

UNCITRAL Colloquium on the Law of International Trade
for a Greener Future, 23 October 2024

Toward Greener Procurement

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**International aspects, with particular reference
to the importance of international trade and
trade-related legal instruments**

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International trade and the fight against climate change

The relationship in general

Position at WTO membership level



12th Ministerial Conference (MC) (2022) – Outcome document

14. We recognize global environmental challenges including climate change and related natural disasters, loss of biodiversity and pollution. We note the **importance of the contribution of the multilateral trading system to promote the UN 2030 Agenda and its Sustainable Development Goals** in its economic, social, and environmental dimensions, in so far as they relate to WTO mandates and in a manner consistent with the respective needs and concerns of Members at different levels of economic development.

Position at WTO Secretariat level



International trade is part of the solution (rather than the problem) and part of the climate response



WTO Members should make full/fuller use of trade as part of the climate action toolkit.



Win-win approach to trade and environment

Trade can support decarbonization efforts and accelerate the green transition, by

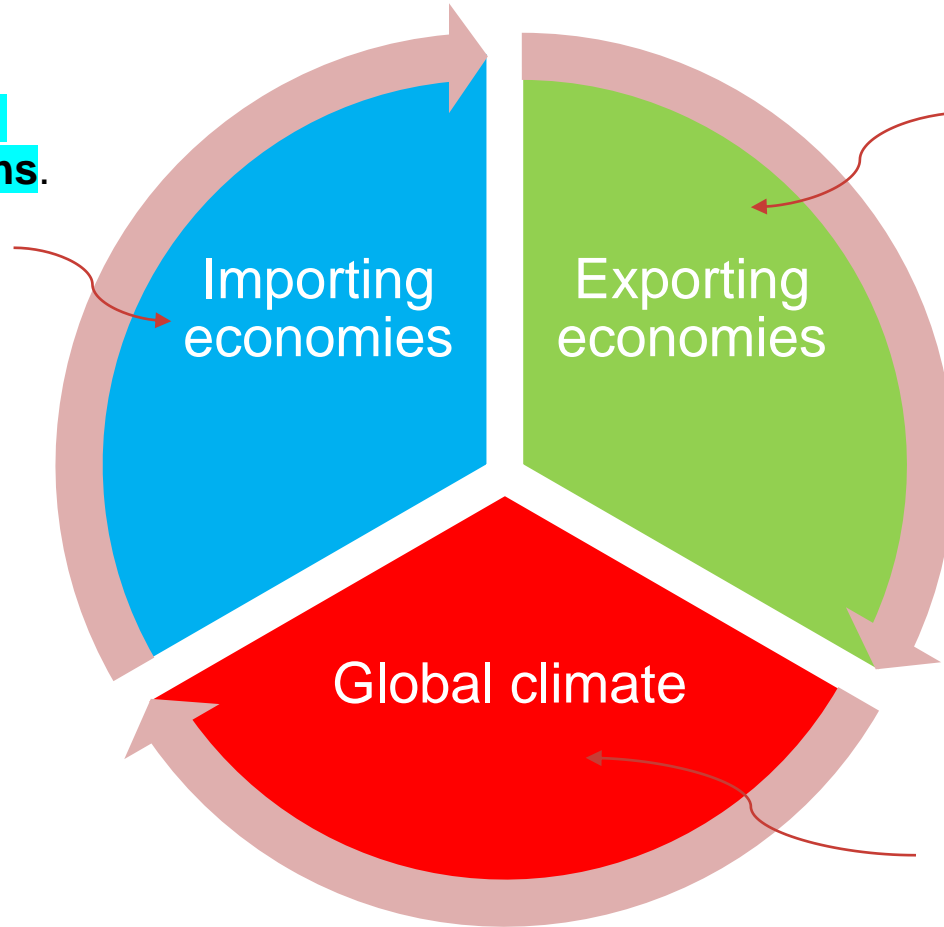
- helping to deliver greater emission reductions for each dollar spent
- expanding markets for green products and thereby reducing manufacturing costs and promote innovation, and
- facilitating the dissemination of green technologies.

