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Jean Monnet Working Paper 04/11

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NYU School of Law • New York, NY 10011

The Jean Monnet Working Paper Series can be found at

www.JeanMonnetProgram.org

ISSN 1087-2221 (print)
ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

GREEN PUBLIC PROCUREMENT IN CHINA AND THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT: IS IT HARD TO BE "FAIRLY" GREEN?

By Michelle Q Zang[*]

Abstract

This paper will look into the issue of green public procurement (GPP) from the following perspectives: the relevant disciplines under the WTO Agreement on Government Procurement (GPA), the laws and practice in China, as well as in the European Union (EU). The aim of this paper is two-fold. First, it will explore, in the GPA context and under China's procurement system, the current normative GPP framework and the development in practice. Second, it will assess the GPA regime and China's procurement system in the light of an efficient, transparent and competent GPP operation. In pursuit of improvement and resolution, a comparative study on pertaining EU practice and law-setting will be included. In conclusion, this paper argues that neither the GPA nor the system of China can be considered sufficiently competent in dealing with GPP issues. Under the GPA, clarification and elaboration of GPP-related issues are highly desirable; and for China's imminent GPA accession, domestic reform in GPP is essential to warrant a WTO-consistent system and avoid violation of its GPA commitments.

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INTRODUCTION

Procurement of goods and services by government agencies for their own purposes is a core element of the operation of governments. It secures the inputs that enable governments to fulfill their tasks, having a major impact on key stakeholders in society. Government procurement is of considerable economic significance at both the domestic and international levels. It is mainly due to the fact that procurement market accounts for 10 – 15 per cent of the national Gross Domestic Product and thus closely links to the benefits for domestic and foreign stakeholders in terms of increased competition.

Since public resources are scarce, the efficiency of the procurement process is a primary consideration of every procurement regime. Open, transparent and non-discriminatory procurement is generally considered to be the best tool to achieve "value for money" as it optimizes competition among suppliers, both domestically and internationally. Moreover, procurement systems have a significant impact on the efficiency of the use of public funds and, more generally, on public confidence in government and on good governance. The attainment of value for money, public access to information on government contracts, and fair opportunities for competition among potential suppliers, are all essential elements of an efficient government procurement system. It is especially the case in terms of the current economic recession, which has raised considerable concerns and debates over the control of domestic public expenses.

Government procurement markets are of interest to foreign suppliers as well as domestic suppliers. Public procurement of goods and services represents a major part of a country's market for foreign suppliers and is thus considered an importance aspect of international trade. In this respect, principles of transparency and fair competition identified above are equally relevant in the international context. Nonetheless, in the early years, government procurement has been substantially kept away from the application of the major multilateral trading rules. In the original negotiation of the General Agreement on Tariffs and Trade (GATT) in 1947, government procurement was explicitly excluded from the key national treatment obligation. More recently, government procurement has also been excluded from the main market access

commitments of the General Agreement on Trade in Services (GATS).

Over the years, GATT Parties and WTO Members have been seeking ways to address this issue in the multilateral trading system and a plurilateral agreement, namely, Agreement on Government Procurement (GPA) becomes the major achievement in this regard. Detailed discussion on the GPA will be provided in the subsequent section; here, suffice it to say that the GPA is based on the principles of openness, transparency and non-discrimination, which applies to parties' procurement covered by the agreement and to the benefit of parties and their suppliers, goods and services.

In the meanwhile, the plurilateral nature also indicates that the GPA is not of general application, which thus produces binding force only over the WTO Members that have signed and acceded to it. At the current stage, China, as an observer in the GPA committee, is engaged in intense bilateral and multilateral negotiations for its imminent accession. Issues and difficulties pertaining to China's GPA accession have been identified on many occasions.[1] Among others, discussion in this paper will mainly focus on the issue of Green Public Procurement (GPP) and explore the possible means for China to establish an efficient domestic GPP regime in compliance with the relevant GPA disciplines.

The GPA, insofar as environmental policy is concerned, establishes only "framework" or "baseline" rules to guarantee the compliance with non-discrimination and transparency of domestic measures and laws. However, systemic deficiency and lack of competence have emerged while more and more national GPP measures are adopted.

[1] Anderson Robert D, "China's accession to the WTO Agreement on Government Procurement: procedural considerations, potential benefits and challenges, and implementation of the ongoing re-negotiation of the Agreement", *Public Procurement Law Review*, 2008; Wang Ping, "China's evolving legal framework on public procurement", *Public Procurement Law Review*, (2004) 6, 285-318; Wang Ping, "Coverage of the WTO's Agreement on Government Procurement: challenges of integrating China and other countries with a large state sector into the global trading system", *Journal of International Economic Law*, (2007) 10, 887-920; Wang Ping, "China's Accession to the WTO Government Procurement Agreement – challenges and the way forward", *Journal of International Economic Law*, (2009) 12, 663-706.

Therefore, this paper will explore GPP-related problems under both the GPA and current procurement system of China. In pursuit of a competent and efficient policy module, a study on the EU regime will be included, which is widely conceived as the most environmental-concerned system among WTO Members. Research in this paper will be organized as follows. Section I will provide a brief introduction on GPP policy, particularly regarding, first, reasons why governments integrate this policy as part of their procurement system; second, debates over its influence on the social and economic development; and third, means of implementation in practice. Section II will focus on the current procurement system of China and the GPP policy thereunder. Section III will move on to the discussion in the GPA context. Following a brief review of the negotiation and developing history, this Section will explore the normative possibilities and disciplines under the GPA framework to enforce national environmental objectives. Owing to the ongoing negotiation process and the forthcoming accession, the current GPP regime of China will also be examined in the light of relevant GPA benchmarks. Section IV will set out concluding remarks of this paper. Based on the assumption that neither the GPA nor the China's current system is sufficiently competent in dealing with GPP issues, this Section will provide for potential resolutions with reference to the pertaining EU practice and law-setting.

SECTION I. GREEN PUBLIC PROCUREMENT

There are two major functions of government procurement that have been widely recognized: the participation of the government in the market as a pure *purchaser* and simultaneously *regulating the market* through the use of its purchasing power to advance conceptions of social justice.[2] The use of government contracting power as a tool of social regulation has been defined in different terms, such as "the issue of linkage", "horizontal policies", or "secondary policies".[3]

[2] McCrudden Christopher, "Using public procurement to achieve social outcomes", *Natural Resources Forum*, (2004) 28, 257-267, p.257.
[3] McCrudden Christopher, *Buying Social Justice: Equality, Government Procurement, & Legal Change*, OUP, 2007; Arrowsmith and Kunzlik, *Social and Environmental Policies in EC Procurement Law*, Cambridge University Press, 2009; Bovis Christopher, *EC Public Procurement: Case Law and Regulation*, Oxford University Press, 2006.

Such policy considerations originated from the social concerns in Europe and North America on labor standards and unemployment, which subsequently expanded to employment opportunities of disable workers and further developed in addressing racial equality in the US.[4] More recently, there has been growing debate about how aspects of social procurement can be combined with green procurement to produce the concept "sustainable procurement", thus addressing both social and environmental issues.[5] Thus, the term GPP is used to cover the procurement policies in pursuit of less environmental impact.

In practice, GPP policies often begin with a generalized mandate that procurement be effected in an environmentally conscious manner and such general intentions have spawned a broad variety of specific programs.[6] For instance, in 1991, the Danish Ministry for Environment and Energy issued a "Strategy for the Promotion of Sustainable Product Procurement Policy", which was followed by an "Action Plan for Sustainable Public Procurement Policy" requiring state purchasing departments to incorporate environmental considerations into contract award criteria. Japan provides yet another example where green public purchasing has developed mainly in the contract of overarching national policies; and in June 1995, the Japanese government adopted an "Action Plan for Greening Government Operations". In the US, there exists a wide array of programs and initiatives aiming at encouraging the Federal Government to green its operation. Under the 1976 "Buy Recycled" program, the Environmental Protection Agency establishes criteria to assist federal procuring agencies in identifying products for which they must develop affirmative procurement programs.[7] The common feature shared among the initiatives above is, although with the coverage over all public purchasing activities, they in practice mainly focus upon certain, or limited, categories of products. The product types covered usually include office equipments, vehicles,

[4] McCrudden Christopher, n.2.
[5] McCrudden Christopher, n.2.
[6] Marron Donald, "Greener Public Purchasing as an Environmental Policy Instrument", *OECD Journal on Budgeting*, (2003) 4, 71-105, p.78.
[7] OECD, "Trade issues in the greening of public purchasing", COM/TD/ENV(97)111/FINAL.

construction and infrastructure materials and cleaning products.

There has been intense debate regarding government's use of public procurement, or the legitimacy thereof, for environmental purposes, as well as for other social objectives. Reasons that are based on principle have been firstly raised as the primary justification for the policy choice as such. It is argued that government and public bodies award public contracts on behalf of the communities that they serve; it is thus not unreasonable for these communities to expect that such contracts go to contractors who do not violate the basic norms of the communities.[8] Therefore, the award of public contracts, which is not simply an economic activity by the administration, has a politically symbolic character that may be entirely legitimate.[9]

The other argument supporting social concerns to be enclosed in public procurement refers to the fact that they might be used as valuable tools for enforcing relevant legislative norms. In particular, pursuit of environmental and social objectives through government purchasing might be effective instruments in supplement to other existing regulations with similar policy aims. Insofar as environmental protection is concerned, other instruments include, *inter alia*, direct regulation, information provision and labeling requirements. Therefore, government procurement is a valuable tool for policy enforcement, either as a supplementary instrument besides the existing legislation, or as a mechanism in its own right.

