

# Government Procurement Regulation in the WTO

**Semester:** Fall semester- 2023

**ECTS:** 2

**Lecturer:** Dr. Rika Koch

**Dates:** Four Thursdays in October and November (19.10, 2.11, 16.11, 30.11), 9.15 – 11.45 hrs

**Room:** Silva Casa Auditorium, World Trade Institute, Hallerstrasse 6, 3012 Bern.

**Audience:**

- Master of Advanced Studies of International Law and Economics (MILE) Students – Compulsory
- Joint LL.M. / Diploma of Advanced Studies Trade and Investment Law (TRAIL+) Students - World Trade Institute / Faculty of Law, Unibe - Compulsory
- Master Level students, University of Bern - Elective
- Certificate of Advanced Studies / Diploma of Advanced Studies in International Law and Economics (CAS ILE & DAS ILE) Students - World Trade Institute, Unibe – Elective

## Course Overview

### International Government Procurement Law

Class	Date	Day	Time	Hours	Lecturer	Topic
1	19.10	Thursday	9.15 – 11.45	2.5	Rika Koch	Introduction to international government procurement regulation in the WTO
2	2.11	Thursday	9.15 – 11.45	2.5	Rika Koch	Government procurement principles, Sustainable Government Procurement (pt. I)
3	16.11	Thursday	9.15 – 11.45	2.5	Rika Koch	Sustainable Government Procurement (pt. II)
4	30.11	Thursday	9.15 – 11.45	2.5	Rika Koch and guest lecturers	Developments and contemporary issues in government procurement in the WTO

## Course Description

This course provides an introduction to the international law governing government procurement (also referred to as “public procurement”). Students will gain an in-depth understanding of what government procurement is and how it is regulated within the World Trade Organisation (WTO) through the Government Procurement Agreement (GPA). The course will focus on contemporary issues that surround international government procurement, e.g. the strategic use of government procurement to advance sustainability goals. Finally, students will familiarize themselves with current developments in government procurement within the WTO, on a national level and through Free Trade Agreements (FTA).

## Learning Outcomes

At the end of the course, students will know what government procurement is and why it is a relevant topic in international trade. They will gain an understanding of what plurilateral regulation entails, what the main government principles and rules are according to the WTO’s GPA. They will also learn how these principles can be reconciled with other policy objectives in government procurement. Of particular emphasis will be the objectives of environmental and social sustainability. Finally, students will be able to assess government procurement disputes and to develop arguments as a complaining or a responding party before the WTO adjudicatory bodies.

## Lecturer

### Rika Koch

Rika Koch is an assistant professor and co-leader of the public procurement research group at the Bernese University of Applied Science (BFH). In addition, she is a lecturer in WTO Law and a guest lecturer on Swiss foreign economic law at the Universities of Zurich and Bern. Before her current role, she served as a legal counsel in the Swiss Federal Administration, where she advised on a number of legal issues, especially public procurement projects.

She studied political science at the University of Zurich, Law at the University of Bern and did her PHD on green government procurement at the University of Zurich with a research stay at the University of Nottingham (UK), funded by the Swiss National Foundation SNF.

In her research she focuses on public procurement law at the intersection of environmental and social law, but also on questions surrounding public procurement law and digitalization, such as data protection and artificial intelligence (AI).

## SESSION 1: 19<sup>TH</sup> OF OCTOBER 2023

### Subject

Introduction to international government procurement regulation in the WTO

### Topics

1. What is government procurement and why does it matter?
2. Government procurement exception in multilateral WTO law (Article III:8 of the GATT).
3. Plurilateral government procurement regulation through the GPA?
4. How does the GPA work, what are its main principles?
5. Why is corruption and collusion an issue in government procurement?

### Compulsory Reading Material

- 1.1 Arrowsmith, Sue and Anderson Robert (2011), "The WTO regime on government procurement: past, present and future" In *The WTO Regime on Government Procurement - Challenge and Reform* edited by Sue Arrowsmith and Robert D. Anderson (Cambridge University Press), Chapter 1, pp. 3 – 58, thereof: pp. 3 – 33.
- 1.2 Matsushita, Mitsuo (2006), "Major WTO Dispute Cases Concerning Government Procurement", *Asian Journal of WTO and International Health Law and Policy*, 1(2), pp. 299 – 316, thereof 299 – 309.
- 1.3 Lang, Elisabeth and Steiner Marc (2017/2018), "Public Procurement Regulation: Fostering Market Access and Simultaneously Preventing Corruption – A Swiss Perspective", *British Journal of White Collar Crime*, pp. 14 – 59, thereof: pp. 15 – 29.

### Optional Reading Material

- Ohashi, Hiroshi (2009), "Effects of Transparency in Procurement Practices on Government Expenditure: A Case Study of Municipal Public Works", *Review of Industrial Organization* 34(3), pp. 267 – 285.
- Davies, Arwel (2015), "The GATT Article III:8(a) Procurement Derogation and Canada – Renewable Energy", *Journal of International Economic Law* 18, pp. 543 – 554.
- Reich, Arie (2009), "The New Text of the Agreement of the Agreement on Government Procurement: An Analysis and Assessment", *Bar-Ilan University Public Law and Legal Theory Working Paper No. 03-09*, pp. 1 – 39.