More specifically, how do GPP and international trade relate to each other?

GPP and trade can be mutually supportive.



Trade supports **shift to greener** gov't procurement (**consumption**) patterns.
(Access to green goods / services / technologies)



Trade supports **shift to greener** production patterns.
(Price competitiveness, incentive to invest in innovation)

Global climate benefits as more economies shift towards greener cons/prod patterns.



Summary premise for this presentation



International trade does not subvert green public procurement policies.

Make full/fuller use of trade when implementing green public procurement policies at the domestic level.

Open procurement markets/keep them open for efficient suppliers of greener products

- The foregoing considerations support the **relevance of international trade rules** to possible **future UNICTRAL Model Law guidance/supplementary text**.
- Also, the preamble to the Model Law itself refers to the objective of encouraging participation in procurement proceedings by suppliers “regardless of nationality”, “**thereby promoting international trade**”.
- And: **UNCITRAL designed its Model Law to be compatible with the GPA**.

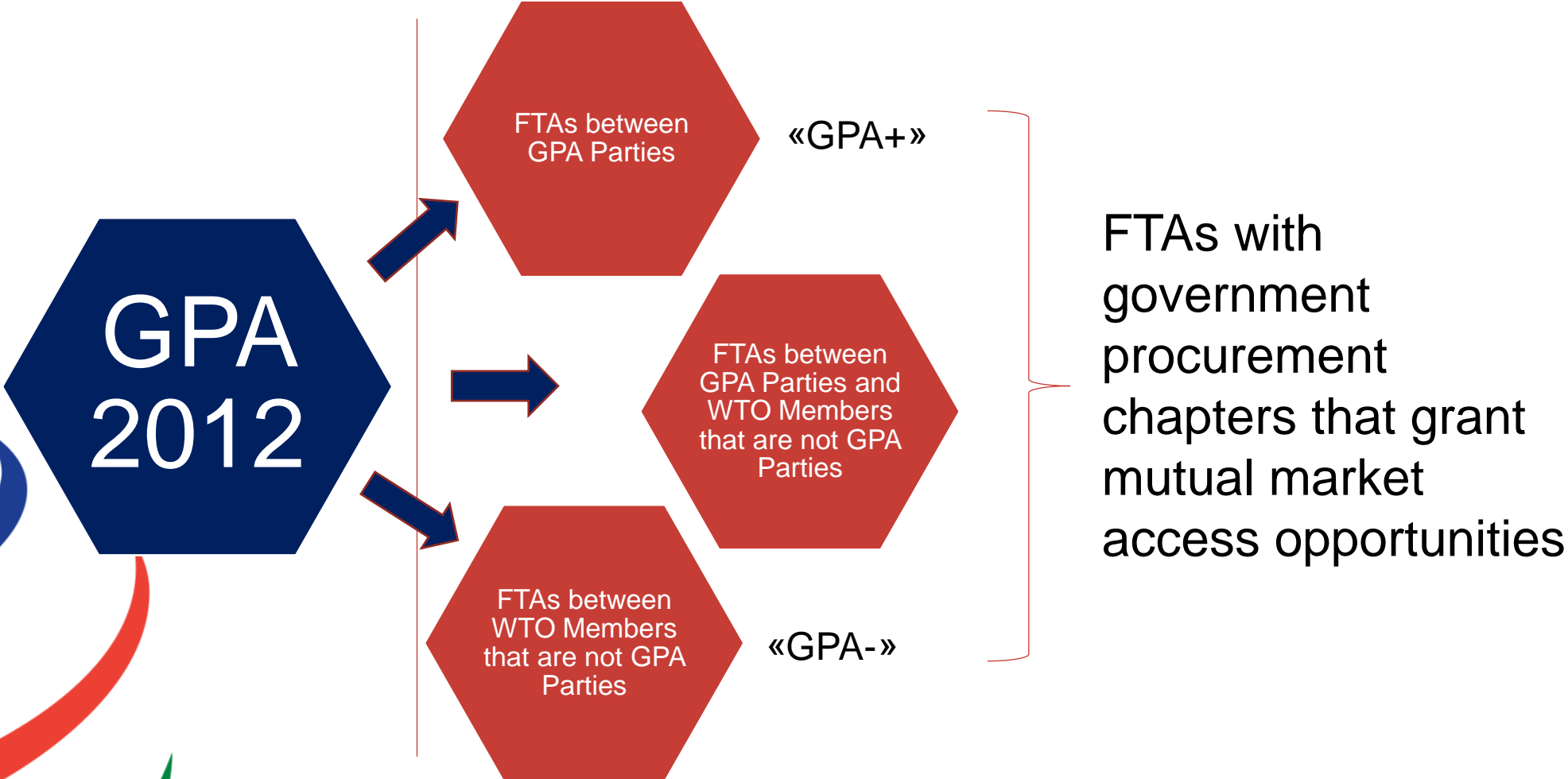
International trade cooperation in the area of government procurement