The third reason for advocating social benefits during procuring activities is due to the indirect effect of public procurement on private market. Indeed, governments frequently intend for social policies to not only change their own purchasing decisions but also to influence the behavior of other socio-economic actors by setting the example, and by sending clear signals to the market place.[10] In other words, they expect similar

[8] McCrudden Christopher, "International economic law and the pursuit of human rights: a framework for discussion of the legality of 'selective purchasing' laws under the WTO Government Procurement Agreement", *Journal of International Economic Law*, (1999) 2, 3-48, p. 9.
[9] Ibid.
[10] Marron Donald, n. 6, p. 82.

purchasing approaches could go beyond the public market and be adopted more widely by private buyers. Hence, the award of public contract can be effective in providing a substantial inducement for private contractors to adopt good practices.[11]

For example, establishing a GPP policy, i.e. reduction in CO2 and house gas emissions, communicating its initiatives and demonstrating the results, suggest that first, action in this area is feasible and will probably lead to positive outcomes; and second, private sector can use similar green criteria for their own procurement needs. In the meanwhile, by describing environmental impacts of a particular product or service throughout its life cycle and providing information on the benefits of green procurement, the knowledge and understanding of environmental problems will also be expanded.

Nevertheless, it has to note that GPP is usually not the primary instrument to achieve particular environmental targets; more frequently, it is merely one of several other approaches of enforcement that mutually reinforce each other. With regard to the effectiveness of GPP as an environmental instrument, research has revealed that GPP is most promising if it focuses on bringing forth new green products that the private sector has reason to adopt and when government is the primary sources of demand. In contrast, it will be least promising when it focuses merely on switching government purchases from existing brown products to existing green products. Hence, this observation suggests that the potential environmental benefits of GPP may be small, relative to other environmental policy instruments.[12]

On the opposite side, however, a careful "benefit – cost" test is highlighted and particular concerns have been raised regarding the effectiveness of public procurement in achieving the social benefits sought.[13] It is worried that, first of all, such use of public procurement might involve the opportunity for domestic protection excluding competition from foreign suppliers. Second, during the procuring activities, there is the

[11] McCrudden Christopher, n.8.
[12] Marron Donald, n.6, p. 92.
[13] Arrowsmith Sue, Linarelli John and Wallace Don, *Regulating Public Procurement, National and International Perspectives*, Kluwer Law International, 2000, p. 290.

danger of decreased level of transparency subject to the extra layer of policy complexity, which might further lead to corrupted procurement decisions. Moreover, it is argued that the overall spending will be, in most cases, increased, which imposes addition burden upon the government spending.[14]

However, research and studies in GPP have pointed to the opposite. On the one hand, applying environmental criteria to procurement procedures can sometimes incur higher purchasing costs; on the other hand, the life-cycle approach nevertheless indicates that the overall costs often actually decrease since the higher purchasing prices of green goods and services are compensated for by lower operating, maintenance or disposal costs. With regard to concerns about domestic protectionism and unjust decision-making process, it is submitted that they belong to the primary issues that the GPA strives to address; the question here thus relates to how GPA parties can achieve their environmental objectives while guaranteeing the level playing field for both foreign and domestic suppliers. As the title of this paper indicates, is it hard to be "fairly" green?

SECTION II. GOVERNMENT PROCUREMENT SYSTEM OF CHINA AND ITS GPP POLICIES

Unlike most national procurement systems that are subject to a single unified legislation, public market of China is regulated by two major national laws: the Tendering Law and the Government Procurement Law (GPL). A detailed review of the legislative history and system development goes beyond the scope of this paper; notwithstanding, the coming section will briefly introduce certain significant features of the systerm.

First of all, the co-existence of two major national laws indicates an implicit internal division of the regime. In China, the tendering and procurement systems have been, in parallel, developed, designed, driven and supervised by different ministries of the central government. Under the tendering system, the National Development and Reform Commission (NDRC) has been acting the leading role, which unified the tendering practice and legislation from different regions and enacted the first nationwide Tendering Law in 1999. In the field of government procurement, it is the

[14] McCrudden Christopher, n.8, p. 10; Arrowsmith Sue, Linarelli John and Wallace Don, n. 13, p. 290.

Ministry of Finance (MOF) that launched the reform project in mid-1990s, which eventually led to the entry into force of the GPL in 2003.

Despite of the differentiated aims, scopes and provisions, the Tendering Law and the GPL share one significant common feature: the administration-dominated legislative and developing process. In other words, the current procurement regime of China is primarily based on the administrative decisions from a number of governmental institutions, which, rather than the national legislature, have been the major driving force behind the move throughout the process of initiation, drafting, discussion promulgation and implementation.[15]

Such a regime embryo gives rise to several policy concerns. First of all, it is questioned whether such an administrative operation provides sufficient considerations on the democratic institutional framework and whether it limits accountability from the public and media.[16] Second, the governmental institutions involved usually put emphasis, above the basic requirements of probity, certainty and coherence of legal rules, upon administrative convenience, protection of sectoral or regional interests and affirmation or expansion of their administrative territories.[17] Last but not least, when the legislative process involves several ministries with different interests, internal conflicts and inconsistency of the complicated institutional framework will inevitably hinder legal certainty, system coherence and regime enforcement.[18]

Insofar as GPP is concerned, nowadays, most governments have adopted domestic policy initiatives in their procuring activities. As for China, Articles 9 of the GPL requires that government procurement assist the achievement of national policy objectives in economic and social development, such as environment protection, promotion of less-developed and minority-populated regions, and the development of small and medium sized enterprises. However, such generally framed provisions can neither provide

[15] Wang Ping, (2004) , n.2.
[16] Ibid.
[17] Ibid.
[18] Ibid.

sufficient practice guidelines nor lead to substantive standards in procurement activities, which were thus described as "toothless".[19]

Such a situation remained until 2006 when a series of implementing measures were enforced. First of all, the MOF and the Ministry of Environmental Protection (MOEP) jointly issued "Opinions on Government Procurement of Eco-labeled Products".[20] Subsequently, the General Office of the State Council published "Notice on Establishing the Mechanism for Mandatory Procurement of Energy-efficient Products".[21] In substantive terms, these two documents establish a GPP mechanism dealing, respectively, with eco-labeled and energy-efficient products. Typical examples of eco-labeled products include automobiles, photocopiers and office furniture while air-condition and lighting products are considered in the energy-efficient category.

Different purchasing policies have been adopted. For eco-labeled products, procuring entities are only required, under the same functional, technical and service conditions, to offer preference to labeled products, which is addressed as "preferred procurement". For energy-efficient products, not only similar preferred procurement is required, more importantly, for selected energy-efficient products, the procuring entity is subject to compulsory purchasing obligation.[22]

For the purpose of enforcement, two lists, respectively for eco-labeled and energy-efficient products, are published by MOF, MOEP and NDRC. The two lists have followed a similar format. They enclose various product categories and, under each category, enumerate qualified products with relevant information on their trademarks and producers. Therefore, if a public entity has planned procurement within the listed categories, preference shall be accorded to the products named in the list, compared to

[19] Wang Ping, (2009) , n.2, p. 692.
[20] Opinions on Government Procurement of Eco-labelled Products, MOF Treasure Decree [2006] No.90, Chinese version available at http://www.ccgp.gov.cn/zcfg/hongtouwj/201009/t20100929_1321460.html.
[21] State Council Notice on Establishing the Mechanism for Mandatory Procurement of Energy Saving Products, State Council Secretariat Notice [2007] No. 51, 30 July 2007, Chinese version available at http://www.gov.cn/zwgk/2007- 08/06/content_707549.htm.
[22] Selection criteria for compulsory procurement of energy-efficient products will be discussed in the subsequent parts.

those that are not. For example, when the MOF plans to purchase automobiles, one of the categories in the list of eco-labeled products, preference should, subject to the same technical, functional and service conditions, be given to the listed brands compared to the unlisted suppliers. For procurement of energy-efficient products, i.e. air-conditioning, the same rules of preference apply; besides, compulsory purchase might be required if the number of listed suppliers, as well as the competition among them, is sufficient, allowing the procuring entity adequate choices.

Both lists are updated on a regular basis, in January and July, each year. The lists are substantively based on two domestic ecological certificates, namely, "China Environmental Labeling" and "Energy/Water Conservation Certification". In particular, once the indicated certificate has been awarded, the product will be enclosed into the list in the next upcoming update; also, the effective period of a listed product will end precisely on the expiry time of the pertaining certificate. In other words, for preferred or compulsory GPP, the domestic certificates constitute the major benchmarks.

Questions thus arise as to the extent to which preferred and compulsory procurement can favor the listed products and how such favorable treatment is enforced in practice. Answers to these questions, together with their WTO-consistency, will be discussed in subsequent sections. Here, discussion will first comment on the China's current GPP system in terms of its policy certainty and transparency. Indeed, the approach of directly linking GPP with domestic certificates appears to be rather controversial in these regards.

