

GREEN INDUSTRY, PROCUREMENT, AND TRADE: REFINING INTERNATIONAL TRADE'S RELATIONSHIP WITH GREEN POLICY

GARRETT DONNELLY*

Green industrial policy, an aspirational headline with the 2019 Green New Deal Resolution, has continued to gain steam and take shape. Green industry was a core focus of presidential platforms during the 2020 election. Federal agencies have demonstrated an increased willingness to revamp their purchasing power—that is, their procurement policy—to buy green products and stimulate emerging green industrial sectors. In general, these policy shifts toward green industry typically tout three primary goals: to develop the domestic manufacturing base and to strengthen both environmental and labor protections. For instance, in November 2021, as part of the larger Infrastructure Investment and Jobs Act, Congress took aim at the failure of supply chains to meet adequate environmental and labor standards by enacting a domestic content preference-scheme for infrastructure programs receiving federal financial assistance. The nationalist orientation of this kind of policy, however, often runs afoul of the nondiscrimination spirit of World Trade Organization disciplines.

This Note evaluates how trade disciplines can enable a green-industrial strategy in government procurement while abiding by WTO disciplines, offering a few options. While countries continue to aggressively deploy green industrial policies to attain environmental benefits, these strategies must be carefully structured to avoid co-optation by populist, protectionist goals. As such, this Note considers the implications that arise when this form of green industrial procurement supports the advancement of global welfare—and when it does not. In particular, this Note explores how refining the traditional relationship between international trade rules and green-industrial initiatives can produce mutually beneficial results. On the one hand, trade rules can be interpreted to permit environmental and labor-conscious decisionmaking while protecting against protectionist discrimination. On the other, this Note proposes that procurement decisionmaking should incorporate supply-chain disclosure or cost-accounting of environmental and labor impact, which, when justified under the existing public morals discipline in WTO trade agreements, forms a method of government engagement that can enable a more robust international trade regime.

* Copyright © 2023 by Garrett Donnelly. J.D., 2022, New York University School of Law; B.A., 2018, Columbia University. I am incredibly grateful to Professor Robert Howse for his guidance throughout the development of this Note, as well as for his course on International Trade Law which sparked my interest in this area. Thank you as well to Professor Richard Revesz for his thoughtful and valuable feedback. Many thanks to my friends and family for listening to me talk about procurement and for their ever-present support. Finally, thank you to the fabulous editors of the *New York University Law Review* for their excellent and thorough work in developing this piece.

INTRODUCTION 283

I. WHY PROCUREMENT? GREEN INDUSTRIAL POLICY AND BUYING AMERICAN 291

 A. *Buying Green Industry* 292

 B. *Building Green America* 295

II. THE WTO PROCUREMENT FRAMEWORK 300

 A. *Shifting the Focus of the National Treatment Principle* 302

 B. *Justified Derogation: Exceptions* 303

 C. *Technical Specifications Inclusive of Environmental Concerns* 307

 D. *What Procurement is Covered?* 308

 1. *The Scope of the GATT’s Procurement Derogation* 309

 2. *Agency Schedules* 311

 E. *Process for Coverage Modification & Entitlement to Retaliation* 312

III. REFINING THE GREEN-TRADE PROCUREMENT STRATEGY 317

 A. *The Administrative Gerrymander: Siloing Green Procurement* 318

 B. *The Traditional Approach: The Exceptions Balancing Test* 321

 C. *The Agency Tailor: Curating Implementation* 325

CONCLUSION 329

INTRODUCTION

As the global climate continues to deteriorate, nations turn to green industrial policy for a solution.¹ The volume of tools deployed to develop green industry continues to swell. In the United States, this includes grant funding for “green-collar” workers and significant subsidies targeting emerging green technology sectors.² China provides

¹ See, e.g., Jason Bordoff, *The Time for a Green Industrial Policy Is Now*, FOREIGN POL’Y (Mar. 15, 2021, 9:08 AM), <https://foreignpolicy.com/2021/03/15/biden-climate-energy-transition-green-new-deal-industrial-policy> [<https://perma.cc/G92F-XCT4>] (describing green industrial policy initiatives in the United States, United Kingdom, Germany, and China); see also Mark Wu & James Salzman, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy*, 108 NW. L. REV. 401, 417 (2014) (noting that industrial policy has recently taken on a “green” tinge).

² Dani Rodrik, *Green Industrial Policy*, 30 OXFORD REV. ECON. POL’Y 469, 474 tbl.1 (2014) (listing grants to support training for green collar workers and funding for research and development in green technologies as among the United States’ key green industrial policy tools); Wu & Salzman, *supra* note 1, at 419.

concessional lending for renewable energy projects³ and claims title to the world's largest solar energy capacity.⁴ Others have coupled subsidies to green industry with local content requirements for manufacturing inputs—for example, India once made subsidies to solar power manufacturers contingent on their use of domestically produced components—to enable domestic component producers to compete with foreign suppliers.⁵ The list seems endless, and some have even dubbed this mad dash to develop domestic capacity in green industry as the “green race.”⁶

In the United States, while earlier rumblings of green industrial policy around the Green New Deal engendered scorn from some conservative U.S. congressmembers,⁷ consensus has continued to grow around the value of green industrial policy on both sides of the aisle.⁸ As part of this gradual crescendo, in November 2021, Congress passed the Infrastructure Investment and Jobs Act. The Act requires infrastructure projects receiving federal financial assistance to prioritize procurement of goods that are produced, and whose components primarily originate, in the United States.⁹ In doing so, the Act aims to “reinvest tax dollars in companies and processes using the highest labor and environmental standards in the world,”¹⁰ an objective in line with President Biden’s campaign promise to orient procurement to stimulate domestic, green industry.¹¹ Similarly, some federal agencies have committed to implement these green industrial goals in their government procurement practices.¹² This happens, in particular,

³ Rodrik, *supra* note 2, at 477 tbl.3.

⁴ *Top Five Countries with the Largest Installed Solar Power Capacity*, NS ENERGY (July 13, 2021), <https://www.nsenergybusiness.com/features/solar-power-countries-installed-capacity> [<https://perma.cc/SWL6-5UEY>].

⁵ Wu & Salzman, *supra* note 1, at 424–25.

⁶ Rodrik, *supra* note 2, at 473 (quoting Sam Fankhauser, Alex Bowen, Raphael Calel, Antoine Dechezleprêtre, David Grover, James Rydge & Misato Sato, *Who Will Win the Green Race? In Search of Environmental Competitiveness and Innovation*, 23 GLOB. ENV'T CHANGE 902 (2013)).

⁷ See Barrasso on Green New Deal: We Need Solutions, Not Socialism, U.S. S. COMM. ON ENV'T & PUB. WORKS (Feb. 12, 2019), <https://www.epw.senate.gov/public/index.cfm/2019/2/barrasso-on-green-new-deal-we-need-solutions-not-socialism> [<https://perma.cc/ND7N-BGW8>] (“There’s another victim of the Green New Deal, it’s ice cream. . . . [C]heeseburgers and milkshakes will become a thing of the past.”).

⁸ See Bordoff, *supra* note 1 (noting, as an example, Senator Marco Rubio’s change of heart).

⁹ Build America, Buy America Act, Pub. L. No. 117-58, §§ 70901–27 (2021). The Act is contained in Title IX of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (2021).

¹⁰ Build America, Buy America Act § 70911(7).

¹¹ See *infra* note 70 and accompanying text.

¹² See *infra* note 72 and accompanying text.

when the federal government buys green products, such as by replacing gas-powered government vehicles with an all-electric fleet.¹³

What, though, does domestic procurement have to do with international trade? The United States is a member of the World Trade Organization (WTO), an international body of 164 members that functions as a platform to develop and negotiate international trade agreements.¹⁴ In various forms, these agreements have as a central feature a nondiscrimination principle: WTO members will not discriminate against one another in trade.¹⁵ The strength and value of these agreements rests on a principle of reciprocity. For example, parties to the General Agreement on Tariffs and Trade (GATT),¹⁶ the oldest agreement with the largest scope, agree to open their domestic markets to foreign goods in exchange for reciprocal access to export their own goods to international markets. The economic propriety of this arrangement derives from the idea of comparative advantage—that some countries can produce particular goods more efficiently than others and correspondingly can sell them for less. On balance, then, trade can reduce costs to consumers by importing cheaper goods; this reduction in costs increases wealth retention potential for consumers in trading countries.

The WTO houses about thirty trade agreements, each varying in scope and membership.¹⁷ These agreements restrain potential trade discrimination in various forms, from subsidies,¹⁸ to technical regulations and standards,¹⁹ to—the focus of this Note—government procurement. In large part, WTO members subscribe to all WTO

¹³ See JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION 8 (1993); Rodrik, *supra* note 2, at 474 tbl.1 (listing the purchase of energy-efficient vehicles as an example of green government procurement policies).

¹⁴ See WORLD TRADE ORG., WTO IN BRIEF 10 (2021), https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.pdf [<https://perma.cc/4P9E-3L3S>]. The WTO membership accounts for ninety-eight percent of world trade, and twenty-five countries are negotiating membership. *Id.*

¹⁵ See WORLD TRADE ORG., *supra* note 14, at 6 (“Through these agreements, WTO members operate a non-discriminatory trading system that spells out their rights and their obligations.”).

¹⁶ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

¹⁷ WORLD TRADE ORG., *supra* note 14, at 6.

¹⁸ *E.g.*, *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), WORLD TRADE ORG., https://www.wto.org/english/tratop_e/scm_e/subs_e.htm [<https://perma.cc/S633-ESD2>].

¹⁹ *E.g.*, *Technical Barriers to Trade*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm [<https://perma.cc/82BJ-BADY>].

agreements.²⁰ However, the Agreement on Government Procurement (GPA)²¹ is one of four “plurilateral” agreements at the WTO, i.e., agreements with only a subset of WTO members as signatories: Only 48 of the WTO’s 164 members are signatories to the GPA.²² Each party to the GPA commits to a policy of non-discrimination among potential suppliers to their governments based on the supplier’s foreign identity or affiliation. That is, a party cannot simply choose to procure domestic over foreign goods, at least among parties to the agreement.²³ For context, global government procurement constitutes around a four-trillion-dollar market for international trade.²⁴

When disagreements arise, the WTO relies on an internal arbitration system to adjudicate whether a party has violated an agreement.²⁵ An ad-hoc panel is called to evaluate the claim, and once it has issued its decision, a party may take an appeal to the Appellate Body (AB), a standing body of seven members who serve four-year terms.²⁶ As with

²⁰ *Plurilaterals: Of Minority Interest*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm [https://perma.cc/99CK-MUZJ].

²¹ WORLD TRADE ORG., AGREEMENT ON GOVERNMENT PROCUREMENT 2012 AND RELATED WTO LEGAL TEXTS (2012), https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf [https://perma.cc/H6HE-8JS6] [hereinafter 2012 GPA]. Prior to the revised GPA, commentators might refer to the Agreement on Government Procurement by the acronym “AGP.” See, e.g., TODD B. TATELMAN, CONG. RSCH. SERV., RL32211, INTERNATIONAL GOVERNMENT-PROCUREMENT OBLIGATIONS OF THE UNITED STATES: AN OVERVIEW 1 (2005), <https://sgp.fas.org/crs/misc/RL32211.pdf> [https://perma.cc/9VBX-A474]. Today, common usage is “GPA,” as evidenced by the revised GPA’s own denomination. See, e.g., 2012 GPA, *supra*, at 7.

²² See *Plurilaterals: Of Minority Interest*, *supra* note 20; *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [https://perma.cc/M8TD-93DW]. The GPA has twenty-one parties comprising forty-eight WTO members, with thirty-five WTO members participating in the GPA Committee as observers, eleven of which are currently in the process of acceding to the agreement. *Agreement on Government Procurement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm [https://perma.cc/8RTK-BDJ4].

²³ See *infra* Section II.A.

²⁴ U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-414, INTERNATIONAL TRADE: FOREIGN SOURCING IN GOVERNMENT PROCUREMENT 36 (2019) [hereinafter GAO, 2019 FOREIGN PROCUREMENT REPORT]. For an accounting of U.S. government procurement statistics reported to the WTO, see *U.S. Government Procurement Statistics*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/government-procurement/us-government-procurement-statistics> [https://perma.cc/J6AH-7USC].

²⁵ The arbitration system is governed by a set of rules referred to as the “Dispute Settlement Understanding” and is administered by the Dispute Settlement Body. See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Dispute Settlement Understanding].

²⁶ *Appellate Body*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm [https://perma.cc/2PV7-YQGY]. Currently, there are no members of the AB—the term of the last sitting member expired on November 30, 2020—and the AB has not been able to hear new appeals since December 2019 as the United States has continued, across administrations, to block the appointment of new members.

domestic U.S. litigation, these disputes form the basis for settlement talks between the parties. However, if a party is found to have violated an agreement, it must either withdraw the derogating policy or the aggrieved party may institute reciprocal countermeasures to offset the harm of the discrimination.²⁷

For the past seventy years, the trade regime has proven a remarkable success. At its core, this system has helped to assure stability in international trade.²⁸ Strengthening free trade has entangled international economies as to reduce the risk of military conflict and thus deter war.²⁹ Developing and least-developed countries have leveraged partnerships with developed nations to enable sustained, long-term growth.³⁰ However, the trade regime does not have a spotless record. While one might expect that the trade system should cultivate a framework commensurate with those labor protections long considered fundamental,³¹ and environmental protections that may only just

See id.; *Appellate Body Block Hits Five Years, but WTO Members Optimistic on Reform*, INSIDE U.S. TRADE (Aug. 29, 2022, 5:07 PM), <https://insidetradetrade.com/daily-news/appellate-body-block-hits-five-years-wto-members-optimistic-reform> [<https://perma.cc/LMT9-2G8J>]. While 126 of the WTO's 160 members support recommencing AB member selection, the United States has insisted instead on "working to achieve durable, lasting reform." *See Türkiye States Intention to Implement Findings in Pharmaceuticals Dispute with EU*, WORLD TRADE ORG. (Aug. 29, 2022), https://www.wto.org/english/news_e/news22_e/dsb_29aug22_e.htm [<https://perma.cc/53KC-WY7R>].

²⁷ *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [<https://perma.cc/DZ35-9B3L>].

²⁸ *See* WORLD TRADE ORG., *supra* note 14, at 2 (noting the stability and assurances global trade provides for consumers, producers, and exporters).

²⁹ *See id.* at 2–3 ("Trade frictions are channeled into the WTO's dispute settlement process That way, the risk of disputes spilling over into political or military conflict is reduced.")

³⁰ *See id.* at 8 (describing the special provisions in WTO agreements intended to aid developing economies to build trade capacity). For the distinction between "developing" and "least-developed" countries, see *Who are the Developing Countries in the WTO?*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm [<https://perma.cc/BE45-4HEQ>] (last visited Aug. 27, 2022, 12:24 PM) (noting that members self-declare developing country status).

³¹ What "basic labor standards" encompass may vary, but scholars sometimes refer to the International Labor Organization's framework as the baseline. *See, e.g.*, Christian Barry & Sanjay G. Reddy, *International Trade and Labor Standards: A Proposal for Linkage*, 39 CORNELL INT'L L.J. 545, 548 & n.8 (2006) (citing *Declaration on Fundamental Principles and Rights at Work*, INT'L LAB. ORG., <https://www.ilo.org/declaration/lang-en/index.htm> [<https://perma.cc/3BB2-LE6S>]); CHRISTIAN BARRY & SANJAY G. REDDY, *INTERNATIONAL TRADE AND LABOR STANDARDS: A PROPOSAL FOR LINKAGE 4* (2008) (defining "basic labor standards" as those which are "minimally adequate," as concretized by the ILO). These standards include freedom of association and the right to collective bargaining, the elimination of forced labor, the effective elimination of child labor, elimination of employment discrimination, and a safe and healthy working environment. *Declaration on Fundamental Principles and Rights at Work*, INT'L LAB. ORG., <https://www.ilo.org/declaration/lang-en/index.htm> [<https://perma.cc/3BB2-LE6S>].

stave off disaster,³² agreements at the WTO have often served to cut down legislation aimed at developing stronger labor and environmental protections.

This conflict between WTO agreements and the development of higher labor and environmental standards stems from the WTO's general prohibition against arbitrary protectionism: This principle, codified in the various nondiscrimination provisions, has animated the modern international trade system since its conception. While the nineteenth century saw the growth of trade liberalization policy and thought, the trade disruptions caused by the First World War led the United States, in particular, to enact restrictive trade policies that altogether caused a spiraling devaluation of currencies concurrent with the Great Depression.³³ Following the Second World War, political leaders looked to establish a cooperative trade system premised on liberalized trade to avoid the consequences of these protectionist restrictions, culminating in the GATT in 1947.³⁴ During the ensuing post-war decades, however, developing economies seeking to build domestic industry relied on state intervention to help craft infrastructure: States established market institutions, deployed subsidies to stimulate underperforming sectors, and created public enterprises, to name a few.³⁵ These techniques—state intervention to foster development of domestic industry—encompass what is called “industrial policy.”³⁶

In the 1980s, a school of neoliberal thought sometimes referred to as the “Washington Consensus”³⁷ came to see industrial policy as at odds with liberalized trade, and this economic perspective has come to

³² See generally Brad Plumer & Raymond Zhong, *Climate Change Is Harming the Planet Faster Than We Can Adapt*, *U.N. Warns*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/28/climate/climate-change-ipcc-report.html> [<https://perma.cc/6T68-7WLN>] (noting that the risks of climate change could soon overwhelm our ability to adapt if emissions are not quickly reduced); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY (2022), https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_FinalDraft_FullReport.pdf [<https://perma.cc/KL5B-LMDD>] (detailing the economic, environmental, and health risks of continued climate change).

³³ BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 25–26 (3d ed. 2009).

³⁴ See *id.* at 26–27 (noting the “beggar-thy-neighbour” policies of the 1930s inspired the United States to pursue trade negotiations). The WTO was established on January 1, 1995, building onto the existing organizational structure created by the GATT. *Id.* at 57.

³⁵ See Robert H. Wade, *Return of Industrial Policy?*, 26 INT'L REV. APPLIED ECON. 223, 226–27 (2012) (noting development economics after the Second World War had stronger interventionist priors than mainstream economics).

³⁶ *E.g.*, *id.* at 227; Wu & Salzman, *supra* note 1, at 416–17.

³⁷ Wade, *supra* note 35, at 227.

dominate international trade policy for the past several decades.³⁸ Their argument, by its own terms, has lent itself toward abolition of all trade restrictions. For example, they consider worker protections as additional frictions in an already sluggish market and as pretext for protectionist policy.³⁹ And so, many have argued that trade has no room for social policy, and environmental and labor policy in particular. This seems a curious yet enduring perspective, given that trade is a determining stimulant to production, which shapes both the labor force and the environment. For example, following this approach, at least as of 2012, the World Bank would award top scores on “trade policy” to countries with minimal barriers to trade; it would award top scores with respect to “labor market institutions” to countries with near-zero labor protections.⁴⁰

Against this backdrop, a series of notable disputes at the WTO over the past twenty years has found legislation implementing industrial, environmental, or other “moral” prerogatives in violation of WTO agreements. For example, U.S. regulation requiring a “dolphin-safe” label on cans of tuna was found to be too coercive an imposition on Mexican tuna producers.⁴¹ India’s local-content subsidies designed to increase domestic solar components production were found to be unjustifiable under GATT exceptions.⁴² While animal rights activists successfully pushed for legislation in the European Union banning imports of seal products resulting from abusive hunting practices, the WTO Appellate Body decided the policy’s exception for indigenous hunts arbitrarily distinguished against commercial hunts insofar as its implementing regulations were ambiguous.⁴³ Admittedly, these head-

³⁸ See *id.* at 224, 227 (describing development economics’ shift toward a more mainstream, neoliberal direction in the 1980s). Some, however, do not consider trade gains as necessarily diminished by virtue of the existence of social or industrial policy. See BARRY & REDDY, *supra* note 31, at 2, 166 n.5 (“[W]e do not assume that free trade is always the policy that maximizes the gains from trade.”).

³⁹ Wade, *supra* note 35, at 227 (comparing neoliberal economists with early liberals who dismissed labor unions and ignored the consequences of pure free markets on workers).

⁴⁰ *Id.*

⁴¹ See Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 297, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) [hereinafter Appellate Body Report, *US—Tuna/Dolphin*] (“[W]e are not persuaded that the United States has demonstrated that the measure is even-handed . . .”).

⁴² See Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 6, WTO Doc. WT/DS456/AB/R (adopted Oct. 14, 2016) [hereinafter Appellate Body Report, *India—Solar Cells*] (affirming the holding of the lower panel).

⁴³ See Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.327, 5.333, 5.337, WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter Appellate Body Report, *EC—Seal*].

lines blur the more complex nuance beneath each of these cases, but nonetheless present striking results.

U.S. government procurement, as noted earlier, is bound not to discriminate among parties to the GPA. And in light of this brief history of the WTO, the green-industry rationales for domestic, Buy American procurement policies strike a protectionist chord such that their justification on environmental and labor grounds may appear pretextual and violative of WTO nondiscrimination principles.⁴⁴ Yet, the trade rules *should* permit deployment of tools like procurement to foster domestic green industry.⁴⁵ This Note steps in to analyze when and how green industrial procurement could violate U.S. commitments at the WTO, and what it means for how trade rules support the advancement of environmental and labor welfare. Likewise, this Note develops strategies for how procurement can be directed to achieve environmental and labor goals and reduce the protectionist tinge of such measures.

Buy American policies, though, go one step farther. Not only must a procurement decisionmaker give preferential treatment to U.S. products, but the components of the product must have primarily been developed in the United States—requiring at least a surface-level inquiry into the supply chain for a given product. This Note further proposes that this inquiry should require disclosure of environmental and labor compliance—or some form of cost and impact reckoning, as with social cost of carbon analyses—throughout the supply chain. Such a revision would render the aggressive, targeted use of procurement a more palatable tool for policymakers designing projects to combat climate change and support labor advancement. This Note also explores one possible means of advancing environmental and labor policy—leveraging procurement—by developing in international trade a workable middle ground between a stifling, bureaucratic regulatory mode and the “organized anarchy”⁴⁶ of an unrestrained and unfocused free market. At its most forceful, this Note advocates for a more radical reconsideration of how the United States positions itself in global trade, armed with the tools that enable purposeful engagement with other states’ practices.

Products] (noting that court was not persuaded that the EU’s implementation was not arbitrary or unjustifiable).

⁴⁴ For an elaboration of the mechanics of federal Buy American policies, see *infra* notes 78–83.

⁴⁵ See, e.g., Wu & Salzman, *supra* note 1, at 418 & n.71 (remarking how “[t]here is a growing recognition that industrial policy, when executed well under certain circumstances, can be effective” but clarifying that one proponent “noted that such efforts must be properly aligned with a country’s resource base and factor endowments”).

⁴⁶ ROBERTO MANGABEIRA UNGER, *FREE TRADE REIMAGINED* 25 (2007).

This Note proceeds in three Parts. Part I provides an overview of green procurement policy and the Buy American requirements for government procurement, discussing procurement as a tool of social policy, its recent shift into the U.S. political limelight as pressure has increased to integrate environmental decisionmaking in procurement, and how the Buy American Act of 1933 constrains federal procurement. Part II lays out the United States' commitments at the WTO, which set the boundaries for preferential treatment of domestic goods in procurement. The GPA imposes the core set of constraints, informed by the norms established through adjudications at the WTO over disputes primarily regarding the GATT. Recognizing how these constraints restrict government action in two dimensions—the scope of coverage and the substantive restriction of the GPA's nondiscrimination provision—Part III outlines potential strategies available to government actors aiming to advance labor and environmental policies that either work within the existing agreement's parameters or require a substantive reimagining of how trade incorporates social policy.

I

WHY PROCUREMENT? GREEN INDUSTRIAL POLICY AND BUYING AMERICAN

Few actions resemble as prototypical an exercise of sovereign power quite like that of a government directly purchasing goods and services with taxpayers' dollars.⁴⁷ Government procurement decisions carry a political charge in a way that private actors trading on an open market could accomplish only indirectly. For that reason, such direct expenditures will fall under heightened scrutiny by virtue of their distinctively sovereign character.⁴⁸ And for that same reason, agreements like the GPA which purport to curtail that power, albeit through reciprocal concessions, ruffle domestic feathers.⁴⁹ But before delving

⁴⁷ See Paul J. Carrier, *Sovereignty Under the Agreement on Government Procurement*, 6 MINN. J. GLOB. TRADE 67, 68–69 (1997).

⁴⁸ See *id.* at 90–91 (noting that public opinion is generally in favor of domestic government procurement); Maria Anna Corvaglia, *Public Procurement and Private Standards: Ensuring Sustainability Under the WTO Agreement on Government Procurement*, 19 J. INT'L ECON. L. 607, 611 (2016) (noting that governments' procurement policies depend not only on legal justifications, but also on political and economic justifications).

⁴⁹ See Luca Tosoni, *The Impact of the Revised WTO Government Procurement Agreement on the EU Procurement Rules from a Sustainability Perspective*, 8 EUR. PROCUREMENT & PUB. PRIV. P'SHIP L. REV. 41, 44 (2013).

into those dimensions: Why focus on procurement in the first place?⁵⁰ What unique opportunities does procurement present to advance the public interest?

A. *Buying Green Industry*

Procurement refers to when a government purchases goods or services—its *contracting* power.⁵¹ Regulation, by contrast, is where a government dictates the terms by which private parties buy and sell goods and services.⁵² Governments employ numerous tools to advance their industrial or social agendas, like tax credits or subsidies for renewable energy production.⁵³ Procurement coexists comfortably among these tools as another means to advance green industrial goals.

While “green procurement” can encompass various, independent considerations,⁵⁴ two dimensions are key. First, green procurement refers chiefly to *buying* green products. The smaller the environmental footprint of a given product, the better: What kind of resources does it consume? What health or environmental effects does its use create?⁵⁵ By prioritizing the purchase of products with the greatest environmental benefits, green procurement functions as a pseudo-subsidy to help expand the market for emerging green technologies.⁵⁶ In order to achieve its environmental goals, though, green procurement should encompass consideration of the *industry* behind a product. The environmental footprint of a given procurement could be as shallow as the product’s emissions while in use, as described above, or it could encompass the impact of the production processes used in developing that product. An environmentally conscious government should weigh the costs of this more comprehensive accounting of externalities against its domestic benefits—environ-

⁵⁰ For a comprehensive overview of procurement theory, see generally LAFFONT & TIROLE, *supra* note 13.

⁵¹ See, e.g., *id.* at 9 (“[W]e . . . refer to procurement when the firm supplies a good to the government”); Christopher McCrudden, *Buying Social Justice: Equality and Public Procurement*, 60 CURRENT LEGAL PROBS. 121, 121 (2007) (referring to governments’ contracting power as a means to produce social justice).

⁵² See LAFFONT & TIROLE, *supra* note 13, at 9 (referring to regulation as when firms supply goods “to consumers on behalf of the government”).

⁵³ See MICHAEL TAYLOR, INT’L RENEWABLE ENERGY AGENCY, ENERGY SUBSIDIES: EVOLUTION IN THE GLOBAL ENERGY TRANSFORMATION TO 2050, at 26–27 (2020), <https://www.irena.org/publications/2020/Apr/Energy-Subsidies-2020> [<https://perma.cc/BAJ2-UQNM>] (describing the various policy regimes different countries use to support green industries).

⁵⁴ See ERIC A. FISHER, CONG. RSCH. SERV., R41197, GREEN PROCUREMENT: OVERVIEW AND ISSUES FOR CONGRESS 4 (2010) (listing, as examples, a product’s energy use, recycled content, and toxicity).

⁵⁵ See *id.*

⁵⁶ See *infra* notes 69–72 and accompanying text.

mental or otherwise. In this sense, procurement refers to the capacity of the government to strengthen the integrity of developing green-technology markets through its purchasing power. The question becomes not only whether the given product is one in which government should invest, but also whether the structure of the industry backing the product is one appropriate for government investment. Current U.S. federal procurement decisionmaking does not extend this far.⁵⁷

Some would prefer to separate procurement from these stickier, discretionary choices.⁵⁸ They argue that the contracting agency's goal should be to secure what it needs for a good price—a clear signal that taxpayer dollars are not wasted—and under fair bargaining conditions. After all, private contracting abides by a set of market disciplines to ensure fairness, so government procurement should follow these well-established norms.⁵⁹ Procurement should follow this more competitive model to avoid additional bureaucratic hurdles that stymie its objectives⁶⁰ and otherwise rely on price preference discrimination that unfairly raises costs for “bad bidders.”⁶¹ At the very least, why not regulate directly and establish market rules that are clear and predictable?⁶² “If the government believes that employers should

⁵⁷ The Federal Acquisition Regulations focus on sustainability by reference to product characteristics alone. See 48 C.F.R. § 23.103 (2014); see also DANIEL I. GORDON, ADM’R FOR FED. PROCUREMENT POL’Y, OFF. OF MGMT. & BUDGET, IMPROVING SUSTAINABLE ACQUISITION AND REPORTING (2011), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/procurement_green/improving-sustainable-acquisition-and-reporting.pdf [<https://perma.cc/YHV9-RZY2>]. The waivers granted by the Made in America Office have been particularly concerned with supply chain gaps, but not their environmental footprints. See CELESTE DRAKE, DIR., MADE IN AMERICA OFF. & LESLEY A. FIELD, ACTING ADM’R FOR FED. PROCUREMENT POL’Y, IMPROVING THE TRANSPARENCY OF MADE IN AMERICA WAIVERS (2021), <https://www.energy.gov/sites/default/files/2021-11/Improving-the-Transparency-of-Made-in-America-Waivers%2010%2026%202021.pdf> [<https://perma.cc/9RLG-U6BV>].

⁵⁸ McCrudden, *supra* note 51, at 128–35.