The WTO's GPA 2012 as a key global legal instrument



- Legally binding and enforceable international trade agreement
- Part of the WTO
- Accession is voluntary
- Currently covers 49 WTO Members, incl. several developing country Members
- Reciprocal but partial opening of covered Members' government procurement markets
- Special and differential treatment for developing countries if this meets a development need

Growing number of bilateral/regional free trade agreements (FTAs), with active developing country participation

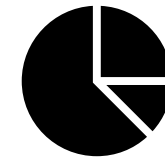


How GPP measures fit within the international legal framework established by the GPA 2012 and FTAs

Relevant international trade rules do not constrain any and all GPP measures but only some.

GPP measures **not covered** by international trade rules

- Procuring entity not covered
- Product (good, service, work) not covered
- Contract value below international agreement threshold



GPP measures covered by international trade rules and **permissible**

GPP measures covered by international trade rules and **prohibited**

- International trade rules seek to ensure that GPP policies are not used as a means to protect domestic suppliers, goods and services, if market access rights have been exchanged in an international trade agreement.

GPP measures covered by international trade rules

Nature of applicable obligations benefiting suppliers and products from Parties, e.g. under the GPA 2012, incl.:

- Market access (right to participate, above thresholds and for covered entities and goods/services)
- Transparency
- Non-discrimination
- Competition and integrity
- No unnecessary obstacles to trade
- (Possibly) temporary special and differential treatment for developing countries

GPA 2012

GPP and the GPA 2012 (1)

GPA 2012 seen as permissive: The GPA 2012 permits implementation of any covered GPP measure provided that it does not contravene GPA 2012 rules.

- 2017 WTO Expert Symposium on Sustainability in Government Procurement: «The [GPA 2012] provides **significant scope** for appropriate reflection of **sustainability considerations** in procurements covered by the Agreement. This is particularly clear with respect to **environmental or ‘green’ policy objectives**.» (GPA/W/341)

Nevertheless, whether **specific** GPP measures are permitted or prohibited is not always straightforward to determine.

GPP and the GPA 2012 (2)



- Mindful of this difficulty, the GPA Parties as a group took certain steps.

1. They **clarified** the text of the GPA 2012 to state explicitly :

1. that GPA Parties may apply **technical specifications** to promote the conservation of natural resources or protect the environment; and
2. that **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.

→ **But** no clarification in the GPA 2012 regarding environmental sustainability-related «conditions for participation» or exclusions.

GPP and the GPA 2012 (3)



2. They recognized that even with these clarifications, there **remained** a certain lack of clarity. The WTO Committee on Government Procurement therefore established a Work Programme on Sustainable Procurement covering GPP, which initiated its work in 2014 and is still active today, to:

1. examine “the ways in which [GPP] can be practiced in a manner consistent with Parties’ international trade obligations” and

2. identify measures that are consistent and list “best practices”.

→ Initial outcomes expected soon.

GPP and the GPA 2012 (4)



3. Individual GPA Parties have **inserted clarifications into their FTAs.**

FTAs

GPP and FTAs (1)



- E.g. the **United States-Colombia Trade Promotion Agreement** (2006):

Article 9.14: **Exceptions**

1. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail or a disguised restriction on trade, nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining measures:

- (a) necessary to protect public morals, order, or safety;
- (b) necessary to protect human, animal, or plant life or health;

...

2. The Parties understand that paragraph 1(b) **includes environmental measures** necessary to protect human, animal, or plant life or health.

GPP and FTAs (2)

- E.g. the **European Union-Japan FTA** (2017):

Article 10.10

Environmental conditions

Procuring entities **may lay down environmental conditions relating to the performance of a procurement**, provided that those conditions are compatible with the rules established by this Chapter and are indicated in the notice of intended procurement or in another notice used as a notice of intended procurement or tender documentation

GPP and FTAs (3)



- E.g. the **United Kingdom-New Zealand FTA (2022)**:

Article 16.10

Environmental, Social, and Labour Considerations

A Party, including its **procuring entities**, may:

- take into account environmental, social, and labour considerations at any stage of a procurement**, provided they are non-discriminatory and are indicated in the notice of intended procurement or tender documentation; and
- take appropriate measures to ensure compliance with its environmental, social, and labour law, international obligations, including under Chapter 22 (Environment) and Chapter 23 (Trade and Labour), and standards of conduct, ethics, and integrity, provided they are non-discriminatory.

GPP and FTAs (5)



- E.g. the **Modernized Canada – Ukraine FTA (2023)**:

Article 11.2

Environmental, Socio-Economic, and Labour-related Considerations

1. The Parties recognize the role of government procurement in:

(a) **advancing environmental and climate change objectives**, including those set out in the Paris Agreement, done in Paris on 12 December 2015;

[...]

2. For greater certainty, a Party, including its procuring entities, **may take into account environmental, socio-economic, or labour-related considerations** in the procurement process, **including through conditions for participation, technical specifications, or evaluation criteria**, provided that those considerations are consistent with Article IV(1) and (2) of the GPA 2012 and **do not constitute an unnecessary obstacle to international trade**.

Take-aways

Clear endorsement by GPA Parties and (certain) FTA Parties of the concept of
GPP



Related trade rules:

Clear in part

And being clarified but in selective and *ad hoc*
bilateral fashion



Still only limited «visibility» for possible guidance/supplementary text relating to
the UNCITRAL Model Law when it comes to ensuring coherence with
international trade rules.

Other – non-trade-specific and non-binding – bilateral (or multilateral) international cooperation in the area of GPP

Non-trade bilateral international cooperation in the area of GPP



- E.g. **Singapore – Australia Green Economy Agreement (2022)**
 - **Non-exhaustive list** of environmental factors and government procurement practices **recognized by both countries**
 - Non-binding **cooperation** with a view to achieving a **better understanding** of the respective environmentally sustainable government procurement regimes.

Non-trade bilateral international cooperation in the area of GPP



- E.g. **Joint EU-US Catalogue of Best Practices on Green Public Procurement (2024)**
 - **Emanated from:** The EU-US Trade and Technology Council Working Group on Climate and Clean Tech
 - **Purpose:** To promote a shared understanding on sustainability considerations in public procurement.
 - **Launch of a joint EU-U.S. initiative on green public procurement policies:** (based on the joint catalogue of best practices for green public procurement and following stakeholders' consultation) "to **deepen the commonalities** of the respective public procurement approaches with the aim of contributing to achieving our climate ambitions. **This initiative could also inform discussions within the WTO Agreement on Government Procurement**".

