financing
ITA	Information Technology Agreement
ITO	International Trade Organization
ISO	International Organization for Standardization
IT	Information technology
IVöB	Interkantonale Vereinbarung über das öffentliche Beschaffungswesen
KG	Kartellgesetz
KP	Kyoto Protocol
LCC	Life cycle costing/life cycle costs
LCM	Law on the Establishment of a Swiss Common Market
LCR	Local content requirement(s)
LtSM	Link to the Subject Matter
MEA	Multilateral environmental agreement(s)
MEAT	Most economically advantageous tender(er)
MFN	Most favoured nation
MRA	Mutual recognition agreement
npr PPM	Non-product-related Process and Production Methods
OECD	Organisation for Economic Co-operation and Development
OJEU	Official Journal of the European Union
org-FGOP	Ordinance on the Organization of Federal Public Procurement
Org-VöB	Verordnung über die Organisation des öffentlichen Beschaffungswesens der Bundesverwaltung
PPM	Process and production methods
QMS	Quality management systems
PR	Panel report
S&D	Special and differential [treatment]
SDR	Special drawing rights
SME	Small and medium-sized enterprises
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
SR	Systematische Sammlung des Bundesrechts
TBT	Agreement on Technical Barriers to Trade
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union
THG	Bundesgesetz über die Technischen Handelshemmnisse
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
USCMA	US–Mexico–Canada Agreement
USG	Bundesgesetz über den Umweltschutz
VCLT	Vienna Convention on the Law of Treaties
VöB	Verordnung über das öffentliche Beschaffungswesen
WTO	World Trade Organization

Chapter 1
Introduction

1.1 Research Subject

With the acknowledgment of environmental protection as an important governmental responsibility, environmental aspects in public procurement have been receiving growing attention in recent years. Governments build schools (and other public buildings) out of wood instead of concrete, hospitals serve food from organic producers and public buses use electricity instead of diesel—all with the aim of protecting the environment. What is generally referred to as "green" public procurement (GPP) is increasingly perceived as a viable way to contribute to environmental protection policies.

From an environmental perspective, GPP is uncontested, since it contributes to environmental protection in many ways: through reducing greenhouse gas (GHG) emissions and landfill waste, conserving natural resources, and increasing demand and supply for environmental friendly production—to name only a few examples.

From an international trade law perspective, however, there is potential for conflict. Critics fear the use of GPP as a cover for protectionism and run counter to the legislative framework of the World Trade Organization (WTO). For example, a country may require its police to buy only electric cars, instead of petrol cars. While the official reason could be the protection of the environment, the true reason might be to boost the national industry of electric cars. Another country may request that authorities build public houses with wood to keep the ecological footprint of construction low, but the true reason could be to develop the local wood industry. Both of these examples are clear cases of discriminatory public procurement practices. However, there are more ambiguous cases: a country may award a contract for managing waste disposal to a local bidder, arguing that he has the shortest transportation route and thus emits little GHG. Is this a justified case of GPP or discriminatory protectionist public procurement?

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Often a delicate balancing act between environmental and competition concerns becomes necessary. The difficulty that arises from this balancing act is to exploit the scope of GPP provisions without risking a breach of non-discrimination provisions in the pertinent public procurement legislation.

On a WTO level, the Government Procurement Agreement (GPA) is the pertinent international agreement for public procurement regulation. The GPA contains plurilateral rules that Signatory States and their procuring authorities have to adhere to. Until 2012, the GPA did not regulate GPP, creating a legal gap that caused many controversies about its compatibility with the non-discrimination obligations of the GPA. However, this has changed with the most recent revision: the current version of the GPA expressly acknowledges GPP as a public procurement strategy.

While this removes all doubts about the general compatibility of GPP with the GPA, questions of the exact scope and limit of GPP under the revised GPA 2012 still remain largely unanswered.

1.2 Relevance and Research Goals

In many jurisdictions, there is still considerable legal uncertainty about the status of GPP laws and policies and their relation to the GPA. This causes a challenging situation for all actors involved in the procurement process. It is difficult for the procuring authority, on the one hand, to define the goods or services they wish to procure and, on the other hand, for the bidding companies to design their tendering offer accordingly. This, in turn, undermines confidence in the procurement system. As pointed out by Weber/Menoud legal uncertainty regarding the GPA (and fear from unforeseeable legal consequences) is one of the principle reasons that leads contracting authorities to refrain from implementing GPP.[1]

Working from this background, this thesis aims to overcome legal uncertainties that still surround national GPP regarding its compatibility with the GPA. In a first step, the pertinent provisions of the GPA will be assessed within the broader context of general WTO law and jurisprudence to draw conclusions on the interpretive scope potentially granted by a Panel or the Appellate Body. In a second step, this thesis assesses the implementation laws of both the EU and Switzerland. This will serve the goal of formulating concrete policy recommendations for Switzerland (and other Signatory States) on how to design GPP laws and practices in accordance with the GPA.

Thereby, this thesis also serves to illustrate the interaction mechanisms between the WTO and its Member States. Based on the example of Switzerland it shows how sovereign states proceed to implement their obligations arising from international law, in a field that has practical implications even on the communal level. Moreover, the analysis of the implementation of the GPA in Switzerland, focusing on the

[1] Weber/Menoud, 185.

specific example of GPP, also highlights how potential conflicts between international (trade) rules and domestic (environmental) policies can be reconciled.

A look at the amount of existing literature on GPP presents a mixed picture: while in the EU there is extensive literature,[2] this is not the case in other GPA countries such as Switzerland, Japan or the US.[3] Nevertheless, scholars from the European Union (EU) mainly focus on GPP and its compatibility with the EU legislative framework. The question of compatibility with the GPA seems to be of little interest. Scholars of international law, on the other hand, seem to leave the question of GPP aside and rather focus on the more classical issues of international public procurement, such as coverage of the revised GPA 2012, market liberalization, or issues of membership.[4]

In Switzerland, GPP is a little researched topic. Although literature on public procurement does not fail to mention the GPA as an important source of law, an exact analysis taking into consideration issues of general WTO law, especially jurisprudence, has not been conducted so far. This explains why GPP remains a contentious issue, whereby WTO law is often argued to be an impeding instead of an enabling factor, despite the changed legal situation under the GPA 2012.

1.3 Research Questions

This thesis will be guided by a set of research questions, whose answers will serve to meet the research goal. Each of these questions addresses a different layer of governance, namely the international, regional and domestic level.

The starting point of this thesis is the fundamental question of what scope the revised GPA leaves for GPP. However, the GPA is a framework agreement that becomes fully effective only through implementation on the domestic (or in the case of the EU, regional) level. Since the WTO does not set forth requirements on *how* to transpose the GPA, but leaves implementation to its signatory parties, it is interesting to compare how various Signatory States use the respective scope and leeway given to them under the GPA.

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[2] See *ex multis*, Arrowsmith / Kunzlik, *passim*; Sjåfjell / Wiesbrock, *passim,* or Semple 2015, *passim*.

[3] Although some countries have published GPP recommendations for procurement officials, these guidelines typically adopt a practitioner's perspective and do not elaborate on dogmatic legal aspects.

[4] See for example Arrowsmith 2003, Reich 2009, *passim*; Anderson / Arrowsmith, *passim*, or Evenett / Hoekman, *passim,* or Georgopoulos / Hoekman / Mavroidis, *passim*.

1.3.1 WTO

In a first step, identifying the various GPP elements that have found their way into the GPA 2012 will help to get a clear understanding of what instruments the GPA provides for the consideration of GPP. The first research question in this regard takes a look at the changed wording of the law:

- *Which GPP provisions have been introduced by the GPA 2012 revision?*

In a second step, these GPP provisions will be analyzed behind the background of the various non-discrimination principles enshrined in WTO law. The question that will guide this analysis is:

- *What limits do the various non-discrimination provisions of WTO law pose to GPP?*

In line with the general rules of treaty interpretation,[5] these provision have to be analyzed in order to make assumptions (albeit hypothetical ones) about the ways in which the WTO adjudicatory bodies would interpret their wording. Accordingly, the sub-question asked in this regard is:

- *How would a Panel or the Appellate Body interpret the wording of the pertinent GPA provisions?*

Due to the lack of case law on the GPA, this question can only be answered by looking at the decisions of the adjudicatory bodies within the context of the multilateral WTO agreements, namely the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) or the Agreement on Technical Barriers to Trade (TBT). Since WTO adjudicatory bodies may only deviate from former case-law when "cogent reasons" to do so exist,[6] assessing the interpretative approaches of the multilateral agreements will make it possible to draw conclusions on potential interpretive approaches of GPA.

1.3.2 EU

The EU is an important party to the GPA as all of its 28 Member States are bound by the GPA (although the EU counts as a single party). Moreover, the EU is known as an important advocator of GPP. Therefore, its ways of implementing GPP can provide important insights on how to balance GPP with the requirements of non-discrimination, also for other GPA parties, such as Switzerland. To this aim the following questions will guide the research in Part III:

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[5] See below, next chapter.

[6] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, circulated 30 April 2008 [*US – Stainless Steel*], 160.

- *How are the GPA's non-discrimination and GPP elements transposed into EU public procurement legislation?*

This question will be assessed by looking at the text of revised public procurement directives. In addition, case-law and developments at policy level will also be taken into account.

1.3.3 Switzerland

Switzerland has been a Signatory State of the GPA from the beginning. However, unlike all the other GPA Parties, Switzerland has not ratified the GPA 2012 as of 2020. The reason for this delay is that the GPA ratification was taken as an opportunity to simultaneously reform domestic public procurement law. This process of total reform has proven to be a lengthy one, since it requires consolidation by many stakeholders at various federal levels.

This total reform comes with significant changes for GPP: for the first time, GPP elements are now mentioned in the Swiss public procurement law. Moreover, the law also provides guidelines on how to conduct GPP in line with principles of non-discrimination and best value for money. Nevertheless, GPP is a relatively new issue under Swiss law, and there is still great legal uncertainty, especially concerning its compatibility with the GPA. Behind this background, the following research question will guide the analysis in Part IV:

- *How does Switzerland implement the GPA in general and GPP elements in particular within the course of its total reform?*

Thereby, the focus lies on an assessment of the legal text, i.e. the provisions of the legislative proposal for a revised Swiss public procurement law. This not only provides practical solutions for GPP in line with the GPA, but also illustrates the legislative mechanisms of interaction between the WTO and its Member States.

1.4 Methods

1.4.1 Rules of Treaty Interpretation

To interpret the scope of the new legal provisions on GPP in the GPA, it is necessary to adopt a textual analysis following the general rules on treaty interpretation inscribed in the Vienna Convention on the Law of Treaties (VCLT).

The VCLT is of major relevance when interpreting WTO law: it has long been acknowledged by WTO jurisprudence that Articles 31 and 32 VCLT are "customary rules of interpretation of public international law" within the meaning of Article 3.2

Dispute Settlement Understanding (DSU).[7] Therefore, the WTO dispute settlement bodies need to take these articles into account when interpreting the covered agreements.[8]

According to the VCLT, the starting point of every textual analysis is the wording of the text.[9] Article 31.1 VCLT states that:

> A treaty shall be interpreted in good faith in accordance with the **ordinary meaning** to be given to the terms of the treaty in their **context** and in the light of its **object and purpose** (emphasis added).

The first step is to identify the "ordinary meaning" of the analyzed provision. This can be complex, because words have usually more than one meaning.[10] Therefore, the elements of "context" and "object and purpose" are also taken into consideration.

The identification of the "ordinary meaning" is easy, when the analyzed treaty/agreement has a definition catalogue (which is now the case in Article 1 of the GPA). Nevertheless, the majority of important key terms remain without legal definition, which makes it necessary to resort to jurisprudence.

However, since jurisprudence under the GPA remains scarce (the new GPA 2012 has so far not been subject to scrutiny by a Panel or the Appellate Body), it is necessary to refer to jurisprudence under the other (multilateral) WTO Agreements. This approach complies with the VCLT, since Article 31.1(a) expressly states that

> The context (…) shall comprise, in addition to the text (…) (a): any agreement relating to the treaty which was made between all the parties in connection with conclusion of the treaty.

Therefore, jurisprudence made in relation to agreements such as the GATT and the TBT can be generally considered relevant context for the GPA.

When there is no case-law available, treaty interpreters usually resort to the dictionary to find the "normal" linguistic usage of a term.[11] However, the Appellate Body also pointed out that "dictionary meanings leave many interpretive questions open".[12] This makes an analysis on a case-by-case basis under consideration of the specific circumstances of the respective case necessary. Other legal sources may

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[7] Article 3.2 DSU states, *inter alia*, that the WTO dispute settlement mechanism (DSM) "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with *customary rules of interpretation of public international law*" (emphasis added).

[8] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996 [*US – Gasoline*], 17.

[9] See e.g. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996 [ABR, *Japan – Alcoholic Beverages II*], 11.

[10] Schwarzenberger, 219.

[11] Gardiner, 186.

[12] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999 [ABR, *Canada – Aircraft*], para. 153.

serve as relevant context, e.g. other agreements that were concluded between all the GPA parties, or at least between the two parties involved in a dispute (Article 31.2(b) VCLT).[13] Furthermore, the Preamble or other provisions, titles, punctuation and syntax of a treaty (or related treaties) may serve as relevant context.[14]

As indicated by the last word of Article 31.1 VCLT, it is important that a term is not only interpreted by its literal meaning, but also by its "objective and purpose".[15] The Appellate Body reiterated on various occasions that an interpretation of an agreement in light of its "objective and purpose" avoids an unnecessarily narrow interpretation.[16]

If the three elements in Article 31 VCLT would still leave the meaning of the respective provision unclear or lead to "absurd or unreasonable" conclusions, Article 32 VCLT allows recourse to "supplementary means of interpretation, such as preparatory work". Consequently, the negotiation history of the GPA will be considered within the framework provided for in Article 32 VCLT. Other supplementary sources could include academic books or articles, case reviews or country reports.

1.4.2 Illustrative Comparison

The GPA, like any WTO agreement, is constituted as a framework law and, as such, merely sets forth objectives and minimal standards to be adhered to. Signatory States generally have broad discretionary power when it comes to the implementation of the GPA rules in their domestic laws.

In some GPA Signatory States, as it tends to be the case in Switzerland, this discretion has led to confusions with regard to the implementation of GPP laws and policies. Consequently, procuring authorities have often refrained from introducing environmental ("green") criteria in their tender requirements, for fear of a potential violation of WTO law. To highlight and delineate the scope for GPP within the GPA, this thesis thus compares Swiss implementation laws with the implementation laws of the EU, another GPA signatory.

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[13] In an environmental context this most importantly concerns multilateral environmental agreements (MEA) or treaties based on the United Nations Framework Convention on Climate Change (UNFCCC).

[14] See Gardiner, 197 – 210; Cook, 15.4.

[15] This third element Article 31.1 VCLT, although consisting of two different words, is commonly understood as one term, see e.g. Gardiner, 213.

[16] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998 [ABR, *US – Shrimp*], para. 114; Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011 [ABR, *US – Anti-Dumping and Countervailing Duties (China)*], paras. 8.75-8.76. ABR, *US – Shrimp*, paras. 129–131.

Thereby, the EU will serve as the base of comparison, notwithstanding the fact that the EU regulates only on a regional, and not on a domestic level. Like the GPA, the EU's public procurement directives are only the framework regulations (with the primary aim of strengthening the internal market), while public procurement usually takes place at a (sub-) national level. Although a comparison between the EU as a supranational body and Switzerland as a sovereign state can only be illustrative, it nevertheless provides valuable insights. First of all, the EU is known to be taking a lead role in global climate change mitigation, and in the same line, also is a driving force in GPP implementation. Secondly, Swiss law has traditionally always had strong ties to EU law, due to its geographic proximity and its technical connection to the EU internal market. Thirdly, Switzerland is characterized by a strongly federalist structure. Since public procurement typically takes place on a cantonal or even communal level, the regulatory situation can, to some degree, still be comparable. The comparison with EU laws and practices is thus expected to provide useful insight in terms of an illustrative "best-practice" example.

Thereby, this thesis does not claim to be universal and pursue a purely comparative approach. The comparison of the two different legislations within the EU and Switzerland is a very limited one; a comparison based on a more extensive sample encompassing a bigger number (or even all) of the GPA Member States would, however, go beyond the scope of this thesis.

1.4.3 Expert Interviews

The effectiveness of GPP strongly depends on the way they are applied in the individual tendering process. It is thus important to consider the practical perspective and experiences of procuring entities.

Therefore, apart from the textual analysis, this thesis has greatly benefited from the opportunity to interact with experts and practitioners, who were willing to share their expertise in the field of GPP. Those meetings have been extremely helpful and have provided a better understanding of the practical context in which GPP policies and practices are developed and applied in the "real world". Thereby, the thesis does not claim to constitute qualitative or quantitative research. The interviews conducted were of an informal nature; they provided guidelines for interpretation and helped to understand the practical constraints in establishing or enforcing GPP.

1.5 Limitations

Public procurement is a complex subject: it is relevant not only on a legal, but also on an economic, political and social level. Furthermore, in the case of GPP, environmental natural science also plays a significant role to assess the environmental effectiveness of various GPP measures. The analysis of this thesis, however, focuses

on one aspect of public procurement and GPP, namely the aspect of regulation. It conducts a legal analysis, relying on the limited methods of treaty interpretation and drawing on the legal literature.

Further limits are posed by language. Public procurement legislations all over the world are characterized by fragmentation. The same applies to public procurement jargon. While the EU commonly refers to the term “public procurement”, American scholars mainly speak of “government procurement” (and “public contracting”). This is also the predominant term used in a WTO context, and consequently, the term used in the English version of Swiss official documents.[17] This thesis uses both terms analogously. Moreover, literature shows a broad variety in addressing the various actors engaged in public procurement. For reasons of consistency, this thesis mainly refers to the public buyer as “procuring entity” or “contracting authority” and to the private provider as “supplier” or “tenderer” (and, if the context required it, “bidder” or “economic actor”).

Finally, this thesis is up to date as of spring 2020. Jurisprudence, literature and legislative developments have been considered until 29 March 2019 and punctually complemented until April 2020, legislative developments in Switzerland have been considered until the final adoption of the Swiss public procurement law in 2019.

1.6 Outline

This thesis is structured in four parts. **Part I** starts by providing the conceptual framework for GPP. Chapter 2 briefly outlines the underlying concept of public procurement, in order to draw a picture of the potential of conflict between international procurement and horizontal policies. This is necessary to understand the bigger picture surrounding the debate about GPP. Chapter 3 then continues to introduce the concept of GPP, by discussing its role as an environmental policy measure and by providing practical examples of application and by introducing the basic instruments of implementation.

Part II addresses GPP in the context of international trade law, in particular within the framework of WTO law. It will start in Chap. 4 with embedding GPP in the broader context of the general “trade and environment” debate that surrounds the question of compatibility of trade law with environmental measures. To this aim, it also provides examples of regulatory approaches of GPP in international public procurement regimes other than the GPA. Chapter 5 discusses why not only the GPA but also the multilateral agreements of the WTO may be relevant for GPP. Chapter 6 constitutes the key chapter of this thesis, providing a detailed analysis of the GPA’s non-discrimination principle on the one hand, and the GPP provisions on the other hand. This serves to delineate the scope of the GPA for

[17] For legal texts or designations in German, this thesis has referred to (official or unofficial) translations and only in cases where such translations did not exist on the author’s own translation.

environmental considerations within the framework of technical specifications, award criteria and supplier related criteria.

Part III shifts the focus from the international to the implementation level and addresses the EU. The EU has taken a pioneer role for international public procurement liberalization and at the same time also for GPP. Therefore, it provides a good example of how to balance both of these concerns. A special focus lays on the textual analysis of the new public procurement directives that have been either adapted or newly introduced with the 2014 revision. Moreover, jurisprudence on GPP and institutional developments on a policy level are also considered in the analysis.

Part IV addresses the domestic implementation level by analyzing GPP in Swiss public procurement laws. Switzerland is an interesting example of GPA implementation because its public procurement laws are still relatively young, and because GPA implementation in a distinctly federalist country entails particular challenges. Chapter 9 will shed light on these challenges and provide an overview of Swiss public procurement regulation, especially regarding GPA implementation. This is necessary for the discussion in Chap. 10 of the integration of GPP elements in the public procurement legislation that will be reformed within the course of the GPA ratification. Thereby, the analysis also includes questions of compatibility with WTO law to answer: namely, whether or not revised Swiss procurement laws meet the non-discrimination requirements of the GPA 2012, especially regarding GPP. To this aim, the scope for GPP under the GPA will be delineated in Chap. 9.

Ultimately, this thesis concludes with some final observations reflecting the research questions: firstly, by providing some practical solution approaches regarding the specific design of GPP policies and measures in compatibility with the GPA, and secondly, by discussing potential future developments of GPP in the WTO, the EU and in Switzerland.

Part I
Conceptual Framework

Chapter 2
Public Procurement Regulation

2.1 Terminology

There is no universal definition for the term public procurement (term referred to in the EU) or government procurement (term referred to in the US and in the WTO context). Literature commonly refers to it as:

> The purchasing by public bodies from external providers of the products and services these bodies need.[1]

This working definition highlights the two criteria that are decisive for a purchase to qualify as public procurement: the buyer, on the one hand, is a public body (i.e. the *contracting authority* or *procuring entity*) and the seller, on the other hand, is private provider (usually referred to in literature and practice as *tenderer*, *bidder*, *supplier* or *economic actor*).

As a third criterion, Arrowsmith in the above definition refers to "products and services these bodies need".[2] The question of whether a contracting authority needs the good or service they procure to fulfill a public function (as opposed to a commercial activity) often gives rise to controversy. For example, it is not clear whether the provision of a public bike rental service constitutes a public need and thus qualifies as public procurement.[3] Moreover, the delineation between public procurement and concessions often remains ambiguous.[4]

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[1] Definition based on Arrowsmith 2003, 2–3.

[2] *Ibid*.

[3] See for example in Switzerland, Sect. 9.3.

[4] *Ibid*.

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2.2 Phases

Public procurement is more than a mere monetary transaction. It is a process that includes various phases:[5]

1. *Planning phase*: in a first step, contracting authorities recognize the need for goods, services and construction works and determine the characteristics that define it.[6]
2. *Opening of the tender*: in a second step, they publish the tendering announcement/call for offers.
3. *Evaluation phase*: after having received the offers, the contracting authority evaluates the best offer, according to the previously determined criteria.
4. *Awarding phase:* the contract is awarded to the best tenderer, while the others are notified of the awarding decision.
5. *Contract Administration Phase*: the public procurement process does not end with the awarding of the contract, but is followed by the phase where the tenderer has to perform the contract. The contracting authority can monitor the implementation of the contract.

Although public procurement encompasses all five stages, legal studies often focus on public procurement in a narrower sense, covering only the first four stages (until the actual conclusion of the contract), since it is in these phases that the legal challenges arise. In the context of GPP, however, the contract administration phase is of particular relevance, since this phase can achieve significant environmental savings.

2.3 Objectives and Principles

Public procurement primarily serves the aim of satisfying the need of the government, i.e. public bodies, as outlined in the working definition above.[7] However, these public bodies may also pursue other objectives, such as economic stimulation, technical innovation or, as will be seen in the further course of this thesis, environmental protection.

These objectives are not always mutually supportive: the objective of fostering small and medium-sized enterprises (SME), for example, can undermine the objective of providing best value for tax payer's money. In the same line, environmentally beneficial goods often require advanced technology that is not available to all providers.

[5] See also Corvaglia 2017, 76.

[6] A practitioner even calls this phase the most decisive phase for GPP implementation, "where the magic happens", GPA/W/341, 15.

[7] See Sect. 2.1.

Often, there no clear hierarchy between the various objectives.[8] Generally, contracting authorities tend to prioritize economic concerns and make award decisions in favor of the offer with the lowest price.[9]

As a means to achieve these objectives, public procurement laws have established general public procurement principles. Although public procurement laws differ from country to country,[10] they are usually guided by three principles: the principles of economic efficiency, transparency and non-discrimination.[11]

Economic efficiency is generally achieved when the contract is awarded to the offer providing "maximum added value", i.e. best value for money,[12] and transparency when both the information on specific procurement opportunities as well as the rules to be applied are communicated to all potentially interested parties.[13] The third principle, the principle of non-discrimination and/or equal treatment will lie at the center of this thesis: it encompasses the obligation to treat all tenderers equally. Thereby, the question of whether this obligation is limited to nationals or also extends to foreign tenderers usually depends on the extent to which the respective country has liberalized its public procurement market through international agreements, as will be shown in the following.

2.4 Relevance of Regulation

Public procurement encompasses a broad spectrum of goods and services, ranging from simple items like office equipment or school utensils to high-volume contracts for highways, hospitals or airports.[14] Thereby, it is of significant economic importance, accounting for an average value of 12% of Gross Domestic Product (GDP) in Member States of the Organization for Economic Co-operation and Development (OECD).[15] In developing countries, this number is even higher, amounting to 25–50%.[16] This shows that the government is an important consumer in any country's economy and therefore, public procurement significantly impacts any country's economic (and also technical) progress.[17]

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[8] Dekel, 256.

[9] See *ex multis* Schooner, *passim* or within the context of EU laws Kingston 2016, *passim.*

[10] Trepte, 4.

[11] Arrowsmith/Linarelli/Wallace, 72 *et seqq.*; Dekel, 240; Brown-Shafii, 60.

[12] Dekel, 242.

[13] Arrowsmith 1998a, 796.

[14] For a detailed account of the logic and necessity of public procurement regulation see Trepte, *passim*.

[15] OECD 2017, 172.

[16] According to the IISD 2012b, 6, public procurement amounts to 43% (of GDP) in India, 47% in Brazil and 52% in Ghana.

[17] Weber/Menoud, 184.

The economic relevance of public procurement is also the primary reason why most countries have regulation in place for the conduct of public procurement. These regulations usually set rules to avoid corruption and nepotism, and to ensure the economic use of taxpayer's money.

Apart from economic relevance, however, public procurement also bears significant political and social importance: It is often perceived as the government's responsibility to distribute public resources in line with principles of procedural fairness, to ensure best value for money and to avoid corruption and nepotism. In this sense, the way that public procurement is regulated and carried out can be seen as a key feature of good governance.[18]

2.5 International Public Procurement

In many countries, there is the tradition to isolate the public procurement sector from foreign competition. Through reserving public procurement contracts to national tenderers, governments wish to protect national industries and create jobs.[19] The most prominent historic example is the "Buy America Act" of 1933, which was established in the aftermath of the Great Depression and contained local content requirements (LCR), price preference schemes and even prohibitions to purchase from foreign tenderers in some sectors.[20]

However, despite its prevalence, economic evidence does not support protectionist procurement. On the contrary, it can even be economically inefficient: firstly, it limits the government's choice and increases end-prices, secondly, it artificially incentivizes specialization in a certain sector and thereby may lead to market distortions.[21]

Opening up procurement borders to foreign competition, in turn, is expected to foster competition, stimulate trade and lead to better overall value for money.[22] The practice of opening up national public procurement markets to foreign bidders and to allow cross-border competition will be referred to as "international procurement" in the further course of this thesis.

Protectionist tendencies also explain why public procurement was systematically excluded from the scope of the GATT and the GATS, and therefore, not subjected to the auspices of WTO law.[23] Only a small number of GATT Contracting Parties/ WTO Member States considered it beneficial to open up their procurement markets

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[18] See below, Sect. 2.4; for a detailed account on the interrelation between public procurement and good governance see Brown-Shafii, *passim*: In this context, Lang/Steiner, 22, point to the fact that the GPA serves as a "stamp of approval" for good governance.

[19] Arrowsmith/Linarelli/Wallace, 241.

[20] Linarelli, 774 and 778.

[21] See Trionfetti, *passim*; Brülhart/Trionfetti, *passim*.

[22] See Arrowsmith 2003, Chapter 1.

[23] See below, Sect. 5.2.

to international trade and started negotiations international procurement in various fora, such as the OECD, the UN, the World Bank, the GATT and, finally, the GPA.[24] Nowadays, however, the tendency towards international procurement has gained strong support. This becomes evident when looking at the expanding membership of the GPA as well as increased bilateral efforts to liberalize public procurement through free trade agreements (FTA).

2.6 Horizontal Policies

The notion of horizontal policies refers to the practice of using public procurement as a policy tool to achieve other objectives of public interests. Often, these horizontal objectives are of a non-economic nature. They include, for example, the consideration of labor standards or environmental requirements or the protection of national industries.[25]

Traditionally, horizontal objectives were also described by the term "secondary objectives", as opposed to what was often perceived to be the primary objectives of public procurement.[26] However, as Arrowsmith notes, the term horizontal objectives is more accurate, since it stresses the interrelated character of the various procurement goals and does not suggest a hierarchy between them.[27]

Generally, three different types of horizontal policies can be distinguished:

1. **Industrial horizontal policies** are used to provide economic opportunities to certain economic sectors, usually local industries that are under commercial pressure. Procuring authorities support these sectors by raising demand for their services or products, e.g. through including LCR or through requiring the use of certain products instead of others. The most prominent example is the US "Buy America Act" of 1933.
2. **Social horizontal policies** promote gender and racial equality or to assure that labor standards are respected.[28] They might also serve to support business owned by minority groups or SME. Furthermore, governments might exclude tenderers that do not provide minimum wages, employ a certain ratio of females or, as it is the case in Switzerland, do not provide the opportunity for young people to complete an apprenticeship ("Lehrlingsausbildung").

[24] See below, Sect. 6.1. For a detailed account of public procurement liberalization see e.g. Blank/Marceau, *passim,* or Arrowsmith 2003, Chapter 2.

[25] Weber/Menoud, 184.

[26] Although this varies according to the country-specific procurement laws, the principles of economic efficiency, non-discrimination and transparency are often considered to be the "primary" goals of public procurement.

[27] Arrowsmith 2010a, 150; Arrowsmith/Kunzlik, 13–14.

[28] For a comprehensive overview on the instrumental use of public procurement for social purposes see McCrudden, *passim*.

3. **Environmental horizontal policies** contribute to the protection of the environment and climate change mitigation. The scope and limits posed by environmental horizontal policies lie at the heart of this study and will be analyzed in detail throughout the following chapters.

Horizontal policies are often subject to controversy because of two reasons. Firstly, pursuing other policy objectives through public procurement is sometimes perceived to come with increased production costs and higher prices. However, these concerns seem unfounded: various studies that focus on life-cycle costs rather than acquisition costs show that they can be limited through considering sustainability criteria.[29]

The second concern, which will stand in the center of this study, is with regard to competition. Protectionist public procurement and GPP are closely linked and sometimes even overlap.[30] If applied wrongly, horizontal policies run the risk of arbitrarily favoring certain tenderers, thereby violating the principle of non-discrimination. Therefore, it is important to design horizontal policies in a way that will not be discriminatory, as will be shown in the following chapters of this thesis.

However, as will be shown within the further course of this thesis, a paradigm shift has taken place in many countries (and is currently taking place in some others) away from the perception that horizontal policies are per se extraneous ("vergabefremd"), towards the view that they can be indeed a beneficial instrument to promote "noble political objectives".[31]

2.7 Summary and Findings

Due to its economic importance and due to the various objectives and interests at stake, public procurement needs to be subjected to rules that regulate this sensitive area.[32]

However, it is not always clear whether an acquisition by a public body qualifies as public procurement in the strict legal sense. Thereby, a proper delineation is decisive to know for public authorities whether they need to adhere to the (usually strict) public procurement rules or whether they can choose the private provider freely. Problems of precise classifications are not only encountered on a national level, but are also pertinent in WTO law. The question of whether a purchase transaction falls under public procurement laws or not, becomes particularly relevant in the case of GPP, since this area is particularly prone to conflicts with public procurement laws.

[29] See, *ex multis*, Wiesbrock/Sjåfjell, 236–237 or PWC, Chapter 6. See also examples mentioned below, Sect. 3.5.

[30] Corvaglia 2017, 51.

[31] Weber/Menoud, 184; Weber 2018, 247, see also below, Sects. 8.1 and 10.1.

[32] *Ibid*.

GPP forms part of a bigger debate surrounding public procurement and horizontal policies. In most countries, public procurement strives to achieve various objectives (e.g. best value for money, fair and equal treatment, competition, protection of the environment or social values) and it is often a challenging task for procuring authorities to reconcile these various objectives and the principles enacted to achieve them.

However, it is by now broadly acknowledged that public procurement can serve to achieve more than one goal. Therefore, the term "secondary objectives" has become obsolete and literature now refers to the more adequate term of "horizontal policies", when referring to public procurement policies such as GPP. Nevertheless, pursuing various horizontal objectives can lead to tensions and requires a delicate balancing act.

GPP lies within the heart of this area of tension: Although many governments (mostly, but not only in the EU) make use of GPP as a common horizontal policy (if not the most common one), the means to implement GPP remains disputed in many countries, such as Switzerland.

Chapter 3
Green Public Procurement (GPP)

3.1 Terminology

3.1.1 Working Definition

GPP refers to the inclusion of environmental criteria in the public procurement process. Thereby, the term is narrower than the more frequently used term "sustainable public procurement",[1] since the latter encompasses not only environmental but also social and economic aspects. The European Commission defines GPP as:

> Process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured.[2]

Thereby, the definition highlights four characteristic elements: (1) GPP is a process that is conducted by public authorities, (2) the procurement object can be goods, services as well as works, (3) the aim of GPP is to reduce the environmental impact of public purchases, as compared to "normal" public procurement and, (4) GPP concerns the whole life-cycle of public procurement.

[1] Sjåfjell/Wiesbrock, 3, define "sustainable public procurement" as "rules and practices that contribute to global sustainability: a balancing of social and economic development, ensuring the fundamentals of quality of life for all people, within the ecological boundaries of the planet we live on".

[2] COM (2008) 400, 4.

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3.1.2 Life-Cycle Approach: Stages of GPP

GPP can be implemented on all phases of the public procurement process, i.e. throughout the whole life cycle, from procurement planning to the contract management phase.[3] While the life-cycle of a product covers all stages, from acquisition to disposal, the life-cycle of a service covers all stages: from its preparation to the end of its provision.[4] Choosing a tenderer that can provide long-term environmental solutions for the whole life-cycle makes a crucial contribution to environmental protection.

Already prior to the initiation of the procurement contract, the question of whether to procure or not can be influenced by environmental concerns.[5] Procuring authorities may, for example, recycle a product or refrain from starting a construction project due to potentially harmful effects on the environment. In the planning phase, the environmental impact can be minimized through the careful selection of the procurement object and the respective tenderer,[6] normally through defining the supplier or contract related requirements.[7] In the evaluation phase, contracting authorities have the possibility award points for environmentally-friendly behavior according to the criteria or specification set forth in the planning phase.

The last stage of the procurement process, the *contract administration phase*, also bears relevance. Environmentally friendly maintenance or recycle services offered by the tenderer can significantly contribute to environmental protection, as is well illustrated by this example: through applying GPP on recycling policies, procurement officers managed to reduce CO_2 levels by 10 million tons, which amounts to the equivalent of taking 3.5 million cars off the road.[8]

From a legal point of view, GPP in the contract administration phase can be specified in advance by evaluation criteria and/or contract performance clauses.[9] In the contract administration phase monitoring mechanisms, such reporting requirements, should not be underestimated; OECD countries identified the lack of monitoring mechanisms as a major obstacle to GPP implementation.[10]

[3] Corvaglia 2017, 76.

[4] Dragos/Neamtu 2016, 119.

[5] Arrowsmith 2010a, 162.

[6] Arrowsmith 2010a, 169.; Sjåfjell/Wiesbrock, 18.

[7] See below, Sect. 3.6.

[8] DEFRA, 11.

[9] Sjåfjell/Wiesbrock, 18, see below, Sect. 8.5.

[10] OECD 2011, 155.

3.1.3 Regulatory Level: Law or Administrative Practice

GPP implementation takes place on different regulatory levels. Firstly, on a statutory level through incorporating GPP-provisions in public procurement (or sectoral) laws. As such, GPP has binding force and is legally enforceable in domestic (and sometimes even international) courts. However, with a few exceptions, legislators usually make GPP discretionary, not mandatory.[11]

Secondly, and more often, GPP is implemented on a lower regulatory level in the form of an administrative practice. Procuring authorities make use of their discretionary power to give weight to environmental criteria in the evaluation process, without being legally mandated to do so. These policies or practices qualify as legal guidelines rather than regulatory instruments and are not sufficiently specific to create rights and duties for individuals, which makes them difficult to enforce legally.[12] The fact that GPP is often implemented on a low regulatory level also complicates observability and harmonization.

Drawing from this background, this thesis will generally refer to "GPP policies",[13] a term that includes GPP both on the level of the law as well as implemented by administrative practice.

3.2 Objective: Environmental Protection

The objective of GPP is the protection of the environment and climate change mitigation, something that is widely regarded as an important public responsibility in many countries. However, what concrete measures does this include? How can purchasing activities of the governments influence the environment?

The protection of the environment is a broad concept.[14] It encompasses actions to prevent climate change, but also actions to mitigate its negative consequences. Typical environmental protection policies are measures for biodiversity preservation, waste minimization, GHG emission reduction, energy efficiency or resource optimization through recycling and through conserving natural resources.[15] Additionally, environmental protection policies can be complemented by horizontal strategic measures: for example by increasing demand for environmental friendly

[11] See also below, Sect. 8.8.

[12] See also Bovis 1998, 228.

[13] The term policy denotes an "organized and established form of government or administration", according to the Oxford Shorter Dictionary. This can encompass laws but also customary traditions or practices.

[14] For the sake of simplicity the two terms "environmental protection" and "climate change mitigation" will be used as synonyms.

[15] The term "natural resources" is understood in a broad way, encompassing raw materials and other commodities, but also living creatures and organisms, as will be further elaborated upon in Sect. 6.4.1.

options, by increasing supply-chain transparency, through training programs to enhance awareness, capabilities and capacities, through standardization (of products and services) and through streamlining processes.[16]

This shows that there are multiple ways in which governmental purchasing behavior can have a positive impact on the environment: GPP can be applied by generally considering environmentally friendly options such as recycling strategies or low-emission products as well as by generally raising demand for environmentally friendly option, by awareness raising (on both sides) and by standard-setting. Concrete examples for GPP practices and their impact on the environment will be given in the further course of this chapter.

3.3 Relevance

3.3.1 Ecological Relevance

Results from local GPP projects suggest that there is significant potential to contribute to the protection of the environment, in particular regarding electricity and GHG savings. The city of Vienna, for example saved over 15,000 tons of CO_2 a year through its "EcoBuy" (ÖkoKauf) GPP initiative, mainly through saving electricity, emission limits for office materials, preferring ecologically sound construction or efficient lightning.[17] Further estimates suggest that if all electricity in the EU was purchased from renewable energy sources, 60 million tons of CO_2 emissions could be saved.[18]

However, to measure ecological effectiveness, looking at the numbers is not enough. GPP does not only raise demand for environmentally friendly product and services. If demand is high enough producers will have an incentive to also raise supply. Higher supply, in turn, will lead to effects of scale, making environmentally friendly products or services cheaper and more accessible for the broader public.[19] Apart from these structural effects, GPP may also raise awareness and set standards regarding environmentally conscious behavior. Therefore, GPP can provide incentives for the private sector to change their purchasing patterns towards environmentally friendly options.[20]

[16] GPA/W/341, 8, 13 and 14.

[17] ÖkoKauf Wien, 46–57.

[18] Wiesbrock / Sjåfell, 230.

[19] See also Wiesbrock / Sjåfell, 231; Wiesbrock, 107.

[20] Corvaglia, 6 with reference to McCrudden; Wiesbrock / Sjåfell, 231.

3.3.2 *Economic Relevance*

Purchasing low-energy or water saving products, for example, can help to reduce utility bills and reducing hazardous substances in products can cut disposal costs. However, this economic saving potential often only becomes visible when shifting the focus from acquisition costs to adapting a long-term life-cycle perspective.[21]

3.3.3 *Relevance for Good Governance*

The way that public procurement is regulated and carried out is a key feature of good governance.[22] It is broadly acknowledged that the spending of taxpayers' money should reflect the public interest of the people a government represents.[23] Governments are thus not "neutral" consumers on a free market,[24] but should consider their democratic mission when buying goods or services. Generally, public procurement regulation is an important policy tool to achieve (and reconcile) various policy goals.[25]

GPP is based on the perception that nowadays environmental protection is an important governmental responsibility. Accordingly, the government, as the usually most powerful consumer in every national economy, should use its economic leverage to "buy green", provided that the protection of the environment reflects a common concern of their population.[26] This perception of the government as a role model is especially apparent in the case of the EU, where legislations often contain the soft law obligation for the public sector to "lead by example".[27]

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[21] See for more details below, Sects. 8.4 and 10.4.

[22] For a detailed analysis of public procurement and good governance/accountability issues see Brown-Shafii, *passim*.

[23] See *ex multis* Corvaglia, 608; Brown-Shaffi, 15 or Arrowsmith/Kunzlik, 17.

[24] Weber/Menoud, 184.

[25] Schebesta, 317.

[26] Weber/Menoud, 184 and 200.

[27] See for example Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of building, Recital 23. Also Switzerland acknowledges the important role of the "Confederation as a Model", stating that "Sustainable development cannot just be demanded. It must also be demonstrated", Federal Council 2016, 50.

3.3.4 Relevance for Innovation

Finally, public procurement is increasingly acknowledged to play an important role in spurring innovation through raising the demand of a certain product, service or production process.[28] Thereby, governments can not only encourage certain production processes or strategies, but also the development of new market capabilities. Thereby, innovation in public procurement is not only limited to the development of new technologies, but, increasingly, including services and organizational innovations.[29]

Innovation is of particular importance in the field of environmental protection, since there is a big need for new technologies to address climate change and adapt to its consequences.[30] This is also acknowledged by the revised EU legislative framework on public procurement that states that innovation (and in particular "eco-innovation") is a main driver of sustainable growth.[31] Therefore, the EU has also introduced the procurement procedure of "innovation partnership" (Article 31 Directive 2014/24/EU).

3.4 GPP as an Environmental Policy Measure[32]

3.4.1 Relevance of Environmental Policies

Economists have identified climate change as the typical example of market failure.[33] The environment is a public good and an unregulated market therefore provides the incentive to free-ride and to impose costs for the public that arises from environmental damages.[34] It is broadly acknowledged by now that environmental protection is a public responsibility. Many (if not all) governments around the world have thus enacted environmental policy measures to assume this responsibility. Typical examples of environmental policy measures include "green" taxes, subsidies, technical regulations or more complex regimes like emission trading schemes (ETS).

[28] For a detailed overview on public procurement innovation strategies in 11 different countries see Lember et al., *passim*.

[29] Lember et al., 2.

[30] Semple 2015, 7.24.

[31] Preamble of Directive 2014/24/EU, Recital 47.

[32] For a detailed account and critical assessment of various environmental policy measures see Trüeb 2001, 388–514.

[33] For a detailed analysis of the political economics of environmental protection see Trüeb 2001, 128–218.

[34] Weber 2017, 355.

However, *how* environmental policy measures should be designed, i.e. which one of the above mentioned examples is most effective, is still subject to big controversies. A look at common contemporary environmental policies enacted all around the world presents a colorful picture. Governments usually do not follow a single policy strategy for environmental protection, but use different environmental policy tools.

3.4.2 Command-and-Control vs. Market-Based Policies

Generally, environmental policies can be divided in two categories. Through "command-and-control instruments"[35] governments employ uniform standards to protect the environment.[36] These instruments are inflexible: they uniformly impose environmental requirement on a certain product sector/group of persons without considering special circumstances. Command-and-control instruments may range from import bans and prohibitions of production to less rigid requirements, such as limits of GHG emissions or electricity consumption (technical regulations).[37]

Market-based instruments, in contrast, use the dynamics of the free market to provide incentives to act in an environmental friendly manner and to internalize negative externalities. Subsidies for ecologically desirable behavior and the taxation of ecologically damageable behavior can be attributed to this category. The most elaborate approaches of market-based instruments are the various ETS that have been established throughout the world.[38]

In contrast to command-and-control measures, market-based instruments aim at steering the behavior of economic actors in accordance with their economic interests "automatically" towards an environmentally-friendly direction rather than using "regulatory force" through prohibitions or restrictions. In theory, market-based instruments allow for any desired level of environmental protection to the lowest overall costs.[39]

A comparison between the two categories shows that market-based environmental measures are more business-friendly. Firstly, they are more cost-effective and provide for dynamic incentives for technology innovation.[40] Secondly, they operate in accordance with the free market providing incentives for economic actors, while leaving the final decision to act in their own autonomy. Therefore, they are less likely to come into conflict with international trade law.[41] Command-and-control

[35] This term was coined by Aldy/Barret/Stavins 2012, 155.

[36] Aldy/Barret/Stavins 2012, 154.

[37] *Ibid.*

[38] Weber/Koch 2015b, 3: apart from the EU, countries like China or Australia plan to establish ETS.

[39] Aldy/Barret/Stavins 2003, 359.

[40] Aldy/Barret/Stavins 2003, *passim*.

[41] Trüeb 2001, 512.

instruments, however, force a preference for a certain environmental behavior on economic actors through rigid regulatory power.[42]

Nevertheless, market-based instruments are not free from deficiencies. Taxes and subsidies are criticized for potentially leading to market distortions[43] and ETS are still in their infancy stage, suffering from various structural deficits.[44]

Governments generally follow a mixed strategy, combining various (market-based and command-and-control) environmental policy tools. Although the coordination of various policy instruments comes with transaction costs, a carefully balanced mixture of various environmental policy tools seems to be the most promising strategy for climate change mitigation in accordance with political and social realities.

3.4.3 Classification of GPP

Like other environmental policies, the role of GPP remains contested. Despite the fact that many countries have accepted them as an effective policy instrument for environmental protection, critics still object that governments should rather focus on "real" environmental measures (or none at all), instead of mixing public procurement with environmental protection and "diluting" classic public procurement procedures. However, in legal public procurement doctrine (in particular within the EU but increasingly also in other countries like Switzerland or the US) the view prevails that the ecological effectiveness of GPP as an environmental policy tool justifies potential disadvantages.[45]

GPP policies cannot be clearly classified as belonging to either one of the above illustrated categories. This is mainly due to strong variations in the design, in particular with regard to the level of regulation and compulsoriness.[46] However, GPP mainly operates on the basis of steering demand and supply through consumer's choice: it provides incentives to contribute to ecologically desirable behavior rather than to apply "regulatory force". Therefore, GPP is in line with normal market behavior and can even contribute to the functioning of the market.[47] It can thus be considered a business-friendly market based instrument that does not negatively affect the private industry, but rather provides punctual positive incentives for ecological behavior and innovation.

[42] Weber 2017, 356.

[43] Cosbey / Mavroidis, *passim*; see also Shadikhodjaev, 481 for an overview of market distortion in the energy sector through various forms of subsidies for fossil fuels on the one hand and on renewable energy on the other hand.

[44] Weber / Koch 2015b, *passim*.

[45] See e.g. Arrowsmith 2010a, 159; Arrowsmith / Kunzlik, 15 and 16.

[46] See below, Sect. 3.6.

[47] Arrowsmith / Kunzlik, 15.

Furthermore, the high degree of flexibility also makes GPP an ideal environmental policy measure. Depending on the particular procurement contract and the respective relevance of environmental concerns, procuring authorities can either apply mandatory environmental requirements, provide positive incentives for GPP on an optional level (i.e. in the form of award criteria), or not consider environmental criteria at all. In that sense, GPP can be a useful (additional) policy tool to complement a government's overall strategy for environmental protection.

3.5 Areas of Application

GPP is not limited to certain sectors, but can be applied in any procurement contract. In the following, five "high-impact sectors"[48] are illustrated: (1) The construction sector, (2) the transportation sector, (3) the electricity sector, (4) the IT and office equipment sector and (5) the food sector. Thereby, it is important to note that the enumeration is illustrative rather than universal, meant only to provide an overview of priority groups identified in various areas.

3.5.1 Construction Sector

The construction sector typically constitutes an important pillar in the national economy. In developed countries it accounts for an average value of 6% of GDP, with steep growth rates of up to 7% a year.[49] Thereby, the share of public spending in the construction sector may amount up to 40%, as it is the case in the EU.[50]

Given the significant volume, applying GPP in the construction sector can have a significant environmental impact. Contracting authorities may include criteria regarding energy efficiency, construction material, water consumption, impacts on traffic or land use as well as waste management during the construction process and during the management-phase of the building.[51]

The Newport region in the United Kingdom exemplifies this significant saving potential: through using recycled materials for a road construction project, cost savings of two million GBP could be reached.[52] Thereof, one million GBP were saved in construction costs, 100,000 GBP by limiting GHG emissions and another 100,000 GBP through avoiding landfill costs.[53]

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[48] DEFRA, 17. PWC, Chapter 4, also provides an analysis of GPP in ten selected product groups.

[49] For the UK see Rhodes 2015, *passim*.

[50] Kahlenborn et al., 1.

[51] EU Commission, Buying Green Handbook, 49.

[52] DEFRA, 58.

[53] *Ibid*.

3.5.2 Food Sector

As shown by a study carried out by the EU Commission, food is responsible for a share of approximately 20–30% of all the environmental impacts within the EU, with meat products having the biggest environmental impact.[54]

This high impact rate can be traced back to various factors, the biggest one being production. Harmful food production methods such as factory farming are characterized by high energy use, high volumes of GHG emissions and large volumes of waste. Moreover, packaging, delivery and disposal are further factors contributing to environmental pollution. Consequently, raising the share of organic food and providing alternatives to meat products in public canteens is an important field of GPP.[55]

3.5.3 Transportation Sector

The transport sector is responsible for roughly one quarter of global GHG emissions,[56] a remarkable number which can be expected to increase considering that motorized traffic is rapidly growing worldwide.

Transportation is important for governments in two regards. Firstly, a government, like private sector companies, depends on various means of transportation for reasons of logistics. Secondly, unlike private sector companies, governments bear the responsibility to provide a public transportation system that ensures the mobility of its citizens.

The transportation sector has become an important field of GPP implementation. Not only logistics, but also the procurement choices for public transportation fleets can have a significant impact on the environment, in particular with regard to overall energy consumption and pollutant emissions.[57] In addition to vehicle fuel efficiency, the "greening" of the transportation sector also holds significant potential for green technology innovation. Approaches like transforming cars from energy consumers to energy producers—for example, through the capturing of solar energy—are only a few examples of increasingly innovative trends.[58]

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[54] Tukker et al.,15. The number also include tobacco and narcotics. For a detailed analysis of GPP in the food sector at EU level see Schebesta, *passim*.

[55] EU Commission, Buying Green Handbook, 70–71.

[56] World Bank Open Data 2018, available at: https://data.worldbank.org/indicator/EN.CO2.TRAN.ZS.

[57] See Directive 2009/33/EC of on the promotion of clean and energy-efficient road transport vehicles, Recital 16.

[58] IISD 2012a, 11.

3.5.4 Electricity Sector

Governments are a major consumer of energy. Electricity is one of the largest contributors to environmental pollution: approximately 70% of the overall GHG emissions are caused by the generation, transmission and distribution of electricity.[59] Thereby, a shift in power generation could significantly lower emission levels. “De-carbonizing” the electricity sector by replacing energy generated from fossil fuels with renewable energy is an important pillar of climate change mitigation.[60]

In this regard, the public sector could serve as an important standard-setter by purchasing electricity from renewable energy sources, and thus facilitating the shift from conventional to renewable energy sources. In the EU, switching to electricity from renewable sources would lead to savings of 60 million tons of CO_2.[61]

3.5.5 Office Equipment and IT Sector

Equally important as shifting from conventional to renewable energy is the general reduction of energy consumption. In this regard, a considerable amount of energy can be saved through considering the energy consumption of IT and other office equipment. Studies from the EU, where minimum energy efficiency requirements apply for the procurement of IT products,[62] have shown that if all IT purchases in Europe would be based on environmental considerations this would lead to overall energy savings of approx. 30 terawatt hours—a number which amounts to the equivalent of four nuclear reactors.[63]

An example from Denmark presents an impressive record: Copenhagen’s contracting authorities replaced 638 computer servers with just 38 new ones. The contract was awarded on a 5-year basis, covering acquisition, operation and maintenance. Furthermore, the winning tenderer’s promise to plant 500 trees in India, to fully offset the server’s energy consumption, represents an innovative approach to further contributing to environmental protection. The procurement project ultimately led to CO_2 reductions of 75% and monetary savings of around 1.6 million Danish Crones.[64]

The same holds true for other office equipment, like furniture, air conditioning, lighting equipment, electronic appliances, paper and stationary. A pilot project by the Finnish city of Turku showed that applying environmental criteria for lighting (buying the most energy efficient light bulbs) led to a decrease in electricity

[59] Weber/Koch 2015a, 757.

[60] *Ibid*.

[61] Sjåfjell/Wiesbrock, 230.

[62] See Regulation No 106/2008 on a Community energy-efficiency labelling programme for office equipment.

[63] Nordic Council, 5.

[64] *Ibid,* 17.

consumption by 50%.[65] Other examples for GPP in the office equipment sector include the consideration of recycled paper or paper from sustainably managed forests.

3.6 Instruments of Implementation

In order to ensure the permissibility of GPP in the individual case, contracting authorities are confronted with the technical questions of how to implement GPP.[66]

Generally, GPP can be implemented by means of various different procurement "instruments".[67] The most common are: technical specifications, award criteria, qualification criteria and exclusion criteria. Thereby, a differentiation between those instruments is of crucial importance, since they impose different obligations on potential tenderers. In practice, however, a clear delineation between these instrument often proves challenging and therefore, they are often confused.[68]

While technical specifications and award criteria are contract-related criteria, referring to characteristics that are required or desirable for the procurement contract, qualification and exclusion criteria are supplier-related criteria, referring to characteristics that the company or the person bidding for the contract should (or cannot) have.

A further distinction is with regard to compulsoriness. While award criteria are optional "nice-to-have" criteria, technical specifications, qualification and exclusion criteria are mandatory. Compliance is thus necessary in order to be considered for the contract within the evaluation process.

Although the legal structure of these instruments varies from country to country, the following sections will continue with a general overview of each of these instruments to provide the basis for a general understanding of the legal challenges surrounding GPP implementation.

3.6.1 Technical Specifications

Technical specifications are the mandatory requirements defining a public procurement contract. Through technical specifications contracting authorities can describe the characteristics of what they seek to purchase. As indicated by the name, technical specifications usually refer to the technical characteristics of the contract. Some

[65] *Ibid,*, 14.

[66] Schebesta, 319.

[67] The term "instruments" refers to the classical public procurement categories, such as technical specifications or award/evaluation criteria. They will be referred to as "instrument" for reasons of simplicity and accuracy. In literature, the (less clear) terms "issues" or "conditions" are also used.

[68] See Corvaglia 2017, fn 229 *et seq*. with references or Steiner 2006, 58.

examples include the technical construction details for a building, such as security measures, or the technical details for software systems.

Technical specifications are a common instrument (Steiner 2006 even calls them the “classical category”)[69] to implement GPP, for example through setting minimal environmental standards.[70] Examples include requiring the use of a biodegradable materials or maximum emission threshold values for transport vehicles. Since non-compliance with technical specifications excludes tenderers from participation, technical specifications in national public procurement laws usually contain strict rules.[71] This is of particular importance within the context of international public procurement, since manipulating technical specifications can be a means of hidden protectionism.[72]

3.6.2 Award/Evaluation Criteria

Award criteria (also called “evaluation criteria” in WTO-terminology) are the benchmark by which to compare the offers received.[73] Like technical specifications, award criteria refer to the physical or functional characteristics of the goods or services to be procured. However, as opposed to technical specifications, award criteria are not mandatory. They are designed as “nice-to-have” criteria. Nevertheless, if tenderers fulfill an award criterion, they are granted extra points (whereby the amount of points is calculated according to the importance of ecological criteria for the procurement contract). Ultimately, the offer with the most points will receive the contract. Compliance with green award criteria is therefore a competitive advantage in the selection process.

Award criteria are less (trade) restrictive than other instruments. This speaks in favor of using them as a GPP implementation instrumenting over the mandatory criteria. While assigning extra points to tenderers offering electricity from renewable energy resources or tenderers offering certified organic food would likely be accepted by courts, but the respective requirement in form of mandatory technical specifications could be more contradictory from a legal perspective.

[69] Steiner 2006, 72: “Die technischen Spezifikationen sind aus Sicht der ökologischen Vergabe die klassische Kategorie, weil sie der umweltfreundlichen Beschaffungspraxis die meisten Möglichkeiten bieten.”

[70] Weber/Menoud, 192.

[71] In the context of Switzerland, see below, Sect. 10.3.

