

THE GEORGE WASHINGTON UNIVERSITY

GOVERNMENT PROCUREMENT LAW PROGRAM

NEW PROTECTIONISM IN INTERNATIONAL PUBLIC PROCUREMENT

Wednesday, September 7, 2022

9:00 am EST – 14:00 UK – 15:00 CET

Welcome



Research Fellow in Law, Yale Law School
Ph.D. Candidate, University of St. Gallen

Recording and materials at:
www.desireeklingler.com and
www.publicprocurementinternational.com

Questions: Please use Chat (not Q&A)

All panellist statements are in their personal capacities

Moderators & Panelists



Désirée Klingler (Yale,
St. Gallen)



Chris Yukins
(GW Law)



Robert Anderson
(WTO ret.)



Michael Bowsher
(Monckton Chambers / KCL)



Simon Evenett
(St. Gallen)



Laurens Abu-Talib
(AföB)



Eike Klapper
(EU Diplomat)



Jean Heilman Grier
(USTR ret.)

Today's Agenda

Moderators

- Désirée Klingler: Welcome, introductions & preliminary thoughts on new protectionist measures
- Chris Yukins: Brief overview of IPI/EU Anti-Subsidies initiative in Procurement/U.S. Buy American developments
- Robert Anderson: Framing perspectives on global trade agreements

Panelists

- Simon Evenett: Emerging patterns of protectionism
- Laurens Abu-Talib: Swiss perspective on new protectionist measures
- Eike Klapper: European perspectives on IPI/Anti-Subsidies
- Jean Heilman Grier: U.S. perspectives on IPI/Anti-Subsidies
- Michael Bowsher: Post-Brexit perspectives

Questions – among panel and from audience

Three areas of tension (red thread)



- **National protectionism VERSUS Free market access/trade**
 - US: Buy American Act, Biden's Executive Order 14005 (Jan. 2021), Infrastructure Investment and Jobs Act (Nov. 2021), etc.
 - EU: IPI, Agreement on Foreign Subsidies (both June 2022)
 - Switzerland: "contracting authority shall take into account ... the different price levels in the countries from which the product/service is provided" (Art. 29 PPA)
 - International: WTO-GPA (and China, Brazil, Russia negotiations), Free-trade agreements
- **Legal OR political instrument?** (keyword "strategic procurement")
 - Few "Buy American" contracts (BAA covers 1% of total federal procurement)
 - WTO- GPA "trumps" Buy America(n) legislation
 - Many waivers for EU contracts (due to public interest, not available product, and high costs)
- **Protectionism AND Sustainability**
 - Can sustainable contracts be a market opener?
 - Currently, only EU companies manufacture wind turbines etc.





*Professor Christopher Yukins
GW Law School*

Framing the Response –
Buy American, IPI and
the Agreement on
Foreign Subsidies



Robert Anderson / WTO (ret.)

- All government measures bearing on trade, including in government procurement markets, are not necessarily “protectionism”. Rather, we must look to the nature, purpose and likely impacts of the measures.
- In this case, the measures under discussion arguably respond to legitimate concerns (free riding on government procurement market-openers and unfair/inefficient subsidies).
- Like the US “Walled Garden” system (per Yukins-Schooner), the current EU/related measures may strengthen incentives to join the WTO Government Procurement Agreement (GPA)/regional agreements embodying similar disciplines.
- This is not to say that there are no risks.
- What is really needed: renewed collaborative international efforts to build up the GPA/related bilateral and regional initiatives as a tool of market access, good governance and (more and more) sustainability. The measures under discussion could eventually promote this outcome, with appropriate follow-through (e.g., renewed negotiations regarding China’s GPA accession/further modernization of the GPA).