Non-trade multilateral cooperation in the area of GPP



- OECD report (2024): “Harnessing Public Procurement for the Green Transition: **Good practices** in OECD countries”

(identifies good practices regarding green procurement strategies but also persistent challenges and provides **recommendations** to help governments unlock the potential of public procurement towards to support the green transition)

- UNEP Sustainable Public Procurement Implementation Guidelines (2021)

(provides decision-makers with a **methodology** and roadmap for designing and implementing sustainable public procurement policies and action plans, with the aim of providing a common vision, language, and framework for SPP, and guides stakeholders on how to effectively pave the way towards its implementation)

UNCITRAL Model Law

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Possible future guidance
documents or supplementary text
addressing GPP

Points for consideration from a WTO perspective: Opportunities

Guidance document/supplementary text as catalyst for achieving international-level **convergence regarding GPP rules**

- Could inspire and **facilitate follow-on international rule-making in other fora** (e.g. revision of the text of the GPA 2012)

Accelerator of **GPP adoption across the globe**, including by reducing the need for costly research into optimum design of GPP rules, etc.

International-level recognition of GPP could provide **encouragement for procuring entities** around the world to make use of available flexibilities (**culture change**)

Points for consideration from a WTO perspective: Caveats (1)



- **Align with the WTO's win-win approach** to trade and environment (GPP) and include guidance/rules relating to the UNCITRAL Model Law that promote or preserve the use of trade as a tool to support decarbonization efforts and accelerate the green transition (**ensure consistency with international trade rules**).
 - **Not** doing so would ultimately be detrimental to environmental objectives (climate change mitigation and adaptation).
 - **Not** doing so could render the **UNCITRAL Model Law less useful as a tool to guide the implementation of GPA 2012 rules** and undercut the substantial efforts that went into the harmonization of the two legal instruments (Model Law and the GPA 2012).
 - **Doing** so would be consistent with the "T" in UNCITRAL and the 2011 UNGA Res.:
 - 2011 UNGA Res.: UNCITRAL to coordinate with other IOs to avoid inconsistent or conflicting results in the modernization and harmonization of public procurement law (**e.g. consistency with any results emanating from the WTO work programme on sustainable procurement!**)
 - **WTO Secretariat** could provide comments or other input (close collaboration already previously when the GPA 2012 and Model Law were negotiated).

Points for consideration from a WTO perspective: Caveats (2)



- How to take into account the centrality of the **development dimension** in possible new UNCITRAL guidance/supplementary text?
 - See WTO MC12 declaration above: Achieve UN SDGs «in a manner consistent with the **respective needs and concerns of Members at different levels of economic development**»
 - Risk of **bias** since GPP laws and policies are more widespread (for now) in and tailored to high-income economies
 - No one-size-fits-all approach: **Across-the-board** GPP rules vs. **sectoral** approach vs. **otherwise differentiated** approach (level of ambition/regulation)

Points for consideration from a WTO perspective: Caveats (3)



- How to deal with possible **trade-offs**?
 - E.g. with regard to the important role placed by Micro, Small and Medium-sized Enterprises (**MSMEs**) in sustainable development and poverty reduction (see WTO MC13 Declaration, 2023).
 - GPP rules/requirements (owing to administrative burden and other cost implications) might, as an unintended consequence, force the **market exit** of vulnerable MSMEs.

Points for consideration from a WTO perspective: Caveats (4)



- How to address the risk of *ad hockery*?
- Just sustainable public procurement alone also covers **social and economic sustainability**.
 - A selective/partial approach to guidance/supplementing text carries a risk of introducing incoherence and fragmentation into the Model Law.
- There are **other types** of (strategic) public procurement with a specific objective (e.g. innovation procurement, emergency procurement and gender-responsive procurement).