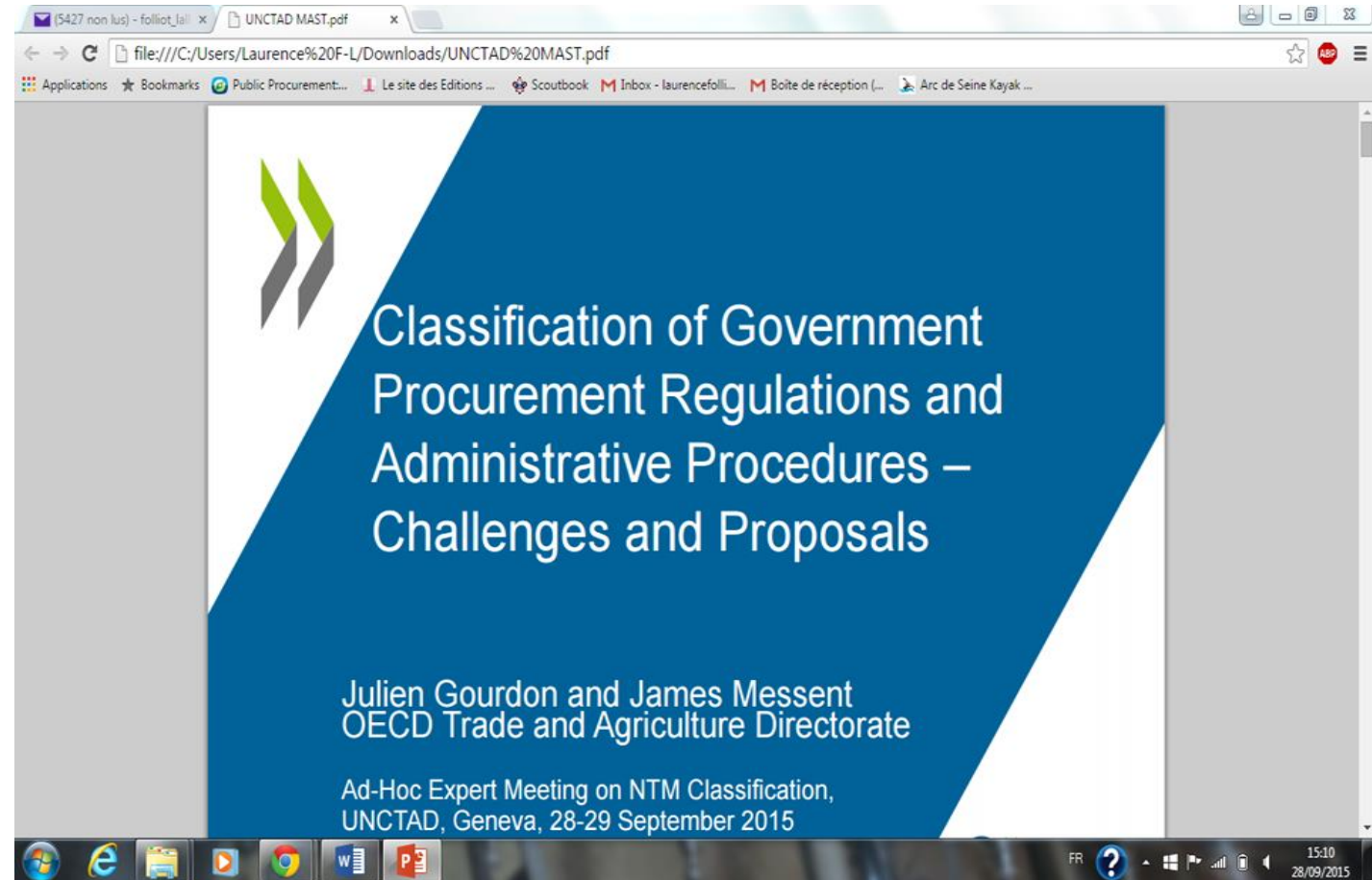


Comments on the proposal for a Classification of Government Procurement NTMs

- Mrs Laurence Folliot Lalliot, Professor of Public Law
- University of Paris Ouest Nanterre (France)