As mentioned earlier, the lists of eco-labeled and energy-efficient products are updated twice per year. On the one hand, such frequent updating aims to make sure that the coverage of the lists corresponds to the increasing number of the pertaining certificates that have been issued; on the other hand, however, due to the repealing effect of each updated version, the adverse effect thereof, particularly with regard to the policy uncertainties caused, cannot be ignored. Put in another way, for each round of the updating, procuring entities have to review the newly-issued lists to make sure they have fulfilled their GPP obligations; for potential suppliers, the updating might also give rises

to changes and adjustments to their tendering documentation and strategy that have already been in place. It is thus argued that frequent data updating usually imposes additional burdens and costs upon the procuring participants and, in the meanwhile, jeopardizes policy stability and certainty of the system.

Another issue of the over-reliance upon domestic certificates lies in the obstacles created in policy transparency. For many WTO Members, the common practice is that governmental authorities are ensuring fuller transparency of their GPP systems by publishing, together with the product lists, the underlying selection criteria, which normally involve the participation of expert groups, representatives of various interest groups, and more important, subject to public review.[23] Such criteria publication and public scrutiny are not included in China's GPP practice, which instead sets out the award of pertaining certificate as the only benchmark. It is thus unclear whether the evaluation criteria would be provided for public access, indicating that the actual role played by comments and proposals submitted by outsiders in the final decision-making process was generally not an open process with little or no participation by foreign interests.[24]

SECTION III. THE GREEN PROCUREMENT INITIATIVES UNDER THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT

With regard to the balance between politics and economics, the interplay of domestic and international rules on procurement policy can be made in several different venues. Increasingly, choices are influenced, if not determined, by decisions taken internationally. [25] The following discussion will look into the major international disciplines on procurement, namely the WTO rules under the GPA, with particular emphasis on its GPP policies.

The original GPA was negotiated during the Tokyo Round of trade negotiations and

[23] OECD, n. 7.
[24] OECD, n.7.
[25] McCrudden Christopher, n.3, p.16.

concluded in Geneva in April 1979.[26] During the Uruguay Round, Parties to the GPA held further negotiations in the context of an Informal Working Group[27], which involved the broadening of entity coverage, expansion of the coverage to services and construction services and further improvements of the text thereof.

Coverage negotiations were initiated through a bilateral request/offer process in September 1990. These negotiations involved the tabling of offers and the submission of requests by interested Parties to their trading partners. Following the bilateral negotiations for improvement and the finalization of specific offers which occurred in 1993, the final text with the attached draft schedule of parties was issued on 15 December 1993. On that date, the Informal Working Group adopted a Decision concluding negotiations and agreeing that the text entitled GPA 1994, together with Annexes 1-5 of Appendix I of each of the participants embodied the results of their negotiations as at that date.[28] Eventually, the GPA was signed in Marrakesh on 15 April 1994 and entered into force on 1 January 1996.

In general, the GPA establishes an agreed framework of rights and obligations among its Parties with respect to their national laws, regulations, procedures and practices in the area of government procurement. The GPA entails a limited coverage and thus the obligations apply only to procurement 1) by procuring entities that each Party has listed in the Annexes as "central government entities," "sub-central government entities" and "other entities"; 2) of all goods; and 3) of services and construction services that are specified in the Annexes. GPA coverage under each of the Annexes is also contingent upon certain threshold values being exceeded, the values of which are expressed in terms of Special Drawing Rights. Furthermore, the coverage is also contingent upon the various notes found in the Annexes.

Insofar as environment is concerned, first of all, the Preamble to the WTO Agreement

[26] This Agreement was amended following negotiations in pursuance of Article IX:6(b) through a Protocol which entered into force on 14 February 1988.
[27] The Informal Working Group on Negotiations was originally established in May 1985 to improve the text of the Tokyo Round Agreement.
[28] GPR/SPEC/77.

recognizes the need to act in accordance with the principle of sustainable development and to protect and preserve the environment;[29] and the Appellate Body has confirmed this position on several occasions. In *US – Gasoline*, it was ruled "indeed, in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment including its relationship with trade, their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements".[30] Later in *US – Shrimp*, the Appellate Body further specified that "the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement, which informs *not only the GATT 1994, but also the other covered agreements*, explicitly acknowledges 'the objective of sustainable development'" (emphasis added).[31]

Despite the well-developed environmental consciousness under the WTO, the GPA text merely includes few references to this issue. In fact, the original GPA agreed in 1994 contains no provisions in this regard. In 2006, GPA Parties decided to change this situation and inserted articles on environmental considerations into the revised version of the GPA (GPA 2007),[32] which, in particular, allow the procuring entities to prepare,

[29] The Preamble of the WTO Agreement provides as follows: "Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."
[30] Appellate Body Report, *US — Gasoline*, para. 30.
[31] Appellate Body Report, *US — Shrimp*, para. 129.
[32] Discussion in this paper will be based on the revised GPA text 2007, available at http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/W297.doc. The text is provisional in that it is subject to (i) a legal check; and (ii) a mutually satisfactory outcome to the other aspect of the negotiations on a new Government Procurement Agreement, namely those on an expansion of coverage. However, the GPA Parties have agreed that the new text should be used as the basis for accession negotiations with countries wanting to join the GPA.

adopt, or apply technical specifications and evaluation criteria to promote the conservation of natural resources or protect the environment.[33]

Despite the text amendments, it is nevertheless argued that, under the GPA, the role of social policy is a distinct or side issue and the bodies involved consider the appropriate balance between the social and the economic as a more difficult task, not a normal activity that takes place within the system itself, but outside it, and in a more episodic manner.[34] Policy reconciliation has not yet been reached under the current GPA regime, which thus might give rise to high-profile conflicts with the potential to undermine the legitimacy of economic liberalization. In other words, on the one hand, the GPA is currently embedded in an institutional context that appears ill-equipped to deal with this type of problems. On the other hand, the GPA cannot avoid dealing with such issue entirely and thus the WTO adjudicatory institutions are likely to be called upon to issue their understanding and interpretations.[35]

Under the current GPA system, there are specifically two possible routes through which the contracting Parties would be able to integrate environmental elements into their procuring activities. First of all, Parties can integrate environmental requirements into the substantive GPA criteria pertaining to different stages of the procurement. For example, the GPA allows procuring entities significant scope to take account ecologic requirements during the process when exact nature of the goods is specified, the list of qualified suppliers is drawn up, offers are evaluated and the award criteria applied.[36] The second option lies in the so-called "exception article". Article III GPA provides for a list of exceptional circumstances under which the contracting Parties are allowed to adopt trade-restrictive national measures that would be otherwise in violation of their GPA commitments.

[33] Article X, GPA 2007.
[34] McCrudden Christopher, n.3, p.583.
[35] Ibid, p.587; McCrudden Christopher, n.8, p. 47.
[36] Kunzlik Peter, "International Procurement Regimes and the Scope for the Inclusion of Environmental Factors in Public Procurement", *OECD Journal on Budgeting*, (2003) 4, 107-152, p.111.

There are significant differences, in terms of both nature and form, between measures under these two options. To make the distinction, it has to bear in mind the government's dual roles acting as both "purchaser" and "regulator" during the procuring activities. When being considered as a purchaser, the government should be entitled to decide its own purchase choices, i.e. whether or not to make a purchase and what kind of product or service will meet its needs. All these considerations can be well reflected through the first option in framing of the so-called "buying decisions".[37] In the meanwhile, there might be cases where domestic measures with restrictive effect on market access are regarded by the government, acting as economy regulator, as necessary in terms of certain policy objectives, i.e. public moral or human health. Therefore, Article III GPA provides for the leeway, or the justification, allowing obviations from its GPA obligations. For example, GPA contracting Parties can invoke this article in defense of their domestic measures in pursuit of environment protection, as well as human health, which nevertheless treat suppliers from other Parties in a less favorable way.

In terms of China's ongoing accession process, there might be another route as the "third" option to achieve domestic environmental aims under the GPA. In particular, during the revision process in 2007, GPA Parties decided to insert a special article on transitional mechanism and implementation period on temporary basis.[38] According to Article IV, apart from being granted special consideration to its development, financial, and trade needs and circumstances, a developing country may be allowed to adopt or retain one or more of specified transitional measures, in a non-discriminatory manner, during a transition period after its accession.[39] Furthermore, it is also agreed that the parties may agree to delay the application of any GPA obligation, except those related to national treatment and non-discrimination, by an acceding developing country for an implementation period not to exceed three years.[40]

[37] Detailed discussion will be elaborated in the subsequent parts.
[38] Article IV, GPA 2007.
[39] Article IV. 3, GPA 2007.
[40] Article IV. 4, GPA 2007.

However, it is argued that the transitional measures under Article IV GPA have the primary focus upon protecting, or reserving, the interests of domestic industries and entities for procurement purpose, rather than other social and environmental objectives. This article aims to provide for the acceding members additional period of adjustment before opening up for foreign competition. During the transitional period, preferential treatment can be reserved for certain domestic industries and entities, through either granting special preference or non-implementation of certain GPA obligations; and environmental policies shall not be expected to be part of it.

Hence, the following discussion will look into the two options mentioned earlier, particularly with respect to the magnitude of domestic discretion permitted under the GPA and the extent of immunity under the "exception article" for environmental objectives. Discussion will also examine the GPP practice of China, in the light of the relevant GPA disciplines.