## SESSION 2: 2ND NOVEMBER 2023

### Subject

Sustainable Government Procurement pt. I: The strategic use of government procurement to foster environmental policy goals

### Topics

1. Government Procurement Principles pt. II
2. Strategic procurement: How can governments use procurement as a strategic policy tool to foster environmental goals?
3. How can “green government procurement” be reconciled with the GPA?
  - Technical Specifications
  - Award Criteria
  - Process and Production Methods (PPM)
  - Justification Reasons
4. Cases

### Compulsory Reading Material

- 2.1 Tosoni, Luca (2013), “The Impact of the Revised WTO Government Procurement Agreement on the EU Procurement Rules from a Sustainability Perspective”, *European Procurement & Public Private Partnership Law Review*, 8(1), pp. 41 – 48.
- 2.2 Davies Arwel (2011), “The national treatment and exceptions provisions of the Agreement on Government Procurement and the pursuit of horizontal policies” In *The WTO Regime on Government Procurement - Challenge and Reform* edited by Sue Arrowsmith and Robert D. Anderson (Cambridge University Press), Chapter 14, pp. 429 – 443.

### Optional Reading Material

- Koch, Rika (2020), *Green Public Procurement under WTO Law*, Springer, Chapters 6.4 – 6.9 .
- Casier, Liesbeth (2019), “Canada’s International Trade Obligations: Barrier or opportunity for sustainable public procurement?”, IISD report, pp. 1 – 37.
- Steiner, Marc and Klingler, Désirée (2023), “The Revised Swiss Public Procurement Law: More Quality and Sustainability”, *European Procurement & Public Private Partnership Law Review* EPPPL 18(1): pp. 1 – 7.
- Steiner, Marc (2015), “The WTO Government Procurement Agreement: Assessing the scope for green procurement”, *Biores* 9(10), 21 – 24.

## SESSION 3: 16TH NOVEMBER 2023

### Subject

Sustainable Government Procurement pt. II: The strategic use of government procurement to foster labour standards and other sustainability goals

### Topics

1. Why are labor standards and other social concerns relevant in government procurement?
2. Does the GPA leave room for social concerns and if so, which ones?
  - labor standards
  - gender-equality
  - support for minority groups and Small and Medium Enterprises (SME)
3. National examples of green and social government procurement: How do GPA-states implement sustainability in their government procurement laws and practices?
4. Cases

### Compulsory Reading Material

- 3.1 (4.2) Semple, Abby (2017), “Socially Responsible Public Procurement Under EU Law and International Agreements: The GPA, CETA and the EU-Ukraine Deep and Comprehensive Free Trade Area”, *European Public Procurement and Public Private Partnership Law Review* (3), 1 – 22, thereof: pp. 1 – 4 and pp. 11 – 17.
- 3.2 Linarelli, John (2011), “The limited case for permitting SME procurement preferences in the Agreement on Government Procurement”, In *The WTO Regime on Government Procurement - Challenge and Reform* edited by Sue Arrowsmith and Robert D. Anderson (Cambridge University Press), Chapter 15, pp. 444 – 458.

### Optional Reading

- Casier, Liesbeth (2019), “Canada’s International Trade Obligations: Barrier or opportunity for sustainable public procurement?”, IISD report, pp. 1 – 37.
- Corvaglia, Maria Anna, “Public Procurement and Private Standards: Ensuring Sustainability under the WTO Agreement on Government Procurement”, *Journal of International Economic Law*, Volume 19, Issue 3, pp. 607 – 627.
- European Institute for Gender Equality EIGE (2022), *Gender-responsive public procurement in the EU*, Luxembourg: Publications Office of the EU, [https://eige.europa.eu/gender-mainstreaming/toolkits/grpp?language\\_content\\_entity=en](https://eige.europa.eu/gender-mainstreaming/toolkits/grpp?language_content_entity=en)

## SESSION 4: 30TH NOVEMBER 2023

### Subject

Outlook: Developments in international government procurement law and policies in the WTO and beyond

### Guest Lecturers:

- Judge Marc Steiner (Federal Administrative Court)
- Reto Malacrida (WTO)

### Topics

1. Procurement in times of Covid-19: How resistant to crisis was (and is) international government procurement?
2. Current developments in the GPA:
  - Accession: What are the main obstacles preventing other (developing) member states from the WTO from joining the GPA?
  - “WTO+”: Government procurement chapters in Free Trade Agreements (FTA)
3. Impact of the GPA on its signatory states: The case of Switzerland

### Compulsory Reading Material

- 4.1 Arrowsmith, Sue (2021), “Recommendations for urgent procurement in the EU Directives and GPA: COVID-19 and beyond”, In *Public Procurement Regulation in (a) Crisis? Global lessons from the Covid-19 pandemic* edited by Sue Arrowsmith, Luke Butler, Annamaria La Chimia and Christopher Yukins (Hart Publishing), pp. 1 – 34, thereof: pp. 27 – 34.
- 4.2 (3.1) Semple, Abby (2017), “Socially Responsible Public Procurement Under EU Law and International Agreements: The GPA, CETA and the EU-Ukraine Deep and Comprehensive Free Trade Area”, *European Public Procurement and Public Private Partnership Law Review*, Volume 3, pp. 1 – 22, thereof pp. 17 – 22.

### Optional Reading Material

- Woolcock, Steve (2013), “Policy Diffusion in Public Procurement: The Role of Free Trade Agreements”, *International Negotiations* 18, pp.153 – 173.
- Yun, Mikyung (2023), Government Procurement Defence Under GATT 1994 Article III:8(a): A Critical Review of the Turkey-Pharmaceutical Products Dispute, *Journal of World Trade* 57(1), pp. 183 – 208.

## Exams and Grades

- **Short written submission:** The examination for this course will consist of a short written submission (approx. 3 pages), where students are required to **analyse a public procurement dispute for its consistency with WTO law**, arguing from either the complainant's or the respondent's perspective. The dispute will be allocated to the students by the lecturer.

## Readings

All readings are available in the following link: