

International Procurement Regimes and the Scope for the Inclusion of Environmental Factors in Public Procurement

by

Peter Kunzlik*

* Peter Kunzlik is Associate Dean, Nottingham Law School, Head of the Centre for Legal Research and Professor of European Business Law, Nottingham Law School, Nottingham Trent University, United Kingdom.

1. Introduction

Through adherence to regional trade agreements, membership in common market areas, and other international treaties, OECD member country governments have agreed to subject their public procurement procedures to a certain degree of international regulation. This paper will review the importance of legal constraints that such regimes place on the “scope” for including environmental criteria in public procurement.

The paper reviews four international procurement regimes: the Government Procurement Agreement (selected because of its character as a plurilateral agreement within the WTO system); the procurement regime of the European Union (selected because it represents a regime operating in the context of a common market rather than only a free trade area); the North American Free Trade Agreement (selected as an example of a procurement regime operating in the context of a regional free trade agreement between members of the WTO who are signatories to the GPA); and the Australia and New Zealand Government Procurement Agreement (selected as an example of a bilateral procurement agreement between countries not party to the WTO Government Procurement Agreement).

In all cases, the incorporation of environmental concerns into issues such as the qualification and selection of potential suppliers, technical specifications of goods and services to be procured, and contract award criteria is explored. While many of the same issues arise in the four cases, they are often addressed in very different ways.

2. The Government Procurement Agreement

Government procurement is excluded from the national treatment and most-favoured-nation treatment rules of GATT 1994 [Article III:8(a)] and GATS [Article XIII:1].¹ It is dealt with instead by the Government Procurement Agreement (GPA) which is one of the plurilateral agreements annexed to the WTO Agreement (see generally Arrowsmith, 1996a; Blank and Marceau, 1996; and WTO, 1996). The GPA is therefore part of the WTO Agreement only as between those members of the WTO that have accepted it (WTO Agreement, Article II:3). It follows that procurements in states not party to the GPA are not regulated within the WTO system. Neither are procurements by procuring entities within a GPA state to the extent that tenderers or potential tenderers are not themselves from another GPA state. Furthermore, the GPA only applies

to procurements in excess of prescribed threshold values; and, in respect of sub-central governmental bodies or public utilities, only to the extent that such entities are included within the Annex to the GPA in respect of each party. (For a summary of the GPA regime, see OECD, 1999.)

The Preamble of the GPA makes no reference to environmental protection, but the Sixth Recital of the Preamble to the WTO Agreement, which recognises the need to act in accordance with the principle of sustainable development and to protect and preserve the environment, informs all the multilateral and plurilateral agreements annexed to the WTO Agreement including the GPA.² In fact, as is argued below, the GPA allows procuring entities significant scope to take account of environmental factors when defining specifications, deciding upon criteria for qualification or selection of tenderers and/or framing contract award criteria.

Procuring entities must do so, however, within the GPA framework that, *inter alia*, applies a national treatment rule and a most-favoured-nation treatment rule to procurement under the GPA Article III(1). These rules are supported by GPA Article III(2), which prohibits discrimination against locally based suppliers on the basis of the degree of foreign affiliation and ownership or on the basis of the country of production of the goods or services being supplied (provided that the country of production is a party to the GPA).

2.1. Technical specifications

The GPA controls the use of environmental (and other) technical specifications in public procurement in four ways:

- Where “appropriate” technical specifications must be based on international standards, where they exist, or otherwise on national “technical regulations”, recognised national “standards” or recognised national building codes [GPA Article VI:2(b)]. By linking specifications to international and national “standards” and “technical regulations”, the GPA indirectly links them to the controls contained in the Agreement on Technical Barriers to Trade (TBA) on the preparation, adoption and application of such standards and regulations.
- The GPA (reflecting a like provision in the TBA) provides that specifications shall, “where appropriate”, be prescribed “in terms of performance rather than design or descriptive characteristics” [GPA Article VI:2(a)]. This clearly encompasses the specification of requirements relating to environmental performance at the consumption stage of the product or facility to be procured.
- Article VI:1 provides that technical specifications must not be prepared, adopted or applied “with a view to, or with the effect of, creating unnecessary obstacles to international trade”.
- The use of technical specifications is, of course, subject to the national treatment and most-favoured-nation rules contained in GPA Article III:1.

Although the equivalent domestic treatment and most-favoured-nation rules under GATT 1994 are based upon the concept of “like products”, that concept has not been expressly imported into the rules as stated in the GPA. Article VI:1 provides that:

*Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or **the processes and methods for their production** and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. (Emphasis added.)*

This provision clearly assumes that requirements as to “processes and production methods” (PPMs) may, in principle, be included in specifications as long as they do not create unnecessary obstacles to trade. More significantly, no distinction appears to be made between product-related³ and non-product-related⁴ requirements in this regard. Indeed since product-related PPM requirements relate by definition to “the characteristics of the products or services procured”, it appears that the separate reference to “the processes and methods for their production” is indeed intended to include non-product-related PPM requirements. This interpretation is strengthened by the fact that those words are preceded by the word “or” which indicates that they are intended to cover requirements that are different from those encompassed by the earlier reference to product characteristics.

This view seems to be confirmed by Article VI:2(b) which provides, *inter alia*, that “technical specifications” shall, where appropriate, be based on international “standards” where they exist (or otherwise on national “technical regulations” or “recognised national standards”), the terms “standards” and “technical regulations” being defined as referring respectively to non-mandatory and mandatory documents “which [lay] down characteristics of a product or a service or their related processes and production methods”. The drafting of this provision indicates that the word “characteristics” governs each limb (i.e. product characteristics and production-and-process methods) of the definition that follows. Thus a document will be covered by the definition of “technical specification” if it lays down characteristics of a product, characteristics of a service or characteristics of processes and production methods related to a product or a service. The breadth of the definition is made clear by its second sentence, which provides that a standard or technical specification may (in each case) “... also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method”.

Moreover, an interpretation of the GPA that accepts that non-product-related PPM requirements do fall within the definition of “specifications” seems also to be confirmed by a consideration of the consequences if that were not to be the case. The result of holding that such a requirement could not be a “specification” would be that the requirement would not be subject to the rules (in particular the rule against creating unnecessary obstacles to trade and the rules as to basis and transparency) that the GPA lays down to govern “specifications”. It would be odd if the drafters of the GPA intended such a consequence. The consequence, on the other hand, of accepting that non-product-related PPM-based requirements do constitute “specifications” would not be that they would be deemed *a priori* consistent with the GPA but rather that their lawfulness would depend upon application on a case-by-case basis of the substantive rules of the GPA including, of course, the national and most-favoured-nation rules and the specific rules governing specifications.⁵

It might be argued that even if non-product-related PPM requirements may, in principle, be included in specifications, they will, in practice, always be precluded by the rule [in GPA Article VI:2(a)] that specifications must, where appropriate, be stated in terms of performance rather than design or descriptive characteristics. On the other hand, this would seem to amount to an *a priori* prohibition of non-product-related PPM-based specifications and would sit uncomfortably with the definition of “technical specifications” provided by the GPA. The “performance” of a product or service might therefore be taken as including its wider “environmental performance” from cradle to grave. Furthermore, even if the concept of “performance” were to be construed as relating only to performance at the consumption stage, procuring entities would arguably be free to derogate from the “specification in terms of performance” rule since it would not be “appropriate” to specify environmental requirements in such narrow terms because an assessment of the “environmental performance” of a product requires life-cycle analysis of its environmental impacts throughout both the production and consumption stages.

Both the rule against “unnecessary obstacles to international trade” and the national treatment and most-favoured-nation treatment rules would be infringed by a technical specification that laid down PPM requirements (or, indeed, any other requirements) for tenderers from some GPA states but not for domestic tenderers or those from other GPA states. However, cases may also arise in which, although the same PPM-based specifications (whether product-related or non-product-related) apply to all tenderers, those from another GPA state may argue that it is in practice harder for them to comply with the specification than it would be for domestic tenderers or those from other GPA states (*e.g.* because of difficulties of access to appropriate technology, the stage of development of their industries or the regulatory regimes of their own countries).

The question therefore arises as to whether such a state of affairs would infringe the national treatment or most-favoured-nation rules or the rule against unnecessary obstacles to trade. Clearly if a PPM-based (or any other) specification were deliberately adopted in order to prejudice suppliers from other GPA countries, that specification would be held to have been “adopted... with a view to... creating unnecessary obstacles to international trade” and would also infringe the national treatment and/or the most-favoured-nation rule. Equally, if non-product-related PPM requirements are specified by reference to proprietary technology without permitting “equivalents”, the effect of the specification might well be regarded as discriminatory and as creating an unnecessary obstacle to trade.

On the other hand, if it is accepted that procuring entities do in principle have the discretion under the GPA to specify PPM requirements (whether product or non-product related) then, provided that such requirements are applied equally to all potential suppliers, both domestic suppliers and those from other GPA states, the fact that the requirement in question relates to process and production methods rather than to characteristics of the product at the consumption stage would not in itself necessarily imply that it infringes the national treatment or most-favoured-nation rules, or constitutes an “unnecessary obstacle” to trade. In the absence of a “like product” concept,⁶ the fact that the requirement is equally applicable to all potential suppliers would (in the absence of features such as those referred to above) seem to preclude their being characterised as discriminatory. Equally, in every market some suppliers will be more able than others to comply with technical requirements of a specification (whether relating to product characteristics or to PPMs) and the inability of a particular potential supplier or suppliers to comply with such requirements can hardly be regarded in itself as an obstacle to trade. Indeed, even if it were so regarded, then – provided that the non-product-related PPM requirements in question are necessary and apt to achieve the environmental protection goals of the procuring entity – it is difficult to see how they could be regarded as creating “unnecessary” obstacles to trade.

2.1.1. Eco-labelling

A procuring entity may base its specification upon the use of “terminology, symbols, packaging, marking or labelling requirements” as they apply to a product, service, process or production method. Requirements that goods bear recognised “eco-labels” to reflect their friendliness to the environment could fall in principle within this category.⁷ Similarly, the requirements of a specification on labelling might include labelling as to a product’s content or as to optimum conditions for use, reflecting environmental or health concerns. The specification’s requirements might also specify characteristics of the product’s packaging necessary to ensure its reusability or recyclability or, it seems, as to the

environmental soundness of the PPMs used in its production. This appears, incidentally, to be consistent with the position under GATT itself since the Report of the GATT Panel in *Tuna I* (*supra*) concluded that restrictions on the use of environmental labels based upon non-product-related PPMs which were “voluntary” in the sense that they did not affect the relevant product’s access to a national market were consistent with GATT (see generally Okubo, 1999; for the practical effects of eco-labelling schemes, see OECD 1997b). It is important to note, however, that this report was not adopted.

Eco-labelling schemes involve a process of qualification (including verification by the awarding body or a third party) before a product becomes entitled to bear the relevant label. It is possible that a particular scheme’s rules and procedures for qualification/verification may preclude participation in the scheme by non-domestic enterprises, or may make their participation more difficult in practical terms (*e.g.* if a scheme were to require production of specific documents to establish that the product meets the required criteria where these are in practice only available to domestic producers). If an eco-label scheme is indeed characterised by such features, then for a procuring entity to specify that products to be purchased must bear the label of that particular scheme would itself disadvantage non-domestic suppliers and thereby infringe the national treatment rule and the rule against creating unnecessary obstacles to trade. The difficulty might, however, be overcome by specifying compliance with the substantive criteria applied by an eco-labelling scheme and, whilst accepting the label as proof of compliance, also accepting other means of proof (see Lind, 1996, and EC Commission, 2001c).

2.2. Transparency

Where procuring entities wish to include environmental requirements in their specifications, they must observe the GPA’s procedures. The guiding principle for such procedures is the need for transparency. Except in cases of limited tendering, for example, they are required to publish “invitations to participate” in respect of intended procurements (GPA Article IX:1). These must also contain “any economic and technical requirements, financial guarantees and information required from suppliers” [GPA Articles IX:5 and IX:6(f)]. In selective tendering, entities maintaining permanent lists of qualified suppliers must publish annually a notice stating the conditions to be fulfilled by suppliers with a view to their inscription on the list and the methods according to which each of those conditions will be verified [GPA Article IX:9(b)]. Where essential to ensuring the firm’s capacity to fulfil the terms of the contract in question, these conditions may include requirements as to provision of details of a tenderer’s environmental history and its use of environmental management systems. Such requirements, together with details of the specification itself, must also be included in the tender documentation since this must state “any economic and

technical requirement, financial guarantees and information or documents required from suppliers” [GPA Article XII:2(f)] and “a complete description of the products or services required or of any requirements including technical specifications” [GPA Article XII:2(g)].

2.3. Qualification and selection

GPA Article VIII prohibits discrimination between domestic suppliers and those of other parties (or between suppliers of other parties) “in the process of qualifying suppliers”. It also specifically provides that “[a]ny conditions for participating in tendering procedures shall be limited to those which are essential to ensure the firm’s capability to fulfil the contract in question” [Article VIII:(b)]. The selection conditions must relate to the potential tenderer’s capacity to deliver the contract as specified. In the event that the procuring entity is indeed entitled to specify both product-related environmental characteristics and non-product-related PPM requirements and in fact does so, the tenderer’s capacity to fulfil both types of condition as specified may be taken into account. In such circumstances any technical qualifications or further information which may be required by the procuring entity relating to the potential tenderer’s environmental performance (such as its history of prosecution or other proceedings for infringement of environmental laws) might well be regarded as permissible as “necessary for establishing the commercial and technical capacity of suppliers” as required by GPA Article VIII:b.

Such capacity might also be measured by reference to the potential tenderer’s experience (or track record of success or failure) in complying with similar environmental requirements as those specified when executing other contracts or by reference to qualification under an environmental management system such as that under ISO 14001 and 14004 or EMAS (see Howard, 1996; Thimme, 1996; and Murray, 1997).

2.4. Compliant tenders – “additional criteria” – “contract compliance”

To be considered for award, a tender must conform to the essential requirements stated by the notices and tender documentation in respect of the contract [GPA Article XIII:4(a)]. Nothing in the GPA in principle prevents procuring authorities from including in the documentation and notices details of environmental obligations (including, for example, as to participation in environmental protection programmes) to be imposed by contract terms upon the successful contractor. So long as these do not discriminate against non-domestic contractors, such requirements would be permissible under the GPA and, if a tender were not to accept them, the procuring entity would be required to exclude that tender from consideration as being non-compliant.

2.5. Contract award criteria and weightings

GPA Article XII:2(h) requires that the contract award criteria, including “any factors other than price that are to be considered in the evaluation of tenders”, must be published in the procuring entities’ invitations to participate. If an entity wishes to include environmental criteria, these must therefore be published. It is also essential that the desired environmental specifications and qualification conditions be stated in the tender documentation since awards must be made in accordance with the criteria and essential requirements contained in that documentation [GPA Article XIII:4(c)]. Furthermore, unless in the public interest a procuring entity decides not to award a contract, it is required to make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or is determined to be the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation [GPA Article XIII:4(b)].

It is important to note that the GPA regime does not limit the non-price award criteria to the “most economically advantageous” tender, merely to the “most advantageous” in terms of the criteria stated in the tender documentation. This permits a wide discretion for procuring entities when applying environmental award criteria since it is not necessary for the procuring entity to demonstrate that it will itself accrue any economic advantage from the application of those criteria, still less any direct economic advantage. This may well be an appropriate approach, since the principles underlying the GPA – transparency and non-discrimination – are not threatened by allowing procuring entities to apply published award criteria that incorporate environmental values which, though objectively verifiable, may not always be easily expressed in terms of economic benefits to the entities concerned.

The facts that the “specific evaluation criteria” must be published in advance, and that the procuring entity must apply only those criteria, do of course impose certain limits on the extent of the latter’s discretion. Nonetheless, since the GPA does not expressly require that the procuring entity must publish the respective weightings that may be applied as between the specific award criteria (or the hierarchy of comparative importance of such criteria), significant room is left open, should the procuring entity so wish, for the application of weightings at the award stage that may favour environmental criteria. The possibility of the application of weightings that have not been subject to prior publication does, of course, somewhat compromise the transparency and fairness of the process.

2.6. Power of derogation

Provided that such measures are not applied in a manner which could constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in the GPA is to be construed to prevent any Party from imposing or enforcing measures necessary to protect, *inter alia*, “human, animal or plant life or health” (GPA Article XXIII:2). Entities are entitled under the general GPA rules to take account (in the ways discussed above) of environmental factors in defining specifications, conditions for the qualification of tenderers, and award criteria. Nothing in GPA Article XXIII:2 purports to restrict that entitlement. Instead, it expressly preserves the right of “any Party” to take measures to advance the legitimate objectives in question subject to the prescribed limitations. Clearly, in interpreting Article XXIII:2, previous decisions relating to the interpretation of the comparable exceptions in GATT 1994 Article XX will be influential (and in particular the interpretation of its *chapeau* whose provisions the introductory wording of GPA Article XXIII:2 so closely follows).

3. The European Union

The Treaty of Rome, as amended, creates a common market rather than merely a free trade area among its members. Accordingly, although free movement of goods, services, workers and capital are the “fundamental freedoms” upon which the common market is based, the European Community is furnished with institutions and a range of law-making powers that enable it to legislate in a wide range of policy fields including, in particular, the environment. In addition, even so far as free trade within the common market is concerned, the Treaty provisions that enshrine the “fundamental freedoms” are subject to specific derogations. Thus, for example, Article 30 of the EC Treaty allows derogation from the free movement of goods between member states for “the protection of health and life of humans, animals and plants... [provided that such derogation] shall not constitute a means of arbitrary discrimination between [m]ember [s]tates”. Furthermore, the Court of Justice has created a parallel route to derogation based upon its case law.⁸ In certain circumstances this permits member states to derogate from free movement of goods to protect certain “mandatory interests” recognised by the Court of Justice which include, *inter alia*, protection of the environment,⁹ a concept that is potentially wider than simply the protection of the life and health of humans, animals and plants.

The Treaty endows the Community with its own environmental mission. It provides that the “task” of the Community includes, by the implementation of stated policies, the promotion of “sustainable development of economic activities” and “a high level of protection and improvement of the quality of the environment” (Article 2 EC). The policies in question include “a policy in the

sphere of the environment” [Article 3(1)(l) EC] the objectives of which are the preservation, protection and improvement of the quality of the environment, the protection of human health, the prudent and rational use of natural resources and the promotion of international measures to deal with regional or worldwide environmental problems [Article 174(1) EC]. Environmental policy is not to be regarded, however, as existing in isolation. On the contrary, Article 6 EC requires that “[e]nvironmental protection requirements must be integrated into the definition and implementation of [other Community policies], in particular with a view to promoting sustainable development”.

Community environmental policy is in fact developed within the context of successive Environmental Action Programmes. The Fifth Action Programme, *Towards Sustainability (1992-1999)* (OJ 1993, No. C138/1, p. 26), emphasised the “shared responsibility” of the public and private sectors, together with consumers, for environmental protection, and that environmental factors should, in particular, be integrated into the purchasing policies of public authorities. The current programme, *Environment 2010: Our Future, Our Choice* [COM(2001)31final], is the Sixth Environmental Action Programme. The Sixth Action Programme anticipates that within the framework of the proposed “Integrated Product Policy” (IPP), as outlined in the Commission’s *Green Paper on Integrated Product Policy* (EC Commission, 2001a), the Commission “will address ways to improve the environmental performance of products throughout their life cycle” and that “[t]his will comprise action on economic incentives for environmentally friendly products, enhancing ‘green’ demand through better consumer information, **developing an objective basis for green public procurement**, and action to encourage more environmentally friendly product design” (p. 17, emphasis added).

The programme emphasises that governmental organisations can help in “greening” the market by using environmental performance as one of their purchase criteria, and that the Commission, while ensuring consistency with the internal market, will seek to encourage the uptake of green procurement practices by including in a database guidelines to help businesses and local authorities establish good systems. The Commission will also look at the feasibility of promoting green purchasing by introducing an obligation to carry out an assessment of the environmental impact of the different alternatives available that meet the needs of the purchasing authorities (the programme, p. 18). The *Green Paper on Integrated Product Policy* (EC Commission, 2001a) also emphasises that public authorities must act as “leaders” in the process of green management and “in changes of consumption towards greener products”.

Eco-labelling schemes, including those already established by the Community and those in a number of member states, are seen as especially relevant to green purchasing and the programme indicates that the Community scheme will be reviewed and improved if necessary (p. 18) and that the

Commission will consider measures, within its IPP (“including the use of fiscal incentives where appropriate”), to encourage the up-take of eco-labels (p. 18).

Since the EC is party to the GPA, its own procurement regime accommodates the GPA requirements.¹⁰ The EC procurement regime itself incorporates two elements. First, it must be remembered that the general body of Community law will, so far as relevant, apply to public and utilities procurement (Arrowsmith, 1995b). Thus, for example, the provisions of the EC Treaty that prohibit discrimination against nationals of other member states on grounds of nationality apply to all procurements made by public authorities, regardless of whether they are subject to the specific rules provided by the Community’s procurement directives. A particular procurement may, for example, not be caught by one of the directives because it does not equal or exceed the relevant value threshold that triggers the directive’s application. The Treaty’s rule against discrimination on grounds of nationality will, however, apply in any event. Second, the Community has two specific regimes of regulations respectively governing: the procurement of works, goods and services by public authorities; and the procurement of works, goods and services by certain utilities (for a summary description of these see OECD, 1999, p. 29). These regimes are provided by means of “directives” which are, essentially, mandatory instructions requiring member states to ensure that their domestic laws conform to the requirements of the directives but which leave them with a degree of discretion as to the choice of form and method of transposition (Article 249 EC).

Public contracts are governed by three separate directives for works, supply contracts, and services.¹¹ A separate directive¹² governs procurement by certain utilities in respect of supply, works and services contracts. The extent to which the EC procurement regimes permit “green procurement” has been the subject of much debate (Arrowsmith, 1995a and 1996b). The guidance provided by the EC Commission has itself recently been updated, the Commission’s earlier statements on the subject (EC Commission 1989, 1996, and 1998) now having been replaced by its *Interpretative Communication on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Environmental Considerations into Public Procurement* (the “Communication”) (EC Commission, 2001b).¹³ This follows a judgment of the Court of Justice in the *Nord-Pas-de-Calais* case.¹⁴ A further important case, *Concordia Bus Finland*,¹⁵ has recently cast further light on the extent to which procuring authorities within the Community can seek to use public procurement contract award criteria to advance environmental policies.

It is argued below that although the procurement directives at present make no express provision as to environmental protection, contracting authorities and utilities may nonetheless further environmental objectives (in several ways at least) through the procurement process. The scope for procuring entities to define the subject matter of their contracts in the way that they

consider most environmentally sound is, however, subject to the general rules of Community law, notably those EC Treaty provisions providing for free movement of goods and services laid down in Articles 28 to 30 and 43 to 55 EC (Arrowsmith, 1995b). This means that the subject matter of the contract may not be defined with the intention or effect of discriminating against tenderers from other member states. The application of these general rules will tend to require case-by-case analysis.

3.1. Technical specifications

Environmental protection requirements can, to an extent, be incorporated into technical specifications. These, of course, are the technical requirements relating to the works, goods or services being procured and do not relate directly to the environmental performance of the provider unconnected with the contract itself. They do, however, have an indirect effect on selection of potential contractors since the “technical capacity” of potential contractors (see below) relates to their capacity to fulfil the contract as specified.

Under the Treaty itself, specifications must not be drawn so as to discriminate against works, goods or services (or their providers) from other member states¹⁶ and even if indistinctly applicable must not restrict intra-Community trade.¹⁷ Measures may be justifiable in the latter case, however, under the *Cassis de Dijon* principle, which allows member states to derogate from free movement of goods to protect “mandatory interests” recognised by the Court of Justice (*Danish Bottles, supra*). Mandatory interests include environmental protection so that such measures will be lawful, provided that they are proportionate. It would, therefore, be permissible under the Treaty to impose non-discriminatory product-related specifications as to the environmental performance of products, provided that these requirements have not already been harmonised at Community level, provided that they truly relate to environmental justification, and provided that they are no more restrictive of intra-Community trade than necessary.

It does appear that in the procurement context these rules imply a general principle that specifications must not be drawn up in such a way as to exclude products which meet the authority’s performance requirements (Arrowsmith, 1996b) so that environmental specifications, like others, should be expressed whenever possible in terms of performance or that, where specific products or processes are referred to, the specification should add “or equivalent”. That being the case, an issue arises as to when a product will be said to be “equivalent” to that specified by the public authority. Advocate-General Darmon in *Dundalk (supra)* suggested that a product should be so regarded when it has been allowed onto the market in any member state.

However, this has been criticised as limiting “government’s policy choices to an unacceptable degree” (Arrowsmith, 1996b, p. 584), a criticism which is particularly apt in respect of environmental specifications. If authorities are to embrace their “shared responsibility” for the environment, they must be permitted to set high environmental specifications and not be forced to accept works, goods or services which attain only lower standards accepted for general market access elsewhere in the Community. This is particularly so since member states are themselves permitted by Article 176 EC to adopt higher levels of environmental protection than those laid down by Community legislation, so long as the measures are compatible with the EC Treaty and are notified to the Commission. However, the level set must not be such as to result in discrimination – i.e. such as where they have the effect of improperly reserving the contract to domestic suppliers. Framing environmental requirements in a specification at a standard intended to exclude non-domestic suppliers would, of course, be discriminatory. Framing them at an objectively stated standard apt to further a contracting authority’s chosen environmental objective would not, however, necessarily be discriminatory just because only a few undertakings are capable of meeting that standard (see the judgment in *Concordia Bus Finland*, *supra*).

The further rules as to specifications contained in the EC public procurement directives are “without prejudice to the legally binding national technical rules” of member states. Thus, contracting authorities and their contractors/suppliers/service providers remain bound by national and Community environmental legislation (provided that this legislation is itself compatible with the Treaty and applicable Community law).

The directives’ rules require that specifications be drawn up by reference to European specifications and, in the absence of these, by reference to international or national standards.¹⁸ This would apply in the environmental area, as elsewhere. The Commission’s *Communication* has emphasised that this requirement amounts, however, only to an obligation to refer to such European documents as a benchmark and does not imply that contracting authorities are bound to purchase only products or services conforming to these. Suppliers have the possibility of offering alternative solutions which, if equivalent, contracting authorities must accept (the *Communication*, p. 10).

The Commission’s *Green Paper on Public Procurement in the European Union* (EC Commission, 1996) did, however, indicate that efforts should be made to develop European standards or common technical specifications, and gave as an example the “European eco-label, complying with Community law” under Regulation 880/92. It appears, therefore, that a specification requiring that products meet the criteria for the award of the European eco-label would be permissible.

Finally, the *Communication* also makes clear that, in the absence of European and national standards dealing with the environmental performance of goods and services, contracting authorities are free to specify a higher level of environmental performance than that laid down in legislation or standards, provided that this does not discriminate against tenderers from other member states.

3.1.1. Specifying product characteristics

The directives' definition of "technical specifications" appears quite narrow at first sight. Annex III of the Public Supply Contracts Directive (93/36), for example, defines the term as meaning:

*The totality of the technical prescriptions contained in particular in the tender documents, defining the **characteristics required of a material, product or supply**, which permits [it] to be described in a manner such that it **fulfils the use for which it is intended** by the contracting authority. These shall include levels of quality, performance, safety or dimensions, including the requirements applicable to the material, the product or the supply as regards quality assurance, terminology, symbols, testing and test methods, packaging, marking or labelling.¹⁹ (Emphasis added.)*

The Commission's view is that the concept of "technical specification" includes "the possibility of prescribing the basic or primary materials to be used, **if this contributes to the characteristics of the product or service** in such a manner that it fulfils the use for which it is intended by the contracting authority" (the *Communication*, p. 11, emphasis added). In the Commission's view this means that the procuring authority may require that, for example, the window frames of a building should be made of wood rather than plastic, or that recycled glass or other recycled or reused materials must be used. Since the definition of "technical specification" focuses upon a product's fitness for post-procurement use, it does not easily seem to encompass non-product-related PPM requirements. The Commission's view is that although the definition does "not explicitly refer to production processes", procuring authorities may require the use of a specific production process "if this helps to specify the performance characteristics (visible or invisible) of the product or service" and "this implies that the product differs from identical products in terms of its manufacture or appearance (whether the differences are visible or not) because an environmentally sound production process has been used, e.g. organically grown foodstuffs, or 'green' electricity.²⁰ Contracting authorities must be careful that the prescription of a specific production process is not discriminatory" (the *Communication*, p. 11).

The difficulty that arises from this guidance is that, although appearing at first sight to advise that only product characteristics or product-related PPM requirements may be specified, the examples given to illustrate permissible

requirements include some, namely “green electricity”, in respect of which the PPM requirements in question simply do not affect the “performance characteristics” of the product at the consumption stage. “Green” electricity is, as a matter of “performance characteristics”, entirely the same as electricity produced using non-green technologies. The same might be true of some organically grown foods (although the possibility, for example, of minute pesticide residues in non-organically grown foodstuffs might justify the conclusion that the use of organic PPMs do result in an “invisible” “performance characteristic”). It is therefore unclear from this guidance whether in the Commission’s view non-product-related PPM requirements are precluded or whether they may be acceptable where they contribute to “the characterising of the product” in the minds of consumers even though (as in the case of “green” electricity) they do not affect the product’s innate physical composition or properties.

Such an interpretation might arguably reflect the “shared responsibility” of procuring entities for the environment so as to permit non-product-related PPM requirements to be included in the specifications. To do so might also be justified in light of the requirement of Article 6 EC that environmental protection be integrated into the definition and implementation of other Community policies including, in this case, procurement policy; and by the renewed emphasis upon the need to manage a product’s environmental impacts throughout its life cycle which informs the integrated product policy.

3.1.2. Variants

In cases where a contract is to be awarded on the “most economically advantageous” basis, the public procurement directives allow contracting entities to lay down a standard specification whilst indicating that tenders complying with one or more defined variants of that specification (*e.g.* variants allowing for a higher degree of environmental performance) will be permitted. This allows contracting authorities to receive a range of solutions to their procurement needs (within the permitted variants) offering different balances between financial considerations and their environmental objectives (the *Communication, supra*, para. 1.4). Contracting authorities are required to state in their tender notices the minimum specifications to be met by variants and, where variants are not permitted, they are required to say so in their tender notice.²¹

3.1.3. Eco-labelling and environmental management systems

The *Communication* defines “eco-labelling” as referring to the award of the label on a voluntary basis to products fulfilling specific criteria, and intended to inform consumers about environmentally sound products, the criteria being “based on the lifecycle of the product and relat[ing] to different aspects, such as: performance of the products, materials contained in the products, production

processes, take back and recycling, user instructions and consumer information” (the *Communication*, p. 12). Since all of these aspects are regarded as constituting “technical specifications”, the Commission concludes that a requirement that a product conform to the criteria of a particular eco-label scheme (such as the European eco-label, national eco-labels, pluri-national eco-labels and private eco-labels) is itself a permissible “technical specification” provided that the contracting authorities do not limit the means of proof only to the production of the eco-label certificate itself since access to a particular eco-labelling scheme may not in practice be equally available to tenderers from other countries. The contracting authority is entitled, however, to provide that a product having the specified eco-label certificates shall be deemed to comply with the specification but must also accept other evidence of conformity including, for example, test reports.

On the other hand, the Commission indicates that “[r]equirements which do not relate to the production itself, like the way how the firm is run... are not technical specifications and can therefore not be made mandatory” (the *Communication*, p. 11). It appears therefore that a firm’s adherence to an environmental management system cannot be included in specifications.

3.2. Qualification and selection

3.2.1. Technical capacity

The Commission’s *Green Paper on Public Procurement in the European Union* (EC Commission, 1996, para. 5.50) suggested that “under certain conditions, environmental protection objectives [may] be included among the criteria for selecting candidates” and that such criteria “are designed to test candidates’... technical capacity and may therefore include environmental concerns depending on the expertise required for specific contracts”. The selection grounds are in fact further limited, for public contracts, to those relating to “economic, financial and technical capacity”. Utilities may, however, prescribe any “objective criteria and rules” (see below). Accordingly, in the Commission’s view, the EC public procurement directives do allow environmental factors to be taken into account in qualification/selection but only to the extent that they relate to “technical capacity” and only to the extent that they relate to the tenderer’s ability to perform the contract in question.

Where the technical specification does legitimately provide environment-related requirements, contracting authorities can have regard to the capacity of the tenderers to meet those requirements. In doing so they may, however, only require production of the information prescribed in that regard by the directives themselves and that information “must have a direct link to the subject matter or the execution of the contract” (the *Communication*, p. 15). Permitted information as to technical capacity that might be relevant to environmental information

includes: a statement of tools, plant and technical equipment available to the tenderer; a description of the tenderer's technical facilities, its measures for ensuring quality and its study and research facilities; and a statement of the technicians and technical bodies which the tenderer calls upon in executing the contract. Furthermore, where the subject matter of the contract requires specific environmental know-how (the Commission gives the example of the construction of a waste treatment plant), then specific experience in respect of such contracts may be included among the selection criteria.

3.2.2. Environmental management systems

It appears that adherence to an environmental management and audit system can be relevant as a means of proof of technical capacity where the specific system in question has an impact on the quality of the firm's products or on its capacity to execute a contract in accordance with the contract's environmental requirements. Thus, the Commission concludes that "... whenever elements of a company's or organisation's environmental programme and management scheme could be regarded as one or more of the references that could be required for establishing a company's technical capacity, the EMAS registration could serve as a means of proof" (the *Communication*, p. 17). It appears therefore, that contracting authorities can explicitly state in their contract documents or tender notice that whenever potential tenderers have an EMAS system which covers the requirements as to technical capacity, it will be accepted as sufficient proof of that capacity. On the other hand, such authorities may not exclude other means of proof (such as, for example, a certificate under ISO 14001) as to do so would be regarded as discriminatory, since access to a particular scheme may not in practice be equally available to tenderers from other countries and since, such schemes being voluntary, some equally qualified tenderers may have chosen not to adhere to the scheme.

So far as utilities' procurement is concerned, the relevant directive allows contracting entities to base selection upon such "objective criteria and rules" as they may establish [Directive 93/38, Articles 30(2) and 31(1)]. This seems to give the procuring entity at least as broad a discretion to lay down environmentally based selection criteria as to "technical capacity" as do the public procurement directives. It seems possible that it also gives a utility an ability to set selection criteria that are unconnected to the tenderer's capacity to perform the contract as specified, but that are instead based upon "objective criteria" relating to the environmental performance of the tenderer's organisation as a whole. This also would appear to entitle the utility to use adherence to an environmental management and auditing scheme as one of the criteria for selection, provided that the criteria for adherence to the scheme are themselves "objective".

3.2.3. *Environmental crime or misconduct*

The public procurement directives allow contracting authorities to exclude contractors found guilty of an offence concerning their professional conduct or of grave professional misconduct.²² It is generally assumed that these factors also potentially fall within the “objective criteria” that utilities may adopt for selection of tenderers under the Utilities Directive 93/38. This, therefore, allows contracting entities to exclude tenderers from selection where they have been convicted of environmental crimes (such as pollution of watercourses or the breaking of conditions attached to discharge consents, etc.). The concept of “grave professional misconduct” is not yet defined by EC legislation or case law, but it seems possible that it might apply in the case where a tenderer has been the subject of an adverse decision by a national environmental regulatory agency but in circumstances in which the agency has chosen not to prosecute, perhaps accepting instead the tenderer’s agreement to take remedial action.

3.3. *Compliant tenders – “additional criteria” – “contract compliance”*

When letting a contract, a procuring entity may wish to impose upon the successful contractor obligations that are not directly connected with the specific objective of the contract itself but which pursue secondary policy goals. Thus, for example, an authority letting a contract for the construction of an administrative office may wish to include contractual conditions requiring the successful tenderer to participate in social or environmental programmes of one sort or another. The extent to which it is permissible under the directives for authorities to do so and, if it is permissible, the extent to which such authorities may have regard to the conditions in question when selecting contractors or awarding the contract, has been the subject of recent case law. In principle, however, the difficulty arises because, as the Commission itself acknowledges, nothing in the directives constrains the right of procuring entities to decide for themselves what they wish to procure and the terms on which they will do so (although, as already noted, the EC Treaty itself prohibits conduct that amounts to discrimination against suppliers from other member states). If an authority decides that it wishes to procure, for example, the construction of a building, but that the construction contractor awarded the contract must undertake to participate in a programme of skills training for the local unemployed, or to contribute to an environmental clean-up in the procuring entity’s area (“secondary policy contract conditions”) that, in principle, is a matter of free choice for the authority. If, however, in a particular case it would be more difficult for a contractor from another member state than a domestic contractor to comply with the secondary policy contract conditions, the latter may infringe the rule against discrimination on grounds of nationality enshrined in the Treaty.

In the absence of such infringement (which would need to be determined on a case-by-case basis), any firms submitting tenders would normally, if they wish to be considered for the award of the contract, be required to accept the secondary policy contract conditions just as they would be required to accept the other conditions of the contract. Unless they do so, their tenders will not be “compliant” in the sense that they will not be responsive to the authority’s invitation to tender. The principle of equality of tenderers requires that such non-compliant bids be rejected. In principle this issue is quite separate from the process of qualification/selection and from the contract award stage. Under the directives authorities are only required (variants apart) to select tenderers from among those who have submitted compliant tenders. Equally, the contract award criteria are intended to be applied to determine to which of the compliant tenderers the contract should be awarded.

The Court of Justice first considered the question of secondary policy contract conditions in the *Beentjes* case²³ in which a Dutch Court had asked it to decide whether an awarding authority could oblige tenderers to undertake to employ a quota of long-term unemployed persons in the performance of the contract. The Court ruled that such a condition has no relation either to selection (the checking of contractors’ suitability on the basis of their economic and financial standing and their technical knowledge and ability) or to the criteria for the award of contracts as referred to in the directive. Nonetheless the Court held that this “additional specific condition” was not in itself incompatible with Community law but ought to have been mentioned in the relevant contract notice. This analysis was entirely consistent with the view expressed above that secondary policy contract conditions, while relevant to the question of whether a tender is compliant, are not relevant to the selection or award processes contemplated by the directives. The Commission’s subsequent interpretation of *Beentjes*²⁴ has, however, been problematic. While stressing (quite rightly) that such conditions must not be discriminatory and may not be used as selection or award criteria, the Commission has seemed to imply that the contract terms in question must be disregarded by an authority when deciding whether particular tenders must be rejected as non-compliant.

The problem was considered by the Court of Justice in *Nord-Pas-de-Calais* (*supra*) in which a local authority required tenderers for certain works contracts for the renovation and rebuilding of schools to propose participation in the local policy against unemployment. The Court rejected the Commission’s interpretation of *Beentjes*. Instead it took the view that the “additional criteria” in that case, because they led to the exclusion of a bidder, must have been regarded as “a criterion for the award of the tender” and, since such conditions were not ruled *a priori* unlawful in *Beentjes*, they were to be regarded as lawful. Furthermore, since the Commission had not alleged that the additional criterion was

discriminatory (which, if established, would constitute an infringement of the Treaty) or that there had been a failure to publish it in the contract notice (in which case there would have been an infringement of the Works Directive), it was to be regarded as lawful. This outcome may, however, need to be regarded as specific to the case. Should the Commission choose to plead the point in future cases, it may not be difficult to establish that such an “additional criterion” does indeed tend to have discriminatory effects upon suppliers from other member states who may find it more difficult than local suppliers to conform to the social criterion in question. Equally, the reasoning in *Nord-Pas-de-Calais* does itself seem suspect. As one commentator has put it, the Court’s reasoning seems to result from a confusion between questions of compliance and the prescription of award criteria (see Arnould, 2001, p. NA15). The Court, however, failed to distinguish between the question of whether a bid is compliant, a question in respect of which the awarding authority has no margin of discretion (Arnould, 2001, pp. NA15 and 16), and the quite distinct question as to the permissible award criteria applicable to compliant bids (which imply a margin of discretion for the contracting authority within the award criteria prescribed by the directives).

Be that as it may, however, the current position resulting from *Nord-Pas-de-Calais* seems to be that criteria additional to those specified as award criteria by the directives can be used as award criteria provided that they are specified in contract notices as required by the directive and are not discriminatory. This means that “additional criteria” related to environmental goals may in principle be permissible as award criteria when the contract is let on the “most economically advantageous” basis. However, this does raise difficulties in terms of lack of transparency and increased uncertainty as to the application of some of the directive’s procedural rules (Arnould, 2001, pp. NA17-18).

3.4. Contract award criteria and weightings

Contracts covered by the directives must be awarded on the basis either of “the lowest price” or to the “most economically advantageous” tender. Environmental factors have no part to play at the award stage when lowest price is the sole criterion. If “most economically advantageous” criteria are adopted, they must observe the principle of non-discrimination. However, as the *Green Paper on Public Procurement in the European Union* (EC Commission, 1996, para. 5.51) made clear, the Commission’s view prior to *Concordia Bus Finland* (*supra*) was that environmental factors “could play a part in identifying the most economically advantageous tender, but **only** in cases where reference to such factors makes it possible to gauge an **economic advantage** which is specific to the works, supplies or services covered by the contract and **directly benefits the contracting authority or contracting entity**” (emphasis added).

This point was re-iterated by the Commission in its *Communication* in which it stated that in order to be permissible, award criteria must “concern the nature of the work to be carried out or the manner in which it is done” (the *Communication*, p. 19) and “the criteria applied shall generate an ‘economic advantage’ for the contracting authority” (the *Communication*, p. 20). Thus, although general “environmental soundness” cannot be regarded as a permissible criterion since it is not thought to be measurable and does not necessarily bring an economic advantage to the contracting authority (the *Communication*, p. 20), it may be possible to achieve the same objectives by expressing the requirement in terms of “specific, product-related and economically measurable criteria” (the Commission gives the example of the rate of energy consumption). In the Commission’s view such criteria relate “in most cases” to the quality or performance of the product or the execution of works or services (i.e. to quality or technical merit which are specifically referred to in the directives as being factors that can fall within the “most economically advantageous” criteria). Equally, all costs borne by the contracting authority during a product’s life cycle can be taken into account when assessing the “most economically advantageous tender”, including purchase cost, direct running costs (including energy, water and other resources used during the lifetime of the product), maintenance costs, “spending to save” (e.g. by investing in insulation to reduce heating costs), as well as the cost of recycling or disposal of the product at the end of its life.

As a general rule, however, the Commission’s position has been that “externalities” are not borne by a purchaser, but by society as a whole and that they cannot therefore generally be taken into account under the “most economically advantageous” criteria (the *Communication*, p. 22). If the Commission is right, externalities can only be taken into account under those criteria if, in specific cases, the external costs due to the execution of the contract are borne directly by the purchaser of the product or service in question.²⁵ Even then danger of discrimination may arise since, for example, taking into account the external costs of transport might tend to discriminate against non-national suppliers since the Community has no harmonised system for the economic evaluation of such external costs (the *Communication*, p. 22).

The Commission’s restrictive approach to the interpretation of the “most economically advantageous” award criteria arose from the word “economically” as it appears in the directives. However, there is certainly scope for argument that “economic” advantages could be construed to include economic advantages accruing to society as a whole, and need not be limited to economic advantages of direct benefit to the procuring authority. On such a basis the elimination of pollution (and consequent clean-up or health care costs) might, for example, be said to constitute “economic advantages” even if the clean-up or health care costs

would not fall upon the particular contracting authority but upon another government entity. Similarly, the preservation of landscape or the conservation of animals, plants and their habitats might be said to produce economic advantages by attracting tourists, or by improving the quality of life and so attracting a potential work force to the area. The Commission's interpretation, however, is much narrower, and even when it is possible to link environmental protection with economic advantages it may still be impossible to say that the advantage is "specific" to the works, supplies or services covered by the contract, or that it is "measurable" or that it "directly benefits" the contracting authority.

3.4.1. *Concordia Bus Finland*

As noted above, the Court of Justice has recently given judgment in the *Concordia Bus Finland* case (*supra*). The case concerned questions referred to the Court of Justice by a Finnish court directly relating to the permissibility of the use of environmental award criteria.

The first question addressed in the case was whether the Public Service Contracts Directive 92/50 permits the City of Helsinki, when seeking to let a contract for bus transportation services, to take into account the level of nitrous oxide and noise emissions from potential contractors' bus fleets when applying "most economically advantageous" criteria. The City of Helsinki had sought to do so by awarding extra points in the tender evaluation (as announced by prior publication) to tenderers whose fleets had nitrous oxide emission and noise levels below a stated level (see Thompson, 2001).

The Court held that an environmental protection criterion that is not itself of a purely economic nature can, in principle, figure among "most economically advantageous" award criteria. This followed from the facts that Article 36(1) of the directive, which lists examples of individual criteria that authorities are free to adopt when applying the "most economically advantageous" approach, was not exhaustive; and that it expressly listed the "aesthetic characteristics" of tenders.²⁶ From this the Court concluded that "[i]t cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of a contracting authority" (paras. 54 and 55 of the judgment). Furthermore, the Court held that, in light of the objective of the directive (to co-ordinate procedures for the award of public contracts in order to eliminate barriers to the free movement of goods and services) and of the principle stated in Article 6 EC (that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities), the adoption of criteria relating to the preservation of the environment could not be excluded when a contracting authority is applying the "most economically advantageous" approach (paras. 56 and 57 of the judgment).

Thus the Court clearly rejected the view that an environmental award criterion is only permissible if it has an economic character, or if it relates to a direct economic benefit attributable to the contracting authority. On the contrary, the Court considered that “[i]t cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority” (para. 55 of the judgment). This does not mean, however, that the Court considered that the ability of contracting authorities to rely upon environmental contract award criteria is unlimited. First, the permissibility of the use of an environmental award criterion does not excuse a contracting authority which has opted to let a contract on the “most economically advantageous” basis from assessing the “value” to the authority of the various competing tenders by applying all of the award criteria (including non-environmental criteria) that it has listed in its tender notice. In other words, although the Court considered that certain environmental contract award criteria are in principle permissible, it nonetheless affirmed that the function of award criteria should be to determine the most economically advantageous tender, overall.

Furthermore, the authority’s ability to rely upon environmental award criteria is subject to four specific constraints, namely, requirements that each award criterion must:

- be “linked to the subject matter of the contract” (para. 59 of the judgment);
- not have “the effect of conferring on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer” (para. 61 of the judgment);
- be applied in conformity with all the procedural rules laid down by the directive, including those on advertising, so that all criteria must be expressly stated in the tender notice, where possible in descending order of importance (para. 62 of the judgment); and
- comply with the fundamental principles of Community law including, in particular, the principle of non-discrimination (para. 63 of the judgment).

The Court considered that the particular environmental criteria at issue in the case satisfied all the above requirements. They related to the level of nitrogen oxide emissions and noise levels of the buses to be used in providing the public transportation services for which the authority had invited tenders. As such they were to be regarded as linked to the subject matter of a contract for the provision of urban bus transport services (para. 65 of the judgment). Furthermore, the point system according to which the environmental criteria were to be applied did not confer unrestricted freedom of choice on the contracting authority since it required tenders to meet specific and objectively quantifiable environmental requirements (para. 66 of the judgment). Furthermore, the criteria had, indeed, been expressly mentioned in the relevant tender notice (para. 67).

The second important question referred to the Court in *Concordia Bus* was whether the use of environmental award criteria is prohibited if it appears that, since few operators in the sector can meet the criteria, only the transport enterprise of the authority which is inviting tenders is in fact capable of submitting a tender satisfying them.

The Court regarded this question as relating to the application of the principle of non-discrimination and held that the environmental criteria in the case had not in fact offended that principle. The criteria were objective and applied without distinction to all tenders, were directly linked to the fleet offered, and were an integral part of a system of awarding points – which system also allowed for the awarding of points on the basis of other criteria linked to the fleet (para. 83 of the judgment). In such a context the Court held that the fact that the environmental criteria could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, did not in itself constitute a breach of the principle of non-discrimination (para. 85 of the judgment).

Finally, in response to the third question referred by the national court, the Court confirmed that the same interpretation would apply if the contract at issue, instead of being subject to the Directive 92/50 on public service contracts had been subject to the Utilities Directive (Directive 93/38 Concerning the Co-ordination of Procedures for the award of Supply, Works and Services Contracts by Certain Entities Operating in the Water, Energy, Transport and Telecommunications Sectors) (para. 93 of the judgment). In doing so, however, it expressed a broader view that the wording of the relevant provisions of each of the procurement directives (Directive 92/50 on Public Services Contracts, Directive 93/36 on Public Supply Contracts, Directive 93/37 on Public Works Contracts, and the Directive 93/38 on Utilities Procurement) was “substantially the same” (paras. 88 and 89), that those directives are intended to attain “similar objectives in their respective fields” (para. 90), and that the principle of equal treatment “lies at the heart of all of the public procurement directives”. It considered, furthermore, that nothing disclosed in the case had indicated that the interpretation of the principle of equal treatment as regards a contracting entity’s choice of contract award criteria “should depend in this case on the particular directive applicable to the contract in question” (para. 92 of the judgment). From this it appears that, although the Court did not expressly say so, it is likely that its interpretation as regards the use of environmental criteria under Directive 92/50, and as to the application of the non-discrimination rule in relation to such criteria, would be equally applicable under any of the other procurement directives, not just Directive 93/38.

The judgment of the Court of Justice permits procuring entities greater freedom than the Commission had hitherto acknowledged to use contract award criteria that take account of environmental impacts occasioned in

performance of public contracts (consumption externalities). However, this does not mean that it is admissible to use environmental criteria relating to production externalities (e.g. a points system allowing points to be awarded if tenders offer to provide the goods to be procured containing a specified percentage of recycled material where the use of recycled material does not affect the intrinsic characteristics of the product supplied). This question, which did not arise on the facts of *Concordia Bus Finland*, remains open. On the one hand, it might be argued that such criteria would not be “linked to the subject matter of the contract” if a narrow interpretation were to be put on that phrase (to the effect that award criteria must be linked to performance of the contract). On the other hand, if a broader interpretation were adopted (perhaps reflecting the “integration” principle in Article 6 EC), it might be argued that a criterion relating to PPMs not affecting the characteristics of the procured product (such as the above requirement as to recycled content) is indeed linked to the subject matter of the contract since it is linked to the production of that product, and hence to the product itself.

Finally, it should be noted that in cases where the “most economically advantageous” criteria are adopted, although the directives do require prior publication of the contract award criteria, and although they also prohibit procuring entities from applying criteria other than those which have been published, they do not require that the published details indicate the precise weighting, if any, to be given to particular criterion. Instead the directives simply require publication of the criteria “where possible in descending order of importance”. The Commission, however, currently proposes amending the directives so as to make it compulsory for procuring entities to state in their prior publication of award criteria the relative weighting to be given to each criterion.²⁷ Moreover, the Court of Justice ruling indicated that criteria should, where possible, be listed in descending order of importance in the tender notice (judgment of the Court, para. 62).

4. The North American Free Trade Agreement

NAFTA created a free trade area comprising Canada, the United States and Mexico but did so in a way that was specifically intended to accommodate environmental concerns. Thus the Preamble to NAFTA recites that the Parties undertake to achieve the objectives of the Agreement “in a manner consistent with environmental protection and conservation” (Eleventh Recital) and to “promote sustainable development” (Thirteenth Recital). Furthermore, NAFTA Article 104 provides that in the event of any inconsistency between its terms and the specific trade obligations provided by certain multilateral and bilateral environmental conventions,²⁸ the obligations of those conventions are to prevail (provided that where a Party has a choice between equally effective and reasonably available means of complying with such obligations, it chooses

the alternative that is least inconsistent with NAFTA). Equally, NAFTA also makes (non-mandatory) provision exhorting the Parties not to waive or derogate from environmental protection standards in order to attract or maintain inward investment [Article 1114(2)]. Perhaps unexpectedly, NAFTA Chapter 11, which sets standards of treatment of foreign investors and a binding arbitral mechanism for resolving disputes between governments and foreign investors, has, however, proven to have a potentially significant impact upon domestic environmental regulation within the Parties (Mann, 2000; Dhooge, 2001; and Gantz, 2001).

Environmental protection is also the subject of a so-called side agreement to NAFTA, the North American Agreement on Environmental Co-operation (NAAEC). This provides for the establishment of the Commission for Environmental Co-operation (CEC), charged, *inter alia*, with making recommendations concerning a range of environmental issues including specifically eco-labelling [NAAEC Article 10(2)(r)] and “the environmental implications of goods throughout their life cycles” [NAAEC Article 10(2)(m)]. (See also Mann, 2000.) More generally, the CEC is also tasked with being an institutional link between NAFTA and the NAAEC (and between trade and environmental law) by assisting the Free Trade Commission (set up pursuant to NAFTA) in respect of environment-related matters generally and, more specifically, by making recommendations as to the avoidance of environment-related trade disputes and by constituting a focus for inquiry and comment on trade and environment issues. The objectives of NAAEC (stated in NAAEC Article 1) include the fostering of environmental protection and improvement in the Parties’ territories, promoting sustainable development based on co-operation and mutually supportive environmental and economic policies, increasing co-operation between the Parties on a range of environmental matters, supporting NAFTA’s environmental goals, enhancing compliance with environmental laws, promoting pollution prevention policies and transparency, and promoting “economically efficient and effective environmental measures”. A further objective is to “avoid creating trade distortions or new trade barriers” [NAAEC Article 1(e)]. NAAEC also requires the Parties “with the aim of achieving high levels of environmental protection and compliance” to “effectively enforce” their own environmental laws [NAAEC Article 5(1)] and provides two processes for the policing of that obligation, namely: i) reviews by the CEC secretariat following the filing of submissions by citizens or NGOs (NAAEC Articles 14, 15); and ii) a dispute resolution between the states concerned leading, in the case of a finding of persistent failure to “effectively enforce”, to the imposition of sanctions (NAAEC Part V).

Government procurement is dealt with by Chapter 10 of NAFTA. This applies to specified federal government entities (those listed in NAFTA Annex 1001.1a-1), specified government enterprises (those listed in NAFTA Annex 1001.1a-2) and to

a number of state or provincial entities (listed in NAFTA Annex 1001.1a-3) in respect of the procurement of specified goods, services and construction services (i.e. those listed in NAFTA Annexes 1001.1b-1, 1b-2, and 1b-3) where the value of the contract equals or exceeds stated thresholds. This coverage is, however, subject to transitional provisions for Mexico [NAFTA Article 1001(2)a and Annex 1001.2a.], to certain reservations by each of the States Parties [NAFTA Article 1001(2)b and Annex 1001.2b]; and to the operation of other value thresholds and valuation rules in respect of specific matters as between Canada and the United States [NAFTA Article 1001(2)c and Annex 1001.2c]. Chapter 10 only applies to a limited number of sub-central governmental entities. Annex 1001.1a-3 merely indicates that “coverage under this annex will be subject of consultations with state and provincial governments in accordance with Article 1024”. The outcome is that the Chapter applies only in respect of 37 of the 50 United States, only 20 of which have agreed to GPA coverage of most or all of their executive agencies, and 17 of which have only agreed to coverage of selected executive agencies or have excluded important sectors (Tiefer, 1997).

In respect of procurements governed by Chapter 10, the Parties are to accord national treatment and most-favoured-nation treatment to suppliers of goods and services of another Party [NAFTA Article 1003(1)] and are not to discriminate against a locally based supplier on the basis of the degree of foreign ownership [Article 1003(2)a], nor on the grounds that the goods or services offered originate in one of the other Parties [Article 1003(2)b]. Chapter 10, however, permits the Parties to deny the benefit of the chapter to service suppliers from another Party where that service is supplied by an enterprise that is owned or controlled by persons of a non-Party and that has no substantial business activities in the territory of a Party [Article 1005(1)]. It may also deny the benefit of the Chapter to an enterprise that is owned or controlled by nationals of a non-Party on certain other grounds [Articles 1005(2) and 1113(1)(a)]. Chapter 10 specifically prohibits “offsets”, defined as “conditions imposed or considered by an entity prior to or in the course of its procurement process that encourage local development or improve its Party’s balance of payments accounts, by means of requirements of local content, licensing of technology, investment, counter-trade or similar requirements” (Article 1006).

4.1. Technical specifications

The term “technical specification” is defined (NAFTA Article 1025) as referring to a specification which lays down “goods characteristics or their related processes and production methods, or services characteristics or their related operating methods, including the applicable administrative provisions. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, process, or production or operating method”.

This clearly encompasses specifications laying down environmental characteristics of goods or services, and those laying down process and production methods relating to such “goods characteristics”, i.e. product-related PPM requirements. Such requirements are therefore subject to Chapter 10’s rules governing “technical specifications”. These are provided by Article 1007(1) which requires each Party to ensure that its entities must not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade. The Parties are furthermore to ensure that any technical specification prescribed by their entities are specified, “where appropriate”, in terms of performance criteria rather than by reference to design or descriptive characteristics [Article 1007(2)(a)], and based on international standards, national technical regulations, recognised national standards, or building codes [Article 1007(2)(b)].

The wording of the first sentence of NAFTA’s definition of “technical specification” appears to exclude non-product-related PPM requirements from qualifying as “technical specifications” since it only refers to PPMs relating to “goods characteristics” but not to those which, although they may relate to goods, do not relate to characteristics of those goods. This interpretation is supported by the fact that the definition in Article 915 of the term “technical regulation” (which also refers to “goods characteristics or their related processes and production methods”) is to be interpreted (according to Note 36 of the Notes attached to NAFTA) as referring to: “a) characteristics or their related processes and production methods for a good; [and] b) characteristics for a service or its related operating method.”

The fact that non-product-related PPM requirements appear to be outside the definition of the term “technical specification” in Chapter 10 causes two difficulties. The first concerns the consequences that might be thought to follow from such an interpretation. One view would be that, because the definition of “technical specification” does not encompass non-product-related PPM requirements, such requirements are implicitly prohibited and may not be deployed by entities when specifying their requirements. The difficulty with such an approach, however, lies in the very fact that it depends upon an implicit prohibition gleaned from a purely definitional provision. Article 1025 (in which this definition, together with others, is provided) does not purport to provide prohibitions, or indeed any substantive rules, but merely to provide definitions to be applied in respect of substantive rules stated elsewhere in the Chapter. None of the substantive provisions of the Chapter expressly require procuring entities to apply only those requirements that qualify for inclusion in the “technical specification”. Nor do they purport specifically to prohibit the use of non-product-related PPM requirements. Furthermore, the substantive rules provided by Chapter 10 to govern technical requirements are themselves framed by reference to the defined term “technical specification”. Accordingly,

it seems at least arguable that if non-product-related PPM requirements cannot qualify as “technical specifications”, such requirements may escape the application of the relevant rules altogether or will, at least, be subject to the power of derogation provided by NAFTA (see below).

4.1.1. Eco-labelling

The second difficulty caused by the apparent exclusion of non-product-related PPM requirements from the definition of “technical specifications” relates to the permissibility of eco-labelling requirements. The second sentence of the definition states that the term technical specification “... may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, process, or production or operating method”. This language is certainly sufficiently wide to cover eco-labelling requirements where the labelling scheme in question includes product-related PPM requirements. Since it indicates that a specification may deal with labelling requirements “as they relate to... production or operating methods”, they would also seem to be sufficiently wide to cover eco-labelling requirements based on non-product-related PPM criteria. Once more this interpretation is supported by the fact that the definition in Article 915 of the term “technical regulation”²⁹ is to be interpreted (according to Note 36 of the Notes attached to NAFTA) as referring to: “c) provisions specifying terminology, symbols, packaging, marking, or labelling for: i) **a good or its related process or production method**; or ii) a service or its related operating method” (emphasis added). Nothing in this definition, therefore, requires the labelling requirement to relate to process or production methods relating to “goods characteristics”. It is sufficient that it merely relates to “a good”. The difficulty nonetheless arises as to whether, if non-product-related PPM requirements are indeed themselves excluded from qualifying as “technical specifications” (by virtue of the first sentence of the definition), it can really be permissible (under the second sentence) to include requirements as to qualification under an eco-labelling scheme which itself requires application of non-product-related PPM criteria. If the NAFTA is to be interpreted as impliedly prohibiting non-product-related PPM requirements, it seems at least arguable that it must also be taken as impliedly prohibiting specifications referring to eco-labels incorporating non-product-related PPM criteria.

Equally, of course, the potential for discrimination against non-domestic suppliers that can arise when a procuring entity specifies that a product must bear a particular eco-label is relevant under NAFTA as under the GPA. To avoid the possibility that the qualification/verification requirements of a particular scheme may preclude/disadvantage non-domestic suppliers (in which case a specification requiring the use of the label would infringe NAFTA’s national or most-favoured-nation treatment rules), it would seem wise to specify compliance

with the substantive criteria of a scheme while accepting either the label or other proof of compliance.

4.2. Qualification and selection

NAFTA Article 1008 requires each Party to ensure that its entities' tendering procedures are "applied in a non-discriminatory manner" and consistently with the rules laid down in Articles 1009 to 1016 inclusive. Article 1009(1) specifically applies national treatment and most-favoured nation treatment standards to the process of qualifying suppliers and this is supported by a rule that procuring entities must not misuse the process of qualification in order to exclude suppliers of another Party [Article 1009(2)(d)]. Furthermore, Article 1009(2)(b) provides that the conditions for participation by suppliers in tendering procedures (including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers) and the applicable means of verification are to be "limited to those that are essential to ensure fulfilment of the contract in question".

Accordingly, the extent to which a procuring entity will be able to have regard to the environmental qualifications and capacity of its supplier will depend upon the specific requirements of the contract. There may therefore be greater scope in respect of services contracts and construction services contracts where the contract terms prescribe the required mode of performance, as compared to goods contracts, although even in respect of the latter, the capacity of a supplier to supply products having the characteristics prescribed by the contract (in terms of energy efficiency in use, recyclability and disposal) would seem to be "essential" to the fulfilment of the contract. The same might apply to the contractor's capacity to meet product-related PPM requirements. Furthermore, if non-product-related PPM requirements are not impliedly prohibited and were specified in the contract, then conditions for participation that relate to the tenderer's capacity to satisfy those requirements would also be permissible provided that those requirements are stated in the contract.

Article 1009(2)(c) requires that the financial, commercial and technical capacity of a supplier is to be judged both on the basis of its global business activity and its activity, if any, in the territory of the Party of the procuring entity. This provision will usually be advantageous to potential tenderers where they have significant activities outside the country of the procuring entity. It means that the capacity of such an enterprise to meet environmental requirements would have to be assessed not only on the basis of its facilities, staff, etc., within the country in which the procurement is taking place, but also by reference to those located in other countries. It is not inconceivable, however, that to the extent that managerial capacity to identify, assess and manage environmental risk is essential to the fulfilment of the contract (as it

may be, for example, in respect of construction services for a major project), previous failures by the tenderer successfully to identify, assess and manage such risk in respect of projects in other countries would be equally relevant. This is, after all, also part of the enterprise's "global business activity".

All entities are required to publish invitations to participate for all procurements (except in the cases in which NAFTA permits "limited tendering") (Article 1010). For most entities this must take the form of a "notice of proposed procurement" containing information prescribed by Article 1010(2) including, *inter alia*, "a description of the nature and quantity of the goods or services to be procured" and "a statement of any economic or technical requirements and of any financial guarantees, information and documents required from suppliers". Clearly, therefore, if the environmental requirements of the contract mean that potential suppliers will require specific technical expertise or specific equipment or facilities, these requirements as to technical capacity and the related information that is to be required from potential suppliers must be stated in the invitation to participate.

In addition, in the case of selective tendering arrangements, entities maintaining a permanent list of qualified suppliers must publish annually a notice indicating, *inter alia*, "the conditions to be fulfilled by suppliers in view of their inscription on the lists and the methods according to which each of those conditions will be verified" [Article 1010(6)(b)]. Where a procuring entity provides tender documentation to suppliers this also must contain "all information necessary to permit suppliers to submit responsive tenders", including the information required to be published in the notices referred to above [Articles 1013(1) and 1010(2)(h)]. The documentation must also include, *inter alia*, a statement of any economic or technical requirements and of any financial guarantees, information and documents required from suppliers, the terms of payment [Article 1013(1)(f),(i)] and "any other terms or conditions" [Article 1013(1)(j)]. Once more, therefore, if the environmental requirements of the contract mean that potential suppliers will be required to have specific technical expertise, or specific equipment or facilities, these requirements and the related information that is to be required from potential suppliers must be stated.

4.3. Compliant tenders – "additional criteria" – "contract compliance"

To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and must have been submitted by a supplier that complies with the conditions for participation [Article 1015(4)(a)]. This makes it clear that entities may not award the contract to a tenderer that has submitted a non-compliant tender. This would seem to suggest that, if the contract requires the contractor to fulfil stated environmental obligations or to participate in a stated environmental programme

(and that requirement is included in the contract terms incorporated in the tender documentation), then any tender that does not accept those conditions will be non-compliant and should be excluded. The ability of an entity to stipulate such conditions in the first place will, however, be subject to the general prohibition of discrimination [i.e. the national treatment and most-favoured-nation treatment rules in Article 1003(1)]. Whether conditions requiring participation in a specific environmental programme or compliance with an environmental policy will in fact infringe those rules will need to be determined on a case-by-case basis and will depend upon the nature of the programmes and policies in question and the extent to which compliance is equally open to entities established in the territories of other Parties.

4.4. Contract award criteria and weightings

The tender documentation must also state “the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders, and the cost elements to be included in evaluating tender prices...” [Article 1013(1)(h)]. Thus, if environmental criteria are to be included as award criteria, they must be stated in the tender documentation. NAFTA Article 1015(4)(c) further provides that unless a procuring entity decides in the public interest not to award the contract, it must make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation. Furthermore, awards must be made in accordance with the criteria and essential requirements specified in the tender documentation. The permitted criteria appear to be broad in that when the “most advantageous” basis is used they are not specifically required to relate to an economic advantage accruing to the procuring entity, still less to such an advantage accruing “directly” to that entity. The choice of evaluation criteria is left entirely to the procuring entity subject only to the rules requiring that they must be as specified in the tender documentation. This would suggest that under Chapter 10 of NAFTA, procuring entities may include criteria relating to general benefits accruing to the environment itself or to society as a whole rather than just to environmental advantages that produce economic benefits to the entity itself (such as energy efficiency or waste reduction).

Notably, however, Article 1013 does not require that weightings or the hierarchy of comparative importance to be attached to particular award criteria be stated in the tender documentation. This reserves to the procuring entity the possibility that after the opening of tenders it might adopt weightings emphasising the relative importance of its published environmental (and other) award factors and thereby compromises the principles of transparency and fairness.

4.5. Power of derogation

Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustified discrimination between Parties where the same conditions prevail or a disguised restriction between the Parties, nothing in Chapter 10 prevents any Party from adopting or maintaining measures necessary to protect human, animal or plant life or health [Article 1018(2)(b)]. If the use of non-product-related PPM requirements in specifications is indeed impliedly prohibited by virtue of the exclusion of such requirements from the definition of “technical specification”, then it might nonetheless be permissible if justified by this derogation as being “necessary to protect human, animal or plant life or health”. Presumably, however, issues may arise (as under GATT) as to whether the derogation is intended to permit only measures protecting the life or health of people, animals and plants within the procuring entity’s own country or whether it also permits measures protecting life or health in other countries. Equally, there is clearly scope for argument as to the meaning of the word “necessary” and therefore as to the circumstances in which non-product-related PPM requirements may be “necessary” to advance the permitted goals. If non-product-related PPM requirements in specifications are impliedly prohibited but can nonetheless fall within the purview of Article 1018, they will be lawful provided that they do not “constitute a means of arbitrary or unjustified discrimination between Parties where the same conditions prevail or a disguised restriction between the Parties”. Although this language clearly reflects the wording of the *chapeau* in Article XX of the GATT 1994, the distinctions between the procurement context on the one hand and the import embargo context of *Shrimps* on the other (see above) mean that it is by no means clear that the application of NAFTA Article 1018 would necessarily lead to the legal inadmissibility of non-product-related PPM requirements.

5. Australia and New Zealand Government Procurement Agreement

Australia and New Zealand are not parties to the GPA. They have, however, entered into bilateral agreements with each other covering government procurement. First is the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) of 1983 which seeks to develop closer economic relations, and to eliminate trade barriers, between the two countries. Article 11 of ANZCERTA deals with government procurement and seeks to remove any preferences between the two countries. Commonwealth of Australia procurement officers are therefore required to treat any New Zealand content in offers received from Australian or New Zealand tenderers as equivalent to Australian content. Likewise, New Zealand Government procurement officers are required to treat Australian content as equivalent to New Zealand content. The Commonwealth of Australia (together with the governments of each of the

six Australian States and two Territories) and New Zealand are also parties to the Australia and New Zealand Government Procurement Agreement (ANZGPA, as revised, August 1997). The objectives of the Agreement are to create and maintain “a single ANZ government procurement market”, to maximise opportunities for competitive ANZ suppliers and to reduce costs of doing business for both government and industry (ANZGPA, Objectives).

The ANZGPA is to achieve its objective by ensuring that the opportunity exists for ANZ suppliers “to compete on an equal and transparent basis” for government contracts in the Commonwealth of Australia, the Australian States and Territories and in New Zealand; by “ensuring the absence of inter-state and trans-Tasman application of preference schemes and other forms of discrimination in government procurement, based on the place of origin of goods and services”; and by providing a mechanism for co-operation by the Parties in working towards “the greatest possible consistency in contractual, technical and performance standards and specifications, and simplicity and consistency in the application of procurement policies, practices and procedures”.

The ANZGPA covers “government procurement” which is defined to cover procurement by departments and other bodies controlled by the Parties – but which excludes procurement by any local authority, body corporate or other legal entity that has the power to contract, except where the Parties have exercised their discretion to determine that the Agreement is to apply [Clause 1(e)]. The ANZGPA’s coverage is also subject to a number of partial and total exemptions listed in Annex I to the Agreement, and to a procedure whereby further exemptions meeting criteria set out in Annex I may be adopted (Clauses 6 to 10 and Annex I). Compliance with the Agreement is to be monitored by the Australian Procurement and Construction Council (APCC) which is to report annually to the responsible procurement ministers of the Parties and which may draw up administrative guidelines to assist purchasing officers in the application of the Agreement.

The ANZGPA establishes a number of key principles including a national treatment rule [Clause 2(c)]; a rule requiring non-discrimination in the use of procurement to further other policies (Clause 5, see below); and obligations to promote procurement opportunities for ANZ suppliers [Clause 2(d)]; to achieve maximum practicable simplicity and consistency in the application of procurement policies, practices and procedures [Clause 2(f)]; to seek to maximise competitive opportunities for ANZ suppliers while conforming with the Parties’ commitments under domestic and international government procurement agreements (Clause 3); and not to use any form of procurement practice which discriminates against, is biased against, or has the effect of denying equal access or opportunity to any ANZ supplier (Clause 4). A further key principle which is fundamental to the general approach taken by the ANZGPA is the requirement to

use “value for money including appropriate whole-of-life costs and benefits, as the primary determinant in all procurement decisions” [Clause 2(e)].

This concept appears to be wide enough to permit procuring entities to take a range of environmental factors into account. It is defined as being “aimed at achieving the best available outcome for money spent in terms of the procuring agency’s needs” and the test of the best available value for money “requires relevant comparison of the whole-of-life costs relating directly to the procurement. Whole-of-life considerations include fitness for purpose and other considerations of quality; performance; price; delivery; accessories and consumables; service support; and disposal”.

Whole-of-life cost factors that may be environmentally relevant include energy consumption, reduction and elimination of packaging, and disposal costs. Since they also include “fitness for purpose and other considerations of quality” and “performance” it would appear that if any environmental requirements are specified in respect of a potential purchase as regards the performance of a procured item in use (e.g. discharge or emission standards for machinery, equipment, etc.), these also would constitute “whole-of-life cost factors” that may properly be taken into account when ascertaining “value for money”. One limitation that seems inherent in this definition arises, however, because the definition is framed in terms of “cost”. This might suggest that environmental benefits unrelated to cost may not feature in computations of “value for money”. If this were the case, then the fact that the procurement of a particular design of product, or of particular technology, might produce general environmental benefits (e.g. clean air or clean water) unrelated to cost could not be taken into account in applying the “value for money” approach. Furthermore, the test of the best available value for money requires relevant comparison of the whole-of-life costs relating directly to the procurement. It might therefore be argued that, in many cases, even if environmental advantages such as clean air or water can be regarded as related to “cost”, they cannot be taken into account because they do not relate directly to the procurement in the sense of relating directly to the specific objective of the procurement, i.e. the purchase of a good or service to fulfil a particular function.

Such a view would, however, appear to be unduly restrictive since other parts of the definition of “value for money” suggest a much broader approach. First, the application of the “value for money” principle “is aimed at achieving the best outcome for money spent in terms of the procuring agency’s needs”. The concept of the “best available outcome” seems apt to cover a range of benefits, not only those related to cost. “Best outcome” must be determined “in terms of the procuring agency’s needs” and if, in the procuring agency’s view, it is advantageous to ensure environmental benefits unconnected to cost, then these ought to be capable of being taken into account. Such an interpretation is

supported by the text of Clause 2(e) which requires the Parties to “use value for money, **including** appropriate whole-of-life costs **and benefits**” (emphasis added) as the primary determinant of procurement decisions. Clearly, “whole-of-life costs” are not the only factors that can be taken into account since: i) the word “including” indicates that the following text is not exhaustive; and ii) the inclusion of the words “and benefits” indicates that benefits are to be taken into account as well as the comparison of whole-of-life costs to which the definition itself refers. In fact, even if a narrow interpretation were to be taken of “value for money”, that would not prevent procuring entities having regard to non-cost environmental factors because the ANZGPA does not mandate “value for money” as the only permissible criterion. It merely requires that it be the “primary determinant” of procurement decisions, implicitly acknowledging that other factors may have at least secondary relevance. Indeed, as shall be seen when considering the practice of the Commonwealth of Australia, that jurisdiction clearly understands the concept of “value for money” as carrying a wide rather than narrow meaning, capable of allowing procuring entities a wide discretion to take environmental factors into account in the procurement process.

Second, the reference to cost in Clause 2(e) describes comparison of costs “relating directly to the **procurement**” (emphasis added) and does not (unlike the European procurement regimes as interpreted by the EC Commission) require that, to be taken into consideration, a particular factor must constitute a direct cost benefit to the purchasing entity. Where, for example, the cost of avoiding, cleaning up or managing pollution falls upon the state at large, then, if a particular product will minimise pollution, the procurement of such a product may be said to relate “directly to the procurement” even if the cost of avoiding, cleaning up or managing pollution is not borne by the particular procuring entity. Thus, even if permissible factors were to be limited only to cost factors, the “value for money” approach would nonetheless seem to permit procuring entities to take into account a wide range of environmental externalities.

The Agreement contains two provisions governing the use of procurement to further other policies, including environmental policy. The relationship between these provisions, however, causes considerable difficulty. Annex I, Point 9 provides that “[p]rocurement undertaken by the Parties in accordance with specific policies of a non-procurement nature will not be deemed to be in contravention of the provisions of the Agreement. **These might include environmental and social justice policies**” (emphasis added). On the other hand, Clause 5 of the Agreement establishes that nothing in the Agreement “precludes the Parties from... using purchasing policy to implement other policies, provided that in doing so there is no discrimination on the basis of place of origin or contravention of any commitments of the Parties under domestic and international government procurement agreements”.

The obvious difficulty is that Annex I, Point 9 (in the annex entitled “exemptions from the application of the ANZGPA”) appears to provide that procurements undertaken in pursuit, for example, of environmental policy are not to be regarded as being in contravention of the Agreement (without reference to the question as to whether or not they may be discriminatory in object or effect), whereas Clause 5 – while permitting the use of procurement in the implementation of other policies – does so expressly subject to the proviso that such procurement must involve no discrimination on the basis of place of origin or contravention of the Parties’ procurement commitments.

Although it is indeed difficult to reconcile these two provisions, one possible interpretation would be that Annex I, Point 9 should be regarded as providing an exemption from the “value for money” approach so that purchasing in pursuit of environmental goals should not be regarded as contravening the Agreement simply because it is not based upon a “value for money” approach. This would leave open the possibility that environmental purchasing policies or practices that discriminate on the grounds of the place of origin of goods might nonetheless be regarded as falling foul of the proviso in Clause 5. It is, however, worth noting in that regard that the wording of Clause 5 is itself limited. So far as discrimination is concerned, it only refers to “discrimination on the basis of place of origin” and few environmentally motivated policies will involve discrimination as to place of origin. Equally, the reference in Clause 5 to contravention of any commitments under “international procurement agreements” cannot really be understood as referring to commitments under the ANZGPA itself (such as the other specific “key principles”) since the ANZGPA is referred to throughout as “the Agreement”.

5.1. Technical specifications

The Agreement (unlike the GPA, Chapter 10 of NAFTA, and the EC procurement directives) does not lay down detailed rules specifically relating to technical specifications. So far as the substantive rules of the ANZGPA are concerned, it may appear at first sight that the national treatment rules [Clause 2(c)], the rule against practices biased in favour of “foreign” goods and suppliers [Clause 2(d)], and in particular, the rule against practices which discriminate against, are biased against, or deny equal access or opportunity to, any ANZ supplier (Clause 4) might curtail the Parties’ right to pursue environmental policies where the policy itself, or the technique used to advance the policy, may be intended, or have the effect of discriminating against an ANZ supplier. Annex I, Point 9 and Clause 5 do, however, preserve the Parties’ right to use procurement to pursue environmental policy (subject to the interpretative difficulty discussed above).

Furthermore, the concept of “value for money” as the key determinant of “all procurement decisions” [Clause 2(e)], including decisions as to specifications, also

appears to allow procuring entities to include many environmental requirements in their specifications (whether relevant to costs or benefits and regardless as to whether they constitute direct economic advantages to the procuring entity itself). Finally, of course, even if a narrower interpretation were adopted as regards the value for money concept, that would not in itself constrain the inclusion of environmental requirements in specifications, since Clause 5 expressly permits such conduct and Annex I, Point 9 provides that it shall not, in any event, be deemed to contravene the Agreement.

So far as the definition of technical specifications is concerned, however, it is clear that procuring entities have a wide discretion under the ANZGPA to include environmental requirements. Clearly product requirements and product-related PPM requirements can, in principle, be imposed. Non-product-related PPM requirements also seem permissible subject only to the possibility that they may be discriminatory on a case-by-case basis. If they are discriminatory, they may nonetheless be permitted if Annex I, Point 9 is interpreted according to its literal meaning since, on that basis, if the procurement is undertaken “in accordance” with a specific environmental policy, it will not be deemed to be a contravention of the Agreement.

5.1.1. Eco-labelling

The same analysis would apply to requirements mandating the purchase of goods bearing particular eco-labels. In particular, the permissibility of reference to eco-labelling schemes whose criteria include non-product-related PPM requirements will be the same as that for such requirements themselves.

5.2. Qualification and selection

Nothing in the ANZGPA specifically deals with qualification and selection although the general rule requiring equal treatment for ANZ suppliers [Clause 2(c)], the promotion of opportunities for ANZ suppliers [Clause 2(d)] and the maximisation of opportunities for ANZ suppliers (Clause 3) clearly apply as does the rule against discriminatory practices (Clause 4) and the rule that “value for money” must be used as the key determinant of all decisions (including qualification and selection decisions). There appears, however, to be nothing to prevent a procuring entity from requiring that to be qualified to submit a tender for a particular contract, the tenderer must be able to demonstrate its capacity to perform the contract in an environmentally satisfactory way, its track record of compliance with environmental laws and with environmentally related contract conditions in previous contracts, or its adherence to an environmental management system in its business generally. Once more, this is because even if the application of such consideration in particular cases may disadvantage suppliers of the other Party, or conflict with

the “value for money” rule, it appears, under at least one reading of Annex I, Point 9 that this may not be deemed to be a contravention of the Agreement, if it is in accordance with a specific environmental policy.

It seems implicit in the obligations upon the Parties to “promote” [Clause 2(d)] and to “maximise” (Clause 3) opportunities for ANZ suppliers that contract opportunities must be published in such a way as to be accessible to suppliers of the other Party. The ANZGPA does not, however, specifically require that the qualification/selection criteria and the award criteria must be published in tender documentation or contract notices. Nor is there an express provision prohibiting the application of criteria other than those that may have been published. This potential lack of transparency may leave a considerable degree of *de facto* discretion as to the procuring entity’s choice of environmental selection and award criteria and the weightings to be attached to environmental award criteria relative to other criteria.

5.3. Compliant tenders – “additional criteria” – “contract compliance”

Nothing in the ANZGPA in principle prevents procuring authorities from including contract terms requiring contractors to undertake environmentally related activities if awarded a contract. Tenders not accepting such contract terms may therefore be rejected as non-compliant. Once more there is the possibility that inclusion of such terms unrelated to the primary purpose of the procurement itself may *de facto* exclude ANZ suppliers of the other Party and so infringe the rules against discrimination. Once again, however, if the inclusion of the terms is intended to implement a specific environmental policy, Annex I, Point 9 would appear to apply, with the possible result that such discrimination is not to be deemed a contravention of the Agreement.

5.4. Contract award criteria and weightings

Once more, the award criteria to be adopted must generally relate to “value for money” – a concept which, as argued above, itself leaves considerable scope for procuring entities to take environmental factors into account. To the extent that an entity wishes to further an environmental policy by taking into account factors not within the scope of “value for money”, it appears able to do so by virtue of the provisions in Clause 5 and in Annex I, Point 9 permitting the use of procurement policy to implement environmental and social justice policies. The ANZGPA does not specifically require that the award criteria be published in tender documentation or contract notices. Nor is there an express provision prohibiting the application of criteria other than those that may have been published. This potential lack of transparency may leave a considerable degree of *de facto* discretion as to the procuring entity’s choice of environmental award criteria and the weightings to be attached to environmental award criteria relative to other criteria.

6. Conclusions

This paper has reviewed the potential for the incorporation of environmental concerns in international procurement regimes into issues such as the qualification and selection of potential suppliers, technical specifications of goods and services to be procured, and contract award criteria. In general there do not seem to be significant constraints on the use of environmental criteria in various stages of the procurement process. However, each regime is different, and there are some areas in which there are differences in emphasis that are relevant for environmental concerns. Some of these main differences can be summarised as follows:

- The distinctions between environmental impacts associated with **products** and those associated with **production process methods** (PPMs) is addressed in all cases, but they appear to differ in the extent to which the latter can be included in technical specifications. At the one extreme, the EU appears to take a “hard line” restricting the use of PPMs. However, there is some ambiguity in different texts. There is also some ambiguity in the case of NAFTA, with different articles of the Agreement appearing to be at odds with each other. At the other extreme, the ANZGPA appears to place few constraints on the use of PPMs in technical specifications.
- All of the regimes allow for the use of non-price factors in contract award criteria. However, it would appear that the scope for the inclusion of other factors, including environmentally-relevant factors, differs. Perhaps most significantly, while the EU mandates the selection of the “**most economically advantageous**” tender, the GPA uses the term “**most advantageous**”. The latter would, of course, imply a greater degree of allowable discretion.
- In a related vein, **whole-of-life costs** and “**value for money**” are common features of all the international procurement regimes reviewed, but the extent to which these can include non-financial **external costs** appears to differ. For example, while both the EU and the ANZGPA would allow for the financial costs of disposal to be considered, arguably the latter seems to allow for greater discretion with respect to the incorporation of external environmental costs for which there are no market or administered prices.
- In the qualification and selection of suppliers, the scope for the use of management-related factors (such as certification of an **environmental management system**) as a proof of “technical capacity” also appears to differ somewhat between the regimes. In this case, NAFTA seems most restrictive, with greater scope allowed for the purchase of services or works contracts where this might be more directly relevant than in the case of goods.

Other factors are also important, such as degree of discretion allowed in the use of “**eco-labels**” as technical specifications, preferences for **performance standards** rather than technological standards, and, more generally, the pursuit

of **secondary policy objectives** through public procurement. All of these points are key to an understanding of the extent to which government authorities can incorporate environmental criteria in their tendering procedures and in procurement generally. In general, there is in fact considerable legal scope to do so. However, it is also clear that a number of important issues remain unresolved due to the relatively immature state of case law in this area. The effect that this uncertainty may be having on the willingness of procurement officers in member country governments to exploit this potential scope is not clear.

It does, however, seem clear that the systems reviewed in this paper each reflect an understanding that the procurement process can and should provide opportunities to advance environmental objectives. The extent to which this can be achieved without prejudicing the procurement principles of transparency and non-discrimination (that to a greater or lesser extent underlie each of the systems) will no doubt become clearer as practice develops.

Notes

1. See Jackson (1997) at pp. 224-228 and Arrowsmith, *et al.* (2000) at pp. 182-183.
2. WTO Appellate Body Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*Shrimps I*”) WT/DS58/RW, 15 June 2001, at para. 129.
3. A specification’s requirement is “product-related” where it addresses consumption externalities, *i.e.* the damage created by consumption or disposal of a product that is not incorporated into its cost (OECD, 1997). Such damage necessarily arises because of some characteristic of the product itself. Where PPMs influence the environmental effects of a product at the consumption stage (in use, or upon disposal, re-use or recycling), specifications may express their requirements in terms of these PPMs; but since the PPMs themselves relate to consumption characteristics of the product, such PPM requirements can be considered to be product-related (OECD, 1997).
4. A specification’s requirement is “non-product-related” where it addresses production externalities, *i.e.* the damage created by the production of a product that is not incorporated into its cost (OECD, 1997). Such damage does not arise because of any particular characteristic of the end product itself but because of features of the PPMs deployed in manufacture or harvesting of the product (OECD, 1997).
5. By way of comparison, for the treatment under GATT of non-product-related PPM measures restricting imports, see the Report of the WTO Appellate Body in *Shrimps I* (*supra*) and in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – recourse to Article 21.5 of the DSU by Malaysia* (*Shrimps II*, DS58/AB/RW, of 22 October 2001). See also the Reports of the GATT Panel in *United States – Restrictions on Imports of Tuna* (“*Tuna I*” DS21/R-39S/155, 1991, unadopted) and the GATT Panel in *United States – Restrictions on Imports of Tuna* (“*Tuna II*” GATT DS29/R, 1994, unadopted).
6. The treatment of non-product-related PPM measures affecting imports depends substantially upon the GATT national treatment rule, which requires that “like products” be treated alike. Such measures infringe that rule but may be permitted by way of derogation under Article XX of GATT provided that they satisfy the conditions of such derogation, see *Shrimps I and II* (*supra*). The GPA does not include

a concept of “like products” and “[t]he choice of specifications is entirely the responsibility of the procuring entities. The only limit to their discretion is the obligation not to create ‘unnecessary’ obstacles to international trade (Article VI:1). The question whether the choice of specifications is necessary or appropriate appears to escape judicial review, unless the obligation imposed by Article VI:1 is interpreted in a wide manner. Similarly, the ‘appropriateness’ test for the use of performance-based and international standards is a potential loophole” (Hoekman and Mavroidis, 1997, at p. 18).

7. This would, however, constitute the use of an eco-label in a manner in which it was not originally envisioned – i.e. as a mandatory requirement for a sub-set of the market (public sector demand) rather than a voluntary measure for the market as a whole.
8. Specifically, under Case 120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1984] ECR 3199.
9. Case 302/86 *Commission v. Denmark (Danish Bottles)* [1988] ECR 4607.
10. For the inter-relationship between the two regimes, see WTO (1998 and 2000), Trepte (1995), Appella (1996), Dingl (1996), Footer (1996) and Eeckhout (1997).
11. Directive 93/37 Concerning the Co-ordination of Procedures for the Award of Public Works Contracts (OJ 1993, No. L199, p. 54); Directive 93/36 Concerning the Co-ordination of Procedures for the Award of Public Supply Contracts (OJ 1993, No. L199, p. 1); and Directive 92/50 Concerning the Co-ordination of Procedures for the Award of Public Services Contracts (OJ 1992, No. L209, p. 1). At the time of writing it is proposed to replace these directives with a single directive covering public supply, services and works contracts, which will simplify and amend the public procurement regime (see COM(2000)275 final). It is expected that the new directive will be adopted in the “summer of 2003” and will have to be transposed into national law within 21 months thereafter (“State of Play Document (December 2002)” United Kingdom Government, Office of Government Commerce).
12. Directive 93/38 Concerning the Co-ordination of Procedures for the award of Supply, Works and Services Contracts by Certain Entities Operating in the Water, Energy, Transport and Telecommunications Sectors (OJ 1993, No. L199, p. 84). At the time of writing it is proposed to replace this directive with a new directive on utilities procurement [see COM(2000)276 final]. The expected timeframe for adoption and national transposition of this proposed directive is the same as for the proposed directive on public contracts [“State of Play Document (December 2002)”, *supra*].
13. For discussions, see Thompson (2001) and Williams (2001a, 2001b and 2002).
14. Case C-25/98 *Commission v. France (“Nord-Pas-de-Calais”)*, judgment of 26 September 2000.
15. Case C-513/99 *Concordia Bus Finland Oy Ab (formerly Stagecoach Finland) v. City of Helsinki and HKL-Bussiliikenne*, judgment of 17 September 2002.
16. Case 45/87 *Commission v. Ireland (Dundalk Water)* [1988] ECR 4929.
17. Case C-359/93 *Commission v. Netherlands (UNIX)* [1995] ECR I-157.
18. See Directive 93/36 (supplies), Article 8(2); Directive 93/37 (works), Article 10(2); Directive 92/50 (services), Article 14(2); and Directive 93/38 (utilities), Article 18(2).
19. Similar wording can be found in the definition of “technical specifications” in Annex III of the Public Works Directive (93/37), and the Public Services Directive (92/50) and in Article 1(8) of the Utilities Directive (93/38).

20. In the *Communication*, the Commission intentionally avoided references to the non-product-related PPMs and product-related PPMs.
21. Directive 93/36 (supply), Article 16; Directive 93/37 (works), Article 19; Directive 92/50 (services), Article 24; and Directive 93/38 (utilities), Article 34(4).
22. Public Directive 93/36 (supply), Article 20(1)(c) and (d); Directive 93/37 (works), Article 24(c) and (d); and Directive 92/50 (services), Article 29(c) and (d).
23. Case 31/87 *Beentjes v. Netherlands State* [1988] ECR 4635.
24. EC Commission (1998) at Points 4.3 and 4.4; (1996) at Points 5.38 *et seq.*; and (1989). See also the *Communication (supra)* at para. 3.4 in which the Commission emphasised that additional criteria such as those in *Beentjes (supra)* must not have any direct or indirect [adverse] impact in those submitting bids from other member states and must be expressly mentioned in the tender notice. The Commission added that “[t]his could be equally applicable to conditions relating to environmental protection or performance” (*Ibid.*).
25. There are implications in terms of economic efficiency of not allowing for such “internalisation”. This issue is increasingly important as procurement becomes more decentralised, resulting in more instances in which such externalities arise.
26. The Court did not expand upon the point, but it seems to have assumed that “aesthetic characteristics” are not necessarily economic in nature. On that assumption the inclusion of such a factor in the list contained in Article 36(1)(a) would indeed suggest that “most economically advantageous” criteria are not limited to criteria conferring economic advantages. Advocate General Mischo (who had come to the same conclusion as the Court on the point) had expressly adopted such reasoning (Advocate General Mischo’s *Opinion*, 13 December 2001, para. 104).
27. See the Proposal for a Directive on the Co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts; and the Proposal for a Directive on the Co-ordination of procedures of entities operating in the water, energy and transport sectors (both *supra*).
28. Specifically: CITES, 1973; the Montreal Protocol, 1987; the Basel Convention; and certain bilateral Agreements listed in NAFTA Annex 104.1.
29. This term also refers to “terminology, symbols, packaging, marking or labelling requirements as they apply to a good, process, or production or operating method”.

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