3.1 Option I: incorporating environmental objectives into "buying decisions"

The concept of "government as purchaser" and "government as regulator" can provide a useful shorthand to emphasize the different policy consideration that may arise from different types of procurement measures.[41] As a purchaser acting on the basis of freedom of contract, no fundamental distinction could be drawn between the public and private buyers, particularly in the sense that they should be entitled to decide, on their own, whether or not to make a purchase and what products or services to purchase. Such decisions have been referred to as excluded "buying decisions", which includes the procurement decisions that are not hindrance to trade even when they have a greater impact on non-domestic products.[42] It is argued that such decisions, instead of restricting access to the market, merely establish what the market is.[43] For example, it is an entirely reasonable decision of the government to purchase only cars with emissions

[41] Arrowsmith and Kunzlik, n.3, p. 21.
[42] Ibid, p. 59.
[43] Ibid, p. 61.

below a certain level of carbon dioxide; and procurement regulations should not impose restrictions on it.

The first option for GPP enforcement is to integrate environmental requirements into "buying decisions" of the procuring entity. Such integration might take place in one, or all, of the following phases: 1) designing technical specifications; 2) deciding conditions for participation; and 3) framing contract award criteria. The coming analysis will look into each phase in a chronological order during the procuring process.

3.1.1 Technical specifications

Under a procurement project, buying decisions are first reflected in the process defining "technique specifications". According to Article I (t), technical specification means a tendering requirement that 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 addresses terminology, symbols, packaging, marking, or labeling requirements, as they apply to a good or service.[44] For example, if a supplier from the US would like to attend a tender opened by the Japanese government, it will be obliged to satisfy, or prove to satisfy, all the technical requirements that Japanese government specifies in the procuring documents; and undertake all the financial consequences it might entail.

Green technical specification

According to the research developed by the OECD, various procurement rules are based on the concept of technical specifications, which would appear to cover the environmental characteristics used to determine environmentally preferable products.[45] Article I GPA does not prohibit Parties from including environmental standards into technical specifications and allows a party to prepare, adopt, or apply such specifications

[44] Article I, GPA 2007.
[45] OECD, n.7.

to promote the conservation of natural resources or protect the environment.[46] Such specifications should be of legitimate origin, i.e. the Japanese government endorses stricter requirements for building products due to the high occurrence of earthquake in the area. For the same reason, countries facing serious air-pollution problems might want to impose lower tolerable levels of automobile emissions in their public purchase.

However, the composing process of technical specifications, especially that involves environmental consideration, is not without restrictions from the GPA. According to Article X.1, "a procuring entity shall not prepare, adopt, or apply any *technical specification* or prescribe any *conformity assessment procedure* with the purpose or the effect of creating *unnecessary obstacles to international trade*"(emphasis added).[47] It is clear from the text that "unnecessary obstacles to international trade" has been set as the primary benchmark in measuring the GPA compatibility of technical specifications pertaining to green products.

A preliminary question thus arises as to how technical specifications of a product can result in trade obstacles. This is mainly because, in economic terms, compliance with such requirements might increase the participation costs for foreign suppliers, *inter alia*, translation of foreign regulations, hiring of local technical experts, and adjustment of production facilities. The high costs involved have the effect of discouraging participation; the risk thus arises that such specifications have been *de facto* composed and applied with disguised intention of domestic protection.

Furthermore, obligation to avoid unnecessary trade obstacles applies also to the so-called "conformity assessment procedure". This term refers to any procedure used, directly or indirectly, to determine whether relevant requirements in technical specifications are fulfilled, such as testing, verification, inspection and certification, which confirm that products fulfill the requirements set forth.[48] The underlying rationale is any stricter or more time-consuming procedure than necessary would

[46] Article I.6, GPA 2007.
[47] Article X.1, GPA 2007.
[48] Annex 1, TBT.

impose additional burden on the potential suppliers and thus constitutes "unnecessary obstacles to international trade".

Article X.1 GPA does not provide a proper definition for "unnecessary obstacles to international trade". Nevertheless, reference can arguably be drawn from the WTO Agreement on Technical Barriers to Trade (the TBT agreement), where the same term is used. As Article 2.2 TBT provides, "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating *unnecessary* obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than *necessary* to fulfill a legitimate objective, taking account of the risks non-fulfillment would create" (emphasis added).[49]

Thus, the boundary line between "necessary" and "unnecessary", or the meaning of "necessity", becomes the primary threshold of the test on "unnecessary trade obstacles". Jurisprudence so far is not of much help in understanding these terms in the TBT context, which, however, has developed considerable apprehension under Article XX GATT. Detailed analysis in this regard will be provided in the subsequent parts; here, suffice it to say, under Article XX GATT, one important aspect of the "necessity" test refers to comparison with the possible alternatives; and the measure in question would be considered unnecessary, or more restrictive than necessary, when the objective pursued can be achieved through alternative measures, which have less trade-restrictive effects. Apparently, such an approach suggests a fairly high level of WTO scrutiny over domestic measures.

In contrast, this paper argues that the GPA shall endorse a more "relaxed" or "lowered" threshold for "unnecessary obstacles to trade" because of the different roles acted by the government. In the process of formulating technical specifications the government is acting as public purchaser, as opposed to its role as economy regulator, or policy-maker,

[49] Article 2.2 TBT. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

in the GATT context. On the one hand, policy decisions made by the government under the GATT are in most cases of mandatory nature with general legal applicability. On the other hand, technical specifications are contractual obligations, the binding effects of which are limited only within the parties to the contract; and the only uniqueness lies in the fact that one side of the contract is public entity, instead of private enterprise.

Therefore, the WTO, while carrying out intense scrutiny over regulatory trade measures, should grant the governments more discretion in their buying decisions. It is also argued that if the same "non-alternative" approach were adopted, no technical specifications pertaining to environmental aims would possibly be able to pass the test. It is because, as mentioned earlier, the impact of GPP on environment protection is rather limited and is thus usually used as a secondary instrument in supplement to other environmental policies. As a result, any other "pure" environmental policy with no link to trade would qualify the so-called "less restrictive alternative" that can reach the same policy objective.

According to this paper, a general "rationality" test should be sufficient for the term "unnecessary obstacles to trade" under the GPA, which suggests minimum interference of the government' choices of purchase. The underlying rationale is, as a purchaser, the government should not be required to justify its decision, or target, of purchase unless it discriminates suppliers of foreign origins. This proposal will be further explored in the concluding section.

Formulating green technical specifications

With regard to the formulation of technical specifications, the GPA provides two approaches. First, "where appropriate, technical specifications must be based on international standards, where such exist; otherwise, on national technical regulations, recognized national standards, or building codes".[50] Second, "where appropriate, a procuring entity shall specify the technical specification in terms of *performance and*

[50] Article X.2.(b), GPA 2007.

functional requirements, rather than *design or descriptive characteristics*". (emphasis added).[51]

Some elaborations need to be developed under the second approach. For example, a technical specification on fire-resistant doors should require that the door pass successfully all the necessary tests on fire resistance. Thus it could specify that the door must be fire resistant with a 30-minute burn through time, instead of stipulating how the product must be made, i.e. that the door must be made of steel and one inch thick. For *design or descriptive characteristics,* the GPA further stipulates that "where design or descriptive characteristics are used, a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfill the requirements of the procurement by including words such as *'or equivalent'* in the tender documentation" (emphasis added). [52] Such "equivalent approach" means that the procuring entity should accept products or services with certain technical specifications, different from those required in the tendering documents, nevertheless reach the same outcome through different means. For example, in order to protect the environment from high auto emission levels, the government, in its procurement documents, requires that cars to be purchased be equipped with a catalytic converter as one of the technical specifications. In the meanwhile, it is proved that the same objective to reduce the levels of air pollutants can be achieved through the use of diesel engines in motor vehicles. Thus, according to the "equivalent approach", suppliers of vehicles with diesel engines should be considered satisfying the technical specifications and thus equally admitted to participate the tender.

The last GPP requirement pertaining to formulation of technical specification is that a procuring entity is required not to prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer, or supplier. One situation is nevertheless exempted: when there is no other

[51] Article X.2.(a), GPA 2007.
[52] Article I.2.(a) and Article I.3, GPA 2007.

sufficiently precise or intelligible way of describing the procurement requirements; and in such situation, the "equivalent approach" mentioned above has to be provided.[53]

China's GPP practice: composing green specifications

As mentioned in the previous discussion, the current GPP policy in China is combined with preferred and compulsory procurement. For compulsory procurement, it is required for certain energy-efficient products when the number of the products, which are approved by the "Energy/Water Conservation Certification" and included in the ministries' list, is sufficient enough to provide for the procuring entity adequate "green choices". In such a case, purchase has to be directed towards the listed products only.

Under specific procurement project, compulsory procurement is achieved through the formulation of technical specifications. The usual practice is to set out the specification requiring the products to bear "Energy/Water Conservation Certification" and be included in the list concerned. As a result, unlisted products are automatically excluded since they are unable to meet this specification.

However, the GPA consistency of such practice is highly controversial. It is doubted whether the practice of linking mandatory tendering requirement exclusively to domestic standards is GPA consistent, particularly in the light of "unnecessary trade obstacles" test elaborated in Article X.1 GPA.[54] On the one hand, the GPA term "unnecessary obstacles to trade" should be interpreted in a less-restrictive way compared to the conventional GATT approach of "non-alternative". On the other hand, however, even under the proposed "rationality" test with released, or lowered, threshold, China's practice of compulsory GPP might be caught as GPA inconsistent. It is because such exclusive recognition of domestic certificate, in most cases, leads to an increase of participation costs for foreign suppliers, i.e. translation of standards, hiring of local technical experts, and adjustment of production facilities. Furthermore, it also goes against general "rationale" if the products, which are able to meet all the substantive

[53] Article I.4, GPA 2007.
[54] Article X.1, GPA 2007.

specifications and have been approved by many other environmental schemes but "Energy/Water Conservation Certification", are nevertheless deprived of the chance to participate. Last but not least, in a less straightforward way, compulsory procurement can also be challenged under the non-discriminatory principle: it might be alleged, by setting the obtaining of specific domestic certificate as a mandatory precondition, the procuring entity provides a more favorable position for domestic suppliers.