Specificity of Government Contracts

- Hot topic: recent discussions on the opening of this market (GPA n°1 in 1981, n° 2 in 1996, n° 3 in 2014). Several BTAs cover this topic since the 2000s - Current negotiations between US and EU... Reciprocity principle generates proliferation of overlapping instruments
- Highly sensitive area: Government purchases as an economic tool AND political tool (promoting social considerations)

Collection of data

Outline

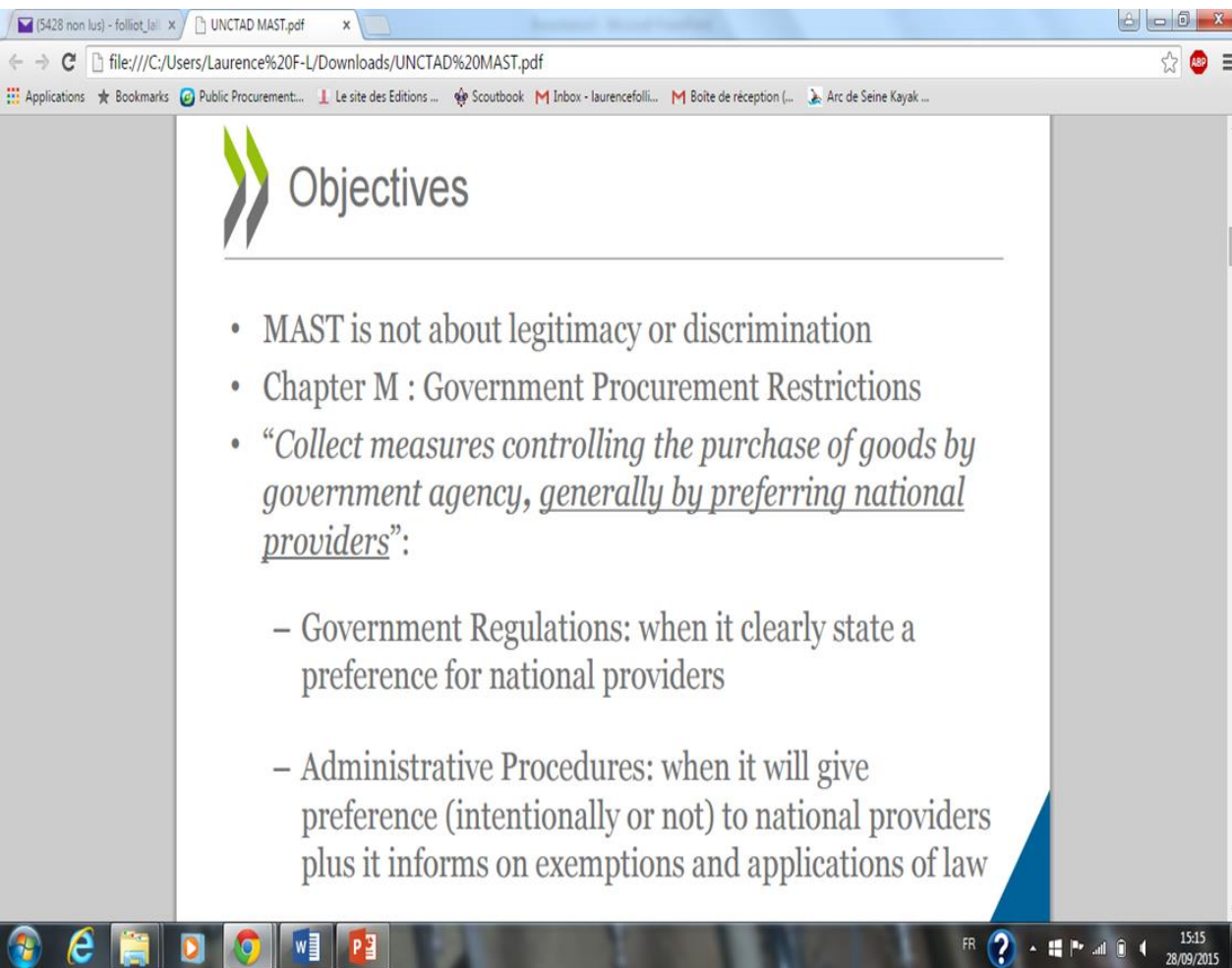
- Objective
- Challenge 1: Modalities
- Challenge 2: Entities
- Challenge 3: Level of Aggregation
- Challenge 4: Sources
- Proposal 1 for Government Regulations
- Proposal 2 for Administrative Procedures
- Existing OECD work on GP

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- Starting point:
- Lack of data on:
« awards to foreign bidders » & « awards to affiliates »

Background

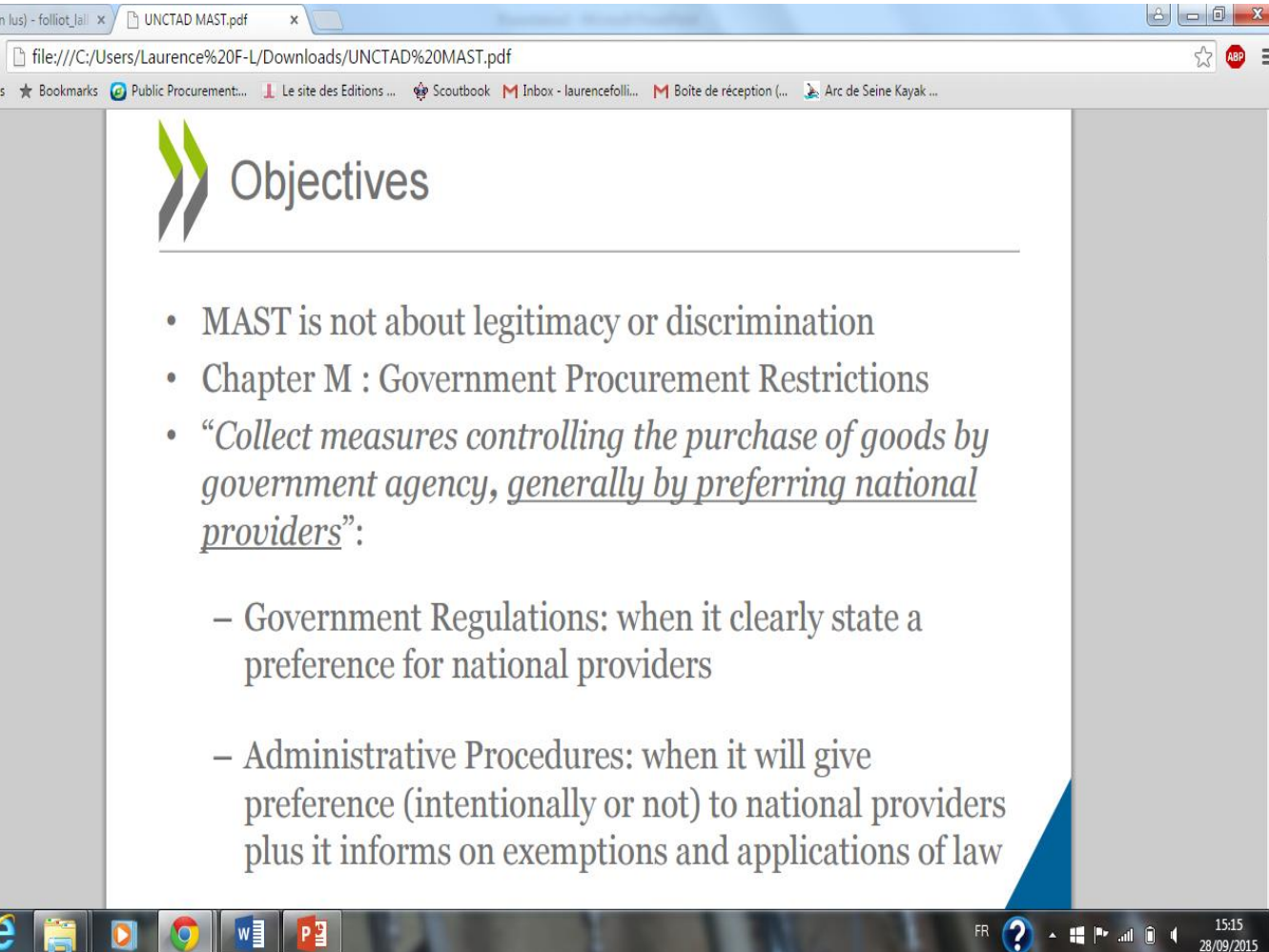


The screenshot shows a PDF document titled "Objectives" with the following content:

- MAST is not about legitimacy or discrimination
- Chapter M : Government Procurement Restrictions
- *“Collect measures controlling the purchase of goods by government agency, generally by preferring national providers”:*
 - Government Regulations: when it clearly state a preference for national providers
 - Administrative Procedures: when it will give preference (intentionally or not) to national providers plus it informs on exemptions and applications of law

- «Laws & Regulations »:
 - Some countries do not have one national set of procurement legislation (local/ sectoral regulations)
 - Profusion of collateral laws (e.x on Investment, on competition...) which impact Gov. procurement
- What « Administrative procedures » means ?
 - = Rules below « laws and regulations » ?
 - or « soft-law » ? (ex: Guidelines)
 - Or « individual decision »/ adjudication ?

Target. Definition of the MAST « M » chapter

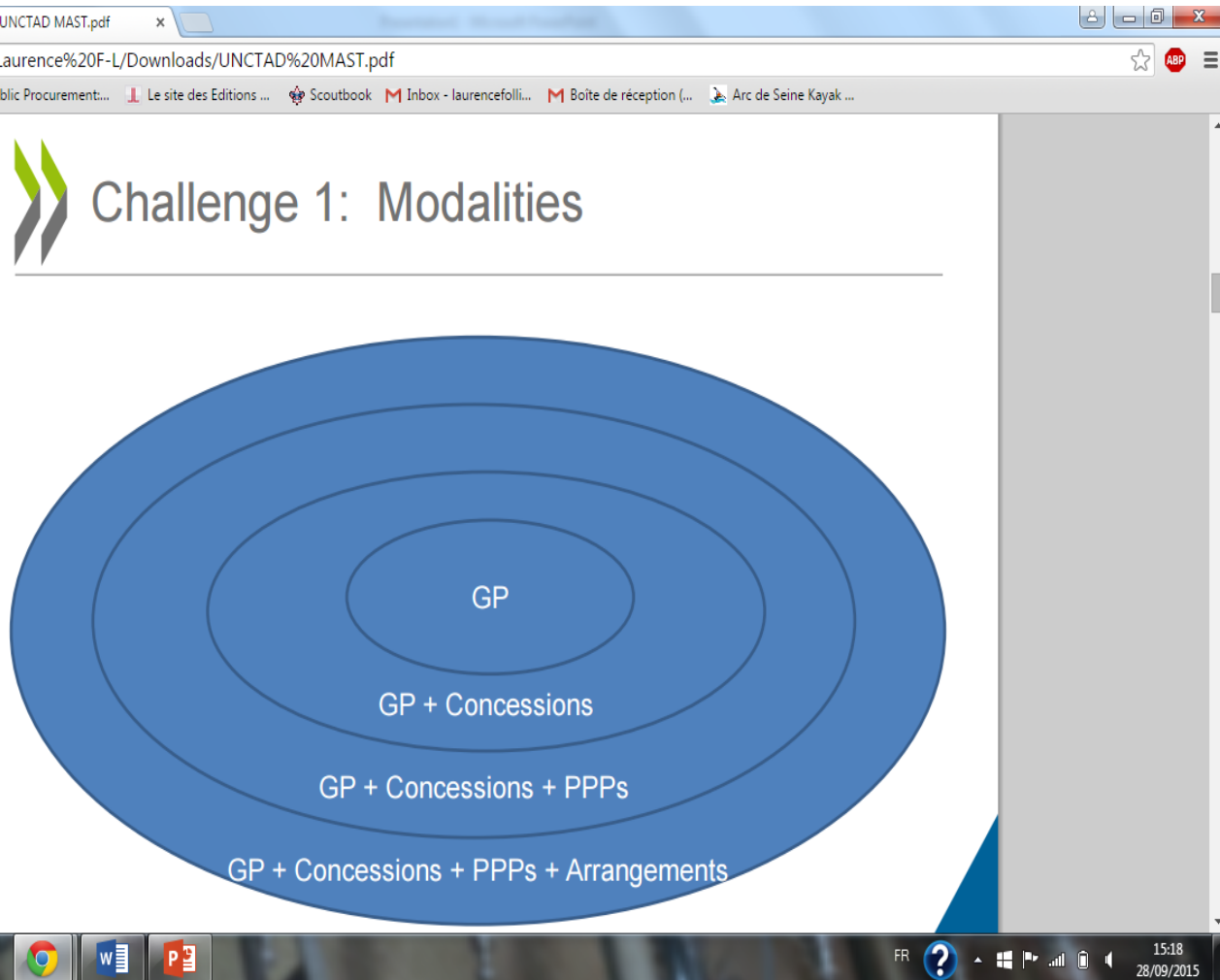


Objectives

- MAST is not about legitimacy or discrimination
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- Addressing « *nationality based discrimination* » v. other discriminations:
 - - for SMEs
 - - for social policies (disadvantaged groups)
 - - for environmental policies
 - - for integrity policies
 - Thresholds

Coverage: which contracts?



- There is no harmonization at the (legal) international level about all these contracts.
- There are actually several international instruments (GPA, UNCITRAL Model Law, UNCITRAL Legislative Guide on PPPs, EU Directives, MDBs Guidelines, BTAs, BITs, OECD Integrity principles)
- Specifically the issue of concessions / PPPs is still heavily discussed
- GP: the best entry point

Procuring entities

The screenshot shows a presentation slide titled "Challenge 2: Entities". The slide features a diagram consisting of three concentric ovals. The innermost oval is labeled "Central Entities". The middle oval is labeled "Central + Sub-Central". The outermost oval is labeled "Central + Sub-Central + SOEs". The slide is displayed in a browser window with the address bar showing "file:///C:/Users/Laurence%20F-L/Downloads/UNCTAD%20MAST.pdf". The Windows taskbar at the bottom shows the date as 28/09/2015 and the time as 15:22.

- Sub-central level is crucial.
- Need to differentiate States/Provinces/decentralized sub-national levels (in a Federal country) from local governments (municipalities/cities, regions)
- e.x for US government contracts
- SOEs: Potential issues. They are not all the time covered by procurement legislation...

References

UNCTAD MAST.pdf

C:/Users/Laurence%20F-L/Downloads/UNCTAD%20MAST.pdf

Public Procurement... Le site des Editions ... Scoutbook M Inbox - laurencefolli... M Boite de réception (... Arc de Seine Kayak ...

Challenge 3: Level of Aggregation

- For Government regulation: “Easy”
 - Sectors are mentioned in laws : find HS codes (as in Global Trade Alert)
- For Administrative procedures: More challenging
 - Does procedure change across sectors?
 - If change for same sector: average by sector?
 - What product/sector in other dataset on GP?

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- Not that « easy » with Trade agreements:
 - No uniform coverage based on reciprocity (ex GPA annexes),
 - No stability: BTA subject to revisions
 - No harmonization between BTA/BIT
- « Administrative procedures »:
 - Might change from one procuring entity to another, one sector to another, or other grounds (discretion, waivers)
 - Might change for specific policies (e.x: environmental policy)

Scope

Challenge 3. Level of Aggregation

- For instance in WTO-GPA datasets
 - For legislation or threshold documentation: broad sectors as goods, construction, services
 - For statistics on contracts: there are categories at 2 digits for goods and services: which classification?
- In Contract award data, example with TED (EC)
 - Classification by activity of contracting authority (COFOG) : General public service, Health; Defense; Education etc...
 - “CPV code”: equivalent to HS code with more than 10,000 goods and services

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- « Construction contracts » included in « Services contracts » or separated from
- Mixed contracts?
- Civilian v. Defense contracts:
- « Defense » sector: several degrees of preferences and of secrecy . (e.x: for highly sensitive goods and services are usually set aside for national suppliers)

Suggested data sources

The screenshot shows a PDF document titled "Challenge 4: Data Sources". The document content is as follows:

- Government Regulations:
 - Legislation on Public Procurement: already some collected by WTO for GPA
 - Other?
- Administrative Procedures:
 - If differs for each contract award ... pain!
 - Where to find such info?
 - Follow steps of official procedure to detect where barriers can appear

The screenshot also shows a Windows taskbar at the bottom with the date 28/09/2015 and time 15:37.

Forms

- Review/ challenges/courts decisions involving foreign companies?

(effective challenge mechanism: access to court for foreign bidders, fees/time limits/language)

- Issue of enforcement:
 - Treaty enforcement
 - Investment Arbitration

UNCTAD MAST.pdf

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Proposal 2 : Administrative Procedures- Step 3: Specific criteria

Code	Sub-Chapter	Group	Sub-Group
AP3	Restriction criteria		
AP31		Qualification criteria	
AP311			Exclusion for failure to pay taxes
AP312			Exclusion for failure to comply with environmental policies
AP313			Exclusion for failure to comply with social policies
AP32		Contractual conditions	
AP321			Production method
AP322			Use of unemployed/ keep existing employees
AP323			Delivery of the contracts
AP324			Environmental standards
AP325			Social objectives