[72] Arrowsmith 2003, 303; see also below, Sect. 6.4.

[73] Schebesta, 320.

3.6.3 Qualification/Selection Criteria

Another possibility to include environmental criteria is through the instrument of qualification criteria (also called selection or eligibility criteria). Unlike technical specifications and award criteria, qualification criteria do not refer to the procurement contract itself, but to the tenderer. In other words, qualification criteria are supplier-related. They reflect basic considerations about the suitability of a tenderer and aim at assuring that tenderers are capable of fulfilling the procurement contract.[74]

Qualification criteria usually refer to basic qualities such as professional competence, solvency or technical capacity of a tenderer. They can, however, also refer to "environmental qualifications".[75] A qualification criterion referring to environmental management systems (EMS), for example, would require tenderers to prove that they have the expertise and the personal capabilities to assess and minimize the environmental impact of its product or service on an operational long-term basis.[76]

3.6.4 Exclusion Criteria

Through exclusion criteria procuring officers specify criteria that justify the exclusion of a tenderer from the bidding process. These criteria primarily aim at assuring a contractor's compliance with the law (referring to fraudulent practices or criminal offenses). Exclusion criteria may provide for the *a priori* exclusion of bidders who have engaged in some kind of tax fraud, bribery or corruption in the past. However, exclusion criteria are not only limited to unlawful conduct, but may also refer to minor offenses like professional misconduct or the provision of false information to contracting authorities.

The relevance of exclusion criteria in the context of GPP is gaining importance as more and more countries adopt environmental protection legislation. Consequently, domestic procurement laws could provide for the exclusion of companies that fail to meet domestic environmental laws or standards. Examples may include the exclusion of companies that emit more GHG that they would be entitled to by law, as well as the failure to pay CO_2 taxes or to install particulate filters in high-emission cars. Thereby, it is not relevant whether the respective bidder is a national or a foreigner.

[74] Semple 2015, 4.12.

[75] See e.g. Article 9.2(a) UNCITRAL Model Law.

[76] Weber/Koch 2016, 11.

3.6.5 Contract Performance Conditions

Another instrument for public procurement implementation that can become relevant within the context of GPP implementation is the instrument of contract performance conditions. Weber/Menoud define this instrument as "obligations which must be accepted by the successful tenderer and which relate to the performance of the contract".[77] By means of contract performance conditions, contracting authorities may refer to the contract administration phase.[78] They could, for example, require the tenderer to dispose the packaging material that will be used when providing the goods or services to be procured in an environmentally friendly way.

Contract performance conditions are not mentioned by the GPA and, so far, are not commonly used in Switzerland (and thus not regulated by Swiss public procurement law). Therefore, it will be discussed within the context of the EU in Chap. 8.[79]

3.7 Summary and Findings

GPP is still a vague term. Generally speaking, it refers to public procurement processes that aim at, *inter alia*, protecting the environment. However, what is understood as environmental protection varies according to the respective government. Therefore, GPP takes various forms and differs with regard to the degree of regulation.

Nevertheless, as has been shown based on various examples throughout this chapter, GPP can be an effective policy instrument to contribute to environmental protection. Often, it is designed as a flexible market based instrument (as opposed to rigid and inflexible command-and-control instruments). Consequently, it does not negatively affect the private industry, but to the contrary, provides positive incentives to correct market failure.

GPP is found in many spheres of life and can be applied in any field of public procurement. A closer look at some example where GPP is applied in practice shows that it does not only lead to savings in terms of environmental protection (e.g. cut back of CO_2 emissions), but also economic savings. This result disproves the perception that environmentally beneficial options are automatically more costly.

Moreover, this chapter has provided an overview of the various "instruments" that ensure the technical implementation of GPP, namely technical specifications, award/evaluation criteria, qualification/selection and exclusion criteria. Since GPP is an inherently technical matter, it is of crucial importance to differentiate between those instruments, since they vary with regard to the degree of their legally binding

[77] Weber/Menoud, 197.

[78] See above, Sect. 2.2.

[79] See below, Sect. 8.5.

character. Therefore, the instrument of award/evaluation criteria should receive particular attention, as it is the least restrictive instrument.

On a domestic level, it is mostly the principle of economic efficiency that is perceived to stand in contrast with GPP. However, studies have shown that, quite to the contrary, GPP can even lead to cost savings· On an international level, however, it is the concept of international procurement and its guiding principle of non-discrimination that are perceived to be in conflict with GPP. This perceived conflict will be the focus of the following chapters.

Part II
World Trade Organization

Chapter 4
GPP and International Trade Regulation

The legal tensions surrounding GPP are part of a bigger discussion: the trade and environment debate, which is about environmental policy measures and their relationship with international trade.

Climate change is a global problem and global solutions are needed. However, for a long period, the protection of the environment was perceived as a national (or even private) matter, rather than an international responsibility. Consequently, for quite some time, no international platform existed to tackle issues of climate change mitigation and environmental protection on a global level.

The UN and the GATT (the WTO's predecessor), the only two international fora with nearly all-encompassing membership, were both established in the direct aftermath of World War II. Their focus was maintaining international security as well as reconstructing the economy and fostering cross-border trade. GHG emissions became a global concern only with the discovery of the "ozone hole" in 1985, which finally triggered international mitigation efforts, in particular in the fora provided for by the UN. These efforts did not easily spill over to the GATT/WTO area, although the WTO also recognized sustainable development as a fundamental objective.[1]

The GATT/WTO has long been criticized for prioritizing trade over environmental concerns and for contributing to what is often referred to as the "race to the bottom", namely: countries trying to "underbid" each other with low environmental regulation to attract foreign investors, and countries with high environmental standards, in turn, running the risk of suffering from "carbon leakage".[2] The WTO has been slow with providing solutions; only in recent decades, adjudicatory bodies have shown a tendency to broaden the scope of environmental measures. Also on an institutional level efforts are undertaken to provide for the fora to discuss "trade and

[1] Recital 1, Preamble of the WTO Agreement.

[2] Kaufmann/Weber 2011, 498.

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R. Koch, *Green Public Procurement under WTO Law*, European Yearbook of International Economic Law 9, https://doi.org/10.1007/978-3-030-48214-5_4

environment" issues and to find solutions. So far, these institutional efforts have not taken clear shape.

The following sections will embed the field of tension surrounding GPP in the broader context of the "trade and environment" debate, paralleling the developments in the United Nations (UN) and the GATT/WTO. Section 4.3 will show that the changed perception of priorities in the trade and environment debate also spilled over to the more technical fora of public procurement as the World Bank and the United Nations commission on International Trade Law (UNCITRAL) both included GPP elements in their guidelines.

4.1 Climate Change Mitigation in the United Nations

Already early after its establishment, in 1949, the UN held a Conference on the Conservation and Utilization of Resources. These efforts, however, were motivated mainly by disputes of UN Member States concerning border demarcation or the allocation of resources, rather than "genuine" environmental concerns.

Nevertheless, these disputes then led to various international agreements dealing with issues regarding the environment.[3] In subsequent years, the international protection of the environment was strengthened by more than one hundred multilateral environmental agreements (MEA).[4] The most significant initiative in the early days of the UN, however, was the UN Conference on the Human Environment in 1971, which led to the "Stockholm Declaration";[5] the first set of clear-cut environmental principles. Ultimately, these various initiatives resulted in the foundation of the United Nations Environmental Programme (UNEP), the first UN institution mandated with the protection of the environment.

In 1988 the UNEP established the Intergovernmental Panel on Climate Change (IPCC), an international body of experts charged with the task of coordinating international scientific research results and presenting them to the international community. The IPCC released its first assessment report in 1990, pointing out rising GHG concentrations and connecting them to rising temperatures.[6] This first IPCC report received wide recognition and laid the groundwork for the "Rio Conference".[7]

[3] See for example the Convention on Fishing and Conservation of Living resources of the High Seas of 29 April 1958.

[4] Such as the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention) of 1971 or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 3 March 1973.

[5] Declaration of the United Nations Conference on the Human Environment.

[6] IPCC, *passim*.

[7] United Nations Conference on Environment and Development, also known as "Rio Conference" or "Rio Earth Summit".

The Rio Conference of 1992 is widely considered a major breakthrough from environmental protection at an international level.[8] It culminated in the adoption of the United Nations Framework Convention on Climate Change (UNFCCC), the first framework treaty for national action on GHG emission. It encompasses 26 Articles, with the ultimate objective being the "stabilization of greenhouse-gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (Article 2 UNFCCC). Importantly for international trade, Article 3.5 UNFCCC addresses the international community and contains the call for international cooperation within the fields of sustainable economic growth. Moreover, it states that climate change mitigation measures should "not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade"—a wording that is adopted from the GATT.[9]

Although not legally binding, the UNFCCC enshrines important principles of climate change mitigation and, nowadays, still constitutes the legal basis for (binding as well as non-binding) international law on climate change.

The UNFCCC also constitutes the legal basis of the Kyoto Protocol (KP) in 1997. Under the KP, developed country Parties committed themselves to legally binding GHG emission reduction targets until 2012, the overall aim being to reduce GHG gas levels by 5% as compared to 1990 (Article 3.1 KP) by means of three "flexibility mechanisms": the ETS (Article 17 KP), the Joint Implementation (Article 6 KP) and the Clean Development Mechanism (CDM, Article 12 KP).[10]

Although the conclusion of the KP was celebrated as an important milestone for internationally coordinated climate action,[11] failure to ratify the KP of big economies like the US, India and China and withdrawal from other Parties like Canada or Japan further undermined the effectivity of the KP. The successor protocol of the KP, the Paris Agreement of 2015, gave rise to cautious optimism. It enshrines ambitious goals, "pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change" (Article 2.1(a) Paris Agreement). While the KP contained a provision referring to international trade, stating that climate change mitigation measures should be designed in a way as to minimize the adverse effects on international trade (Article 2.3 KP), the Paris Agreement does not contain a similar provision.

The legal nature of the Paris Agreement, however, is not clear, as it contains binding as well as soft-law provisions.[12] Moreover, with the withdrawal of the US under the Trump administration the effectiveness of the Paris Agreement is further put

[8] See for example Chasek / Wagner, *passim*.

[9] See wording of the *Chapeau* in Article XX GATT.

[10] For a detailed analysis of the CDM (especially in the context of regulation and financial intermediation) see Weber / Darbellay, *passim*.

[11] See for example Faure / Gupta / Nentjes, 4.

[12] See Rajamani, *passim*.

into question. Therefore, it will remain to be seen whether it reaches its ambitious objectives or rather falls victim to various political currents.

4.2 Environmental Concerns in the GATT/WTO

The common perception of the WTO is the one of a purely economic trade organization; therefore, the WTO and its predecessor GATT have not put a focus on environmental protection. Already under the GATT, this has led to various disputes, when domestic interests of environmental protection were perceived to "clash" with interests of trade liberalization.

This potential for conflict is further reiterated by the text of the law; the GATT was originally drafted in 1947 (with only minor adaptions in 1994) and thus not well-equipped to face the current challenges of climate change. Although important references are made to environmental protection,[13] specifications on the precise design of domestic environmental policies in compatibility with WTO law are lacking. Therefore, a lot of changes in favor of environmental protection have taken place on the level of jurisprudence. Only recently have these efforts been complemented by efforts on a policy level, as will be seen in Sect. 4.2.3.

4.2.1 Legislatory Level: Provisions on Environmental Protection

The first recital of the WTO Agreement expressly declares that international trade and economic endeavor has to be carried out

> In accordance with the **objective of sustainable development**, seeking both to **protect and preserve the environment** (emphasis added).

These objectives are further reflected throughout the various provisions of the covered agreements and have been reiterated repeatedly by jurisprudence.[14]

The most prominent codification of the environmental protection goal can be found in the exception clause of the GATT.[15] Article XX GATT contains two justification reasons related to environmental protection. Article XX(b) GATT allows the adoption or enforcement of domestic measures "necessary to protect human, animal or plant life or health"—even if these measures are in violation of the GATT. Moreover, Article XX(g) GATT preliminarily justifies measures "relating to

[13] See for example Preamble of the WTO Agreement or the exception-catalogue in Article XX GATT.

[14] See below, Sect. 4.2.3.

[15] Apart from the GATS that contains a similar exception-catalogue (Article XIV(b)), none of the other multilateral agreement contain environmental exceptions.

the conservation of exhaustible natural resources". Measures falling within the scope of one of these two provisions have to meet a further burden: as stated in the introduction text of Article XX (the so-called *Chapeau*)[16] the respective measures cannot constitute an "arbitrary or unjustified discrimination" or "disguised restrictions on international trade". However, the (environmental) exceptions, in particular the *Chapeau*, have been interpreted narrowly by the WTO Panels and the Appellate Body.[17] Until present, only in one case, the *EC – Asbestos*[18] case, the respondent party was found to meet the high burdens of the *Chapeau*.[19]

Apart from the GATT and the GATS, the Agreement on TBT has been increasingly invoked in trade and environment disputes.[20] In contrast to the GATT and the GATS, the TBT does not contain an exception catalogue. However, justification provisions form part of the general treaty provisions:[21] Article 2.2. TBT expressly allows technical regulations that aim at fulfilling a legitimate policy objective, such as environmental protection.

The Agreement on Subsidies and Countervailing Measures (ASCM) that could also be pertinent for environmental measures qualifying as "green subsidies" did contain an exception clause for so-called "green light" subsidies, exempting environmental and other subsidies from the coverage of the ASCM. However, this exception clause expired in 2000 and was not renewed.[22]

Apart from the multilateral agreements, some legislatory changes in favor of the environment have also taken place on a plurilateral level. Apart from the GPA, which has added elements of GPP with its 2012 revision,[23] 18 countries started negotiations on an Environmental Goods Agreement (EGA) in 2014. The EGA aims at eliminating tariffs on environmental products and, ultimately, increasing availability and trade volumes of these products. Thereby, environmental products are products that serve the goal of environmental protection (such as wind turbines, solar panels, products for waste management or products to clean water or the air).

[16] For a more detailed textual analysis of the *Chapeau* see below, Sect. 6.8.

[17] Zleptnig, 107.

[18] ABR, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001 [ABR, *EC – Asbestos*]. This case, however, concerned health rather than environmental measures.

[19] For a more detailed illustration see following section.

[20] While the TBT was not invoked in the first years of its establishment, it was suddenly subjected to WTO dispute settlement in three subsequent cases, often referred to as the "TBT trilogy" (Appellate Body Reports, adopted 23 July 2012 [ABR, *US – COOL*], Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, adopted 13 June 2012 [ABR, *US – Tuna II*] and Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, adopted 24 April 2012 [ABR, *US–Clove Cigarettes*]). These cases concerned measures to protect the environment, consumer protection as well as human and animal health.

[21] Zleptnig, 385.

[22] Weber/Koch 2015a, 759.

[23] See below, Chap. 5.

At the moment, however, the negotiations on the EGA seem to have come to a standstill.[24]

4.2.2 Jurisprudence: Trade and Environment Disputes

Due to the lack of clear provisional guidelines on environmental protection it has been largely left to jurisprudence to clarify the relationship between international trade and the environment. In numerous cases the WTO adjudicating bodies investigated one central question: how can Member States design their environmental measures in a way compatible with WTO law?

The first well-known case where a GATT Panel recognized a Member States' right to adopt environmental measures was *US – Tuna I*.[25] *In casu,* the GATT-Panel stated that countries may pursue domestic environmental policies as long as they are designed in a way compatible with the GATT.[26] Already in 1991, the GATT-Panel suggested to amend the text of the GATT, in order to clearly define the scope and limit for environmental policies.[27]

In subsequent disputes, such as *US – Gasoline* (a case concerning threshold values for gasoline to prevent air pollution) or *US – Shrimp* (a case concerning an import restriction for shrimp products from a certain damaging production) the environmental and animal-welfare measures at issue were preliminary justified for being related "to the conservation of exhaustible natural resources" according to Article XX(g) GATT. They, however, still were found to be in violation of the GATT due to the Chapeau. In both cases the Appellate Body emphasized Member States' "large autonomy"[28] to adapt environmental measures; in *US – Shrimp* the Appellate Body even encouraged Member States to take action for the protection of endangered animals and environmental protection in general.[29]

Another case often cited in the context environment related trade disputes is *EC – Asbestos*. Although focusing on health concerns rather than environmental issues, the case is indicative for environmental disputes. Arguing that consumers prefer products without asbestos for obvious health reasons, the Appellate Body found that the products at issue (products with or without asbestos fibers) could not be considered "like". This reasoning led to cautious optimism, leaving room for

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[24] As confirmed orally by the Swiss State Secretariat for Economic Affairs.

[25] GATT Panel Report, United States – Restrictions on Imports of Tuna, 3 September 1991, unadopted [GATT PR, *US – Tuna I*], states in para. 6.4 that the ruling "would affect neither the rights of individual contracting parties to pursue their internal environmental policies". Although *US – Tuna I* failed to be adopted due to a lack of consensus required under the former GATT rules, the ruling has nevertheless become an important precedent for environment-related trade disputes.

[26] GATT PR, *US – Tuna I*, paras. 6.2 and 6.4.

[27] *Ibid.,* para. 6.3.

[28] AB Report, *US – Gasoline,* p. 29.

[29] AB Report, *US – Shrimp,* para. 185.

hopes that the Appellate Body might increase Member State's leeway to differentiate between ecological products based on consumer preferences.[30] Furthermore, *EC – Asbestos* consolidated the practice of accepting *amicus curiae* submissions[31] and thereby introduced a "democratic element" into WTO jurisprudence, by allowing environmental experts and other representatives of the civil society to make their voices heard.[32]

A further precedent case was adopted a decade later in the case of *EC – Seals*, where the WTO dispute settlement organs had to decide on an import ban on seal products.[33] In a watershed decision,[34] the WTO adjudicators supported the ban arguing that concerns about the cruel slaughtering of seals reflected "the public's general feeling" and were thus found to be preliminarily justified under Article XX(a) GATT.[35]

Although the contested import ban ultimately failed due to the *Chapeau*, the broader interpretation of the "public morals exceptions" can still be viewed as a potential turning point for environmental disputes. It suggests that environmental measures could also be justified under the exception of "public morals" in Article XX(a) GATT, provided the respondent can make a *prima facie* case to prove that this reflects the "standards about right or wrong" in the respective country.[36]

Apart from the interpretations provided in the aforementioned cases, however, jurisprudence has so far not contributed much to the clarification of the role of environmental measures in WTO law. In recent cases like *Canada – Renewable Energy*,[37] the Appellate Body did not rule on the question whether to allow green subsidies under the WTO Law, but performed "legal acrobatics"[38] to avoid a clear ruling on whether the creation of a market for renewable energies constituted a subsidy according to the ASCM or not.[39]

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[30] For a detailed analysis of the case and its possible implications see Kaufmann, *passim*.

[31] Marceau / Stilwell define *amicus curiae* submissions as "letters and other information submitted by non-parties to dispute settlement proceedings", 156, fn 3.

[32] Kaufmann, 1175.

[33] Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, adopted 18 June 2014 [*EC – Seals*], for a detailed evaluation of the case in the light of moral legislations see Howse / Langille / Sykes, *passim;* see also Koch 2016, 60–64 or Levy / Regan, *passim*.

[34] Howse / Langille / Sykes, 86.

[35] PR, *EC – Seals*, para. 7.3.

[36] Koch 2016, 64.

[37] Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, adopted 24 May 2013 [*Canada – Renewable Energy*].

[38] Cosbey / Mavroidis, 12.

[39] For a detailed analysis of the case see Weber / Koch 2015a, *passim*.

4.2.3 Policy Level: Institutional Developments

As opposed to the UN, where awareness for climate change emerged on an early stage and led to the establishment of environmental institutions, the WTO is still characterized by weak institutional structures to address trade and environment issues.

Awareness of the impact of international trade on the environment emerged only in the 1990s. To address these concerns Member States established the Committee on Trade and Environment (CTE) at the GATT Ministerial Conference in Marrakesh in 1994. In its first report, the CTE identified various core issues at the intersection of trade and environment, such as MEAs, environmental taxation, labeling programs ("eco-labels"), domestically prohibited goods, intellectual property rights or services.[40] Although the CTE's report contributed to awareness-raising through pointing out the sensitive areas of intersection between trade and environment, the report remained vague and did not contain specific suggestion for action nor proposals to amend the legal text of the WTO agreements.[41] To this day, the CTE has proven a useful forum to address important trade and environment issues, but has made little progress with regard to structural or legal changes.[42]

This standstill stands in contrast to recent developments on a sectoral level, namely within the platform of the GPA Committee. Following the mandate in Article XXIII:8(a) GPA 2012,[43] the committee established a "work programme on sustainable procurement".[44] The program aims at examining various topics related to sustainable procurement and at identifying sustainable procurement measures and policies that serve as an inspiration on how to design sustainable procurement compatible with international trade (Paragraph 3 of Annex E).[45] So far, the promised "best-practice" list has not been published yet, however, the Committee has organized a symposium on the issue in February 2017 that underlines its commitment to serve as a platform to exchange, deepen and disseminate expertise and know-how on GPP.[46]

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[40] WT/CTE/1, *passim*.

[41] For a detailed critique of the first CTE report see Charnovitz 1997 *passim*.

[42] For updates see webpage of the WTO/CTE, available at: https://www.wto.org/english/tratop_e/envir_e/cte00_e.htm.

[43] Article XXIII:8(a) mandates the Committee to undertake further work to facilitate the treatment of sustainable procurement.

[44] See Annex E to Appendix 2 of the Decision on the Outcomes of the Negotiations on Government Procurement, adopted on 30 March 2012.

[45] See also Corvaglia 2017, 112.

[46] GPA/W/341.

4.3 Other Regulatory Approaches of GPP

While the GATT/WTO was (and continues to be) slow in adapting trade law to environmental needs, other international organizations have implemented environmental, i.e. GPP-elements, in their legislations as a matter of course.

A "side-glance" at two of these organizations, namely the UNCITRAL and the World Bank, which also operate in the area of international trade and the economic growth of their Member States, shows other regulatory approaches of combining environmental protection (i.e. GPP) with the need of international trade (i.e. international procurement).

4.3.1 United Nations Commission on International Trade Law[47]

The "Model Law on Procurement of Goods, Constructions and Services" was established in 1994 by the UNCITRAL.[48] It addresses national legislators and serves as a template law to provide examples on how to structure public procurement legislations and is thus as a guide to "best practice",[49] encouraging sound public procurement policies and reducing transaction costs for implementation.

As a framework law, the Model Law provides general rules and principles of public procurement,[50] leaving it to the respective countries to establish detailed procedural rules. Countries are granted broad flexibility in implementing the Model Law, they do not have to adapt it as a whole, but can select those provisions they wish to implement. Moreover, they can make use of so-called "options", i.e. alternative formulations to accommodate the "wide variations among States".[51]

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[47] For a detailed analysis of the UNCITRAL Model Law and the possibility to consider social policies see Corvaglia 2017, 194 *et seqq*.

[48] General Assembly resolution 66/95, Model Law on Procurement of Goods, Construction and Services of the United Nations Commission on International Trade Law, (17 February 1995), Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), Annex I.

[49] Arrowsmith 2004, 19.

[50] It encompasses a catalogue with legal definitions (Article 2), procedural rules (Articles 27-35), transparency/publishing requirements (see e.g. Articles 8-11 and 39, 47 and 49), provisions on the conduct of competitors (Article 7), the evaluation of the bids (Articles 11 and 43 Model) and the awarding of the tenderers (e.g. Article 23 Model Law). Moreover, it contains provisions on specific issues such as electronic reverse auctions (Articles 53-57) or framework agreement procedures (Articles 58-63).

[51] A prerequisite for the use of options, however, is that they "do not compromise the Model Law's essential principles and procedures", UNCITRAL, Enactment Guide, 14 and 15.

Unlike international agreements, such as the GPA, the UNCITRAL Model Law has no binding effect and is not legally enforceable.[52] However, from a soft law perspective it is still an important instrument of international law as it contributes to the harmonization of procurement regulation internationally, and thereby the promotion of international trade.[53]

Until 2011, GPP was not mentioned in the Model Law, a lack that reinforced the need for revision in 2011.[54] The revision finally brought significant changes regarding GPP. Most importantly, the revised Enactment Guide points out the fact that sustainable procurement (a term that includes GPP) is acknowledged as an important objective of many public procurement regimes.[55]

Accordingly, the new Article 9 Model Law on qualification criteria[56] makes reference to the environmental qualifications of suppliers. A contracting authority is thus allowed to consider a supplier's "environmental qualifications" as a necessary requirement. Another reference to GPP is made in Article 11 Model Law on evaluation criteria. This provision expressly states that "evaluation criteria relating to the subject matter of the procurement may include", amongst others, "environmental characteristics" (Article 11.2(b) Model Law). Other instruments of GPP, namely technical specifications and exclusion criteria, are not mentioned in the UNCITRAL Model Law.

Although the Model Law stresses that GPP is a legitimate strategy, GPP measures will have to comply with the general principles of the Model Law, namely the principles of transparency, objectivity and competition. Since it is a framework law, it does not provide clear guidance on the scope and limits of these principles with regard to GPP.

4.3.2 World Bank

4.3.2.1 Relevance for International Procurement

The World Bank is the biggest international financial development institution. It provides loans to developing countries with the objective of reducing poverty.

The World Bank acknowledges that public procurement and development are closely interrelated issues. Public sector spending is an important catalyst for

[52] Arrowsmith/Linarelli/Wallace, 93.

[53] UNCITRAL Enactment Guide, 2.

[54] Arrowsmith 2004, UNCITRAL Enactment Guide, 44.

[55] UNCITRAL Enactment Guide, 4, notes that there is no legal definition of sustainable procurement, but does however explain that the term reflects the "consideration of the full impact of procurement on society and the environment, for example through the promotion of life-cycle costing, disposal costs and environmental impact".

[56] See above, Sect. 3.6.

economic growth in developing countries.[57] Enough liquidity to initiate and carry out public procurement projects will boost the national economy and, ultimately, raise living standards. Therefore, the World Bank, together with other (regional) development banks, aims at facilitating public procurement projects through granting loans. This strategy is referred to as Investment Project Financing (IPF) in World Bank terminology. At present, the World Bank provides funding for approximately 1800 projects in 172 countries.[58]

The World Bank has established a legal framework containing the requirements for IPF to ensure that the financed project is carried out according to certain rules of good governance. In that sense, the regulatory framework of the World Bank (not only the legally binding Articles of Agreements, but also the various guideline documents) constitutes an important legal source, or at least a source for standard-setting, for public procurement regulation on an international level.

The 2015 revision of the World Bank procurement framework[59] has introduced some changes regarding the general principles governing IPF. Some principles have remained unaltered, namely "value for money", "integrity" and "fit for purpose", however the concept of "competition" has been replaced by the broader notion of "fairness".[60] The significant additions regarding GPP will be depicted in the following.

4.3.2.2 GPP

4.3.2.2.1 Guidelines and Technical Assistance

GPP has received new impetus with the revision of the World Bank's public procurement framework in 2011. In a guideline document, the World Bank states sustainable development as one of three reasons for financing public procurement projects, apart from value for money and integrity.[61] Thereby, the World Bank reiterates that "sustainability" encompasses the economic, environmental and social dimensions and that sustainable procurement supports sustainable development.[62] This shows a notable shift from focusing on the lowest bid to the bid that provides

[57] Arrowsmith / Linarelli / Wallace, 101.

[58] GPA/W/341, 8.

[59] The "New Procurement Framework" of the World Bank consists of i) the Bank Policy, ii) the Bank Directive, iii) the Bank Procedure and iv) the Bank Regulations.

[60] World Bank, Bank Policy, Chapter II, C.

[61] World Bank, Sustainable Procurement, 1 states that "Procurement in Investment Project Financing (IPF) supports Borrowers to achieve value for money (VfM) with integrity in delivering sustainable development."

[62] *Ibid.*, 3; For a detailed analysis of the World Bank procurement framework within the context of social concerns see Corvaglia 2017, 212 *et seqq.*

best overall value for money, which in turn is evaluated under consideration of environmental factors.[63]

Furthermore, the World Bank introduced a definition, stating that sustainable procurement is "an approach through which economic, environmental, and/or social factors can be more fully taken into account when determining which bid/proposal is selected for a specific requirement".[64] Thereby, it specifies that sustainability criteria have to be considered throughout the various stages of the procurement process.[65]

It is important to note that GPP is not mandatory under the World Bank rules, but can be applied according to the needs of the borrowing country. The voluntary approach is considered "an acceptable compromise, allowing countries to test sustainable procurement in their own contexts with support from the Bank."[66] If, however, countries do decide to apply GPP, the World Bank will provide assistance in identifying the relevant criteria.[67] This is also to ensure that these criteria are designed and applied in accordance with the World Bank's procurement principles, namely economy, effectiveness, fairness, transparency, value for money, integrity and fit for purpose, and with the borrowing country's national laws.[68] Furthermore, the World Bank also provides practical guidance on how to assess "non-cost sustainability factors", including an overview on certain (online) evaluation tools designed by Member States, stressing its commitment for further efforts to provide guidance material and training in this relatively new field.[69]

4.3.2.2.2 Instruments of Implementation

With regard to the various instruments of GPP, the World Bank states that **technical specifications** can be a valid tool for GPP implementation, provided they are designed as either precise technical conformance or performance specification.[70] These should serve to encourage suppliers to "propose their ideas, innovations, and approaches to managing the sustainability risk."[71] However, green technical specifications must "bear a link to the subject matter of the contract."[72]

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[63] World Bank, Value for Money, 13 expressively states that the criteria of economic, social or environmental sustainability are a component of best value for money.

[64] World Bank, Sustainable Procurement, 3.

[65] *Ibid.*, 5–6.

[66] World Bank 2015, 28.

[67] *Ibid.*

[68] *Ibid.*

[69] *Ibid.*

[70] World Bank, Sustainable Procurement, 7.

[71] *Ibid.*

[72] *Ibid.*; for the nexus-criterion under the GPA see Sect. 6.4.1.4 and for the link-to the subject matter-requirement under EU law see Sect. 8.4.2.1.

If the market for GPP is "not yet mature" in the borrowing country, environmental criteria are best implemented through the instrument of **evaluation criteria**,[73] defined as "standards used in the evaluation of bids to select the most advantageous proposal, which best meets the requirements and offers the best value for money."[74] Green evaluation criteria under World Bank guidelines have to meet four requirements: they have to be (1) p*roportionate* and *appropriate* to the type, nature, market conditions, complexity, risk, value and objective of what is being procured; (2) q*uantifiable* (e.g. convertible to monetary terms), (3) applied *consistently* to all bids and proposals submitted, and (4) specified in the Standard Procurement Documents.[75]

Finally, **monitoring mechanisms** within the sense of contract management are a key factor for the success of the outcomes of any procurement project, also regarding GPP.[76] Therefore, the GPP also points out to the possibility to implement GPP by means of contract performance monitoring. The monitoring (e.g. through periodic audits) of suppliers throughout the duration of the procurement contract can help to verify that sustainability goals are met.[77] However, it is important to note that monitoring results are dependent on the data available. Therefore, it is important to collect data at the appropriate point in the supply chain, as previously specified in the contract, e.g. through online tools.[78]

4.4 Summary and Findings

The tensions surrounding GPP and WTO law form part of the bigger "trade and environment" debate: The relationship of international trade and environmental protection has always been characterized by tensions. Although the protection of the environment has been stated as one of the goals of the WTO (already the GATT 1947 contained environmental provisions), the WTO still has not found a balance between concerns of environmental protection and international trade.[79] As a result, the environmental provisions in the covered agreements still lack clarification of their scope; only recently (and albeit only hesitantly) the Appellate Body seems to take a more positive/progressive stance on interpreting WTO law in favor of environmental concerns.

The question about the environmental responsibilities of the GATT/WTO is also a question often discussed by scholars: critics regularly express the view that the WTO is not the right forum to address concerns of climate change, since this would

[73] World Bank, Sustainable Procurement, 21.

[74] World Bank, Evaluation Criteria, 1.

[75] *Ibid.*

[76] World Bank, Sustainable Procurement, 36.

[77] *Ibid.*

[78] *Ibid.*

[79] Weber 2018, 244.

lead to an overload. However, as pointed out by John H. Jackson, these narrow views misunderstand the history of the GATT and the current function of the WTO as an organization that does not only address tariffs, but whose task it is find common solutions for "virtually every economic regulatory subject."[80]

Whereas the UN has established many important platforms to address climate change mitigation, most importantly the UNFCCC, the WTO lacks similar institutions: its only platform to address environmental issues, the CTE, has kept rather in the background. Although the CTE as well as the UNFCCC pledge their commitment for intra-institutional cooperation, the efforts from both sides to develop a coordinated approach on environmental protection/climate change mitigation have remained low.

On a sectoral level, however, the GPA Committee stands out as a platform being active within the field of GPP: it has established the work programme on sustainable procurement and within this framework already organized a symposium. Other efforts on the legislative plurilateral level, however, do not take shape, as the failure to conclude the EGA shows. Other legislatory changes, on a multilateral level, are not in sight, which is not surprising, considering the strict consensus rules and the current multilateral standstill.

A side-glance to other international fora has pointed out other ways of how to incorporate GPP elements in international trade regulations. The UNCITRAL has introduced GPP as a viable strategy in 2011, shortly before the GPA followed and the World Bank underwent a paradigm change towards the acknowledgment of sustainability goals in public procurement between 2012 and 2015. Thereby, both the UNCITRAL's as well as the World Bank's public procurement guidelines are not mandatory and operate on a soft law basis. This means that GPP is not mandatory. Nevertheless, it is considered desirable and has become the standard procurement procedure.

[80] Jackson 2002, 106–107.

Chapter 5
Relevance of the Multilateral WTO Agreements

Before assessing the scope of GPP under the GPA, it is important to assess how the other WTO agreements, namely the multilateral agreements, affect GPP. This is necessary to understand the obligations that arise from general WTO law for all WTO Member States (also those who have not signed the GPA) when putting in place GPP laws and practices.

The fact that government procurement is excluded from both the scope of the GATT as well as the GATS could lead to the assumption that the multilateral agreements are not relevant for government procurement regulation in general and GPP in particular. This assumption, however, would be misleading.

The same holds true for the ASCM and the TBT: although these agreements regulate specific areas of law and do not contain public procurement provisions, they can still be become relevant for GPP, as will be illustrated in this chapter.

5.1 Non-Discrimination Principle in WTO Law

WTO law emerged around the principle of non-discrimination. By signing the GATT, and by later becoming Member of the WTO, governments contractually limit their sovereign right to discriminate between their own and foreign products and services, in return for reciprocal advantages.[1]

The non-discrimination principle constitutes the most important instrument of international trade law and remains the essential pillar of WTO law.[2] It lies at the very heart of the basic WTO Agreements (GATT, GATS and the Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS]), as well as the

[1] Cottier/Oesch, 142.

[2] See *ex multis,* Diebold, 17.

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special agreements like the TBT, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) or the ASCM, all of which contain general and specific provisions on non-discrimination. Non-discrimination is also the guiding principle of the GPA. Since there is no jurisprudence to clarify the non-discrimination principle under the GPA, the interpretation approaches for the non-discrimination principles under general WTO is the only (and thus essential) indication to make valid assumptions on how the WTO adjudicatory bodies would interpret the GPA.

The WTO non-discrimination principle has two components: the most favoured nation (MFN) principle (Article I GATT and Article II GATS) and the national treatment principle (Article III GATT and Article XVII GATS). While the first one prohibits "to accord less favourable treatment" to like products or services originating in (or destined for) different WTO Member States, the second one prohibits "to accord less favourable treatment" to like imported and local products and services. In this regard, WTO law operates as a "check" on domestic law of Member States.[3]

Thereby, prohibition of "less favourable treatment" essentially means prohibition of discrimination on the basis of nationality or origin. The wording of "no less favourable treatment" has consistently been interpreted by WTO adjudicatory bodies as the obligation to grant equal conditions of competition for foreign products and producers (or services and service providers).[4] Thereby, equality of opportunities focuses on the real and potential effects on competition and encompasses direct (*de lege*) as well as indirect (*de facto*)[5] discrimination.

Since direct discrimination has become less common due to the legal framework provided for by the WTO, most trade disputes evolve around *de facto* discrimination.[6] However, up until today, it remains unclear what exactly amounts to factual discrimination:[7] where does sovereign autonomy to regulate legitimate policy concerns end and where does factual discrimination start?

GPP also illustrates the difficulties in determining factual discrimination. Although it is clear that the non-discrimination obligation constitutes the boundary of GPP, it is far from clear where this boundary needs to be drawn. What happens when a GPP clause is origin-neutral and does not distinguish between domestic and foreign products/service, but, *de facto* benefits local suppliers? When does GPP fall into the legitimate policy scope of a country to contribute to environmental protection and when does it overstep the boundaries of the non-discrimination obligation as imposed by WTO law? Answers to this question require a balancing-act on a case-by-case basis.[8]

[3] Cottier/Oesch, 142.

[4] See *ex multis*, ABR, *Korea – Beef*, para. 135 *et seqq*; PR, *United States – Chapter 337*; paras 5.11–513, PR, *US – Gasoline*, para. 6.10 *et seqq*; Diebold, 19.

[5] For a detailed analysis of *de facto* discrimination in WTO Law see Diebold, 37 *et seqq.* and Ehring, *passim*.

[6] See for example ABR, *EC–Bananas*, AB, *Canada–Automobiles*, all the alcoholic beverages cases, ABR, *EC – Asbestos*; Diebold, 19.

[7] Ehring, 922.

[8] See this chapter and Chap. 6.

Under the GATT as well as the GATS, assessment of *de facto* discrimination is measured based on the concept of likeness, which is a precondition of discrimination.[9] If products are not like (or at least economically substitutable) they do not compete on the market and can thus not be subject to discrimination§. One important dimension of the likeness-debate is the discussion about process and production methods (PPM), namely the controversy of whether production methods also carry weight in the determination of likeness.[10]

5.2 GATT and the GATS: Derogation-Clauses

5.2.1 Ratio Legis *of the Derogation*

Both the GATT and the GATS contain a respective "derogation" or "carve-out" clause that exempts public procurement from their scope. Consequently, the national treatment and MFN (and all other) obligations do not apply to measures or policies enacted within the context of public procurement.

The reason for this exemption is historical and can be traced back to the opposition of many countries to open public procurement markets to international trade. While the draft Charter of the International Trade Organization [ITO], the comprehensive trade organization envisaged by the international community in the aftermath of World War II that failed due to lack of consent by the American congress, contained a draft provision on government procurement, the issue proved too contentious in the GATT/GATS negotiations.[11]

In the GATT, the derogation clause can be found in Article III ("National Treatment on Internal Taxation and Regulation"). While the first paragraphs contain various rules on national treatment, Article III:8(a) GATT states:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the productions of goods.

The derogation clause of the GATS can be found in Article XIII:1 ("Government Procurement") that states:

> Articles II[12], XVI[13] and XVII[14] shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental

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[9] For a detailed description and a critique of the likeness and substitutability test see Ehring, 972.

[10] See within the context of GPP below, Sect. 6.4.3.

[11] Blank / Marceau, *passim.*

[12] Article II GATS on MFN.

[13] Article XVI GATS on "Market Access".

[14] Article XVII GATS on "National Treatment".

purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

Furthermore, and unlike the GATT, the GATS (Article XVIII:2) contains a "negotiations-clause", requiring WTO Member States to further negotiate on service contracts in public procurement. Although such talks have indeed taken place, no consensus has been reached so far.[15]

5.2.2 Scope of Article III:8 GATT

5.2.2.1 Exemption of the MFN Obligation?

While the GATS derogation clearly exempts public procurement from both the national treatment and the MFN obligation as well as from other market access commitments, the scope of the GATT derogation clause is less clear. While public procurement is excluded from the national treatment obligation,[16] it is not clear whether this also extends to the MFN obligation. Legal scholars, however, suggest that the GATT carve-out clause also covers (and thus exempts from) the MFN obligation.[17]

According to Article 31 VCLT, any legal analysis should start with the wording of the respective treaty. A grammatical interpretation based (only) on the text of the wording seems to leave little room for doubt about the exemption from the MFN obligation: Article III:8(a) GATT clearly refers only to "this Article", namely Article III GATT on national treatment (and not to Article I:1 GATT on MFN).

However, doubts arise when analyzing the text of Article I:1 GATT, which extends its coverage to "all matters referred to in paragraphs 2 and 4 of Article III". This cross-reference allows for the interpretation that Articles I:1 and III GATT are interlinked in a way that would, *e contrario,* also extend the exemption of Article III GATT to Article I:1 GATT.

This interpretation is supported by a historical and a teleological interpretation.[18] Various scholars point to the fact that the preparatory works of the ITO, the GATT as well as the GPA suggest that matters of government procurement were not intended to fall within the scope of the MFN obligation.[19] Moreover, an

[15] Hoekman/Mavroidis, 332, fn 27.

[16] Article III:8 GATT refers to "this Article", addressing Article III GATT on national treatment.

[17] Arrowsmith 2003, 61–68; Jackson 2000, 63, not as explicitly Marceau/Blank, 36–37; Dawar, 17, presents a minority position, taking the view that an extension of the derogation to Article I.1 GATT would be "opaque and convoluted".

[18] In cases where an interpretation based on the wording of a provision remains "ambiguous or obscure", Article 32 VCLT allows to take recourse to supplementary means, such as the preparatory works of the respective agreement.

[19] Arrowsmith 2003, 63; Jackson 2000, 63; Marceau/Blank, *passim*.

interpretation based on the *ratio legis* of Article III:8(a) and a look at subsequent practice[20] also suggests an exemption of government procurement from the MFN obligation.[21]

5.2.2.2 Definition Established in *Canada – Renewable Energy*

The scope of the procurement derogation in the GATT was clarified by WTO jurisprudence for the first time in *Canada – Renewable Energy*. In this case, Japan and the EU challenged Canada for allegedly violating the national treatment obligation in Article III:4 GATT through setting LCR for energy generation equipment, as a precondition for energy contracts. Canada contested that Article III:4 GATT did not apply, since the measure at issue (i.e. the LCR) was enacted within a public procurement procedure and therefore exempted by means of Article III:8(a) GATT. The GPA was not applicable, since at that time Canada's provinces were not subject to the GPA.

5.2.2.2.1 Testing Scheme

The ruling of *Canada – Renewable Energy* made big waves. However, critics focused rather on the Appellate Body's findings concerning subsidies;[22] the Appellate Body's conclusions concerning the scope and testing scheme of Article III:8(a) GATT were largely ignored, despite of their potentially significant repercussions.[23] In its analysis, the Appellate Body focused on two elements of Article III:8(a) GATT that proved particularly controversial:

> The provisions of this Article shall not apply to laws, regulations or requirements **governing the procurement by governmental agencies** of products **purchased for governmental purposes and not with a view to commercial resale** or with a view to use in the productions of goods (emphasis added).

In a first step, the Appellate Body shed light on the first element of Article III:8 GATT. "Procurement" was interpreted as a "processes pursuant to which a government acquires products",[24] while *governing* was found to require an "articulated connection between the laws, regulations, or requirements and the procurement, in the sense that the act of procurement is undertaken within a binding structure of

[20] According to the ABR in *Japan – Alcoholic Beverages*, 12–13, *subsequent practice* occurs when there is a "concordant, common and consistent" sequence of acts that are sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation.

[21] Arrowsmith 2003, 63; Marceau/Blank, 37.

[22] See e.g. Cosbey/Mavroidis, *passim*; Weber/Koch 2015a, *passim*; Shadikhodjaev, *passim*.

[23] The one exception being Davies, *passim*, who strongly criticizes the competitive relationship requirement established by the Appellate Body.

[24] Davies, para. 5.59.

laws, regulations, or requirements."[25] A *governmental agency* was defined as "an entity performing functions of government and acting for or on behalf of government".[26]

Secondly, the Appellate Body turned to the fundamental differentiation between procurement "for governmental purposes" and for commercial (re-) *sale*, stating that the first term covers whatever is purchased "in the discharge of its public functions".[27] Commercial re-sale was found to cover situations where the contracting authority has an intention to "maximize his or her own interests."[28]

However, the Appellate Body surprisingly introduced a third requirement, in addition to the two elements that are directly derived from the wording of the text, the criterion of a "competitive relationship".[29] The Appellate Body found that—owing to a "holistic approach"—Article III:8(a) GATT must be understood in relation to the national treatment obligations stipulated in the other paragraphs of Article III.[30] This led the Appellate Body to conclude that:

> The product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased.[31]

Consequently, the Appellate Body found that the challenged LCR did not fall under Article III:8(a) GATT, due to the lack of a competitive relationship between the product discriminated against (electricity generation equipment) and the product procured (electricity), and could not be exempted from the scope of Article III:4 GATT.[32] Therefore, Canada was found to have acted in violation of Article III:4 GATT.

5.2.2.2.2 Critical Assessment

The necessity and adequacy of this third requirement remains contested; the requirement of a competitive relationship would significantly narrow down the scope of the GATT procurement derogation.[33] Certain public procurement measures and policies would not fall under the narrow definition established in *Canada – Renewable Energy* and, consequently, would be subject to the national treatment (and arguably also the MFN) obligation. This would render the GATT public procurement derogation clause factually ineffective.

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[25] ABR, *Canada – Renewable Energy,* para. 5.58.

[26] *Ibid.,* para. 5.74.

[27] *Ibid.*, para 5.68.

[28] *Ibid.,* para. 5.71.

[29] See also Corvaglia 2017, 107.

[30] ABR, *Canada – Renewable Energy*, 5.79.

[31] *Ibid.*

[32] *Ibid.*

[33] See also Corvaglia 2017, 108.

Since this third requirement cannot be derived from the wording of Article III:8 GATT, it is questionable whether such a narrow definition that would factually render the GATT public procurement clause ineffective reflects the legislative intent. Davies is of the opinion that the Appellate Body did not interpret Article III:8 GATT in the light of its object and purpose and that therefore the "holistic approach", *i.e.* the competitive relationship requirement is not justified.[34]

Indeed, this novel approach causes confusion and adds to the already significant legal uncertainty surrounding the scope and meaning of the GATT procurement derogation. Nevertheless, the novel approach was followed in a subsequent case where the adjudicatory bodies based their assessment on the competitive relationship requirement: in *India – Solar Panels* both the Panel as well as the Appellate Body found that an LCR was not covered by the procurement derogation, since the procured good (electricity) did not stand in a "competitive relationship" with the products discriminated against (solar cells).[35] This means that the "competitive relationship" can now be considered an established standard, despite of the uncertain legal consequences and despite of the critical voices raised by literature.

5.3 Relevance of Other Multilateral Agreements

5.3.1 ASCM: GPP as a Subsidy?

Governments may choose to reward environmentally beneficial production methods or consumption choices through granting financial support (to producers and/or consumers).[36] Subsidization may be an effective steering tool, however, it may also have a trade-distortive effect. Therefore, they are subject to the ASCM, whose objective it is to curtail trade-distortive subsidies.

Public procurement of goods may, under certain circumstances, amount to subsidies and become subject to the WTO discipline on subsidies enshrined in the SCM Agreement.[37] Article 1.1 ASCM sets forth three criteria defining a "subsidy" under WTO law, namely:

1. a financial contribution;
2. by a government or a public body;
3. conferring a benefit.

[34] Davies, 546–547.

[35] See ABR, *India – Certain Measures Relating to Solar Cells*, WT/DS456/AB/R, circulated on 16 September 2016 [*India – Solar Panels*], 6.2.

[36] Weber 2017, 358.

[37] The ASCM Agreement does not apply to trade in service and there is no regulation of subsidies under the GATS.

Government procurement, by definition, involves a financial contribution by a government or a public body. Therefore, it is the third criteria ("conferring a benefit"), which will be decisive to establish whether a public procurement practice qualifies as a subsidy. Thereby, this criterion is also the most controversial one—the legal test to determine whether a benefit has been conferred has given rise to fierce debates.[38]

As established by WTO jurisprudence, a benefit exists if the financial contribution at hand "makes the recipient *better off* than it would otherwise have been".[39] Thereby, the relevant market is used as the benchmark to determine whether a benefit exists.[40] If the price paid to the recipient is higher than the actual market price, a benefit (and possibly a subsidy) can be assumed. Within the context of (green) public procurement this means: if a government pays the tenderer a price *above* market value, this could violate the ASCM (although it would not necessarily be prohibited under the pertinent public procurement law).

However, the case of *Canada – Renewable Energy* showed the challenges posed by the market analysis, especially within an environmental context. Since there is no real market for "green electricity" (which is artificially created by the government due to environmental concerns), a real-life market price cannot be determined.[41] The Appellate Body in *Canada – Renewable Energy* noted that an earlier FIT-measure could serve as the relevant market benchmark. It however abstained from a clear decision due to lacking factual evidence.[42]

When a contract is awarded in a competitive tendering process, it can be presumed that payment is at market rate.[43] In the case of selective or limited tendering, however, the adequacy of remuneration might be less obvious and if there is only one tenderer, a clear market delineation could be challenging due to lacking possibilities to compare.

The challenges coming with market delineation are especially apparent in the case of GPP, since the markets in environmental goods tend to be heavily regulated, i.e. created by the government (as was found to be the case in *Canada – Renewable Energy*). So far, jurisprudence has not addressed the issue to a satisfactory degree. Legal doctrine, however, has put forward various alternative tests for market

[38] See e.g. Cosbey / Mavroidis, *passim*.

[39] PR, *Canada –Aircraft*, para. 9.112, as upheld by ABR, *Canada –Aircraft,* para. 157, emphasis added.

[40] PR, *Canada –Aircraft*, para. 9.112, as upheld by the ABR, para. 157.

[41] The Appellate Body in *Canada – Renewable Energy* stated in para. 5.188: "A distinction should be drawn between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist or to correct market distortions therein. Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government would not have created it."

[42] ABR, *Canada – Renewable Energy,* 5.241.

[43] Arrowsmith 2003, 85.

delineation, considering different economic aspects.[44] Whether these alternative approaches will be accepted by WTO adjudicators in future cases remains to be seen.

5.3.2 TBT: GPP as a Technical Barrier to Trade?

The TBT ensures that technical regulations,[45] standards[46] and conformity assessments[47] do not amount to unnecessary obstacles to international trade (see Recital 5 of the Preamble).

The TBT contains various non-discrimination obligations. Article 2.1 TBT, reflects the general national treatment and MFN obligation, stating that "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." The same obligation can be found throughout Article 5 TBT (concerning conformity assessments).

Moreover, the TBT (unlike other covered agreements) contains a necessity-mechanism. According to Article 2.2 TBT, WTO Member States need to assure that technical regulations do not create "unnecessary obstacles to international trade" and are not "more trade-restrictive than necessary to fulfil a legitimate objective."

The TBT does not have direct implications on a WTO Member State's public procurement policies. Article 1.4 TBT explicitly excludes public procurement from its scopes, making reference to the GPA.[48] Therefore, public procurement measures are not bound by the non-discrimination obligation and cannot be subjected to the necessity test, even if they would qualify as technical regulations.

However, the TBT may still have an effect on government procurement, since technical regulations are sometimes reflected in a tender as technical specifications.[49] A technical regulation allowing only the placing on the market of cars with particulate filters (a filter to remove diesel soot), may also be a technical specification in a procurement contract, to make sure that foreign tenderers are aware of this requirement and only submit offers that meet it. Thereby, the fact that the TBT

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[44] See Cosbey / Mavroidis, *passim;* Weber / Koch 2015a, *passim*.

[45] Annex 1.1 TBT defines "technical regulations" as "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory (…)."

[46] Annex 1.2 TBT defines "standards" as "Document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory (…)."

[47] Annex 1.3 TBT defines "conformity assessment" as "any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled (…)."

[48] Article 1.4 TBT states that: "Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage."

[49] Arrowsmith 2003, 324.

provides for general principles to reduce the trade restrictive effect of technical regulations and promotes harmonization may have a positive effect on facilitating market access for foreign tenderers, also in the field of public procurement (in cases where technical regulations and specifications overlap).[50]

5.4 Summary and Findings

As has been shown in this chapter, obligations for GPP arise not only from the GPA,[51] but also from the multilateral agreements of WTO law. Primarily the GATT and the GATS are relevant in this regard, but also the *leges speciales* TBT and ASCM.

The most pressing question concerns the stance of GPP under the GATT and the GATS: the scope of the procurement derogations remain far from clear. Firstly, a (still unresolved) question that has been discussed for a long time is the question of whether the derogation also applies to the MFN obligation. Secondly, recent jurisprudence has added legal uncertainty: *Canada – Renewable Energy* introduced a novel approach, requiring a competitive relationship (between the procured and the discriminated good). This further blurs the scope of the derogation and has the potential of subjecting "swaths of discriminatory domestic content requirements"[52] to Article III GATT.

While this is relevant for public procurement in general, the potential implications for GPP are particularly profound. *Canada – Renewable Energy* is the first (and so far only) case where the adjudicatory bodies ruled in a matter of GPP and exemplifies that GPP is especially sensitive to claims of non-discrimination. The clear implications of the Appellate Body's ruling remain to be seen. The only valid conclusion possible at this point is that *Canada – Renewable Energy* added even more complexity to the interpretation of the procurement derogation and created a situation of legal uncertainty, especially for GPP.

Apart from the GATT and the GATS, GPP may also be affected by the ASCM: When governments provide environmental (or other) incentives through public procurement laws and practices, they have to be careful not to grant a subsidy prohibited under the ASCM. Most notably, WTO Members need to be careful, not to pay prices below market value, in order not to distort the market. The risk of a violation of the TBT through GPP, however, can be considered low, since public procurement is excluded from the scope of the TBT. Governments only need to pay attention when technical regulations have the same effect as technical specifications: in these cases, they have to take the non-discrimination rules of the public procurement legislations into consideration.

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[50] *Ibid*., 77.

[51] See next chapter.

[52] Davies, 553.

This shows that, contrary to prevailing perception, WTO Members that are not at the same time GPA Signatory States still have to consider WTO law when designing GPP laws and practices. For GPA Signatories, however, it is even legally conceivable that a GPP law or practice is compatible with the GPA, but would still run counter multilateral WTO law.[53]

[53] This also raises questions with regard to the relationship between the GATT and the GPA. What if a GPA Signatory States has excluded certain sectors from the GPA but is still accountable for it under the GATT? This is still open to speculations and will have to be clarified by future negotiations and/or jurisprudence.

Chapter 6
Government Procurement Agreement

6.1 Evolution

Despite lengthy efforts to regulate public procurement on an international level, the GATT exempted public procurement from its scope.[1] Nevertheless, a minority group of GATT Contracting Parties pursued efforts to liberalize of procurement markets and negotiated market access on a plurilateral level. These efforts took concrete shape during the 7th GATT Round in Tokyo, where the first version of the GPA, the Tokyo Code of 1979 was concluded: a modest agreement with nine Articles, covering only goods of central entities. The text of the Code was based on a previously elaborated OECD document,[2] but additionally introduced provisions on S&D treatment and enforcement.

The Uruguay Round led to a major reform of the Tokyo Code. Although attempts to move public procurement to the multilateral level failed again,[3] negotiations on a plurilateral level were successfully concluded with the establishment of the GPA that entered into force in 1994 (and superseded the Tokyo Code). Firstly, the 1994 GPA broadened the coverage from federal to local entities, state-enterprises as well as public utilities and extended the scope from only goods to services, constructions and supplies. Secondly, it introduced domestic challenge procedures assuring fair hearing for aggrieved tenderers on the domestic (Article XX) and empowered the WTO adjudicators to make binding recommendations (Article XXII).

The most recent revision led to the conclusion of the GPA 2012 that entered into force in 2014 and was negotiated over the long time spam of nearly a decade.[4] The

[1] See above, Chap. 4.

[2] Blank / Marceau, 14–26.

[3] *Ibid.*, 40–43.

[4] Botschaft Totalrevision FLGP, 2061.

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revision of the GPA was broadly welcomed by scholars as well as practitioners,[5] since it introduces a "completely different mindset compared to the 1994 GPA".[6] It transformed from a mere market access tool to a comprehensive legal framework, addressing a wide range of issues.[7] On a substantive level, the revision brought significant changes:

1. *Anti-corruption*:[8] While the 1994 GPA did not address the important issue of corruption, the 2012 GPA now starts with pointing to the importance of "integrity and predictability" and clearly condemns corruption (Recitals 3 and 6 of the Preamble). Moreover, the catalogue of general principles points to the importance of transparency and impartiality to prevent corrupt practices (Article IV:4). The inclusion of the anti-corruption principle can be considered to entail important soft-law implications.[9]
2. *Procedural Rules*: The procedural rules in the GPA were updated to address new technological innovations. Most importantly, Article XIV GPA introduces the concept of electronic auctions. Moreover, the GPA now allows for procurement procedures other than the three traditional procedures (open, selective or limited tendering*)*.[10]
3. *Domestic Challenging Procedures:* The GPA 2012 softened requirements regarding the impartiality of the domestic judges as well the enforceability of the GPA before domestic courts.[11]
4. *GPP*: The most significant changes for the purposes of this thesis, however, are the new provisions on GPP; namely Article X:6 GPA on technical specifications and Article X:9 GPA on award criteria. These two provisions expressly allowing for the inclusion of environmental criteria and will be analyzed in detail in the further course of this thesis.

One of the most significant changes introduced in the 2012 revision is the explicit recognition of GPP as a viable instrument to promote the conservation of natural resources and to protect the environment: firstly, in Article X.6 GPA on technical specifications and secondly, in Article X.9 GPA on evaluation criteria. The background to this "revolutionary" change is the increasing acknowledgement of the pressing environmental problems and the role of public procurement policies in the overall effort to address it.[12]

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[5] *Ex multis*, Arrowsmith / Anderson, *passim* or Reich 2009, *passim*.

[6] GPA/W/341, 21, citing Steiner.

[7] *Ibid*.

[8] For a detailed analysis on the new anti-corruption goal in the revised GPA see Lang / Steiner, *passim*.

[9] Anderson / Kovacic / Muller, 687; For a conceptualization of soft-law and an analysis of its strengths and weaknesses see Weber 2012, 11–13 and Plato-Shinar / Weber 2015, 234–238.

[10] Article VI:4 GPA states that parties "shall use methods *such as* open, limited and selective tendering" (emphasis added); Anderson / Arrowsmith, 31 call this a "potentially interesting" innovation, but point out to the fact that the implications thereof are not clear yet.

[11] Reich 2009, 1014–1017.

[12] Arrowsmith / Anderson, 31.

These new GPP provisions are an important acknowledgment for environmental protection. Whereas under the GPA 1994 it was not clear whether GPP was a permissible practice,[13] the GPA 2012 now removes legal uncertainty and open the scope for GPA Parties to apply GPP policies and measures.[14] Nevertheless, the wording of the GPP provisions remains vague and the exact extent to which they provide increased flexibilities remains "far from clear".[15]

The vague wording of the GPP provision may be challenging for GPA countries when transposing the new provision into national law. To shed light on this legal uncertainty it is therefore necessary to clarify the scope and meaning of the text of the new GPP provisions. In the absence of relevant jurisprudence, an analysis has to be based on the ordinary meaning of the wording, its context and possibly also under consideration of the GPA's negotiation history, pursuant to the generally recognized rules for treaty interpretation as set out in Articles 31 and 32 VCLT.

6.2 *Modus Operandi*

6.2.1 Plurilateral Agreement

WTO law distinguishes between two categories of legal: multilateral[16] and plurilateral[17] agreements. The GPA belongs to the latter category. A legal definition can be found in Article II:3 WTO Agreement:

> The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

Thereby, plurilaterals are the exception to the "single undertaking", namely the idea that WTO law constitutes one cohesive set of rules that impose equal rights and obligations on all Member States. Plurilateral agreements, however, are only binding upon Signatory States, while multilateral agreements are binding on all WTO Member States and form a *conditione sine qua non* for membership.

Plurilateral agreements are mostly negotiated in areas in which some WTO Member States (typically developed countries) wish to achieve deeper liberalization while others, typically developing countries, want to protect the sector from foreign competition. The fact that plurilateral agreements are usually concluded by a majority of developed countries reflects the gap that is commonly referred to as the

[13] Steiner 2006, 26; Arrowsmith 2010a, 353.

[14] See *ex multis* Arrowsmith/Anderson 2011, 30/31, Reich 2009, 1011 ff.

[15] Arrowsmith/Anderson, 31.

[16] As listed in Annexes 1, 2 and 3 of the WTO Agreement.

[17] As listed in Annex 4 of the WTO Agreement.

"north-south divide". This divide becomes apparent also in the case of the GPA with a vast majority of its Signatory States being developed economies.

Up to date, Annex 4 encompasses two plurilateral agreements: the GPA and the Agreement on Trade in Civil Aircraft.[18] Conceptual disagreement exists about the legal status of some "new generation agreements", namely the "Information Technology Agreement" (ITA) (first negotiated in 1997 and last revised in 2016), the "Agreement on Basic Telecommunication and the Agreement on Financial Services" and, finally, the "Environmental Goods Agreement" (currently under negotiation). As opposed to the GPA, these agreements are not based on reciprocity, but extend their benefits to all WTO Member States (provided that membership reaches a critical mass). However, since these agreements are not listed in Annex 4, it is not clear whether they are covered by the term "plurilateral agreements" as defined in Article II:3 WTO Agreement.[19]

Plurilateral agreements are not without controversy. On the one side, they run counter to the idea of the WTO as a platform with a common understanding of the rules for world trade.[20] On the other side, however, they provide additional flexibility to WTO Member States.[21] Given the situation of political stalemate, plurilateral agreements are often viewed as an alternative to keep the WTO in pace with the changing realities of the market.[22]

6.2.2 Enforcement Mechanisms

One of the most significant achievements of the 1994 GPA (as opposed to its predecessor the Tokyo Code) was the introduction of a two-level challenging system.[23] Accordingly, GPA Signatory States have to grant aggravated (foreign and local) bidders access to a domestic challenging system, to enable individuals to enforce their rights under the GPA.

The pertinent provision in this regard, Article XVIII ("Domestic Review Procedures"), obliges GPA Parties to provide for a "timely, effective, transparent and non-discriminatory administrative or judicial review procedure." Claims can be raised on two grounds: firstly, for a breach of the GPA and secondly, for a failure to comply with a Party's measures to implement the GPA (Article XVII:1).

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[18] The "International Diary Agreement" and the "International Bovine Meat Agreements" were terminated in 1997.

[19] While Draper/Dube, *passim*, classify the ITA as "inclusive plurilateral agreements", Hoekman/Mavroidis *passim*, have coined the term "critical mass agreements", distinguishing them from plurilateral agreements.

[20] Hoekman/Mavroidis, 333–334.

[21] *Ibid*.

[22] Draper/Dube, *passim* or Hoekman/Mavroidis, *passim*.

[23] Reich 2009, 1014.

The right to bring procedures is granted to (foreign or domestic) suppliers who have (or had) an interest in the procurement. The definition of the term "supplier" in Article I:1(t) GPA clarifies that not only actual but also potential suppliers have the right to raise a complaint.[24] In this regard Article XVII GPA sets forth some minimum judicial safeguards that GPA Parties have to meet.[25]

When domestic legal remedies are exhausted, a GPA Party can take action by means of the WTO Dispute Settlement Mechanism (DSM), i.e. bring an alleged discrimination of his citizen (through another GPA Signatory State or their contracting authority) before a Panel and the Appellate Body (Article XX GPA). In this regard, Article XX:3 GPA states that the procedural rules of the DSU apply in any GPA related disputes before the DSM. However, challenges before the WTO DSM remain rare; in only two cases a GATT/WTO Panel was established to decide upon an alleged violation of the GPA.[26]

The 2012 revision weakened the requirements for national challenge procedures and the obligations to provide remedies. One example is the requirement of independence: while the GPA 1994 required an "independent review body with no interest in the outcome of the procurement" (Article XX.6 GPA 1994), the GPA 2012 merely requires an "impartial administrative or judicial authority that is independent of its procuring entities" (Article XVIII.4 GPA). Furthermore, the GPA 1994 contained the guarantee of a direct contestability of the GPA. The revision in 2012, however, contains the wording "where the supplier does not have a right to challenge directly a breach of the Agreement" (Article XVIII:1 GPA), implicitly limits challenges to failures to comply with a Party's measures to implement the Agreement. This weakening of the GPA-remedies, which can be explained with the overall goal to expand membership of the GPA through enhanced flexibilities, was met with criticism by Reich.[27]

Moreover, legal uncertainty remains regarding the result of challenging procedures:[28] do the judges (or the administrative review bodies) have to grant the right to receive damages/compensation of an aggravated bidder? To what extent are they obliged to postpone the effectiveness of a public procurement contract that was concluded in violation of GPA law? To what extent are they allowed or even obliged to grant damages to an aggravated bidder that has won a case? The GPA revision has failed to provide clarity and the question of the extent of damages or the question of suspension remains open.

Challenging procedures are also relevant within the context of GPP. On the one hand, a bidder who was discriminated through environmental criteria could raise a

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[24] Article 11(t) GPA states that supplier means "a person or group of persons that provides or could provide goods or services."

[25] See Matsushita, 309–313.

[26] See GATT Panel Report, *Panel on Norwegian Procurement of Toll Collection Equipment for the City of Trondheim*, adopted 13 May 1992, [*Norway – Trondheim Toll Ring*]; Panel Report, *Korea – Measures Affecting Government Procurement*, adopted 19 June 2000 [*Korea – Procurement*].

[27] Reich 2009, 1014–1017.

[28] *Ibid.*, 1014.

claim for violating GPA law through discriminatory green specifications or evaluation criteria.[29] On the other hand, whether a bidder could enforce a "right for GPP" remains uncertain because the new GPA provisions on GPP are discretionary provisions. It is, however, conceivable for a bidder who included green criteria in his offer to raise a claim on the basis that the contracting authority failed to evaluate "the most advantageous tenderer" (for example, focusing too much on price) and thus violated Article XV GPA.[30]

6.2.3 Scope: "Covered Procurement"

The GPA applies to "covered procurement" (Article II:1 GPA). However, the question of what is covered or not depends from country to country, as Signatories can negotiate coverage as specified in their individual schedules (listed in Appendix I).[31] Therefore, the analysis of whether or not a certain public contract falls within the scope of the GPA requires an individual analysis of the respective Signatory State's schedule.

Article II GPA sets forth various requirements that determine whether a Party's public contract is "covered procurement" and falls within the scope of the GPA:

1. The first step according to Article II:2 GPA is to test whether the procurement contract is conducted by *a procuring entity* that is listed in the Party's individual schedule and whether it exceeds the stated *threshold value* (also listed in Appendix I). Article II(5)–(8) GPA provides guidelines on the calculation of the of a contract.
2. According to Article II:2 GPA, covered procurement refers to "procurement for *governmental purposes*" and "not procured with a view to commercial sale or resale (…)." This criterion reflects the wording of Article III:8 GATT.[32] If GPA jurisprudence would adopt an equally narrow interpretation, this would significantly limit the scope and coverage of the GPA.[33]
3. Furthermore, the procurement process needs to be concluded by *contractual means* (Article II:2(b) GPA).
4. Finally, it cannot be covered by the exceptions in Article II:3 GPA or any the Parties individual exclusions in Appendix I.

[29] For the various requirements see below, Sects. 6.4 and 6.5.

[30] See below, Sect. 6.5 of this chapter as well as Sects. 8.4 and 10.4.

[31] The Annexes in Appendix I are structured as follows: Central government entities (Annex 1), Sub-central government entities (Annex 2), All other entities (Annex 3), Services covered by the Agreement (Annex 4) and Construction Services (Annex 5).

[32] See above, Sect. 5.2.

[33] See above, Sect. 5.2.2.2.

As a result of the 2012 revision most of the GPA Signatory States extended their coverage also to local contracting entities.[34] The thresholds vary slightly, from an average value of 130,000 Special Drawing Rights (SDR), amounting to around US$181,000, for goods and services procured by central government entities, to 5 million SDR (US$7 Mio) for construction contracts. Threshold values for Annex 2 and 3 (sub-central and other entities) tend to be slightly higher.

6.3 Non-Discrimination Principle

The GPA aims at opening up public procurement markets worldwide and at promoting good governance in public procurement systems.[35] These objectives are achieved by means of the principles of non-discrimination and transparency (see Article IV GPA).[36]

These two principles are closely interrelated: the transparency principle gives effect to the principle of non-discrimination, for example, by making it difficult to conceal discriminatory behavior and by reducing transaction costs and asymmetry of information.[37] Both principles are particularly important for international public procurement. Absence of transparency, for example, often has a disproportionate effect on foreign suppliers—if relevant information is not published, it may be more difficult for foreign tenderers to obtain it than for domestic tenderers.[38]

While transparency concerns in international procurement have moved to the background,[39] the compatibility of GPP with the GPA non-discrimination principle is a concern that is still often raised by legislators and procuring authorities.[40] This thesis, therefore, focuses on the analysis of the non-discrimination obligation, delineating its scope to draw conclusions on the limits posed to GPP.

The principle of non-discrimination in Article IV GPA is the "bedrock foundation" of the GPA.[41] The first two paragraphs of Article IV contain general provisions on non-discrimination (both national treatment as well as MFN), while the remaining paragraphs 3–7 address specific issues, namely electronic means, conduct of procurement and rules of origin.

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[34] https://e-gpa.wto.org/en/ThresholdNotification/FrontPage.

[35] Weber / Menoud, 186; Lang / Steiner, 22 *et seq.*; Anderson / Osei-Lah, 61 *et seq.*

[36] Arrowsmith 2003, 168; Weber / Menoud, 186; Corvaglia 2017, 116 *et seqq.*

[37] Arrowsmith 2011, 286; Arrowsmith 2003, 169.

[38] Arrowsmith 2003, 170.

[39] *Ibid.*, 354.

[40] Switzerland is one example, see below, Chap. 9.

[41] Arrowsmith 2011, 286.

6.3.1 General Non-Discrimination Provision (Article IV:1)

Article IV:1 GPA contains the general non-discrimination principle, reflecting the wording of the national treatment and MFN provisions of the GATT/GATS:

> 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 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;
b) and goods, services and suppliers of any other Party (emphasis added).

While "treatment no less favourable" is adopted from the GATT/GATS national treatment provisions in Articles III GATT and XVII:1 GATS, "immediately and unconditionally" is derived from the MFN provisions in Articles I:1 GATT and II:1 GATS. In the same line, Subparagraph a expressly refers to national treatment (foreign vs. domestic good, services and suppliers), while subparagraph b contains the MFN element (goods, services and suppliers of various GPA Parties).

However, unlike the GATT/GATS, the GPA refers to GPA parties on a legislative or executive level ("each Party") as well as to the respective procuring authorities ("including its procuring entities"), addressing both the process of legislation ("Rechtsetzung") as well as the application of the law ("Rechtsanwendung").

The key term of "no less favourable treatment" has been subject to numerous disputes in the GATT/GATS context: Panels and the Appellate Body have consistently interpreted it as the requirement to ensure *equal competitive conditions*.[42] Less favourable treatment is thus conferred, when the measure potentially "modifies the conditions of competition in the relevant market to the detriment of imported products."[43]

The word "immediately" has so far never given rise to controversies and can thus be interpreted according to its dictionary meaning as "without any intervening time or space." However, the exact meaning of the term "unconditional" is less clear. In various disputes the WTO adjudicatory bodies interpreted it in a broad way.[44] Accordingly WTO Member States may generally attach conditions to the granting of an advantage, but not base these conditions on the origin of the respective goods.[45]

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[42] See e.g. GATT Panel Report, *United States – Chapter 337 of the Tariff Act of 1930*, adopted on 7 November 1989 [*US – Chapter 337 Tariff Act*]; ABR, *US – Gasoline;* Appellate Boy Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, adopted 10 January 2001 [*Korea – Various Measures on Beef].*

[43] ABR, *Korea – Various Measures on Beef*, para. 135 *et seq*.

[44] See e.g. Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, adopted 23 July 1998 [*Indonesia – Autos*], Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000 [*Canada – Autos*].

[45] Panel Report, *Canada – Autos*, para. 10.29, as upheld by the ABR which states that "[A violation of] Article I:1 depends upon whether or not such conditions discriminate with respect to the origin of products".

This case-law analysis shows that any distinction based on origin, irrespective of the effect, is *per se* incompatible with the non-discrimination obligation.[46] For public procurement this means that procuring entities cannot set forth different requirements based on different nationalities (of the suppliers) or origins (of the products or services to be procured). Any legal or factual distinctions (e.g. LCR or knowledge of the local environment) would presumably be condemned as a violation of Article IV:1 GPA by a Panel or the Appellate Body.

6.3.2 Article IV:2: "FDI-Provision"

Apart from the elements that reflect the GATT/GATS wording, Article IV:2 furthermore contains a GPA-specific provision stating that (emphasis added):

(…) a Party, including its procuring entities, shall not:

(a) treat **a locally established** supplier less favourably than another locally established supplier on the basis of the degree of **foreign affiliation or ownership** or
(b) 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 reference to locally established foreign suppliers in Article IV:2(a) GPA is an important anti-circumvention provision. It clearly extends the non-discrimination obligation to suppliers that are neither entirely domestic, nor foreign. This often becomes relevant in the case of firms that are owned by various stakeholders, or locally established firms that are owned by foreign nationals.[47] In today's globalized and interlinked economy with cross-border equity ownership, such specifications are increasingly important to avoid legal uncertainty.

By referring to "locally established [foreign] suppliers", Article IV:2(a) GPA extends the scope of the non-discrimination obligations to foreign direct investment (FDI). FDI serves as an important economic driver, especially for developing or emerging economies. Thereby, legal security is a key factor for attracting investors. Therefore, 160 countries have signed the Convention of the "International Centre for Settlement of Investment Disputes" (ICSID), which provides investment dispute resolution mechanisms.

With the coverage of FDI in the GPA the international community has gained another tool for the protection of foreign investors. Members of the GPA can now enforce the rights of foreign investors through the WTO DSM, which provides for a

[46] PR, *Korea –Beef*, para. 627, as upheld by the ABR.

[47] Gordon/Rimmer/Arrowsmith, 184 refer to a study from the United Kingdom showing that in 1994, 99.5% of all successful bidders in the country were UK-based, however, only 64% per cent UK-owned. Today, more than 20 years later, this percentage has presumably decreased even further due to the increasing internationalization of companies worldwide.

more effective enforcement mechanism than the ICSID. GPA membership could thus serve as a proof for legal security and good governance.[48]

The importance of the FDI provision is further reinforced by current developments. As shown by a study from the EU, foreign participation in domestic procurement markets is more likely to occur through foreign tenderers with local establishments (13.9% of the total value) than through actual cross-border bidding by foreign tenderers located in their respective countries (only 3.5% of the total value).[49]

Moreover, Article IV:2(b) GPA offers increased protection for local suppliers. Like all WTO agreements, the GPA does not contain rules to prohibit reverse discrimination ("Inländerdiskriminierung"). Through prohibiting the discrimination of local suppliers offering foreign goods or services from other GPA countries, Article IV:2(b) GPA at least provides for a minimal degree of protection from reverse discrimination.

6.3.3 Other Non-Discrimination Provisions

Apart from Article IV GPA, the GPA contains various provisions that further undermine the principle of non-discrimination; e.g. Article XI GPA (Time-Periods) stating that "time-period, including any extensions of the time-periods, shall be the same for all interested or participating suppliers" (Article XI:1 GPA). Another example includes Article XV GPA (Treatment of Tenders and Awarding of Contracts) that further reinforces the obligation to treat tenderers equally.

6.4 Technical Specifications

Technical Specifications are an important instrument for GPP implementation:[50] they are the means to specify the mandatory environmental requirements for the products or services to be procured. Examples of technical specifications referring to mandatory environmental requirements ("green" technical specifications) may include the requirement to use recycled materials, set forth a maximal level of GHG emission, or to prove compliance with environmental standards (e.g. based on verification mechanisms).[51]

[48] In the words of Lang / Steiner, 22, GPA membership can serve as a "stamp of approval".

[49] EU Commission 2016, 15.

[50] See above, Sect. 3.6.

[51] Arrowsmith 2003, 303.

However, in the context of international procurement it is important to note that differences in technical specifications can amount to barriers to trade.[52] To apply green technical specifications in a uniform manner, it is therefore of utmost important to be aware of the specific rules that place limits on the application of technical specifications.

6.4.1 Scope: Legal Analysis of the Wording

6.4.1.1 Explicit Reference

Green technical specifications are now expressly provided for in Article X.6 GPA, which states 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** (emphasis added).

Before the revision of 2012, it was not clear whether national GPP rules and practices of GPP were permissible under the GPA. The text of the GPA did not at all mention the issue. Since 2012, however, Article X:6 GPA makes it clear that green technical specifications are, *per se*, permissible under the GPA. While this was quite clear for those GPA Parties already applying GPP in their domestic regulations, namely the EU Member States, this can be considered quite a significant paradigm change for others.

However, although the new text of the GPA clearly clarifies that green technical specifications are allowed, it does not specify *to what extent* green specifications are permissible, i.e. how far governments and contracting authorities of a GPA Member State can go until they are considered in violation with the other principles of the GPA.

Green technical specifications may have a discriminatory effect and cause conflicts with the rules of the GPA. Direct discrimination occurs where contracting authorities deliberately set forth green technical specifications in a way that shows a preference to certain domestic industries or even favors a certain supplier.[53] Indirect discrimination, however, may occur without protectionist motives. Examples include cases where contracting authorities refer to national environmental rules (or standards) that may be difficult to comply with by foreign tenderers,[54] or where contracting authorities consult national suppliers before setting out the technical specifications.

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[52] Like it is the case with technical regulations, see above Sect. 5.3.2; Gordon/Rimmer/Arrowsmith, 28.

[53] Arrowsmith 2003, 305–306.

[54] It is a well-known issue that different rules in different countries cause transactions costs for cross-border trade, since supplier have to meet different requirements or use different verification mechanisms.

The delicate delineation between permissible and discriminatory green technical specifications is illustrated well with this example: while it is undisputed that contracting authorities may set forth certain levels of energy efficiency when procuring electronical devices, it is not, however, clear how high the level may be set. Even if the country at issue has in force a technical regulation requiring energy efficiency level B, for example, for the placing into the market of electronic devices, a contracting authority may go “beyond the law”[55] and require energy efficiency level A. However, in theory, this might make them vulnerable to be challenged before the WTO dispute settlement bodies, which would have to determine the GPA compatibility of such a practice on a case by case basis.

Given these tensions arising from the non-discrimination requirements of the GPA and the environmental protection goals of a GPA country, green technical specifications require a careful balancing test. The starting point to determine the scope for green technical specifications for GPA Member States is a textual analysis of Article X:6 GPA, according to the rules of textual interpretation as set forth in Articles 31 and 32 VCLT.[56] Since Article X:6 GPA has so far not been subject to interpretation by a Panel or the Appellate Body, the context will significantly be informed by the jurisprudence on analogous terms set out in the GATT or other multilateral agreements.[57]

6.4.1.2 Definition of Technical Specification

The list of definitions in Article I GPA, which was introduced with the 2012 revision, defines “technical specification” in Article I.u GPA as:

> ***Technical specification*** *means a tendering requirement that:*

i) “lays down the *characteristics* of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision”; or
ii) “terminology, symbols, packaging, marking or labelling requirements as they apply to a good or service”

Two aspects of this definition are worth mentioning. Firstly, the definition also includes PPM. This is not a novelty of the GPA 2012, but was already introduced into the 1994 GPA during the Uruguay Round (most likely influenced by the TBT Agreement, which contains a similar wording in its definition for the term

[55] For a distinction between horizontal policies securing compliance with legal requirements and those who go beyond such requirements see Arrowsmith 2010b, 14–168.

[56] See above, Sect. 1.4.

[57] According to Article 31.3. (b) VCLT the “context” for the purpose of the interpretation of a treaty shall comprise in “any agreement (…) which was made between all the parties”.

"technical regulation").[58] However, in combination with the new provision on GPP, this inclusion of PPM may gain relevance.[59]

Secondly, it is the reference to "labeling requirements" (i.e. labels)[60] that calls for attention. As pointed out by Corvaglia, the use of labeling- and certification-schemes has drastically increased as an instrument of verification for environmental criteria.[61] The direct reference in Article I.u GPA suggests that designing technical specifications to require a certain label is generally permissible under the GPA. However, as has been shown by regional and national jurisprudence, labeling requirements are a controversial issue, running the risk of discriminating against foreign tenderers.[62] Therefore, labeling requirements, especially eco-labels, have to be designed within the borders of the non-discrimination obligation and cannot create unnecessary obstacles to trade, as will be shown in the further course of this chapter.[63]

6.4.1.3 Conservation of Natural Resources/Protection of the Environment

Article X:6 GPA aims at the "conservation of natural resources" and the "protection of the environment." For the first term, GATT jurisprudence can be consulted as relevant context:[64] Article XX(g) GATT contains similar wording, justifying measures "relating to the conservation of exhaustible natural resources". Whereas the term "conservation" equals "preservation of the environment",[65] the Appellate Body has adopted a broad interpretation for "exhaustible natural resources": it was found to include, on the one hand, air,[66] petroleum,[67] minerals and other raw materials,[68] on the other hand, also living creatures, such as turtles.[69] It is also broadly acknowledged to include the atmosphere, as well as biodiversity.[70]

[58] Annex 1.1 TBT defines "technical regulations" as: "Document which lays down product characteristics *or their related processes and production methods* (…)."

[59] See below, Sect. 6.4.3.

[60] For an assessment of the term "label" and "labelling requirement" see Weber 2018, 240, fn 4.

[61] Corvaglia 2016, 607.

[62] See below, Sect. 6.4.4 as well as Sect. 8.6.

[63] *Ibid.*

[64] Article 31(2)(a) VCLT specifies that "Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" is relevant context.

[65] Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, adopted 22 February 2012 [*China – Raw Materials*], para. 3.55; Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, adopted 29 August 2014 [*China Rare Earths*], para. 7.372.

[66] PR*, US – Gasoline*, para 6.36.

[67] ABR, *US – Shrimp*, para. 128.

[68] PR, *China – Rare Earths*, para. 7363.

[69] ABR, *US – Shrimp*, para. 128.

[70] Kaufmann/Weber 2011, 512.

Notably, Article X:6 GPA goes further than Article XX(g) GATT. It does not only protect the conservation of *exhaustible* natural resources, but natural resources in general, which includes also renewable resources (such as wood) and all living creatures, not only endangered ones.

The second term in Article X:6 GPA, the term "to protect the environment" does not exist anywhere else within WTO law and has thus not been clarified by jurisprudence either. However, Article XX(b) GATT, referring to "measures necessary to protect human, animal or plant life or health", is often invoked to justify environmental measures.[71] Article XX(b) GATT arguably aims at the same protection objective as Article X:6 GPA, covering measures addressing the prevention (or mitigation) of damages on flora and fauna,[72] or the reduction of air pollution.[73] Therefore, countries have often invoked Article XX(b) GATT to justify their domestic environmental measures. Thereby, the meaning of the term "protection of human, animal or plant" life was not the subject of controversy in the disputes, but rather the meaning of the term "necessary to", which will be further elaborated upon in the following.

From a comparison with general WTO law it follows that the protection aim/policy objective of Article X:6 GPA is broad, encompassing a wide range of measures to protect environmental goods and natural resources of any kind, including the atmosphere, flora and fauna or the biodiversity as a whole. Therefore, technical specifications can specify any characteristics that have a beneficial effect on natural resources or on the environment.

6.4.1.4 Nexus-Requirement

Article X:6 GPA refers to technical specifications *to promote* the conservation of natural resources or *to protect* the environment. This requires a subjective component and a causal link ("nexus"): the respective green technical specifications have to be designed with the aim (and the effect) of achieving the envisaged protection goal.

Thereby, it is worth mentioning that the GATT provisions analyzed above also require a nexus between the measure at issue and the policy objective. Article XX(b) GATT requires the strongest nexus, referring to measures "*necessary* to protect human, animal or plant life or health", requiring a strong link between the measure at issue and the protection objective under consideration of potentially less trade restrictive alternative measures.[74] The "relating to"-criterion in Article XX(g) GATT

[71] See for example Panel Report, *China – Rare Earths*, where China based its Article XX(b) defense on the assertion that the contested measure was part of a comprehensive policy "to protect the environment."

[72] Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, adopted 17 December 2007 [*Brazil – Retreaded Tyres*], para 7.45.

[73] Panel Report, Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, adopted 21 November 2006 [*EC– Biotech*], para. 7.210.

[74] See e.g. ABR, *Korea –Beef*, paras. 152 ff., or ABR, *EC – Asbestos*, paras. 155 *et seqq.*

requires a "close and genuine relationship of ends and means" between the measure and the conservation objective[75] and asks whether the measure is suitable to achieve the desired level of protection.[76]

It is suggested that the nexus requirement under Article X:6 GPA can be put on a similar level as the "relating to"-criterion in Article XX(g) GATT. Accordingly, a technical specification has to be *suitable* to protect the environment or conserve natural resources. For instance, low CO_2-reduction in the production process (or compensation of CO_2 through participation in the ETS) could be a conceivable specification covered by Article X:6 GPA, but might fail the test under Article XX(b) GATT.[77]

6.4.1.5 Discretionary Provision: "May…"

WTO law does not only contain mandatory framework provision, i.e. provisions requiring a government to take or not to take a particular action, but also discretionary provisions, i.e. provisions enabling a government to take or not to take a particular action. Discretionary provisions are usually indicated with the word "may" (as opposed to the mandatory wording of "shall").[78]

As interpreted by the WTO adjudicatory bodies, the ordinary dictionary meaning of "may" as an auxiliary verb is "to have the ability or power, can."[79] Although there are certain circumstances where, depending on the context, "may" can establish a mandatory obligation,[80] it usually indicates that there is no legal obligation.[81]

Article X:6 GPA thus makes technical specification an option, not an obligation. Member States, including their procuring entities, are not required to consider ecological criteria in their technical specifications, but can do so as they deem appropriate.

[75] ABR, *US – Shrimp*, para. 136; ABR, *Korea – Beef*, paras. 152 *et seqq.*, or ABR, *EC – Asbestos*, paras. 155 *et seqq.*

[76] Trachtman 2016, 60.

[77] Kaufmann/Weber 2011, 515.

[78] This is also acknowledged by the Swiss government in Botschaft Teilrevision, 1860, where the Federal Council points to the fact that the GPA contains mandatory (marked by the wording of "shall") as well as discretionary provisions.

[79] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, adopted 19 May 2003 [*Argentina – Poultry Anti-Dumping* Duties], para. 8.5.

[80] Cook, 16.10.

[81] See for example Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, adopted 20 April 2004 [*EC – Tariff Preferences*], para 7.38 or PR, *Argentina – Poultry Anti-Dumping Duties*, para. 8.5.

6.4.1.6 "In Accordance with This Article"

Article X GPA contains some limitations that need to be considered when setting green technical specifications. Article X:6 GPA specifies that they need to be "in accordance with this Article." The following five obligations arise from Article X GPA:

1. *Necessity-test*: Green technical specifications shall not amount to "unnecessary obstacles to international trade" (Article X:1 GPA).
2. *Functionality*: Green technical specifications shall be based on performance and functional requirements as well as on international standards (Articles X:2 and X:4 GPA).
3. *"Or equivalent"-requirement*: Contracting authorities need to consider equivalent offers, when setting technical specifications in a restrictive way (Articles X:3 and X:4 GPA).
4. *Anti-corruption*: Green technical specifications cannot be defined in cooperation with persons with commercial interests in a manner that would be bad for competition (Article X:5 GPA).
5. *Transparency*: Green technical specifications are subject to various publications and information obligations (Articles X:7 and Article X:10 GPA).

These obligations constitute the limits of green technical specifications and will thus be assessed in turn in the following.

6.4.1.7 "For Greater Certainty"

Article X:6 GPA is introduced by the words "for greater certainty." This introductory clause cannot be found in any other WTO agreement. Its origin is influenced by EU law; its meaning, however, is not clear. An optimistic scholar suggests that this was added to the wording of the text to undermine once and for all that green technical specifications are allowed under the GPA.[82] Arrowsmith however, points out that the introductory clause only serves to reinforce the status quo for green technical specifications under the GPA 1994,[83] and that the level of added certainty is "rather limited."[84] Furthermore, it is confusing why Article X:9 on evaluation criteria does not contain an analogous or similar introductory clause.

Article X:6 GPA does not resolve the question of exactly what kinds of environmental technical specifications can be considered in the procurement process. Nevertheless, if procuring entities design and publish their green technical

[82] Reich 2009, 1012. Arrowsmith 2011, 323.

[83] Arrowsmith 2011, 323: "no change is intended to the present position, as it states that it is included 'for greater certainty'."

[84] Arrowsmith 2011, 323.

specifications in a clear and transparent way, this will enhance legal certainty for tenderers that environmental criteria are considered and specifies how they will be considered.

A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.

6.4.2 Limits

6.4.2.1 General Non-Discrimination Principle

As elaborated above,[85] the general non-discrimination principle enshrined in Article IV GPA prohibits Parties (including their procuring entities) to accord treatment less favourable to goods and services offered by suppliers from other GPA States. This obligation of equal treatment also extends to situation where domestic (or locally established foreign) suppliers offer goods or services originating in another party's territory (Article IV.2 GPA).

It is needless to say that the non-discrimination principle also applies to (green) technical specifications. Accordingly, GPA Parties (i.e. their procuring entities) need to design technical specifications in a way not to accord treatment less favorable. As shown in Sects. 5.1 and 6.3, relevant jurisprudence within the context of the GATT suggests that this means that contracting authorities have to design (green) technical specifications in a way that the conditions of competition do not change to the detriment of foreign suppliers.

However, as a general principle, Article IV GPA remains vague and does not provide procuring entities with clear guidance on how to design green technical specifications. Therefore, Article X GPA provides a set of specifying, clear requirements that constitute some guidelines for green technical specifications and, at the same time, also delineates their limits.

6.4.2.2 Necessity-Requirement

The first requirement in Article X:1 GPA states that (green) technical specifications (or conformity assessment procedures) shall not be designed "with the purpose or the effect of creating unnecessary obstacles to international trade." Thereby, the most apparent question is: when is an obstacle to trade considered "necessary"? Or to put it in more formal terms: against which benchmark can "necessity" be determined?

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[85] See Sect. 6.3.

Procuring entities are generally granted a broad discretion to define their level of protection for a legitimate policy objective. They can, for instance, decide to procure an ecologically friendly bus fleet and draft their technical specifications accordingly. It is thus not possible to challenge a (green) technical specification based on the claim that the level of (environmental) protection is too high.[86] Countries can only submit claims on the basis that the same protection level could have been achieved using a less trade restrictive technical specification.[87] Moreover, as stated by Arrowsmith, a restriction can be considered "necessary" if there is no policy justification for it.[88]

Guidelines for the legal test to determine necessity can be found in jurisprudence concerning the TBT and the GATT. The former sets forth that technical regulations cannot create "unnecessary obstacles to international trade" (Article 2.2 TBT) and the latter states that justification measures need to be "necessary" to achieve the respective protection goal (Articles XX(a), XX(b) and XX(d) GATT).

In the course of numerous disputes, the WTO adjudicators have established a two-tier test to assess necessity. The first element is the question of *effectiveness*. Does the measure/technical regulation at issue make a "material contribution" to the envisaged protection objective?[89] If this can be answered in the affirmative, the second (slightly stricter) question must be: is there a *less trade restrictive* measure/technical regulation that would equally contribute to the envisaged protection objective?[90]

Although jurisprudence under the GATT and the TBT cannot entirely be transposed onto the GPA, it can still provide some indication of the guidelines along which WTO adjudicators will likely interpret Article X:1 GPA.[91] Accordingly, green technical specifications need to qualify as the "least trade-restrictive option" as compared to alternative, reasonably available, equally effective green technical specifications.[92] However, it can be argued that that the necessity-test under the GPA should be applied less strictly than under the TBT.[93] A differentiation has to be made

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[86] Arrowsmith 2003, 313.

[87] *Ibid.*

[88] *Ibid.*

[89] PR, *US – Clove Cigarettes*, para. 7.331. Unlike Article X GPA, Article 2.2 TBT refers to a "legitimate policy objective" and contains an enumerative list of potential legitimate policy objectives. For jurisprudence on the "material contribution" in the GATT-context see e.g. ABR, *EC – Asbestos*, paras. 155 *et seqq*.

[90] RR, *US – Clove Cigarettes*, para. 7.331.

[91] The GATT and the TBT are the relevant "context" of the GPA in line with Article 31.1 VCLT, as was elaborated above, Sect. 1.4. This view is reaffirmed by the Panel in *US – Clove Cigarettes* that stated in paras. 7.353 – 7.368 stated that some aspects of Article XX(b) GATT jurisprudence "may be taken into account in the context of interpreting Article 2.2 TBT". Furthermore, Arrowsmith 2003 as well as Reich 1999 both take the view that the TBT and the GPA are relevant by analogy.

[92] The Appellate Body in *EC – Asbestos* stated in para. 170 that an alternative measure is considered "reasonably available", if the country at issue could reasonably be expected to employ it to achieve the respective policy objective.

[93] Arrowsmith 2003, 316.

between the government as a consumer (setting technical specifications) and the government as a regulator (setting technical regulations), since the former sets requirements that apply to the market as a whole, whereas the latter is applicable only to one particular procurement contract.[94]

6.4.2.3 Conformity Assessment Procedures

However, Article X:1 GPA does not only refer to technical specifications; also "conformity assessment procedures" may not amount to unnecessary barriers to trade. These are defined in Annex 1.3 TBT Agreement as: "Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled (…)." In other words, conformity assessment procedures are regulated procedures used to *verify* that the pertinent technical regulation (or in the case of public procurement technical specification)[95] is fulfilled by the producer or supplier.

Although conformity assessments are strongly regulated procedures, they can also be carried out by private actors, provided that those are accredited.[96] Since country specific conformity assessment or accreditation procedures may amount to technical trade barriers, countries often negotiate "Mutual Recognition Agreements" (MRA). Through MRA, the conformity assessment and accreditation procedures of one country are also recognized as equal in another country.

Conformity assessment procedures are relevant for public procurement, since technical specifications often call for verification. If verification comes in the form of a conformity assessment, these procedures can *de facto* be a competitive disadvantage for foreign supplier, since it can mean the double burden of having to undergo conformity assessment procedures in two countries (for the same product or service). Therefore, Article X:1 GPA sets forth that conformity assessment procedures as well as technical specifications should not put unnecessary obstacles to international trade.

6.4.2.4 Functionality and Performance-Orientation

The GPA essentially distinguishes between technical specifications in terms of "performance and functional requirements" on the one hand, and in terms of "design or descriptive characteristics" on the other hand.

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[94] See also Steiner 2006, 41.

[95] Technical regulations and technical specifications may be overlapping concepts, see above, Sect. 5.2.2.

[96] "Accreditation" means the formal recognition of a private body (usually through a governmental accreditation body) to qualify as a conformity assessment body and to conduct conformity assessment procedures in the prescribed field.

The term "functional" generally refers to "relating to activity rather than to structure or form."[97] Accordingly, technical specifications in terms of functional requirements refer to the purpose or the expected outcome of the good or service to be procured, leaving it to the supplier to decide the details on how to achieve it. Technical specifications in terms of performance relate to the implementation or the execution of the procurement contract.

Technical specifications based on "design or descriptive characteristics" refer to specific detailed requirements, such as size, esthetics, appearance as well as the strength or texture of certain materials. They, however, run the risk of being discriminatory, restricting competition and innovation. Therefore, Article X:2(a) GPA[98] recommends that, wherever appropriate, technical specifications should be "in terms of performance and functional requirements rather than design or descriptive characteristics."

The functionality and performance specification requirements become all the more important in the context of GPP. If ecological tendering requirements are too detailed and restrictive this may prevent some suppliers from submitting proposals. A technical specification, for example, requiring a bus fleet to be run by biogas fuel may give a competitive advantage for biogas car providers, putting other potential suppliers at a disadvantage. If, however, the contracting authority sets a maximum amount of CO_2 emissions for the bus fleet (or a vehicle), they avoid protectionist consequences and still contribute to environmental protection.

However, Article X:2(a) GPA applies only "when appropriate." As pointed out by Arrowsmith, technical specification in terms of performance and functional requirements can be difficult and costly to draft.[99] If procuring authorities consider them too costly (and thus not "appropriate"), it lies within their discretion to refer to technical specifications in terms of "design or descriptive characteristics".

6.4.2.5 International Standards

Article X:2(b) GPA states that procuring entities shall, wherever appropriate, base technical specifications on international standards. A standard is defined in Article I(s) GPA as "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 (…)." As the legal definition points out, standards can contribute to (international) harmonization and, consequently, facilitate mutual recognition. Furthermore, standards enjoy a high level of credibility, since they are developed by experts.[100]

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[97] Oxford Shorter Dictionary 1, 1042.

[98] A very similar provision was contained in Article VI:2(a) 1994 GPA.

[99] Arrowsmith 2003, 318.

[100] Therefore, a national technical regulation based on an international standard does presumably not create an obstacle to international trade (Article 2.5 TBT).

Such “recognized bodies” can be public or private in nature. While some countries have a very centralized structure with a national standardization body in charge of developing standards, other countries have a more heterogeneous structure with various organizations establishing (voluntary) standards, which might then become mandatory through acknowledgement of government agencies.[101] Traditionally, standardization bodies operated mainly on a national level, however, in recent years they have become increasingly regional or even global. This is illustrated by the fact that the International Organization for Standardization (ISO), the most important international standardization body, has doubled the number of standards from 10,000 to more than 21,000.[102]

Also in public procurement, authorities increasingly rely on (international) standards.[103] They can be a valuable and meaningful tool to draft technical specifications and enhance credibility. However, if such standards have been established by only one country on a national level, they might be difficult to implement by foreign tenderers and can thus be a competitive disadvantage. Therefore, Article X:2 GPA recommends that procuring entities resort to international standards, to the extent they exist. An assumption in analogy to Article 2.5 TBT suggests that technical specifications based on international standards might also create the assumption that they are not unnecessary obstacles to international trade and thus in accordance with Article X:1 GPA.[104]

It is worth noting that the GPA, on the one hand, only refers to existing standards. The TBT, on the other hand, has a broader scope mandating Member States to base technical regulations on existing standards and those whose completion is imminent (Article 2.4 TBT).[105] If international standards do not exist, the GPA recommends the use of “recognized national standards” instead (or building codes).

6.4.2.6 Equivalence, Prohibition of Trademarks

Article X:3 GPA states that procuring entities referring to design or descriptive technical specifications should indicate that equivalent tenderers will also be considered (provided that these tenderers “demonstrably fulfill the requirements”). This has to be indicated by adding “or equivalent” to the respective technical specification.

Thereby, Article X:3 GPA aims at limiting potentially protectionist consequences of overtly formal technical specifications through introducing the “or equivalent”-offsetting mechanism. When referring to the example earlier this means that contracting authorities requiring a bus fleet to be fueled by biogas fuel (which is a

[101] World Trade Report 2005, 75.

[102] Pauwelyn 2014, 743 and ISO webpage, available at http://www.iso.org/iso/home/about.htm.

[103] In the context of private standards see Corvaglia 2016, *passim*.

[104] Arrowsmith 2003, 319.

[105] This difference became relevant and was discussed in a dispute concerning the GPA before a Japanese court, see Matsushita, 312–313.

descriptive technical specification) should further indicate that fleets with "equivalent" fueling methods are equally considered in the selection process.

A similar "or equivalent"-requirement is contained in Article X:4 GPA that forbids the use of technical specifications referring to or requiring a *particular trademark*[106] or *trade name, patent,*[107] *copyright, design, type, specific origin, producer or supplier.* Consequently, for example, an Italian procuring entity cannot ask for cars or buses by the brand "Fiat."

The "or equivalent"-requirement is necessary for international procurement because technical specifications referring to a particular trademark run the risk of restricting competition. Their use would only be justified in cases where "there is no other intelligible way of describing the procurement requirements." However, also in these cases, the procuring entity is required to add an "or equivalent"-indication to make sure that equally qualified tenderers can still submit their offers.

In the case of GPP the prohibition of referring to trademarks and similar signs is particularly important in the context of eco-labels, as will be elaborated further below.

6.4.2.7 Rules on Dialogues

Article X:5 GPA addresses what is often referred to as "dialogue" with interested parties in the preparation phase (i.e. the phase when contracting authorities define, *inter alia*, the technical specifications). It states that:

> A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.

This issue has received much attention throughout recent years; the analogue provision in the Tokyo Code was even subject of a dispute before a GATT Panel in the *Norway –Trondheim Toll Ring* case.[108] On the one hand, dialogues can be useful (in some cases even necessary) to increase technical knowledge and to gain a clear understanding of how to define technical specifications. This holds particularly true for GPP. Green technology is a relatively new scientific field that is quickly developing, which can make it difficult for contracting authorities to have the relevant

[106] Article 15 TRIPS defines "trademarks" as: "Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark."

[107] Article 27 TRIPS states that "any inventions" in "all fields of technology" can be considered a "patent", provided that they are "new, involve an inventive step and are capable of industrial application."

[108] *In casu*, the US argued that consultation by a Norwegian entity for the procurement of a toll collection system resulted in discrimination, since only the particular supplier could meet the specifications. However, the Panel having found that the limited tender was in violation of the GPA did not further elaborate on this issue.

knowledge of how to design technical specifications in the most ecologically advantageous way. On the other hand, adopting the advice of market operators runs the risk of favoring them and thereby distorting competition. It is thus important that such dialogues are conducted in a neutral way without threatening competition.

Firstly, Article X:5 GPA addresses (consultations with) "person(s) that may have a commercial interest in the procurement". This refers to potential tenderers, but also to other market competitors or even potential consultants or subcontractors in general.[109] Secondly, Article X:5 GPA forbids dialogues "in a manner that would have the effect of precluding competition". This covers clear cases in which procuring entities draft technical specifications in a way that only the tenderer who consulted the procuring entity can fulfill them. However, the GPA leaves it to Member States to specify other circumstances that qualify as "precluding competition" and to regulate the relationship between dialogues and technical specifications in more detail.

Article X:5 GPA is not entirely new: a similar provision was already contained in the 1994 GPA.[110] However, with the strengthening of the anti-corruption aspect in the GPA,[111] it might gain additional impetus, stressing that contracting authorities have to avoid corruptive behavior when drafting technical specifications. Thereby, Article X:5 GPA highlights that the two problems of corruption and competition often overlap and undermine the role of the GPA as an important instrument in deterring the former and promoting the latter.

6.4.2.8 Transparency: Tender Documentation

Procuring entities are bound to various transparency obligations when defining technical specifications: they "shall make available to suppliers tender documentation that includes *all information necessary to permit suppliers to prepare and submit responsive tenders*" (Article X:7 GPA). The details on how to publish the relevant information are set out in the section "Tender Documentation" in Articles X:7–10 GPA. Accordingly, contracting authorities need to publish a comprehensive description of the required (green) technical specifications.

Furthermore, tenderers have to be given the opportunity to address questions or requests concerning technical specifications to the procuring authority provided that this does not give that supplier and advantage over other suppliers (Article X:10(c) GPA).

Moreover, it is important to note that the GPA does not generally prohibit modifications of technical specifications. The only precondition is that such changes are

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[109] Arrowsmith 2003, 232.

[110] Article VI:4 GPA 1994 stated that "entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement."

[111] See also Arrowsmith/Anderson 2013, 25.

transparently published or communicated to all interested parties (Article X:11 GPA). However, any transparency obligations are useless, except if tenderers are given “adequate time” to allow tenderers to adapt to the published information (Article X:8 GPA and Article X:11 GPA).

6.4.3 Production and Processing Methods (PPM)

Although, as seen above, Article X GPA provides for clear rules on how to design technical specifications, the practical implementation may still raise questions. One of the open questions is in this regard is the differentiation between products as such and their PPM.

PPM are highly controversial in general WTO law,[112] and also unfold relevance in the context of (green) public procurement. While it is clear that governments may regulate product standards, it is not clear to what extent they can also regulate PPM. A further difficulty is added by the distinction in two categories, namely PPM that are directly visible in the end product (“product related PPM”, e.g. the requirement to use a certain distinguishable material or color in the production of a textile) and PPM that are not visible in the end product (“non-product-related”, or npr PPM, i.e. harvesting methods for wood products or labor standards).

Generally, PPM are contentious because of their potentially “extraterritorial effects”,[113] namely the fact that regulations concerning the production of goods adopted by one country develop their effect in another country.[114] Therefore, the prevailing view in WTO law still holds that PPM cannot be the basis for regulatory distinction—at least if they are not directly discernible in the end product (npr PPM).[115] The ongoing controversy surrounding the legality of PPM stands in stark contrast to their increasing importance in reconciling trade and environmental (and also social) issues.[116] To solve this dilemma, recent scholarly opinion draws a more differentiated picture. As pointed out by Kaufmann/Weber the important issue is not banning npr PPM, but rather “preventing the potential abuse of PPM for establishing trade barriers, while at the same time ensuring that the necessary distinctions [on the basis of PPM] are possible.”[117]

While the issue of npr PPM under the old GPA was viewed with skepticism, the new text of the GPA 2012 removed uncertainty. In contrast to general WTO law, the

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[112] See e.g. Charnovitz 2002, *passim.*

[113] See e.g. Charnovitz 2002, 62–63; Cottier/Oesch, 166.

[114] For an analysis of so-called border tax adjustments (BTA) under consideration of PPM see Kaufmann/Weber 2011, *passim*.

[115] See Cottier et al., 11–28. New trends in legal doctrine, however, draw a differentiated picture, leaving space for environmental concern, see e.g. Howse/Regan, *passim*; Charnovitz 2002, *passim*; Kaufmann/Weber 2011, *passim*.

[116] Cottier/Oesch, 166.

[117] Kaufmann/Weber 2011, 506 with references.

GPA wording is clearer about PPM. The legal definition of "technical specifications" in Article 1.u GPA now states:

> Technical specification means a tendering requirement that: lays down the characteristics of goods or services to be procured (…) **or the processes and methods for their production** or provision (emphasis added).

The wording of Article 1.u GPA expressly refers to PPM and makes it clear that technical specifications can refer to product standards but also to PPM- Thereby, this does not only refer to product-related, but also to npr PPM. While the TBT states that technical regulation may refer to "*related* process and production methods" (Annex 1.1 TBT), the GPA does not include such a specification—thus creating the presumption that technical specification may refer equally to product-related as well as npr PPM. This is also supported by an historic interpretation: whereas the GPA 1994 still referred to related PPM (see footnote of Article V.2), the GPA 2012 has crossed out this reference.

Consequently, contracting authorities can set technical specifications considering not only the product *per se,* but also its PPM, favoring products that are produced in a certain way over others. This leaves broad scope for the use of PPM as an instrument of GPP: contracting authorities may not only set environmental specifications directly visible in the end product, but also require that product to be produced in an environmentally friendly manner.

Thus, a contracting entity can, by means of technical specifications, exclude tenderers that do not produce their livestock in compliance with certain pre-defined animal welfare standards. This would arguably not be possible under the GATT or the TBT, both of which would preclude a government from setting forth technical regulations or other measures that would impede the importation of food being produced in a non-animal-friendly way.

From an environmental perspective, the broad scope for PPM (including npr PPM) granted by the GPA is positive. Negative externalities caused by environmental pollution are characterized by the fact that they are invisible and as such harder to measure. Limiting possible green technical specification to visible characteristics would undermine its effectivity and would render GPP an empty shell.

6.4.4 Eco-Labels

Eco-labels provide ecological information regarding the origin, production, performance etc. of a product (or of a service). Prominent examples of eco-labels include the various "organic" labels (indicating sustainable production without chemical additives and, in the case of livestock, under consideration of animal welfare standards), as well as energy labels (indicating the energy use of household appliances

or other electrical devices). Labels differ with regard to compulsoriness:[118] while some are mandatory (e.g. declaration obligations for tobacco products or alcoholic beverages), most labels are of a voluntary nature, leaving the decision to achieve certification to the producer. Although some voluntary labels are regulated by the state, they are usually designed and certified by private actors (see, for example, the Max Havelaar label).

Eco-labels have gained popularity as an instrument for GPP implementation in the planning phase,[119] helping contracting authorities to define the good or service to be procured by means of technical specifications and awarding criteria.[120] Eco-labels make it possible for the contracting authorities to concisely determine clearly measurable ecological minimum criteria for the good or service to be procured. Thereby, reference to labels may save time and costs otherwise involved with elaborating the specifications. It may also add to credibility, given that the labelling schemes are usually elaborated by experts. Furthermore, labels may enable an effective monitoring of the requirements, since certification usually encompasses some kind of verification mechanism.[121] In this regard, eco-labels can significantly contribute to environmental protection on the one hand, and promote international procurement through the harmonization of technical specifications or award criteria on the other hand,.

At the same time, however, basing technical specifications on eco-labels may come into conflict with the non-discrimination obligation for *de facto* favoring national tenderers, since it may be easier for them to comply with nationally established labels.[122] Therefore, although the GPA generally allows for the reference labelling requirements within the framework of specifications (see Article I.u GPA), it is central that contracting authorities take into account the limits when resorting to eco-labels.

Thereby, the most important limit to technical specifications in general and eco-labels in particular is the general non-discrimination principle of Article IV GPA as well as the necessity-test contained in Article X:1 GPA. Those paragraphs require eco-labels not to modify the conditions of competitions of foreign tenderers and not to amount to unnecessary obstacles to trade. Accordingly, the aim and objective of the respective label should be carefully balanced against the burden it imposes—only when the eco-label at issue effectively contributes to the protection of the environment a high degree of trade restrictiveness is justified. Notably, not only the label itself, but also conformity assessment procedures coming with certification for the respective label underlie the necessity-requirement.

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[118] Weber 2018, 241; as Corvaglia 2016, points out on 615, the distinction of mandatory and voluntary labels is blurred.

[119] Corvaglia 2016, 609; Caranta 2016, 101 with reference to Semple 2015, 7.032.

[120] Caranta 2016, 100.

[121] Corvaglia 2016, 612.

[122] Caranta 2016, 100.

A second requirement for eco-labels within the framework of technical specifications is derived from Article X:2 GPA, according to which eco-labels should, when appropriate, be based on international standards. This also entails the requirement to refer to labels based on international labels instead of national ones, since it could be more difficult for foreign tenderers to seek certification thereunder.

Of further significance is the *"or equivalent"-requirement* set forth in Articles X:3 and X:4 of the GPA. Accordingly, contracting authorities have to allow offers that can be considered equivalent to the respective eco-label and clearly indicate this option.

Finally, the rules of disclosure (*transparency requirements*) as stated in Article X:7–10 GPA require contracting authorities to publish all the relevant information about an eco-label, presumably also including certification procedures and to answer questions that suppliers may have.

Unlike EU law,[123] the GPA does not refer to the use of (eco-) labels within the framework of award/evaluation criteria. Since, however, award criteria are not mandatory and thus less strict in comparison to technical specification, a similar (or less strict) standard is suggested to apply for award criteria when referring to eco-labels.[124]

6.5 Evaluation Criteria

Evaluation criteria (or award criteria) are another instrument for GPP.[125] Like technical specifications, evaluation criteria are used to describe physical or functional characteristics of the good or service to be procured. Evaluation criteria are not mandatory, but can be weighted according to their relative importance for the procurement contract.

While technical specifications set forth the minimal standards, evaluation criteria serve to identify the best offer. This is evaluated using the total value of the aggregated scores of all the evaluation criteria that the supplier can meet. Hence, if the contracting authority sets forth green evaluation criteria, a tenderer does not necessarily have to comply with it and provide for green options. However, if he does, he is awarded more points. This in turn gives him an advantage in the evaluation process. Accordingly, suppliers who, for example, offer electricity from renewable energy sources may get awarded additional points.

Due to this flexibility that leaves enough entrepreneurial scope for the economic actors, evaluation criteria can be viewed as the most accurate instrument to implement GPP.

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[123] Article 43 Public Procurement Directive, see below Sect. 8.6.

[124] Weber 2018, 249 *et seq*.

[125] See above, Sect. 3.6. In this chapter, the term "evaluation criteria" will be used, since this is the term used in the WTO context. The subsequent chapters will refer to "award criteria", since this is the term referred to in the EU context.

6.5.1 Wording of Article X:9 GPA

The GPA does not provide for a legal definition of the term "evaluation criteria". However, Article X:9 GPA addresses evaluation criteria and thus provides for some indication:

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

The term "environmental characteristics" is new to the GPA (and to WTO law in general) and has therefore never been defined by law or jurisprudence. According to its ordinary meaning, the term encompasses any criteria referring to the environment, i.e. the external conditions affecting the life of a plant or animal, but also human society.[126]

Some uncertainty, however, remains with regard to the *weighting* of green evaluation criteria. The GPA does not provide further guidance on how much weight they can be attributed as opposed to, for example, cost criteria. As will be seen in the following chapters, it is left to domestic legislators and jurisprudence to decide upon the weight attributed to environmental considerations (as juxtaposed to considerations of "price").[127]

The level of regulation is lower for evaluation criteria than for technical specifications: Article X:9 GPA merely contains one requirement, namely the obligation to set out the evaluation criteria in the "notice of intended procurement or tender documentation". The rest of the provision is dedicated to a non-exhaustive list of product characteristics that could be set forth as potential evaluation criteria.