Simon Evenett / St
Gallen Endowment

Statistics on public procurement policy changes since 1 January 2020:

- **213 policy changes recorded, all but 15 disadvantaged foreign firms.**
- **Some noteworthy policy reversals—governments can go too far.**



Laurens Abu-Talib: Swiss perspectives on new protectionist measures

Switzerland:

Polity: Federalism, bicameral system (pros and cons toward open markets)

Policy: (1) Federal law (PPA), (2) Inter-Cantonal Agreement (IVöB), (3) Cantonal legislation (Total: 26+1)

Politics: Salient issues: Sustainability, inclusion of SME, low fees.

Goals: (1) Adoption of revised WTO-GPA-Agreement, (2) harmonisation between Federation and Cantons (in separate legal frameworks)

Procurement criteria "Different price levels" ([Art. 29 lit. 1 PPA](#)):

«In compliance with Switzerland's international obligations, it shall in particular take into account, besides the price and quality, criteria such as [...] the different price levels in the countries where the supply is provided»



It's controversial:

- «Piece de resistance» in Federal Parliament
- Cantonal Agreement did not adopt the criteria
- But some Cantons have adopted it via executive legislation
- Can only be applied outside of the scope of international treaties - so what's the point?
- Huge transactional costs for both sides dealing with complex production chains

Opinion:

- Quality-competition favours high-priced countries in line with spirit of open markets
- May explain why even economic actors favoured quality and sustainability
- Calls for explicit protectionism where answered, in a classic Swiss compromise
- Cantons: Exciting case of policy diffusion for future analysis!

Eike Klapper: European perspectives

- United States
 - Build back better
 - Executive Order on Buy American
 - Investment and Infrastructure Jobs Act
 - Inflation Reduction Act





Jean Heilman Grier U.S. Perspectives

Unilateral Measures by GPA Parties (within constraints of GPA/FTAs)

- US 'Buy American' measures
- Canada's proposed reciprocity measures, responding to 'Buy American' measures
- EU International Procurement Instrument (IPI)
 - Decade in development; implemented August 2022
 - Seeks to remedy EU openness of procurement that is not reciprocated
 - Most member states: no restrictions on participation in procurement – 'free riders'
 - IPI aim: provide leverage for negotiations to open or remove obstacles in third country procurement markets
 - China: 15th year of GPA accessions; no end in sight
 - Could apply to GPA parties: procurement not covered
 - Two types of remedies: exclusion of tenders or price penalties
- EU Foreign Subsidies Regulation: foreign subsidies distorting internal market
 - Political agreement (June 2022); entry into force expected in 2023
 - Foreign subsidies provide foreign firms unfair advantage, bids below market price
 - Applies to procurement of €250 million or more
 - Suppliers must notify financial contributions (broadly defined)
 - If found to distort procurement, supplier can be excluded



Michael Bowsher QC

Post-Brexit UK

Perspectives

Policy or Just Picking Fights?

- Social Value – the Legislative Requirement from 2012
- Improving Economic, Social and Environmental well being over and above the delivery of the contracts themselves...”and at no extra cost(?)”
- Brexit, Procurement and “Buy British”
- National Procurement Policy Statement – A Policy Requirement in the Forthcoming Law
- The need to create new businesses, new jobs and new skills
- First UK-EU WTO Dispute
- Local content requirement in Offshore Windfarm programme
- Revised Supply Chain Guidance
- But what will supply chain resilience demand/permit?



Questions & Discussion

Questions:

- Will the looming economic crisis spur protectionism?
- What *constrains* protectionism?
- Will *sustainable* contracts constrain or enable protectionism?

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**Video recording will be available on
PublicProcurementInternational.com and the GW Law Government
Procurement Law Program YouTube Page**



ABA PCLS Grant Law Committee Meeting (Online): Build America Buy America Act — Stringent New Domestic Sourcing Requirements

September 13, 2022, 11:30 AM – 1:00 PM (EDT) – ONLINE

Related program – next week

- **Information at <https://publicprocurementinternational.com/grant-law-committee-baba/>**

Conclusion