3.1.2 Conditions for participation

The second phase where procuring entity can integrate into "buying decisions" its environmental aims is the formulation of conditions for participation. The term "conditions for participation" refers to the abilities of suppliers to undertake specific procurement project. As the GPA defines, "qualified supplier" means "a supplier that a procuring entity recognizes as having satisfied the conditions for participation".[55] In this regard, Article VIII of the GPA requires any conditions for participation relate to the *essential* legal, commercial, technical, and financial abilities of a supplier to undertake the procurement concerned.[56] It also entitles the GPA Parties and their procuring entities the right to exclude certain suppliers from participation on grounds such as bankruptcy, false declaration and other misconducts.[57]

Insofar as environmental issues are concerned, some policy makers have been attracted to the possibility of concentrating on a supplier's green credentials, in large part due to the many difficulties surrounding the choice and evaluation of criteria for greener products.[58] It is felt that these difficulties might be avoided by shifting critical decisions back to those closer to the production and retail decisions; and a commitment to a recognized environmental management system would reflect an overall commitment by a potential supplying firm to higher environmental performance.[59]

[55] Article I (o), GPA 2007.
[56] Article VIII (b), GPA 2007.
[57] Article VIII.3, GPA 2007.
[58] OECD, n. 7.
[59] OECD, n.7.

However, the use of environmental management system is not without doubt, particularly with regard to whether such system can qualify as "the *essential* conditions" as required under Article VIII.1. In most cases, such management systems only address the organizational structural issues of the company, rather than specific performance standards, without involving imposition, or fulfillment, of specific ecological requirements. Furthermore, the overall participation costs will also be increased in this case owing to the expense spent on the conformity assessment procedures of such system. Although many suppliers might determine to seek the certification required as a matter of routine cost in doing business with government, the time and administrative procedures, as well as economic costs involved, could become a significant deterrent in the participation for any interested suppliers but the largest ones.[60]

3.1.3 Contract award criteria

Criteria of "the lowest price" and "the most advantageous offer"

After participating suppliers submit their tenders, the procuring entity shall start the process of evaluation, which is also the final phase during the "buying decisions" formulation. The evaluation is based on the contract award criteria specified in the tendering documentation, which, in addition to the technical specifications and conditions for participation, also mirror the "buying decisions" of the procuring entity.

According to Article XV GPA, a procuring entity shall award the contract to the supplier that is, first of all, fully capable of undertaking the contract; and, in the meanwhile, has submitted either the most advantageous tender or the one at the lowest price.[61] In other words, on the premise that suppliers concerned are all able to fulfill the tender requirements, i.e. technical specifications, the award criteria should be either the "most advantageous" or the "lowest price".[62]

When price constitutes the sole criterion for contract award, any environmental objective would have to be worked into technical specifications and conditions for

[60] Ibid.
[61] Article XV, GPA 2007.
[62] Article XV, GPA 2007.

participation in relatively great detail when composing the tender documents. When the criterion of "most advantageous" is used, the same environment objective can be incorporated more easily into the appraisal of a specific bid.[63] Put in another way, compared with "lowest price", the "most advantageous" criterion grants the procuring entities more flexibility to add preference for green products.

Distinctions shall be made between the criterion of "most economically advantageous" and that of "most advantageous". It is argued that the latter permits wider discretion for the procuring entities to apply environmental-related criteria since it is not necessary to demonstrate any direct economic benefits accruing from the application of those criteria.[64] This may well be an appropriate approach, since the principles underlying the GPA – transparency and non-discrimination – are not threatened by allowing procuring entities to apply published award criteria that incorporate environmental values which, though objectively verifiable, may not always be easily expressed in terms of economic benefits to the entities concerned.[65]

In the meanwhile, Article XV mandates the evaluation criteria be published and specified in the notices and tender documentation and the evaluation process be solely based on such criteria.[66] However, it is still unclear, from the text of the GPA, whether the procuring entity also has to specify the respective weightings among the criteria, or the hierarchy of comparative importance of such criteria. It is thus argued that significant room has been left open, should the procuring entity so wish, for the application of weightings at the award stage that may favor environmental criteria.[67]

China's GPP practice: awarding green contracts

In 2004, the MOF issued “Administrative Measures of Tendering Activities in Government Procurement of Goods and Service”. This document further elaborates

[63] OECD, n. 7.
[64] Kunzlik Peter, n. 36, p.115.
[65] Ibid.
[66] Article XV, GPA 2007.
[67] Kunzlik Peter, n. 36.

Article XV GPA on tender evaluations and set out more detailed rules on contract award. In particular, Article 50 therein specifies three assessing approaches, namely, the lowest price, synthesis assessment and cost performance assessment.

Under the first approach of "the lowest price", price is the sole yardstick for tenders that satisfy all substantive requirements. For "synthesis assessment", Article 50 provides a list of major elements that should be taken into consideration, including price, technique, financial status, reputation, business record and service. However, this list is non-exhaustive in nature; therefore, although not being explicitly mentioned, environmental benefits should not be excluded. Under this approach, Article 50 imposes upon the procuring entity the obligation to publish relevant weightings of each element in the tender notice.

Furthermore, contract can also be awarded through assessing the "cost performance" seeking for the most value-efficient tender. This approach is based on the ratio between, on the one hand, the overall performance of the goods to be procured and, on the other hand, the price proposed by the supplier. For each tender, assessment of the overall performance entails consideration of the similar elements as those under "synthesis assessment", except price. The outcome of performance assessment will then be compared to the price proposed; and thus, the final result will reflect the product performance under each value unit. In other words, "cost performance assessment" enables the procuring entity to select the tender with the best value for money. There is no substantial difficulty to fit the three approaches above into the GPA context. Particularly, it can be reasonably argued that synthesis assessment and cost performance assessment mirror two different understandings, or interpretation, of the "most advantageous" criterion stipulated under Article XV GPA.

In practice, it is under these two approaches that the procurement preference towards green products, as part of China's GPP policy, is achieved. Extra points are awarded to products that are approved by either "China Environmental Labeling" or "Energy/Water Conservation Certification" and included in the ministries' lists.

On the one hand, procurement preference, which is accorded through objective evaluation process to products with less environmental impact, has its legitimacy justification in the GPA text and principles. On the other hand, however, the practice of granting such preference solely on the basis of domestic standards is highly questionable. That is to say, providing environmental preference in procuring activities is GPA consistent; but limiting the targeted recipients only to those with domestic certificates might incur allegation of discrimination against foreign suppliers. Detailed accusation might vary from case to case, depending on the formulation of tendering documentation at issue and the domestic certificate concerned; however, the general indication is that, in most cases, foreign suppliers confront much more costs and technical difficulties to meet domestic standards and obtain domestic certificates. Moreover, domestic suppliers usually have more advantages and influence in the formulation of selection criteria underlying these certificates, as well as the decision-making process of the approval.

3.2 Option II: incorporating environmental objectives into GPA exceptions

As mentioned above, GPP policy can be achieved under the GPA through, first of all, incorporating such environmental considerations into substantive requirements of specific procurement project, i.e. technical specifications, conditions for participation and criteria for contract award. Moreover, similar policy can also be enforced with sufficient justification from Article III of the GPA. In particular, Article III sets forth a list of exceptions, which might be used by GPA Parties to justify their domestic rules pertaining to government procurement, which, on the one hand, produce trade-restrictive effect; but on the other hand, enforced with significant environmental indications.

> Article III. Exceptions to the Agreement
>
> 2. 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, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

(a) necessary to protect public morals, order, or safety;
(b) necessary to protect human, animal or plant life or health;
(c) necessary to protect intellectual property; or
(d) relating to goods or services of persons with disabilities, philanthropic institutions, or prison labor.

Distinction should be made clear between these two options, especially with regard to the different roles undertaken by the government, as well as the different means of enforcement. First of all, while the first option focuses on individual procurement project and the process of composing substantive requirements in tendering documentation, under the second option, Article III GPA targets government's regulatory measures of general applicability. Noticeable examples in the latter case refer to China's GPP policies under "Opinions on Government Procurement of Eco-labeled Products" and "Notice on Establishing the Mechanism for Mandatory Procurement of Energy-efficient Products", which impose general obligations, in the form of either preferred or compulsory purchase, upon procuring entities. Accordingly, also as the second point of distinction between the two options, government switches its role from a "purchaser" formulating its buying decisions to a "regulator" with in mind the sustainable development of the entire society. In sum, in public procurement, government and its institutions can achieve their environmental objectives either through conducting specific procuring activities or through enforcing generally applicable green policies in their domestic procurement regime. Depending on the means chosen, or the interests they represent, different GPA disciplines apply.

Indeed, the use of "exception article" is nothing new in the WTO context and the most developed practice refers to Article XX of the GATT. Owing to the parallel text language and policy aims, Article XX GATT is, to a certain extent, expected to serve as the guidance when interpreting the counterpart provisions under Article III GPA. In other words, the parallel language clearly shows that previous jurisprudence interpreting exceptions of the GATT will be equally valid for the GPA and the Appellate Body's sequence analysis of Article XX GATT might be equally transposed into the GPA context.