6.5.2 Significance of Article X:9 GPA for GPP

The degree of regulation provided for in Article X:9 GPA is thus rather low and does not contain detailed instructions for GPA Parties and their contracting authorities. Nevertheless, Article X:9 GPA constitutes one of the significant novelties introduced with the 2012 revision, illustrating the paradigm shift towards GPP. While the 1994 GPA only stated that evaluation criteria should serve to evaluate the "most advantageous" offer (Article XIII:4b GPA 1994), without further specifying the criteria to identify this, the new GPA makes it clear that compliance with environmental characteristics can serve as an indication of "most advantageous."

In the revised GPA, the criterion of the "most advantageous tender" can be found in Article XV GPA, which deals with the "Treatment of Tenders and Awarding of Contracts." This article mandates procuring authorities to award the tender to either

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[126] Oxford Shorter Dictionary, 374.

[127] See Sects. 8.4 and 10.4.

the "most advantageous" tenderer or, "where the price is the sole criterion, the lowest price" (Articles XV:5 a and b GPA). While the evaluation criteria thus still serve the identification of the "most advantageous tender" and to award the contract accordingly (just like in the 1994 GPA), the GPA 2012 now provides for a scale to measure what "most advantageous tender" could mean in Article X:9 GPA.

This novelty thus significantly contributes to legal certainty regarding evaluation criteria. While it has always been uncontested that evaluation criteria may refer to economic factors (the most prominent reference criterion being the "price"), the permissibility of other factors, in particular environmental factors, has long been subject to controversy. With the 2012 revision, this legal uncertainty has finally been cleared away, since Article X:9 GPA contains an explicit reference to environmental characteristics.

6.5.3 Limits

Since evaluation criteria are not mandatory and thus less restrictive than technical specifications, GPA Parties and their procuring authorities have broad discretionary power regarding the implementation of green evaluation criteria. In this case, the GPA provides only for framework regulation.

Nevertheless, the general rules as set forth in the GPA also affect the design of (green) evaluation criteria. Accordingly, it is important to ensure that evaluation criteria do not discriminate against foreign suppliers from GPA countries (as compared to local suppliers and suppliers from other GPA countries). Those rules are embedded in Article X GPA or result from the general principles or procedural rules incorporated in the GPA.

6.5.3.1 Transparency Requirement

As indicated earlier, Article X.9 GPA sets forth that (green) evaluation criteria have to be "set out in the *notice of intended procurement* or *tender documentation.*" This is further reiterated in Article X:7(c) GPA: accordingly, not only the evaluation criteria *per se* have to be clearly indicated, but also their "relative importance", i.e. the weight that is attributed to them. This is usually indicated in the form of percentages, formulas or even matrixes.

6.5.3.2 Non-Discrimination Principle (Article IV GPA)

Procuring entities are bound by the GPA's general principle of non-discrimination when referring to environmental characteristics within the framework of evaluation criteria. Accordingly, they cannot treat suppliers that are partially or entirely owned by firms from other GPA countries "less favourable" than domestic suppliers,

whereby less favorable treatment is given when the "conditions of competition are modified to the detriment of foreign tenderers".[128]

Notably, evaluation criteria (like technical specifications) can be *de jure* or *de facto* discriminatory and may thus alter the conditions of competition to the detriment of non-local suppliers. As in the context of technical specifications, this may be the case if evaluation criteria refer to characteristics that are more easily attainable for local suppliers. This is the case, for example, when evaluation criteria refer to national standards or are published on a platform that is unknown to or not easily accessible for foreign suppliers.

6.5.3.3 "Most-Advantageous Tender"

The GPA requires procuring authorities to award the contract, based on the evaluation criteria, either to the "most advantageous tenderer" or to the tenderer with the "lowest price", in cases where price is the sole evaluation criterion (Article XV:5 GPA). The term "most advantageous" is not defined or further specified in the GPA.

However, as illustrated above, the new enumeration in Article X.9 GPA provides some guidance on how the most-advantageous tender could be identified. The wording indicates that "price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery" are valuable criteria.

6.5.3.4 Specific Requirements for Electronic Auctions

Additional requirements arise in the context of electronic auctions.[129] Firstly, Article X:7(e) GPA reiterates that the transparency requirements also apply in the case of electronic auctions and that, accordingly, the evaluation criteria have to be listed in the tender documentation. Furthermore, Article XIV stipulates that procuring entities shall provide each participant the automatic evaluation method that is based on the evaluation criteria and that will be used in the ranking process.

[128] See above, Chap. 5, with reference to ABR, *Korea – Beef*, para. 135 *et seqq.*; PR, *United States – Chapter 337*; paras 5.11–513, PR, *US – Gasoline*, para. 6.10 *et seqq*.

[129] Article I(f) GPA defines "electronic auctions" as an "iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders."

6.5.3.5 PPM and Eco-Labels

While the GPA allows for PPM or Eco Labels within the context of technical specifications,[130] it does not regulate these issues within the context of evaluation criteria. Since technical specifications are a stricter instrument than evaluation criteria, it seems reasonable to assume that PPM and Eco-Labels can, in analogy, also be permissible within the context of evaluation criteria, provided, of course, that the requirements enumerated above (transparency, non-discrimination and qualification as "most advantageous") are met.[131]

6.6 Qualification Criteria

Qualification criteria (also referred to as selection or eligibility criteria) specify characteristics that suppliers have to fulfill in order to be considered for the awarding of the procurement contract. They are supplier-related criteria that set forth the general requirements for participation in the procurement process.

6.6.1 Scope

The GPA does not have a stand-alone provision that refers to qualification criteria. However, two provisions contain rules on the preconditions for participation and thus regulate qualification criteria:

1. Article VIII GPA on "Conditions of Participation" refers to both qualification and exclusion criteria. It delineates the borders for procuring entities when establishing supplier-related criteria.
2. Article IX GPA on "qualification of suppliers" contains rules on procedural matters relating to participation. It states that procuring entities may require interested suppliers to register under a "supplier registration system" (paragraph 1) and encourages GPA Parties to harmonize their supplier registration systems (paragraph 1b). However, supplying systems cannot be applied in a manner that would create unnecessary obstacles to the participation of suppliers from other GPA Parties (paragraph 3).

Neither Article VIII GPA, nor Article IX GPA contain examples of what could be possible qualification criteria (as is the case with evaluation technical specifications and evaluation criteria). Therefore, the scope for using qualification criteria as a tool for GPP has to be defined in the negative, based on assessing its limits.

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[130] See above, Sects. 6.4.3 and 6.4.4.

[131] Steiner 2006, 72.

6.6.2 Limits

Qualification criteria, as any supplier-related criteria, are mandatory and determine the *sine qua non* conditions for participation in the evaluation process. Therefore, they cannot be overly restrictive, in order not to unduly limit a supplier's right to participate. They typically refer to fundamental characteristics like legal, financial, commercial and technical capacities (see VIII.1 GPA). Conversely, it is not clear whether (or to what extent) qualification criteria can refer to environment-related characteristics. A look at the limits of qualification criteria as set forth in Article VIII GPA ("Conditions of Participation") will provide some indication for the scope of green qualification criteria.

6.6.2.1 Essentiality

Article VIII.1 GPA states the general rule that:

> A procuring entity shall limit any conditions for participation to those that are **essential to ensure** that a supplier has the **legal and financial capacities** and the **commercial and technical abilities** to undertake the relevant procurement (emphasis added).

The wording of "essential to" suggests that there is limited room for green qualification criteria; *prima facie*, Article VIII.1 GPA does not allow requiring suppliers to comply with ecological characteristics if these are not essential for performance.[132]

However, in some cases, environmental supplier-related criteria could indeed be *essential* to ensure that the supplier has the technical abilities to undertake the performance. This would be in cases where environmental performance stands in the center of the procurement process, for example, when a procuring entity needs to build a recycling facility. In such a case, it could be required that suppliers have an environment-related education or certification, since environmental protection is the core concept of a recycling facility and a failure to recycle in an environment-friendly way would render the execution of the contract impossible.

6.6.2.2 Transparency Requirement

The transparency principle requires procuring entities to specify any conditions for participation "in advance in notices or tender documentation" (Article VIII.3.b GPA).

[132] Arrowsmith 2011, 321.

6.6.2.3 Non-Discrimination

It can be derived from the general GPA principle of non-discrimination that qualification criteria cannot be designed in a way that would discriminate against foreign suppliers from other GPA countries. Consequently, if procuring entities would require suppliers to have an environment-related education, this should not modify the condition of competition to the detriment of foreign suppliers. Accordingly, a Swiss procuring entity could not set a qualification criterion that requires an education that is only available in Switzerland.

The non-discrimination principle is further reiterated and specified in Article VIII.3 GPA with regard to qualification criteria. This provision states that a procuring entity shall evaluate the qualification criteria "on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity" (emphasis added). Accordingly, if a procuring entity would require the supplier to have an environment related education, it would also have to recognize an equivalent education completed above.

The principle of non-discrimination is also reinforced in Article IX.3 GPA. It states that registration systems or qualification procedures should not be adopted or applied "with the purpose or the effect of creating unnecessary obstacles" to international procurement.[133]

6.7 Exclusion Criteria

Exclusion criteria specify the characteristics or past performances of a supplier are deemed not acceptable. Economic actors who meet these criteria are excluded from the procurement/evaluation process *ab initio*. Like qualification criteria, exclusion criteria are also supplier-related and mandatory criteria and thus should not be overly restrictive in ways that could unduly limit a potential supplier's right to participation.

6.7.1 Scope

Exclusion criteria are also addressed in Article VIII GPA ("Conditions of Participation"). This provision contains a (non-exhaustive) list, enumerating possible reasons that would justify the exclusion of the respective supplier; listed reasons include bankruptcy, fraud or failure to pay taxes. Other reasons according to Article VIII.4 GPA are "deficiencies in performance of any substantive requirement (…)

[133] For the interpretation and testing-scheme of the term "unnecessary obstacle" see above, Sect. 6.4.2.2.

under a prior contract" (paragraph c), or "professional misconduct" (paragraph e). These reasons could, under certain circumstances, allow excluding a supplier due to past failure to perform in an environmentally-friendly manner.

However, as in the case of qualification criteria, the exclusion of a supplier based on environmental criteria is conceivable only in cases where the environmental performance is a core criterion of the respective public procurement contract. For example if the procurement contract is about hazardous waste disposal, where the failure to perform in an environmental-friendly manner through leakage of polluting material would have fatal consequences for public health and the environment. There, failure to adhere to environmentally safe performance would readily qualify as "significant or persistent deficiencies in performance of any substantive requirement (…)" under Article VIII.4.c GPA or as "professional misconduct" under Article VIII.4.e GPA.

Although, in general, the scope of including green exclusion criteria seems rather limited, it has to be borne in mind that the list in Article VIII.4 GPA is not exhaustive. It is, for example, entirely conceivable that the national procurement laws of GPA Parties would provide for the exclusion of suppliers that fail to meet environmental laws. How restrictive such an exclusion criteria is depends on the form and substance of the respective law.

6.7.2 Limits

The limits of the GPA for green exclusion criteria are essentially the same as the ones for qualification criteria that have been illustrated in the foregoing section:

1. **Essentiality**: As provided for in Article VIII.1 GPA, any "conditions for participation" (a term that encompasses also exclusion criteria) cannot go beyond criteria "that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement." As stated above, environment related exclusion criteria are therefore only allowed if they have a close enough nexus to the essence of the procurement contract, as for example would be the case with the procurement of a hazardous waste deposit.[134]
2. **Transparency**: Like qualification criteria, exclusion criteria also have to be specified and published in the procurement documents in advance, according to Article VIII.3.b GPA.
3. **Non-discrimination**: As provided for by the general non-discrimination principle in Article IV GPA, exclusion criteria cannot be designed in a way as to accord treatment no less favorable to foreign suppliers as compared to domestic suppliers. This would be the case when exclusion criteria would be more likely leading to the exclusion of foreign suppliers. An *a priori* exclusion makes participation

[134] See above, Sect. 6.4.1.3.

and hence also competition impossible and, therefore, would definitely meet the definition of "less favourable treatment".

6.8 Environmental Justifications

6.8.1 Rationale

Under general WTO law, the violation of an obligation through a domestic measure can be justified, if prevailing reasons of public interests call for the protection of political, social or cultural objectives. These exemption clauses are enshrined in Article XX GATT (and Article XV GATS respectively). Like general WTO law, the GPA also contains an exception catalogue: Article III GPA (Security and General Exceptions) contains a list of policy reasons that reflect a prevailing public interest which can, if applied correctly, "remedy" a violation of the GPA.

The Article III GPA justifications reflect the justification reasons of the GATT and the GATS with nearly equal wording. In the absence of jurisdiction within a GPA context, the scope of the GPA exceptions, in particular the ones for GPP, will be analyzed based on insights gained from jurisprudence in the Article XX GATT context.

For a measure to be justified under Article XX GATT and Article III GPA respectively, the party invoking the respective provision first needs to establish that the policy objective of the measure to be justified falls within one of the policy objectives enumerated in the exception-catalogue.[135] Secondly, the party needs to prove that the measure at issue is necessary to fulfill the respective objective. Thirdly, the measure at issue has to be in conformity with the so-called *Chapeau,*[136] as will be shown in Sect. 6.8.3.

GPP measures could be justified under two paragraphs of Article III GPA: (1) primarily under paragraph b that justifies measures "necessary to protect human, animal or plant life" and (2) also under paragraph a that exempts measures "necessary to protect public morals, order or safety" from the GPA obligations. The requirements that need to be fulfilled to invoke these provisions, as established by jurisprudence, will be analyzed in turn.

As under general WTO law, the burden of proof to establish that the requirements of the invoked exception provision were met lies upon the responding party.[137]

[135] PR, *US – Gasoline*, para. 6.20.

[136] PR, *US – Gasoline*, para. 620, further reiterated by Panel in PR, *EC – Asbestos*, para 8.184.

[137] Reaffirmed in a public procurement context by the GATT Panel in *Norway – Trondheim Toll Ring*, para. 4.5.

6.8.2 Human, Animal or Plant Life and Health

Article III.2(b) GPA justifies "measures necessary to protect human, animal or plant life or health." This justification reason reflects the text of Articles XX(b) GATT and XIV(b) GATS.

6.8.2.1 Policy Objective

As has been clarified by a Panel in the context of the GATT, the first testing-step to assess whether a measure or policy falls within this justification reason encompasses the analysis of "whether the policy reflected in the measure falls within the range of policies designed to achieve the objective."[138] Accordingly, a Party invoking Article III.2(b) GPA would first have to identify the policy objective of the respective GPP measure and, subsequently, prove that the respective policy objective falls within the range of policies designed "to protect human, animal or plant life or health".

Considering that the policy objective of a measure is not always clear, the Panel in *EC–Tariff Preferences* states that it is best identified through examining the *design and structure* of the respective measure.[139]

6.8.2.2 Necessity

The second element is the most frequently discussed aspect of the justification test under WTO law, namely the necessity-test. Accordingly, a GPA Party invoking Article III.2(b) would have to prove that its GPP measure is necessary for environmental protection. However, at what point is an environmental measure necessary to fulfill its policy objective? Thereby, necessity has to be interpreted narrowly, meaning rather "indispensable", as opposed to, "making a contribution to".[140]

The assessment of necessity implies a careful "weighing and balancing"[141] of the following factors:

1. **Effectiveness**: Does the [GPP] measure at issue make a *material contribution* to the envisaged policy objective?[142]
2. **Proportionality** ***stricto sensu***: Are there *alternative, less trade restrictive measures readily available*? This question has to be answered taking into consideration

[138] PR, *EC – Tariff Preferences*, paras. 7.198–7.199.

[139] *Ibid.*, para 7.201 *et seq.*

[140] ABR, *Korea – Various Measures on Beef*, para 161.

[141] *Ibid.*, para 164.

[142] ABR, *Brazil – Retreaded Tyres*, para. 151; ABR, *EC – Asbestos*, paras. 155 *et seqq.*

the *trade restrictiveness* of the measure as compared to *the importance of the value*.

Notably, the Appellate Body reinforced the Panel's statement in *Brazil – Retreated Tyres* that "few interests are more 'vital' and 'important' than protecting human beings from health crisis, and that protecting the environment is no less important."[143]

6.8.3 Public Morals

Article III.2(a) GPA justifies "measures necessary to protect public morals, safety and order." The first part of this provision, the exception of "public morals", is based on the text of Articles XX(a) GATT and XIV(a) GATS.

6.8.3.1 Policy Objective

"Public Morals" is a vague term.[144] While the term "protection of human, animal or plant life" was never disputed, the term "public morals" can give rise to controversy and has often been subject of interpretation by WTO Panels and the Appellate Body. As first established by the Panel in *US – Gambling* and subsequently reiterated by WTO jurisprudence,[145] public morals "denotes *standards of right or wrong* conduct maintained by or on behalf of a community or nation."[146] Thereby, WTO Member States are granted broad discretion in determining public morals "according to their own systems and scale of value".[147] Moreover, public morals is not a static concept, but "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".[148]

Although environmental concerns, *prima vista*, do not appear to fall under the protection for public morals, jurisprudence from 2013 sheds new light on this term, advocating a very broad interpretation. In the case of *EC – Seals*, the Appellate Body upheld the Panel's decision to find an important ban on Seals products to fall

[143] ABR, *Brazil – Retreaded Tyres*, para. 144, based on PR, *Brazil – Retreaded Tyres*, para. 7.108.

[144] For an analysis of the public morals exception in the context of the GATS, see Weber/Baisch, *passim*.

[145] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, adopted 20 April ABR [*US – Gambling*], para. 299; PR, *EC – Seals*, para. 7.380.

[146] PR, *US – Gambling*, para. 6.465; ABR, *US – Gambling*, para. 299; Weber/Baisch, 381.

[147] PR, *US – Gambling*, para. 6.461.

[148] *Ibid.*

under the "public morals" exception in Article XX(a) GATT, since it acknowledged seals welfare as a "public concern of moral nature within the European Union".[149]

The *EC – Seals* decision can be regarded as a paradigm shift. The protection of public morals was traditionally associated rather with measures enacted for the prevention of alcohol or drug use, gambling addiction or for the protection of damaging content like pornography or violence—not seal welfare.[150] This changed with *EC – Seals*, where the Panel and AB made it clear that it is up to a Member States to protect any public moral concern of its population, as long as it can prove two elements: (1) that the public moral concern in question *indeed exists* in that society, and (2) that the measure at issue is *connected* to the public as defined and applied within the territory of the respective Member State.[151]

Therefore, GPP measures violating the GPA could be justified by the public moral justification, provided that it could be convincingly established that the protection of the environment is a moral concern within the country and that the GPP measure at issue was introduced to protect this concern.

The other terms contained in Article III.2(a) GPA, "order and safety" have not been defined by WTO jurisprudence. The GATS contains a similar provision in its exception catalogue, referring to "necessary to protect public morals or to maintain public order", whereby the ad note specifies that "the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interest of society".[152] The lack of such a specification in the GPA suggests that the GPA terminology of "order and safety" can be interpreted less strictly than the GATS, according to its ordinary meaning.

6.8.3.2 Necessity

Once a public moral concern related to the environment and GPP can be established, a GPA Member State would further have to establish the necessity of this measure. As stated above,[153] an analysis of "necessary" requires (1) a material contribution, and (2) a proof that no other, less trade restrictive measure (with the same effect) would be readily available. Although the burden for "necessity" is high, the Appellate Body in *EC – Seals* still found it to be met: alternative, less trade-restrictive measures were found not to be "reasonably available".[154]

[149] PR, *EC – Seals*, para. 7.631.

[150] Koch, 61–62, with reference to Delimatsis, 258.

[151] PR, *EC – Seals*, para 7.383 *et seq*.

[152] See also Weber/Baisch, 380.

[153] Section 6.8.2.2.

[154] ABR, *EC – Seals*.

6.8.4 *"Chapeau"*

Like general WTO law, Article III.2GPA also contains ab introductory text that states

> Subject to the requirement that such measures are not applied in a manner that would constitute **a means of arbitrary or unjustifiable discrimination** between Parties where the same conditions prevail or **a disguised restriction on international trade** (…) (emphasis added).

This so-called *Chapeau* mirrors the wording of the GATT/GATS and poses an additional burden for justification, containing two requirements. The measure at issue cannot be:

1. applied in a manner that would constitute a means of *arbitrary or unjustifiable discrimination* (between Parties where the same condition prevail),
2. a *disguised restriction* of international trade.[155]

The requirements in the *Chapeau* do not serve to make an assessment of the contested measure *per se*, but of its application.[156] While the justification assess whether a legitimate policy objective underlies the contested measure, the *Chapeau* makes sure that it is not *applied* in a way that would amount to an arbitrary or unjustifiable discrimination or a disguised restriction. This additional burden makes sure that domestic public procurement measures do not jeopardize international procurement more than necessary.[157] This also explains the clear tendency of WTO jurisprudence to interpret the *Chapeau* in a strict and narrow way.[158] In fact, only one case so far, namely the *EC – Asbestos* was found to meet the high burdens of the *Chapeau* and could be justified by WTO law.[159]

The first requirement of the *Chapeau*, the existence of a discrimination, is not only measured based on the effect of the measure, but also based on the *cause and rationale* of the measure.[160] Furthermore, discrimination is considered "arbitrary" when it is overtly rigid and inflexible.[161] Whether a measure is "unjustifiable", in turn, can be assessed based on its "coercive effect".[162] The Appellate Body in *Brazil – Retreated Tyres* specified that a measure is discriminatory when it does not

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[155] ABR, *US – Gasoline*, 23; Weber/Koch 2015a, 777 with reference to Kaufmann/Weber 2011, 515–520.

[156] See e.g. ABR, *US – Gasoline*, 22, ABR, *US – Shrimp*, para. 115; ABR, *Brazil – Retreaded Tyres*, para. 215; ABR, *EC – Seals*, para. 5.302.

[157] Weber/Koch 2015, 776.

[158] In cases like *US – Gasoline, US – Shrimp, EC – Tariff Preferences, Brazil – Retreated Tyres* or *EC – Seals* the respondent party failed to meet the requirements of the *Chapeau* and was thus found to be in violation of WTO law.

[159] PR, *EC – Asbestos* (as upheld by the ABR), para. 192.

[160] ABR, *Brazil – Retreaded Tyres*, para. 226.

[161] ABR, *EC – Shrimp*, para. 177.

[162] *Ibid*., para. 161.

bear a "rational connection to the objective".[163] A clear sign of arbitrary and unjustifiable discrimination was in a case where the responding could not explain the specific criteria and objectives of its measure.[164] Another indication is, whether the measure at issue is applied in a transparent and predictable way.[165] In *US – Shrimp*, the Appellate Body found that the lack of efforts to conduct multilateral negotiations to pursue the policy goal (*in casu* protection of natural resources) was a clear sign of an unjustifiable discrimination.[166]

Furthermore, an arbitrary or unjustifiable discrimination has to occur between countries "where the same conditions prevail". The WTO adjudicatory bodies specified that this implies a comparison between the importing and the exporting country or between two exporting countries.[167] However, it did not further specified the standards of "same conditions".

The further element of the *Chapeau,* "disguised restriction on international trade", is a vague term marked by uncertainty.[168] It is assessed based on the similar criteria as "arbitrary or unjustifiable discrimination".[169] As specified in *EC – Asbestos*, the focus rather lies on "disguised", not on "restriction".[170] In other words, a Panel or the Appellate Body have to assess whether the country invoking it actually abuses the invoked justification reason as a pretext for protectionism.[171] This has to be assessed based on the design, architecture and revealing structure of the measure to be justified.[172] Thereby, factors such as rigidity, inflexibility, the coercive effect or the lack of transparency (of the application of the measure) are decisive.[173]

In short, the way that a GPP measure is *applied* is essential to meet the high burdens of the *Chapeau* in Article III.2 GPA. Thereby, whether a GPP measure meets these burdens depends on the specific design and application that has to be assessed on a case-by-case basis. Nonetheless, a GPA party enacting a GPP measure should make sure that it is applied in a transparent way, providing enough flexibility to other GPA Parties, so that it does not have a coercive effect and cannot be found to be an "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade".

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[163] ABR, *Brazil – Retreaded Tyres*, para. 227; see also Kaufmann/Weber 2011, 517.

[164] PR, *EC – Tariff Preferences*, paras. 7.228–7.229, 7.232 and 7.234.

[165] ABR, *US – Shrimp*, paras. 180–181.

[166] *Ibid*., para. 166.

[167] *Ibid*., para. 150.

[168] Kaufmann/Weber 2011, 518.

[169] ABR, *US – Gasoline,* 25.

[170] PR, *EC – Asbestos*, para 25.

[171] ABR, *US – Gasoline*, 25, Kaufmann/Weber 2011, 518.

[172] Kaufmann/Weber 2011, 518.

[173] ABR, *Brazil – Retreaded Tyres*, para. 251.

6.9 Summary and Findings

The current GPA 2012 is well equipped with a tool-kit encompassing various instruments for GPP, namely technical specifications, evaluation criteria and supplier-related criteria, as well as, under certain circumstances, PPM and eco-labels. These tools have been "greened" by the GPA revision 2012. In that sense, the revision has brought significant changes for environmental protection.

The newly introduced GPP provisions are undoubtedly an important acknowledgment for environmental protection: they remove legal uncertainty and open the margin of manoeuvre for GPA Parties to apply GPP policies and measures.[174]

The most weight carries the new Article X:6 GPA that states that technical specifications may be used "to promote the conservation of natural resources or protect the environment". Thereby, this provision can be interpreted broadly to encompass any specification that has a beneficial effect on natural resources or on the environment. It adds to legal certainty, since it removes any remaining doubts about the general question of whether environmental concerns can also be considered within the framework of technical specifications.

Uncertainty, however, still remains to the extent of GPP permissible under the GPA. The analysis carried out in this chapter has shown that there are several limits posed by the non-discrimination provisions. Apart from obligations arising from the general non-discrimination principle inscribed in Article IV GPA, Article X GPA contains more detailed and specific requirements. In sum, five specific requirements for technical specifications can be directly derived from Article X GPA:

First of all, green technical specifications (as well as conformity assessment procedures relating thereto) cannot amount to "unnecessary obstacles to international trade" (necessity requirement, Article X:1 GPA). Secondly, they shall be based on performance and functional requirements as well as on international standards (functionality requirement, Articles X:2 and X:4 GPA). Thirdly, the equivalence requirement asks contracting authorities to consider equivalent offers, when setting technical specifications in a restrictive way (Articles X:3 and X:4 GPA). In fourth place, the revised GPA has added an anti-corruption requirement in Article X:5 GPA, forbidding to define (green) technical specifications with the help of persons with commercial interests in a manner that would be bad for competition. In the fifth place, (green) technical specifications need to be documented and published in a transparent way (transparency requirement, Articles X:7 and Article X:10 GPA).

The GPA rules on (green) evaluation criteria are less strict. The relevant provision in Article X:9 GPA only contains a transparency requirement, requiring evaluation criteria to be "set out in the notice of intended procurement or tender documentation". Furthermore, the general principle of non-discrimination inscribed in Article IV GPA applies. Accordingly, evaluation criteria should not be designed in a discriminatory way, i.e. cannot modify the conditions of competitions to the detriment of foreign tenderers. Furthermore, the GPA requires procuring authorities

[174] See *ex multis* Arrowsmith/Anderson, 30/31, Reich 2009, 1011 *et seqq*.

to award the contract, based on the evaluation criteria, to the most advantageous tenderer (Article XV:5(a) GPA). Most notably, environmental characteristics can be a factor to determine the else vague term of "most advantageous". Therefore, the reference to "environmental characteristics" within the framework of Article X:9 GPA can also be considered one of the significant changes of the GPA revision.

As for supplier-related criteria (namely qualification criteria and exclusion criteria), the GPA 2012 did not introduce any notable novelties. The degree of regulation for these instruments provided for by the GPA can also be considered as low. Generally, qualification as well as exclusion criteria are not ideally suited for GPP, since they are person-related or company-related criteria and do not define the product, service or work to be procured. This is also reiterated by the text of the GPA which states that exclusion criteria must be essential for the carrying out of the respective contract (Article VIII.1 GPA). Therefore, green exclusion criteria are only allowed when the protection of the environment lies at the very heart of the respective contract. By analogy, the same can be considered to apply for qualification criteria.

Moreover, this chapter analyzed the scope for PPM and eco-labels. The GPA goes further than the multilateral agreements of the WTO, containing a broad acceptance for PPM—product-related PPM as well as npr PPM—within the framework of technical specifications. As for evaluation criteria,[175] the GPA does not provide any guidance on whether or to what extent PPM can be considered. Notwithstanding the scope for PPM here is presumably even broader, considering that evaluation criteria are less strict than technical specifications.[176]

From an environmental perspective, this explicit recognition is positive. Negative externalities caused by environmental pollution are characterized by the fact that they are invisible and as such not directly discernible (so-called npr PPM).[177] Therefore, regulating the environmental impact of a product through requiring an environmentally friendly PPM adds to the effectivity of GPP. Positive aspects can also be seen from a legal perspective. The clear wording of the GPA leaves no room for doubt about the compatibility of technical specifications referring to PPM and thus avoids the legal uncertainty that characterizes the debate under the multilateral agreements. Nevertheless, also within the context of PPM it is crucial to consider the various non-discrimination and transparency obligations.

The same applies within the context of eco-labels. Contracting authorities need to make sure that a reference to (eco-) labels within the context of technical specifications does not modify the conditions of competition and does not amount to an unnecessary obstacle to trade (Article X:1 GPA). Therefore, the eco-label at issue should be based on international standards (Article X:2 GPA). Most importantly,

[175] Since exclusion and qualification criteria are supplier- and not product-related criteria, the issue of PPM is not relevant in their context.

[176] Kaufmann / Weber 2015, 29; Steiner 2006, 72, (rightly) points out the fact that if a GPP criterion is permissible within the framework of technical specification, it should at the same time also be permissible within the framework of evaluation/award criteria, since the latter are less restrictive.

[177] See above, Sect. 6.4.3; Weber 2018, 244.

contracting authorities cannot exclusively set forth the eco-label as the only specification, but have to consider equivalent solutions that would provide for the same protection goal (*equivalence-requirement,* Articles X:3 and X:4 GPA). This must also be indicated in the respective tender documents.

Even if a GPP measure would be found to violate the non-discrimination obligation of the GPA, the justification reasons enshrined in Article III.2 GPA could remedy such a violation. As has been shown in Sect. 6.8, two justification reasons could apply within the context of GPP, namely Articles III.2(a) and (b) that justify measures necessary to protect either "public morals, order or safety" or "human, animal or plant life or health". Furthermore, a measure in violation of the GPA would have to meet the additional burdens posed by the *Chapeau*. Overall, GATT/GATS precedence suggests that also under the GPA the WTO dispute settlement bodies would interpret the justification reason in a strict and narrow way, so that only a few measures could be justified. This makes it questionable whether the justification reasons are an effective instrument to balance trade and non-discrimination concerns with environmental concerns in public procurement.[178]

[178] Arrowsmith 2003, 355.

Part III
European Union

Part III analyses GPP on a regional level in the EU. The fact that the EU follows a comprehensive GPP practice raises the question of how this is compatible with the EU's obligations as a GPA Party. Answers to this question will be found in the following chapters. Chapter 7 will illustrate the structure and logic of the EU public procurement regime. This is necessary to understand the functioning of GPP within the EU, which will be the focus in Chap. 8.

Chapter 7
Regional Public Procurement Regulation and Implementation of the GPA

7.1 Regional Public Procurement Regulation

7.1.1 Evolution of Common Public Procurement Regulation

Public procurement plays an important role in the functioning of the EU's common internal market[1] and for the free movements of goods and services.[2] Therefore, public procurement (above a certain threshold value)[3] is regulated at Union level: EU Member States have to implement their domestic public procurement laws according to the overarching EU public procurement framework legislation. Thereby, they are given significant flexibility. This also becomes apparent within the field of GPP.[4]

For public procurement contracts below the significant EU threshold values, Member States are free to adopt their own domestic legislations, as long as they do not contradict EU primary law.[5]

EU public procurement law evolved on a regional level over more than 40 years. Basic common public procurement legislation (one directive for public sector works and another one for supply contracts)[6] was established in the 1970s. However, these

[1] According to Article 26(2)TFEU, the *internal market* "shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

[2] COM/85/310 final, 24.

[3] Thresholds vary according to contract's qualification as "work", "service" or "supply". They can be checked on the Commission's website, available at: www.simap.europa.eu.

[4] See below, Chap. 8.

[5] See below, Sect. 7.4.

[6] Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works

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laws only superficially regulated public procurement and were “largely ineffective.”[7] In 1985, the Commission identified protectionist public procurement as “one of the most evident barriers to the achievement of a real internal market”[8] and encouraged the amendment of the legal sources.[9] Consequently, liberalization of public procurement markets was an important element of the European integration process. To this aim, enhanced legislation was introduced in 1988, extending the scope of common public procurement rules.

Since the 1980s, EU public procurement legislation, policy guidelines and jurisprudence have steadily developed and complemented one another. Thereby, the tendency towards sustainable procurement is of particular importance for this thesis. Within the last decades, EU public procurement legislation and practices shifted from “a single topic of the common market” to a “multi-faceted tool” of governance.[10] The emergence of GPP rules, jurisprudence and policy initiatives will be analyzed in the next chapter.

7.1.2 2014 Reform and Current Developments

The 2012 revision of the GPA also had a major impact on EU public procurement. The ratification process triggered a comprehensive reform of EU public procurement laws in 2014, entailing the reform of the two already existing procurement directives[11] and introducing a new directive (the “Concession Directive” 2014/23/EU).[12]

The aim of the reform was to make public procurement processes simpler, more flexible, to grant facilitated access to SME and to strengthen the role of social and (most importantly for this thesis) environmental criteria.[13] Other changes include reforms regarding “e-procurement”, special procurement methods (e.g. framework agreements, dynamic procurement systems, electronic auctions and catalogues or cross-border common procurement), rules on in-house procurement and on dialogues, rules on modifications of a procurement treaty, rules on “abnormally low

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contracts to contractors acting through agencies or branches and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts.

[7] Gordon / Rimmer / Arrowsmith, 29.

[8] COM/85/310 final, 23; Bovis 1998, 220–222.

[9] COM/85/310 final, 24.

[10] Bovis 2016, xv.

[11] The “Coordination Directive” 2004/18/EC was replaced by the new “Public Procurement Directive” 2014/24/EU and the former “Utilities Directive” 2004/17/EC was replaced by new “Utilities Directive” 2014/25/EU.

[12] For an overview of the three directives as the main source for EU public procurement law see below in Sect. 7.4.2.

[13] COM/2011/896 final, *passim*.

tenders" (ALT) and strengthened rules on anti-corruption.[14] Most of these reforms constitute a codification of jurisprudence.

Although the 2014 reform is completed for the time being (the transition period for EU Member States expired in 2016 and 2018), EU public procurement is constantly developing on a policy level. In order to increase the number of cross-border procurement contracts[15] and to strengthen the single market, the EU Commission issued a "public procurement strategy" in 2017, focusing on six strategic policy priorities. Most notably, the first policy goal is "ensuring wider uptake of innovative, green and social procurement".[16]

7.2 Notion of Public Procurement

While there is no overall legal definition in international law, the EU procurement directives define public procurement as:

> (…) acquisition by means of a **public contracts of works, supplies or services** by one or more contracting authorities from economic operators chosen by those contracting authorities, **whether or not the works, supplies or services are intended for a public purpose**.[17]

Accordingly, the EU differentiates between the procurement of works, supplies and services. A work contract covers all kinds of construction services (e.g. erection of roof covering and frames, construction of highways, roads etc.), as defined in Annex II of Directive 2014/24/EU.[18] A public supply contract regulates the procurement of goods: it is a contract that aims at the purchasing or leasing of a product (Article 2(8) Directive 2014/24/EU). Finally, a service contract aims at providing services other than those covered by a work contract. Thereby, the directives do not provide a legal definition of the terms "product" or "service".

Notably it is not relevant whether the contract at issue is made for public purposes or not: the definition encompasses public contracts for any purposes.[19] This is opposed to WTO law that distinguishes contracts for "governmental purpose" or "commercial sale". As illustrated above, the pertinent provisions in both the GATT and the GATS (carve-out clauses), as well as the definition in the GPA only encompass contracts made for governmental purpose.[20] As it stands, WTO jurisprudence

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[14] COM/2017/0572 final, 3.

[15] According to COM/2017/0572 final, 4, 23% of the value generated in public procurement contracts is achieved by cross-border procurement.

[16] COM/2017/0572 final.

[17] Article 1(2) Directive 2014/24/EU, Article 1(2) Directive 20144/25/EU.

[18] This thesis will refer to the main public procurement directive 2014/24/EU and only refer to the other two relevant directives (2014/23/EU and 2014/25/EU) in case of deviations.

[19] Nevertheless, Recital 10 of Directive 2014/24/EU stresses that a "body" with predominantly commercial character cannot be deemed to be a contracting authority within the sense of EU law.

[20] See Sects. 5.1 and 6.2.3.

has not provided for a clear delineation of "governmental purpose" and "commercial sale". To the contrary, latest jurisprudence has caused confusion and added to the high degree of uncertainty.[21]

While the GPA only refers to three different procurement procedures,[22] the EU follows a more detailed approach. The new directives introduce four different categories: ranging from "open procedure" (which is the standard procedure according to Article 27 Directive 2014/24/EU), to the "restrictive procedure" (called "selective tendering" in WTO language) and to the competitive dialogue and the negotiated procedure, which is called "limited tendering" in WTO language (Articles 30 and 32 Directive 2014/24/EU).

7.3 EU and the GPA

The fact that the EU is a GPA Signatory State adds another dimension to the already multi-layered public procurement regime of the EU that ranges from a regional to the communal level of the Member States. Thereby, not only the EU legislative public procurement framework, but also the Member States implementation laws have to meet the requirements of the GPA. Regarding GPP this means that all public procurement laws in the EU have to meet the non-discrimination requirements as set forth in the GPA.

7.3.1 Driving Force

The EU is one of the founding parties of the GPA: the then European Communities (EC) signed the Tokyo Code of 1979.[23] The EU is known as having been a major driving force for public procurement regulations on a plurilateral level, also in the GPA negotiations in 1994 and again during the 2012 revision.[24] This prominent role is due to the fact that the EU has long been a major advocator of procurement liberalization. Its strong regulatory capacity in public procurement (with probably the most advanced procurement legislation)[25] is a constant source of inspiration for GPA negotiations.[26] GPP is only one example of a public procurement area that has

[21] See Sect. 6.1.

[22] See above, Sect. 6.2.

[23] The EU counts as one Signatory Party to the GPA, although all 28 EU Member States are Parties.

[24] Blank/Marceau, 122; Casavola calls the EU "the GPA's chief promoter", 294; Gordon/Rimmer/Arrowsmith, 160; Arrowsmith 1998b, 13; for an embedment of the EU's dominant role in GPA negotiation within the theoretical framework of the "EU as a global actor" literature see Ladi/Tsarouhas, *passim*.

[25] Ladi/Tsarouhas, 399.

[26] See for example Gordon/Rimmer/Arrowsmith, 160; Arrowsmith 1998b, 13; Casavola, 295.

"spilled over" from the EU on the GPA agenda, as will be shown in the next chapter. This explains why the GPA and the EU public procurement legislative framework have a similar structure and are based on the same values and principles.[27]

Moreover, the EU is an important GPA Party. Two-thirds of the countries bound by the GPA are EU countries. Furthermore, the EU expansions have brought more countries to the GPA than other accession procedures. While the EU has added 10 new GPA Parties through the so-called eastward expansion rounds in 2004, 2007 and 2013,[28] only Iceland, Chinese Taipei and Armenia acceded the GPA through formal accession procedures. This shows that without the EU, the GPA would have a much smaller number of parties and would be less relevant.

7.3.2 Presumption of Equivalent Protection

There is no strict enforcement mechanism to ensure that GPA Signatory States fulfill the requirements under the GPA when transposing it into their national laws. Article XXII(4) GPA merely calls upon parties to ensure the conformity of its public procurement laws, procedures and practices with the provision of the GPA.

Thereby, the implementation lies in the discretion of the respective country and is only subject to the monitoring mechanisms provided for by the GPA Committee (Article XXI(3) GPA)[29] and to potential dispute settlement in the forum of the DSM. Furthermore, Parties have to notify modifications of its annexes (Article XIX GPA) and any other changes to laws and regulations relevant to the GPA (Article XXI(5) GPA. In this regard, any GPA Party's implementing legislation is also subject to a peer-review process, as other Parties can raise questions and raise concerns.[30]

Since the EU public procurement directives also serve to transpose the GPA into EU law, compliance with the directives creates the presumption of GPA compliance.[31] The presumption of equivalence is also reflected in the text of the directives. The Recital 17 of Directive 2014/24/EU states that the GPA obligations are deemed to be fulfilled by applying the directive to tenderers from GPA states. Although the recitals of an EU secondary law directive are not binding, they are relevant context

[27] Casavola, 295.

[28] Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.

[29] For a more detailed illustration of the surveillance and monitoring by the GPA Committee see Arrowsmith 2003, 406–409.

[30] The opportunity to comment on other Parties implementing laws is frequently used within the forum of the GPA Committee meetings, see GPA/32 from 12 January 2000. This report, however, dates back to the year 2000 and does not concern the most current EU legislative package from 2014. Newer reports are not available.

[31] See also Semple 2015, xxxviii; GPA/W/341, 21.

for the interpretation of the substantive provisions, since they are a reflection of the legislative intent.[32]

Generally, the level of regulation of EU public procurement legislation goes far beyond that of the GPA and therefore the level of protection granted to tenderers also exceeds the one provided for by the GPA. This will be shown on the basis of the example of the non-discrimination principle in Sect. 7.5.

7.3.3 Direct Effect

How do the EU general principles and public procurement directives interact with the GPA? As a general principle, the CJEU has established that EU law should be interpreted in consistency with international law:[33] Accordingly, contracting authorities within the EU have to apply the EU public procurement directives in conformity with the GPA (which makes profound knowledge of the GPA indispensable for EU contracting authorities).

However, in cases of conflict between the EU public procurement directives and the GPA that cannot be solved by means of judicial interpretation, the question of direct effect becomes relevant: Can an aggrieved tenderer invoke the GPA directly before a national court? This question is controversially discussed in the EU.

Originally, the CJEU has followed a broad approach, granting direct effect to international agreements concluded by the EC.[34] In the precedence case of *Kupferberg* the CJEU decided that FTA are directly binding in any Member State, under the precondition that the respective provision is unconditional and sufficiently precise.[35] However, notwithstanding *Kupferberg* and subsequent decisions, the CJEU followed a stricter approach in relation to the GATT (and, subsequently, the WTO law).[36] Already in the 1970s, the CJEU denied direct effects for the GATT arguing that it is “not capable of conferring on citizens of the Community rights which they can invoke before the courts”.[37] The CJEU repeated this decision in many following cases, also with regard to WTO law.[38] It only softened its strict

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[32] Semple 2016, 62.

[33] Oesch 2019, 806 with reference to Case C-84/95, Bosphorus v Minister for Transport, Energy and Communications and Others [*Bosphorus*], ECLI:EU:C:1996:312.

[34] Oesch 2019, 811; Kaddous, 301.

[35] Case 104/81, Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A. [*Kupferberg*], ECLI:EU:C:1982:362.

[36] Oesch 2019, 813 *et seqq*.

[37] Joined cases 21 to 24-72, International Fruit Company NV and others v Produktschap voor Groenten en Fruit [*International Fruit Company*], ECLI:EU:C:1972:115, para. 27.

[38] See for example Case C-69/89, Nakajima All Precision Co. Ltd v Council of the European Communities [*Nakajima*], ECLI:EU:C:1991:186.

approach to define some exceptional reasons that would justify the direct applicability of WTO law.[39]

The CJEU has not yet had the opportunity to assess the effects of the GPA. Therefore, it is still uncertain whether it would qualify the GPA (in the same line as the multilateral WTO agreements) as not having direct effect or whether it would adopt a more open approach.[40] It could be argued that the GPA (as opposed to the GATT/GATS) does not only regulate general trade in goods or services, but also individual rights bidders. This approach was further suggested by the GPA 1994 that stated in Article XX(2) that "each Party shall provide (…) procedures *enabling suppliers to challenge alleged breaches of the Agreement*". Consequently, affected suppliers have to be permitted to directly challenge an award decision before a national court or review body.[41] Under the revised GPA, however, this provision has changed. While the legal text still contains this provision in Article XVII(1)a GPA, the revision has added a weakening addition in paragraph b stating: "where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party (…)".[42] This shows that the question of whether to grant direct effect to the GPA or not lies within the Signatory State's own jurisdiction and leaves the question of direct applicability in the EU in the dark.

However, considering the generally higher level of protection for tenderers provided for by the EU procurement regime as compared to the GPA, the risk of collusion of these two legal sources is low and, therefore, the question of direct applicability is not very relevant in practice.

7.4 Legal Foundations

EU public procurement legislation is a multilayered web of regulations on different levels of the norm-hierarchy. On the one hand, a contracting authority in an EU Member State is bound by its domestic public procurement laws. On the other hand, however, these laws constitute the implementation of the EU legislative framework, which in turn transposes international law, in particular the GPA.

[39] In two cases, namely Case 70/87 Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities [*Fediol*], ECLI:EU:C:1989:254 as well as in the *Nakajima case*, the CJEU recognized that EU law could be subject for a compatibility test with WTO law if the measure at issue referred expressly to WTO law (Fediol exception) or if the measure at issue was adopted expressly to ensure compliance with the EU's obligations under WTO law (Nakajima exception).

[40] As pointed out by Kaddous, 312, the CJEU has shown the tendency to follow a more open approach with regard to the questions of direct effect and interpretation of the EU's international obligations in favor of individuals.

[41] Casavola, 302.

[42] See above, Sect. 6.2.2.

The following sections will provide a short overview of the various legal sources that are relevant for public procurement on an EU level. The final step of the implementation-cascade, the transposition in Member State's domestic laws, will not be further elaborated because this would go beyond the scope of this thesis.

7.4.1 Primary Law: Treaty on the Functioning of the EU

Primary law, consisting of the treaties of the EU, the general principles of law and customary law,[43] is a relevant legal source for EU public procurement. This is reflected by Recital 1 of the 2014/4/EU Directive that expressively refers to the Treaty on the Functioning of the European Union (TFEU):

> The award of public contracts by or on behalf of Member States' authorities **has to comply with the principles of TFEU**, and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

In other words, although EU public procurement is mainly regulated through detailed provisions in the public procurement directives (that are considered to implement and specify primary law), the EU primary law sources still apply in parallel. This is of particular relevance for public contracts under the EU threshold values. While the EU public procurement directives are only applicable to procurement contracts over a certain threshold value, the TFEU (and the other treaties, including the Charter of Fundamental Rights of the European Union [CFREU][44]) applies to *all* procurement contracts, notwithstanding their value. This is even more relevant when considering that literature suggests that about 85% of all public procurement transactions concluded on EU territories fall outside of the scope of the procurement directives and are thus only bound by the TFEU.[45] The importance of primary law for public procurement processes has been acknowledged by the Commission and by the CJEU on various occasions.[46]

The substance of the various relevant freedoms and the principles derived therefrom will be further analyzed within the context of the non-discrimination principle discussed further below.

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[43] Bradley, 103; Oesch 2019, 405.

[44] Article 6(1) TEU states that the CFREU "shall have the same legal standing as the Treaties". For a detailed analysis of the inclusion of human rights within the framework of the various public procurement instruments (such as exclusion grounds, labels or award criteria) see Sanchez-Grael, *passim*.

[45] Semple 2015, 1.10, Bovis 2016, 37; for a more detailed analysis on "sub-dimensional" public procurement see Dragos, *passim*.

[46] See e.g. COM/2006/C 179/02 final, *passim*.

7.4.2 Secondary Law: Procurement Directives

The principles of the TFEU are given practical effect and are complemented through more detailed regulation in secondary law, namely through the public procurement directives. Their objective is to "achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds" (Recital 2 of Directive 2014/24/EU).

The current directives were adopted in 2014 by the European Council and had to be implemented by the EU Member States by 2016. The legal framework consists of the following three main directives regulating public procurement processes within the EU:

1. Directive 2014/24/EU (Public Procurement Directive)[47]
2. Directive 2014/25/EU (Utilities Directive)[48]
3. Directive 2014/23/EU (Concessions Directive)[49]

While the Directive 2014/24/EU can be considered the *lex generalis*, covering public procurement in general, the other two directives regulate specific sub-areas. Directive 2014/25/EU applies to the water, energy, transport and postal services sectors and Directive 2014/23/EU applies to the award of concession contracts. Moreover, the three public procurement directives are complemented by the Directive 2007/66/EC (Remedies Directives)[50] that contains regulation for challenging mechanisms and legal consequences of faulty public procurement procedures.

As will be seen, the EU public procurement directives provide for detailed regulation and contain important rules on specific aspects of public procurement that go well beyond the scope of the GPA. The following sections will provide a short overview of the directives and their role as an implementing tool of the GPA.

7.4.3 Modus Operandi of the Public Procurement Directives

Like any EU directive, the public procurement directives operate on the basis of procedural autonomy. They are binding for EU Member States with respect to the envisaged *aims,* however, leave to the Member State the *means* to achieve these

[47] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[48] Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

[49] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

[50] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to the effectiveness of review procedures concerning the award of public contracts.

aims.[51] The only precondition is the equivalence and effectiveness of the respective implementation laws, according to the principle of sincere cooperation (Article 4(3) Treaty on European Union [TEU]). Therefore, directives are flexible legal instruments that leave room to take into account the specific circumstances in the respective Member State.[52] This is of particular importance in the context of public procurement, since this sector is "dominated by national sensibilities".[53]

Ultimately, these national transposition legislations are the binding legal source for national procurement procedures. However, the public procurement directives could still be directly binding, namely in cases where there is no national implementation legislation, or if national implementation legislations are not sufficiently clear.[54]

The three directives all have different scopes of application. They, however, share the common objectives and principles, namely to contribute to the achievement of the EU Single Market through opening up and harmonizing public procurement markets.[55] Non-discrimination is the key principle of the directives, closely linked to other principles like transparency. Other objectives of the public procurement directives include sustainability, such as the protection of the environment. Notably, these objectives are not considered secondary, but *complementary* goals and do not stand in a hierarchic relationship to other procurement goals.[56]

Furthermore, the three public procurement directives also share common procedural rules that all public authorities must follow. This starts at stage one of the procurement process, with rules for the definition of the goods, service or work to be procured (rules on technical specification, award criteria, qualification and exclusion criteria).[57] In the opening phase, this mostly concerns rules for the publication in the Official Journal of the EU (OJEU). Moreover, all the directives contain rules on the specific procedure that have to be followed when awarding a contract. All three directives refer to the Remedies Directive which provides for the suspension, the set-aside or the ineffectiveness of a public contract in case of violation.

[51] Bradley, 100.

[52] Bovis 1998, 228; Casavola, 299.

[53] Bovis 1998, 229.

[54] Casavola, 301.

[55] Cantore/Togan, 144.

[56] Cantore/Togan, 144.

[57] The rules on the respective public procurement instruments are further detailed in the context of GPP below, in this chapter.

7.4.4 Scope and Coverage

The procurement directives contain rules on public procurement procedures carried out by contracting authorities or entities (*ratione personae*) with respect to public contracts (Directive 2014/24/EU*),* supply, works or service contracts (Directive 2014/25/EU) or concessions (Directive 2014/23/EU) (*ratione materiae*) above a certain threshold value.[58]

Directive 2014/25/EU regulates purchasing activities by public entities in the areas of: water, transport, energy (in particular electricity generation) and postal services. Although the companies in this sector are often private companies licensed by the state, they usually operate in areas with a public mandate where competition is limited (e.g. through monopolies) and are therefore subject to specific rules of public procurement. The basic principles and procedures of Directive 2014/25/EU are similar to those of the other directives, but they are simpler and give purchasers more flexibility.

Directive 2014/23/EU applies only to concessions. Prior to 2014, concessions were not clearly regulated and EU Member States had to rely on of fragmented (domestic) legal sources and on complex case law.[59] The adoption of the new Concession Directive now provides clarity on the awarding of concession contracts.

In order to determine which one of the public procurement directive applies, it is important to consider in a first step what kind of contract is affected. If it is a contract in the field of the supply of utilities, Directive 2014/24/EU applies (and for concessions Directive 2014/24/EU respectively). If none of these special laws apply and if it is a "normal" public procurement contract, the general Directive 2014/24/EU applies. In a next step, the authority/entity issuing the contract has to be covered by the directive and the contract at question has to fall above the threshold values, as will be shown in the following. Lastly, the threshold values have to be met by the respective contract or concession.

7.4.4.1 Public Contracts, Supply Contracts or Concessions

Directive 2014/24/EU applies to public contracts or design contests respectively (Article 1). Public contracts are defined as "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services" (Article 2.1(5)).

Directive 2014/24/EU uses the broader term of "contracts" (Article 1) that encompasses supply, work or service contracts in the field of utilities, such as gas, heat, water supply or postal or transport services.

[58] This is stipulated in Article 1 of all three directives.

[59] Cantore/Togan, 149; Semple 2015, 1.18.

Directive 2014/24/EU refers to concessions, namely a contract where the contracting authority/entity entrusts a concessionaire with the execution of works or services (Article 2). Thereby, the authority/entity concedes the right to exploit the works or services subject to the contract. The core aspect of any concession contract is the granting of a right of usage or exploitation. A prominent example is the procurement (and subsequent putting into operation and management) of a highway by the concessionaire, who can in turn levy toll charges.

Thereby, the concessionaire bears the *economic risk* that comes with the operation of the facility for which the right of usage/exploitation has been granted. The element of economic risk is what distinguishes a concession from a "normal" public procurement contract (Recital 18 of Directive 2014/23/EU). Therefore, certain authorizations and licenses as well as leasing contracts, in particular in the field of port and airports that do not come with operating risks or do not require the procurement of specific works or services, do not qualify as a concession (Recitals 14 and 15 of Directive 2014/23/EU).

7.4.4.2 Contracting Authorities or Entities

The directives cover central and sub-central governmental authorities and entities governed by public law. Thereby, the *ratione personae* is the same for all EU Member States. Unlike in the GPA, EU Member States cannot negotiate exceptions and exclude entities from their coverage. In that sense, the EU procurement laws are much stricter than the GPA that follows a positive-lists approach and allows for specifications in countries' individual schedules.[60]

Directives 2014/23/EU and 2014/25/EU further refer to contracting *entities* (in addition to contracting authorities). This term is used as a fallback provision, enumerating entities that are not authorities in the classical sense, but still pursue public activities. Examples include private companies that are involved in the supply of utility-activities (e.g. supply gas and heat or electricity), as depicted in Articles 8 to 14 Directive 2014/25/EU or Annex II Directive 2014/23/EU.

7.4.4.3 Thresholds Values

All three public procurement directives only apply above a certain threshold value. Thereby, the thresholds vary according to the type of contract (work, service, supply contract or concessions) and the authority/entity (central or local) issuing the contract. Central government bodies usually have lower thresholds than sub-central ones. For example, central government bodies have a threshold of €134,000 for service or supply contracts, while sub-governmental bodies have a threshold of €221,000. This reflects the historical development of both the GPA and the EU,

[60] See above, Sect. 6.2.

which were binding first to central government bodies and only at a later point in time to sub-central government bodies.[61]

High thresholds apply to public work contracts under the Utilities Directive and concessions that only fall under the scope of the Concessions Directive, if they are worth more than €5.2. Furthermore, all three directives contain strict rules on how to estimate the value of a public contract for the purpose of threshold application.[62] Thereby, it is important to note that the threshold values are often adapted; this is ensured by review clauses in all the three public procurement directives.[63] The aim of this continuous revision is to ensure that the thresholds correspond to the GPA thresholds that are set not in Euros but in SDR (Preamble of Directive 2014/24/EU, Recital 18).

7.5 Non-Discrimination Principle

The principle of non-discrimination underlies not only the GPA, but is also the cornerstone principle of the EU. The equal treatment of all Member States lies at the heart of European integration. Unlike in the WTO, the EU non-discrimination principle does not only concern the economic dimension of trade, but also affects human rights, civil rights and issues like investment, taxation or the free movement of persons.

Since public procurement is a decisive element of the single market, non-discrimination is also the guiding principle of EU public procurement law. Article 18 Directive 2014/24/EU (and Article 36 Directive 2014/25/EU and Article 3 Directive 2014/23/EU)[64] contains a provision on principles of public procurement stating:

> Contracting authorities shall treat economic operators **equally** and **without discrimination** and shall act in a **transparent** and proportionate manner (emphasis added).