⁵⁹ *Id.* at 128 (presenting the argument that “[p]rivate contracting is subject to market disciplines to ensure that this [fair exchange] is achieved” and so “[g]overnment would truly be acting in the public interest, if it were to act just like another commercial organization motivated by commercial considerations”). *But cf.* Alexandra B. Klass & Gabriel Chan, *Regulating for Energy Justice*, 97 N.Y.U. L. REV. 1426, 1435 (2022) (arguing, in the context of regulating public utilities, that “[r]ate setting is and always has been social policy implemented within a legislative framework designed to promote the public interest”).

⁶⁰ McCrudden, *supra* note 51, at 129 (noting this argument “stress[es] the need for a less bureaucratic form of government, one that is revenue driven and competitive, and one that seeks to take a more commercial approach”).

⁶¹ *Id.* at 129–30.

⁶² *Id.* at 131–32.

adopt certain forms of practice, it should make this a legislative requirement for all employers.”⁶³

A perhaps clichéd foundation to “Why procurement?” starts with a reminder that every government action should be rooted in the public interest in its fullest sense.⁶⁴ The purely economic approach to procurement decisionmaking described above seems to forget that just like any consumer, the government has an identity which shapes its purchasing preferences,⁶⁵ and it exercises those preferences within existing market disciplines that assure fairness. Unlike the businesses to which the purely economic model is typically applied, government has goals other than just profit maximization—pertinently here, reducing the negative externalities of its activity, encouraging sectoral policies, and developing employment opportunities.⁶⁶ And so, government *should* use opportunities like procurement to advance the public interest it represents rather than function as a passive steward. More practically speaking, however, Christopher McCrudden notes that “[t]he greater the public perception of a *compliance gap* between the aspirations towards equality incorporated in public policy, and its delivery in practice, the more likely it is that equality will be linked to public procurement.”⁶⁷ That is, where the public perceives alternate regulatory means as having failed, the more it will turn to other modes, and in particular a more direct means of intervention like that of procurement.⁶⁸ And in this case of green-industrial policy, as will be elaborated later, U.S. commitments at the WTO—as well as U.S. political economy, for that matter—constrain its ability to enact market-wide legislation implementing certain forms of green-industrial policy.

So, in the context of devising a plan to accommodate green-industrial policy within international legal parameters, a few specific advantages to procurement emerge. In general, the discretion involved with government purchasing affords the government a more bespoke method of economic intervention as a participant in the

⁶³ *Id.* at 132.

⁶⁴ *Cf.* 48 C.F.R. § 1.102-2(c)(1) (1997) (“An essential consideration in every aspect of the [Federal Acquisition Regulations] System is maintaining the public’s trust.”).

⁶⁵ *See* McCrudden, *supra* note 51, at 138.

⁶⁶ *See* LAFFONT & TIROLE, *supra* note 13, at 643; *see also* McCrudden, *supra* note 51, at 138–41.

⁶⁷ McCrudden, *supra* note 51, at 136.

⁶⁸ *See generally* Marco R. Di Tommaso, Mattia Tassinari, Stefano Bonnini & Marco Marozzi, *Industrial Policy and Manufacturing Targeting in the US: New Methodological Tools for Strategic Policy-Making*, 31 INT’L REV. APPLIED ECON. 681 (2017) (developing methodology for assessing strategic sectors for industrial policy to mitigate government failure).

market rather than overhead regulator. In the same vein, it resembles a domestic political compromise between those who wish to preserve the sanctity of market autonomy and those more amenable to nationalizing labor through state enterprises. By procuring from private sector entities, the government does not upset traditional market flexibility but instead fosters it by stimulating competition. From an international perspective, by avoiding private sector intervention, green industrial programs can get off the ground without frustrating WTO commitments which, as will be noted later in the GATT context, may be triggered by this form of government social intervention via market-wide regulation policy.

B. *Building Green America*

Given some of the advantages discussed above, procurement has of late found a growing spotlight. During the 2020 presidential primaries, Elizabeth Warren promised to marshal over a trillion dollars in procurement for sustainable development.⁶⁹ On the campaign trail, President Biden listed the use of government procurement to foster clean energy policy as a day one initiative,⁷⁰ and has since issued an executive order mandating the procurement of U.S. goods and services wherever possible, creating the Made in America Office within the Office of Management and Budget which oversees waivers for non-domestic procurement.⁷¹ The Department of State has incorporated procurement power into its long-term strategy to achieve net-zero greenhouse gas emissions to support nascent markets for green technologies.⁷² As part of the recent Infrastructure Investment and Jobs Act, Congress passed the Build America, Buy America Act, which developed a domestic content preference-scheme for infrastruc-

⁶⁹ The figures vary by the candidates, but during her presidential campaign Elizabeth Warren called for \$1.5 trillion in federal procurement to encourage sustainable development. See Tracey M. Roberts, *Greenbacks for the Green New Deal*, 17 *PITT. TAX REV.* 53, 60 (2019).

⁷⁰ *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, JOE BIDEN FOR PRESIDENT, <https://joebiden.com/climate-plan> [<https://perma.cc/HNM3-4PA8>] (listing as the second line-item goal for day one of “[u]sing the Federal government procurement system – which spends \$500 billion every year – to drive towards 100% clean energy and zero-emissions vehicles”).

⁷¹ Exec. Order No. 14,005, 86 Fed. Reg. 7475 (Jan. 25, 2021).

⁷² See U.S. DEP’T OF STATE, *THE LONG-TERM STRATEGY OF THE UNITED STATES: PATHWAYS TO NET-ZERO GREENHOUSE GAS EMISSIONS BY 2050*, at 16 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/US-Long-Term-Strategy.pdf> [<https://perma.cc/WC7Y-XEEU>].

ture projects receiving federal financial assistance as part of an aggressive use of procurement controls for environmental and labor policy.⁷³

These recent calls and legislation for developing green industry tend to tout three core goals: first, to grow the domestic manufacturing base and deter offshoring jobs by developing a more robust clean energy sector;⁷⁴ second, to enhance environmental protections; and third, to likewise strengthen labor protections.⁷⁵ The latter two are framed as the justification for trade-restrictive measures—for instance, that environmental protections help the United States “stop the transfer of . . . pollution overseas.”⁷⁶ Or, in a more aggressive rendition from the Build America, Buy America Act, taxpayer dollars “should not be used to reward companies that have moved their operations, investment dollars, and jobs to foreign countries or foreign factories, particularly those that do not share or openly flout the commitments of the United States to environmental, worker, and workplace safety protections.”⁷⁷

How exactly does government procurement incorporate these goals? Currently, two statutes constrain federal procurement of foreign products: the Buy American Act of 1933 and the Trade Agreements Act of 1979.⁷⁸ The Buy American Act requires that “only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from . . . materials, or supplies . . . produced, or manufactured in the United States, shall be

⁷³ Build America, Buy America Act, Pub. L. No. 117-58, §§ 70901–27, 135 Stat. 1294, 1294–309 (2021). The domestic-content preference scheme in the Act resembles a prohibited import-substitution subsidy covered by the Subsidies and Countervailing Measures Agreement, outside the scope of the current discussion. *See* SCM Agreement, *supra* note 18, art. 3.1(b).

⁷⁴ H.R. Res. 109, 116th Cong. 13 (2019) [hereinafter Green New Deal Resolution] (calling for “trade rules, procurement standards, and border adjustments . . . to stop the transfer of jobs . . . overseas”); Build America, Buy America Act § 70911(14) (aiming to shore up “the strength and readiness of the defense industrial base of the United States” because U.S. industry “has been diminished” as domestic manufacturing operations “have moved offshore”); *see* Press Release, White House, President Biden to Highlight Clean Energy Manufacturing and Deployment Investments that Cut Consumer Costs, Strengthen U.S. Energy Sector, and Create Good-Paying Jobs (Feb. 28, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-president-biden-to-highlight-clean-energy-manufacturing-and-deployment-investments-that-cut-consumer-costs-strengthen-u-s-energy-sector-and-create-good-paying-jobs> [https://perma.cc/LRR7-YH5T].

⁷⁵ A fourth goal of increasing importance, securing energy independence, is outside the scope of this discussion.

⁷⁶ Green New Deal Resolution, *supra* note 74, at 13.

⁷⁷ Build America, Buy America Act § 70911(2)–(3).

⁷⁸ *See* Acetris Health, LLC v. United States, 949 F.3d 719, 722–24 (Fed. Cir. 2020) (explaining the parameters imposed by the Acts).

acquired for public use.”⁷⁹ However, where “the head of the Federal agency concerned determines [an] acquisition to be inconsistent with the public interest,” the agency may deviate from the Act’s requirements.⁸⁰

On the other hand, the Trade Agreements Act of 1979 authorizes the President to waive any discriminatory purchasing requirements—like those set forth in the Buy American Act—for any country that “will provide appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products,”⁸¹ a power which the President has delegated by executive order to the Office of the U.S. Trade Representative (USTR).⁸² Conversely, the Trade Agreements Act also directs the President—and, by delegation, the USTR—to prohibit the procurement of goods from a foreign country not party to the GPA “in order to encourage additional countries to become parties to the Agreement.”⁸³ As a result, this liberalized procurement is cabined strictly among GPA signatories.

In light of the three green-industrial goals described above, while the Buy American Act does prioritize the development of the domestic manufacturing base, it does not focus on developing stronger environmental or labor protections beyond various executive-branch calls to procure green products.⁸⁴ Certainly, industrial tools that bolster underdeveloped domestic industry are valuable instruments in a government’s larger state-building portfolio. The Buy American Act’s domestic-products requirement makes sense in the context of government procurement, particularly given how the government directly spends taxpayer money. Nonetheless, the way a government engages in this spending connects to larger trade-flows. As such, market participation by the government must remain conscious of its connection to broader environmental and labor practices. Moreover, political actors must avoid succumbing to the convenient political alignment between environmental, labor, and protectionist groups that risks coalescing

⁷⁹ Buy American Act, 41 U.S.C. § 8302(a)(1).

⁸⁰ *Id.* The agency may also deviate where it determines the cost of the domestic goods are “unreasonable” or are not “produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.” 41 U.S.C. § 8302(a)(1)–(2).

⁸¹ Trade Agreements Act of 1979, 19 U.S.C. § 2511(b)(1); *see also Government Procurement*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/government-procurement> [<https://perma.cc/N76Z-V9ZG>]; GAO, 2019 FOREIGN PROCUREMENT REPORT, *supra* note 24, at 5–6, 6 n.16.

⁸² Exec. Order No. 12,260, 46 Fed. Reg. 1653 (Dec. 31, 1980).

⁸³ 19 U.S.C. §§ 2512(a)(1), 2518(1).

⁸⁴ *See supra* notes 70–72 and accompanying text.

around a blind, protectionist stance on international trade.⁸⁵ Such protectionist techniques make for good short-term domestic political gains, but they avoid wrestling with how to establish disciplines that strengthen long-term welfare through the global trade regime.

On the domestic front, policy groups have made strides in pushing for integration of environmental impact costs into agency decisionmaking, notably around the use of the social cost of carbon. As Richard Revesz and Max Sarinsky have written, using a metric like the social cost of carbon “allows agencies to account for climate effects and seamlessly compare them in their decision making against other monetized economic effects” and better “internalize the costs of climate change.”⁸⁶ They point to how the Federal Acquisition Regulation (FAR) already recognizes that agencies should consider environmental impact in procurement decisionmaking, specifically with respect to provisions like those directing agencies to “reduce[] greenhouse gas emissions from direct and indirect Federal activities” in their acquisition of goods and services.⁸⁷ Agencies have already demonstrated the viability of this evaluation—for example, the General Services Administration has considered social cost of carbon estimates when awarding parcel-shipping contracts, considering both the market and non-market economic impacts of expected contractor emissions.⁸⁸ More recently, in October 2021, the interagency FAR Council requested comment in a proposed rulemaking seeking to amend the FAR “to ensure that major Federal agency procurements minimize the risk of climate change.”⁸⁹

These developments have met resistance. While the use of the social cost of carbon was upheld by the Seventh Circuit in *Zero Zone v. United States Department of Energy*, the Trump Administration cut back on its use and worked to alter the viability of the metric.⁹⁰ On

⁸⁵ See Wu & Salzman, *supra* note 1, at 445–50 (describing the hesitancy in recent years of environmental groups to speak out against environmentally unfriendly trade decisions when it would jeopardize their alliance with labor unions and domestic producers).

⁸⁶ Richard L. Revesz & Max Sarinsky, *The Social Cost of Greenhouse Gases: Legal, Economic, and Institutional Perspective*, 39 YALE J. ON REGUL. 855, 872 (2022).

⁸⁷ *Id.* at 883 (quoting 48 C.F.R. § 23.202(a)).

⁸⁸ *Id.*

⁸⁹ Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions, 86 Fed. Reg. 57404-01 (proposed Oct. 15, 2021); see also Ctr. for Biological Diversity et al., Comment Letter on Proposed Rule for Amendments to Federal Acquisition Regulation (Jan. 13, 2022), https://policyintegrity.org/documents/Joint_SC-GHG_Comments_to_FAR_Council_on_Procurement_no_attachments.pdf [<https://perma.cc/6B49-R6JZ>] (detailing the methodology and viability of integrating the social cost of carbon into procurement decisionmaking).

⁹⁰ See *Zero Zone, Inc. v. United States Dep't of Energy*, 832 F.3d 654, 678 (7th Cir. 2016); INST. POL'Y INTEGRITY, HOW THE TRUMP ADMINISTRATION IS OBSCURING THE

the other hand, when the United States Postal Service (USPS) announced in March 2022 that it was planning to acquire around 10,000 electric vehicles as part of a total order of 50,000 “Next Generation Delivery Vehicles,”⁹¹ environmental groups, states, and the United Auto Workers filed lawsuits, “arguing that the agency failed to comply with environmental regulations.”⁹² The White House and the EPA also asked the USPS to reconsider its plan.⁹³ Later that year, the USPS doubled its commitment to purchasing 25,000 electric vehicles.⁹⁴

In light of these efforts, this Note turns to how refining international trade rules can buttress these environmental initiatives, and what the trade regime might expect in return from agency implementation. In other words, how can we sharpen the relationship between trade rules and domestic procurement programs to better incorporate the goals of green industrial policy? Over the next two Parts, this Note argues that we must shift from an outcome- to a process-oriented measure of progress. At bottom, domestic-content preferences are blunt tools. Instead, the trade system can better aid these three green-industrial objectives by tailoring its preference scheme to affirmatively incorporate environmental metrics, for which trade rules would require a robust disclosure system to pinpoint how current trade patterns allocate harmful environmental and labor practices among trading partners.

With this backdrop, this Note turns to explore how WTO commitments establish constraints on green-industrial policy—in particular, whether and under what circumstances the three green-industrial goals outlined above would run afoul of these agreements.

COSTS OF CLIMATE CHANGE (2018), https://policyintegrity.org/files/publications/Obscuring_Costs_of_Climate_Change_Issue_Brief.pdf [<https://perma.cc/F5JS-YKHX>].

⁹¹ Press Release, U.S. Postal Serv., USPS Places Order for 50,000 Next Generation Delivery Vehicles; 10,019 To Be Electric (Mar. 24, 2022), <https://about.usps.com/newsroom/national-releases/2022/0324-usps-places-order-for-next-gen-delivery-vehicles-to-be-electric.htm> [<https://perma.cc/QJ93-XGS2>].

⁹² David Shepardson, *U.S. Postal Service To Boost Electric Delivery Vehicle Purchases*, REUTERS (July 20, 2022, 5:20 PM), <https://www.reuters.com/world/us/us-postal-service-plans-up-electric-delivery-vehicle-purchases-2022-07-20> [<https://perma.cc/8LJH-ZNZE>] (reporting that the lawsuits aimed to block USPS’s plan to order mostly gas-powered delivery vehicles).

⁹³ *Id.*

⁹⁴ *Id.*; *Postal Service Modernization Enables Expanded Electric Vehicle Opportunity*, U.S. POSTAL SERV. (July 20, 2022) <https://about.usps.com/newsroom/national-releases/2022/0720-postal-service-modernization-enables-expanded-electric-vehicle-opportunity.htm> [<https://perma.cc/CT2A-PJ4Y>].

II THE WTO PROCUREMENT FRAMEWORK

This Part discusses how WTO trade agreements constrain green-industrial procurement policy, looking to how the Buy American Act and the three industrial goals discussed above interact with the GPA's requirements.⁹⁵

First, how does the GPA interact with the Buy American Act's requirement that procured goods are substantially "produced, or manufactured in the United States"?⁹⁶ Section II.A explains how, absent a waiver under the Trade Agreements Act, such a domestic-product requirement would constitute a de facto violation of the GPA's core non-discrimination principle. Second, to what extent can such a violation be excused with the typical green-industrial policy justification that domestic infrastructure spending "should not be used to reward" business in countries that "openly flout" U.S. commitments to environmental and worker safety protections?⁹⁷ Section II.B elaborates that while a set of exceptions to the GPA preserves parties' "right to regulate," this justification produces potentially bifurcated results. With respect to labor protections, such justification attacks the heart of the GPA's purpose to diminish non-competitive domestic industry. Environmental protections, on the other hand, have found some suc-

⁹⁵ Other agreements—e.g., various FTAs—do cover government procurement. *FTAs with Government Procurement Obligations*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/government-procurement/ftas-government-procurement-obligations> [<https://perma.cc/P8LY-8Q4S>] (last visited Aug. 24, 2022). But because the GPA is the most comprehensive, and the WTO's history and case law lends itself to a more robust analysis, this Note focuses on the WTO structure alone.

⁹⁶ Buy American Act, 41 U.S.C. § 8302(a)(1).

⁹⁷ Build America, Buy America Act, Pub. L. No. 117-58, § 70911(3), 135 Stat. 1294, 1295 (2021). Whether or not this language is mere congressional puffery is ultimately secondary to whether and how trade rules can incorporate environmental or labor policy. That said, it is important to acknowledge that these legislative platitudes asserting U.S. dominance at the very least paint an incomplete picture. For example, on the environmental front, while the conventional wisdom has held that some countries and regions—in particular Europe and the United States—have had across-the-board more stringent environmental risk regulation than others, recent empirical research has revealed more nuanced variations. Jianhua Xu & Jonathan B. Wiener, *Comparing U.S. and Chinese Environmental Risk Regulation*, REGUL. REV. (Dec. 20, 2021), <https://www.theregreview.org/2021/12/20/xu-wiener-comparing-us-chinese-environmental-risk-regulation> [<https://perma.cc/R7TC-N6MH>] (“[N]either the United States nor China dominated relative regulatory stringency. . . . [T]he United States had more stringent regulations on 27 risks, China on 13 risks, and the United States and China were on par in regulatory stringency on five risks.”). Politically, too, U.S. commitments internationally have fluctuated across administrations. See H.J. Mai, *U.S. Officially Rejoins Paris Agreement on Climate Change*, NPR (Feb. 19, 2021, 10:29 AM), <https://www.npr.org/2021/02/19/969387323/u-s-officially-rejoins-paris-agreement-on-climate-change> [<https://perma.cc/6AAK-F4EB>].

cess under the exceptions but would still seem to require narrow tailoring to target the alleged environmental harm. That said, as explained in Section II.C, an evaluation of a product's environmental footprint is permitted, but whether this footprint could extend beyond product characteristics and into the product's supply chain remains dubious.

The remainder of this Part considers the GPA's scope rather than its substance: While the Act covers by default all U.S. government procurement, how much of that procurement does the GPA cover? Section II.D explains, first, the scope of the GATT's public-sector procurement exclusion: If the government procured an item to resell it on the commercial market, rather than use it for internal purposes, it would remain subject to the GATT, not the GPA. This is most consequential for countries with more extensive state ownership of utilities—not a feature of the comparatively detached U.S. government presence. Second, Section II.D discusses the GPA parties' schedules which outline what kinds of purchases government agencies have committed to place under the GPA's nondiscrimination obligation. Finally, Section II.E describes the process for and consequences of unilateral withdrawal of coverage.

Before diving in, a few observations about GATT disciplines provide an important backdrop to the GPA.⁹⁸ First and foremost, the GATT restrains market-wide government regulation through the wide net cast by its national treatment obligation, which requires that imported products “be accorded treatment no less favourable than that accorded to like products of national origin” as they navigate the domestic market.⁹⁹ This includes *de facto* discrimination, where a facially neutral regulation or permissible exception nevertheless has a disproportionate and unjustified impact with respect to one country's goods.¹⁰⁰ But, as noted above, the GATT excludes government procurement from this obligation,¹⁰¹ a space filled by the GPA. Second, the manner in which the “like products” requirement of the GATT's national treatment obligation has been interpreted often may not distinguish between environmentally friendly products and their counter-

⁹⁸ Little case law discusses the GPA directly. However, because these agreements contain provisions that replicate or closely parallel each other, panel and Appellate Body determinations with respect to a provision in one agreement are considered instructive for like or identical provisions in other agreements. For the GPA, this is particularly true in the case of exceptions, whose structure and language closely parallels that of the GATT and other multilateral agreements.

⁹⁹ GATT, *supra* note 16, art. III.4.

¹⁰⁰ See *infra* Section II.B.

¹⁰¹ See *infra* Section II.D.1.

parts, where for all other purposes they are directly substitutable.¹⁰² Finally, the GATT provides for a set of exceptional circumstances whereby parties may discriminate between products on the basis of national origin, but these exceptions have left little room for environmental or labor policy that imposes uneven burdens among GATT parties.¹⁰³ Because the structure of the GPA's exceptions closely parallels that of the GATT, these disputes are discussed in Section II.B and are considered instructive for GPA purposes.

A. *Shifting the Focus of the National Treatment Principle*

The GPA reframes the GATT's national treatment obligation under its nondiscrimination principle, requiring that any procurement measure "accord[s] . . . treatment no less favourable" to any good or service provided by any party than that accorded to domestic suppliers or other parties.¹⁰⁴ Whereas the GATT focused on the treatment of the products, the GPA considers the treatment of the supplier: How does the supplier's status as a foreign entity factor into the procuring agency's decisionmaking process?¹⁰⁵ Rather than limiting government intervention in the private market, the GPA limits how a government may choose to spend its money.¹⁰⁶ And so the first layer of the Buy American Act—that the government may procure only articles "that have been manufactured in the United States"—would violate the GPA by according treatment less favorable to a foreign supplier absent a waiver.¹⁰⁷

The GPA's non-discrimination obligation reaches farther, however, in protecting not only foreign goods and services but also the foreign affiliation of local suppliers: A party and its procuring entities shall not treat a local supplier "less favourably" than another locally

¹⁰² See Appellate Body Report, *India—Solar Cells*, *supra* note 42, ¶ 5.40. As the Appellate Body has explained, the determination of "likeness" is, "fundamentally, a determination about the nature and extent of a competitive relationship between and among domestic and imported products." Appellate Body Report, *Philippines—Taxes on Distilled Spirits*, ¶ 170, WTO Docs. WT/DS396/AB/R, WT/DS403/AB/R (adopted Jan. 20, 2012). Relevant factors include the products' physical characteristics, end-uses, consumer's tastes and habits, tariff classification, and relevant internal regulations. *Id.* ¶ 118. Additionally, relevant for the instant discussion, production processes and methods have been held irrelevant in determining whether products are "like." See Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, ¶ 5.19, WTO Doc. WT/DS23/R39S/206 (adopted June 19, 1992) (finding tax credits granted to small breweries discriminatory, even if extended to foreign small breweries, because "beer produced by large breweries is not unlike beer produced by small breweries").

¹⁰³ See GATT, *supra* note 16, art. XX.

¹⁰⁴ 2012 GPA, *supra* note 21, art. IV.1.

¹⁰⁵ See Carrier, *supra* note 47, at 93.

¹⁰⁶ See *id.* at 94.

¹⁰⁷ See Buy American Act, 42 U.S.C. § 8302(a)(1).

established supplier based on foreign affiliation or ownership, or “discriminate against” a locally established supplier because its goods or services are those of another party.¹⁰⁸ A local supplier with a higher level of foreign ownership, or one who relies in some part on foreign-sourced components in addition to its domestic production, should not receive disparate treatment based on those characteristics. Altogether, the national treatment principle comprehensively limits agencies from injecting *any* consideration of foreign identity in procurement decisions. Correspondingly, the second layer of the Buy American Act, which requires that the procured product itself was manufactured “substantially all from . . . materials . . . mined, produced, or manufactured in the United States,” also would violate the GPA absent a waiver.¹⁰⁹

It follows that, as a general matter, legislation that applies a domestic procurement requirement designed to prevent shifts in production to other countries contravenes the GPA.¹¹⁰ After all, the purpose of the GPA is to promote competition based on comparative advantage and eliminate this sort of arbitrary distinction based on national origin.¹¹¹ Notably, the GPA omits the “like products” component of GATT’s national treatment principle. Agency discretion is therefore not confined in choosing to exclude otherwise substitutable products for reasons other than national affiliation, presuming that such a decision does not constitute disguised discrimination. This discretion, as will be discussed further below regarding the GPA’s coverage of technical specifications, provides an avenue for environmental policy.

B. *Justified Derogation: Exceptions*

The exceptions in WTO agreements serve the crucial function of preserving each member-state’s “right to regulate.”¹¹² As long as WTO members make legitimate regulatory distinctions without cre-

¹⁰⁸ 2012 GPA, *supra* note 21, art. IV.2.

¹⁰⁹ *See id.* § 8302(a)(1).

¹¹⁰ *See, e.g.*, Build America, Buy America Act, Pub. L. No. 117-58, § 70911(8), 135 Stat. 1294, 1295 (2021).

¹¹¹ *See* SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO 345 (2003).

¹¹² Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT’L L. 367, 428 (2012); Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 109, 174, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012) [hereinafter Appellate Body Report, *US—Clove Cigarettes*] (elaborating the “right to regulate” in the context of the TBT Agreement).

ating discriminatory effects among trading partners, they may pass legislation affecting trade without violating WTO agreements.¹¹³

The GPA permits derogation from its nondiscrimination rule in several circumstances. First, nothing shall prevent a party from taking “any action . . . that it considers necessary for the protection of its essential security interests relating to” procurement necessary for war materials or national defense purposes.¹¹⁴ Further, a party may take measures—provided that they are not applied as to “constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade”—necessary to protect public morals; “human, animal or plant life or health”; intellectual property; or “relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.”¹¹⁵

An adjudicator engages in a two-step analysis to determine whether one of the exceptions applies.¹¹⁶ First, the adjudicator focuses on the nature of the particular exception—e.g., public morals, “human, animal or plant life or health”—and evaluates whether the policy actually serves the substantive purpose of the claimed exception.¹¹⁷ If so, then under the chapeau¹¹⁸ to the exceptions, the adjudicator determines whether nonetheless the policy acts as “a disguised restriction on international trade” or is “applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.”¹¹⁹ To do so, a variety of factors are balanced: the importance of the policy, the restrictive impact of the measure, to what extent the measure actually achieves the policy objective, and what alternatives

¹¹³ See, e.g., Howse & Langille, *supra* note 112, at 428; Appellate Body Report, *US—Clove Cigarettes*, *supra* note 112, ¶¶ 109, 174.

¹¹⁴ 2012 GPA, *supra* note 21, art. III.1 (specifying procurement “relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes”).

¹¹⁵ *Id.* art. III.2.

¹¹⁶ See, e.g., Panel Report, *United States—Tariff Measures on Certain Goods from China*, ¶ 7.107, WTO Doc. WT/DS543/R (Sept. 15, 2020) [hereinafter Panel Report, *US—Tariff Measures*]; Wu & Salzman, *supra* note 1, at 411. For a detailed breakdown of the exception’s components and complexities, see, for example, Mark Wu, Note, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 *YALE J. INT’L L.* 215, 229–36 (2008).

¹¹⁷ See Wu & Salzman, *supra* note 1, at 411. Some have argued that this step should be replaced instead with an inquiry that determines whether the measure is the least trade-restrictive means of achieving its purported end. See, e.g., Jeremy C. Marwell, Note, *Trade and Morality: The WTO Public Morals Exception after Gambling*, 81 *N.Y.U. L. REV.* 802, 806 (2004).

¹¹⁸ At the WTO, “chapeau” refers to an umbrella or preambulatory paragraph that applies to all provisions in a particular clause. Marwell, *supra* note 117, at 829 n.151.

¹¹⁹ 2012 GPA, *supra* note 21, art. III.2; Wu & Salzman, *supra* note 1, at 411.

are available.¹²⁰ In sum, the first step considers whether the trade restriction in fact resembles the kind of policy contemplated within the language of the exception; the second probes the authenticity of the restriction's stated purpose in order to root out potential protectionism.

Could the Buy American Act's domestic procurement requirement be excused by the green-industrial goal to develop a domestic clean-energy sector?¹²¹ Or stronger labor protections?¹²² Simply put, no. Industrial policy does not fit into these exceptions. As Susan Arrowsmith notes, because the purpose of the GPA is "to promote in government markets competition based on comparative advantage," it is no surprise the agreement omits "derogations allowing support for non-competitive domestic industry."¹²³ In other words, such a derogation would be the exception that swallows the rule, or as here, the agreement. That said, unlike the 1994 GPA, the revised GPA—outside of the above-mentioned exceptions—provides a transitional scheme for developing countries to maintain price preference programs for a predetermined period following their accession.¹²⁴ Further, least developed and developing countries may agree to have an "implementation period" which delays the "application of any specific obligation."¹²⁵ This scheme should not be construed, however, to evince an increased leniency toward industrial policy in the revised GPA, but rather acknowledges that the lack of an on-ramp had effectively foreclosed developing and least-developed country participation in the 1994 GPA.¹²⁶

Whether the exceptions can accommodate a green-industrial justification based on avoiding environmental harm is less certain, however. *US—Shrimp/Turtle* entertained certain environmental policies but relied in part on a GATT exception excusing measures "relating to the conservation of exhaustible natural resources,"¹²⁷ a provision not present in the GPA. More pertinently, the Appellate Body in

¹²⁰ See, e.g., Panel Report, *US—Tariff Measures*, *supra* note 116, ¶ 7.159. Specifically, the means-ends nexus portion of analysis is referred to as the "necessity" test in an exceptions evaluation. *Id.* ¶¶ 7.236–238.

¹²¹ See *supra* note 74 and accompanying text.