Indeed, the Appellate Body, in *US-Gambling*, has already appraised a similar approach of "interpretation transplant" among different WTO agreements. In that case, taking into account that Article XIV GATS sets out the general exceptions in the same manner as does Article XX GATT and that both of these provisions affirm the right of Members to pursue objectives identified therein even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements, the Appellate Body thus found previous decisions under Article XX GATT relevant for the analysis under Article XIV GATS.[68] Such "interpretation transplant" was then intensively endorsed in the classic "two-tier analysis" contemplated under Article XX GATT, particularly in the interpretation of the term "necessary" and the requirements set out in their respective chapeaux.[69]

Before proceeding the discussion on jurisprudence, it has to point out that, owing to the different nature of the agreements, application of the exception article under the GPA shall not be expected as frequent as in the GATT context. In essence, the GPA was negotiated with a rather limited coverage and thus the obligations thereunder apply only to the procuring activities of explicitly named procuring entities and of explicitly specified services and construction services, together with all goods products. Furthermore, the GPA coverage is also contingent upon various notes found in its Annexes, where the GPA Parties are free to set forth particular requirements and restrictions on its market-opening process. Therefore, the GPA parties are entitled to "legitimatize" the potentially GPA-inconsistent measures through the setting of coverage, as well as the Annexes notes mentioned above. Hence, if the procurement project concerned, or the domestic procurement legislation as such, is not covered by the GPA in the first place, there is no need for the government to justify its national measure through the exception article. As Article V GPA provides, principles of national treatment and MFN apply only to "any measure regarding *covered* procurement" (emphasis added).[70]

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[68] Appellate Body Report, *US – Gambling*, para. 291.
[69] Appellate Body Report, *US – Gambling*, paras. 292 - 327.
[70] In particular, Article V GPA 2007 provides that "with respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to

Insofar as environmental policies are concerned, the most related provision under Article III GPA refers to subparagraph (b), which exempts measures "necessary to protect human, animal or plant life or health".[71] Therefore, analysis below will focus on the WTO jurisprudence relating to the interpretation of the counterpart provisions under Article XX GATT, as well as the chapeau thereof.

3.2.1 Trade vs. Environment

To start with, the Appellate Body, in *US – Gasoline*, first clarified the function of Article XX GATT with respect to national measures taken for environmental protection, together with the WTO approach in general towards national environmental measures. According to the Appellate Body, there is no doubt about the ability of any WTO Member to take measures to control air pollution, or more generally, to protect the environment.[72] Indeed, in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment; therefore, WTO Members have a large measure of autonomy to determine their own policies on the environment, their environmental objectives and environmental legislation. The only restriction upon such autonomy is the need to respect the requirements of the GATT and the other covered agreements.[73]

In the scrutiny under Article XX GATT, the Appellate Body has followed the classic "two-tiered test" that was established in *US – Gasoline*: first, provisional justification by reason of characterization of the measure under one of the exceptions; second, further

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the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to: (a) domestic goods, services, and suppliers; and (b) goods, services, and suppliers of any other Party."

[71] Article III.2 GPA 2007 provides: "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, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:...(b) necessary to protect human, animal or plant life or health;..."

[72] Appellate Body Report, *US — Gasoline*, paras. 30 and 31.

[73] Ibid.

appraisal of the same measure under the introductory clauses of Article XX.[74] According to the Appellate Body, in order to justify the protection under Article XX GATT, the measure at issue must not only come under one or another of the particular exceptions listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX.[75]

3.2.2 Paragraph (b): "necessary to protect human, animal or plant life or health"

The Panel on *US — Gasoline*, in a finding not reviewed by the Appellate Body, presented the following test in respect of Article XX (b):

> As the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to establish the following elements:
> (1) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
> (2) that the inconsistent measures for which the exception was being invoked were necessary to fulfill the policy objective; and
> (3) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.
>
> In order to justify the application of Article XX(b), all the above elements had to be satisfied.[76]

In line with the "two-tiered test" the Appellate Body subsequently confirmed in the same dispute, the Panel indeed disentangled it into three steps under paragraph (b): first, it has to check whether the non-economic criterion falls under one of the exceptions; then, to address the necessity requirement; and finally, to test the specific standard against the safeguards provided by the chapeau.

For the "necessity test" in the second step, the Appellate Body, in *Brazil – Retreaded*

[74] Ibid, para. 22.
[75] Ibid.
[76] Panel Report, *US — Gasoline*, para. 6.20.

Tyres, set out elaborate understandings:

> We begin our analysis by recalling that, in order to determine whether a measure is "necessary" within the meaning of Article XX (b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is *necessary*, this result must be confirmed by comparing the measure with *possible alternatives*, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary. (emphasis added)[77]

The Appellate Body also helpfully annotated the term "necessary" mentioned not only in Article XX(b), but also in Articles XX(a) and XX(d) of the GATT, as well as in Article XIV(a), (b), and (c) of the GATS:

> Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to". We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[78]

With regard to "possible alternatives", the Appellate Body considered:

> It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken. As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to "show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives." We recall that, in order to qualify as an alternative, a measure

[77] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178.
[78] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 141.

> proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued". If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a *genuine alternative*. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, "*reasonably available*". As the Appellate Body indicated in *US – Gambling*, "[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties." If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not "reasonably available", taking into account the interests or values being pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary. (emphasis added)[79]

It thus becomes clear that, in the test of "possible alternatives", two elements have to be checked: the genuineness in the light of the capacity of the alternative to achieve the targeted policy aim and the reasonable availability in terms of the access to the alternative.

In sum, the "necessity test" under the exception article shall start with a process of weighing and balancing and complete by a comparative analysis of potential alternatives. Applying this test to GPP policy, several notes have to be taken. First of all, objectives pursued under national GPP policy mainly, if not exclusively, lie in the preservation of environment, which, admittedly, has been ranked as "less vital or important common interests or values" compared to protection of public moral, order, or safety; also, it is linked, but in a less straightforward way, to protection of human, animal or plant life or health. Consequently, it should not be surprising if the WTO judiciary carries out a highly strict scrutiny upon such national policies, especially in the weighing and balancing process between the importance of the value pursued and the trade-restrictive effects of the measure at issue.

[79] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

Second, it also appears rather difficult for GPP policy to survive from the comparative analysis developed in *Brazil – Retreaded Tyres*, which is in principle based on the "non-alternative" approach. In particular, it would be rather difficult for the GPA party concerned to argue that there is no alternative measure, which is reasonably available and is equally competent to achieve the objective pursued. As mentioned earlier, among other policy instruments, GPP just acts as a supplementary instrument in the national scheme of environmental protection and any "pure" environmental policy with no link to trade would qualify the "less restrictive alternative" that can reach the same policy objective.

3.2.3 Preamble interpretation

For the preamble part of the exception article, the same opening statement has been adopted in Article XX GATT and Article III GPA: “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, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures...”

The Appellate Body has developed radical interpretation on the chapeau of Article XX GATT, which becomes equally, or even more, important compared to the subsequent paragraphs on specific exceptions. In *US — Gasoline*, it held that the chapeau has been worded so to prevent the abuse of the exceptions under Article XX:

> The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather *the manner in which that measure is applied*. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of abuse of the exceptions of Article... The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably,

> with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned. (emphasis added)[80]

Subsequently, in *US — Shrimp*, the Appellate Body further described the nature and purpose of Article XX as a balance between the right of a Member to invoke an exception and the duty of that same Member to respect the treaty rights of the other Members.[81] Accordingly, the task of interpreting and applying the chapeau is essentially the delicate one of locating and marking out a line of equilibrium for such a balance, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.[82]

Besides the generic issues addressed above, the Appellate Body also elaborated its understanding respectively with regard to the term "arbitrary or unjustifiable discrimination between countries" and "disguised restriction on international trade".

For "arbitrary or unjustifiable discrimination between countries", three elements must be satisfied. First of all, the application of the measure in question must result in discrimination; second, the discrimination must be arbitrary or unjustifiable in character; third, such discrimination must occur between countries where the same conditions prevail, not only between different exporting Members, but also between exporting Members and the importing Member concerned.[83]

The Appellate Body further held that the concepts of "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade" are related concepts which "imparted meaning to one another"; hence, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to arbitrary or unjustifiable discrimination, may also be taken into account in determining the presence

[80] Appellate Body Report, *US — Gasoline*, para. 22.
[81] Appellate Body Report, *US — Shrimp*, paras. 156 and 159.
[82] Ibid.
[83] Appellate Body Report, *US — Shrimp*, para. 150.

of a disguised restriction on international trade.[84] According to the Appellate Body, "it is clear to us that 'disguised restriction' includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction', which may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX".[85]

For China's current GPP practice of preferred and compulsory procurement for domestically certified products, previous analysis has already revealed the difficulty in justifying such measures as "necessary" under paragraph (b). Furthermore, under the chapeau test, it is also highly questionable whether the manner, in which such measures are applied, can be immunized from being considered as "arbitrary or unjustifiable discrimination between countries" and "disguised restriction on international trade", particularly with regard to the exclusive recognition of domestic certificates precluding the application of other standards and labels of equivalent effect.

It is therefore concluded that, in the light of the jurisprudence pertaining to paragraph (b) and preamble of Article XX GATT, it appears rather difficult for GPA parties to invoke the exception article to justify their domestic GPP policy. In order to achieve environmental aims without unnecessary violation of their GPA obligations, the governments are thus advised, in the following discussion, to integrate their GPP policy into individual procurement projects where they enjoy sufficient discretion as a "purchaser", as opposed to the role as the "regulator" over domestic economy that would be subject to intense scrutiny from the WTO.

SECTION IV. CONCLUDING REMARKS: RESOLUTION PROPOSALS WITH REFERENCE TO THE EU REGIME

As concluding remarks, this section will set out proposals for improvements in GPP issues. For the GPA system and the current procurement regime of China, proposals will

[84] Appellate Body Report, *US — Gasoline*, para. 25.
[85] Ibid.

be made with reference to the practice and law-setting of the EU, which, from many perspectives, has established a number of plausible modules.

4.1 GPP under the WTO Agreement on Government Procurement

As discussed earlier, in domestic procurement system, GPA Parties act as both economic "regulators", as in the GATT context, and commercial "purchasers" under individual procurement projects. It has already been argued that the Member should, as a purchaser, be entitled with adequate autonomy and flexibility in their procuring activities. Insofar as the tender notice and relevant documentation, i.e. technical specifications and evaluation criteria, have been composed in line with pertaining GPA requirements, it should be up to the procuring government to decide how much it would like its purchase to be "green".

The principal GPA requirements in this regard include non-discrimination and the prohibition of unnecessary obstacles to trade. Indeed, both requirements focus solely on the way to *prescribe* and *select* the purchasing target, rather than regulating on the choice of target itself, which should have been decided by the procuring government, in accordance with its purchase needs, even before drafting the tender notice. Hence, the government can choose to purchase the most expensive but ecologic products and service; once such decision is made, it has to sets out the technical specifications, contract award criteria, as well as other elements under the tender documentation, in a GPA consistent way.

The GPA test of "unnecessary obstacles to trade", imposed on technical specifications, might require a different formula from the similar test under the GATT. Rather than following the non-alternative approach and the process of balancing and weighing, interpretation of "unnecessary obstacles to trade" under the GPA shall be preferably based on a check of general "rationality" with sufficient respect to the choice of the procuring government. Put in another way, as a purchaser, the procuring government should not be required to justify its buying decisions unless such decisions are based on reasons that go against general rationales. For example, the government does not need to explain the reason why it chose to purchase five-seat cars with emissions below a

certain level of carbon dioxide, instead of five-seat cars of all kinds.

Under others circumstances, where the government's role is pure economic "regulator", policy scrutiny of GATT-style should prevail, i.e. China's GPP policy that mandates preferred or compulsory purchase of green products. Here, the GATT-style scrutiny usually takes place in the scenario where violation of non-discrimination is confirmed and justification under the exception article becomes necessary. It is nevertheless noted that, based on the established jurisprudence on Article XX GATT, it appears to be rather difficult for the government at issue to defend its domestic GPP policy as legitimate exception under Article III of the GPA. Therefore, instead of justifying domestic GPP as GPA-consistent measure, government has more autonomy and flexibility, as well as less chance of GPA violation, if it chooses to substantiate and integrate environmental objectives into different stages of specific procurement project, i.e. by introducing green technical specifications of the goods to be procured or special criteria in contract award.

However, the current GPA system has not yet paid sufficient attention to GPP issues and improvement and clarification could be expected in the following areas: 1) extended means of proof; 2) disciplined use of eco-labels; and 3) released scrutiny over national "buying decisions".

4.1.1 Extended means of proof

To start with, domestic GPP policy usually involves complex technical specifications with different environmental objectives; it is thus desirable for the GPA to set forth adequate rules on means of proof, particularly those pertaining to the "equivalent approach" in proving the satisfaction of specifications. So far, the GPA use of this approach is limited only to situations where technical specifications are prescribed by design or descriptive characteristics, or with reference to specific trademark or trade name, patent, copyright, design, type, specific origin, producer, or supplier.[86] Arguably, more flexibility should be permitted for the suppliers in showing the satisfaction of, not only technical specifications, but also contract award criteria.

[86] Article X.3 and 4, GPA 2007.

In this regard, the EU regime presents a plausible legislation module. The general principle in defining technical specifications, as stated in the preamble of Directive 2004/18 (the Directive),[87] is that "the technical specifications drawn up by purchasers should allow public procurement to be opened up to competition. To this end, it should be possible to submit tenders, which reflect the diversity of technical solutions".[88] Specifically, Article 23 of the Directive elaborates detailed rules on the formulation of technical specifications: technical specifications shall be generally formulated either by reference to various international or national technical standards or regulations; or in terms of performance or functional requirements of the goods or service to be procured; or by a combined approach of both.[89]

Among the international or national standards of different sources, Article 23 lays down an obligatory hierarchy: preference shall be given first of all to the European instruments; and when these do not exist, reference can be made to international or national standards or comparable instruments.[90] However, such a provision does not necessary mean that contracting authorities are bound to purchase only products or services in conformity with the standards; indeed, the obligation thereunder is only to refer to these standards as a benchmark, leaving the possibility for suppliers to offer equivalent solutions. As Article 23.3 (a) provides, "each reference shall be accompanied by the words '*or equivalent*'" (emphasis added). In other words, although the tenderers must prove to the satisfaction of the procuring authority, they have sufficient discretion in deciding the means of proof. Article 23.4 further stipulates that "where a contracting authority makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the

[87] Directive 2004/17/EC and Directive 2004/18/EC constitute the major EU legislation framework in public procurement. Directive 2004/17/EC covers the procurement procedures of entities operating in the water, energy, transport and postal services sectors; and Directive 2004/18/EC covers public works contracts, public supply contracts and public service contracts. Due to the substantive similarity in GPP between the two directives, subsequent discussion will focus solely on Directive 2004/18/EC.
[88] Preamble 29, Directive 2004/18.
[89] Article X.2, GPA 2007 and Article 23.3, Directive 2004/18.
[90] Article 23.3 (a), Directive 2004/18.

tenderer proves in his tender to the satisfaction of the contracting authority, *by whatever appropriate means*, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications". (emphasis added)

With regard to contract award criteria, the option of "equivalent approach" is also available under the Directive. According to Article 24, contracting authorities may authorize tenderers to submit variants, provided the possibility of such authorization has been indicated in the contract notice. In particular, contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation; and only variants meeting the minimum requirements shall be taken into consideration.[91]

Hence, with reference to the wide application of "equivalent approach" under the EU regime, it might be desirable for the GPA to extend the use of such approach in a similar fashion, allowing diverse means of proof for the suppliers. By doing so, the GPA could guarantee a level playing field for competition without diminishing the purchase needs of procuring entity; and in the meanwhile, prevent discrimination among suppliers stemming from rigid insistence upon specific, or domestic, benchmarks and standards.

4.1.2 Disciplined use of eco-labels

The second GPP-related issue under the GPA is the needs for standardized use of eco-labels. Due to the wide use of eco-labels in domestic GPP regimes, rules in this regard, which are not currently included in the GPA, become essential.[92] Again, reference can be drawn from the relevant EU practice, which, in essence, has integrated rules in this regard into the formulation of technical specifications.

According Article 23.6 of the Directive, eco-labels could constitute part of the means of

[91]Article 24, Directive 2004/18.

[92] Article X.2 (b) GPA on the use of international standards in technical specifications is not sufficient since eco-labels, in the WTO context, are generally not considered as standards or regulations at national and international levels.

proof when technical specifications are formulated in terms of performance or functional requirements. Conditions for using an eco-label as means of proof include the following: the specifications are appropriate to define the characteristics of the object of the contract; the requirements for the label are drawn up on the basis of scientific information; the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organizations can participate; and they are accessible to all interested parties.[93] It thus becomes clear that, not all the established eco-labels can be used as a proof except those with sufficient credibility in terms of objectivity, transparency and fairness, meeting the yardsticks specified above.

Furthermore, under the EU regime, reference to eco-labels does not mean that the products or service to be procured have to bear the labels. Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the documentation; they must, however, accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognized body.[94] In other words, contracting authorities have to be cautious not to limit the means of proof only to the presentation of the eco-label certificates; they shall accept other means of proof to ensure that the specifications and the means to assess the conformity would not result in the reservation of the contract to national and local companies. Hence, the EU practice of introducing eco-labels as technical proof, setting up "quality check" of qualified eco-labels and accepting other appropriate means of proof, constitutes a plausible starting point if relevant rules would be added into the GPA.

In other circumstance where eco-label is not part of means of proof but part of technical specifications, i.e. the air-conditioning to be procured has to bear "China Environmental Labeling", the "equivalent approach" becomes even more critical since discrimination or unnecessary trade obstacles could easily arise otherwise. In that case, it is important

[93] Article 23.6, Directive 2004/18.
[94] Article 23.6, Directive 2004/18.

that the procuring entity accepts labels, standards and proof of "equivalent effect" besides the one explicitly named in the tendering documentation.

4.1.3 Rationality test over national "buying decisions"

The third GPP issue to be explored under the GPA relates to the rationality test towards government's "buying decisions". It has been argued that, with regard to the requirements arising from the principle of non-discrimination and prohibition of unnecessary trade obstacles, a general rationality check of technical specifications and award criteria would be sufficient in the GPA context. Under this test, if the requirements and conditions of tendering documentation can be reasonably warranted by general rationales, the government, as a purchaser, should not be required to justify its choice of what products to purchase and how much preference it counts towards particular features of such products.

A similar test has been established by the European Court of Justice (the ECJ) in developing conditions under which environmental requirements can be taken into consideration. In *Helsinki Bus*[95], the ECJ, on the one hand, confirmed the possibility of taking into consideration environmental award criteria and on the other hand, nevertheless set out certain conditions for the contracting authority to do so. Among others, the most important ones include first, the criteria concerned should be linked to the subject matter of the contract; and second, they should not give unrestricted freedom of choice on the contracting authority, meaning any environmental requirements must be specific and objectively quantifiable.[96]

Application of the conditions above was further elaborated in *Wienstrom*.[97] In that case, the disputed tender documentation specified, as one of the technical specifications, that bidders should supply electricity from renewable energy sources. In the meanwhile, another specification required bidders to prove that they had disposed of or would

[95] Case C-513/99, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne,* [2002] ECR I-7213.
[96] Ibid.
[97] Case C-448/01, *EVN AG and Wienstrom GmbH v Republik Österreich*, [2003] ECR I-14527.

dispose of a minimum amount of electricity per year from renewable energy sources, for other consumers, equivalent to the estimated amount under the tender. For tender evaluation, one of the contract award criteria, with a weighting of 45 per cent, was included with points to be awarded based on the amount of electricity from renewable sources, which the bidder could supply to other consumers in excess to the amount under the tender concerned.

For the situation in that case, on the one hand, the government's choice to purchase electricity generated only from renewable energy should be respected. On the other hand, the specification requiring provision from the supplier of the "same" electricity to other consumers outside the procurement project, as well as the 45 per cent weighting points granted in contract award criteria, should be caught as "irrational" under the general rationality test. In its judgment, the ECJ reached a similar conclusion: in order for the criterion to be acceptable, it should be expressly linked to the subject matter of the contract; it is, however, not acceptable to use an award criterion which is based on the total amount of electricity from renewable sources that can be provided in excess of the amount required under the contract, as this is not linked to the subject matter of the contract and would lead to unjustified discrimination against bidders who are fully able to meet the contract requirements.[98]

Arguably, the direct linkage, as required by the ECJ, between the subject matter of the contract and the contract award criteria, is in line with the general rationality test proposed in this paper. For technical specifications and conditions for participation, similar linkage can be drawn directly from the GPA text. In particular, Article VI GPA defines technical specifications as those laying down *the characteristics of the products or services to be procured* and according to Article VIII GPA, any conditions for participation in tendering procedures shall be limited to those which are *essential* to ensure the firm's capability to fulfil the contract in question. Further clarification is highly required since the same wording and terms as those used in other WTO agreements might cause confusion and mis-interpretation. Such clarification can be

[98] Ibid.

expected either from elucidation in the text of the agreement or from future jurisprudence when the WTO panel or the Appellate Body issue their understanding.

4.2 GPP under the procurement system of China

With regard to compulsory purchase in certain energy-efficient products, the GPA inconsistency thereof can be easily challenged, even under the general rationality test with lowered level of scrutiny. As mentioned earlier, compulsory purchase is achieved through requiring the obtaining of "Energy/Water Conservation Certification" as mandatory technical specification of the tender; and such practice could be alleged as "unnecessary obstacles to international trade" under Article X GPA due to the consequential excluding effect towards all the other means of proof with equivalent effect.

Similar problem of such "Chinese-only" practice also arises in the preferred procurement of eco-labeled and energy-efficient products. The procuring entity, in order to afford preference for green products, provides extra points in contract award criteria, solely, to products that have attained "China Environmental Labeling" or "Energy/Water Conservation Certification". Although purchase preference belongs to the "buying decisions" of the procuring entity that should not be overtly interfered by the party's GPA obligations, the manner in which such preference is applied is nevertheless subject to GPA scrutiny. In particular, in applying its purchasing preference, the GPA parties are obliged, under the principle of non-discrimination, to treat suppliers of any other party, as well as their products and service, in a no-less-favorable manner, compared to domestic suppliers, products and services. Therefore, limiting the preference only to domestically certified products renders foreign suppliers in a less favorable position since, for various reasons, it is usually much more expensive and technical difficult for them to attain the certificate required.

In addition to the above "as applied" claims against the formulation of technical specifications and contract award criteria, "as such" challenges towards the two legislative documents, namely, "Opinions on Government Procurement of Eco-labeled Products" and "Notice on Establishing the Mechanism for Mandatory Procurement of

Energy-efficient Products", are also conceivable. The latter has already incurred considerable contention from governments and suppliers of WTO Members, which consider the compulsory procurement policy established therein as a significant restriction on market access. Moreover, they also question the exclusive recognition of domestic certificates under both documents claiming that the same preference should be accorded to products with sufficient quality of any source; and, any rigid yardstick might risk unfavorable treatment towards foreign suppliers and should thus be supplemented with the "equivalent approach".

Based on the foregoing analysis, if China acceded to the GPA without modifying its current policy and practice in GPP, certain GPA parties would probably lodge their complaints at the WTO, in the form of either "as such" or "as applied" or combined claim. In that case, China would have no other option but attempting to justify the measures at issue as legitimate exceptions under Article III GPA. However, previous discussion also revealed that it would be rather difficult for domestic GPP to satisfy the standards and tests that have been established in the jurisprudence; and as a result, WTO judiciary would conclude the GPA inconsistency and recommend amendments.

One plausible alternative for China is to switch its environmental concerns from nation-wide policy to individual procurement project, from mandatory legal obligations to discretional "buying decisions". As discussed earlier, the GPA imposes much less restraints upon decisions of the government where it acts purely as a commercial purchaser. That is to say, under specific procurement project, the procuring government or its institution, enjoys sufficient autonomy to decide how "green" its purchase should be. Nevertheless, such autonomy has to be applied in a GPA-consistent manner; and in China, it is the use of, or the over-reliance on, certain domestic certificates as the only qualitative threshold that incurs most of the controversy. One solution is to attach the "equivalent approach" to the use of domestic certificates, according to which procuring entity should accept all means of proof with equivalent effect.

Another option for China lies in the reform of the current "as such" legal framework, preferably changing the existing mandatory obligations into policy guidance on a

voluntary basis. In this regard, the EU scheme of "Common GPP Criteria" sets up a plausible module, which is defined as a voluntary instrument meaning that individual Member States and public authorities can determine the extent of implementation.

The EU "Common GPP Criteria" scheme is consisted of "core criteria" and "comprehensive criteria". The "core criteria", which are designed for minimum additional verification effort or cost increases, are those suitable for use by any contracting authority across the Member States and address the key environmental impacts. The "comprehensive criteria" are for those who wish to purchase the best environmental products available on the market and thus may require additional verification effort or a slight increase in cost compared to other products with the same functionality. For example, the "core" set of criteria for vehicles will focus on the emissions of noise, CO2, and other pollutants, while the "comprehensive" criteria will also cover elements that can influence the consumption of fuel or other environmental impacts.

So far, the European Commission has issued two sets of GPP criteria consisting of both "core" and "comprehensive" levels. The first set of criteria developed in 2008 cover product and service groups in ten categories, which had been identified as priority groups and as the most suitable for greening using GPP.[99] In July 2010, the Commission concluded another around of criteria development and set forth GPP criteria for eight new product categories.[100] For each category, the GPP criteria first identifies the key environmental impacts of the category and the corresponding GPP approach, and then defines the core criteria and comprehensive criteria, respectively, in terms of the requirements pertaining to technique specifications, contract performance and contract

[99] The priority sectors for implementing GPP were selected through a multi-criteria analysis including: scope for environmental improvement; public expenditure; potential impact on suppliers; potential for setting an example to private or corporate consumers; political sensitivity; existence of relevant and easy-to-use criteria; market availability and economic efficiency. The covered categories include the followings: Copying and graphic paper; Cleaning products and services; Office IT equipment; Construction; Transport; Furniture; Electricity; Food and Catering services; Textiles; Gardening products and services.

[100] The covered categories include the followings: Windows, Glazed Doors and Skylights; Thermal insulation; Hard floor-coverings; Wall Panels; Combine Heat and Power; Road construction and traffic signs; Street lighting and traffic signals; Mobile phones.

award criteria, where appropriate.

Furthermore, it is also important for China to introduce a creditable, participatory and transparent process of decision-making in criterion development. As the EU experience demonstrates, when developing "Common GPP Criteria", the system not only provides stakeholders with the possibility to comment on the documents and the draft GPP criteria at several stages of the process; it also involves the participation of a GPP Advisory Group composed of one representative per Member State as well as five representatives of other stakeholders, i.e. civil society, industry, small-medium enterprises, public procurement and local authority.

In conclusion, the studies in this paper have shown that, for GPP policy to be enforced in a GPA-consistent manner, domestic procurement regime, like the one in China, shall preferably run a "two-lane" approach in parallel.

From a generic perspective, the first lane is to introduce operational guidance promoting green procurement rather than imposing mandatory purchasing obligations upon public entities. This approach will, first of all, effectively avoid claims for GPA violation at the WTO dispute settlement, which is only concerned with national measures of mandatory nature. Furthermore, compared with the current regime in China mandating the bearing of specific Chinese certificates, a guidance system is also able to effectively reduce the participation costs of potential suppliers.

The second lane highlights individual procurement projects, where the government or its institutions can achieve their environmental aims through the composition of green "buying decisions" in technical specifications, conditions for participation and contract award criteria. Owing to the fact that the public organ is acting solely as a commercial purchaser, the GPA intervention in this regard should be kept marginal, limited within the general scrutiny of rationality.