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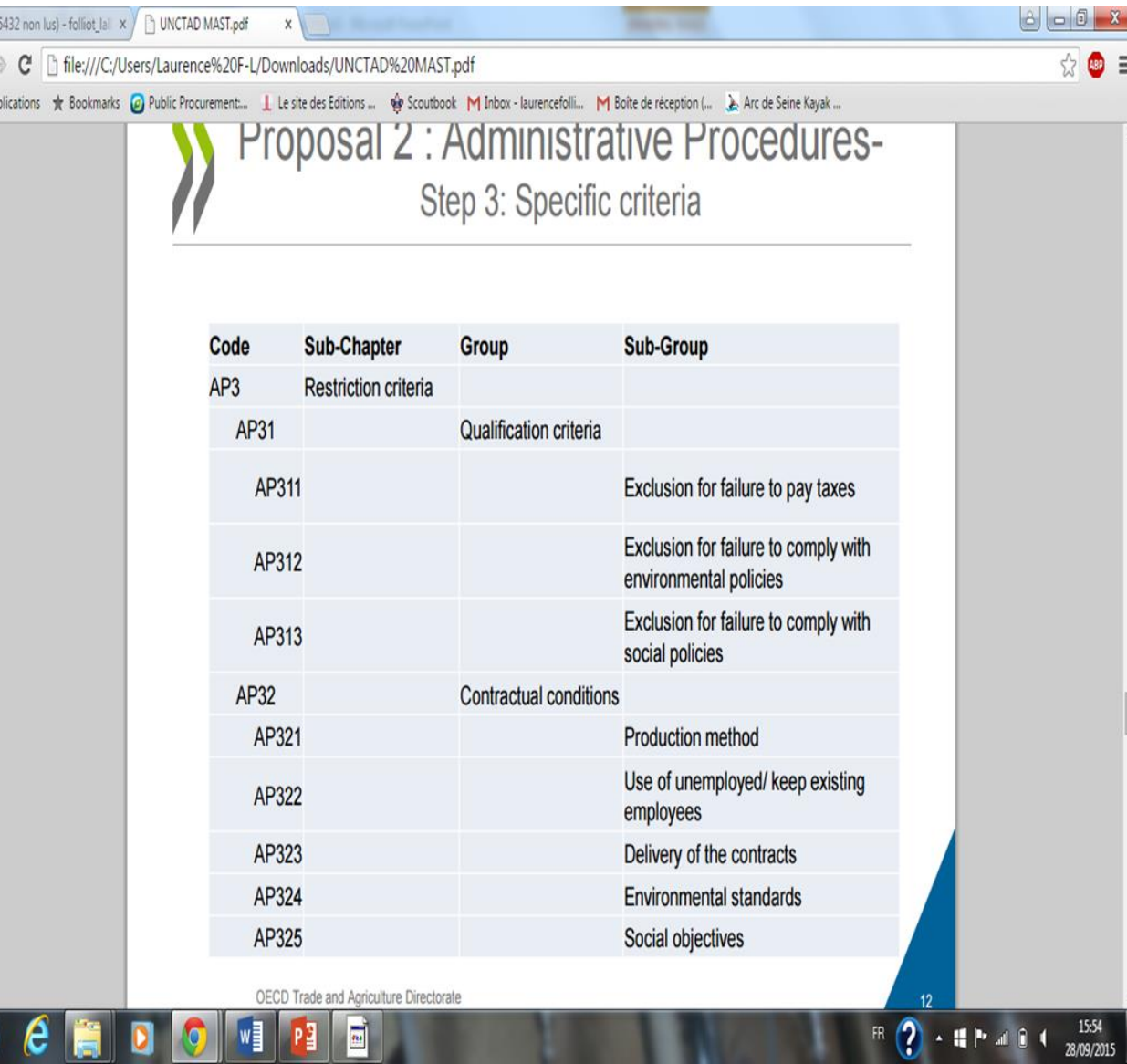
12

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- Grounds for exclusion/qualification
 - Size of the company/turn-over
 - Registration
 - Past performance
 - Mandatory association with local company/ Rules on joint venture
 - Rules on sub-contractors

- Issue of certification: What ?
How? Who?

Award of the contract



The screenshot shows a PDF document titled "Proposal 2 : Administrative Procedures- Step 3: Specific criteria". The document contains a table with the following data:

Code	Sub-Chapter	Group	Sub-Group
AP3	Restriction criteria		
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- Evaluation Criteria:
 - MAET: in monetary terms?
 - Margin of preferences
 - Quotas
 - Geographical bias: How to frame subjectivity?
- Bid security (depending on the banking system)
- Signature validity/ enforcement of the contract

Performance of the contract

432 non lus) - folliot_lai x UNCTAD MAST.pdf

file:///C:/Users/Laurence%20F-L/Downloads/UNCTAD%20MAST.pdf

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- Risks? Administrative delays
- Restrictive rules on:
 - Language of the contract
 - contractual amendment/unilateral change
 - Contractor's restructuring- assignment of the contract to a third party
- Conditions for termination (termination for convenience – damages?)
- Post-contractual Liabilities

Future fruitful collaboration



- Questions:
 - Who is the « consumer »/beneficiary in this area?
 - Double levels of discrimination in GP? Adding nationality to other existing technical and non technical barriers. Ex Rule on origins