This shows that the EU bases its public procurement regulations mostly on the same principles as the GPA. The only subtle difference is that EU procurement also refers to equal treatment and proportionality. The element of equal treatment is regarded as another dimension of the non-discrimination principle.

The following sections aim at assessing to what degree the EU primary and secondary law sources reflect and thus implement the GPA non-discrimination

[61] Semple 2015, 1.10.

[62] Article 5 Directive 2014/24/EU, Article 16 Directive 2014/25/EU and Article 8 Directive 2014/23/EU.

[63] Article 6 Directive 2014/24/EU, Article 15 Directive 2014/25/EU and Article 9 Directive 2014/23/EU.

[64] Unlike the Utilities and the Procurement Directive, the pertinent provision in the Concessions Directive is entitled "Principle of equal treatment, non-discrimination and transparency" and is thus more specific as to which principles are referred to.

principle. Of particular interest is the question of whether the EU public procurement directives provide for an equal (or even higher) protection level for foreign tenderers (from other EU Member States and from GPA Parties).

7.5.1 Non-Discrimination in the TFEU

Article 18 TFEU contains the general prohibition of discrimination stating that "any discrimination on *grounds of nationality* shall be prohibited". Accordingly, any differentiation based on nationality is not allowed. This reflects the standard of the GPA (see e.g. Article IV GPA and in further detail above, Sect. 6.4). However, while the wording of the GPA prohibits treating foreign tenderers (from other GPA Signatory States) "less favourably", Article 18 TFEU is broader and thus also encompasses the discrimination of nationals (reverse discrimination, "Inländerdiskriminierung").

The principle of non-discrimination is derived from the fundamental freedoms that form the pillars of the EU.[65] The first of these freedoms, the free movement of goods, is enshrined in Article 34 TFEU that prohibits "all *qualitative restrictions* on imports and all measures having *equivalent effect*" (emphasis added). Since public procurement—including GPP measures—can have an effect equivalent to qualitative restrictions, Article 34 TFEU becomes applicable to public procurement and prohibits direct discrimination in public procurement awarding processes (such as price preference schemes or LCR) as well as indirect discrimination. The CJEU adopted a broad interpretation of "equivalent effect", encompassing also measures that are "capable of" potentially having a restricting effect (as laid down in the so-called *Dassonville* formula).[66] Applying this broad interpretation to public procurement means that e.g. technical specification referring to a "specific make or source or of a particular process", without accepting equivalent solutions, are prohibited.[67]

The freedom to provide services in Article 56 TFEU prohibits EU Member States to prevent nationals of other Member States to provide services on their territory. EU companies can thus provide (public procurement or other) services in any EU country without the need for a local establishment. Thereby, favoring prefers local companies in the evaluation process of a service contract would qualify as direct discrimination, while setting forth additional requirements for foreign suppliers

[65] Semple 2015, 2.18.

[66] Case 8/74, Procureur du Roi v Benoît and Gustave Dassonville [*Dassonville*], EU:C:1974:82. The Dassonville formula in para. 5 states that "all trading rules enacted by Member States which are *capable of* hindering, directly or indirectly, actually or *potentially,* intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions (emphasis added)."

[67] Case C-359/93, Commission of the European Communities v Kingdom of the Netherlands [*Commission v Netherland*], EU:C:1995:14; see also below, Sect. 8.3.

(such as certification requirements), but not for national ones would amount to indirect discrimination, both prohibited under Article 56 TFEU. Indirect discrimination was found in the public procurement case of *Contse*. In the case at hand, the contracting authority set forth award criteria that accorded more points to suppliers (for services of home respiratory treatments) that, firstly, had their production facilities situated within a radius of 1000 km (of the capital of the province where the service is to be provided) or, secondly, had local offices within the province.[68]

Another fundamental freedom that often becomes relevant in the context of public procurement is the freedom of establishment. Article 49 TFEU prohibits Member States to apply "restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State". This provision was invoked in the public procurement case of *Re Data Processing*, where an Italian procurement legislation limited participation in certain data processing contracts to Italian public ownership.[69] Since, in practice, all data processing firms in Italian public ownership were Italian, the CJEU found this requirement to indirectly violate the freedom to provide services (Article 56 TFEU), as well as the freedom of establishment in Article 49 TFEU.[70]

7.5.2 Non-Discrimination in the Public Procurement Directives

The principle of non-discrimination is often referred to, but not further elaborated in the procurement directives. However, detailed rules on specific procurement issues like the various GPP instruments,[71] conflict of interests,[72] communication (especially via electronic ways),[73] electronic means,[74] or preliminary market consultations[75] further reflect the non-discrimination principle and apply it to concrete issues of interests.

With regard to non-discrimination and GPP, public procurement directives expressly state that the consideration of "costs imputed to environmental externalities" should not have a discriminatory effect, i.e. "should be established in advance in an objective and non-discriminatory manner and be accessible to all interested

[68] Case C-3/88, Contse and others v Ingesa [*Contse*], EU:C:2005:644.

[69] Case C-272/91, Commission of the European Communities v Italian Republic [*Re Data Processing*], ECLI:EU:C:1994:167.

[70] *Re Data Processing*, Recital 1.

[71] See below, Chap. 8.

[72] Article 24 Directive 2014/24/EU.

[73] Article 22 Directive 2014/24/EU.

[74] Preamble of Directive 2014/24/EU, Recital 53.

[75] Article 40 Directive 2014/24/EU and Article 58 Directive 2014/25/EU.

parties".[76] Detailed rules on non-discrimination that become relevant in a GPP context can also be found in the specific provisions on the various contract-related or tenderer-related procurement instruments that will be further illustrated in the following chapter.

Most importantly, the public procurement directives also contain provisions referring directly to the GPA. Article 25 Directive 2014/24/EU[77] is entitled "Conditions relating to the GPA and other international agreements" and reads as follows:

> [For contracts falling within the scope of the GPA] Contracting Authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements **treatment no less favourable** than the treatment accorded to the works, supplies, services and economic operators of the Union (emphasis added).

This provision reflects the wording of the GATT and the GPA and thus leaves no room for doubt that the WTO non-discrimination standard is also reflected in EU public procurement laws, in addition to the EU non-discrimination standard. Furthermore, Recital 98[78] expressly states that social policies should not be designed in a way as to discriminate against GPA tenderers.

All these direct non-discrimination obligations regarding GPA tenderers are remarkable insofar as the public procurement directives generally apply to tenderers from GPA countries by means of the direct reference in Recital 17 of the Public Procurement Directive's Preamble. In this regard, the cross-references to the GPA throughout the text of the directives can be considered a "double protection" against discrimination of foreign tenderers from GPA countries.

7.5.3 Equal Treatment Element

The principle of equal treatment can be regarded as an additional dimension of the non-discrimination principle.[79] While WTO law does not contain any principle of equality, EU law has enshrined equality as a fundamental right.[80]

The principle of equal treatment has been defined by the CJEU within the context of public procurement as:

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[76] See Preamble of Directive 2014/24/EU Recital 93 or Preamble of Directive 2014/25/EU Recital 98.

[77] An analogous provision can be found in Article 43 Directive 2014/25/EU.

[78] Analogous provisions can be found in Recital 103 Directive 2014/24/EU and in Recital 65 Directive 2014/23/EU.

[79] Case C-458/03, Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG [*Parking Brixen*], ECLI:EU:C:2005:605, para. 26; Cottier/Oesch, 145.

[80] Cottier/Oesch, 145 with reference to Case C-292/97, Kjell Karlsson and Others, ECLI:EU:C:2000:202; Ehring, *passim*, however, argues that the WTO jurisprudence has turned the non-discrimination obligation into an equal treatment obligation.

> The equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated the same way, unless such a treatment is objectively justified.[81]

The court thus proceeds in a two-step analysis, first assessing whether the companies or situations at issue are comparable. If so, then the second step is to assess whether there are objective grounds for different treatment.[82]

This shows that the definition of non-discrimination in the EU goes further than in the GPA. While the latter only requires Parties not to grant "less favourable treatment",[83] the EU law equal treatment obligation prohibits any differentiation, regardless of the result. In other words, although the interpretation of "less favourable treatment" is broad and includes measures having a merely potentially detrimental impact, the EU law requirement of equal treatment is still considered to be stricter.

7.5.4 Prohibition of Direct and Indirect Discrimination

Firstly, the non-discrimination treatment principle prohibits direct discrimination. This includes cases where different criteria apply to bidders (although the bidders are "comparable"). This also includes examples of corruption, or directly preferring local tenderers over national ones.[84]

Secondly, the non-discrimination principle also covers indirect discrimination. Accordingly, it can also imply the positive obligation of contracting authorities to level the playing field and to ensure competition, e.g. in cases where one tenderer is better informed about the procurement contract, since he was involved in the preparation phase.[85]

The CJEU has on various occasions ruled on the prohibition of direct and indirect discrimination in the context of public procurement and repeatedly reiterated the particular protection that foreign tenderers deserve. In *Commission v France*, the CJEU stated that the non-discrimination principle protects foreign tenderers with a "justified hope for participation in the procurement process and gives them the right to receive the same information as domestic ones".[86] In the same line, foreign

[81] Joined cases C-21/03 and C-34/03, Fabricom SA v Belgian State [*Fabricom*], ECLI:EU:C:2005:127, para 27.

[82] Arrowsmith 2010c, 130.

[83] See above Sect. 6.4.

[84] *Ibid.*

[85] This was at the center of the dispute in *Fabricom*; Semple 2015, 2.26.

[86] Arrowsmith 2010c, 131 with reference to Case C-16/98, Commission of the European, Communities v French Republic [*Commission v France*], ECLI:EU:C:2000:541.

tenderers can challenge an allegedly unfair award decision before a court as local tenderers.[87]

7.5.5 Exceptions and Justifications

Exceptions to the non-discrimination obligation can be found in both primary and secondary law. While the motives for justification are largely the same in WTO and EU law, the CJEU is less strict in the application of these justification reasons.[88] As a consequence, legitimate policy reasons are more likely to "trump" non-discrimination obligations under EU law than under WTO law.

The public procurement directives inscribe some explicit exceptions from the prohibition of discrimination: Article 20(1) states that authorities can reserve a percentage of contracts for companies that employ at least 30% disadvantaged or disabled people. There is, however, no explicit exception for environmental goods or for GPP in general.

Apart from the specific exclusion reasons in the public procurement directive, the general justification reasons inscribed in the TFEU also exclude procurement authorities from their obligation to accord non-discriminatory and equal treatment. Restrictions on the rights conferred by the TFEU may be justified if **legitimate reasons** as set forth, on the one hand, in the derogation-provisions (Articles 36, 52 and 62 TFEU) justify it. Such legitimate reasons typically include public policy, morality, health or security. Moreover, breaches can also be justified by unwritten overriding reasons relating to the public interest, notwithstanding whether they are inscribed in the law or not.[89] Such overriding reasons constitute, most prominently, the protection of the environment or of consumers.

As a second requirement, the measure at issue must also be **proportional**. Proportionality in general EU law is assessed considering whether the measure or policy is *suitable* to achieve the envisaged policy objective, whether it is *necessary* (within the sense that there are no less restrictive, equally effective measures) and whether the restriction is *reasonably bearable*.[90] Unlike WTO law in the *Chapeau* of Article XX GATT (and analogously Article III(2) GPA), EU law does not require a government to show good faith in the form of efforts to negotiate mutually agreeable solutions.[91]

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[87] *Ibid.*, with reference to Case C-87/94, Commission of the European Communities v Kingdom of Belgium [*Walloon Buses*], ECLI:EU:C:1996:161; see also below, Sect. 7.6.

[88] Cottier/Oesch, 155–156.

[89] The principle of unwritten justifications was first acknowledged in Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [*Cassis-de-Djion*], ECLI:EU:C:1979:42.

[90] See e.g. Case C-209/03, The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills [*Bidar*], EU:C:2005:169 or Case 333/13, Elisabeta Dano and Florin Dano v Jobcenter Leipzig [*Dano*], EU:C:2014:2358.

[91] Cottier/Oesch, 158; for a detailed interpretation of the *Chapeau* see above, Sect. 6.8.1.

Applied to the example of GPP this would mean that if a GPP measure or policy would be found to run contrary to a principle enshrined in the TFEU, a procuring entity could generally invoke the protection of the environment as an uncodified justification reason. Moreover, the measure or policy would have to meet the proportionality test. This would be possible only in cases where the GPP measure or policy is highly effective and the only conceivable measure to achieve environmental protection.

7.6 Remedies

As for implementation, the GPA as well as the Remedies Directive set forth some minimal standards that national courts or review bodies have to meet. Thereby, the Remedies Directive provides a higher level of protection for tenderers than the respective GPA provision;[92] it is more detailed and also contains framework rules on the consequences of a ruling. The award of damages is so far not regulated on an EU level but is left to Member States and still is a field of significant legal uncertainty.

Since the Remedies Directives leave broad discretion to EU Member States, there are substantial differences between the enforcement regimes at national level in the EU.[93] Differences exist also regarding the number of disputes: A study conducted by the Commission shows that in Cyprus only 1% of all the procurement contracts are subject to review, while in Sweden this percentage is as high as 19%.[94]

Enforcement of public procurement laws and the quest for remedies by a tenderer in the EU is complex and takes place on various levels, starting with the national level. For a contract issued by a government from an EU state, aggrieved tenderers can, in a first step, invoke a violation (of either national or EU procurement laws) before a national court. Whether they can also raise a claim based solely on the GPA is contentious.[95] However, this question is not of practical significance, since the EU public procurement directives are considered to implement the GPA; they have more detailed and stricter regulation and thus can be considered to provide a higher level of protection than the GPA.

A fact that is relevant for GPA parties, however, is the fact that the EU public procurement directives are also applicable to tenderers from other GPA parties (Preamble of Directive 2014/24/EU, Recital 17).[96] This means that, for example, a Swiss company could raise a claim before an EU court on grounds of a right derived

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[92] Casavola, 317.

[93] Arrowsmith 2010c, 288.

[94] Semple 2015, para. 8.02.

[95] See also discussion on the direct applicability of the GPA in the EU above, Sect. 7.3.3.

[96] The text states that "for contracts covered by [the GPA] (…), contracting authorities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements."

from the EU public procurement directives, even if Switzerland is not an EU Member, but only a GPA party.

On a supranational level tenderers can appeal the decision of a national court of last instance before the CJEU. Over the years, the CJEU has served as an important driver in developing not only the standards of judicial protection but for public procurement in general. Also the question of the legality of GPP has often been raised before the CJEU, which in turn has played a decisive role in overcoming the legal insecurities in this regard (see below, Chap. 8). Although a tenderer could, under certain circumstances, raise an individual claim before the CJEU, the most active plaintiff in this regard is the Commission. The legal instruments available to raise a claim are Article 258 TFEU (infringement procedure) and Article 267 TFEU (preliminary ruling). An infringement will be assumed when an EU Member States has failed to communicate its implementation measures, when its national laws are not in conformity with EU law and when EU law is applied wrongly.[97] If an EU Member State does not comply with a CJEU ruling, penalty measures will be taken based on Article 260 TFEU.

Finally, on an international level, the government of an aggrieved tenderer can also resort to the inter-governmental dispute mechanisms of the WTO, provided that the country in question is a GPA Party. There, a complaint could be raised on the grounds of either (1) infringement of the EU's GPA obligations by a EU contracting authority, or (2) the application of a measure by the EU, whether or not it conflicts with the GPA (Article XX.2 GPA). However, the scope of these provisions remains vague and the fact that very few cases under the GPA have been brought before a WTO Panel raises questions about the effectiveness of the WTO DSM in the particular case of the GPA.[98]

7.7 Summary and Findings

The EU is a Party to the GPA and bound by the latter's legislative framework. Nevertheless, the question of how the EU implements the GPA has to be viewed in light of its distinctive role. The EU has long been the main advocator of public procurement market liberalization and as such has played a driving role in GPA negotiations. This dynamic has also been supported by the fact that the EU's detailed and elaborated legislative framework on public procurement may have served as an inspiration for the drafting of the GPA.[99] In other words, unlike in many other GPA States, where the GPA has served as a "top-down" incentive to establish or reform

[97] Matei, 358.

[98] Casavola, 313.

[99] See Ladi/Tsarouhas, *passim*.

domestic public procurement legislations,[100] the influence of the GPA on EU public procurement legislation can be considered comparably low.

As has been shown in this chapter, the EU public procurement legislative framework is generally based on the same principles as the GPA: both operate through competition mechanisms to liberalize procurement markets.[101] The EU legislative framework, however, goes further than the GPA and contains more detailed rules and stricter standards than the latter.[102] The non-discrimination obligation in EU primary law and in the public procurement directive was interpreted broadly by the CJEU and thus can be considered to go further than the non-discrimination principle contained in the GPA and the GATT.

This means that the level of protection granted to tenderers by the EU public procurement framework presumably surpasses the requirements of the GPA. Therefore, the question of whether the GPA should be directly applicable before EU courts (most probably this will be rejected by the CJEU), may be considered of low practical relevance.

Furthermore, the procurement directives contain mechanisms to ensure their extraterritorial applicability, extending its applicability to tenderers from GPA countries. Foreign tenderers from other GPA countries may also benefit from the high level of protection conferred by the EU non-discrimination principle. Moreover, the public procurement directives contain explicit reference to the GPA, further highlighting the attention that foreign tenderers from GPA countries deserve.

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[100] As will be seen in the case of Switzerland in Chap. 10.

[101] Casavola, 295.

[102] Casavola, 317; Cottier/Oesch, *passim*, compare the general non-discrimination principle of the WTO and the EU. They reach the conclusion that the EU non-discrimination principle is stricter and more differentiated, 166.

Chapter 8
Regulatory Scope for GPP

In the EU, GPP is a broadly acknowledged practice and an important tool for what is often referred to as "strategic procurement".[1] This chapter looks at the legislative framework for GPP in the EU. It starts with illustrating the evolution of GPP on the levels of (1) jurisprudence, (2) legislative reform and (3) policy action. It then discusses the role of the Environmental Integration Principle (EIP) as an important element of EU environmental policy and a guiding principle for EU Member States. Sections 8.3–8.7 then take a closer look at the various instruments of public procurement and delineate their scope and limits as a tool for GPP implementation.

8.1 Evolution of GPP in the EU

Environmental concerns lay at the heart of current European public procurement laws and policies. GPP is defined as:

- *A process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured.*[2]

In the EU region, GPP has evolved into an acknowledged policy tool in the EU, used to foster environmental policy goals as well as best value for money in public procurement.[3] However, the focus on sustainability in public procurement is a

[1] See for example Semple 2016, 54 or Dragos/Neamtu 2016, 114.

[2] COM/2008/400 final, 4.

[3] See, *ex multis,* Semple 2015, 7.01 ff.; Sjåfjell/Wiesbrock, xiii; Schebesta, 316; Nordic Council of ministries, 3 or Miranzo Diaz, 8.

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relatively novel development that has gathered strong momentum in the last two decades.

The development from viewing GPP as a merely "secondary goal" to forming part of what is called "strategic procurement"[4] has been spurred on at three levels. Firstly, by EU jurisprudence, secondly, by policy initiatives of the Commission, and thirdly, by legislative reform including GPP.

8.1.1 Jurisprudence, Policy Initiatives and Legislative Reforms

The evolution of GPP in the EU is often said to have been triggered by the CJEU.[5] EU jurisprudence has consistently stated that environmental concerns can be considered as complementary to economic concerns in the public procurement process and in the same line, the CJEU has repeatedly undermined the legitimacy of GPP—although not without posing certain limits to it.[6]

Beentjes[7] from 1988 was the first case on sustainable procurement where the CJEU allowed placing social considerations over purely economic ones. In 2002, the CJEU decided its first precedent case on GPP, the case of *Concordia Buses*.[8] In the case at hand, a Finnish authority awarded additional points to operators of a bus fleet, whose buses had low nitrogen oxide emissions and who had a certified environmental program. This was challenged by the tenderer Concordia Bus, whose offer was cheaper than the one of the winning tenderer. Finally however, the court upheld the procuring authority's strategy. The advocate general argued that "the emissions criteria are irretrievably linked to the configuration of the fleet" and expressly stated that environmental criteria can indeed be considered in a public procurement contract, provided that they are designed in compatibility with the non-discrimination principle and the four freedoms.[9] This reasoning was followed

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[4] Dragos/Neamtu 2014, 310.

[5] See for example Semple 2015, 7.11; Arrowsmith/Kunzlik, fn 7; Miranzo Diaz, 12; Schebesta 317. As noted by Bradley, 141, this is symptomatic for the increasingly important role of the CJEU as an arbiter who is obliged to weigh up a variety of concerns that do not necessarily have to be legal in character.

[6] Bovis 2016, xiii.

[7] Case 31/87, Gebroeders Beentjes BV v State of the Netherlands [*Beentjes*], ECLI:EU:C:1988:422. *In casu*, the authority favoured companies that imply long-term unemployed (by means of an award criterion).

[8] Case C-513/99, Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne [*Concordia Bus*], ECLI:EU:C:2002:495.

[9] *Concordia Bus*, Opinion of Advocate General Mischo, ECLI:EU:C:2001:686, paras. 77 and 123.

throughout subsequent cases, such as *EVN and Wienstrom*[10] in 2003, *Max Havelaar*[11] in 2012and *Vent de Colère*[12] in 2013.

However, it was only a decade later that the EC Commission started to officially accept the consideration of environmental factors in public procurement processes. In 1996, it acknowledged the potential of GPP through public procurement in its "Green Paper on Public Procurement in the European Union".[13] In a further green paper on "Integrated Product Policy" the Commission went on to acknowledge that public procurement can lead to an important "kick-off effect" for green consumption and stated its intention to "take the lead in greening its procurement activities".[14] In the same year in 2001, the Commission pointed to the range of possibilities for sustainable procurement under the existing legislative framework.[15]

The EU legislative framework on public procurement only gradually included GPP considerations.[16] The CJEU cases mentioned in the foregoing sections lay the foundation for a reform of the EU public procurement rules in 2004. The 2004 directives, for the first time, made reference to the EIP in public procurement.[17] The 2004 legislative framework also introduced provisions on key aspects of GPP, for example on green technical specifications, green award criteria, or on the use of eco labels and EMS as selection criteria.[18]

These infant steps in the direction of GPP soon gained momentum. Soon after the 2004 reform, the Commission went on to reiterate the significance of GPP on various occasions and established it as an aim through publishing a periodically updated "Handbook on Environmental Public Procurement".[19] This handbook is complemented by various country-based or region-based handbooks on a (sub-) national level.

More recent case law, like the *Max Havelaar* ruling in 2012, further clarified the scope and limits for GPP and significantly strengthened its stance in EU law. All this led to the fact that the balancing of economic, environmental and social objectives was regarded as a major factor in the 2014 reform.[20] The 2014 directives reflect this

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[10] Case C-448/01, EVN AG and Wienstrom GmbH v Republik Österreich [*EVN and Wienstrom*], ECLI:EU:C:2003:651.

[11] Case C-368/10, European Commission v Kingdom of the Netherlands [*Max Havelaar*], ECLI:EU:C:2012:284.

[12] Case C-262/12, Association Vent De Colère! Fédération nationale and Others v Ministre de l'Écologie, du Développement durable, des Transports et du Logement and Ministre de l'Économie, des Finances et de l'Industrie [*Vent De Colère*], ECLI:EU:C:2013:851.

[13] COM/1996/583, final, Chapter VI.

[14] COM/2001/68, final, 12 and 15.

[15] COM/2001/0566 final, *passim*, Miranzo Diaz, 11.

[16] Schebesta, 316.

[17] See below, Sect. 8.2.

[18] See Article 23 Directive 2004/18/EC, Article 53 Directive 2004/18/EC, Article 48(2)(f) Directive 2004/18/EC.

[19] COM/2008/400 final, 4.

[20] Kingston 2016, 25.

paradigm change and today, sustainable procurement development is even called by scholars "the backbone of the modernization reform of public procurement".[21]

8.1.2 2014 Revision and Forward

In the current 2014 EU legislative framework on public procurement, GPP is expressly stated as a main focus. Recital 2 of Directive 2014/24/EU states that public procurement is an essential instrument to be used to achieve sustainable growth. This is further reiterated in Recital 91 that points out that the directive was meant to clarify "how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development."

Moreover, the 2014 revision has introduced a compulsory environmental requirement in Article 18(2) Directive 2014/24/EU. The potentially significant implication of this new provision will be analyzed in more detail in Sect. 8.7, when discussing green exclusion and selection criteria. Most importantly, the 2014 revision significantly strengthened the scope of GPP within the framework of the various instruments for public procurement, as will be further elaborated in Sects. 8.3–8.7.

The fast pace of GPP development in the EU has not slowed down after the 2014 reform, but to the contrary, rather represents the starting point of a series of newest developments. In the aftermath of the adoption of the 2014 public procurement directives, the EU Commission has been very active in promoting new policy initiatives to improve public procurement and to foster the collaboration between the various EU policy levels. Thereby, it stands out that the EU Commission has identified "ensuring a wider uptake of innovative, green and social procurement" as its top priority.[22] Other initiatives include a "voluntary ex-ante assessment mechanism" that will allow national authorities to seek assistance by Commission services when planning large infrastructure procurement projects, in particular with regard to their compatibility with EU laws.[23] These soft-law initiatives by the EU Commission will be an indispensable addition to the legislative reforms and serve as an important orientation for national authorities before the background of growing complexity of EU public procurement law.

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[21] Dragos/Neamtu 2016, 116.

[22] COM/2017/572 final, 8.

[23] COM/2017/572 final, 8.

8.2 Environmental Integration Principle (EIP)

Sustainability has a "strong legal position" among the objectives enshrined in the Treaties of the EU.[24] This becomes apparent, for example, when looking at Article 3.3 TEU that states that the EU shall establish an internal market and "work for the sustainable development of Europe", aiming at "a high level of protection and improvement of the quality of the environment". Accordingly, the internal market does not only serve economic purposes, but also the wider goal of sustainable development, of which the environmental dimension forms the basis.[25]

This dual-aim is further reinforced by Article 11 TFEU, which is the central provision for environmental protection in EU primary law, as will be shown in the following.

8.2.1 General Nature of the EIP

Article 11 TFEU contains the so-called "environmental integration principle" (EIP). It codifies the mandate to ensure a comprehensive environmental protection policy, stating that:

> **Environmental protection requirements must be integrated** into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development (emphasis added).

The EIP in Article 11 TFEU is one of the most important elements of EU environmental law.[26] It enshrines the legal requirement that legislators and authorities must integrate environmental protection requirements into the definition and implementation of all EU policies and activities.[27] It is therefore the key instrument to implement the sustainability goal within the EU.[28]

It is generally recognized that the EIP is more than just a mere policy objective, but constitutes a legally binding general principle.[29] This interpretation is also supported by the wording "must"—which constitutes a strong wording, considering that other Union policy objectives like gender equality (Article 8 TFEU), high level of employment (Article 9 TFEU), consumer protection (Article 12 TFEU) or animal welfare contain the weaker formulation "shall".[30]

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[24] Sjåfjell/Wiesbrock, 5.

[25] Wiesbrock, 112.

[26] Sjåfjell/Wiesbrock, 8.

[27] Bovis 2016, 18.

[28] Wiesbrock, 112.

[29] Wiesbrock, 106, with references.

[30] These provisions state that the Union "shall aim at" (Articles 8 and 10 TFEU), "shall take into account" (Articles 9 and 12 TFEU) and therefore do not contain an obligation, but rather an encouragement; see also Kingston 2011, 118.

Consequently, there is little doubt that Article 11 TFEU contains a legal requirement to *consider* public procurement in EU policy or activity and to *interpret provisions in favor of environmental protection*.[31] There is, however, uncertainty as to the precise degree and extent of obligation arising from this principle.[32] Sjåfjell infers from Article 11 TFEU the duty for EU institutions, on the one hand, to seek a balance between the various objectives of EU law and for the economic operators, on the other hand, the duty to take specific action to achieve the various objectives.[33]

8.2.2 Implications for GPP

Public procurement is an important field of "Union's policies and activities" (Article 11 TFEU). Therefore, the EIP in Article 11 TFEU also contains the mandate to promote environmental consideration in this field, namely GPP. This is also acknowledged in the Preamble of the current and the former EU public procurement directive,[34] and was used by the CJEU in the precedence case of *Concordia Bus* to justify the first ruling in favour of GPP with the EIP.[35] However, since public procurement mostly takes place on a domestic level, it is unclear whether the EIP (that addresses the EU institutions and not the Member States) contains concrete obligations for national procurement authorities.

However, as pointed out by scholars, notwithstanding the possibility that Article 11 TFEU does not directly confer rights or obligations to individuals and thus might not directly be binding for EU Member States,[36] the principle of sincere cooperation enacted in Article 4(3) TEU requires Member States to actively work towards the attainment of the EU goals. Therefore, Member States do not only have the right but also the duty to consider GPP to a degree that is proportional to taking into considerations other objectives.[37]

[31] Wiesbrock, 106 with reference to Kingston 2011.

[32] For a more detailed account see Sjåfjell, *passim*.

[33] Sjåfjell, 55–58.

[34] Recital 91 Directive 2014/24/EU states that "Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts."

[35] *Concordia Bus*, para 57: "In the light of [Article 11 TFEU], which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment […]."

[36] Sjåfjell, 55–58.

[37] The requirement for proportionality can be derived from the three duties substantiated by Sjåfjell, 55–58: the first duty is to seek a balance between the various objectives of EU law.

Accordingly, EU legislators and the EU courts have to make sure that the national procuring authorities do not procure goods, services or works without taking the environment into consideration.[38] This does not mean that GPP has to be mandatory (although it is in Italy), but merely includes the obligation not to equate the "most advantageous tenderer" with the cheapest one.[39]

Nevertheless, there is a tendency to make GPP mandatory in certain sectors. Examples include the sector of IT products,[40] where contracting authorities have to consider minimum energy efficiency requirements, or the sector of public buildings[41] that have to be nearly CO_2 neutral. Another important example is the sector of road transport vehicles, where public authorities have to include award criteria considering lifetime costs for energy consumption, CO_2 emissions and pollutant emissions.[42]

8.3 Technical Specifications

Technical specifications serve to define the mandatory characteristics of the good, service or work to be procured and are the most common instruments for GPP implementation.[43] Statistical data for the EU illustrate this tendency: 69% of all the public procurement contracts contain technical specifications referring to environmental criteria, while this is the case for only 45% of the award criteria.[44]

The significance of technical specifications as an application-instrument for GPP is also acknowledged in the Directive 2014/24/EU: Recital 74 states that technical specifications

> (…) need to allow public procurement to be **open to competition** as well as to **achieve objectives of sustainability** (emphasis added).

This addresses the precarious balancing act required by contracting authorities to, on the one hand, consider environmental aspects in their technical specifications, and on the other hand, design them in a way as not to be unnecessary strict and thus discriminating. Notwithstanding these potentials for conflict, green technical

[38] Wiesbrock, 130.

[39] Wiesbrock, 130; Sjåfjell/Wiesbrock, 11; see in more detail below, Sect. 8.4.

[40] Regulation (EC) No 106/2008 on a Community energy-efficiency labelling programme for office equipment, in particular Article 6.

[41] Directive 2010/31/EU on the energy performance of buildings requires Member States in Article 9 to ensure that all new public buildings are nearly CO_2 neutral.

[42] See Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles. This directive also provides for a common calculation method to measure operational life time costs in Article 6.

[43] See also above, Sect. 6.4.

[44] Semple 2015, 7.09; Kahlenborn et al., 8.

specifications seem to be broadly accepted in the EU and, unlike specifications considering social criteria, have not often been subject to challenges under the CJEU.[45]

8.3.1 Scope and Limits

Like in WTO law,[46] one of the main challenges in EU law is finding a balance between environmental and non-discrimination concerns when designing technical specifications.

Similar to the GPA,[47] the EU public procurement directives are also characterized by detailed provisions concerning competition/non-discrimination requirements. Apart from a definition of technical specifications in Annex VII(1), the Directive 2014/24/EU lists five preconditions for the drafting of technical specifications in Article 42:

1. *Competition Requirement*: Recital 74 states that technical specifications should be drafted in such a way as to "avoid artificially narrowing down competition". Technical specifications that favor a specific economic operator by "mirroring key characteristics of the supplies, services or works habitually offered by that economic operator" are not allowed. Competition concerns are further reiterated in Article 42(2) which states that technical specifications "shall afford *equal access* of economic operators" and shall not have "*the effect of creating unjustified obstacles* to the opening up of public procurement to competition" (emphasis added).
2. *Transparency Requirement*: Article 42(1) states that technical specifications shall be set out in the procurement documents.
3. *Functionality and Performance Orientation*: Article 42(3)a states that technical specifications shall be "in terms of performance or functional requirements, including environmental characteristics". This mirrors the GPA wording,[48] with the difference that Article 42(3) makes a direct reference to environmental characteristics. Furthermore, technical specifications shall refer to European or international standards Article 42(3)b. This provision is the analogue version of Article X:2 GPA, with the only exception that the EU legislations prefers European standards, while the GPA's preference are international standards.

[45] The one exception being the precedence case of *Max Havelaar.*

[46] See above, Sect. 6.4.

[47] See above, Sect. 6.4: according to Article X GPA green technical specifications i) cannot amount to unnecessary obstacles to international trade, ii) shall be based on performance and functional requirements as well as on international standards, iii) have to include and consider equivalent offers and cannot be based on trademarks, iv) cannot be drafted with the help of persons with a commercial interests in a manner that would be bad for competition and v) need to be documented and published in a transparent way.

[48] See above, Sect. 6.4.

4. "*Or equivalent"-Requirement*: If a technical specification is designed referring to trade-marks or patents (which is allowed only in exceptional cases), contracting authorities have to indicate that equivalent solutions are also accepted (Article 42(4)). According to Article 42(5), the same applies to offers that do not refer to standards; in these cases, the contracting authorities have to allow the bidder to prove his equivalence with the required standard. Notably, this requirement also mirrors the GPA requirement in Article X:3 GPA.[49]
5. *Requirement of a link to the subject-matter*: The link to the subject-matter (LtSM) is an important key word applied to technical specifications in the new 2014 legislation. It was introduced in the *Concordia Bus* ruling (para. 59 and others) and subsequently incorporated in the former Directive 2004/18/EC, where it applied to award criteria, but not to technical specifications. According to Article 42, technical specifications can only refer to PPM, when those are linked to the subject-matter of the contract. The same applies to performance-oriented and functional criteria (subparagraph 3a), as well as the exceptional use of trade-marks or patents (subparagraph 4). The GPA does not contain such a requirement.

This shows that the EU law provides for a degree of regulation and protection of non-discrimination concerns for technical specifications equivalent to the GPA. Most notably, the safeguarding of competition and non-discrimination through prevention of abuse by the restrictive formulation of technical specification (Article X:1 GPA and Article 42(2) Directive 2014/24/EU) appears to be the core concern of both regulatory frameworks. Another common concern is the requirement to formulate specifications in terms of functional and performance-oriented requirements (Article X:2 GPA and Article 42(2)(a) Directive 2014/24/EU). This is to prevent narrowly formulated specifications unnecessarily restricting access for some bidders. The same aim is pursued by the "or equivalent"-requirement that requires the indication that equivalent offers are also considered.

However, while the GPA only protects the market-access opportunity of foreign tenderers, the EU non-discrimination obligation regarding specifications applies to any economic operator (national or foreign) and thus also protects the discrimination of nationals ("Inländerdiskriminierung").[50]

Unlike the GPA, the 2014/24/EU Directive expressly states the importance of a broad and functional formulation of technical specifications for GPP and innovation, since this leaves room for innovative solutions and GPP strategies that else might not be possible if specifications are formulated too narrowly. Another difference is that EU law prefers European standards, while the GPA prefers international standards.[51] In order to avoid conflict between the GPA and the EU Public Procurement Directive it is therefore important to indicate that both kind of standards are considered equivalent (see also "or equivalent"-requirement).

[49] *Ibid.*

[50] While EU law typically contains wordings such as "shall afford equal access of economic operators", the GPA expressly refers to "*foreign* suppliers, goods or services" (emphasis added).

[51] Semple 2015, 4.32.

Finally, the EU directives require (green) technical specifications to have a link to the subject-matter at issue (LtSM-requirement). The LtSM requirements been established by the Court in the context of award criteria and has only now with the 2014 reform been added to the rules on technical specifications. To what exact degree this requirement limits the drafting of green technical specification in the EU remains uncertain so far, since its scope still has to be clarified by jurisprudence. WTO law does not contain an analogous requirement: Article X:6 GPA requires a nexus between the technical specification and the environmental policy goal,[52] though not with the subject matter of the contract itself.

8.3.2 PPM

The issue of PPM may play a prominent role under EU law, especially in the context of green technical specifications. As observed by Cottier/Oesch most of the cases before the CJEU concerning PPM concerned environmental protection.[53] Thereby, the court has generally adopted a more liberal view regarding PPM than the WTO DSM, allowing for a greater scope for inclusion of PPM.[54]

The relevance of PPM is reflected in Article 42 Directive 2014/24/EU that expressly recognizes that technical specifications may refer to PPM:

> [Technical specifications] may also refer to the **specific process or method of production** or provision of the requested works, supplies or services or **to a specific process for another stage of its life cycle** even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives. (emphasis added)

The highlighted parts show that the EU directives, unlike under the GPA,[55] make a clear reference to npr PPM ("to a specific process for another stage of its life-cycle" and "even where such factors do not form part of their material substance").[56] There are two conditions for specifications referring to PPM: firstly, the PPM have to be linked to the subject-matter of the contract, and secondly, they have to be proportionate to the value and the objective of the contract.

The clear regulation of PPM within the framework of technical specifications is an important novelty of the 2014 directive. The importance of PPM for environmental protection was already established in the precedence case of *Preussen Elektra*[57]

[52] Article X:6 GPA refers to "technical specifications *to* promote the conservation of natural resources or protect the environment" (emphasis added).

[53] Cottier/Oesch, 167.

[54] *Ibid.*

[55] See above Sect. 6.4.

[56] See also Semple 2015, fn 43.

[57] Case C-379/98, PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein [*Preussen Elektra*], ECLI:EU:C:2001:160.

in 2001, in which the CJEU allowed for technical specifications to refer to renewable energies (which notably is a npr PPM), reiterating the importance of renewable energies for the reduction of GHG, which it acknowledged to be "amongst the main causes of climate change."[58] Subsequently, the 2004 directive also included PPM in its legal text, stating that contracting authorities "may lay down environmental characteristics such as PPM" (see Preamble of Directive 2004/18/EC Recital 29). It did, however, not specify the closer circumstances or conditions for PPM. In this regard, the 2014 Public Procurement Directive importantly fills a legal gap.

8.4 Award Criteria

8.4.1 Scope

Award criteria (referred to as "evaluation criteria" in WTO terms)[59] are an actively used instrument within the EU, in particular in the context of GPP. The way in which they are designed and weighted is of central importance to tenderers and can significantly shape the product, service or work to be procured.[60] Recital 89 of Directive 2014/24/EU calls award criteria a "central notion" and enumerates various possibilities for the inclusion of environmental criteria within the framework of award criteria.[61] Notably, Article 67 Directive 2014/24/EU also expressly allows for the inclusion of npr-PPPM within the framework of award criteria.[62]

As illustrated above,[63] Article X:9 GPA requires evaluation criteria merely to be published and to adhere to the general principle of non-discrimination, while expressly allowing reference to environmental criteria. Unlike the GPA, the EU Public Procurement Directive contains detailed rules for the design and weighting of award criteria, which are also central in the context of GPP, i.e. for the drafting of green award criteria. These rules have undergone various changes during the 2014 legislative reform and present a codification of the latest jurisprudence.

8.4.1.1 Most Economically Advantageous Tender (MEAT)

Article 67(1) Directive 2014/24/EU states as a basic principle that

> […] Contracting authorities shall base the award of public contracts on the **most economically advantageous tender** (emphasis added).

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[58] *Preussen Elektra,* para. 73.

[59] See above Sect. 6.5.

[60] Semple 2015, 440.

[61] See for example Recital 91, Recital 97 or Article 67(2) Public Procurement Directive.

[62] For the discussion on npr PPM see above, Sects. 6.5 and 8.3.2.

[63] Section 6.5.

The terminology of "most economically advantageous tender" (MEAT) is the overriding concept of the reformed directives.[64] It should be read in analogy to the term "best price-quality ratio" (Recital 89 Directive 2014/24/EU).

The MEAT approach marks an important shift away from price towards quality as the decisive criterion,[65] remarkable insofar as the former directives allowed for a "lowest price"-approach, where contracting authorities could also decide to award the contract solely on the basis of the criterion of price (Article 53(1b) Directive 2004/18/EC). This option was criticized in literature as running counter to the obligation to consider environmental protection concerns (as mandated by Article 11 TFEU), since it would lead to cutting costs at the expense of environmental standards.[66]

Therefore, from an environmental perspective, the limitation to the MEAT approach is a welcome development. As contrary to the 2004 directives, the 2014 directives have not only deleted the "price only"-option: Article 67(2) Public Procurement Directive now expressly states that EU Member States may prohibit basing the award on the lowest price.[67]

The question of what precisely the MEAT-requirement entails is answered illustratively in Article 67(2) Public Procurement Directive:

> The **most economically advantageous tender** […] shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including **qualitative, environmental and/or social aspects**, linked to the subject-matter of the public contract in question (…) (emphasis added).

Article 67(2) a–c continues to enumerate examples of criteria that may determine the MEAT, for example experience of staff, technical assistance or delivery conditions, and again, environmental criteria.[68] Notably, the enumeration in Article 67(2) is not exhaustive (Recital 92 Directive 2014/24/EU).

Thereby, it is important to highlight that the term "price or cost", on the basis of which MEAT shall be identified, does not refer to the "lowest price"-approach, but rather to a "cost-effectiveness approach" that assesses the whole operating life cycle of a product, service or work as will be elaborated in the following. It is, however, equally important to note that the price-criterion cannot be neglected. In other words, award criteria cannot refer solely on qualitative (non-cost) criteria, but have to consider monetary criteria (not only acquisition costs but life-cycle costs, as will

[64] Although the "most economically advantageous tender" was already contained in the 2004 directives, the term in the 2014 directives has a slightly altered meaning and needs to be read in light of new jurisprudence and of its new context, as pointed out in Recital 89 of Directive 2014/24/EU.

[65] Semple 2016, 55, fn 12.

[66] Wiesbrock 2013, 120.

[67] According to Article 67(2) Directive 2014/24/EU "Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion (…)".

[68] So far, the CJEU has confirmed in three cases (*Concordia, EVN and Wienstrom* as well as *Max Havelaar*) that environmental (or social) criteria can be decisive to ensure value for money according to the MEAT approach.

be seen in the following) to a certain degree, as clarified in Recital 92 Directive 2014/24/EU).

8.4.1.2 Life-Cycle Approach

The approach of Life-Cycle Costing (LCC) is a novelty of the 2014 Directives and one of its “pivotal elements”.[69] It is an additional tool for the implementation of environmental criteria and has the potential to foster the paradigm shift towards GPP. Although the concrete implications remain yet to be seen, some scholars consider it “one of the most fundamental modernization challenges” and highlight its great potential for GPP.[70]

The new concept of LCC finds its own provision in Article 68 Directive 2014/24/EU. This includes (1) costs relating to acquisition; (2) costs of use, such as consumption of energy and other resources; (3) maintenance costs; (4) end of life costs, such as collection and recycling costs (Article 68(1)).

This first part of the definition highlights the difference of LCC and mere acquisition costs/purchasing price that has so far often been at the center of interest and attributed significant weight within the framework of award criteria. The focus on acquisition costs, however, can be misleading, since it reflects only a fraction of the total costs: low acquisition costs do not necessarily imply low maintenance or recycling costs, quite to the contrary. The regulation of LCC is an important motivation for contracting authorities to shift their focus away from evaluating the lowest acquisition costs towards the more encompassing life-cycle approach.[71]

The differentiation between acquisition costs and long-term costs is of big significance for GPP. As already mentioned, environmentally-friendly products (or so-called “eco-high-tech solutions”) are often characterized by high acquisition costs, but may turn out to be cheaper in the long term, due to efficiency-factors such as long life-spams or low power consumption.[72] Article 68(1)(b) states that LCC may also include:

> (…) costs imputed to **environmental externalities** linked to the product, service or works during its life cycle, **provided their monetary value can be determined and verified**; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs (emphasis added).

This shows that under the LCC-approach, the internalization of environmental externalities can be considered as a factor to evaluate the best offer. Moreover, Article 68(1)(b) provides examples of what environmental externalities are. However, the precondition for the consideration of environmental externalities is that they can be determined, i.e. measured and verified.

[69] Sjåfjell/Wiesbrock, 19.

[70] Dragos/Neamtu 2016, 116.

[71] *Ibid.*

[72] See e.g. Dragos/Neamtu 2016, 117.

Apart from the requirement of determinability and verifiability, Article 68(2) contains rules on transparency (publication of the data to be provided and the method used to determine the LCC, in particular environmental externalities) as well as on calculation methods.

Thereby, the requirement to use an "objectively verifiable and non-discriminatory" method is of particular importance and serves to ensure that the LCC-approach does not "unduly favour or disadvantage certain economic operators" (Article 68(2)(a)). Recital 96 reiterates the need to balance LCC with the obligations posed by the non-discrimination principle and underlining that calculation-methods should "avoid distortions of competition through tailor-made methodologies" and "remain general in the sense that they should not be set up specifically for a particular public procurement procedure."

Article 68(2)(c) even makes a direct reference to the GPA, stating that the LCC data that tenderers have to submit

> can be provided with reasonable effort **by normally diligent economic operators**, **including economic operators from third countries party to the GPA** or other international agreements by which the Union is bound (emphasis added).

This is an important specification of the non-discrimination principle and helps to mitigate the risk of direct or factual discriminatory effect, also with regard to international procurement, beyond the Union's borders on a WTO level. However, as pointed out by Dragos/Neamtu, the concrete implications will yet remain to be seen, as much will depend on the interpretation of the concept of a "normally diligent economic operator".[73]

8.4.2 Limits

Apart from the renewed concept of MEAT and the related concept of LCC, Article 67 Directive 2014/24/EU sets three more preconditions that must be observed when drafting (green) award criteria, namely the LtSM-requirement, a competition and a transparency requirement.

These requirements represent a codification of former case law on award criteria, in particular of the *Concordia Bus* case of 2002, a case that concerned the public tender for the entire bus system of Helsinki. The issue of contention was a system of award criteria that gave additional point for environmental criteria, namely low nitrogen oxide emissions, low noise emissions or certified environmental protection. While the second-placed bidder Concordia argued that the award criteria always have to be of an economic nature,[74] the CJEU supported the contracting authority's "environment policy decision" and ruled that it is permissible to include

[73] Dragos/Neamtu 2016, 127 and 132.

[74] *Concordia Bus*, paras. 27 and 44.

ecological criteria in the criteria for the award of a procurement contract.[75] The Court, however, also attached preconditions for the implementation of green award criteria, namely that they are: linked to the subject matter of the contract (LtSM-requirement); do not confer an "unrestricted freedom of choice" on the procuring authority; are expressly stated in the tendering documents; and comply with the non-discriminatory principle.[76] These preconditions are now incorporated Article 67 Directive 2014/24/EU and will be analyzed in the following.

8.4.2.1 Link to the Subject-Matter (LtSM)

Article 67(3) Directive 2014/24/EU states that award criteria shall be considered to meet the LtSM requirement where they relate to the product, work or service to be procured "in any respect and at any state of their life cycle". Consequently, award criteria cannot refer to the general practices of a tenderer, but have to refer to the specific product, service or work to be procured.[77]

In *Concordia Bus,* the case that established the LtSM requirement, the CJEU found that "award criteria […] must themselves also be linked to the subject-matter of the contract".[78] *In casu,* the court found that criteria relating to low emission and noise level of buses "must be regarded as linked to the subject-matter of a contract for the provision of urban bus transport services".[79]

Up to this date, the Court has ruled only in one case that the LtSM requirement was not met. In the case of *EVN and Wienstrom* the awarding of points to tenderers that provided proof for their general ability to produce big volumes of renewable energy did not have a sufficiently close link to the contract at issue (since it referred to a general ability and not to the ability required to fulfill the contract).[80] However, a strong weighting of 45% for the tenderer's ability to produce the energy required for the fulfillment of the contract from a renewable energy source was found to be linked to the subject-matter and thus legitimate.[81]

Due to the fact that, with the 2014 reform, the LtSM requirement was introduced as a precondition for the design of several instruments of public procurement processes throughout the directives, it is likely that its application will be further subject to jurisprudence and will probably be further defined by the CJEU.[82]

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[75] *Ibid.*, paras. 53 *et seqq*.

[76] *Ibid.,* para. 64.

[77] Semple 2015, 4.43.

[78] *Concordia Bus*, para. 59.

[79] *Ibid.,* para. 65.

[80] *EVN and Wienstrom,* para. 72.

[81] *Ibid.*

[82] Semple 2015, 4.43.

8.4.2.2 Effective Competition

Article 67(4) states the second precondition for (green) award criteria under EU law, namely the competition requirement:

> Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition […].

This competition requirement was first mentioned in the *Beentjes* case, where the CJEU states that it would run counter the EU directives if contracting authorities "unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer".[83] In the case at hand, the court ruled that an award criterion granting points to companies that employed a certain percentage of formerly long-term unemployed persons was in violation of EU law. In particular, it was found to be discriminatory, since it *de facto* discriminates against foreign tenderers. This shows that the competition requirement is strongly related to the non-discrimination obligation and aims at preventing the arbitrary use of award criteria as a means of disguised protection.

The significance of the competition requirement for green award criteria manifested itself in the *Concordia Bus* case. In the case at hand, the CJEU stated that in cases where award criteria are "objectively quantifiable environmental requirements", they are not considered to confer an unrestricted freedom of choice on the contracting authority and thus meet the competition requirement.[84]

8.4.2.3 Transparency

Article 67(5) Directive 2014/24/EU reiterates that not only the award criteria themselves, but also their relative weighting have to be clearly specified in the procurement documents. This requirement is by no means a novelty and is already evident from the general transparency principle that guides public procurement in probably all procurement jurisdictions.

8.5 Contract Performance Conditions

Another public procurement instrument (one that is not mentioned in WTO law but is often used in the EU) is the instrument of contract clauses, i.e. so-called contract performance conditions. They set forth specific requirements for contract performance at the post-award stage.

Through contract performance conditions, contracting authorities can lay down the "specific requirements relating to the performance of the contract" (Recital 104

[83] *Beentjes*, para. 26.

[84] *Concordia Bus*, para. 66.

of Directive 2014/24/EU). Accordingly, contract performance conditions constitute *fixed objective requirements* that have no impact on the assessment of tenders (as opposed to award criteria, which form the basis for assessment and selection). Since such specific requirements can refer to the environmental performance of a good, service or work, contract performance conditions are a good tool to implement GPP by means of contractual design.

Examples of green contract performance clauses include requiring the supplier to take back used goods and recycle them, or requiring the supplier to monitor and report the GHG emissions (or any other environmental issue) caused by the delivery of the procured product.[85] Another conceivable contract performance clause could be the requirement to offset GHG emissions caused by the delivery of a product or provision of a service on the carbon market.[86] In the same line, the contract authority could also require the supplier to provide product samples and impose a fine, if product standards are not met.

Contract performance conditions are regulated in Article 70 Directive 2014/24, which states as follows:

> Contracting authorities may lay down special conditions relating to the performance of a contract, **provided that they are linked to the subject-matter of the contract** within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, **environmental,** social or employment-related considerations (emphasis added).

Most notably, the wording of Article 70 expressly allows for contract performance conditions referring to environmental concerns, thereby leaving no room for doubts about the compatibility of green contract clauses with EU law. Nevertheless, the insertion of contract performance conditions is not without any limits, as becomes evident from Article 70. The first condition is the LtSM requirement, established by the court within the context of award criteria,[87] and is now extended to also apply to contract performance clauses. The reference to Article 67(3) on award criteria reiterates that a criterion (or contract condition) is considered to be "linked to the subject-matter of the contract", when it relates to the good, service or work to be procured "in any respect and at any stage of their life cycle".

Despite this specification, the exact scope of environmental contract performance clauses within the limits set by the LtSM requirement will remain to be seen. This requirement was newly introduced within the context of contract performance conditions and much its scope will depend on future judicial interpretation. As suggested by Semple, a contract performance condition generally requiring a tenderer to participate in an ETS scheme is likely to lack the required link, while the requirement to offset carbon emissions that occurs during the process of contract performance is likely to fulfill the LtSM requirement.[88]

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[85] EU Buying Green Handbook, 64 and 65.

[86] Semple 2015, 5.19.

[87] See above, Sect. 8.4.2.1.

[88] *Ibid.*, 5.21.

The second requirement refers to transparency, i.e. to the publication of contract performance conditions in the procurement documents. Nevertheless, it is not clear how contract performance clauses can and should be published in advance, considering that they may be subject to substantial modifications during the procurement procedure.[89] Semple suggests that only those contract performance clauses that have a substantial impact on competition should be published in advance.[90]

Both of these preconditions are closely linked to the non-discrimination requirement as their main purpose is to avoid contract performance conditions being used as a means of disguised protection or to undermine competition.

8.6 Eco-Labels

Although Eco-Labels[91] are not a public procurement instrument *sui generis*, they can however be a useful additional tool for GPP implementation. Thereby, the use and regulation of eco-labels in EU law has undergone drastic developments. While their use in public procurement processes has long been highly contested, their use within the framework of the GPP instruments has increased substantially.[92] The "surprisingly stringent" regulation of eco-labels in the current public procurement directives is one of the particularly striking outcomes of the 2014 reform.[93]

While the 2004/18/EC Directive already made (marginal) reference to Eco-Labels within the framework of technical specifications,[94] eco-labels are now prominently regulated in their own provision in Article 43 Directive 2014/24/EU. Most importantly, their application is not limited to technical specifications anymore, but clearly extends to all contract-related instruments of public procurement, namely technical specifications, the award criteria and contract performance conditions.

[89] *Ibid.*

[90] *Ibid.*

[91] For a description of eco-labels, see above, Sect. 6.4.4; within the context of energy labels see Weber 2018, passim.

[92] Corvaglia 2016, 607; Schebesta, 326; Weber 2018, 247 *et seqq*.

[93] Schebesta, 326.

[94] "They [contracting authorities] can use, but are not obliged to use appropriate specifications that are defined in ecolabels" (Preamble of Directive 2004/18/EC Recital 91).

8.6.1 Judicial Background: Max Havelaar Ruling

The *Max Havelaar* case of 2012 is the precedence case for GPP, in particular with regard to labelling requirements.[95] It had major implications on the legislative process of the 2014 reform and lead to the codification of case law on eco-labels in Article 43 Directive 2014/24/EU.

In casu, the CJEU assessed the procurement of coffee machines in public buildings and had to judge upon, *inter alia*, the legality of technical specifications that required the Max Havelaar and the EKO label.[96] In its ruling, the CJEU emphasized the necessity to "mention expressly the detailed environmental characteristics it intends to impose even where it refers to the characteristics defined by an eco-label".[97] This is to ensure that a potential tenderer can refer to "a single official document, coming from the contracting authority itself" without having to collect information about the requirements applicable to a particular eco-label.[98] In the case at hand, the CJEU found that the contracting authority failed to comply with this obligation, since it failed to identify the detailed technical specifications corresponding to the label concerned and list them separately.[99]

The *Max Havelaar* ruling thus contains important clarifications on the scope and limit of green technical specifications, in particular with regard to labels. On the one hand, it demonstrates that labels are a generally acceptable means of formulating technical specifications. On the other hand, however, the ruling also shows that contracting authorities have to adhere to certain preconditions to avoid *de facto* discrimination.

8.6.2 New Provision

The requirements established in the *Max Havelaar* ruling are reflected by the current wording of the law. Introduced by the 2014 reform, Article 43(1) Directive 2014/24/EU now makes direct reference to labels, in particular eco-labels:

> Where contracting authorities intend to purchase works, supplies or services with specific **environmental […]characteristics** the may, in the technical specifications, the award criteria or the contract performance conditions, **require a specific label as means of proof** that the work, services or supplies correspond to the required characteristics (…)(emphasis added).

[95] For a detailed analysis of the *Max Havelaar* ruling see Steiner 2012, passim.

[96] The EKO label certifies products with at least 95% organic agricultural ingredients and Max Havelaar is a label that relates to fair trade, i.e. social standards like payment of minimum wages for workers, see *Max Havelaar* paras. 34 *et seqq.*

[97] *Max Havelaar*, para. 67.

[98] *Ibid.*

[99] *Ibid.*, paras. 69 and 70.

This provision contains a general permission of labels in all the contract-related procurement instruments (technical specifications, award criteria or contract performance conditions) on a voluntary basis. In other words, contracting authorities are generally free to decide whether or not to refer to labels when defining the subject of the procurement.[100] However, if they do, they have to comply with seven requirements, as inscribed in Article 43.

First of all, according to paragraph a, the requirements set forth in the respective eco-label must have a close LtSM.[101] Secondly, it needs to be objectively verifiable and non-discriminatory (paragraph b). This requirement was first spelled out within the context of award criteria in the *Concordia Bus* case[102] and can also be derived from the general non-discrimination and transparency principle.

Thirdly, contracting authorities' can only make reference to labels that have been established in an open and transparent procedure in which all the relevant stakeholders were able to participate (paragraph c). Furthermore, the respective label has to be accessible to all tenderers (paragraph d) and the label at issue cannot have been drafted by someone involved in the tendering process (paragraph e). This is to ensure the neutrality of the label and to prevent corruption.

Finally, Article 43(1) reiterates the "or equivalent"-requirement (see Article 42 for technical specifications), stating that: "Contracting authorities requiring a specific label shall accept all labels that confirm that the works, supplies or services meet equivalent labelling requirements."

This shows that eco-labels within the framework of contract-related criteria are now closely regulated and can be considered in compliance with EU law (in particular with the non-discrimination and transparency obligation), when drafted according to the seven preconditions as set forth in Article 43(1) Directive 2014/24/EU. Thereby, these seven requirements are mostly a repetition of the general requirements applying to technical specifications, award criteria and contract performance conditions.

It is worth noting that the wording of the current legal text "softens" one criterion previously established by jurisprudence in *Max Havelaar*: the requirement to list the criteria of the respective label separately has not been included in Article 43.[103] In this regard, the legislative developments introduced by Article 43 are another significant novelty that makes the application of GPP through the instrument of eco-labels easier than before.[104]

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[100] Caranta 2016, 102. Furthermore, the author points to the exceptions in the field of energy-efficiency, where labelling requirements may be mandatory, see Caranta 2016, 103.

[101] This is a repetition of the requirement already incorporated in the respective provisions on technical specifications (Article 42), award criteria (Article 67) and contract performance conditions (Article 70).

[102] *Concordia Bus*, para. 66, see also Sect. 8.4 on award criteria.

[103] See above, Sect. 8.4.

[104] Miranzo Diaz, 15.

8.7 Supplier-Related Criteria

Selection and exclusion criteria are supplier-related criteria (while technical specifications and award criteria are contract-related criteria).[105] Selection criteria (also referred to by the term "qualification criteria") specify the characteristics that a tenderer has to have to be capable to execute the contract and exclusion criteria specify the characteristics that are a no-go and that justify the exclusion of the respective tenderer. Supplier-related criteria are binary and decide whether a tenderer can participate in the procurement process and can be considered for evaluation.[106] This makes them less suitable for GPP implementation then contract-related criteria, especially award criteria that can be applied in a weighted way.

8.7.1 Scope of Green Selection Criteria

Article 58(1) Directive 2014/24/EU contains an exhaustive list of permissible selection criteria, referring to

a) suitability to pursue the professional activity;
b) economic and financial standing and;
c) technical and professional ability.

As specified in Annex XII Directive 2014/24/EU ("Means of Proof of Selection Criteria"), the last selection ground also includes the possibility for contracting authorities to require evidence of (Annex XII, part II, paragraph g). Apart from this possibility to consider proof for EMS, however, the scope for green selection criteria remains limited. This is also reiterated in sentence three of Article 58(1) which states that:

> They [contracting authorities] shall limit any requirements to those that **are appropriate to ensure** that a tenderer has the **legal and financial capacities** and the **technical and professional abilities** to perform the contract to be awarded (emphasis added).

This wording is nearly identical to Article VIII GPA ("Conditions for Participation"),[107] the only striking difference being that EU law calls for selection criteria "appropriate" to ensure the required legal, finance, technical and

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[105] See also above, Sects. 3.6 and 6.6.

[106] The 2014 reform softens the so far strict separation between supplier related criteria and contract related criteria: While, in general, exclusion or selection criteria are meant to concern a tenderer's overall capability, award criteria should concern the contract only. However, Article 67(2)(b) Directive 2014/24/EU now states that qualification and experience of staff can also be considered within the framework of award criteria, of course only on a weighted preference basis.

[107] See above Sect. 6.6: Article VIII(1) GPA states as follows: "A procuring entity shall limit any conditions for participation to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement."

professional abilities, while WTO law contains a stricter wording asking for selection criteria "essential" to ensure these qualities.

Consequently, under EU law—similar to the situation under WTO law—selection criteria can only refer to environmental characteristics in cases where environmental performance stands in the center of the procurement process and environmental qualification is essential (in terms of technical and professional ability according to Article 58(1)(c) Directive 2014/24/EU) to perform the procurement contract.

As illustrated in Sect. 6.6, an environment-related selection criterion could be conceivable, for example, when procuring a recycling facility, where an environment-related education is necessary to perform the contract, i.e. build the facility and provide for its operation. However, while the GPA allows for environment-related qualification/selection criteria solely when it is *essential* to ensure the execution of the contract, under EU law these criteria only have to be *appropriate*. This wording suggests a broader scope for the inclusion of green selection criteria under EU law than under WTO law.

This different scope can lead to possible conflicts when applying the EU rules to contracts that are above the WTO/GPA threshold values. In procurement contracts that are above the GPA thresholds and thus open to bidders from GPA countries, it can therefore be recommendable for EU contracting authorities to give prevalence to the GPA and to apply the stricter standard of essentiality when setting forth the selection criteria.

8.7.2 Scope of Green Exclusion Criteria

Reasons that lead to the exclusion of a potential supplier from the public procurement process are set out in Article 57 Directive 2014/24/EU. The enumeration of mandatory exclusion grounds[108] in Article 57(1)(a–f) contains reasons related to criminal offences, like corruption, money laundering, child labor or fraud and do not include any reasons related to environmental protection.

However, the Directive 2014/24/EU also contains discretionary grounds for exclusions, which are enumerated in Articles 57(2) and (4). In the context of GPP, Article 57(4)(a) becomes pertinent: it states by direct reference that where contracting authorities can prove a violation of the applicable obligations referred to in Article 18(2) ("Principles of Procurement"), they may exclude the respective suppler. Since Article 18(2) states that Member States shall ensure that tenderers comply with, *inter alia*, obligations in the fields of environmental law established by

[108] Mandatory ground of exclusion means that the contracting authorities of the respective EU Member States have to exclude a tenderer, when these reasons are given. The mandatory character of these exclusion grounds is indicated by the wording "shall" and by the wording "the obligation to exclude an economic operated shall also apply" in the last sentence of Article 57(1) Directive 2014/24/EU.

Union law or international environmental law provisions,[109] this reference might have implications for GPP (even more given the fact that EU law is characterized by a high standard of environmental law). The clear scope of it, however, remains to be seen, since neither Article 18(2) nor Article 57(4) have been subject to jurisprudence yet.

Other discretionary exclusion grounds with a potential link to environmental protection are “grave professional misconduct” or “deficiencies in the performance of a substantive requirement under a prior contract” (Articles 57(4)(c) and (g) Directive 2014/24/EU, referred to as “prior performance”-ground).

However, the barriers for contracting authorities to invoke these provisions seem high. Grave professional misconduct can only be assumed when this would render the integrity of the tenderer questionable, as is further specified in Article 57(4)(c) Directive 2014/24/EU. The “prior performance”-ground can only be assumed when the deficiencies in the performance of a previous public procurement contract are significant, persistent, related to a substantive requirement of that former contract and have led to termination of that contract. Semple criticizes this newly introduced burden as overtly strict and “unduly tilted in favour of economic operators”.[110]

For these reasons, the scope for green exclusion grounds seems limited to Article 57(4)(a) in connection to Article 18(2) Directive 2014/24/EU.

8.7.3 Limits

Article 58(1), fourth sentence, contains the limits of selection criteria. They need to be (1) related and (2) proportionate to the subject-matter of the contract. The first requirement reflects the LtSM requirement that was illustrated above within the context of technical specifications and, in more detail, in the context of award criteria.[111] The precondition of proportionality can be considered to imply a balancing test, taking the restrictive effect tenderers into account.

An important limit to a contracting authority’s discretion with regard to selection criteria refers to the means of proof. As already stated in the preamble of the Directive 2014/24/EU (Recital 84), the administrative burdens for potential suppliers to prove compliance with both selection and exclusion criteria have to be kept as low as possible. In this regard, Annex XII enumerates the permissible forms of evidence.

There is no analogous list with regard to exclusion criteria. However, Recital 101 of the Directive 2014/24/EU states that contracting authorities should “pay

[109] The pertinent international environmental agreements are listed in Annex X Directive 2014/24/EU.

[110] Semple 2015, 4.11.

[111] Sections 8.3.1 and 8.4.2.1.

particular attention to the principle of proportionality" when applying the discretionary grounds for exclusion.

8.8 Summary and Findings

The scope of GPP for EU Member States und EU law has steadily widened throughout the last decades.[112] The EU has witnessed a growing recognition of sustainability goals in public procurement that has paralleled with a shift away from economic concerns. Nowadays, GPP is a common and widespread practice in the EU. This is also reflected by terminology: in the EU, GPP is described with the positively connoted term "strategic procurement",[113] while the terms "horizontal policy" or "secondary goal" are not commonly used.

As illustrated in this chapter, this paradigm shift evolved along the three levels of case-law from the CJEU, policy initiatives of the EU Commission and the two legislative reforms of the EU public procurement directives in 2004 and 2014. This development has been shown to be in line with the legal mandate of the EIP in Article 11 TFEU, which entails the obligation to consider GPP on all stages of the procurement process.

Nevertheless, like the GPA, EU law faces the challenge of reconciling GPP with the economic concerns of competition and non-discrimination. This becomes evident when looking at regulation of the various public procurement instruments in the 2014 EU directives.

In the field of technical specifications, EU law sets forth five requirements for "green" technical specifications. These requirements broadly reflect the GPA requirements: it is a core concern of both the GPA as well as the EU directives to prohibit discrimination through an overtly restrictive technical specification (Article X:1 GPA and Article 42(2) Directive 2014/24/EU). Another common concern is the requirement to formulate specifications in terms of functional and performance-oriented requirements. However, unlike in the GPA, technical specifications under EU law are now subject to the LtSM requirement. To what degree this limits green technical specifications will have to be clarified by jurisprudence. Therefore, Semple calls the LtSM requirement in its new form an "esoteric concept".[114] It can be assumed (from jurisprudence within the context of award criteria) that the CJEU will apply a broad interpretation of the LtSM requirement and that this requirement will thus not have an overtly restrictive effect.

With regard to award criteria, EU law provides for a significantly more detailed level of regulation than WTO law. While the GPA contains non-discrimination and

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[112] Wiesbrock, 132.

[113] The EU Commission calls public procurement "a strategic instrument in each Member State's economic policy toolbox", see COM/2017/572 final, 2.

[114] Semple 2016, 54.

transparency obligations (Article X:9), the new EU Directive 2014/24 has codified requirements established by jurisprudence and clearly delineates the limits of award criteria regarding non-discrimination (competition and LtSM requirement) and transparency. Furthermore, EU law is characterized by a shift away from the lowest price to a more comprehensive approach, focusing on the best price-quality ratio (MEAT approach). Thereby, the price is assessed based on LCC methods, which are now regulated in Article 68 Directive 2014/24/EU.

This paradigm shift represents an important impetus for GPP, as it allows for the consideration of environmental externalities (Article 68(1)(b)) within the price calculation, provided that they are: (1) objectively verifiable and non-discriminatory; (2) accessible to all interested parties. Nevertheless, the MEAT/LCC approach can be technically demanding and has not yet asserted itself in procurement practice.[115] Finding a common and harmonized methodology to calculate LCC, preferably not only on an EU but on an international level, remains a major challenge. Practical experience on a national level will have to show whether this approach can be easily implemented or whether it raises more questions that it can answer.

A further distinction to the GPA is that the EU public procurement directives clearly allow reference to npr PPM within the framework of both technical specifications as well as award criteria.[116] A legal gap is closed by Article 43 Directive 2014/24/EU, which now clearly states that all of the contract-related instruments may refer to eco-labels and which specifies the preconditions to do so. The GPA only contains marginal reference to labels and only within the context of technical specifications.[117]

In addition to technical specifications and award criteria, EU law further contains an additional contract-related instrument, namely contract performance conditions. This additional instrument is regulated in Article 70 Directive 2014/24/EU and refers to the last stage of the public procurement process: the performance of the contract after its conclusion. Since this stage is often neglected as an important phase for GPP,[118] the direct reference to environmental criteria in Article 70 can make an important contribution to the fostering of GPP throughout the execution of the contract.

As for supplier-related criteria, the scope for GPP remains limited under EU law, as is the case under WTO law. Nevertheless, the EU directives provide for a more detailed level of regulation than the GPA. With regard to selection criteria, the EU grants more discretion than the GPA: While Article VIII(1) GPA requires selection/qualification criteria to be "essential" for the performance of the contract,[119] EU law requires them only to be "appropriate" (Article 58(1) Directive 2014/24/EU). The

[115] According to the EU Commission 55% of procurement procedures are still based on the lowest price, see COM/2017/572 final, 5.

[116] The GPA does not regulated (npr) PPM within the context of award/evaluation criteria, see above, Sects. 6.4 and 6.5.

[117] See above, Sect. 6.4.4.

[118] See above, Sect. 2.2.

[119] See above, Sect. 6.4.1.2.

scope of green exclusion criteria in EU law seems limited to violations of pertinent environmental laws (Articles 57(4)(a) and 18(2)) Directive 2014/24/EU).

This shows that the reformed EU directives provide for considerable opportunities for GPP. However, whether EU Member States seize these opportunities remains within their discretion. According to prevailing opinion, EU law provides only for optional framework legislation on GPP. The EIP, as enshrined in primary EU law, provides only for the obligation to "consider" GPP in their public procurement practices. Therefore, public procurement remains a national process and its effectiveness depends on national implementing laws, policies and jurisprudence.[120] In other words, if (and only if) the EU Member States and their contracting authorities make actual use of the various opportunities provided for in the EU directives, they can implement a comprehensive and effective GPP system. Italy exemplified this by making GPP mandatory on a national level in 16 product and service sectors.[121] Other countries such as Austria, the Netherlands and the UK have also introduced mandatory GPP requirements in certain sectors.[122]

Overall, GPP is still more of a "nice to have" rather than a core concern in public procurement contracts in many countries. This shows that GPP has to undergo further and continuous development. Soft law actions, such as the policy initiatives of the EU Commission, remain important in order to foster the development of GPP from a mere legal option to a broadly established and tested procurement practice, on a national and local level.

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[120] Sjåfjell / Wiesbrock, 239.

[121] See webpage of the Italian ministry of environment (ministerio dell'ambiente), available at: http://www.minambiente.it/pagina/gpp-acquisti-verdi.

[122] GPA/W/341, 5.

Part IV
Switzerland

Part IV analyses GPP on the domestic level, using Switzerland as an example. Switzerland is the last country to ratify the revised GPA 2012. On a domestic level, it provides an illustrative example of the challenges that may arise between public procurement regulation and federalist concerns and on an international level it illustrates how domestic procurement laws are shaped by international procurement regulations, notably the WTO. Within this context, the following chapters address the evolution of public procurement regulation in Switzerland, the role of the GPA and, most importantly, the changed scope for GPP under the revised GPA 2012. What effect do the revised GPA rules have on environmental goals in Swiss public procurement laws and practices? How can Switzerland implement GPP in accordance with WTO law under the revised GPA? to implement GPP?

Chapter 9
Domestic Public Procurement Regulation and Implementation of the GPA

9.1 Structural Background

Swiss public procurement regulation is characterized by the federalist structure of Switzerland.[1] Since there is no constitutional basis for the Swiss national government to regulate public procurement on a sub-federal level, regulation largely remains within the competency of the 26 Swiss cantons. Thereby, cantonal public procurement accounts for the biggest share of public procurement in Switzerland: 80% of the 41 bio Swiss Francs total value of public procurement contracts in Switzerland is generated on the cantonal or communal level.[2]

This also explains why the legislative framework for public procurement in Switzerland is a highly fragmented "patchwork" of one federal and 26 cantonal (and sometimes even communal) laws.[3] Trüeb 2015 calls the fact that Switzerland has 27 legal frameworks for one state, while the EU has one legal framework for 28 states an "incomprehensible and annoying legal fragmentation".[4]

The complex confluence of international and national legal bases can sometimes make it difficult for both tenderers and authorities to identify the pertinent provisions.[5] Most importantly, Switzerland is a Signatory State to the GPA and as such bound by it on all levels. However, since the implementation of the GPA by the cantons remains a cantonal responsibility, the level of regulation and the protection

[1] Steiner 2013, 73.

[2] BBI 2017 1851, 1854.

[3] Oesch 2010, 5 ("historisch gewachsenes Flickwerk").

[4] Trüeb 2015, 25.7 ("Gerade in Fragen des Binnenmarkts ist eine solche Rechtszersplitterung sowohl unverständlich als auch ärgerlich").

[5] Trüeb 2015, 25.6.

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R. Koch, *Green Public Procurement under WTO Law*, European Yearbook of International Economic Law 9, https://doi.org/10.1007/978-3-030-48214-5_9

granted for tenderers varies from canton to canton.[6] Efforts to harmonize the cantonal laws go back more than one decade. However, only the most recent reform efforts (triggered by the GPA 2012 revision) that are currently in progress promise improvements.

The following section provides an overview of the legal basis for public procurement in Switzerland, focusing on the mechanisms for implementation of the GPA. It starts with depicting the evolution of the legislative framework and the reforms that are currently taking place in the process of ratification of the GPA 2012. Sections 9.5 and 9.6 then take a closer look at the legal foundations of Swiss public procurement and assess how it reflects the core GPA-requirement of non-discrimination of foreign tenderers.

9.2 Emergence of a Regulatory Framework

9.2.1 Early Regulatory Approaches

Until the mid-1990s, the public procurement sector was only minimally regulated. On a federal level, only two ordinances (*Einkaufs*- and S*ubmissionsverordnung*)[7] were in place. These two ordinances were enacted in the 1970s and provided for minimal rules on the procurement of public goods and works, while the public procurement of services remained unregulated.[8]

On an international level, Switzerland was already bound by the Convention establishing the European Free Trade Agreement (EFTA) from 1960 and the first version of the GPA, the Tokyo Code in 1979.[9] However, both of these agreements only superficially liberalized public procurement and left Swiss laws largely unaffected.[10] Therefore, procuring authorities had practically unlimited discretion. There were two turning points in the early 1990s that led to comprehensive structural reforms in Switzerland's economic legislation and to the regulation of public procurement on a federal level.

On a domestic level, Switzerland was marked by the result of a vote in 1992, by which the Swiss people rejected the accession to the European Economic Area (EEA). To prevent economic isolation, the Swiss government aimed at establishing a "euro-compatible Swiss internal market"[11] and enacted unilateral laws on the

[6] Steiner 2013, 73.

[7] Verordnung vom 8. Dezember 1975 über das Einkaufswesen des Bundes, AS 1975 2373. Verordnung vom 31. März 1971 über die Ausschreibung und Vergebung von Arbeiten und Lieferungen bei Hoch- und Tiefbauten des Bundes, AS 1971 677.

[8] Oesch 2010, 5; Trüeb, Article 1 FLGP, 2.

[9] See above, Sect. 6.1.

[10] BBl 1994 IV 1, 369.

[11] BBl 1994 IV 1, 349.

regulation of the internal market, of cartels or technical barriers to trade, as well as on public procurement that entered into force in 1996.[12]

On an international level, it was the ratification of the Uruguay Round Agreements that led to major domestic reforms.[13] Switzerland became a Member State of the WTO[14] and also signed the GPA 1994. Consequently, Switzerland had to implement the public procurement principles and standards as set forth in the 1994 GPA until the expiry of the implementation period in 1996. The requirements entailed radical reforms, in particular the establishing of "non-discriminatory, timely, transparent and effective [challenging] procedures" before "a court or an independent review body" (Article XX GPA 1994).

Since Switzerland did not provide the possibilities to challenge an awarding decision at that time, the establishment of a domestic challenging mechanism and, as a sufficient legal basis thereof, the establishment of a federal law on public procurement became necessary.[15] In that sense, the ratification of the GPA 1994 was used as an opportunity to place Swiss procurement laws on a new foundation and to regulate central public procurement in the form of a federal act.[16]

As an implementing law on the federal level, the Federal Law on Government Procurement (FLGP)[17] entered into force on the 1st of January 1996, at the same time as the GPA 1994. It was complemented by the Federal Ordinance on Government Procurement (FOGP).[18] While the FLGP mirrors and specifies the obligations set forth within the GPA 1994, the FOGP contains specifying provisions and also covers public procurement contracts below the relevant GPA threshold values.

On a cantonal level, the implementation of the GPA 1994 was rendered more difficult by the federalist structure. According to the distribution of competencies, the Swiss government cannot give the cantons any instructions on how to implement the GPA 1994.[19] Therefore, the implementation of the GPA 1994 on a cantonal level was fully left to the autonomy of the cantons.[20] The only mandatory requirements for cantonal governments are enshrined in the Law on the Establishment of a

[12] BBI 1994 IV 1, 6; Oesch 2010, 5; see below, Sect. 9.4.

[13] Trüeb, FLGP 1, 4, calls the legislative reforms that took place in the aftermath of the Uruguay Round a "wave of codification" ("Kodifikationswelle").

[14] For a detailed report on the redesigning of the Swiss legal framework that the ratification of the Uruguay Round Agreements entailed see BBI 1994 IV 950, *passim*.

[15] BBI 1994 IV 1, 371.

[16] Oesch 2010, 7.

[17] Bundesgesetz über das öffentliche Beschaffungswesen (BöB), SR 172.056.1, English translation according to Switzerland's "Notification of National Implementing Legislation" from 30th of July 1997 (GPA/15).

[18] Verordnung über das öffentliche Beschaffungswesen (VöB), SR 172.056.11, translation according to GPA/15.

[19] Oesch 2010, 7.

[20] BBI 1994 IV 1, 371.

Swiss Common Market (LCM).[21] This law states that domestic tenderers cannot be preferred over tenderers from other cantons and that the cantons have to consider Switzerland's obligations from international agreements.[22]

In order to meet these requirements in the most harmonized way as possible, the cantons negotiated an inter-cantonal framework agreement (a so-called Concordat) on public procurement (Inter-cantonal Agreement on Public Procurement, IAPP).[23] The IAPP entered into force in May 1996 with only four cantons joining, however, by 2009 all 26 cantons became Members.

9.2.2 Lengthy Reform Efforts

After the turn of the millennium, factors like fast technological progress, the fragmentation of the domestic legal situation as well as developments on an international law level (in particular the GPA negotiations) made a comprehensive reform of Swiss public procurement laws necessary. The Federal Council first acknowledged the need to revise the national public procurement law in 2001 and submitted a draft version for a revised FLGP for consultation in 2008.

With this first reform effort, three goals were pursued: firstly, the modernization of public procurement laws (through including processes such as e-auctions); secondly, granting more flexibility to procuring authority (through changing overtly rigid rules and regulating processes such as dialogues); and, finally, the harmonization of the fragmented legal foundations.[24] However, unlike the representatives from the industry, who strongly supported the harmonization efforts, all but one canton rejected the reform proposal.[25] Consequently, the first reform effort failed due to the lacking support of the cantons.

Thereafter, the Swiss government decided to pursue an incremental reform strategy. Accordingly, the revision of the FLGP was put on hold until the GPA negotiations were concluded and a more broadly-based proposal for harmonization could be reached with the help of the cantons.[26] In the meantime, however, some urgent matters of reforms were implemented at level of ordinance (through a reform of the FOGP), in order to avoid a deterioration of the economic situation. The revised FOGP entered into force on the first January of 2010 and included, *inter alia,* new rules on sustainability (Articles 27 and 40 FOGP 2010).[27]

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[21] Bundesgesetz über den Binnenmarkt (BGBM), SR 943.02.

[22] See in more detail below, Sect. 9.5.

[23] Interkantonale Vereinbarung über das öffentliche Beschaffungswesen (IVöB), translation according to GPA/15.

[24] Fetz, 24.

[25] *Ibid*., 24; Trüeb 2011, FLGP 1, 5.

[26] BBI 2017 1851, 1862 *et seq.*

[27] See also below, Sect. 10.1.

From a political perspective, the incremental reform strategy may have been a pragmatic solution to prevent political stalemate and economic damages. From a dogmatic perspective, however, the approach to include such significant changes on a low regulatory level (in the ordinance and not in the law) is questionable and was criticized by scholars for undermining the principle of legality.[28]

In the meantime, the reform of the FLGP proved to be a lengthier process than initially expected. The draft for consultation was submitted only in February 2017, nearly a decade after the first draft in 2008. The Swiss parliament approved the draft FLGP only in 2019, after long parliamentarian debates The revised FLGP will enter into force in 2021. This lengthy process makes Switzerland the last country to ratify the 2012 GPA by far (Korea, the second last country ratified the 2012 GPA on the 14th January 2016).

9.3 Notion of Public Procurement

9.3.1 Clarification of Central Terms

The FLGP 1996 does not define the term "public procurement" and thus did not clarify what kind of public contracts fall within the scope of the FLGP. This was criticized as a gap leading to legal insecurity.[29] However, Articles 8 and 9 d-FLGP[30] now provide for a definition of a public contract ("öffentlicher Auftrag") and thus clearly delineate the *ratione materiae*, in particular regarding concessions and the delegation of public responsibilities.[31] According to Article 8 d-FLGP, a public contract is

> a contract between the contracting authority and a supplier that serves the **fulfillment of a public function** (…) (emphasis added).[32]

This shows that Switzerland follows the rather strict delineation of the GPA, where government procurement has to be "for governmental purposes" and "not procured with a view to commercial sale or resale".[33] This stands in contrast to the EU, whose public procurement directives advocate a broad notion of public

[28] Oesch 2010, 7; Trüeb 2015, 25.8; the Federal Council also acknowledges that public procurement has not always been regulated on the appropriate level ("wobei Regelungsgehalte nicht immer stufengerecht abgebildet worden sind"), BBI 2017 1851, 1865.

[29] Trüeb 2011, FLGP 1, 5; for a detailed analysis of the *ratione materiae* under the FLGP 1996 see Galli/Moser/Lang/Steiner, 177 *et seqq*.

[30] Based on the draft version presented by the Federal Council on the 15th February 2017, BBl 2017 2005. The draft version will be referred to as "d-FLGP", reflecting the German version "E-BöB".

[31] BBI 2017 1851, 1868.

[32] Author's own translation.

[33] See above, Sect. 6.2.

procurement, where the existence of a "governmental purpose"/"public function" is not a decisive criterion.[34]

The differentiation between public and non-public function has given rise to many disputes in Switzerland. A prominent question that was dealt with by various courts was whether the provision of public bikes is a public function and thus falls within the scope of public procurement laws.[35] The d-FLGP will not provide for a clarification of the term "public function" and the legal insecurities in this regard will therefore have to be clarified by future jurisprudence.

Following the example of the EU (Article 1(2) Directive 2014/24/EU),[36] Article 8 d-FLGP now differentiates between the procurement of works, supplies or services. Another novelty is Article 9 d-FLGP: it specifies that the transfer of a public task and a concession fall within the definition of a "public contract" and, consequently, are covered by public procurement rules, if the supplier (i.e. the concessionaire) receives special rights, which he carries out within the public interest and against (monetary) compensation.

Contrary to EU law, the d-FLGP will still not define the term "concession"[37] and the applicability of public procurement laws is often not clear.[38] The envisaged Article 9 d-FLGP contains a codification of jurisprudence and provides for some clarification of the term "public contract". Despite the remaining legal uncertainties, this fosters the general principle that concessions should not be used to circumvent public procurement laws.[39]

9.3.2 Public Procurement Procedures

Traditionally, the FLGP contained the three procurement procedures set forth in the GPA, namely open, selective, or limited tendering (Article 13 FLGP 1996). However, as discussed above,[40] the list of conceivable tendering procedures under the GPA is not exhaustive anymore, but leaves room for other tendering procedures.

[34] See above, Sect. 7.2, Article 1(2) Directive 2014/24/EU defines the term public procurement as "(…) acquisition by means of a public contracts of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose."

[35] See for example Beyeler 2016.

[36] See above, Sect. 7.2.

[37] Jurisprudence has circumscribed it as the "granting of the right to perform a monopolized public task or the right for the special use of a public area", decision of the Federal Supreme Court 2C-900/2011 of the 2nd of July 2012. It is worth noting that the meaning of the term concession in Switzerland differs from the meaning of the term as it is commonly used in the EU (see above, Chap. 7).

[38] See e.g. BGE 125 I 209; BGE 135 II 49; Galli/Moser/Lang/Steiner, 189–193; Beyeler 2012, 823 *et seqq*.

[39] BGE 135 II 49.

[40] Section 6.1.

Aside from the three tendering procedures stated in the GPA, cantonal procuring authorities often make use of the so-called "tender invitation procedure" ("Einladungsverfahren"), a procedure located between selective and limited tendering that allows the invitation of at least three tenderers to present their offers. With the revision, the tender invitation procedure will be legally enshrined in Article 20 d-FLGP. It is, however, only applicable when the procurement contract at issue falls outside the scope of the GPA.

9.4 Switzerland's GPA Membership

9.4.1 History

Switzerland has participated in the plurilateral negotiations on public procurement liberalization actively from the beginning. It was a Party to the Tokyo Code in 1979 and a founding Party to the GPA 1994. While the Tokyo Code's legal implications remained low, the GPA 1994 committed Switzerland to open up public procurement not only on a federal, but also on a cantonal and communal level and included certain companies in the utility sector.[41] Moreover, the GPA 1994 required Parties to liberalize the procurement of services, whereas the Tokyo Code was limited to goods.

In the ratification process of the 1994 GPA, the Swiss government pointed at the relevance of the GPA for Switzerland. Due to the steadily increasing commercial importance of public procurement, it declared the establishment of a common set of enforceable rules on public procurement, the fostering of liberalization and access to new markets as a core interest of Switzerland as an export nation.[42] Most importantly, it was the GPA 1994 that granted Swiss tenderers access to the procurement markets of the EU and EEA countries.[43] The Swiss government also welcomed the introduction of a challenging mechanism for aggravated tenderers.[44]

In the aftermath of the conclusion of the GPA 1994, Switzerland soon proclaimed its intention to continue contributing to the liberalizing of international procurement liberalization, preferably within the forum of the GPA.[45] Subsequently, it proved this commitment by actively participating in the GPA 2012 negotiations. From 2006 to 2012 Switzerland even chaired the WTO's Joint Committee on government procurement (GPA Committee), with the Swiss diplomat Nicholas Niggli serving as

[41] Companies providing goods or services in the sectors of water, energy or transport, airports and ports facilities or telecommunication, according to Annex 3 of the GPA 1994.

[42] BBI 1994 IV 1, 349 and 367.

[43] *Ibid.,* 367 and 370.

[44] *Ibid.,* 367.

[45] *Ibid.,* 370.

the Chair.[46] In this role, Switzerland led the GPA reform negotiations and significantly contributed to its successful conclusion.[47]

In its request for adoption of the GPA 2012, the Federal Council stressed the importance of the GPA Membership for Switzerland, even more under the revised GPA. The economic importance of the market access gains of 1700 bio US dollars, which represents a gain of 80–100 bio US dollars as compared to the GPA 1994.[48] The Federal Council further identified the sectors most benefitting from the GPA, namely the sectors of railway materials, architectural, engineering and other technical services, R&D, medicinal products, elevators and many more.[49] These sectors will profit from GPA 2012 innovations such as the fact that all Parties have subjected their construction services to the GPA and that countries such as Japan or Canada have made important liberalization concessions on a communal level.[50] Furthermore, the EU opened their railway sector to GPA Parties and other countries (South Korea and Israel) have now opened their public transportation sector.[51] Switzerland furthermore acknowledges the fact that the modernization of the GPA and the increased flexibilities granted to the Signatory States has reduced legal uncertainties in international procurement law.[52]

9.4.2 Direct Applicability of the GPA

The question about the direct applicability of the GPA is as controversially discussed and equally relevant in Switzerland as it is in the EU.[53]

As a general principle, Swiss law also needs to be interpreted in a way to ensure conformity with international law ("völkerrechtskonforme Auslegung"), in order to avoid conflict.[54] Moreover, Switzerland follows a monistic tradition: international and domestic legal sources are perceived as forming part of one single legal framework.[55] This means that international law does not necessarily have to be transposed into Swiss law (although the mostly technical international trade agreements of WTO law are transposed).[56] Therefore, Switzerland generally acknowledges the

[46] See webpage of the GPA Committee, available at: www.wto.org/english/tratop_e/gproc_e/gpa_committee_e.htm.

[47] BBl 2017 2053, 2065 *et seq.*

[48] *Ibid.*, 2069.

[49] *Ibid.*

[50] *Ibid.,*, 2070.

[51] *Ibid.*; GPA/15, 7.

[52] BBl 2017 2053, 2072.

[53] See above, Sect. 7.3.

[54] Engelberger, 20 *et seqq*., see also above within the context of the EU, Sect. 7.3.3.

[55] Engelberger, 18; for a more detailed illustration see Wüger, 24 *et seqq*.

[56] BBI 1994 IV 950, 1171.

prevailing character of international law sources and the self-executing character of certain provisions, provided that the respective norm is justiciable, i.e. sufficiently precise to create rights and obligations for an individual and to form the basis for a decision.[57]

Most remarkably, questions about the direct applicability of WTO Law have arisen before court mostly within the context of the GPA, not the multilateral agreements.[58] This shows that, contrary to the GATT/GATS or even the TBT, the GPA is a WTO agreement that particularly affects economic actors in Switzerland. Accordingly, it is of particular interest to them (in their role as tenderers) to make direct use of the rights conferred to them under it.

A look at jurisprudence since adoption of the GPA 1994 shows that the direct applicability of the GPA is generally acknowledged (as opposed to the GATT/GATS, where Swiss jurisprudence presents an unclear, mixed picture).[59] This becomes particularly evident when looking at jurisprudence at the turn of the millennium: the Federal Supreme Court for the first time allowed for a claim to be directly based on the GPA (even on abstract provisions like the principle of transparency).[60] In a subsequent case the court clearly stated that the GPA can be considered to be a mixed agreement consisting of some provisions that are directly applicable (self-executing)—for example rules on the design of procurement instruments[61] and publication requirements—and others that need to be specified in transposition laws.[62]

This shows that, generally, the GPA is directly applicable, provided that the respective provision is justiciable and that an aggravated tenderer (Swiss or from another GPA country) can invoke a claim based on the GPA.[63] However, the practical relevance of the GPA's direct applicability is diminishing, since the implementation laws in Switzerland are characterized by an increasing degree of regulation and can be considered to cover the scope of the GPA.[64]

[57] Engelberger. 12 and precedent cases such as BGE 124 III 90 and BGE 129 II 249, BBI 1994 IV 950, 1171.

[58] Engelberger, 89.

[59] Engelberger; 108, 113 and 130; Wüger 171 *et seqq*.

[60] Decisions of the Federal Supreme Court 2p.274/1999 of March 2 2000 and 2P.4/2000 of June 26 2000; see also BBI 2017 1851, 1860.

[61] In Switzerland, the term "procurement instruments" does not seem common. Instead, the term "procurement requirements" ("Vergabeanforderungen") is used, see for example Federal Department of Finance, Explanatory Report, 30.

[62] BGer 2P.151/1999 with reference to BBI 1994 IV 950.

[63] For a dissenting opinion see Trüeb 2015, 25.6.

[64] Engelberger, 122, 127 and 130. This is reinforced by the most recent reform.

9.5 Implementation of the GPA

Although Switzerland follows a monistic approach, which makes the GPA directly applicable,[65] it was still necessary to put in place domestic laws for its transposition, for example to regulate specifications of national relevance, such as the introduction of challenging procedures.[66]

As illustrated in Sect. 9.1, Switzerland has by now established a comprehensive regulatory framework for public procurement. This regulatory framework has its roots in the GPA and serves as its implementation (although the complexity and the degree of regulation is steadily increasing).

Therefore, the GPA represents the core of the Swiss international procurement system.[67] It obliges Switzerland to adhere to the international principles and procedures for public procurement: the national as well as the cantonal governments have to implement the GPA into their public procurement laws and ensure an adequate standard of protection.

Apart from the GPA, Switzerland is bound in the field of public procurement by other international treaties, most importantly the Bilateral Agreement CH-EU, but also the EFTA Agreement and other FTAs containing chapters on public procurement.[68] As pointed out by Steiner 2013, Switzerland is not bound by EU public procurement laws, despite its bilateral agreement with the EU.[69] However, from a comparative law perspective these laws are still interesting for Switzerland.

9.5.1 Federal Level

The most notable innovation of Switzerland's ratification of the 1994 GPA was the introduction of a legal basis for federal public procurement. Since its entry into force in 1996, the FLGP constitutes the legal grounds for any public contracts concluded by national procuring entities. The corresponding ordinance, the FOGP contains detailed implementation provisions, specifying and complementing the FLGP.

[65] See above, Sect. 9.4.2.

[66] GPA/15, 7.

[67] Matei, 359; Oesch 2010, 6.

[68] See for example the FTAs of the EFTA (which Switzerland is part of) with countries such as Mexico, Colombia, Chile, Singapore, Hong Kong or Israel.

[69] Steiner 2013, 73.

9.5.1.1 Law and Ordinance on Government Procurement

The FLGP applies to all procuring entities of the federal administration for procurement contracts that exceed the threshold values specified in Switzerland's Annex 1 to the GPA. Derogations of the GPA scope are listed in the General Notes in Switzerland's Annex 1 to the GPA. New derogations could be negotiated with the other GPA Signatory States according to the rules of Article XIX(1) GPA ("Modifications and Rectifications to Coverage").[70]

The aim of the FLGP is to grant transparency, to foster competition, to ensure economic efficiency of public means as well as equal treatment of tenderers (Article 2 d-FLGP). As stated above, these aims are closely interrelated.[71] Transparency is essential to ensure equal treatment and equal treatment, in turn, serves the goal to bring competition, which in turn leads to the economic efficient use of public funds. While economic efficiency and competition are domestic goals (see also Article 126 Swiss Constitution), transparency and equal treatment of tenderers reflect the goals of the GPA.

Most notably, the revised version of the FLGP introduces new goals. The new purpose provision states in Article 2(a) d-FLGP that the law aims at the economically, socially and ecologically sustainable use of public funds. The fact that sustainability is now included as a primary goal and purpose of public procurement is of crucial importance for GPP, as will be further illustrated in the following section.[72] Furthermore, Article 2(d) d-FLGP introduces the additional aim of prevention of collusion and corruption.

9.5.1.2 Law on the Common Market (LCM)

The LCM also forms part of the economic stimulation package enacted in 1996. It aims at fostering economic cohesion and the competitiveness on a national level through ensuring the internal market of Switzerland and granting equal market access to economic actors in Switzerland.

The LCM contains a provision on public procurement. Article 5 LCM states that public procurement lies within the competence of cantons and reiterates the constitutional principle that cantons are bound to international obligations. Moreover, the LCM contains provisions on transparency and non-discrimination and reiterates that tendering procedures have to be subject to appeal, also on a cantonal level (Article 9 LCM).

[70] Kaufmann/Weber 2015, 15.

[71] See above, Sect. 6.3.

[72] See below, Chap. 10.

9.5.1.3 Cartel Act

The Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA)[73] was also introduced as part of the 1996 economic stimulation package. It does not address public procurement directly, but contains rules that prohibit the abuse of a dominant position (Article 7 CartA) and unlawful agreements between competitors (Article 5 CartA). This provision also covers collusive tendering (also called bid-rigging).

In the aftermath of recent public procurement scandals, a debate arose about whether Swiss criminal law, the CartA or the FLGP should contain stricter rules and sanctions on collusive tendering. In this regard, the revision of the FLGP envisages some minor changes, introducing the prevention of corruption as a general principle (Article 2 and Article 11 d-FLGP) and including it in the grounds of exclusion as well as the catalogue of sanctions (Articles 44 and 45 d-FLGP). Nevertheless this does not change the fact that Swiss law is characterized by a comparatively low level of regulation when it comes to sanctioning mechanisms of collusive tendering.[74]

9.5.1.4 Federal Law on Technical Barriers to Trade

The Federal Law on Technical Barriers to Trade (FLTBT)[75] contains rules on technical regulations, i.e. the requirements for the placing on the market of a product in Switzerland. Like the laws depicted above, the FLTBT also entered into force in 1996 as part of the unilateral package for economic stimulation.

Although the FLTBT does not contain specific provisions on public procurement, there are nevertheless situations where it can become relevant for contracting authorities when designing the contract-related requirements.[76] Although the government does not act as a regulator when purchasing goods, services or works, but as a buyer on the free market, requirements such as technical specifications could nevertheless have a similar effect as technical regulations.[77] If, for example, a government/procuring entity constantly requires a certain environmental standard when procuring goods, this may affect the supply and demand patterns of producers and private buyers.[78] In the context of cross-border procurement, this (green) technical specification may have the same effect as a technical barrier to trade.

In order not to undermine the FLTBT, technical specifications (and other mandatory requirements) that may have the effect of technical barriers to trade should take

[73] Kartellgesetz (KG), SR 251.

[74] In Germany, for example, submission fraud is a penal offence according to the German Criminal Law, and can be punished with up to 5 years in prison.

[75] Bundesgesetz über die Technischen Handelshemmnisse (THG), SR 946.51.

[76] See also above, Sect. 5.3.2.

[77] Kaufmann/Weber 2015, 25.

[78] See also above within the context of the TBT, Sect. 5.3.2.

into consideration the four requirements enshrined in Article 4.3 FLTBT. They should be justified by a preponderant public interest (such as, in the case of GPP, environmental protection), be proportional and amount to neither an “arbitrary discrimination” nor “a disguised barrier to trade”.[79] These requirements reflect the wording in Article XX GATT and III.2 GPA.[80]

9.5.2 Cantonal Level

The IAPP forms the basis for the public procurement laws of the cantons. It was enacted in 1994 and revised in 2001. The IAPP contains framework rules for public procurement on a subnational level.[81] It aims at opening up procurement markets of the cantons (and municipalities) and at harmonizing procurement processes through common principles (Article 1(1) IAPP). A further goal is the implementation of the GPA and the Bilateral Agreement CH-EU on a cantonal level (Article 1(2) IAPP).

The material scope of the IAPP largely reflects the one of the FLGP. Differences can be found regarding the subjective scope, the various applicable thresholds (also for the application of the GPA), the access to legal remedies, the rules on dialogues, and certain formal criteria like deadlines. While the revision will further contribute to the material and also formal alignment of the FLGP and the IAPP, these minor differences are likely to remain.

Since the GPA revision requires general changes on both the federal and cantonal level, the IAPP, like the FLGP, has become subject to a total revision. In order to implement the changes required by the GPA 2012 on the federal and cantonal level in a consistent way, and at the same time harmonize both laws, the national and federal authorities followed a coordinated approach. In 2012 a group consisting of legal practitioners as well as delegates from the national and cantonal authorities was charged with the task of drafting the texts of both the FLGP and the IAPP in a consistent way. This was a remarkable development considering that disunity between the cantonal and the federal level have so far been the major obstacle to reform/harmonization efforts.

Based on the IAPP, the Swiss cantons have enacted their own cantonal public procurement legislations.[82] Thereby, the scope and degree of detail of these laws vary: while some cantons have merely enacted a law of accession rendering the IAPP applicable (e.g. the canton of Zürich), other cantons have wide-raging laws

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[79] For an interpretation of this wordings within the context of Article XX GATT and Article III.2GPA see above, Sect. 6.8.

[80] *Ibid.*

[81] *Ibid.*, 23.

[82] The pertinent legal foundations in the cantons are the respective cantonal laws, which will not be discussed in detail here.

(and implementing ordinances) in place (e.g. the canton of Bern).[83] In some cantons, there are even public procurement rules on a communal level.[84]

9.5.3 *Reform of Legal Framework*

As already mentioned in the previous section, the total reform of the FLGP/IAPP pursues three goals, namely the harmonization of the legal foundations of the national and cantonal levels, the clarification of the legal text as well as their potential for flexibility and modernization. The draft texts of the FLGP/IAPP 2021 introduce some changes to meet these goals:

1. *Harmonization-goal:* The biggest (domestic) aim of the total revision is the harmonization of the various public procurement laws in Switzerland. Thereby, the harmonization goal can be understood on a vertical level (i.e. the alignment of national and cantonal laws) as well as on a horizontal level (i.e. the alignment of the various cantonal laws). As for the vertical harmonization, the revision introduced some moderate changes regarding legal protection, i.e. challenging mechanisms.[85]
2. *Clarification-goal*: Both the d-FLGP and the d-IAPP have been restructured to be aligned to the structure of the revised GPA 2012.[86] For example, the Article 3 d-FLGP now contains a catalogue with legal definitions to clarify central terms like "public company". Thereby, these definitions have mostly been taken over from the GPA.[87] The d-FLGP covers 64 provisions—nearly twice as much as the FLGP 2012 with 37 provisions. This change in volume can be traced back to the fact that the revised FLGP will include provisions that have so far been regulated in the FOGP.[88] This "transmission" from the FOGP back to the FLGP restores the often criticized status of inappropriate level of regulation.[89] Regarding terminology, some of the terms in the German version of the draft d-FLGP have been adapted to the EU terminology.[90]

[83] For an overview on cantonal legislations see Galli/Moser/Lang/Steiner, 70–99.

[84] Kaufmann/Weber 2015, 15; Galli/Moser/Lang/Steiner, 100–105.

[85] BBl 2017 2053, 1867.

[86] BBl 2017 2053, 1869.

[87] According to BBI 2017 1851, 1887 most of the definitions of the draft versions have been taken over from the GPA ("Die meisten Definitionen des Entwurfs sind selbsterklärend und wurden unverändert aus dem GPA 2012 und dessen Anhängen übernommen").

[88] Examples include the rules on recusal in draft Article 13, the rules on prior involvement of the parties in draft Article 14 or the rules on the evaluation of the price in draft Article 15.

[89] See above Sect. 9.2.

[90] An example is the word "Dialog" (Article 24 d-FLGP) that is commonly used in EU terminology instead of "Verhandlungen" (Article 20 FLGP 1996).

3. *Flexibilization and Modernization-goal*: The total revision aims at providing more flexibility to procuring entities through the introduction of flexible instruments such as dialogues, framework agreements (an instrument often used in practice but so far not reflected in the legal text).[91] Furthermore, the d-FLGP/IAPP both provide for a legal source for e-auctions in Article 23.

These innovations should contribute to the overarching goal of standardization of the federal and cantonal public procurement processes, which in turn should lead to cost savings for public entities (through limiting the time required for the evaluation of offers) as well as for bidders.[92]

Most notably, despite the initial reluctance of the cantons, the need for harmonization has been broadly acknowledged. This is reflected by the draft text of the IAPP which shows that the harmonization goal has been largely achieved and the formal structure and the material content of the two legislations have been adapted to each other. Deviations remain in minor areas such as deadlines, language details or requirements concerning the education of trainees ("Lehrlingsausbildung").

9.6 Principle of Equal Treatment and Non-Discrimination

Swiss public procurement law reflects the traditional objectives and principles of the GPA. While the revised GPA adds the goal of integrity and predictability as well as the goal of anti-corruption, non-discrimination of foreign tenderers remains the primary objective and the *raison d'être* of the GPA (see Recitals 1 and 2 of the GPA Preamble).

Similarly, the total revision of Swiss public procurement laws will add new objectives to the purpose catalogue in Article 2.[93] Article 2 d-FLGP aims at (1) the sustainable use of public funds, (2) transparent procurement procedures, (3) equal treatment and non-discrimination of tenderers and (4) the fostering of effective competition between tenderers, in particular with regard to collusive tendering and corruption.

As will be discussed in further detail below,[94] there is no direct hierarchy between these various objectives of the FLGP. Sustainability concerns, therefore, deserve the same attention as equal treatment and non-discrimination concerns. Nevertheless, it is important to note that sustainable public procurement, and thereby also GPP, are necessarily bound to the non-discrimination principle, since the latter one is a direct obligation from the GPA.

[91] BBl 2017 2053, 1869.

[92] *Ibid.*, 1869.

[93] Article 1 FLGP 1996 stipulates the primary objectives of i) transparent conduct of procurement, ii) the strengthening of competition between tenderers, iii) obtaining best value for money and iv) equal treatment of all tenderers. Sustainability was not included as an objective.

[94] Section 10.1.3.

The following section will therefore illustrate the various dimensions of the non-discrimination and equal treatment principle as reflected in Swiss public procurement law, especially the FLGP. This is necessary to understand the (sometimes suspenseful) context of GPP in Switzerland as in any Signatory State of the GPA.

9.6.1 Non-Discrimination as a GPA-Obligation

Non-discrimination is the central principle of the GPA.[95] Therefore, Swiss covered contracting authorities cannot discriminate against goods, services and suppliers from other GPA Parties. As illustrated above, WTO jurisprudence has interpreted the non-discrimination principle as the obligation not to modify the conditions of competitions for foreign tenderers and not to impose conditions regarding the origin of foreign goods, services and suppliers.[96]

It is worth reiterating that non-discrimination extends to the legislative process ("Rechtsetzung") as well as the application of the law ("Rechtsanwendung"), as the GPA addresses both "Parties" as well as "their procuring entities." Accordingly, the Swiss legislators when drafting (federal or cantonal) laws, as well as the procuring authorities in applying these laws, cannot accord less favourable treatment (within the sense of modifying the conditions of competition) to tenderers from other GPA States than they would accord to Swiss tenderers nor differentiate between tenderers from GPA States.

As further specified by Article IV:2 GPA ("FDI-provision") the non-discrimination obligation applies regardless of any foreign affiliation or ownership and also extends to the origin of goods or services that a Swiss company might provide.[97] This specification was added with the 2012 GPA revision and constitutes an important contribution to the protection of foreign investors and to the prevention of reverse discrimination.

Switzerland follows a monistic system with jurisprudence having confirmed the direct applicability of the GPA in various cases.[98] Therefore, the GPA non-discrimination principle can be considered to have direct effect without the need for transposition into Swiss law. Nevertheless, equal treatment is also enshrined as a constitutional principle, as will be seen in the following. Moreover, Swiss public procurement law reflects the non-discrimination principle of the GPA and provides for equivalent protection of foreign tenderers, as will be seen below.[99]

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[95] See above, Sect. 6.3.

[96] See above, Sect. 6.3.1.

[97] See above, Sect. 6.3.2.

[98] See above, Sect. 9.4.2.

[99] Section 9.6.3.

9.6.2 Equal Treatment as a Constitutional Principle

The equal treatment obligations enshrined in the Swiss Constitution provide an adequate standard to also meet Switzerland's non-discrimination obligations as set forth by international law.[100] The non-discrimination and equal treatment principle in Swiss public procurement law is a reflection and specification of the constitutional principle of "Equality before the Law", enshrined in Article 8 Swiss Constitution.[101] Paragraphs 1 and 2 state the general principle that every person is equal before the law and that "no person may be discriminated against, in particular on grounds of origin (…)".[102]

Article 8 Swiss Constitution encompasses any form of government action,[103] namely the legislation process ("Rechtsgleichheit in der Rechtsetzung")[104] as well as the application of the law ("Rechtsgleichheit in der Rechtsanwendung").[105] Accordingly, a law or ordinance cannot differentiate between two groups of persons and authorities have to apply the law in a uniform way.[106] The constitutional principle applies only when the respective persons (or groups of persons) are considered "like" or at least comparable to each other.

However, even when two persons or groups are like/comparable, exceptions may apply for "objective reasons", such as nationality or residential status.[107] This means that a foreign tenderer could not base a claim of discrimination solely on Article 8 Swiss Constitution. In this regard, the equal treatment and non-discrimination provisions of the FLGP are an important specification to underline that differential treatment of a Swiss tenderer as compared to a tenderer from a GPA country would not qualify as an "objective reason." Therefore, the equal treatment and non-discrimination principle of the FLGP goes further than Article 8 of the Swiss Constitution and can thus be attributed an independent significance as a specification of the general constitutional principle.[108] This is in line with Oesch, who points out the fact that Article 8 Swiss Constitution is directly enforceable, though needs

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[100] Oesch 2008, 10.

[101] Trüeb 2011, FLGP 1, 14; for a detailed analysis of the scope of Article 8 Swiss Constitution see Oesch 2008, *passim*.

[102] Article 8(2) reflects one particular aspect of the equal treatment obligation and is also referred to as the "prohibition of discrimination", see Biaggini, Swiss Constitution 8, 18.

[103] Article 35(2) Swiss Constitution; Biaggini, Swiss Constitution 8, 7; Oesch 2008, 11.

[104] For a detailed analysis of the principle of equality in the legislation process see Oesch 2008, *passim*.

[105] Biaggini, Swiss Constitution 8, 7.

[106] *Ibid.*, 13.

[107] See e.g. BGE 131 I 166, 180; Oesch 2008, 38 and 69.

[108] Trüeb 2011, FLGP 1, 13, seems to be of another opinion, stating that the FLGP equal treatment provision does not have an independent significance ("keine eigenständige Bedeutung").

to be specified under certain circumstances;[109] the non-discrimination and equal treatment provisions in the FLGP could be such specifications.

Another reflection of the constitutional principle of equal treatment is enshrined in Article 29 Swiss Constitution ("General Procedural Guarantees") which contains the right to be heard and states that "every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time." An effective challenging mechanism is an essential part of any domestic procurement law (and an important requirement of the GPA). Thereby, the non-discrimination principle also requires granting equal access and treatment for foreign tenderers, as well as reasonable deadlines (Article XVIII GPA). As a basic constitutional right, the principle of equality is directly enforceable by individuals (and legal entities), regardless of their nationality.[110]

Of further importance in this regard is the principle of competitive neutrality ("Wettbewerbsneutralität") laid down in Article 94 Swiss Constitution. It states that "the Confederation and the Cantons have to abide by the principle of economic freedom". This obligation contains the prohibition of any public authority to distort competition. The principle of competitive neutrality also contains the mandate for procuring authorities not to distort competition through their (protectionist) public procurement choices. In this context, Article 27 Swiss Constitution that enshrines the principle of economic freedom becomes relevant that (in conjunction with Article 94 Swiss constitution) entitles economic actors (i.e. potential tenderers) to equal treatment by the public bodies (i.e. the procuring authority).

9.6.3 Equal Treatment and Non-Discrimination in the FLGP

9.6.3.1 Purpose-Provision

Equal treatment of all tenderers was listed as the number one purpose of the FLGP 1996 in Article 1(2). The term non-discrimination was not mentioned. In this regard, the revision envisages a slight alteration in the text: Article 2(c) d-FLGP that contains the purpose-catalogue refers to "equal treatment and non-discrimination of tenderers", whereby both terms are treated in analogy.

The Federal Council specifies that the principle of "non-discrimination and equal treatment" in the field of public procurement encompasses the obligation to accord neither a less nor a more favorable treatment to any tenderer as compared to other tenderers.[111] This principle includes the prohibition of applying different selection criteria to evaluate offers or to design technical specification (or qualification criteria) in a way that would favor one particular tenderer.[112] Moreover, it implies the

[109] Oesch 2008, 12.

[110] Biaggini, Swiss Constitution 8, 6; Oesch 2008, 12.

[111] BBI 2017 1851, 1886.

[112] *Ibid.*; see also Trüeb 2011, FLGP 1, 14.

obligation to grant the same deadlines for all tenderers, to provide the same amount of information as well as equal opportunities for subsequent improvements of their offer.[113] Furthermore and most importantly, it also includes the obligation to grant all aggravated tenderers equal access to challenging mechanisms.[114]

Article 4 FLGP 1996 (“Foreign Tenderers”) specifies that the equal treatment principle does not only apply to Swiss tenderers, but also to foreign tenderers from GPA parties. Despite its symbolic value pointing out to the special vulnerability of foreign tenderers to discrimination, this provision does not have an independent meaning. The prohibition to discriminate against foreign tenderers can also be derived directly from the scope of the non-discrimination obligation that extends to all tenderers falling under the scope of the FLGP, namely also tenderers from GPA states. This explains why Article 4 FLGP 1996 will be omitted in the revised text. The d-FLGP specifies (in various provisions)[115] that it applies to both contracts falling within the scope of an international treaty (“Staatsvertragsbereich”)[116] and contracts that do not meet the threshold value of any international treaty. For example, Article 6 d-FLGP specifies that local as well as GPA-Parties’ tenderers can participate in public procurement processes in Switzerland.

This principle of open access for foreign tenderers was questioned by a controversial legislative proposal that asked for the consideration of the different price levels (“unterschiedliche Preisniveaus”) as an (optional or mandatory) award criterion allowing to make bids from foreign countries with a lower price level artificially more expensive in order to “level the playing field” for Swiss bidders.[117] In the end, this legislative proposal found its way into the wording of the revised law in Article 29 d-FLGP. It is, however, only applicable for tenders not covered by the GPA.

9.6.3.2 Objectivity and Impartiality as a Procedural Principle

The objectivity and impartiality of contracting authorities is one of the fundamental principles of Swiss public procurement law and an important means to meet the equal treatment and non-discrimination goal.[118] It was incorporated in Article 8 FLGP 1996 (“Procedural Principles”), stating that a contracting authority has to respect the equal treatment of domestic and foreign tenderers at all stages of the procurement process. The FLGP revision will introduce a slightly adapted text:

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[113] Trüeb 2011, Article 1 FLGP, 14.

[114] Kaufmann/Weber 2015, 18.

[115] See for example Articles 6, 8, 16 or 29 d-FLGP.

[116] In the first place, this refers to the GPA as the most important international public procurement agreement. Other international treaties are: the bilateral agreement CH-EU, the EFTA Convention and other FTAs, see BBI 2017 1851, 1887.

[117] Parliamentary debate on the FLGP revision, 13 June 2018, vote of National Council Silvia Flückiger-Bäni.

[118] *Ibid.,* 1909.

Article 11(c) d-FLGP ("Procedural Principles") states that contracting authorities have to respect the equal treatment of tenderers on all stages of the procurement process, omitting the linguistic differentiation of "domestic" and "foreign".[119] The Federal Council stresses that Article 11 d-FLGP reflects the general GPA principle as laid down in Article IV GPA 2012.[120]

Both the current FLGP 1996 as well as the revised text of the FLGP specify some procedural principles with regard to the design of the procurement instrument, i.e. the contract- and supplier-related requirements, that have to be considered in order to grant non-discriminatory treatment.[121] As far as they concern GPP, they will be further discussed in the next chapter.

9.7 Summary and Findings

Switzerland's public procurement legislation is characterized by a high level of fragmentation between the various federalist levels (confederation, cantons and communities). Thereby, harmonization efforts were made difficult by the fact that, due to historic reasons, the competence for regulation does not lie at the federal, but at the cantonal level. Nevertheless, Swiss procurement legislation has undergone major structural changes since the Uruguay Round: From a very low level of regulation before the 1990s to a "patchwork"[122] of various different (and at times even contradictory) legal bases to a harmonized set of rules (to be enacted with the total reform).

Thereby it is worth noting that both of the comprehensive reforms undertaken so far were triggered by international incentives, namely by the developments of the GPA negotiations. This illustrates the significant impact of WTO Law (i.e. the GPA) on the design, the aims and the degree of regulation of Switzerland's procurement legislation.

In order to meet Switzerland's obligations under the GPA, the FLGP contains several provisions on equal treatment and non-discrimination: firstly as a purpose provision, secondly as a procedural principle and thirdly, throughout the legal text with regard to specific issues of public procurement. These provisions—together with the basic constitutional principles of equality before the law and competition neutrality—can be expected to do justice to the non-discrimination requirements of the GPA. The Swiss equal treatment principle can even be considered to go further

[119] This differentiation is rendered superfluous by Article 6 d-FLGP that clarifies that the term "tenderer" includes foreign tenderers (from GPA states).

[120] BBI 2017 1851, 1908–1909.

[121] One example is the reference to the ILO-Agreement within the framework of the qualification criteria and the possibilities to provide evidence of compliance (see Article 6 d-FLGP paragraphs 2 and 5; or the rules on the prior involvement of tenderers in Article 14 d-FLGP).

[122] Oesch 2010, 5.

than the GPA non-discrimination obligation, since it also prohibits reverse discrimination between any tenderers and not only between foreign and domestic ones.[123]

As for the legislation process ("Rechtsetzung") the FLGP and the IAPP do grant equal treatment within the sense of equal conditions of competition to suppliers from GPA countries. Both legislations expressly prohibit according less favourable treatment to foreign suppliers covered by international treaties in public procurement processes that fall within the scope of the respective treaties. Whether the public procurement laws are also *applied* in a way as not to modify the conditions of competition remains to be seen and will, if necessary, have to be assessed by Swiss courts.

As will be shown in the following chapter, the rules on the various public procurement instruments contain more detailed requirements on how to guarantee non-discriminatory treatment within the context of GPP. With regard to GPP, the revised text reveals some potentially significant changes, pointing towards a paradigm shift.

[123] BBI 1994 IV 950, 1177.

Chapter 10
Regulatory Scope for GPP

10.1 Evolution of GPP

Swiss public procurement regulation is relatively young, as compared to other sectors. The need for regulation emerged only with the ratification of the GPA 1994 and the internal pressure to restructure domestic economic laws that arose with the rejection of the accession to the EEA.[1] In view of this historical background, and considering the general spirit of trade liberalization induced by the Uruguay Round, Swiss regulators put a strong focus on aspects of market liberalization and procurement authorities were sensitized to considerations of competition.[2] Other policy concerns were dismissed as "secondary goals" or "extraneous aspects" that got into the way of the "primary goals".[3] This shows that the GPA was (and often still is) perceived as limiting GPP, which in turn explains why contracting authorities refrain from implementing GPP out of fear from legal consequences before the WTO DSM.[4]

Therefore, unlike in the EU, GPP is not yet entirely established as a common practice in Switzerland. Even though, on a general level, GPP is increasingly acknowledged as a suitable tool to complement other environmental policies, there is still skepticism with regard to its concrete implementation and general compatibility with WTO law.

Despite remaining skepticism, current developments show that a paradigm shift in favor of GPP is taking place,[5] namely (1) on a policy level through policy action,

[1] See above, Sect. 9.2.1.

[2] See also above, Sect. 9.2.1. or Steiner 2013, 74; Steiner 2014, 150–151.

[3] Steiner 2013, 74; Arrowsmith 2010a, 150.

[4] Weber/Menoud, 185.

[5] Steiner 2014, 172.

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R. Koch, *Green Public Procurement under WTO Law*, European Yearbook of International Economic Law 9, https://doi.org/10.1007/978-3-030-48214-5_10

(2) on a judicial level through court practice and, (3) on a legislative level through inclusion of GPP-provisions in the revised public procurement laws.[6]

This chapter will start with a short illustration of the evolution of GPP in Switzerland on these levels. It then assesses the role of the environmental elements in the revised constitution. The following sections take a closer look at GPP implementation on a technical level through assessing the legislative changes in the rules on technical specification, award criteria and supplier related criteria. Thereof, Sect. 10.7 will draw conclusions regarding the scope of GPP.

10.1.1 Policy Level: Consolidation

The first step towards the acknowledgment of GPP was taken in 1996, with the foundation of a Unit for Ecological Public Procurement ("Fachstelle öffentliche Beschaffung"), a special unit attached to the Federal Office for the Environment (FOEN). This unit is vested with the mandate to foster GPP through providing training, generating information platforms and establishing a catalogue with "green" criteria for certain product categories (Article 28 of the Ordinance of the Organization of Federal Public Procurement [Org-FOGP]).[7] So far, however, the public visibility of the unit remains low.

A turning point for environmental and climate change mitigation policies came in 1997 with the adoption of the Sustainable Development Strategy ("Strategie Nachhaltige Entwicklung"). It is published by the Federal Council and renewed every 4 years. Based on the constitutional provisions on sustainable development and environmental protection,[8] the strategy aims at fostering sustainable development through identifying areas where concrete measures can effectively contribute to sustainability.[9] Most notably, the Federal Council already identified GPP as one of the measures in 1997, stating that the government will take into account ecological aspects in its purchases.[10] This was reiterated in the subsequent Sustainable Development Strategy from 2002, in which the Federal Council stated that "one of the federal government's responsibilities is to set an example, e.g. in its own procurement activities".[11] In its current sustainability strategy (covering 2016–2019),

[6] For an analysis of GPP on the three levels of policy action, jurisprudence and legislatory changes in the EU see above, Sect. 8.1.

[7] Verordnung über die Organisation des öffentlichen Beschaffungswesens der Bundesverwaltung (Org-VöB), SR 172.056.15.

[8] Swiss Federal Council 2002.

[9] For the respective action areas see Swiss Federal Council 2016, 16.

[10] BBl 1997 III 1045, 1051 ("Beim Einkauf hat er [der Bund] neben dem Preis und der Qualität auch die ökologischen Aspekte zu berücksichtigen").

[11] Swiss Federal Council 2002, 12. (The German version reads: "Der Bundesrat ist sich dabei bewusst, dass es zu einer der Aufgaben des Bundes gehört, durch eigenes Verhalten eine Vorbildfunktion wahrzunehmen, z.B. in seinem eigenen Beschaffungswesen.")

the Federal Council confirms its commitment to ensure high sustainability requirements in public procurement throughout the whole life cycle and mentions plans to establish a national platform on sustainable public procurement.[12]

On the level of foreign policy, Switzerland launched an international Task Force on Sustainable Public Procurement within the framework of the UN Marrakech process of 2005, a process that aims at fostering sustainable consumption and production. Through joining the Task Force, governments committed themselves (on a voluntary basis) to establishing projects for the promotion of sustainable procurement.[13]

On a national level, more concrete policy action was taken by the Federal Council in 2011 with the issuing of "Recommendations for Ecological Public Procurement" that are updated periodically ever since. These recommendations can also be considered a milestone for GPP.[14] Firstly, the Federal Council's reiterates its commitment to take a leading role in GPP, and secondly, it formulates concrete measures on how to do so on an implementing level.[15] Although non-binding, these guidelines created some sort of signaling effect which led some cantons/municipalities to publish their own recommendations.[16]

10.1.2 Jurisprudence: Confirmation

Court decisions allowing for the consideration of environmental criteria in the public procurement process also significantly contributed to the general acknowledgment of GPP. One of the first decisions concerning GPP dates back to the year 1998: *In casu*, the cantonal court stated that, as a general rule, environmental criteria that go beyond the minimum requirements of the law can indeed be considered, provided that they are published in the tendering documents.[17]

On the federal level, a precedent GPP case from the year 2000 concerned the consideration of transportation route ("Transportweg") in a public waste transport contract. The Federal Supreme Court stated that considering CO_2 emissions during the transportation route of a good (or the delivery of a service) can be a permissible award criterion (or even a technical specification) in cases in which it is crucial/central to the procurement contract.[18] In the case at hand, however, the court ruled

[12] Swiss Federal Council 2016, 50.

[13] Caranta 2013, 54.

[14] Steiner 2013, 74.

[15] See Recommendations, *passim*.

[16] See for example "guidelines for ecological requirements in the public procurement process" of the City of Zürich ("Richtlinie ökologische Anforderungen im Beschaffungsprozess").

[17] Judgment of the Administrative Court of the Canton of Zurich of November 24 2010, VB.1998.00319, BEZ 2000 Nr. 9, E. 8.

[18] Decision of the Federal Supreme Court of May 31 2000, 2P.342/1999/a) and b).

against the weighting of 20% for the transportation route and stated that the contracting authority should have considered the type of vehicle (in addition to the transport route) to make an adequate picture of the pollution emission and to achieve the envisaged policy aim of environmental protection.[19]

Although the general permissibility of GPP (in particular green award criteria) was confirmed in subsequent cases,[20] there is still relatively little case-law on GPP. As pointed out by scholars, precedence cases from the EU, such as *Concordia Bus*[21] or *EVN and Wienstrom*,[22] can provide guidance for interpreting relevant Swiss law.[23] However, with the stronger legal anchoring and the more frequent use of GPP in Switzerland, more cases are to be expected.

10.1.3 Legislative Reform: Codification

The most relevant novelties for GPP on a legislative level will come with the total revision of the public procurement law. As laid out above, the Federal Council, already on an early stage (namely in the Strategies for Sustainable Development 1997 and 2002), expressed the view that sustainability and economic efficiency can indeed be reconciled.[24] This position is finally reflected in the new public procurement act and ordinance, as well as in the IAPP. Moreover, these new legal bases for public procurement put forward practical solutions on how such reconciliation can be achieved on the technical implementation level.[25]

10.1.3.1 First Codification of GPP in the Ordinance (FGOP)

The first time that GPP and social public procurement was mention in Swiss legislation was with the partial revision of the FOGP in 2010.[26] Firstly Article 7 stated that a winning supplier had to guarantee compliance with the International Labour Organization (ILO) Core Convention for services performed abroad. This novelty was a first step towards the acknowledgment of "secondary goals" or "horizontal policies" in public procurement and, as such, welcomed by scholars.[27] Secondly,

[19] *Ibid*, c).

[20] Decision of the Federal Supreme Court of November 6 2000, 2P.122/2000, E. 7.

[21] See above, Sect. 8.4.2.1.

[22] See above, Sect. 8.4.2.2.

[23] Steiner 2006, 43; Steiner 2013, 75; see also Weber/Koch 2016, 9.

[24] Steiner 2006, 18.

[25] See below, Sects. 10.3–10.7.

[26] As illustrated in Sect. 9.2.2, the Ordinance was revised before the law, according to the strategy of "incremental reform".

[27] Steiner 2013, 77, calls this inclusion a "fairly spectacular development".

Article 40 FOGP introduced a GPP element, acknowledging that competitions in procurement can also serve to evaluate "environmentally preferable solutions."

With the total reform of Swiss public procurement legislation also brings about a reform of the FOGP. The envisaged draft d-FGOP will be conceptualized as the implementation-legislation of the d-FLGP and, as such, does not contain any fundamental rules on GPP. As an implementing rule of fundamental importance, Article 3 d-FOGP ("Sustainability") will specify that the term sustainability should be understood in terms of its ecological, economic and social dimension, throughout the whole life-cycle. Thereby, the explanatory report points out that this provision should not be used to justify discrimination of foreign tenderers and protectionism, though also reiterates the commitment of the government to pursue high environmental standards in purchasing.[28]

10.1.3.2 Incorporation of the Sustainability Goal in the Law (FLGP)

The general acknowledgment of GPP starts in the purpose provision of the d-FLGP. Article 2(a) d-FLGP ("Purpose") states that the FLGP aims at the "economically, ecologically and socially sustainable use" of public funds.[29] This is followed by the transparency goal in subparagraph b and the "equal treatment and non-discrimination" goal in subparagraph c.

Whereas ecological concerns are not mentioned in the FLGP 1996, GPP will now be listed as a primary concern in the purpose catalogue of the d-FLGP. This shows that GPP is by no means a secondary concern anymore, and that the term "secondary goal" and even more the term "extraneous aspects" ("vergabefremde Aspekte") are definitely outdated. In the parliamentary debate, the Federal Council reiterated this fact, by stating that the purpose provision regarding sustainability will be the "red threat" of the FLGP and will have to be considered when interpreting other provisions of the law.[30] Furthermore, it shows that more than 20 years after the signing of the first GPA 1994, the goal of liberalizing the Swiss public procurement market has largely been achieved,[31] and that the d-FLGP reflects the new challenges of contemporary public procurement, such as GPP and prevention of collusion.

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[28] Explanatory Report FGOP, 5.

[29] The German version, considering a parliamentary proposal from the 3rd of June 2018 reads: "den wirtschaftlichen und den *volkswirtschaftlich*, ökologisch und sozial nachhaltigen Einsatz der öffentlichen Mittel" (emphasis added).

[30] Parliamentary debate on the FLGP revision, 13 June 2018, vote of Federal Council Ueli Maurer ("Dieser Zweckartikel ist sozusagen der rote Faden dieses Gesetzes, und in der einzelnen Auslegung hat man sich immer wieder daran zu orientieren").

[31] In 2015, 5% of all the procurement contracts on a federal level were awarded to foreign suppliers, mainly from the EU or the US, BBl 2017 2053, 2055. There are no figures available for cross-border procurement on a cantonal level.

The inclusion of sustainability concerns in the new purpose catalogue FLGP was a main focus of the consultation process ("Vernehmlassung") as well as the debate in parliament. While the "greening" of Swiss public procurement law was mostly welcomed,[32] concerns were raised about what some members of parliament still continue to perceive as "extraneous elements".[33] In this context, it is surprising that skeptical parliamentarians still perceive WTO law as a factor limiting GPP, instead of enabling it.[34]

10.2 Environmental Elements in the Swiss Constitution

10.2.1 Material Scope

The general basis for GPP in Switzerland is the Swiss constitution.[35] Whereas the constitution was traditionally structured as a mainly economic constitution, it is now also guided by sustainability concerns, following a revision in 1999. As illustrated by Morell, the inclusion of sustainability concerns can be explained by the influence of international law, where the concept of sustainability has reached the status of international customary law in the aftermath of the Rio Conference in 1992.[36]

The 1999 revision of the Swiss Constitution fostered the position of environmental protection in many respects: firstly, it acknowledging the "responsibility towards future generations" in the preamble; secondly, through including the aim to promote sustainable development and the commitment to a long term preservation of natural resource (Article 2); and, thirdly, through incorporating two fundamental provisions on sustainable development (Article 73) and the protection of the environment (Article 74).

Article 73 states that:

> The Confederation and the Cantons shall endeavor to achieve a balanced and **sustainable relationship between nature and its capacity to renew itself** and the demands placed on it by the population (emphasis added).

The principle of sustainable development is followed by the more specific Article 74 that contains the mandate to:

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[32] Consolidation Report, 9.

[33] See for parliamentary debate on the FLGP revision, 13 June 2018, vote of National Council Daniela Schneeberger ("Das Beschaffungsrecht soll […] nicht […] zweckentfremdet werden. […] Zu viele sachfremde und rein politisch begründete Kriterien überfordern […]. Als WTO-Mitglied unterstehen wir den Regeln des internationalen Wettbewerbs").

[34] *Ibid.*

[35] Kaufmann/Weber 2015, 33, with reference to Steiner 2014, 151.

[36] Morell, Article 73, 1–10; see also above, Sect. 4.2.

> Legislate on (…) the **protection of the natural environment** against damage or nuisance (paragraph 1) and to ensure that such damage or nuisance is avoided (…) (emphasis added).

The Federal Council complied with this mandate in enacting the Environmental Protection Act (EPA)[37] that contains command-and-control as well as market-based policy measures.[38] Notably, the EPA also specifies the notion of environmental protection as the protection of people, animals and plants, focusing especially on the protection of the natural foundations of life and biodiversity (Article 1).

The legal character of these two environmental provisions is not clear: Prevailing legal doctrine still considers them competence provisions that do not create individual rights.[39] Nevertheless, their inclusion two decades ago still illustrate the cementation of sustainable development and environmental protection as an important public responsibility.[40] The fact that the current constitution is also guided by sustainability concerns led scholars to observe a shift away from the focus of a purely “economic constitution” towards the parallel existence of what is often referred to as “environmental constitution”.[41]

These two main provisions of the environmental constitution (Article 73 and Article 74) are supplemented by Article 54 Swiss Constitution on “Foreign Relations”. This provision contains a non-exclusive list of Switzerland’s foreign policy goals, whereby sustainability is one of the concerns. Article 54(2) states that Switzerland shall “assist in (…) the conservation of natural resources” as part of its foreign policy strategy.

10.2.2 Potential Field of Tension

The co-existence of the two goals of economic freedom and sustainability can create tensions, in the Swiss Constitution as well as in public procurement laws. These tensions, however, can be solved by applying laws and measures for environmental protection in a proportional way. As pointed out by Kaufmann/Weber, the crucial question is not about whether the fundamental economic rights prevail over the fundamental principles of sustainability (or vice-versa). Rather, the more solution-oriented question should be asked of how the economic system in Switzerland can be designed in a way beneficial for sustainability.[42] In any case, conflicts have to be assessed on a case-by-case basis, whereby environmental concerns serve as an

[37] Umweltschutzgesetz (USG) SR 814.01.

[38] Morell, Article 74, 15; Kaufmann/Weber 2015, 25.

[39] Morell, Article 74, 6, with references; less clear Vallender, Article 73, 23–33, with references.

[40] Morell, Article 74, 4 points out to the increasing importance of this public responsibility; Kaufmann/Weber 2015, 33.

[41] Steiner 2006, 104.

[42] Kaufmann/Weber 2015, 32 with references.

"immanent limit to economic freedom".[43] The assessment of whether the environmental measure at hand is disguised protectionism deserves special attention, in particular in the context of international trade (and international procurement).[44]

10.2.3 Implications for GPP

As pointed out by Steiner, the "red thread" for sustainability woven into the Swiss constitution in the 1999 revision is more than just a mere "update", but represents the explicit acknowledgement of the indispensability of the preservation of natural resources.[45] In this regard, the question arises to what extent the elements of the environmental constitution foster the scope for GPP—or even contain the obligation to consider GPP.[46]

The justiciability of Article 73 is a contentious issue.[47] Some legal scholars argue that Article 73 lacks clarity and precision to have a directly binding effect on public authorities or be directly invoked before court.[48] Others, however, argue that Article 73 is a constitutional principle that could be directly invokable and constitutes direct instructions to public authorities.[49] The Federal Supreme Court is rather skeptical, stating that the "normative density" of Article 73 is low.[50] Nevertheless, there is a consensus that legislators as well as authorities should take this principles as a "guideline"[51] (in strategic and value-oriented terms) when designing and specifying the legal order.[52]

The same considerations apply regarding Article 74 that also does not give rise to individual rights or obligations,[53] but addresses the legislator.[54] Both Article 73 as well as Article 74 seem to go less far then the EIP, which addresses not only legislators but also the authorities.[55] Nevertheless, Biaggini points to the fact that Swiss authorities, in any case, have to guide their actions based on the constitution and are, therefore, still indirectly bound by Articles 73 and 74.[56] In that sense, the

[43] *Ibid.*

[44] Steiner 2006, 104.

[45] Steiner 2013, 75 with reference to BBI 1997 I 1, 127.

[46] See above, Sect. 8.2.1, for the discussion within the similar context of the EIP.

[47] Vallender, Article 73, 27.

[48] Griffel 2001, 30; Griffel 2015, BSK BV 73, 12.

[49] Petitpierre-Sauvain, 560.

[50] Decision of the Federal Supreme Court of February 23 2004, BGer 1A.115/2003, E. 3.2.

[51] "Richtschnur, Leitplanke und Wertungsmuster", Vallender, Article 73, 26.

[52] Vallender, Article 73, 26.

[53] Morell, Article 74, 3.

[54] *Ibid.*, 6.

[55] See above, Sect. 8.2.

[56] Biaggini, Swiss Constitution 73, 4 and Swiss Constitution 74, 11.

environmental provisions of the Swiss Constitution should be treated as the "read thread", guiding authorities as well as legislators in any actions that are environmentally relevant.[57] This broad reading would also imply GPP and contain the mandate to consider sustainability concerns and protection of the environment when procuring goods, services or works, similar to the EIP depicted above.[58] Accordingly, the implications of the environmental constitution on public procurement could be considered similar to those of the EIP, namely containing an obligation to at least "consider" GPP and to generally not choose goods, services and works that would damage the environment.

10.3 Technical Specifications: New Provision on GPP

In Switzerland, technical specifications[59] are generally perceived as the classical and most adequate procurement instrument to implement GPP.[60] Swiss public procurement law, unlike the GPA or the EU Directives, does not provide for a definition of the term technical specifications. However, the definition in Article 1.u GPA applies to Switzerland as a Signatory State.[61]

The d-FLGP introduces changed rules on technical specifications. The proposed Article 30 d-FLGP extends over four paragraphs, while the former provision in Article 12 FLGP 1996 contained only two paragraphs. The d-FOGP does not contain additional rules on technical specification. As pointed out by Steiner, the GPA has to be used as the basis to interpret the FLGP provision on technical specifications, since the degree of regulation of the latter remains low.[62]

Notably, the total revision of the FLGP will, for the first time, also enshrine GPP in the draft provision on technical specification: Article 30(4) d-FLGP states as a general rule that a procuring authority may design technical specifications for the conservation of natural resources or to protect the environment.[63] It stands out that this wording reflects the GPP provision in Article X:6 GPA.[64] Article 30(4) thus covers the same policy objective ("Schutzziel") as Article X:6 GPA, namely (1) the conservation of natural resources, and (2) the protection of the environment.

[57] Vallender, Article 73, 23 with reference to Rausch, 918; Biaggini, Article 73, 5, shares this reading, referring to a "programmatic guiding principle ("programmatische Leitmaxime").

[58] See above, Sect. 8.2.

[59] See above, Sect. 6.4 for the GPA and 8.3 for the EU.

[60] Weber/Menoud, 192; Steiner 2006, 72.

[61] See also Explanatory Report FLGP, 31.

[62] Steiner 2006, 31, referring to the FLGP 1996. This statement, however, remains valid in the context of the revised FLGP 2021, since the degree of regulation can still be considered low.

[63] The wording in German is "Die Auftraggeberin kann technische Spezifikationen zur Erhaltung der natürlichen Ressourcen oder zum Schutz der Umwelt vorsehen."

[64] See above, Sect. 6.4.

10.3.1 Scope

As elaborated in Chap. 5,[65] the term conservation of natural resources was interpreted broadly by the Appellate Body, ranging from air, petroleum or minerals to living creatures and biodiversity in general. Environmental protection covers measures aiming to prevent or mitigate damage to flora and fauna. Accordingly, Swiss procuring authorities can adopt technical specifications that directly aim at achieving one of these two policy objectives (nexus-requirement). A parliamentary proposal to limit the “conservation of natural resources and natural protection” to the requirements of the EPA as well as to international law was rejected by a majority of the parliament.

10.3.2 Relevance

Although Article 30(4) FLGP is a voluntary provision that does not entail any obligations to consider environmental criteria. Nevertheless, the relevance of this new provision should not be underestimated.[66] For the first time, Swiss public procurement law makes concrete reference to GPP and thereby acknowledges its legitimacy. This is especially noteworthy considering that Swiss law on technical specification contains only four paragraphs; and one of these paragraphs is dedicated to GPP.

Although the inclusion of GPP in the provision on technical specification was not a contested issue, it still gave rise to discussions in the consultation process. While on the one side various stakeholders (mainly NGO’s or green political parties) requested a binding, mandatory provision and the inclusion of social sustainability, on the other side industry representatives requested to completely delete the GPP-paragraph.[67]

10.3.3 Limits

Although green technical specifications are now expressly acknowledged by the FLGP, they have to be designed within the limits posed by the various GPA obligations in order to ensure that they do not a distortive effect on competition.[68] Thereby, the FLGP, as the transposition law of the GPA, reflects the main GPA-requirements

[65] *Ibid.*

[66] Kaufmann/Weber 2015, 6.

[67] Consultation Report, 46.

[68] Explanatory Report FGLP, 46.

regarding non-discriminatory technical specifications in Article 30(1) FLGP as follows:

1. *Transparency Requirement*: Article 30(1) d-FLGP contains the (not particularly extensive) transparency obligation to publish technical specification in the tendering documents. This requirement was already included in the former FLGP. It reflects the (more detailed) rules on documentation in Article X:7–10 GPA.
2. *Functionality and Performance-Requirement*: Article 30(1) d-FLGP furthermore contains the requirement that technical specifications have to be designed, *inter alia,* in terms of functionality or performance and that they can refer to labelling. This is based on Article X:2(a) GPA. However, the respective GPA provision goes further than the FLGP, since it contains the clearer mandate not to base technical specifications on criteria of design.[69]
3. *(International) Standards as a Basis*: Article 30(2) d-FLGP states that a procuring authority has to base its specifications on international standards. Alternatively, certified national standards or recommendations from the industry can also serve as a basis. This requirement has its roots in Article X:2(b) GPA, but constitutes a slightly weakened provision by adding the relativization "where possible and appropriate".[70]
4. *Equivalence, Prohibition of Trademarks*:[71] Article 30(3) d-FLGP prohibits basing technical specifications on trademarks or patents (and the like), with the exception of cases where "no other sufficiently precise or intelligible way" of specification exists. In such cases, the "or-equivalent"-indication is necessary. This requirement mirrors Article X.4 GPA.

This shows that Article 30 d-FLGP is modelled after the equivalent provision in Article X GPA.[72] However, the two GPA-paragraphs that are not included in Article 30(1) d-FLGP are the "no unnecessary obstacle to trade"-requirement in Article X:1 GPA and the rules on dialogues in Article X:5 GPA.[73] While the latter one will be regulated in a new, separate provision (Article 24 d-FLGP), the d-FLGP does not incorporate the "unnecessary obstacle to trade"-prohibition. Only the explanatory report states that green technical specifications should not lead to protectionism or barriers to trade.[74] From an international trade law perspective, the failure to include the respective prohibition in the wording of the revised law is regrettable, since it would have strengthened the position of the GPA in Swiss public procurement law. This is reinforced from a legal coherence perspective, considering that the FLTBT,

[69] For a detailed discussion of the requirement not to base specifications on design see above, Sect. 6.4.2.4.

[70] The GPA wording in Article X:2(b) refers to international standards "where such exist".

[71] Reflection of Articles X:3 and X:4 GPA, see above, Sect. 6.4.2.6.

[72] Kaufmann/Weber 2015, 32.

[73] See above, Sect. 6.4.

[74] Explanatory Report FGLP, 32. Interestingly, the explanatory report refers only to Article IV GPA, neglecting to mention Article X:1 GPA.

unlike the FLGP, does include a "disguised barrier to trade"-prohibition, reflecting the wording of the GATT and the Preamble of the TBT.[75]

Unlike the EU, who added clarifications regarding environmental characteristics and the additional LtSM requirement,[76] Swiss law does not add any further requirements to the design of green technical specifications. To the contrary, it slightly weakens the wording of the GPA, for example by not insisting on the use of international standards.

10.4 Award Criteria

Award criteria can be considered the most suitable instrument to implement GPP. Unlike all other public procurement instruments, they are not strictly binary, but allow for a proportional weighting according to the importance for the public procurement contract at issue.[77] Therefore, they are not "stand or fall"-requirements, but grant a competitive advantage to the tenderers fulfilling them. As a result, award criteria were also a focal point of discussion in the sustainability debate that surrounded the total reform of Swiss public procurement legislations. The legal scope for green award criteria granted by the law will play a decisive role in giving practical effect to the sustainability-purpose provision.[78] The following section will shed light on the scope for green award criteria and discuss the envisaged changes.

10.4.1 Evolution of Green Award Criteria

The FLGP 1996 already contained a reference to environmental protection in its provision on award criteria. Article 21(1) FLGP 1996[79] states the general principle that the "most economically advantageous offer" is awarded the contract (the so-called "MEAT-requirement"[80]). The second sentence lists potential factors to be

[75] See above, Sect. 9.5.1.4. There, the view is expressed that technical specifications are also bound to the rules on technical regulations. Accordingly, technical specifications under the FLGP could not be "disguised barrier to trade", since this prohibition from the FLTBT would apply in analogy to the FLGP.

[76] See above, Sect. 8.3.1.

[77] See above, Sect. 3.6.

[78] National Council, parliamentary debate on the FLGP revision, 7 March 2019, vote of Federal Council Ueli Maurer ("Artikel 29, 'Zuschlagskriterien', ist wahrscheinlich einer der wichtigen Artikel in diesem Gesetz."), and vote of Priska Birrer-Heimo in the parliamentary debate on the FLGP revision, 13 June 2018 ("Artikel 29 mit den Zuschlagskriterien ist entscheidend. Er ist sozusagen das Filetstück").

[79] Based on Article XIII:4b GPA 1994.

[80] See above, within the context of the EU, Sect. 8.4.1.1.

considered identifying MEAT, *inter alia*, the environmental impact ("Umweltverträglichkeit") of the offered procurement solution, namely factors such as low levels of pollution, good disposal management and preservation of natural resources or reparability.[81] Furthermore, and most importantly, the explanatory report of the FLGP (already at that time) pointed to the fact that ecological sustainability and economic efficiency do not have to be considered contradictory, but can be complementary concepts.[82]

The environmental elements in the FLGP 1996 constituted the first steps towards the legal codification of green award criteria. Further steps were taken in the revision of the FOGP in 2010. Article 27(2) FOGP ("Evaluation Systems") added GPP-related elements to the list of conceivable award criteria: *inter alia,* "sustainability", "degree of innovation" and "costs to be expected throughout the total life span." These new criteria, however, were met with criticism on the grounds that they were too vague and supposedly open the doors for "extraneous aspects" in public procurement.[83]

Finally, the revision of the d-FLGP led to the codification of green award criteria. The environmental elements from the 2010 FOGP were transposed to the level of the law and are now contained in Article 29 d-FLGP.

10.4.2 Scope

10.4.2.1 "Sustainability"

The second sentence of Article 29(1) d-FLGP contains a (non-exclusive) enumeration of conceivable award criteria that can be taken into consideration by a procuring authority on a voluntary basis (with the exception of the criterion of "price", which is mandatory).[84] Thereby, some additional environmental elements were introduced with the current revision, namely the criterion of "life-cycle costs" (LCC) and "sustainability."[85] Other listed criteria such as "quality", "creativity" or "innovation" could also become relevant in the context of GPP.

"Sustainability" extends over three dimensions of economic, ecological and social sustainability.[86] Moreover, it encompasses the criterion of "environmental impact" that was listed as a separate criterion in the FLGP 1996, but is now summarized under the term sustainability. Accordingly, factors such as soil-, water-, or

81 BBI 1994 IV 950, 1193.

82 *Ibid.*

83 Trüeb 2011, Article 21 FGLP, 15.

84 This is indicated by the wording "apart from the price [the contracting authority may consider…]", see Heusi-Schneider, 357.

85 While the latter was already contained in the 2010 Ordinance, the former is an innovation of the ongoing revision.

86 Explanatory Report FLGP, 31; see also above.

air-pollution can be considered under this element.[87] Scholars advocate a broad interpretation of the two overlapping terms, sustainability and environmental impact, that would include factors that do not have a direct link to the subject-matter, such as a positive carbon footprint.[88]

10.4.2.2 Life Cycle Cost Approach

The criterion of LCC is a newly introduced element in the d-FLGP. Nevertheless, it is not an entirely new concept to Swiss public procurement law. Already the former Ordinance in its revised version of 2010 stated that the “costs to be expected throughout the total life span” can be considered in the evaluation process.[89] The revised law now includes LCC as a conceivable award criteria in Article 29(1) d-FLGP. The term LCC encompasses not only the purchasing costs, but also the sub-categories of productions costs, operating costs as well as reinstatement and recycling costs.[90] Other costs could include energy consumption costs, cleaning expenses or service costs.[91]

Unlike in the EU, where LCC is regulated in detail in a separate provision of the revised directive (Article 68 Directive 2014/24/EU),[92] the newly introduced LCC-element has not received much attention in Switzerland yet. Schneider-Heusi welcomes the inclusion of the LCC-approach, calling it not only useful, but necessary (arguing not from an ecological perspective, but from a point of view of economic efficiency).[93] Also Steiner points at the importance of considering costs throughout the whole life span, however, also recalls some currently unsolved questions regarding calculation methods.[94]

Indeed, it is remarkable that the legislative proposal of Swiss public procurement legislation, as opposed to the EU Directives, does not provide for further specifications on how to calculate costs under the LCC-approach. Given the technical complexity of LCC, the risk of legal insecurities and discrimination is inherent. This is especially apparent regarding foreign tenderers. In EU law, Article 68(2) Directive 24/2014/EU acknowledges this risk and provides for rules to be adhered to when

[87] *Ibid.*

[88] Galli / Moser / Lang / Steiner, 839, with references.

[89] See above, Sect. 10.1.

[90] Explanatory Report FLGP, 33; BBl 2017 1851, 1943 or, generally and in more detail decision of the Administrative Court of the Canton of Zurich of January 18 2018, VB.2017.00496, *passim.*

[91] Schneider-Heusi, 331.

[92] As elaborated above in Sect. 8.4.1.2, scholars in the EU have reacted euphoric to the introduction of the LCC approach: Sjåfjell / Wiesbrock, 19 even call it the “pivotal element” of the 2014 revision.

[93] Schneider-Heusi, 331.

[94] Steiner 2013, *passim*.

assessing costs based on LCC. In Switzerland, however, both the FLGP as well as the FOGP remain silent on this topic.[95]

As for GPP and LCC, the Federal Council specified in his report on the draft proposal that the internalization of environmental externalities can be considered when calculating costs, provided that this is done based on a broadly acknowledged calculation method.[96] The exact scope and calculation methods of LCC, however, remain unclear and will have to be decided by future case law.

10.4.2.3 Most Economically Advantageous Tenderer

The MEAT-requirement, stating that public contracts have to be awarded to the "most economically advantageous tenderer",[97] can now be found in a new, separate provision on the awarding of a contract (Article 41 d-FLGP).[98] Thereby, the d-FLGP does not provide a clear definition of MEAT according to Swiss law.[99] However, Article 41(2) d-FLGP[100] states that public contracts can be awarded solely based on the criterion of price, only in the case of highly standardized products or services.[101] This is to ensure that economically most advantageous is not confused with "lowest price." While the GPA does not set requirements for when price can be the sole criterion, the EU is even stricter, providing Member States the option to prohibit basing the award of a contract solely on the criterion of price.[102]

The explanatory report of the FLGP makes reference to the GPA, calling MEAT a "cardinal principle" of the GPA.[103] This does not seem accurate, considering that GPA allows for an evaluation of the offer based on both MEAT and (acquisition) price (Article X.7(c) and Article X 9 GPA). Consequently, the "most advantageous tender" is rather one of two alternatives, not a genuine principle of the GPA (unlike in the EU, where the MEAT-approach is the standard-option to evaluate an offer).[104]

[95] The only requirement for the application of LCC, namely the transparent publication of the data and methods used, is specified in the report of the Federal Council, see BBl 2017 1851, 1943.

[96] *Ibid.*

[97] See also Article X:9 GPA and Article 67(1) Directive 2014/24/EU.

[98] In the 1996 version of the FLGP, the MEAT-requirement was contained in the provision on "award criteria".

[99] A parliamentary proposal from December 10 2018 to include a definition of MEAT as "the best price-performance ration" was rejected in the latest parliamentary debate on the FLGP revision, 7 March 2019.

[100] Like Article 21(3) FLGP 1996.

[101] However, the Explanatory Report FLGP, 35, specifies that this does not automatically mean that procurement contracts for highly standardized goods or services have to be evaluated based on the lowest price. Also in these cases, price can have a subordinate significance as compared to other criteria.

[102] See above, Sect. 8.4.1.1.

[103] Explanatory Report FLGP, 35. Notably, the explanatory report fails to make the differentiation between "economically most advantageous" and "most advantageous" tenderer in the GPA.

[104] See above, Sect. 8.4.

10.4.3 Limits

The question of which award criteria are legitimate and which are extraneous ("vergabefremd") has given rise to many disputes on federal on cantonal level. A look at the wording of the revised law does not reveal much about the limits of green award criteria. Apart from the transparency and the functionality requirement and principle of MEAT, the limits of green award criteria in Swiss law have to be derived either directly from the GPA or from jurisprudence.

10.4.3.1 Functionality

Article 29(1) d-FLGP states, as a general principle, that offers have to be evaluated "based on functional/performance oriented award criteria".[105] This reflects the functionality requirement of Article X:2 GPA (regarding technical specifications) and contains the obligation to draft award criteria in terms of the expected outcome, and not in terms of design or descriptive characteristics.[106] Notably, the GPA requires functionality only for technical specifications. The provision on evaluation criteria in Article X:9 GPA does not contain a respective requirement. This means that Swiss law surpasses the GPA obligations in this regard.

10.4.3.2 Transparency

Article 29(3) d-FLGP states the general transparency obligation for contracting authorities to publish award criteria as well as their respective weighting in the tendering documents. As specified by the Federal Council, this obligation also extends to the calculation methods and the data used when following an LCC approach.

10.4.3.3 General Non-Discrimination Obligation

If applied wrongly, green award criteria can have a discriminatory effect, in particular on foreign tenderers. Therefore, the general principle of non-discrimination is of particular importance and has been the focus of many court cases. According to jurisprudence, green award criteria violate the non-discrimination obligation, when the award criterion of "transportation or distribution route" was (1) set without being a crucial/central element of the procurement contract, (2) attributed too much weight (in particular as compared to the criterion of price), or (3) without

[105] The German version reads: "Die Auftraggeberin prüft die Angebote anhand leistungsbezogener Zuschlagskriterien."

[106] See above, Sect. 6.5.3.4.

considering other criteria that would make a greater contribution to the protection of the environment.[107]

Therefore, contracting authorities have to formulate (green) award criteria in a way that is compatible with the non-discrimination obligation. Although the text of Article 29 d-FLGP does not contain a direct reference to non-discrimination, this can be derived from the GPA or from its transposition/implementation measure in Articles 2 or 11 d-FLGP.

10.4.3.4 Minimal Weighting of "Price"

The wording of Article 29(1) d-FLGP makes clear that the price is the only criterion that has to be considered mandatorily when evaluating the various offers.[108] Exceptions to this rule are justified only in cases of very complex public procurement contracts.[109] However, neither the former nor the revised FLGP contained rules on how much the price-criterion has to be weighted.

This question has given rise to various disputes. Jurisprudence has established that the price-criterion has to be weighted at least 20%.[110] The exact weighting has to be assessed on a case-by case basis, depending on the complexity of the good or service to be procured. In the case of a procurement-contract ranging in the "mid-field" of the complexity spectrum, the court decided that a weighting of 45% was only marginally acceptable.[111] To set "price" as the only award criterion is only legitimate in the case of highly standardized goods or services (Article 41(2) d-FLGP).[112]

Schneider-Heusi welcomes that legislators have refrained from regulating the weighting of the price in the law. A standardized regulation would unduly limit the scope of the contracting authorities, considering that the weighting of the price (as well as the calculation scheme use) strongly depends on the good or service to be procured and should thus be determined on a case-by case basis.[113]

[107] Decision of the Federal Supreme Court of May 31 2000, 2P.342/1999/c).

[108] See also Schneider-Heusi. 329. Moreover, the author points out the mandatory consideration of the price-criterion is a Swiss characteristics and is not mandated by the GPA, Schneider-Heusi, 357.

[109] Galli / Moser / Lang / Steiner, 854.

[110] See for example Judgment of the Federal Supreme Court, BGE 129 I 313 7.1; Galli / Moser / Lang / Steiner, fn 1799 and 854; for a detailed analysis of the weighting of the price-criterion as well as a discussion of various cases see Schneider-Heusi, 339–340.

[111] See Schneider-Heusi, 340, referring to decision of the Administrative Court of the Canton of Zurich of August 18, 2017, VGer ZH VB.2017.00351, E.43.

[112] In this regard, the FLGP goes further than the GPA, which allows the consideration of "price" as the only criterion without preconditions (Article XV:5(b) GPA).

[113] Schneider-Heusi, 357.

10.4.3.5 Is There a "Link to the Subject-Matter"-Requirement?

The explanatory report of the revised ordinance of 2010 stated that any award criterion must have a factual LtSM,[114] specifying that this is considered to lack in cases in which the award criterion is "insignificant" to the public procurement contract at issue. Apart from the significance-threshold, it is not clear when a LtSM is given. Like in the EU, a clearer, more general definition will have to be provided by the courts in future jurisprudence.[115]

However, the EU, unlike Switzerland, has included the LtSM requirement in the wording of the revised law (see for example Articles 42(1) or 67(3) Directive 2014/24/EU). Switzerland has refrained from codifying the LtSM requirement in the new FLGP (or the FGOP). Neither the text of the law nor the explanatory report contain any reference. Therefore, it is not clear to what extent procuring authorities are bound by it.

10.5 Qualification Criteria

10.5.1 Scope

Qualification criteria are supplier-related criteria that set forth the general requirements for participation in the procurement process.[116] Economic actors that do not meet the qualification criteria are considered *ex ante* unsuitable, i.e. unqualified for the undertaking of the procurement contract and excluded from the evaluation process.[117] In that sense, qualification criteria serve the goal of limiting the market of suppliers to those that are capable of delivering the desired quality.[118]

According to Article 27(2) d-FLGP, qualification criteria can, amongst others, refer to the

> professional or technical capability, financial, economic or operational capacities as well as the experience of the supplier.

[114] Explanatory Report FGOP, 19 ("Die Zuschlagskriterien müssen in einem sachlichen Zusammenhang mit dem Beschaffungsgegenstand stehen").

[115] See above, Sect. 8.4.

[116] See also above, Sects. 3.6, 6.6, 6.7 and 8.7; in the context of Switzerland see Trüeb 2011, FLGP 9, 1; BBI 2017 1851, 1939.

[117] In Switzerland, this has to be in form of a contestable decree ("anfechtbare Verfügung") issued by the procuring authority.

[118] Decision of the Federal Administrative Court of September 29 2010, B-1470/2010, E.6.1 ("Eignungskriterien dienen dazu, den Anbietermarkt auf jene Unternehmungen einzugrenzen, welche in der Lage sind, den Auftrag in der gewünschten Qualität zu erbringen").

This list is non-exhaustive; it enumerates those characteristics that are prima vista considered "objectively necessary", though does also leave room for other criteria.

As compared to the FLGP 1996 (Article 9(1)), the list of qualification criteria in the d-FLGP is slightly extended and also includes professional and operational capacities. Since both lists are only illustrative, this change does not entail significant material consequences. Nevertheless, it could provide clarification for GPP, for example, when contracting authorities wish to set the requirements for an EMS (that fall under the category of "operational capacities")[119] or a professional qualification within the field of environmental protection. Although the d-FLGP (unlike Article 62 Directive 24/2014/EU) does not explicitly mention EMS or Quality Management Systems (QMS), they can be considered legitimate selection criteria under Article 27 d-FLGP as falling under "operational capacities".

10.5.2 Limits

Since qualification criteria are decisive for the question of whether a supplier can participate in the bidding process, they may have the effect of restricting competition. For that reason, there is potential of conflict with the non-discrimination principle (of the GPA as well as its implementing law the FLGP) as well as with the competition purpose of the FLGP. The following mechanisms, that constitute the limits to (green) qualifications, try to mitigate this risk.

10.5.2.1 "Objective Necessity"- or "Essentiality"-Requirement

According to Article 27(1) d-FLGP, qualification criteria have to be objectively necessary ("objektiv erforderlich") in order to protect suppliers against excessive requirements and prevents undue restrictions on competition.[120] This reflects the essentiality-requirement incorporated in Article VIII.1 GPA that requires qualification criteria to be essential for the undertaking of the contract at issue.[121] It also shows that Swiss public procurement law follows the stricter GPA-standard for qualification criteria, as compared to the EU, where qualification criteria only have to meet the standard of appropriateness.[122]

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[119] Analogies for the legitimacy of EMS can be drawn from the decision of the Federal Administrative Court of September 29 2010, B-1470/2010, *passim*, where the court decided that it is legitimate to require a quality management system (QMS), if the complexity of the good or service to be procured justifies it.

[120] BBI 2017 1851, 1941.

[121] See above, Sect. 6.4.1.2.

[122] See above, Sect. 8.7.

Jurisprudence has constantly interpreted the criteria of objective necessity to, on the one hand, require a close nexus to the good or service to be procured ("Auftrags- und Leistungsbezogenheit"); on the other hand, however, it has also highlighted the large discretion of procuring authorities.[123] "Objective necessity" was found to exist if (1) the contested qualification criteria stand in a material connection to the procurement contract, (2) are not used to unduly favor certain suppliers and (3) allow for a sufficient competition ("Restwettbewerb")[124] of suppliers.[125]

This broad interpretation leaves room for the application of (green) qualification criteria. Accordingly, contracting authorities can require some form of environmental qualification from the supplier, whereby the respective requirement has to stand in close connection to the procured good or service and be "essential" (but not "necessary" in the common meaning of the word).

10.5.2.2 Non-Discrimination Obligation

Apart from the "essentiality/objective necessity"-requirement, contracting authorities are also bound by the general principle of non-discrimination (Article IV GPA in conjunction with Articles 2(c) and 11(c) d-FLGP). Accordingly, the qualification of a tenderer has to be assessed according to uniform standards and that qualification criteria cannot be to favor an individual tenderer.[126]

The non-discrimination obligation does not only apply to the design of qualification criteria, but also to the requirements of proof ("Nachweiserbringung") attached to them. Qualification criteria are considered *de facto* discriminatory if the proof/certification for compliance with them imposes an undue burden on the potential supplier. In this regard, Annex 1 of the d-FOGP contains a list with legitimate requirements for proof, including, *inter alia*, guarantees of the bank, professional certificates or references.

10.5.2.3 Transparency

Qualification criteria have to be published in the tender documents (Article 27(1) d-FLGP). The publication also has to include specifications about the required proof of qualification, in particular regarding the timeframe to submit the required proofs.

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[123] Galli/Moser/Lang/Steiner; 557–558 with references; Decision of the Federal Administrative Court of September 29 2010, B-1470/2010, E.2.1. with references.

[124] Decision of the Federal Administrative Court of September 29 2010, B-1470/2010, 6.3 *et seqq*.

[125] *Ibid*., E.2 and E.6.

[126] BBI 2017 1851, 1886.

10.6 Exclusion Criteria

Possible grounds for exclusion from the evaluation process are set out in Article 44 d-FLGP. They include bankruptcy, corruption, failure to pay taxes, collusive tendering, insolvency or a breach of labor laws.

The FLGP does not differentiate between mandatory or discretionary grounds (unlike the EU in Article 57 Directive 24/2014/EU).[127] Although the "may"-wording suggests that the exclusion grounds enumerated in Article 44 d-FLGP are discretionary, legal scholars and jurisprudence suggest that the contracting authority is indeed obliged to exclude a supplier on these grounds.[128] The explanatory report states that the "may"-wording only points to the discretion of the authority in cases of minor offenses.[129] In other words, contracting authorities have a large discretion in not excluding a supplier in line with the principle of proportionality,[130] but are obliged to do so once a certain degree of severity is met.[131]

Although the list was extended in the revision, it is still limited to "traditional" grounds of exclusion. The scope for green exclusion grounds, i.e. the possibility to exclude a supplier for not meeting environmental standards, seems narrow at first sight. As opposed to the provisions relating to labor laws in Article 44(2)(f) d-FLGP, the exclusion for not complying with environmental laws is not expressly stated in the FLGP, although this was suggested in the consultation process.[132] However, although these suggestions were not incorporated in the draft text of the FLGP, it would still be conceivable for contracting authorities to set forth a green exclusion criterion, since the enumeration in Article 44 d-FLGP is not exhaustive.[133] In that sense, the scope for green exclusion criteria is not as narrow as it seems. The exact scope, however, is very unclear and will have to be delineated by future jurisprudence.

The limits to the design of exclusion criteria as set forth by Swiss laws are, firstly, the proportionality principle, and secondly, the prohibition of excessive formalism.[134] The GPA leaves broad discretion to its Parties when it comes to exclusion grounds. Article VIII:4 GPA is indicative, rather than containing clear obligations ("where there is supporting evidence, a Party, including its procuring entities, *may* exclude a supplier on grounds such as…"). The only requirement that can be directly

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[127] See above, Sect. 8.7.

[128] Galli/Moser/Lang/Steiner, 435, with references.

[129] "In Bagatellfällen".

[130] Galli/Moser/Lang/Steiner, 444; Explanatory Report FLGP, 37 with reference to the decision of the Federal Supreme Court of January 10 2013, 2C_782/2012, E. 2.3.

[131] Explanatory Report FLGP, 37, with reference to Article 57(1) Directive 24/2014/EU.

[132] Consultation Report, 56; Many stakeholders criticized the lack of green exclusion criterion in the list that would refer to reasons such as "breach of environmental standards", or declaration of production facilities.

[133] Explanatory Report FLGP, 37.

[134] *Ibid.*

derived from the GPA is the existence of "supporting evidence". Interestingly, Swiss law reflects this requirement only in paragraph 2 ("wenn hinreichende Anhaltspunkte dafür vorliegen") and not in paragraph 1 of Article 44.

Further limits are posed by the general non-discrimination principle. Accordingly, Swiss contracting authorities cannot establish exclusion criteria that would constitute a disadvantage for foreign suppliers as compared to Swiss ones.

10.7 Summary and Findings

GPP is not an entirely established practice in Switzerland yet, unlike in the EU. Even though GPP is increasingly acknowledged as an environmental policy measure, insecurity with regard to its implementation still prevails. One main reason why procuring entities refrain from GPP implementation is the remaining doubts about its compatibility with the GPA and fear of legal disputes before the WTO DSM.

The total reform of Swiss public procurement law will provide remedy: it will finally incorporate GPP provisions, namely provisions on green technical specifications (Article 30 d-FLGP) and award criteria (Article 29 d-FLGP). Thereby, the legislative proposal mainly mirrors the respective GPA provision, without adding substantial content. This stands in contrast to the EU: the 2014 directives are more detailed than the GPA, adding further GPP provisions and specifications.

Under revised Swiss law, green technical specifications have to be set forth within the same limits as already stated under the GPA: (1) they have to be transparent, (2) refer to functional and performance based specifications and (3) international standards and have to accept equivalent offers. The GPA-requirement that technical specifications cannot amount to unnecessary obstacles to trade has to be derived directly from the GPA itself and is not reflected in the legislative proposal.

Green award criteria are regulated in more detail in the legislative proposal: Article 29 d-FLGP introduces sustainability elements, making award criteria the most relevant instrument for GPP under Swiss public procurement law.[135] This shift away from technical specification as the instrument commonly referred to implement GPP can be welcomed: award criteria are more adequate, since they are less rigid and less restrictive. Nevertheless, some of the new sustainability elements add to legal insecurity. Open questions remain regarding the implementation of the LCC approach (in particular within the context of calculations methods) and regarding the role of the award criterion "price" and its appropriate weighting. Given the complexity of these issues, green award criteria can be expected to be a focus of future disputes within the context of GPP.

The changed legal situation for GPP in Switzerland shows that GPP is by no means a "secondary concern" anymore. It can be expected that, also in Switzerland,

[135] See also Kaufmann/Weber 2015, 4, who state that the details added to the provision on award criteria change the content significantly in favor of GPP.

trends will develop towards the acknowledged use of GPP as "strategic procurement". This may even provoke the question of whether there is an obligation for GPP. Although the FLGP mainly contains voluntary provisions on GPP, an obligation could be derived from the constitution, namely from Articles 73 and 74 Swiss Constitution. These provisions contain the mandate to avoid damages to the environment and consider sustainability. To what extent these environmental provisions contain a legally binding obligation with regard to GPP remains subject to speculations. Parallels could be drawn from the EU's EIP that contains the mandate to at least *consider* environmental protection in public procurement processes.[136]

[136] See above, Sect. 8.2.

Part V
Concluding Remarks

Chapter 11
Conclusion

This thesis has assessed the scope for GPP under WTO law in view of the GPA's non-discrimination requirements. It followed a multilayered approach, assessing three different regulatory levels: Part I started with general observations, embedding GPP in the broader context of the trade and environment debate. Part II then turned to the level of the WTO, discussing the role of public procurement as well as GPP and analyzing the wording of the revised GPA under consideration of interpretational approaches. Part III and Part IV focused on the level of implementation, illustrating firstly the regulatory context and design of the EU public procurement directives and secondly, analyzing the scope for GPP in Switzerland against the background of the total reform of Swiss public procurement laws.

The following sections will close this thesis with concluding remarks. Section 11.1 starts with a presentation of the main findings, firstly on a vertical level with regard to the WTO, the EU and Switzerland and secondly, on a horizontal level, with regard to the technical implantation of GPP by means of the public procurement instruments. Section 11.2 discusses the future prospects for GPP on the international level, in the EU and in Switzerland.

11.1 Findings on the Vertical Level

11.1.1 General Observations

Public procurement is a process inherently shaped by public interests. These are, *per definitionem*, a dynamic concept and evolve with the changing needs of society. In the same line, environmental protection is acknowledged as a legitimate public interest that can, to a certain degree, also justify restrictions of international trade.

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This has been reiterated by WTO jurisprudence in recent years and should also guide concerns about the compatibility of GPP with non-discrimination obligations.

GPP follows a general trend that characterizes environmental policy measures: governments around the world tend to shift away from classical command-and-control instruments and turn to market-based instruments instead. GPP can be categorized as a market-based environmental policy instrument, with the consumer taking a preference-based purchasing decision that contributes to the effective functioning of the market.

Throughout this thesis, the perception shift of GPP from a questionable practice to a broadly accepted (and legally established) norm was manifested by the example of the GPA: the 2012 revision of the GPA introduced GPP as a viable option within the framework of technical specifications and award/evaluation criteria. This shows that GPP has become an optional yet viable strategy for public procurement in line with the GPA.

An analysis of other selected international platforms and organization has revealed that the GPA is by no means an exception. To the contrary; in recent years, other major international regimes entitled with cross-border public procurement regulation have included GPP concerns, suggesting that GPP has been acknowledged as a viable and common practice on an international level. The GPA's codification of GPP can thus be seen as following a general tendency, rather than establishing a new trend.

In the EU, the tradition of considering sustainability concerns in public procurement goes even further back: GPP has emerged before the turn of the millennium and is now an established practice and legally little disputed. The EU was also a strong driving force in the GPA negotiations, indicating that some form of "norm cascade"[1] is taking place: while initially mainly the EU practiced GPP and had put in place respective provisions, it has by now become the norm in many international regulatory fora. Moreover, a spill-over effect has occurred from the level of international law to Switzerland: with the imminent total reform, GPP will finally be legally enshrined in the revised Swiss public procurement law. As the direct comparison if the legislative proposal of the Swiss FLGP has shown, the envisaged GPP provisions mainly reflect the respective GPA provision, but also mirrors some GPP elements of the EU public procurement directives.

[1] Term coined by political scientists such as Finnemore/Sikkink, which describes the dissemination of a norm, after having overcome the initial stage of "norm emergence".

11.1.2 WTO

11.1.2.1 Legal Acrobatics in the Multilateral Agreements

The legal uncertainties surrounding the compatibility of GPP with WTO law forms part of a bigger debate: disputes and discussions are so common that “trade and environment”-debate has become an established term.

As the multilateral agreements have not been revised since the Uruguay Round in 1994, their legal text does not seem fit to meet the contemporary challenges posed by climate change. Therefore, the scope for environmental protection under these agreements is shaped by developing jurisprudence. The WTO adjudicatory bodies have, on the one hand, incrementally increased the interpretative scope for environmental measures. On the other hand, they have also given rise to confusion: in an attempt to interpret the (anachronistic) text of the GATT in line with environmental concerns, the Appellate Body performed what was referred to as “legal acrobatics”.[2] The first WTO case dealing with the procurement derogation and with GPP, *Canada – Renewable Energy*, raised more questions about its applicability than it was able to answer.

Therefore, in the long term, the revision of the legal texts of the multilateral agreements seems inevitable. In the meantime, a contemporary interpretation of the multilateral agreements is necessary. Already in *US – Shrimp*, the Appellate Body rightly point-pointed out to the fact that the text of the GATT was “actually crafted more than 50 years ago” (nowadays 70 years) and therefore, “they must be read in the light of contemporary concerns of the community of nations about the protection and conservation of the environment”.[3]

11.1.2.2 GPP Codification in the GPA

11.1.2.2.1 Strong Signaling Effect

The introduction of GPP elements belongs to the most important novelties of the 2012 GPA revision. GPP now has its legal foundation in Articles X:6 GPA (technical specifications) and X:9 GPA (award criteria). Although these two provisions are of a voluntary nature and not very detailed, their potential impact is still far reaching: The inclusion of GPP into the legal text has a strong signaling effect. As was illustrated by the case of Switzerland, the GPA was often perceived as impeding GPP and stated as an argument against the implementation of GPP laws and practices. With the 2012 revision, this argument is not valid anymore. To the contrary, the GPA is now definitely not an obstacle, but much more an enabling factor for

[2] Cosbey / Mavroidis, 28.

[3] ABR, *US – Shrimp*, paras. 129–131.

GPP. The GPA 2012 also contains clear legal requirements and testing schemes, at least for technical specifications, delineating the scope for GPP.

The relevance of the GPP codification goes beyond the GPA and will presumably spill over to other international trade agreements. FTA, in particular, often use WTO agreements as the basis for their respective sectoral chapters. Thereby, it does not come as a surprise that recent FTA, such as the Comprehensive Economic and Trade Agreement (CETA) or the new US-Mexico-Canada Agreement (USCMA), have already included (i.e. copied) the GPP provision of the GPA into their public procurement chapters.

11.1.2.2.2 Modernized Text

Chapter 6 has shed light on the scope and wording of the GPA by interpreting the various textual elements. Thereby, it became apparent that the wording of the GPA provides special textual flexibility for environmental concerns as compared to multilateral laws. This holds true for technical particularities like PPM (which are allowed for consideration under the GPA, even in the form of npr PPM, whereas they are presumably prohibited under the TBT) as well as for the protection goal in general. While Article XX (g) GATT allows only for the protection of *exhaustible* natural resources, the main GPP provision in Article X.6 GPA refers to *all* natural resources. Moreover, it adds a clear reference to the "protection of the environment" as an additional protection goal, a wording that has so far not been expressed in WTO law. Moreover, it the GPA also contains specific non-discrimination obligations tailored to the contemporary needs of international procurement.

11.1.2.2.3 Benefits of Plurilateral Regulation

The analysis of the GPA also exemplifies the benefits of plurilateral regulation. As the example of the multilateral agreements has shown, their wording of the law lacks precision with regard to contemporary challenges such as environmental protection. This legal loophole is then left to the WTO adjudicatory bodies to fill, who in turn do not always see themselves in the position to strike this difficult balance. However, a revision of the legal text that is often urged for (by scholars as well as jurisprudence) does not seem realistic, due to strict consensus rules combined with a situation of political stalemate.

The wording of the GPA reflects various elements taken from multilateral agreements (mainly the GATT/GATS, but also the TBT), while at the same time taking omitting certain aspects or adding tailor-made provisions to meet the specific needs of public procurement processes in a globalized world. This shows that plurilateral agreements can be adapted to the changed realities of their Signatory States. Re-negotiations can be a lengthy process (as shown by GPA revision 2012 that took more than 10 years) and are not immune to failure (as shown by the example of the

EGA). Nevertheless, consensus finding is easier on a plurilateral platform, since the number of parties involved is smaller and the regulatory field is narrower.

11.1.3 EU

11.1.3.1 Pioneer Role

The EU also looks back on a long history of GPP. Sustainable procurement was first acknowledged by the CJEU in 1988; it has evolved ever since on the level of jurisprudence as well as on the levels of legislation and policy action. By now, GPP is a broadly acknowledged established practice. This is also reiterated by the wording used to refer to GPP. While many countries still use terms like “secondary policies”, the EU generally refers to GPP using the term “strategic procurement”. This reiterates the fact that GPP is commonly perceived as adding value not only regarding environmental protection, but also monetary savings and quality improvements.

Considering the proactive role of the EU in both general public procurement regulation as well as GPP, it does not come as a surprise that the EU has been a driving force in the GPA negotiation and has shaped the discourse on GPP on an international trade law level. Therefore, the practical impact of the GPA on the EU public procurement laws can be considered low. This is especially apparent in the field of GPP, where EU law provides for a significantly higher level of regulation than the GPA.

11.1.3.2 New Instruments for GPP Implementation

The latest legislative reforms of the EU public procurement directives in 2014 have brought GPP a further step forward and contributed to its consolidation and its compatibility with the non-discrimination obligation.

The two most commonly used instruments for GPP implementation, the contract-related instruments of technical specifications and award criteria are characterized by clear and encompassing regulation: the 2014 public procurement directives specify the scope for GPP, providing for precise limits regarding non-discrimination and specific issues arising within the context of GPP, for example npr PPM or eco-labels. Only the newly codified LtSM requirement has given rise to questions and will have to be clarified by jurisprudence.

As for supplier-related instruments, the scope for GPP remains narrow under EU law, as under the GPA. However, the 2014 public procurement directives introduce new innovative tools, such as EMS, that could help to apply green selection/qualification criteria. Moreover, EU law (unlike Swiss law or the GPA) provides for the additional instrument of contract performance conditions, which allows for the implementation of GPP in the contract administration phase.

11.1.4 Switzerland

11.1.4.1 Challenging Regulatory Context

Public procurement regulation in general and GPP in particular operates against a challenging regulatory context. Switzerland is characterized by a strongly federalist structure, whereby public procurement is regulated on a sub-national level, remaining within the competence of the cantons or sometimes even the municipalities. This makes a consolidated approach of GPP implementation on all three federal levels a legally and politically challenging exercise.

Part IV has illustrated how Switzerland (the last country to ratify the GPA 2012) makes use of its increased scope for GPP within the course of the total revision of Swiss public procurement laws. Thereby, it became apparent that the GPA has a great impact on Swiss public procurement law. Unlike the EU, Swiss implementing laws do not add content that would go beyond the GPA, but essentially reflect the scope and limits for GPP as set forth within the GPA.

11.1.4.2 Combining Top-Down and Bottom-Up Regulation

The public procurement sector was not regulated in Switzerland until the 1990s, with the signing of the GPA 1994. Ever since, it has been slowly but steadily developing. Thereby, Switzerland is facing a dilemma. On the one hand, it is characterized by a strong federalist structure with public procurement regulation as a cantonal competence, which creates grounds for fragmentation. On the other hand, Switzerland has a relatively small market and, at the same time, a competitive economy, depending strongly on exports. Therefore, public procurement liberalization and GPA membership is an important national interest of Switzerland, as was repeatedly reiterated by the Federal Council.

This explains why Switzerland has taken an active role in GPA negotiations on an international level, while domestically facing the challenging task to harmonize the strongly fragmentized domestic law and adapting it to changed realities and needs of public procurement. The need to ensure that not only the federal government but also all 26 cantons meet the new requirements of the GPA also explains why Switzerland is still not able to ratify the revised GPA, 7 years after its conclusion in 2012.

This dual role also becomes apparent using the example of GPP. Switzerland played an outstandingly active role in the promotion of GPP on an international level, for example as a founder and driving force of the UN Marrakech Task Force on Sustainable Public Procurement. However, on a national level the anchoring of GPP proved to be more difficult and the "paradigm shift" away from a traditional perception of public procurement has taken place only in recent years.

11.1.4.3 GPP Still in Its Infancy Stage

Although GPP was acknowledged as an important environmental policy measure in 1997 (within the publication of the first Sustainable Development Strategy), the legal and practical anchoring of GPP is only slowly gaining momentum. Only within the framework of the GPA ratification, i.e. the total reform of the domestic public procurement legislation, the perception of GPP has reached a tipping point and is becoming generally acknowledged as a valid (or even necessary) procurement strategy. The acknowledgement of GPP finally culminated in its codification in the legislative proposal for revised public procurement laws. Thereby, the most significant change, at least in a symbolic manner, is the acknowledgment of the sustainability-goal in purpose-provision in Article 2 d-FLGP.

In general, Swiss law has mostly taken over the GPP elements from the GPA. The draft provision on green technical specifications reflects the wording of Article X:6 GPA. Only the draft provision on green award criteria (that does not have a respective foundation in the GPA) goes further and takes up some elements previously introduced by the EU directives, for example the LCC approach. However, these (technically complex) new concepts are not further circumscribed in the text of the law, which is likely to cause considerable controversy in the foreseeable future.

Therefore, GPP can still be considered in its infancy stage—especially in comparison to the EU that follows "strategic procurement" as a matter of course. Reasons for this slow development include firstly, the federalist structure that required a bottom-up regulation of public procurement, secondly, legal culture that still prioritized price concerns and thirdly, lack of scientific research. Whereas the EU undertook (and continues to undertake) extensive technical research on the economic, ecological and also legal effects of GPP, research in Switzerland is taking place in a surprisingly uncoordinated way, mostly on a cantonal or even communal level.

The same holds true for developments on other policy levels. The courts indeed take an active (albeit rather cautious) role in defining the scope and the limits of GPP (especially in view of non-discrimination). However, policy developments by the federal and cantonal governments are characterized by a high degree of fragmentation and a low degree of public visibility.

11.2 Findings on the Horizontal Level

GPP remains an inherently "technical effort".[4] As has been shown throughout this thesis, its effectiveness depends on the practical implementation in the individual procurement contracts. Through implementing the various public procurement

[4] Dragos / Neamtu 2016, 114.

instruments carefully and in line with the law, contracting authorities as well as tenderers create the conditions for GPP.

A comparison between the legislative frameworks of the EU and Switzerland has shown significant differences in the regulation of these instruments. Since these differences can have a strong impact on the practical effectiveness of GPP, they will be illustrated in the next sections to allow for conclusions and concrete policy recommendations.

11.2.1 Legislatory Approach and Regulatory Design

On a substantial level, the EU directives and Swiss public procurement laws follow a different approach in regulating the public procurement instruments. Swiss public procurement law (in analogy to the GPA) defines the scope of GPP in a positive way, generally highlighting its allowance. EU law is more differentiated, defining the scope for GPP in a negative way emphasizing its limits. Article 42 Directive 2014/24/EU, for example, does not directly allow for "green" technical specifications, but enumerates the five requirements to be met and makes a clear reference to (product related and npr-) PPM.[5] In the same line, Article 67 Directive 2014/24/EU, instead of generally pointing to green award criteria, refers to the more technical matters of MEAT (an approach that inherently contains GPP) and LCC. Moreover, it sets forth the three requirements to be met by green award criteria.

On the one hand, this negative approach can be explained by the fact that the EU directives are only a legislatory framework and the details of GPP remain within the regulatory competences of the respective EU Member State. On the other hand (and probably more importantly), it is because GPP is already a broadly accepted norm in the EU and does not need explicit mentioning. From a practical perspective, the negative approach followed by the EU is more useful for both contracting authorities as well as tenderers, since it clearly illustrates the limits within which GPP can operate.

It is thus regrettable that Switzerland did not take the total reform of public procurement legislation as an occasion to provide for an equally clear guidance as EU law. Rather, the draft legislation envisages only a superficial delineation; crucial points like the definition of the LCC approach or details providing for the weighting of the criterion of price have so far not found their way into the text of the law. In the same line, the other limits to GPP such as non-discrimination requirements have to be derived directly from the GPA, from the Swiss constitution or from the general public procurement principles.

Taking into consideration that GPP is still in an infancy stage in Switzerland, its explicit reference can be viewed as a first step towards an established practice of

[5] "[technical specifications] may refer to the specific process or method of production (…) even when such factors do not form part of their material substance".

strategic procurement. In a second step, however, clarification of its scope and limits as well as rules on important issues such as LCC will be necessary.

11.2.2 Distinguishing Technical Specifications from Award Criteria

The technical analysis of the various public procurement instruments in Switzerland has shown that delineation can be difficult and that GPP is still inherently associated with technical specifications. This becomes apparent when looking at tendering documents and talking to procurement practitioners, but also when analyzing the respective provisions in the law: While Article 30 d-FLGP expressly states that technical specifications may be designed as to "promote the conservation of natural resources and protect the environment", Article 29 d-FLGP only marginally refers to GPP, enumerating sustainability as one viable award criteria (amongst many).[6]

This perception is misleading. It neglects the potential of award criteria as the market based instrument for GPP implementation:[7] while technical specifications are strictly binary and impose environmental protection concerns on the tenderer, award criteria allow for their proportionate weighting. Moreover, award criteria are the preferred instrument from an environmental effectiveness perspective: Although binary requirements like the use of recycled materials can limit emissions, most environmental benefits come from technically more complex solutions, so-called "cleantech" or "envirotech" solutions (like CO_2 storage, smart grids or solid waste management).

In this sense, environmental protection is closely linked to technological innovation. The environmentally most beneficial solution for a public procurement contract may be technically complex and thus not easily identifiable by contracting authorities. Award Criteria, as opposed to technical specifications, leave room for this kind of technical innovation and allow for the granting of a competitive advantage to the bidder with the best solution.[8] In the EU, this seems to be commonly acknowledged, as it is suggested by the wording of the law, by precedence cases on green award criteria, such as *Concordia Bus, Max Havelaar* or *EVN and Wienstrom* as well as by literature.[9]

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[6] Although the reference to sustainability is an important novelty whose significance for GPP should not be underestimated, the wording of this draft provision remains weak.

[7] For a differentiation between market based and command-and-control instruments, see above, Sect. 3.4.

[8] Along the same lines, the EU Buying Green Handbook, 53, suggests to choose award criteria over technical specifications in cases where the cost and/or market availability of a GPP solution is unknown.

[9] See *ex multis* Semple 2015, 440.

Recent developments in the Swiss parliament[10] as well as on a dogmatic level[11] show a tendency towards the increased acknowledgment of award criteria for GPP. It is to be hoped that these tendencies will be strengthened and that procuring authorities as well as tenderers actively use the potential for technical innovation and GPP provided for by award criteria.

11.2.3 Award Criteria: LCC Instead of Acquisition Price

In the EU, one of the most important changes in the 2014 public procurement directives is the paradigm shift away from the acquisition price towards quality. Most importantly for GPP, quality cannot be evaluated without considering environmental impacts, as can be seen from various provisions in the new directives.

Firstly, the provision on award criteria does not provide for the evaluation of an offer solely based on price anymore (as was the case in the 2004 public procurement directives and continues to be the case in Swiss law). Instead, the current directives clearly state that the requirement of "most economically advantageous" should be identified considering also environmental aspects. Secondly, the current directives now dedicate a specific provision to LCC, which again reiterates that quality considerations have priority over price: Article 68 Directive 2014/24/EU states that even environmental externalities could be taken into consideration when following the LCC approach. This can be considered a great breakthrough for GPP, provided that methods can be found to apply LCC in a consistent and harmonized way, especially the calculation of environmental externalities.

In Swiss public procurement law, the balance between price and quality concerns when evaluating an offer remains shaky. This legal insecurity is considered an important factor impeding GPP implementation. As opposed to EU law, LCC is only marginally outlined in the draft proposal of Swiss public procurement laws: the d-FLGP does not provide for regulation on LCC nor on environmental externalities. To the contrary, the government seems hesitant in their approach, reiterating that both "quality" and "price" matters, while still referring to sustainability criteria with the (anachronistic) term "secondary aims".[12]

Therefore, the exact impacts of the LCC-approach, and consequently also the role of the price-criterion remains to be seen: of particular interest is the question of whether procuring authorities will be able to implement the technically complex LCC-approach in a way as to make use of its environmental potential, or whether this concept (that is still little researched) will raise more questions than it actually answers.

[10] In the parliamentary debate on March 7 2019, many Members of Parliament as well as the Federal Council voiced the opinion that award criteria are the decisive instrument (the "red threat") for GPP, see above Sect. 10.4.

[11] See Kaufmann/Weber 2015, 4.

[12] Explanatory Report, 31.

11.2.4 Eco-Labels

Eco-labels help to streamline GPP processes: they can have the effect of harmonized standards, assisting contracting authorities in defining the relevant GPP criteria on the one hand, and lowering the transaction costs for information acquisition by tenderers on the other hand.[13] CJEU case law and scholars on economic law have repeatedly pointed out to the fact that eco-labels can be a useful additional tool for GPP, to be included in the public procurement process within the framework of both technical specifications as well as award criteria.[14]

This potential is also reflected in the current EU public procurement directives. The new, "surprisingly stringent",[15] provision on labels is one of the most significant novelties for GPP, introduced by the 2014 reform. Article 43 Directive 2014/24/EU, on the one hand, clearly states that eco-labels can be considered by means of technical specification, award criteria and contract performance conditions, and on the other hand, that they are bound by four limiting requirements, namely (1) a close LtSM, (2) verifiability, (3) non-discrimination and (4) the "or-equivalent" requirement.

In this regard, the fact that Swiss law does not provide for regulation on eco-labels is rather surprising. It must be assumed that in Switzerland, unlike in the EU, eco-labels are not a pressing issue, presumably due to the fact that they are not a commonly used additional tool for GPP implementation. This is also suggested by the lack of notable case-law on eco-labels and GPP. Given the above listed environmental and economic benefits, this lack of experience with eco-labels is a missed opportunity for GPP.

11.2.5 Contract Performance Conditions

EU law provides for an additional instrument for GPP implementation, namely contract performance conditions. Swiss public procurement law (the current one as well as the draft proposal) does not contain this instrument.

Contract performance conditions become relevant after the award of the public procurement contract and refer to its performance.[16] They are a means to apply GPP in the last stage of public procurement, i.e. in the contract administration phase.

The possibility to include GPP by means of contract performance conditions is acknowledged by the wording of Article 20 Directive 2014/24/EU, stating that they "may include economic, innovation-related, *environmental*, social or employment-related considerations" (emphasis added).

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[13] Weber 2018, 248.

[14] See Weber 2018, *passim* and Corvaglia 2016, *passim*.

[15] Schebesta, 326.

[16] Weber/Menoud, 197.

In order to make the best use of the various possibilities for environmental protection throughout the whole public procurement process (i.e. all phases of public procurement), Switzerland should also examine contract performance conditions as an additional tool for GPP. At this point, no studies exist to provide information on whether this instrument is already used in practice by procuring authorities. However, a legal anchoring of contract performance conditions (under consideration of the respective limits) in the text of the law would certainly promote the use of this instrument and help to remove remaining uncertainties.

11.3 Outlook

11.3.1 Further Dissemination of GPP

GPP can be expected to gain further ground in the years to come. The broad acknowledgment of GPP on an international level becomes not only apparent when looking at the WTO, but also at other international organizations and public procurement regimes, as has been shown in Part II. An outstanding example is provided by the World Bank. It has not only introduced GPP references in its New Procurement Framework in 2015, but has also reiterated its commitment to conduct further research on sustainable procurement.

The provision of technical aid for the establishment of sustainable public procurement policies in developing countries can also greatly benefit the GPA. A criticism often raised regarding GPP and international procurement is that it inherently discriminates against developing countries, since they do not have the resources for GPP. Technical assistance for governments and suppliers in developing countries will not only increase their competitiveness, but also help to make GPA accession more attractive.

This also illustrates the importance of soft-law effects. The inclusion of GPP in the template laws of the UNCITRAL, for example, is of great significance. It implicitly states GPP as a benchmark for public procurement. Countries basing their public procurement laws on the UNCITRAL Model law are thus likely to also include GPP references. In the same line, the GPP reference in the GPA can have a soft-law effect: as mentioned above, recent FTA, namely the CETA and the USMCA, have both taken up Article X:6 GPA, referring to green technical specifications. It can be expected that future FTA will follow suit.

11.3.2 GPA: Policy Action Needed

As for the GPA, the future of GPP will depend strongly on the work of the Committee. The sustainability symposium that took place in 2017 has been a promising starting point, illustrating that the WTO takes issues of GPP seriously. Moreover, it shows willingness to cooperate with other international public procurement and environmental regimes, such as the OECD, the World Bank and the UNEP. It remains to be seen whether the Committee will have the resources and political will to build upon this success and to pursue research on GPP and international procurement in a coordinated way.

11.3.3 EU: Professionalism and Fast-Paced Developments

On the EU level, GPP is developing at a fast pace, as illustrated by the latest legislative reform. Now that the 2014 reform of the public procurement directives is completed, major developments can be expected on the level of policy action and research. These initiatives are conducted mostly by the EU Commission, but to a considerable degree also by private actors such as NGOs or the epistemic community. Particularly noteworthy in this regard is their coordinated contribution to the establishment of expertise and platforms, providing product and service criteria for GPP implementation.

Additionally, the Commission has stated GPP as a top priority and has established (or will establish) potentially important institutions, such as the voluntary ex-ante assessment mechanism, a competence center where procuring entities can seek assistance and have their tenders approved for compatibility with the legislative framework of EU public procurement law (and by analogy, also with the GPA). Given the increasing complexity of the legal basis for procurement contracts (for both the contracting authorities as well as the bidders) such institutions are likely to become an important contact point.

At the same time, increasing complexity of GPP has led to a rising need for professionalism of public procurement authorities. This is by now broadly acknowledged in the EU and is in line with the general tendency to perceive public procurement not only as an administrative task, but as a multi-faceted strategic tool.

An open question that is discussed with increasing intensity is the question of whether it is necessary to make GPP measures mandatory. Under the current legal framework in the EU, most of the GPP elements are presented as voluntary options. However, the case of Italy shows that Member States can also use their discretion to make GPP mandatory. Other examples can be found on the communal level: The city of Barcelona, for example, introduced binding provisions for GPP in the food, vehicles and electricity sectors. If these pioneer projects meet the expected environmental goals, they could eventually pave the ground for a broader movement of introducing mandatory GPP goals.

11.3.4 Switzerland: Challenges Ahead

With the imminent total reform of Swiss public procurement law, the situation in Switzerland is likely to change and GPP can be expected to become a more commonly used public procurement strategy. This is in line with the general paradigm shift towards the acknowledgment of environmental protection in general, and the acknowledgment of GPP as an important part of it in particular.

However, the practical implementation of GPP could turn out to be a challenging process. A main reason therefore is the lack of a uniform and coordinated GPP implantation strategy. In the EU, the commission has broad competences in coordinating the action of more than twenty countries. In Switzerland, however, public procurement takes place in the smallest governmental entities, namely in the municipalities or in the cantons. Accordingly, these entities often take no or only unilateral action for GPP strategies. This fragmented approach also makes it hard to establish common expertise on GPP, to evaluate approaches or to provide procuring entities with the necessary degree of professionalism. These challenges will become even more pressing with the implementation of the new legislative framework, which is characterized by growing complexity.

But it is worth noting that Switzerland is not a Member of the EU and as such, does not have access to public procurement expertise mechanisms provided for by the EU, such as the voluntary assessment mechanisms. It would be helpful for Switzerland to establish similar institutions or consultation mechanisms, or even more effectively, to negotiate access to the respective EU platforms. This would ensure an exchange of knowledge in pressing topics such as the implementation of LCC approaches. This could also help Swiss suppliers to overcome technical barriers in the form of information gaps and to fully benefit from free access to EU procurement markets.

It remains to be seen how Switzerland meets these challenges. A look at the evolution of public procurement regulation, however, gives rise to cautious optimism. Throughout the last decade, Switzerland has managed to meet a wide spectrum of demands (top-down from the WTO, as well as bottom-up from the sub-federal stakeholders and from the private sector). The result, after more than a decade, has been an impressively well consolidated legislative reform. With this as a precedent, and given enough time, perhaps Switzerland will also find a consolidated approach to GPP and realize its full potential as a market-based environmental policy instrument.

Bibliography

Aldy Jospeh E. / Scott Barret / Robert N. Stavins, “Thirteen Plus One: A Comparison of Global Climate Policy Architectures”, in: *Climate Policy* 3, 2003, 373–397.

Aldy Joseph E. / Scott Barret / Robert N. Stavins, “The Promise and Problems of Pricing Carbon: Theory and Experience”, in: *Journal of Environment and Development* 21(2), 2012, 152–180.

Anderson Robert D. / Kidjo Osei-Lah, “Forging a more Global Procurement Market: Issues Concerning Accessions to the Agreement on Government procurement”, in: Arrowsmith / Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge 2011, 61–91.

Anderson Robert D. / William E. Kovacic / Anna Caroline Müller, “Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance”, in: Arrowsmith / Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform,* Cambridge 2011, 681–718.

Arrowsmith Sue, “Towards a Multilateral Agreement on Transparency in Government Procurement”, in: *International and Comparative Law Quarterly* 47(4), 1998a, 793–816 [Cited “Arrowsmith 1998a”].

Arrowsmith Sue, “National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?”, in: Arrowsmith / Davies (eds.), *Public Procurement: Global Revolution,* London / The Hague / Boston 1998b, 3–26 [Cited “Arrowsmith 1998b”].

Arrowsmith Sue, *Government procurement in the WTO*, London 2003.

Arrowsmith Sue, “Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard”, in: *The International and Comparative Law Quarterly* 53(1), 2004, 17–46.

Arrowsmith Sue, “Horizontal Policies in Public Procurement”, in: *Journal of Public Procurement* 10(2), 2010a, 149–186 [Cited “Arrowsmith 2010a”].

Arrowsmith Sue (ed.), Public Procurement Regulation: An Introduction, Nottingham 2010b [Cited “Arrowsmith 2010b”].

Arrowsmith Sue (ed.), EU Public Procurement Law: An Introduction, Nottingham 2010c [Cited “Arrowsmith 2010c”].

Arrowsmith Sue, “The Revised Agreement on Government Procurement: Changes to the Procedural Rules and other Transparency Provisions”, in: Arrowsmith / Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge 2011, 285–336.

Arrowsmith Sue / John Linarelli / Don Wallace, *Regulating Public Procurement: National and International Perspectives*, London 2000.

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R. Koch, *Green Public Procurement under WTO Law*, European Yearbook of International Economic Law 9, https://doi.org/10.1007/978-3-030-48214-5

Arrowsmith Sue / Peter Kunzlik, "Public Procurement and Horizontal Policies in EC Law: General Principles", in: Arrowsmith / Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law, New Directives and New Directions*, Cambridge 2009, 9–54.

Arrowsmith Sue / Robert D. Anderson, "The WTO Regime on Government Procurement – Past, Present and Future", in: Arrowsmith / Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge 2011, 3–58.

Beyeler Martin, *Der Geltungsanspruch des Vergaberechts, Probleme und Lösungsansätze im Anwendungsbereich und im Verhältnis zum Vertragsrecht,* Zürich 2012.

Beyeler Martin, "Veloverleih – Kein öffentlicher Auftrag?", in: *Baurecht/Droit de la construction* 1/2016, 22–26.

Biaggini Giovanni, *BV Kommentar: Bundesverfassung der Schweizerischen Eidgenossenschaft,* 2nd ed., Zürich 2017.

Blank Anette / Gabrielle Marceau, "A History of Multilateral Negotiations on Procurement: From ITO to WTO", in: Hoekman / Mavroidis (eds.), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement*, Ann Arbor 1997, 31–55.

Bovis Christopher, "The Regulation of Public Procurement as a Key Element of European Economic Law", in: *European Law Journal* 4(2), 1998, 220–242.

Bovis Christopher (ed.), *Research Handbook on EU Public Procurement Law*, Cheltenham/ Northampton 2016.

Bradley Kieran, "Legislating in the European Union", in: Barnard / Peers (eds.), *European Union Law*, 2nd edition, Oxford 2017, 97–141.

Brown-Shafii Susan, *Promoting Good Governance, Development and Accountability: Implementation and the WTO*, Basingstoke 2011.

Brülhart Marius / Federico Trionfetti, "Public Expenditure, International Specialisation and Agglomeration", in: *European Economic Review* 48, 2004, 851–881.

Cantore Carlo Maria / Sübidey Togan, "Public Procurement in the EU", in: Georgopoulos / Hoekm an / Mavroidis (eds.), *The Internationalization of Government Procurement Regulation*, Oxford 2017, 143–160.

Caranta Roberto, "Helping Public Procurement to Go Green: The Role of International Organisations", in: European Procurement & Public Private Partnership Law Review 8(1), 2013, 49–55.

Caranta Roberto, "Labels as Enablers of Sustainable Public Procurement", in: Sjåfjell / Wiesbrock (eds.), *Sustainable Public Procurement under EU law: New Perspectives on the State as Stakeholder*, Cambridge 2016, 99–113.

Casavola Hilde Caroli, "The WTO and the EU: Exploring the Relationship Between Public Procurement Regulatory Systems", in: Chiti / Mattarella (eds.), *Global Administrative Law and EU Administrative Law,* Berlin 2011, 293–320.

Charnovitz Steve, "A Critical Guide to the WTO's Report on Trade and Environment", in: *Arizona Journal of International and Comparative Law*, 1997, 341–379.

Charnovitz Steve, "The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality", in: *Yale Journal of International Law* 27(52), 2002, 59–110.

Chasek Pamela S. /Lynn M. Wagner (eds.), *The Roads from Rio: Lessons Learned from Twenty Years of Multilateral Environmental Negotiation,* New York 2012.

Cook Graham, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles*, Cambridge 2015.

Corvaglia Maria Anna, "Public Procurement and Private Standards: Ensuring Sustainability under the WTO Agreement on Government Procurement", in: *Journal of International Economic Law* 19(3)*,* 2016, 1–21.

Corvaglia Maria Anna, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation*, Oxford 2017.

Cosbey Aaron / Petros C. Mavroidis, "A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO", in: *Journal of International Economic Law* 17, 2014, 11–47.

Cottier Thomas / Matthias Oesch, "Direct and Indirect Discrimination in WTO Law and EU Law", Gaines / Olsen / Sørensen (eds.), *Liberalising Trade in the EU and the WTO: A Legal Comparison*, Cambridge 2012, 141–175.

Davies Arwel, "The GATT Article III:8(a) Procurement Derogation and *Canada – Renewable Energy*", in: *Journal of International Economic Law* 18, 2015, 543–554.

Dawar Kamala, "Government Procurement in the WTO: A Case for Greater Integration", in: *World Trade Review* 15(4), 2016, 645–670.

Delimatsis Panagiotis, "Protecting Public Morals in A Digital Age: Revisiting the WTO Rulings on *US – Gambling* and *China – Publications and Audiovisual Products*", in: *Journal of International Economic Law* 14(2), 2011, 257–293.

Department for Environment, Food and Rural Affairs (DEFRA), Sustainable Procurement National Plan: Recommendations from the Sustainable Procurement Task Force, London 2006.

Dekel Omer, "The Legal Theory of Competitive Bidding for Government Contracts", in: *Public Contract Law Journal* 37(2)*,* 2008, 237–268.

Diebold Nicolas F., *Non-Discrimination in International Trade in Services, 'Likeness' in WTO/GATS*, Cambridge 2010.

Dragos Dacian C., "Sub-dimensional Public Procurement in the European Union", in: Bovis (ed.), *Research Handbook on EU Public Procurement Law*, Cheltenham/Northampton 2016, 176–212.

Dragos Dacian C. / Bogdana Neamtu, "Sustainable Public Procurement in the EU: Experiences and Prospects", in: Lichère / Caranta / Treumer (eds.), *Modernising Public Procurement: the New Directive*, Copenhagen 2014, 308–324.

Dragos Dacian C. / Bogdana Neamtu, "Life-Cycle Costing for Sustainable Public Procurement in the EU", in: Sjåfjell / Wiesbrock (eds.), *Sustainable Public Procurement under EU law: New Perspectives on the State as Stakeholder*, Cambridge 2016, 114–136.

Draper Patrick / Memory Dube, "Plurilaterals and the Multilateral Trading System", E15 background paper, 2013, available at: http://e15initiative.org/wp-content/uploads/2015/09/E15-RTAs-Draper-and-Dube-Final.pdf [all internet sources have last been accessed on 07 April 2020].

Ehring Lothar, "De Facto Discrimination in World Trade Law National and Most-Favoured-Nation Treatment – or Equal Treatment?", in: *Journal of World Trade* (35)5, 2002, 921–977.

Engelberger Lukas, *Die unmittelbare Anwendbarkeit des WTO-Rechts in der Schweiz, Grundlagen und Perspektiven im Kontext der internationalen Rechtsentwicklung*, Bern 2004.

European Commission, Buying Green! A handbook on green public procurement, 3rd ed., 2016, available at: http://ec.europa.eu/environment/gpp/pdf/Buying-Green-Handbook-3rd-Edition.pdf [Cited "EU Buying Green Handbook"].

European Commission, EU Public Procurement Legislation: Delivering Results, Summary of Evaluation Report, 2016, available at: http://ec.europa.eu/DocsRoom/documents/15552/ [Cited "EU Commission 2016"].

Evenett Simon / Bernard Hoekman (eds.), *The WTO and Government Procurement*, Cheltenham / Northampton 2006.

Faure Michael / Joyeeta Gupta / Andries Nentjes (eds.), *Climate Change and the Kyoto Protocol, The Role of Institutions and Instruments to Control Global Change,* Cheltenham / Northampton 2003.

Fetz Marco, "Revision der Verordnung über das öffentliche Beschaffungswesen", in: *Die Volkswirtschaft* 3, 2010, 24–27.

Finnemore, Martha / Kathryn Sikkink, "International Norm Dynamics and Political Change", in: *International Organization* 52(4), 1998, 887–917.

Galli Peter / André Moser / Elisabeth Lang / Marc Steiner, *Praxis des öffentlichen Beschaffungsrechts, Eine systematische Darstellung der Rechtsprechung des Bundes und der Kantone,* 3rd ed., Zürich 2013.

Griffel Alain, *Die Grundprinzipien des Umweltrechts,* Zürich 2001.

Gardiner Richard K., *Treaty Interpretation*, 2nd edition, Oxford 2015.

Georgopoulos Aris / Bernard Hoekman / Petros C. Mavroidis (eds.), *The Internationalization of Government Procurement Regulation*, Oxford 2017.

Gordon Harvey/Shane Rammer/Sue Arrowsmith, "The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO", in: Arrowsmith/Davies (eds.), *Public Procurement: Global Revolution*, London [etc.] 1998, 27–55.

Hatzopoulos Vassilis, "Forms of Mutual Recognition in the Field of Services", in: Lianos/Oududu (eds.), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Integration*, Cambridge 2012, 59–98.

Hoekman Bernard/Petros C. Mavroidis, "WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements", in: *The European Journal of International Law* 26(2), 2015, 319–343.

Howse Robert/Donald Regan, "The Product and Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy", in: *European Journal of International Law* 11(2), 2000, 249–289.

Howse Robert/Joanna Langille/Katie Sykes, "Pluralism in Practice: Moral Legislation and the Law of the WTO after Seals Products", *New York University Public Law and Legal Theory Working Paper No. 506*, 2015, 81–150.

International Institute for Sustainable Development (IISD), "Procurement, Innovation and Green Growth: The story so far…", 2012a, , available at: http://www.iisd.org/pdf/2012/procurement_innovation_green_growth.pdf [Cited "IISD 2012a"].

International Institute for Sustainable Development (IISD), "Procurement, Innovation and Green Growth: The story continues…", 2012b, available at: http://www.iisd.org/pdf/2012/procurement_innovation_green_growth_continues.pdf [Cited "IISD 2012b"].

Intergovernmental Panel on Climate Change (IPCC), Climate Change, the IPCC Scientific Assessment, Cambridge 1990.

Jackson John H., *The Jurisprudence of GATT and the WTO,* Cambridge 2000.

Jackson John H., "Perceptions about the WTO Trade Institutions", *World Trade Review* 1(1), 2002, 101–114.

Kaddous Christine, "Effects of International Agreements in the EU Legal Order", in: Cremona/de Witt (eds.), *EU Foreign Relations Law*, Oxford/Oregon 2008, 291–312.

Kahlenborn Walter et al., *Strategic Use of Public Procurement in Europe. Final Report to the European Commission*, Berlin 2011.

Kaufmann Christine, "Ein Sieg für die Umwelt? – Der Entscheid der WTO im Asbest-Streit zwischen Kanada und der Europäischen Union", in: *Allgemeine Juristische Praxis 10 (AJP/PJA)*, 2001, 1169–1180.

Kaufmann Christine/Rolf H. Weber, "Carbon-related Border Tax Adjustment: Mitigating Climate Change or Restricting International Trade?", in: *World Trade Review* 10(04), 2011, 497–525.

Kaufmann Christine/Rolf H. Weber, *Rechtsgutachten zur Verwendung von Schweizer Holz in Bauten mit öffentlicher Finanzierung,* Erstellt im Auftrag des Bundesamts für Umwelt (BAFU), 2015, available at: https://www.bafu.admin.ch/dam/bafu/fr/dokumente/wald-holz/fachinfo-daten/rechtsgutachten_zurverwendungvonschweizerholzinbautenmitoeffentl.pdf.download.pdf/rechtsgutachten_zurverwendungvonschweizerholzinbautenmitoeffentl.pdf.

Kingston Suzanne, "Why Environmental Protection Goals should play a Role in EU Competition Policy: a Legal Systematic Argument", in: Kingston (ed.), *Greening EU Competition Law,* Cambridge 2011, 97–125.

Kingston Suzanne, "The Uneasy Relationship between EU Environmental and Economic Policies", in: Sjåfjell/Wiesbrock (eds.), *Sustainable Public Procurement under EU law: New Perspectives on the State as Stakeholder*, Cambridge 2016, 23–49.

Koch Rika, "Zuerst der Freihandel dann die Moral? Konsumentenschutzrechtliche Tendenzen im Internationalen Handelsrecht", in: Grosz/Grünewald (eds.), Recht und Wandel, Festschrift für Rolf H. Weber, Zürich 2016, 41–65.

Ladi Stella/Dimitris Tsarouhas, "International Diffusion of Regulatory Governance: EU Actorness in Public Procurement", in: *Regulation & Governance* 11, 2017, 388–403.

Lang Elisabeth / Marc Steiner, "Public Procurement Regulation: Fostering Market Access and Simultaneously Preventing Corruption – A Swiss Perspective", in: *The British Journal of White Collar Crime III(1)*, 2017/2018, 14–58.
Lember Heiko / Rainer Kattel / Tarmo Kalvet, *Public Procurement, Innovation and Policy, International Perspectives*, Berlin/Heidelberg 2014.
Levy Philip I. / Donald H. Regan, "EC–Seal Products: Seals and Sensibilities (TBT Aspects of the Panel and Appellate Body Reports)", in: *World Trade Review* 14(2), 2015, 337–379.
Linarelli John, "Global Procurement Law in Times of Crisis. New Buy American Policies and options in the WTO legal system", in: Arrowsmith / Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and reform*, Cambridge 2011, 773–802.
Marceau Gabrielle / Matthew Stilwell, "Practical Suggestions for *Amicus Curiae* Briefs before WTO Adjudicative Bodies", in: *Journal of International Economic Law* 2001, 155–187.
Matei Emanuela, "The Remedies Directive in Public Procurement", in: Bovis (ed.), *Research Handbook on EU Public Procurement Law*, Cheltenham/Northampton 2016, 352–389.
Matsushita Mitsuo, "Major WTO Cases Concerning Government Procurement", in: *Asian Journal of WTO & International Health Law and Policy* 1 (2), 2006, 299–316.
McCrudden Christopher, *Buying Social Justice: Equality, Government Procurement, and Legal Change*, Oxford 2007.
Miranzo Diaz Javier, "Environmental Clauses in Public Procurement: Developments Introduced by the 2014 Directives", in: *Public Policy Portuguese Journal* 2(1), 2018, 7–23.
Nordic Council of Ministries, "Green Procurement Makes a Difference! Prime Examples from the Nordic Countries", Copenhagen 2009, available at: http://norden.diva-portal.org/smash/record.jsf?pid=diva2%3A700882&dswid=-4443.
OECD, *Government at a Glance 2011*, Paris 2011, available at: https://doi.org/10.1787/gov_glance-2011-en.
OECD, *Government at a Glance 2017*, Paris 2017, available at: https://doi.org/10.1787/gov_glance-2017-en.
ÖkoKauf Wien, *Wirkungsanalyse der ökologischen öffentlichen Beschaffung in der Stadt Wien,* 2014, available at: https://www.wien.gv.at/umweltschutz/oekokauf.
Oesch Matthias, *Differenzierung und Typisierung. Zur Dogmatik der Rechtsgleichheit in der Rechtsetzung,* Bern 2008.
Oesch Matthias, "Entwicklung des Vergaberechts in der Schweiz", in: *Die Volkswirtschaft* 3, 2010, 5–9.
Oesch Matthias, *Europarecht*, 2nd edition, Bern 2019.
Pauwelyn Joost, "Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and how they May Outcompete WTO Treaties", in: *Journal of International Economic Law* 17(4), 2014, 739–751.
Petitpierre-Sauvain Anne, "Que fait le développement durable dans la Constitution fédérale"?, in: Andreas Auer et al. (eds.), *Aux confins du droit, Festschrift für Charles-Albert Morand*, Basel etc. 2001, 553–568.
PricewaterhouseCoopers (PWC), Collection of Statistical Information on Green Public Procurement in the EU, Report on Data Collection Results, January 2009.
Rajamani Lavanya, "The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations", in: *Journal of Environmental Law* 28, 2016, 337–358.
Rausch Heribert, "Umwelt und Raumplanung", in: Thürer / Aubert / Müller, *Verfassungsgrecht der Schweiz,* Zürich 2001, 915–928.
Reich Arie, *International Public Procurement Law, The Evolution of International Regimes on Public Purchasing*, London 1999.
Reich Arie, "The New Text of the Agreement on Government Procurement: An Analysis and Assessment" in: *Journal of International Economic Law* 12(4), 2009, 989–1022.
Rhodes Chris, Construction Industry: Statistics and Policy, Briefing Paper Number 01432, 2015, available at http://www.parliament.uk/commons-library.

Sanchez-Grael Albert, “Public procurement and ‘core’ human rights: a sketch of the European Union legal framework”, in: Martin-Ortega / O’Brien (eds.), *Public Procurement and Human Rights: Risks, Dilemmas and Opportunities for the State as a Buyer*, Cheltenham 2019, 96–114.

Schebesta Hanna, “Revision of the EU Green Public Procurement Criteria for Food Procurement and Catering Services – Certification Schemes as the Main Determinant for Public Sustainable Food Purchases?”, in: *European Journal of Risk Regulation* 9, 2018, 263–328.

Schneider-Heusi Claudia, “Die Bewertung des Preises”, in: Zufferey / Beyeler / Scherler (eds.), *Aktuelles Vergaberecht 2018*, Zürich 2018, 327–358.

Schwarzenberger Georg, “Myths and Realities of Treaty Interpretation, Articles 27–29 of the Vienna Draft Convention on the Law of Treaties”, in: *Current Legal Problems* 22(1), 1969, 205–227.

Schooner Steven L., “Desiderata: objectives for a system of government contract law”, in: *Public Procurement Law Review* 11, 2002, 103–120.

Semple Abby, *A Practical Guide to Public Procurement*, Oxford 2015.

Semple Abby, “The link to the subject matter: A glass Ceiling for Sustainable Public Contracts?”, in: Sjåfjell / Wiesbrock (eds.), *Sustainable Public Procurement under EU law: New Perspectives on the State as Stakeholder*, Cambridge 2016, 50–74.

Shadikhodjaev Sherzod, “Renewable Energy and Governmental Support: Time to ‘Green’ the SCM Agreement?”, in: *World Trade Review* 14(3), 2015, 479–506.

Sjåfjell Beate, “The legal significance of Article 11 TFEU for EU institutions and Member States”, in: Sjåfjell / Wiesbrock (eds.), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously,* London 2014, 51–72.

Sjåfjell Beate / Anja Wiesbrock, “Why Should Public Procurement be about Sustainability?”, in: Sjåfjell / Wiesbrock (eds.), *Sustainable Public Procurement under EU law: New Perspectives on the State as Stakeholder*, Cambridge 2016, 1–22.

Steiner Marc, “Die umweltfreundliche Beschaffung – Vergaberechtliche Möglichkeiten und Grenzen”, Vergaberechtliche Studie erstellt im Auftrag der Beschaffungskommission des Bundes (BKB), Bern 2006.

Steiner Marc, “Gütesiegel für ökologische Produktion und Max Havelaar-Label für Fortgeschrittene: Der EuGH und die nachhaltige Beschaffung”, in: *European Law Reporter* 5/2012, 130–138.

Steiner Marc, “Is there a Swiss Approach towards Sustainable Public Procurement?”, in: *European Procurement & Public Private Partnership Law Review* 8(1), 2013, 73–78.

Steiner Marc, “Nachhaltige öffentliche Beschaffung – Ein Blick auf das Vergaberecht des Bundes und die Perspektiven“, in: Zufferey / Stöckli (eds.), *Aktuelles Vergaberecht* 2014, Zürich 2014, 149–176.

Swiss Federal Council, *Sustainable Development Strategy* 2002, *Report of the Swiss Federal Council*, Bern 2002.

Swiss Federal Council, *Sustainable Development Strategy 2016–2019*, Bern 2016.

The New Shorter Oxford English Dictionary, Volume 1 A – M, Thumb Index Edition, Lesley Brown (ed), Oxford, 1993.

Trachtman, Joel P., “The WTO Jurisprudence of Article XX(g) and the Conservation of Natural Resources”, in: Chaisse / Lin (eds.), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita*, Oxford 2016, 59–67.

Trepte Pete, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, Oxford 2004.

Trionfetti, Federico, “Discriminatory Public Procurement and International Trade”, in: *The World Economy* 23(1), 2000, 57–76.

Trüeb Hans Rudolf, *Umweltrecht in der WTO, Staatliche Regulierungen im Kontext des internationalen Handelsrechts*, Zürich 2001.

Trüeb Hans Rudolf, BöB-Kommentar, in: Oesch / Weber / Zäch (eds.), Wettbewerbsrecht II Kommentar, Zürich 2011.

Trüeb Hans Rudolf, “Beschaffungsrecht”, in: Biaggini / Häner / Saxer / Schott (eds.), *Fachhandbuch Verwaltungsrecht*, Zürich 2015.

Tukker Arnold et al., Environmental Impact of Products (EIPRO), Analysis of the life cycle environmental impacts related to the final consumption of the EU-25, May 2006.

UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, Vienna 2014 [Cited "UNCITRAL Enactment Guide"].

Weber Rolf H., "Overcoming the Hard Law/Soft Law Dichotomy in Times of (Financial) Crises", in: *Journal of Governance and Regulation* 1(1), 2012, 8–14.

Weber Rolf H., "Designing Trade Rules to Promote Climate Sustainability", in: *Journal of Energy and Power Engineering 8*, 2014, 612–619.

Weber Rolf H., "Emission Trading Schemes: A Coasean Answer to Climate Change?", in: Mathis/Huber (eds.), *Environmental Law and Economics*, Cham 2017, 355–377.

Weber Rolf H., "Energy Labels: Nudging Policy to Avoid Trade Implications?", in: Mathis/Huber (eds.), *Energy Law and Economics*, Cham 2018, 239–251.

Weber Rolf H. /Valérie Menoud, "Development Promotion as a Secondary Policy in Public Procurement? An Answer in the Light of the Digital Solidarity Clause", in: *Public Procurement Law Review*, 2009, 184–200.

Weber Rolf H. /Aline Darbellay, "Regulation and Financial Intermediation in the Kyoto Protocol's Clean Development Mechanism", in: *The Georgetown International Environmental Law Review* 22(2), 2010, 271–306.

Weber Rolf H. /Ruth Plato-Shinar, "Consumer Protection through Soft Law in an Era of Global Financial Crisis", in: Weiss/Kammel (eds.), *The Changing Landscape of Global Financial Governance and the Role of Soft Law*, Leiden 2015, 233–257.

Weber Rolf H. /Rika Koch, "International Trade Law Challenges by Subsidies for Renewable Energy", in: *Journal of World Trade* 49(5), 2015a, 757–780 [Cited "Weber/Koch 2015a"].

Weber Rolf H. /Rika Koch, "Der Schweizer Emissionshandel im Kontext der Klima- und Energiedebatte", in: *Jusletter*, November 2015b, 1–13 [Cited "Weber/Koch 2015b"]

Weber Rolf H. /Rika Koch, "Berücksichtigung des Transports, Öffentliches Beschaffungswesen im Spannungsfeld von Umweltschutz und Diskriminierungsverbot", in: *Jusletter*, Februar 2016, 1–17.

Weber Rolf H. /Rainer Baisch, Revisiting the Public Moral/Order and the Security Exceptions under the GATS, in: *Asian Journal of WTO & International Health Law and Policy* 13(2), 374–394.

Wiesbrock Anja/Sjåfjell Beate, "Public Procurement's potential for Sustainability", in: Sjåfjell/Wiesbrock (eds.), *Sustainable Public Procurement under EU law: New Perspectives on the State as Stakeholder*, Cambridge 2016, 230–242.

Wiesbrock Anja, "An Obligation for Sustainable Procurement? Gauging the Potential Impact of Article 11, TFEU on Public Contracting in the EU", in: *Legal Issues of Economic Integration 40(2)*, 2013, 105–132.

World Trade Organization, World Trade Report 2005, Exploring the Links between Trade, Standards and the WTO, available at: https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report05_e.pdf [Cited "World Trade Report 2005"].

Wüger Daniel, *Anwendbarkeit und Justiziabilität völkerrechtlicher Normen im schweizerischen Recht: Grundlagen, Methoden und Kriterien*, Bern 2005.

Zleptnig Stefan, *Justification Provisions of GATT, GATS, SPS and TBT Agreements,* Leiden 2010.

Official Documents

World Trade Organization

WTO, Committee on Trade and Environment, Report (1996) of the Committee on Trade and Environment, WT/CTE/W/1.

WTO, Report by the Secretariat, Key Take-Always from the Committee's Symposium on Sustainable Procurement, GPA/W/341.

Committee on Government Procurement, Notification of National Implementing Legislation, Communication from Switzerland, 30 July 1997, GPA/15.

Committee on Government Procurement, Review of National Implementing Legislation, European Community, GPA/32 from 12 January 2000.

World Bank

World Bank, Bank Policy: Policy and Procedure Framework, 2014, available at: https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b082dd10a8.pdf [Cited "World Bank, Bank Policy"].

World Bank, Procurement in World Bank Investment Project Financing: Phase II: The New Procurement Framework, 2015, available at: https://wbnpf.procurementinet.org/procurement-policy [Cited "World Bank 2015"].

World Bank, Sustainable Procurement, An introduction for practitioners to sustainable procurement in World Bank IPF projects, 2016, available at: http://projects-beta.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework [Cited "World Bank, Sustainable Procurement"].

World Bank, Procurement Guidance, Value for Money, Achieving VfM in Investment Projects Financed by the World Bank by the World Bank, 2016, available at: http://projects-beta.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework [Cited "World Bank, Value for Money"].

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R. Koch, *Green Public Procurement under WTO Law*, European Yearbook of International Economic Law 9, https://doi.org/10.1007/978-3-030-48214-5

World Bank, Procurement Guidance, Evaluation Criteria: Use of evaluation criteria for procurement of Goods, Works, and Non-consulting Services using RFB and RFP, 2016, available at: http://projects-beta.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework [Cited "World Bank, Evaluation Criteria"].

European Union

White Paper from the Commission to the European Council, Completing the Internal Market, COM/1985/310 final
Green Paper, Public Procurement in the European Union: Exploring the Way Forward, COM/1996/583, final.
Commission of the European Communities, Green Paper on Integrated Product Policy, COM/2001/68 final.
Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM/2001/0566 final.
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Public Procurement for a Better Environment, COM/2008/400 final.
Communication from the Commission, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM/2010/2020 final.
Proposal for a Directive of the European Parliament and of the Council on public procurement, COM/2011/896 final.
Commission of the European Communities, Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006 C179/2.
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Making Public Procurement Work in and for Europe, COM/2017/572 final.

Switzerland

Botschaft zur Genehmigung der GATT/WTO-Übereinkommen (Uruguay-Runde) (GATT-Botschaft 1) vom 19. September 1994, BBI 1994 IV 1.
Botschaft zu den für die Ratifizierung der GATT/WTO Übereinkommen (Uruguay-Runde) notwendigen Rechtsanpassungen (GATT-Botschaft 2) vom 19. September 1994, BBI 1994 IV 950.
Botschaft zu einem Bundesgesetz über den Binnenmarkt (Binnenmarktgesetz, BGBM) vom 23. November 1994, BBl 1995 I 1213.
Botschaft über eine neue Bundesverfassung vom 20 November 1996, BBI 1997 I 1.
Bericht des Bundesrats vom 9. April 1997 zur nachhaltigen Entwicklung in der Schweiz; Strategie, BBl 1997 III 1045.
Sustainable Procurement – Recommendations for the Federal Procurement Offices, June 2014, available at: https://www.bkb.admin.ch/bkb/de/home/oeffentliches-beschaffungswesen/nachhaltige-beschaffung.html [Cited "Recommendations"].
Erläuternder Bericht des EFD, Revision des Bundesgesetz über das öffentliche Beschaffungswesen vom 1. April 2015, available at: https://www.bkb.admin.ch/bkb/de/home/oeffentliches-beschaffungswesen/revision-des-beschaffungsrechts.html [Cited "Explanatory Report FLGP"].

Erläuternder Bericht zur Revision der Verordnung über das öffentliche Beschaffungswesen (VE-VöB), 1. April 2015, available at: https://www.bkb.admin.ch/bkb/de/home/oeffentliches-beschaffungswesen/revision-des-beschaffungsrechts.html [Cited "Explanatory Report FOGP"].

Botschaft zur Genehmigung des Protokolls zur Änderung des WTO-Übereinkommens über das öffentliche Beschaffungswesen vom 15. Februar 2017, BBl 2017 2053.

Botschaft zur Totalrevision des Bundesgesetzes über das öffentliche Beschaffungswesen vom 15. Februar 2017, BBl 2017 1851.

Bundesgesetz über das öffentliche Beschaffungswesen (BöB) (Entwurf), BBl 2017 2005.

Bericht über die Vernehmlassungsergebnisse zur Revision des Bundesgesetzes und der Verordnung über das öffentliche Beschaffungswesen (BöB/VöB) sowie der Verordnung über die Schwellenwerte im öffentlichen Beschaffungswesen (SWV), November 2016, available at: https://www.bkb.admin.ch/bkb/de/home/oeffentliches-beschaffungswesen/revision-des-beschaffungsrechts.html [Cited "Consultation Report"].