¹²² See *supra* note 77 and accompanying text.

¹²³ ARROWSMITH, *supra* note 111, at 345.

¹²⁴ 2012 GPA, *supra* note 21, art. V.3.

¹²⁵ *Id.* art. V.4.

¹²⁶ See Carrier, *supra* note 47, at 97–99, 101 ("These ongoing problems demonstrate that it may be time to re-think the structure of the AGP.").

¹²⁷ See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 127, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter Appellate Body Report, *US—Shrimp/Turtle*] (relying on the GATT's Article XX(g) exception).

EC—Seals Products agreed with the panel that the animal welfare protections in the seal products regulations at issue could fit within the public morals exception,¹²⁸ but the AB was “not persuaded” that the European Union had made “comparable efforts” to facilitate access to an indigenous communities exception for seal hunts as between Canadian and Greenlandic Inuit.¹²⁹

If *EC—Seal Products* indicates increased willingness to recognize the public morals claims of WTO members, it nonetheless shifts scrutiny to the manner in which a regulation is applied. A recent dispute is instructive. In September 2020, the panel in *US—Tariff Measures* found unjustifiable an additional duty imposed by the United States on approximately \$234 billion worth of imports from China in response to activities characterized by the United States as “state-sanctioned theft and misappropriation of U.S. technology, intellectual property, and commercial secrets.”¹³⁰ According to the panel, the United States did not adequately explain how these broad-based sanctions would contribute to alleviating the expressed public morals concerns.¹³¹ These cases demonstrate that unless a measure is narrowly tailored to the objectives of the claimed exception, it is unlikely to succeed under WTO exceptions. That said, some argue that if the violations are sufficiently severe or pervasive in a member state, pure sanctions may be the only feasible route to address violations and should be permitted to avoid exacerbating the harm with economic support and to provide deterrence.¹³²

A simple cost-benefit analysis underlies the exceptions: As applied to a nondiscrimination obligation, an exception admits that a policy discriminates between domestic and foreign products but finds the policy permissible because the cost of inflexibility outweighs the cost of the discrimination. The kind of flexibility required by these exceptions, particularly under the chapeau’s framing, tends to be unilateral in scope: It is the *member’s* public morals or national security that are at issue. Environmental policies, by contrast, almost always

¹²⁸ See Appellate Body Report, *EC—Seal Products*, *supra* note 43, ¶¶ 5.289–.290.

¹²⁹ *Id.* ¶¶ 5.337–.338 (quoting Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 122, WTO Doc. WT/DS58/AB/RW (adopted Oct. 22, 2001)).

¹³⁰ See *US—Tariff Measures*, *supra* note 116, ¶¶ 7.37, 7.100, 7.237–.238. The United States appealed the panel decision, but at the time of appeal no division of the Appellate Body could be formed, so the United States noted it would confer with China on next steps. Notification of an Appeal by the United States, *United States—Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/10 (Oct. 26, 2020).

¹³¹ *US—Tariff Measures*, *supra* note 116, ¶ 7.238.

¹³² See Robert L. Howse & Jared M. Genser, *Are EU Trade Sanctions on Burma Compatible with WTO Law?*, 29 MICH. J. INT’L L. 165, 193–94 (2008).

invoke *global* concerns, so an exception might invite an individual member to unilaterally define standards of conduct with regards to an embedded global issue. So construed, it is no surprise that the ultimate remedy in *US—Shrimp/Turtle* was to require good faith negotiations prior to enacting such a policy.¹³³ Rather than permit a jumble of environmental policy standards that vary by region, negotiations can craft a framework for establishing mutually agreed upon standards.

C. *Technical Specifications Inclusive of Environmental Concerns*

Article X of the GPA provides disciplines on the use of technical specifications in government procurement, leading with a familiar refrain that 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.”¹³⁴ While the Agreement on Technical Barriers to Trade cabins technical specifications for products on the open market within its nondiscrimination obligations,¹³⁵ any such specifications contained within the procurement bidding process would be covered by GPA disciplines.

In addition to a variety of new disciplines around transparency in decisionmaking, product or service information, and documentation required by a procuring body not present in the 1994 GPA, Article X.6 of the Revised GPA adds that a party may “prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.”¹³⁶ Rather than framing environmental concerns as secondary, for example by characterizing this provision as an exception, the parties chose to integrate conservation policy into the GPA framework as a technical specifications discipline. Nonetheless, these green specifications cannot exclusively refer to national standards without accepting an equivalent foreign standard and remain in compliance with nondiscrimination provisions, given that a domestic product is more likely to be made to the domestic standard.¹³⁷

¹³³ See Appellate Body Report, *US—Shrimp/Turtle*, *supra* note 127, ¶¶ 18, 38, 55, 166.

¹³⁴ 2012 GPA, *supra* note 21, art. X.1.

¹³⁵ See, e.g., Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 5.1, WTO Docs. WT/DS384/AB/RW, WT/DS386/AB/RW (adopted May 29, 2015) (holding that the 2008 U.S. Farm Bill, which mandated that producers of certain agricultural commodities inform consumers of their products’ country of origin, violated the TBT Agreement’s national treatment obligation).

¹³⁶ 2012 GPA, *supra* note 21, art. X.6.

¹³⁷ See ARROWSMITH, *supra* note 111, at 161 (explaining that it would be “*de facto* discrimination” to implement “standards set by national standardising institutions . . .

Although the environmental specification in Article X.6 resembles a footnote, the revised GPA made an important step in clarifying that a party may adopt technical specifications in order to promote the conservation of the environment. Previously, the Appellate Body had held that this kind of environmental specification violated WTO rules in *US—Tuna/Dolphin*. In that dispute, Mexico successfully challenged United States legislation that conditioned the use of a “dolphin-safe” label on tuna products on the avoidance of a fishing technique harmful to dolphins, called “setting on.”¹³⁸ The unfairness claimed by Mexico was that the United States regulation coercively imposed United States policy onto Mexico.¹³⁹ Under the Appellate Body’s reasoning, the restriction on access to the “dolphin-safe” label “modifie[d] the conditions of competition to the detriment of Mexican tuna products” in a discriminatory manner, given that this restriction does “not address adverse effects on dolphins from the use of fishing methods” employed by other suppliers of U.S. and foreign tuna producers.¹⁴⁰

In the GPA, however, by integrating environmental specifications as presumptively permissible, signatories indicate approval by default, so any potential challenger would have a more difficult time arguing that such an imposition is unfair. Now, environmental specifications are filed into the set of normative concerns involved in a procurement inquiry. However, while “technical specifications” seems to endorse inquiry into the environmental performance of the product itself, it remains unclear whether these specifications may extend into technical aspects of the production process—that is, permitting an inquiry into the supply chain’s environmental integrity.

D. *What Procurement is Covered?*

The GPA’s nondiscrimination principle does not encompass all purchasing activity by a government party to the agreement. The procurement must both fit within the GATT’s exclusion for public sector procurement and be included in the list of agency activities that a party has specifically included for coverage as part of its reciprocal

without indicating that the procuring entity is also willing to accept other products made to the same functional requirements”).

¹³⁸ See generally Appellate Body Report, *US—Tuna/Dolphin*, *supra* note 41, ¶ 172. The fishing technique, called “setting on,” relies on the fact that tuna tend to swim beneath schools of dolphin; fishing vessels encircle with nets both the school of dolphin and the tuna beneath it. *Id.* ¶ 172 n.355.

¹³⁹ See ARROWSMITH, *supra* note 111, at 347 (discussing the *Tuna/Dolphin* case).

¹⁴⁰ Appellate Body Report, *US—Tuna/Dolphin*, *supra* note 41, ¶¶ 239–40, 292, 297, 299.

concessions to joining the GPA, referred to as the annexed agency schedules.

1. *The Scope of the GATT's Procurement Derogation*

As noted earlier, the GATT specifically excludes government procurement from coverage under its national treatment obligation in Article III.8(a): “The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.”¹⁴¹

Evidently, where a government purchases a product “with a view to commercial resale,” or not “for governmental purposes,” that activity remains subject to GATT disciplines.

Feed-in tariffs (FITs) serve as a key subject of the *Canada—Renewable Energy* dispute. Under an FIT, which is a rarity in the United States but the single most popular kind of renewable energy program worldwide, a government will offer long-term contracts for wholesale electricity at a guaranteed price above what a utility would otherwise be able to obtain.¹⁴² In *Canada—Renewable Energy*, Ontario owned various utility companies which exerted substantial control over its electrical grid.¹⁴³ To aid the transition from coal-generated electricity to cleaner alternatives, Ontario sought to incentivize the use of wind and solar electrical generation through a FIT.¹⁴⁴ This decision sparked a WTO dispute brought by Japan and the European Union, who argued that the policy favored domestic over imported products—in particular, wind and solar energy generation

¹⁴¹ GATT, *supra* note 16, art. III.8(a); see Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, ¶ 5.74, WTO Docs. WT/DS412/AB/R, WT/DS426/AB/R (adopted May 24, 2013) [hereinafter Appellate Body Report, *Canada—Renewable Energy*] (explaining the elements of the procurement derogation from the national treatment obligation); see also Steve Charnovitz & Carolyn Fischer, *Canada—Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies*, 14 *WORLD TRADE REV.* 177, 189–92 (2015) (elaborating on the Appellate Body’s analysis).

¹⁴² Charnovitz & Fischer, *supra* note 141, at 179–80, 182–83; Spencer Fields, *Feed-In Tariffs: A Primer on Feed-In Tariffs for Solar*, ENERGY SAGE (Apr. 15, 2021), <https://news.energysage.com/feed-in-tariffs-a-primer-on-feed-in-tariffs-for-solar> [<https://perma.cc/R96V-NFT7>]; Wu & Salzman, *supra* note 1, at 419; see also Bordoff, *supra* note 1.

¹⁴³ See Charnovitz & Fischer, *supra* note 141, at 179 (summarizing the context of the dispute); Appellate Body Report, *Canada—Renewable Energy*, *supra* note 141, ¶ 4.11 & n.375.

¹⁴⁴ Charnovitz & Fischer, *supra* note 141, at 179 (summarizing the context of the dispute).

equipment.¹⁴⁵ The Panel found that the Ontario-owned utilities sold electricity in competition with private-sector retailers, and so the utilities' initial procurement of electricity through the FIT program was with a view to commercial resale; consequently, this activity fell outside of the Article III.8(a) procurement derogation and was subject to the GATT's Article III.4 national treatment discipline.¹⁴⁶

On appeal, however, while the Appellate Body also found the Canadian procurement fell outside the Article III.8(a) derogation, it mooted the panel's basis and instead found that the disputed products—here, the foreign electricity generators and Ontario's generated electricity—were not in competition with each other, a requirement that the Appellate Body read into Article III.8(a)'s text.¹⁴⁷ Nonetheless, the Appellate Body offered substantial dicta elaborating on the nature of the “commercial resale” and “for governmental purposes” components of the GATT Article III.8(a) derogation.¹⁴⁸ The upshot: Market participation by a procuring entity other than purchases made for solely internal purposes likely remains subject to the disciplines in the GATT or other agreements. Ultimately, the Appellate Body found that the FIT program violated the GATT's national treatment discipline.¹⁴⁹

To be clear, there is a world of difference between where the government is a trade participant—say, purchasing a supply of lithium ion batteries for resale to domestic consumers—and where the government acts as a procuring agent, which is typically understood to be purchasing for the government's own purposes. The former, as *Canada—Renewable Energy* makes clear, falls within GATT disci-

¹⁴⁵ Panel Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, ¶¶ 7.72, 7.79, WT/DS412/R, WT/DS426/R (adopted May 24, 2013).

¹⁴⁶ See *id.* ¶¶ 7.151–.154.

¹⁴⁷ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 141, ¶¶ 5.79, 5.82–.84; Charnovitz & Fischer, *supra* note 141, at 191 (describing the precedential importance of the Appellate Body's dicta); see also Appellate Body Report, *India—Solar Cells*, *supra* note 42, ¶ 5.40 (applying the same requirement to Article III(8)(a) in a different dispute context).

¹⁴⁸ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 141, ¶¶ 5.69–.73; see also Charnovitz & Fischer, *supra* note 141, at 191 & n.31 (synthesizing the Appellate Body's dicta). The flipside of the “commercial resale” coin, which likely has a similar but not identical scope, is the “for governmental purposes” limitation in Article III.8(a). See 2012 GPA, *supra* note 21, art. III.8(a); see also Appellate Body Report, *Canada—Renewable Energy*, *supra* note 141, ¶ 5.68 (discussing the nuances of the “for governmental purposes” determination).

¹⁴⁹ See Appellate Body Report, *Canada—Renewable Energy*, *supra* note 141, ¶ 5.85; Charnovitz & Fischer, *supra* note 141, at 178.

plines.¹⁵⁰ That technique does directly impact green initiatives, but this Note focuses on procurement in the stricter sense.

2. Agency Schedules

The GPA commitments only apply to “covered procurement,” which refers generally to the agencies that a government has pre-designated to be subject to the GPA disciplines.¹⁵¹ Literally, this comes in the form of lists attached to the agreement as annexes that catalog which government agencies—broadly denominated as “entities”—will be covered by the agreement.¹⁵² Each country provides, among others, three key annexes: one each for central government, subcentral government, and “other” entities.¹⁵³ For each entity, countries will often designate only specific categories of goods or services procured, with minimum value thresholds for purchases.¹⁵⁴ There are certain built-in exclusions to the agreement as well, such as public employment contracts or procurement conducted for international aid.¹⁵⁵ But the main mechanism to tailor procurement based on industrial or environmental interests appears in each country’s annexed agency schedules.

The United States central government annex covers eighty-five different entities and provides threshold limits of \$183,000 for both goods and services and \$7,032,000 for construction services.¹⁵⁶ Similarly, the subcentral annex covers thirty-seven states and provides threshold limits of \$499,000 for goods and services and \$7,032,000 for

¹⁵⁰ Specifically, such market participation would trigger GATT disciplines around state trading enterprises. See GATT, *supra* note 16, art. XVII.

¹⁵¹ See 2012 GPA, *supra* note 21, art. II.1–2.

¹⁵² See *id.* art. II; see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-727, INTERNATIONAL TRADE: GOVERNMENT PROCUREMENT AGREEMENTS CONTAIN SIMILAR PROVISIONS, BUT MARKET ACCESS COMMITMENTS VARY (Sept. 27, 2016) [hereinafter GAO, 2016 PROCUREMENT AGREEMENTS REPORT], <https://www.gao.gov/assets/gao-16-727.pdf> [<https://perma.cc/4RUQ-E2M6>].

¹⁵³ 2012 GPA, *supra* note 21, art. II.4.

¹⁵⁴ GAO, 2016 PROCUREMENT AGREEMENTS REPORT, *supra* note 152, at 26, 32 tbl.5.

¹⁵⁵ *Id.* art. II.3(d)–(e)(i).

¹⁵⁶ Revised Agreement on Government Procurement (as amended Mar. 30, 2012), U.S. Annex 1, <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=UnitedStates&AnnexNo=1&ContentCulture=en> [<https://perma.cc/5M4H-X79D>] [hereinafter 2012 GPA Annex 1]. Additionally, the United States lists miscellaneous carve-outs in a separate annex, one of which excludes from coverage any set-asides for small- or minority-owned businesses. Revised Agreement on Government Procurement (as amended Mar. 30, 2012), U.S. Annex 7, <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=UnitedStates&AnnexNo=7&ContentCulture=en> [<https://perma.cc/WG54-JR6L>].

construction services.¹⁵⁷ To put these figures in context, consider that a one megawatt solar farm, which can power two hundred homes, would cost roughly one million dollars to install.¹⁵⁸ Any national public project of even modest scale would far exceed the seven million dollar threshold, so it is difficult to imagine that even the smallest undertakings of a green industrial project would fall within the threshold for covered procurement.

Within their respective annexes listing covered entities, most parties include a positive list in the notes that further specifies the services within each agency covered by the agreement, but the United States instead largely uses a negative list in their notes, itemizing the services *not* covered by the agreement.¹⁵⁹ Any new programs that may arise as a matter of policy, if they are farmed out to a listed agency but not already encompassed in these service exclusions, would be automatically covered by the GPA. For example, the Department of Defense has excluded numerous weapons-related categories of goods, from “Nuclear Ordinance” to “Engines, Turbines, and Components,” the latter of which does not include wind turbines, which are *never* covered.¹⁶⁰ But in fact, they affirmatively include in coverage a set of categories such as: “Railway Equipment,” “Motor Vehicles, Trailers, and Cycles,” “Refrigeration and Air Conditioning Equipment,” and “Water Purification and Sewage Treatment Equipment,” noting that each category is subject to a national treatment determination.¹⁶¹

E. Process for Coverage Modification & Entitlement to Retaliation

A party might choose to modify its coverage in three typical scenarios: first, an administrative reorganization that combines a covered and non-covered entity under one umbrella; second, additional concessions agreed upon through ongoing negotiations or a new member’s accession; and third, where political or commercial reasons

¹⁵⁷ Revised Agreement on Government Procurement (as amended Mar. 30, 2012), U.S. Annex 2, <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=UnitedStates&AnnexNo=2&ContentCulture=en> [<https://perma.cc/ATT8-CVVQ>].

¹⁵⁸ Jacob Marsh, *Solar Farms: What Are They and How Do They Work?*, ENERGY SAGE (Aug. 9, 2022), <https://news.energysage.com/solar-farms-start-one> [<https://perma.cc/9G9Y-987B>] (discussing the cost of a typical solar farm).

¹⁵⁹ GAO, 2016 PROCUREMENT AGREEMENTS REPORT, *supra* note 152, at 26.

¹⁶⁰ 2012 GPA Annex 1, *supra* note 156. Each product category is identified by a Product and Service Code (PSC) Manual number, for which the “Engines, Turbines, and Components” category lists primarily turbines used in engines for vehicles. See FEDERAL ACQUISITION SERVICE, PRODUCT AND SERVICE CODE MANUAL 106–08 (2022), <https://www.acquisition.gov/psc-manual> [<https://perma.cc/VYF9-YXVL>].

¹⁶¹ 2012 GPA Annex 1, *supra* note 156.

urge withdrawal of an entity.¹⁶² Implementing a green-procurement program as against GPA signatories through the Buy American Act would fall within the last and most diplomatically sensitive category.

Article XIX of the GPA outlines the process and scope of changes to coverage. A party will notify the Committee “of any proposed rectification, transfer of an entity from one annex to another, withdrawal of an entity or other modification of its annexes to Appendix I,” and include any information “as to the likely consequences of the change.”¹⁶³ Within forty-five days of notification, any party “whose rights . . . may be affected” may notify the Committee of their objection, and the parties “shall make every attempt to resolve the objection through consultations.”¹⁶⁴ If any objections cannot be resolved, then the proposed modification becomes effective 150 days after its initial circulation and the modifying party affirms its intent to implement the modification in writing.¹⁶⁵ Under this scenario, any objecting party “may withdraw substantially equivalent coverage” with respect to the modifying country and as defined by “any criteria relating to the level of compensatory adjustment adopted by the Committee.”¹⁶⁶

At first glance, coverage modification seems an appropriate and traditional route to exclude a potential green industrial project from GPA coverage. But it presents a paradox: How can the United States withdraw coverage of a program that has yet to exist? For most parties who maintain a positive list of covered services, this is no issue. But for the United States—which maintains a negative list whereby the green industrial procurement program would automatically be covered if tasked to an entity within one of its annexes—it would have to withdraw coverage by adding an exception to the list of services excluded for a particular agency. Of course, the GPA accounts for this by including not just “withdrawal of an entity” but also any “other modification of its annexes.”¹⁶⁷ Yet, if the United States were to modify its annex accordingly, and an aggrieved party tried to respond by “withdraw[ing] substantially equivalent coverage,”¹⁶⁸ that party would have no basis for determining the value of that withdrawal for any green industrial project that had yet to be implemented at the

¹⁶² See ARROWSMITH, *supra* note 111, at 126 (discussing possible circumstances where modification would be appropriate).

¹⁶³ 2012 GPA, *supra* note 21, art. XIX.1.

¹⁶⁴ *Id.* art. XIX.2–3.

¹⁶⁵ *Id.* art. XIX.5(c).

¹⁶⁶ *Id.* art. XIX.6.

¹⁶⁷ *Id.* art. XIX.1.

¹⁶⁸ *Id.* art. XIX.6.

time of agreement. Thus, its sanctions would be entirely speculative and inapplicable within the GPA's terms. The text of the GPA provides no clear remedy. That scenario, though, would only play out if a party attempts to withdraw coverage before the potential project is fully sketched out and implemented.

More likely, a party would attempt to withdraw coverage once its green project is up and running. Then, an aggrieved party, pointing to quantifiable economic development stemming from the project, would have a strong case to establish "substantially equivalent coverage."¹⁶⁹ This, however, presents another potential issue. In *Korea—Measures Affecting Government Procurement*, the panel emphasized that parties do not negotiate for a list of entities but rather the anticipated procurement of those entities.¹⁷⁰ The panel found that the United States had not demonstrated that the Korean project in question was a "benefit[] reasonably expected to accrue under the GPA."¹⁷¹ The panel's discussion centered on party communications and actual knowledge with respect to project coverage.¹⁷² In that light, a party would have to demonstrate that it had a reasonable expectation that a particular green-industry project was a benefit which had accrued to it under the GPA.¹⁷³ Depending on the nature of the negotiations—and perhaps market expectations at the time—that may not be such a straightforward case.

All that said, withdrawal of green industrial projects from coverage at the very least would reduce a party's political capital in GPA negotiations: The benefits of the negative-list approach are the automatic concessions that follow any expansion of government services. Moreover, invoking the coverage modification provisions would sidestep diplomatic negotiations and miss the opportunity to devise a

¹⁶⁹ *Id.* art. XIX.6.

¹⁷⁰ Panel Report, *Korea—Measures Affecting Government Procurement*, ¶ 7.109, WTO Doc. WT/DS163/R (adopted June 19, 2000) ("It is true that the Schedules are structured in terms of entities, but that is not the basis for the negotiations. Members . . . do not bargain for names on a list. Rather, they negotiate to achieve coverage of the procurements which are the responsibility of the covered entities."). This case is particularly unique because coverage negotiations were ongoing when domestic Korean legislation shifted the ownership of the project in question among agency heads such that the project became excluded from Korea's initial, but not final, offer of coverage. *See id.* ¶¶ 7.104–7.106, 7.111.

¹⁷¹ *See id.* ¶ 8.2.

¹⁷² *See id.* ¶¶ 7.106–7.116.

¹⁷³ *See id.* ¶¶ 7.118–7.119 (characterizing the U.S. position as not alleging an "actual Schedule commitment" violation and ultimately holding that the United States "failed to carry its burden of proof to establish that it had reasonable expectations that a benefit had accrued"); *id.* ¶ 8.2 ("[T]he United States has not demonstrated that benefits reasonably expected to accrue under the GPA, or in the negotiations resulting in Korea's accession to the GPA, were nullified or impaired by measures taken by Korea . . .").

strategy that would accommodate the integration of green-industrial policy into trade rules.

What does this morass of trade rules mean for procurement as a tool to foster green industry? There is the foundational nondiscrimination principle—generally speaking, that a country cannot discriminate in trade against trading partners, whether through regulation of goods in the open economy (under the GATT), or even in its internal government purchasing decisions (under the GPA).¹⁷⁴ This includes not just explicit, de jure discrimination based on national origin, but also de facto discrimination: Recall the disparate impact of the “dolphin-safe” label as applied against Mexican tuna imports in *US—Tuna/Dolphin*.¹⁷⁵ However, it is permissible in government procurement to establish policies requiring that products meet certain environmental specifications.¹⁷⁶

Consider a few hypothetical modifications to the Federal Acquisition Regulation (FAR), which provides the rules and guidelines for federal procurement.¹⁷⁷ Say the FAR required agencies to prioritize purchase of American goods over foreign goods without providing a waiver for GPA signatories. This would constitute impermissible de jure discrimination. What if the FAR required that individual refrigerator or air-conditioning units purchased for agency offices did not exceed a certain volume of hydrofluorocarbon (HFCs) emissions each year, or integrated such analysis by utilizing the social cost of carbon for those emissions?¹⁷⁸ While this may have a de facto impact on certain foreign suppliers—and constitute a violation if applied to all purchasers in the open market under the GATT—this regulation would most likely be saved thanks to the GPA’s Article X.6 provision permitting technical specifications related to environmental conservation. What if, however, the FAR attempted to identify where

¹⁷⁴ See *supra* Section II.A (discussing the presumptive opposition to discriminatory policy under the GATT and the GPA). Of course, there are numerous other agreements constraining discrimination in trade in different ways, some of which were noted earlier. See *supra* notes 18–19 (discussing other WTO instruments intended to combat discriminatory trade practices).

¹⁷⁵ See *supra* notes 138–40 (discussing that facially country-agnostic trade policies may have discriminatory effects which are forbidden by the GATT and the GPA).

¹⁷⁶ See *supra* Section II.C (elaborating on the conditions under which such policies are permissible).

¹⁷⁷ See generally Federal Acquisition Regulations System, 48 C.F.R. 1 (2019).

¹⁷⁸ See generally Isabelle Gerretsen, *How Your Fridge is Heating Up the Planet*, BBC (Dec. 7, 2020), <https://www.bbc.com/future/article/20201204-climate-change-how-chemicals-in-your-fridge-warm-the-planet> [<https://perma.cc/9F2F-SF37>] (describing environmental reasons for regulating HFC emissions in household appliances).

the manufacturing processes for these products themselves contributed significantly to environmental harm? Could FAR make a procurement decision between two products contingent on which one's production has a lesser environmental impact? Most likely no: this would constitute de facto discrimination to the extent that it disparately affected a party to the agreement.

The question then becomes whether this violation could be otherwise excused. As discussed, the GPA provides a set of exceptions designed to preserve each member's right to regulate.¹⁷⁹ However, in addition to the two-step exceptions analysis, a few other key points emerge from WTO cases. First, non-specific allegations of misconduct by another member cannot sustain disparate treatment, at least where the treatment is not tailored to remedy the perceived harm.¹⁸⁰ Second, a regulation cannot be coercive, i.e., it cannot function to impose one member's regulatory standards upon another.¹⁸¹ And third, a regulation may be more likely to succeed where it is developed with a neutral perspective that accommodates, or at least has made a fair attempt to engage with, the varying interests of affected members.¹⁸²

Correspondingly, then, legislative calls condemning the use of taxpayer dollars to purchase products developed in countries "that do not share or openly flout the commitments of the United States to environmental, worker, and workplace safety protections"¹⁸³ would be overbroad to serve as a justification for this hypothetical FAR regulation, and to the extent that specific HFC standards were developed, could constitute a unilateral imposition of environmental or labor standards in trade. Yet, trade disciplines should serve to facilitate, rather than inhibit, the development of sustainable manufacturing networks. To do so requires a shift in how certain trade rules—like the public morals exception—have been interpreted to accommodate for such interests, and alterations to what federal actors—like those promulgating FAR regulations—could do to facilitate this development. Part III discusses potential options.

¹⁷⁹ See *supra* Section II.B (discussing provisions in the GPA intended to give signatories limited regulatory flexibility).

¹⁸⁰ See *supra* notes 130–31 and accompanying text (affirming that discriminatory trade policies must be highly targeted to achieve their supposed end in order to be found permissible).

¹⁸¹ See *supra* notes 137–40 and accompanying text.

¹⁸² See *supra* notes 127–29 and accompanying text (discussing an example where regulation considered an exception for animal welfare protections but not an exception for seal hunts for indigenous communities).

¹⁸³ Build America, Buy America Act, Pub. L. No. 117-58, § 70911(2)–(3) (2021).

III

REFINING THE GREEN-TRADE PROCUREMENT STRATEGY

As applied in the context of the Buy American Act, this Part analyzes the core green-industrial goals discussed earlier as a case study to develop a strategy that can enable trade to better aid procurement's use as a tool for green industry, considering environmental, industrial, and trade prerogatives, and the political economy that entangles them. While the Act's domestic product requirement would indisputably be a de jure violation of the GPA's non-discrimination principle if applied to GPA signatories, this Part reviews potential strategies that might render these preferences legal within WTO parameters—that is, strategies which avoid activating retaliatory measures—with an eye toward the net welfare effects of each option.

Unlike agreements which have faced the tremendous political pressure of repeated WTO litigation and the whittling effect of judicial interpretation—as with, prominently, the GATT—the precise contours of the GPA have evaded such immense public scrutiny. While the comparatively minor volume of trade captured by the GPA may account for the difference, as countries continue to find other, more traditional routes hostile to their green industrial goals, they will pursue alternatives like procurement where fewer restrictions constrain their spending prerogatives. Sophisticated state actors will, inevitably, find the exploitable crevices in the framework and mold their derogating policies to fit.¹⁸⁴ As such, it is crucial to understand these areas of manipulation and their potential effects on trade, labor, and environmental policy.

The thread tying together the discussion below of various strategies is an exploration of coherent, market-wide disciplines that enable green industrial policy while cabining potential welfare-reducing effects. The current approach—where the USTR waives application to GPA signatories and the scope of green-industrial procurement policy is limited to simply buying green products—does not present a compelling long-term vision for integrating green industrial policy harmoniously across domestic and international trade networks. While the strategy has proven to be feasible, it does not inquire into net welfare effects, and as discussed below, might have net negative effects if simplistically applied. A blind insistence on domestic industrial preference resembles the least common denominator among competing

¹⁸⁴ See Wu & Salzman, *supra* note 1, at 462 (using procurement as a hypothetical); cf. Samuel Issacharoff, *Private Claims, Aggregate Rights*, SUP. CT. REV. 183, 214 (2008) (arguing regulated actors will seek alternative markets rather than exploit loopholes in regulations governing their fields).

domestic political interests whose alliance already stands on shaky grounds.¹⁸⁵

Section III.A discusses possibilities within the scope of coverage, focusing on how procurement could be structured to avoid classification within the annexed agency schedules. Section III.B evaluates how these domestic product requirements would fare under invocation of the public morals exception, finding the scheme as currently constructed too broad to support use of the exception. Section III.C then proposes that the agencies require disclosures that would allow procurement entities to measure the integrity of a given product's supply chain with respect to environmental and labor practices, enabling a particularized use of the public morals exception.

A. *The Administrative Gerrymander: Siloing Green Procurement*

This Section discusses the first, most obvious pressure point: the scope of coverage, which could permit strategies involving misdirection through agency product classifications and procurement schedules. These strategies could take on any combination of three approaches: parcel out purchases as to evade the dollar thresholds for discrete procurement contracts; negotiate carve-outs for green industrial policy; or create a new agency that falls outside of the GPA's annexed agency schedule. Each of these possible avenues indicates a set of latent incentives whose contribution to the trade regime's purpose of advancing global welfare is, at the very least, questionable.

The first approach—parceling out purchases to evade dollar thresholds—is straightforward in concept but would be difficult for an administration to implement across all agencies, and moreover would appear as a flagrant effort to avoid the agreement's coverage. Importantly, GPA disciplines around transparency in procurement decision-making already shore up these concerns,¹⁸⁶ but they lend themselves to fending off substantive discrimination, so to speak. A procuring entity must inform participating suppliers of its award decisions and provide, on request, an explanation to the unsuccessful supplier of the reasons it was not selected “and the relative advantages of the successful supplier's tender.”¹⁸⁷ This transparency aids identification of discriminatory purpose in selecting between two suppliers, but it strains to cabin potential segmentation of procurement by value thresholds, particularly given inconsistencies within and among the

¹⁸⁵ See Wu & Salzman, *supra* note 1, at 445–50 (discussing the evolving relationship between labor and environmental groups).

¹⁸⁶ See 2012 GPA, *supra* note 21, art. XVI.

¹⁸⁷ *Id.* art. XVI.1.

parties' disclosures.¹⁸⁸ Moreover, the procurement statistics disclosures required by Article XVI.4 of the GPA appear sufficiently aggregated as to resemble a sketch of the government procurement market, more useful as a generalized monitoring tool and enticement for other WTO members to accede to the agreement.¹⁸⁹ All that said, the political economy at the WTO and domestic regulatory hassle may well deter the explicit use of this tactic.

The second approach is similarly straightforward in concept: renegotiation of the annexed schedules by adding some form of carve-out for green industrial policy. The propriety of renegotiating an agreement depends on the political economy the United States holds at the WTO with respect to the GPA, and the most significant factor establishing a party's political economy in this arena is simply economic—the party's relative share of concessions—for which the United States may carry a disproportionate burden. The Government Accountability Office (GAO) assessed that for 2015, the U.S. government awarded \$12 billion in procurement contracts to foreign-located firms, half of which went to the six main parties to the GPA.¹⁹⁰ Those six parties awarded \$7 billion to foreign sources, less than a third of which went to U.S. sources.¹⁹¹ Yet, the report acknowledges that these broad figures cannot alone capture the benefits and losses in this trade balance, absent a better accounting of how the foreign-sourced firms contribute to the U.S. economy.¹⁹² Moreover, this approach should be disfavored because it frustrates the advancement of liberalized trade on technical grounds without achieving substantive progress. The GPA aims to diminish—gradually, as has been the process with other negotiations, like tariff concessions—such a parcellation of government procurement markets.¹⁹³ All that said, given the difficulty a party would face in establishing conditions that constitute substantially equivalent coverage or determining that the party had a reasonable expectation that this particular benefit had accrued to it during

¹⁸⁸ See GOV'T ACCOUNTABILITY OFF., GAO-17-168, UNITED STATES REPORTED OPENING MORE OPPORTUNITIES TO FOREIGN FIRMS THAN OTHER COUNTRIES, BUT BETTER DATA ARE NEEDED 18–19 (2017), <https://www.gao.gov/assets/gao-17-168.pdf> [<https://perma.cc/HXL4-ZL7L>] (noting variability within and between reports as a result of poor common understanding of key terms).

¹⁸⁹ See *id.*; Report by the United States of America for 2015, *Notification of Statistics Under Article XVI.4 of the Agreement on Government Procurement 2012*, WTO Doc. GPA/137/Add.8/Rev.1 (revised Oct. 5, 2021).

¹⁹⁰ GAO, 2019 FOREIGN PROCUREMENT REPORT, *supra* note 24, at 12.

¹⁹¹ *Id.*

¹⁹² See *id.* at 2, 12.

¹⁹³ See, e.g., *id.* at 5.

negotiations,¹⁹⁴ the United States may be able to withdraw coverage without direct ramifications anyways.

The third approach requires a significant legislative commitment. Conceivably, to place green industrial projects outside of the scope of coverage, Congress could establish a new agency to house these projects, which by the nature of the annex's structure would avoid the GPA's non-discrimination obligation. Creating a new, green-industry agency implies a change from how the United States has approached procurement—it would be awkward, to say the least, to have a shell agency procure goods and services for later disbursement to appropriate agencies, an arrangement procedurally unprecedented and an administrative nightmare for the OMB. A new agency makes sense where government procurement plays a larger role—not just using procurement dollars as pseudo-subsidy, but also participating in the market as to more directly structure its incentives. Feed-in tariffs, discussed earlier, are a prime example where a government will offer wholesale electricity at guaranteed, below-market rates, but are rare in the United States and would fall back into the GATT's coverage because they do not constitute procurement for internal agency purposes.¹⁹⁵

Other alternatives might include more expansive projects—say, government procurement of construction services and materials for development of solar or wind farms—but such examples require more radical government industrial policy akin to the Works Progress Administration, for which the current U.S. Congress has little appetite. If anything, the potential for siloing green procurement through agency channels or the creation of an entire agency results in aggrandizement of government-directed market intervention in an agency outside of the scope of coverage, ultimately resembling the capitalist alternative and opponent to the formidable state-owned enterprises deployed in China.¹⁹⁶ More modestly, some theoretical procurement projects could be construed as “for governmental purposes” and not with a view to “commercial resale.”¹⁹⁷ An example would be a state or city agency purchasing a fleet of green-technology vehicles as part of

¹⁹⁴ See *supra* notes 170–73 and accompanying text.

¹⁹⁵ See *supra* notes 142–49 and accompanying text.

¹⁹⁶ The GATT does, nonetheless, require state enterprises to comply with its non-discriminatory treatment principle. GATT, *supra* note 16, art. XVII. See generally Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises*, 23 J. INT'L ECON. L. 371 (2020) (noting how China has been able to wield a form of state-sanctioned capitalism to evade WTO commitments).

¹⁹⁷ GATT, *supra* note 16, art. III.8(a); see Section II.D.1 (explaining the GATT's Article III.8(a) government-procurement derogation).

its infrastructure update, deployed as a local transportation service, where a government entity retains ownership of the green technology. All that said, the takeaway here as far as considering policy design in light of GPA constraints is that government procurement which acts not only to stimulate but also to structure nascent green sectors through policies that create the commercial facilities and channels to funnel energy products to consumers will likely fall outside of the GATT's Article III.8(a) derogation. As such, while a non-covered agency's activity would be excluded from GPA disciplines, the kind of activity that would merit streamlining control in a new agency would likely fall back within the GATT's coverage—and so these more expansive policies must be defended through the general exceptions to the agreements, discussed ahead.

In general, any of these approaches that tinker with the scope of coverage have dubious value when viewed through the lens of global welfare gains: these techniques raise levies and dams in trade flows rather than filter out and eliminate negative externalities. As a result, these externalities—be it labor or environmental violations or beyond—are sequestered offshore and at the cost of raised domestic prices for production inputs and consumer goods. These protectionist techniques make for good short-term domestic political gains, but they avoid wrestling with how to establish disciplines that strengthen long-term welfare through the global trade regime. Addressing these externalities head on, as below, marks one path forward.

B. The Traditional Approach: The Exceptions Balancing Test

Public morals exceptions have become a standard practice in the design of trade agreements.¹⁹⁸ Unsurprisingly, though, invoking moral authority to justify departure from a prearranged trading structure causes tensions to flare and invites scrutiny over the authenticity of such a unilateral claim. However, as this Section will explain, preserving the moral idiosyncrasies between trading partners is essential to the pluralism at the heart of the WTO, although the Buy American Act will require further tailoring in order to fit within the public morals exception.

As a brief recap, an adjudicator engages in a two-step balancing test to determine whether one of the exceptions applies.¹⁹⁹ First, they focus on the nature of the measure itself—here, a domestic content

¹⁹⁸ Ming Du, *Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization*, 50 J. WORLD TRADE 675, 675 (2016) (citing Mark Wu, Note, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 YALE J. INT'L L. 221 (2008)).

¹⁹⁹ See *supra* notes 105–08 and accompanying text.

preference for all federal procurement—and see whether it serves the substantive purpose of the claimed exception. Second, they determine whether the measure functions as protectionism in disguise or is applied in an arbitrary or unjustifiably discriminatory manner.

The exceptions generally, and the public morals exception in particular, preserve the pluralism at the core of the WTO. Robert Howse and Joanna Langille have stressed that the GATT—and the WTO more broadly—was not intended to become an invasive regulatory regime but rather was designed to place limits on how countries regulate trade in order to prevent another depression spawned by protectionist policy made in response to domestic political pressure.²⁰⁰ The trade regime was not designed to render substantive judgment on the moral bases of its members' societies.²⁰¹ Striking down morals legislation erodes public confidence in the trade regime, casts doubt on the purposes it serves, and may inspire populist withdrawal.²⁰² And so, finding an appropriate balance between preserving the pluralism of the WTO constituency and protecting against protectionist trade policies is critical to maintain the WTO's legitimacy.²⁰³

To better understand how moral regulations interact with WTO disciplines, some commentators have characterized them as either “outwardly” or “inwardly” directed, depending on whether a nation seeks to protect the morals of those abroad or at home.²⁰⁴ Mark Wu has taken this a step further and broken this division into three forms.²⁰⁵ In his characterization, Type I restrictions are “inwardly” directed, designed to safeguard domestic morals, as with a ban on importing pornography.²⁰⁶ The other two categories are “outwardly” directed: Type II restrictions protect “those directly involved in the production of the product or service in the exporting state,” as with a ban on products made through child labor.²⁰⁷ Type III restrictions take aim at a state whose practices the importing state finds offensive by implementing a ban that captures products or services otherwise unrelated to the morally offensive practices, for which Wu uses the

²⁰⁰ Howse & Langille, *supra* note 112, at 427–28.

²⁰¹ *Id.* at 428; Robert Howse, Joanna Langille & Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products*, 48 GEO. WASH. INT'L L. REV. 81, 86 (2015) (noting that the WTO is poorly positioned to make substantive judgments regarding its member countries' moral choices).

²⁰² See Pelin Serpin, Note, *The Public Morals Exception After the WTO Seal Products Dispute: Has the Exception Swallowed the Rules?*, 2016 COLUM. BUS. L. REV. 217, 249–50.

²⁰³ See Howse & Langille, *supra* note 112, at 428.

²⁰⁴ See, e.g., Liane M. Jarvis, Note, *Women's Rights and the Public Morals Exception of GATT Article 20*, 22 MICH. J. INT'L L. 219, 236 (2000).

²⁰⁵ Wu, *supra* note 198, at 235.

²⁰⁶ *Id.* at 235.

²⁰⁷ *Id.*

example of an outright ban on Sudanese imports because of its government's human rights violations in Darfur.²⁰⁸ Wu emphasizes that any expansion of the public morals doctrine to encompass outwardly directed measures should be done in moderation, with a careful and watchful eye in order to prevent it from accommodating other protectionist or geopolitical interests.²⁰⁹ In a similar vein, others have argued that only tailored Type II measures with narrow application are permissible.²¹⁰

While some have pointed out that Wu's typology has no basis in WTO law or jurisprudence,²¹¹ his characterization nonetheless provides a useful framing device for understanding where moral regulation runs afoul of WTO disciplines. Simplified, this approach recognizes that the more tailored the impact of a moral regulation is to the conduct targeted, the more likely it will be viewed as a genuine expression of public morals and not a disguised restriction on trade.²¹² Of course, this principle has limits—when a regulation bars trade from an entire national industry, as in *US—Tuna/Dolphin*, the regulation may be considered unjustifiably disruptive for unilateral action.²¹³ However, the principle is reinforced by the more recent *EC—Seal Products*, where the Appellate Body emphasized that a measure's contribution to its stated objective is only one component of the exceptions analysis, and instead requires a weighing and balancing.²¹⁴

In light of these boundaries, what would happen if a trade policy like the domestic products requirement contained in the Buy American Act was justified by green-industrial goals? Moral regulation restricts goods facially involving moral issues, e.g., pornography, alcohol, narcotics, hate propaganda, and beyond.²¹⁵ However, the link between the Buy American Act's domestic purchasing requirement and the stipulated green-industrial moral is indirect and—it bears reminding—patently protectionist. Consider recent legislation, dis-

²⁰⁸ See *id.*

²⁰⁹ *Id.* at 248.

²¹⁰ Du, *supra* note 198, at 702.

²¹¹ See Howse & Langille, *supra* note 112, at 414. Howse and Langille further argue that Wu's hierarchy is intrinsically flawed because considerable moral regulation serves dual outward and inward purposes. *Id.*

²¹² See Du, *supra* note 198, at 702 (focusing on the narrowness of a measure's application and "overbroad design" in determining its legality under Wu's typology); see also Marwell, *supra* note 117, at 806 (arguing that a better public-morals discipline would focus on whether trade-restrictive measures are achieved by the least trade-restrictive means).

²¹³ See *supra* notes 139–40 and accompanying text; see also Du, *supra* note 198, at 702.

²¹⁴ Howse, Langille & Sykes, *supra* note 201, at 113; Appellate Body Report, *EC—Seal Products*, *supra* note 43, ¶¶ 5.215–.216.

²¹⁵ Marwell, *supra* note 117, at 818; Wu, *supra* note 198, at 222–23.

cussed earlier, emphasizing that “United States taxpayer dollars . . . should not be used to reward companies that have moved their operations . . . to foreign countries or foreign factories, particularly those that do not share or openly flout the commitments of the United States to environmental, worker, and workplace safety protections.”²¹⁶ By contrast, the operative Buy American provisions themselves have no relation to environmental or labor protection, instead establishing the indiscriminate requirement that “substantially all” manufacturing for a procured good has taken place in the United States.²¹⁷ If these green-industrial goals were used in an attempt to justify the Buy American Act as applied to GPA current or future signatories under the public morals exception, the stated concern with environmental and worker protections would shade the restriction as Type II given that focus on production processes; its overbreadth in application, though, would resemble a Type III restriction with a rent-seeking effect and the potential to reduce net welfare.²¹⁸ Consequently, the provision would likely be viewed as an unjustified restriction on trade.

So, what would a country need to show to satisfy the public morals exception? As indicated above, invoking general environmental or labor protection prerogatives is too broad to satisfy the exception: rather than serving the claimed environmental or labor purposes, an overbroad justification would appear to resemble extra-territorial application of domestic policy, serving as pretext for protectionism. That is, to simply say that U.S. agencies must purchase U.S. goods, and only making exceptions on a country-by-country basis based on environmental or labor policy alignment, has that patently rent-seeking effect that WTO agreements are designed to abate. The best approach to potentially qualify for the public morals exception must be structured to avoid these concerns: the application must be narrowly tailored to the environmental or labor concern as to reduce any rent-seeking effect, and it must be applied neutrally, based on objective data rather than national policy differences. Procurement presents a unique opportunity to test out such a strategy, because a procurement decisionmaker, if armed with specific information relating to the environmental footprint of a given purchase, can incorporate factors like environmental footprint on a purchase-by-

²¹⁶ Build America, Buy America Act, Pub. L. No. 117-58, § 70911(3) (2021).

²¹⁷ See Buy American Act, 41 U.S.C. § 8302(a)(1).

²¹⁸ See Wu & Salzman, *supra* note 1, at 460 (“A WTO ruling against a green industrial policy triggers a welfare gain, by requiring that a rent-seeking protectionist policy be eliminated.”); *id.* at 456 (explaining the standard view that the reciprocal advantages gained through trade agreements “raise[] living standards through welfare gains”).

purchase, rather than country-by-country basis. This is where a tool like disclosure can step in, discussed ahead in Section III.C.

C. *The Agency Tailor: Curating Implementation*

Few disagree that WTO members “should not be given *carte blanche* to claim that any trade restrictive measure is acceptable by simply asserting, on a declaratory basis, that the measure accords with their public morality.”²¹⁹ That said, this Note does not scrutinize whether the moral invoked is representative of the WTO member state’s constituency,²²⁰ instead assuming for the instant purposes that the professed labor and environmental concerns are genuine, even if co-opted at present for protectionist purposes. We can readily point to labor and environmental practices that serve as the basis for moral objection, but we struggle to link these objections to trade without the blunt instrument of a blanket ban. In this vein, it is important to emphasize that the way in which the government incorporates its secondary policies in procurement practices matters greatly to its international acceptability.²²¹

The previous Section revealed the need for a strong, objective through-line to bolster the use of the public-morals exception if used to probe into the supply chain’s integrity. A discipline centered on informational disclosure would shore up concerns of unilateral action with concrete, objective data.²²² In its simplest form, an agency could devise a preclearance scheme by which a procuring agent would validate a prospective supplier’s compliance with at least basic labor and environmental standards as a condition on entry to the market.²²³ Alternately, the agency would not preclear suppliers based on environmental or labor standards, but would have, for example, information on the environmental footprint of a given product’s supply chain,

²¹⁹ Howse, Langille & Sykes, *supra* note 201, at 103.

²²⁰ *Id.* at 105.

²²¹ See Phoebe Bolton & Geo Quinot, *Social Policies in Procurement and the Agreement on Government Procurement: A Perspective from South Africa* 479–80 (“[T]he debate about horizontal policies in public procurement versus free trade will be more constructive if it relates in a very specific way to the manner in which horizontal policies are accommodated in public procurement rather than whether such horizontal policies should be accommodated at all.”), in *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM* 459–80 (Sue Arrowsmith & Robert D. Anderson, eds., 2011).

²²² Cf. Iona Cheyne, *Risk and Precaution in World Trade Organization Law*, 40 *J. WORLD TRADE* 837, 839 (2016) (“[T]he trade liberalization project would be strengthened by demanding objectively verifiable standards of risk and principled justifications for trade-restricting measures.”).

²²³ In practice, this would blend the first and fourth models for socially driven procurement discussed by McCrudden—market access contingent on compliance with technical specifications. See McCrudden, *supra* note 51, at 125–26.

and use that as a discounting factor in a more holistic review—as with recent proposals to integrate, for instance, the social cost of carbon into procurement decisionmaking.²²⁴ This strategy has many salutary effects: requiring disclosure would foster transparency between trading partners, strengthening the trade regime as a whole.²²⁵ Compliance as a precondition to accessing the procurement market or cost-accounting during evaluation resembles an affirmative incentive to meet labor and environmental standards rather than a sanction for when a company’s supply chain falls short, avoiding the post-hoc issues of a sanctions regime.²²⁶ Similarly, the Securities and Exchange Commission is considering whether it should require companies to disclose the “emissions generated by their suppliers to give investors a full accounting of their carbon footprint”²²⁷—forcing public disclosure of supply-chain integrity. To be sure, because a regulatory strategy of this ilk in the procurement context would impose different burdens on accessing the U.S. procurement market between trading partners, it would likely constitute *de facto* discrimination and be considered in violation of the GPA’s core provision on non-discrimination.²²⁸ However, because this strategy verifies the application of the public morals exception in a particular procurement, the issue would be moot.

Because the Buy American Act requires that a procured good is manufactured “substantially” from domestic materials,²²⁹ it already requires some form of supply-chain inquiry in order to facilitate that evaluation. Moreover, this disclosure could be justified as an effort to maintain compliance with international trade agreements,²³⁰ as well as

²²⁴ See Revesz & Sarinsky *supra* note 86; Federal Acquisition Regulation: Minimizing the Risk of Climate Change in Federal Acquisitions, 86 Fed. Reg. 57404, 57405 (proposed Oct. 15, 2021) (to be codified at 48 C.F.R. Ch. 1); see also Ctr. for Biological Diversity et al., *supra* note 89; *supra* notes 86–89 and accompanying text.

²²⁵ Cf. Dani Rodrik, *The Return of Industrial Policy*, PROJ. SYNDICATE (Apr. 12, 2010), <https://www.project-syndicate.org/commentary/the-return-of-industrial-policy-2010-04> [<https://perma.cc/QW6C-SHJJ>] (“[S]uccessful practitioners [of industrial policy] understand that it is more important to create a climate of collaboration between government and the private sector than to provide financial incentives. . . . [C]ollaboration aims to elicit information about investment opportunities and bottlenecks.”).

²²⁶ See BARRY & REDDY, *supra* note 31, at 577 (noting how favoring linkage does not always entail supporting sanctions); see also Robert Howse, *The World Trade Organization and the Protection of Workers’ Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 148–62 (1999) (discussing sanctions scenarios and their likely outcomes).

²²⁷ Michael Corkery & Julie Creswell, *Corporate Climate Pledges Often Ignore a Key Component: Supply Chains*, N.Y. TIMES (Nov. 2, 2021, 5:00 AM), <https://www.nytimes.com/2021/11/02/business/corporate-climate-pledge-supply-chain.html> [<https://perma.cc/2R7F-2UZ8>].

²²⁸ See *supra* Section II.A.

²²⁹ See Buy American Act, 41 U.S.C. § 8302(a)(1).

²³⁰ See *id.* § 70911(15)(A).

part of the general information-cultivating prerogative of a procurement entity seeking to place taxpayer dollars where they have the greatest impact. Or, the agency head could rely on their determination of whether an “acquisition [is] inconsistent with the public interest” in requesting such disclosure.²³¹ Broadly speaking, this method enables the procuring entity to identify which spending opportunities it should avoid in accordance with environmental or labor prerogatives, while providing the trade regime better assurance that procurement decisionmaking is not operated in a discriminatory manner.²³² Of course, a trading partner would—and should—nonetheless be able to challenge whether the decisionmaking functions as disguised, pretextual discrimination.²³³

Such supply-chain disclosure often faces heavy corporate pushback. For instance, a bill proposed in 2021, the Uyghur Forced Labor Prevention Act, aimed to “[e]nsur[e] that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China do not enter the United States market.”²³⁴ However, lobbyists from multinational corporations “argu[ed] that while they strongly condemn forced labor and current atrocities in Xinjiang, the act’s ambitious requirements could wreak havoc on supply chains that are deeply embedded in China.”²³⁵ Ironically, this unsubtle argument from lobbyists resembles a concession of the need for supply-chain disclosure rather than a rejection of disclosure on the merits. In the context of green-industrial procurement, it bears emphasizing that disclosure would be used as one component in an agency’s procurement decision. Similar to how private investors need disclosure to appropriately price a given company’s climate risk exposure, where government procurement is used as an investment tool to stimulate the development of green technology, disclosure enables the procuring entity to determine whether the purchase is appropriate for government investment.²³⁶

²³¹ Buy American Act, 41 U.S.C. § 8302(a)(1); *see supra* note 80 and accompanying text.

²³² *See* Howse, *supra* note 226, at 169 (describing how labor compliance measures could be presumed to be nondiscriminatory and assessment could focus on ensuring “that they are not operated in a discriminatory manner”).

²³³ *See supra* notes 119–20 and accompanying text.

²³⁴ Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. (2021).

²³⁵ Ana Swanson, *Nike and Coca-Cola Lobby Against Xinjiang Forced Labor Bill*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2020/11/29/business/economy/nike-coca-cola-xinjiang-forced-labor-bill.html> [<https://perma.cc/W7TQ-VT7Y>].

²³⁶ *See* JACK LIENKE & ALEXANDER SONG, INST. FOR POL’Y INTEGRITY, ASSESSING THE COSTS AND BENEFITS OF MANDATORY CLIMATE RISK DISCLOSURE 11–12 (2022), https://policyintegrity.org/files/publications/Climate_Risk_v3_%281%29.pdf [<https://perma.cc/HZR5-NZE2>]; *see also supra* notes 54–57 and accompanying text.

To be clear, identifying weak links in a supply chain—based on poor environmental or labor practices—and choosing an alternate supplier would likely constitute *de facto* discrimination under WTO disciplines, because of the likelihood that such a selection would have a systematic, disparate effect on one country's suppliers given variances in environmental or labor standards. However, because the dispositive reason for procuring from an alternate supplier would be narrowly tailored to the specified moral grounds and coupled with objective data as disclosed through the procurement inquiry, there would be a strong case that the procurement decision is justified under at least the public morals exception, satisfying the first step of the exceptions analysis.²³⁷ Further, disclosure and cost-impact analysis would enable a decisionmaker to compare the impact of any two given products' production on a justifiable and country-neutral basis, satisfying the second step of the exceptions analysis, provided that the policy does not function as a disguised restriction on trade.²³⁸

Now, this would likely have a disparate impact on the suppliers of particular countries, but the impact would be strictly limited to procurement decisions that can point to a justifiable environmental or labor cost impact, avoiding any rent-seeking spillover. Moreover, corporate incentives shift: instead of imposing a severe cost on an entire country for a policy disagreement, individual suppliers are incentivized to change production processes in order to access the government procurement market. In some ways, the outcome here follows Mark Wu and James Salzman's prediction with respect to green industrial policy—the environmental protection elements of the Act would remain intact, while reliance on objective data would otherwise winnow the Act's protectionist application.²³⁹ What this design could further enable, though, is the advancement of extraterritorial labor protection in addition to environmental protection.

Two caveats are in order. In the case of developing countries, even where this form of disclosure policy might reveal weak links in the supply chain, a straightforward ban on products flowing from those weak links may well be too simplistic a response. Rather than

²³⁷ The first step of the analysis determines whether the policy in question actually serves the nature of the particular exception. *See supra* note 117 and accompanying text.

²³⁸ The second step of the analysis evaluates whether the policy acts as a disguised restriction on trade or is applied as to constitute a means of arbitrary or unjustifiable discrimination. *See supra* notes 119–20 and accompanying text.

²³⁹ *See* Wu & Salzman, *supra* note 1, at 474 (“Our analysis suggests that governments, in responding to these negative rulings, either find legal work-around solutions or sever only the quasi-protectionist elements, keeping the environmental benefits in place. Meanwhile, these rulings have welfare-positive effects in that they lessen the rent-seeking behavior embedded within the industrial policy.”).

increase welfare, the ban might simply redistribute the environmental or labor harms elsewhere—seeking out less regulated areas—or may trigger a spike in input prices that exceeds the marginal cost of abating the harm.²⁴⁰ In these trickier situations, disclosure enables a more calculated assessment and thereby a more incisive solution as to market intervention rather than the blunt tool of country-wide bans or sanctions.

Additionally, it bears repeating that this Note's proposal is confined to the more limited space of government procurement, using the Buy American Act alongside certain green-industrial policy goals largely as a case study, albeit one whose structural limitations reveal potential for innovation in the evolution of trade disciplines. Because procurement is already a highly discretionary inquiry, it is well suited to disclosure requirements, and where, for example, a market-wide labelling scheme might be infeasible to institute and enforce,²⁴¹ government procurement's limited scope and existing procedural structure renders it an ideal test market for this kind of practice.

CONCLUSION

Government procurement can provide a way for domestic policymakers to exercise discretion in markets without relying on broad-base regulation that would otherwise upset its more freeform dynamics, providing the benefits of tailored government discretion without the undue hampering of one-size-fits-all regulation. While such discretion is bound by the GPA's non-discrimination obligation, that should not inhibit the use of environmental and labor-conscious procurement. But, to the extent that the green-industrial policy requires procurement to incorporate domestic product requirements that mandate favoritism for domestic manufacturing over foreign-sourced materials, it risks violating the terms of our international commitments. A few options discussed above—a new agency, carefully structuring purchases within the scope of coverage, and the tailored application of the public morals exception—work around or appropriately within those obligations to achieve the secondary policies nonetheless. However, these workarounds abate the symptoms without

²⁴⁰ See Wu & Salzman, *supra* note 1, at 444. Wu and Salzman present this as China's perspective, although they note as well the cynical assessment of this perspective—that in presenting this argument China may be “behaving as a mercantilist actor exploiting its natural resources for strategic gain.” *Id.*

²⁴¹ For instance, in the context of the *Seal Products* dispute, Howse and Langille noted how “it is impossible to imagine an effectively monitored and implemented labeling or code of conduct scheme” that resembles a reasonably available alternative to a ban. Howse & Langille, *supra* note 112, at 421.

addressing the cause. A long-term vision for the international trade regime requires a foundational reimagining of how we develop the substance at the core of the international trade's purpose: the advancement of global welfare.

Among these different approaches, one aspect of the GPA's text itself shines through as a potential landmark: incorporating environmental concerns as appropriate technical specifications to consider in a procurement inquiry under Article X.6. This approach may be the answer to the thesis that a discussion of social issues should be framed not as a question of how our actions comply with social prerogatives but rather how each decision advances them. Stop talking about environmental concerns and instead promote environmental interests: they are not exceptions to the rule but rather part of "a language that creates the basis for deliberation."²⁴² The supply-chain disclosure and evaluation discussed in this Note provides the vocabulary of that language; linked integration through provisions like Article X.6 or enabling disciplines like the public morals exception form its syntax. This requires a shift from shorter term, closed-system analysis whereby success is determined by a non-violation *outcome*, to one that understands success as an incremental *process*. However, for full integration of accountability for labor abuses and environmental degradation, much remains to be desired.

²⁴² McCrudden, *supra* note 51, at 147 ("[H]uman rights (and by implication, equality) advocates should 'stop thinking of human rights as trumps and begin thinking of them as a language that creates the basis for deliberation.'" (quoting Michael Ignatieff, *Human Rights as Idolatry*, 95 in HUMAN RIGHTS AS POLITICS AND IDOLATRY 53–98 (Amy Gutman ed., Princeton Univ. Press, 2001))); Bolton & Quinot, *supra* note 221, at 479–80 ("[T]he way in which social policy objectives are inserted into the public procurement regime can play a critical role in the acceptability of the practice in international free trade initiatives.").