

International Trade Agreements: Friends or Foes of Circular Economy?

Circular Procurement Summit 2021

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Roadmap

1. Key international agreements regulating procurement
2. Policy space for the integration of circular economy requirements into procurement
3. Barriers to the integration of circular economy requirements into procurement provisions of international trade agreements
4. How future international trade agreements can better support the integration of circular economy requirements into procurement

Key International Agreements

- WTO Agreements
 - Revised Agreement on Government Procurement (GPA)
 - General Agreement on Tariffs and Trade 1994 (GATT 1994)
 - General Agreement on Trade in Services (GATS)
 - Agreement on Technical Barriers to Trade (TBT Agreement)
 - Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)
- Free Trade Agreements (FTAs)

Existing International Trade Agreements: Space for Circular Economy Procurement Criteria?

- Considerable space provided by recognition of the importance of environmental issues generally and explicit references to the environment in obligations and exceptions
 - GPA [Key Agreement]
 - Preamble (“Recognizing that the procedural commitments under this Agreement should be **sufficiently flexible** to accommodate the specific circumstances of each Party”);
 - Article III (General and security exceptions, incl. environmental exception modelled on GATT Articles XX and XXI);
 - Article X (permitting technical specifications to promote environment and evaluation of environmental characteristics of tender)
 - GPA approach replicated in FTAs
 - WTO Preamble (“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”)
 - GATT 1994 environmental exceptions (Article XX(b) and (g)); GATS (Article XIV(b)); TBT (procurement carveout and environment as a “legitimate objective”) and SPS (elaborates on XX(b))

Revised Government Procurement Agreement

Article X Technical Specifications and Tender Documentation: Technical Specifications

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.
2. In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate:
 - (a) set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics; and
 - (b) base the technical specification on international standards, where such exist; otherwise, on national technical regulations, recognized national standards or building codes ...
6. For greater certainty, a Party, including its procuring entities, **may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment**

Revised Government Procurement Agreement (continued)

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

Article XV Treatment of Tenders and Awarding of Contracts: Awarding of Contracts

- Allowing procurement agencies to award tenders based on the “**most advantageous tender**,” rather than the lowest price, allows for greater flexibility to reward tenders that prioritize circular economy.

Canada-EU Trade Agreement (CETA)

CETA, Article 19.9: Technical specifications and tender documentation:

Technical Specifications

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. ...

6. For greater certainty, a Party, including its procuring entities, **may prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment, provided that it does so in accordance with this Article.**

- EU-Canada Joint Interpretative Statement (prior to signature) of CETA (affirming the Parties' right "to use environmental ... criteria ... in procurement tenders")

Comprehensive and Progressive Agreement for Trans-Pacific Partnership, US-Canada-Mexico Agreement

CPTPP, Article 15.12: Technical Specifications

1. A procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or effect of creating an unnecessary obstacle to trade between the Parties.
2. In prescribing the technical specifications for the good or service being procured, a procuring entity shall, if appropriate: ...
6. For greater certainty, **this Article is not intended to preclude a procuring entity from preparing, adopting or applying technical specifications to promote the conservation of natural resources or the protection of the environment**

USMCA, Article 13.11 (same)

Comprehensive and Progressive Agreement for Trans-Pacific Partnership, US-Canada-Mexico Agreement (continued)

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),
Article 15.3: Exceptions

1. Subject to the requirement that the measure is 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 between the Parties, nothing in this Chapter shall be construed to prevent a Party, including its procuring entities, from adopting or maintaining a measure:

(a) necessary to protect public morals, order or safety;

(b) necessary to protect human, animal or plant life or health; ...

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

Policy space for the integration of circular economy requirements into procurement?

- In a word, **yes**.
- The world has changed:
 - WTO logjam
 - Climate crisis
 - Supply chain disruptions
- Sustainability as a broad concept gaining favor
- Less likely to lead to retaliation
- Links to competitiveness and supply chain resilience

Existing International Trade Agreements: Barriers to Circular Economy Criteria?

- WTO GPA
 - The GPA includes schedules that detail the scope of the GPA for each Party (e.g. covered procuring entities (central and sub-central), goods, services, and construction services)
 - Procurement processes and practices must be transparent, subject to due process, and not discriminate against foreign goods and services
 - Discrimination based on the origin of products, services or suppliers is prohibited
 - Local-content requirements to promote circular economy may violate the GPA
 - But environmental exception available
- GATT 1994, TBT and SPS Agreements, GATS
 - Distinguishing among products based on circular economy criteria could be found to violate general non-discrimination disciplines (**note:** GPA appears to be less strict)
 - Circular economy procurement policies could be challenged as prohibited quantitative restrictions (GATT Article XI)
 - But environmental exceptions available

Opportunities to Leverage FTAs to Advance Circular Economy

- Note: multilateral and plurilateral discussions will likely take years
- Include provisions to explicitly permit governments to take circular economy requirements into account in setting specifications evaluating tenders
- Include provisions providing for reference to relevant international standards (and develop them!)
- Include provisions that carve out certain procurement-related local content requirements designed to support and promote circular economy
- Include explicit environmental exceptions that apply to procurement chapters

Opportunities to Leverage FTAs to Advance Circular Economy

- Rely on new and existing provisions of trade and other agreements that focus on competitiveness and/or supply chain resilience
- Include provisions that provide a framework for cooperation on circular economy issues, e.g.,
 - Agreements on mutual recognition of relevant domestic laws and international standards
 - Collaborate on providing technical training to the private sector on FTA procurement obligations in relation to circular economy issues
 - Agreements to leverage trade tools in order to meet UN SDGs