

## TTIP Negotiations and Public Procurement: A Federalist Approach\*

Maria Anna Corvaglia

### Abstract

*Government procurement is perhaps one of the most underexplored areas in the recent academic literature on transatlantic economic relations and yet it is also one of the most protected economic sectors addressed in the Transatlantic Trade and Investment Partnership (TTIP) negotiations. Even though the EU and the US have undertaken extensive reciprocal procurement commitments under the WTO's Agreement on Government Procurement, as well as in their respective preferential trade agreements (PTAs), the liberalisation and harmonisation of the transatlantic procurement market could not be more ambiguous or controversial. This paper aims to deepen our understanding of crucial aspects of the current EU-US procurement relationship. To this end, the paper explores the TTIP negotiations as well as similar PTAs and underlines the potential implications in terms of the fragmentation of the international discipline of procurement regulation.*

Keywords: Public Procurement, TTIP, Government Procurement Agreement, World Trade Organization

|| [http://www.federalism.eu/resources/working-paper-series/wp\\_1\\_16](http://www.federalism.eu/resources/working-paper-series/wp_1_16)

© 2016 by the author

Maria Anna Corvaglia is lecturer at the  
Birmingham Law School  
email || [M.A.Corvaglia@bham.ac.uk](mailto:M.A.Corvaglia@bham.ac.uk)

\* The paper is forthcoming in the Journal World Investment and Trade (2017). Citations should be made to the final version.

# Table of Contents

1	Introduction .....	3
2	Procurement Chapters in Preferential Trade Agreements: The Regulatory Landscape Before the TTIP.....	4
2.1	Procurement Commitments in PTAs and the Framework of the Discussion.....	4
2.2	The WTO Government Procurement Agreement and its Relevance to PTAs.....	6
3	Regulation of Public Procurement Between the TTIP Parties: Internal and External Public Procurement Regulations .....	8
3.1	Regulatory Asymmetry Between the EU and US Internal Public Procurement Regulations .....	9
3.2	External Procurement Regulations and the Precedents of the TTIP Procurement Chapter: Korea and CETA.....	10
4	TTIP and Public Procurement: Economic Opportunities and Institutional Challenges.....	12
4.1	The Economic Relevance of Public Procurement in the TTIP Dynamics.....	12
4.2	TTIP Negotiating Agenda on Public Procurement and Current Difficulties .....	13
4.3	Internal Institutional and ‘Federal’ Aspects of the TTIP Procurement Negotiations.....	15
5	Conclusions.....	17

# TTIP Negotiations and Public Procurement: A Federalist Approach

Maria Anna Corvaglia<sup>1</sup>

## 1 Introduction

Government procurement has thus far received only very limited attention in the scholarly literature on EU–US economic relations.<sup>2</sup> At the same time it is arguably one of the most protected economic sectors in both the European Union and the United States and hence is one of the thorniest issues addressed during the negotiations on the Transatlantic Trade and Investment Partnership (TTIP) agreement.

To be sure, both the EU and the US have undertaken considerable efforts to bring their respective procurement markets in line with reciprocal procurement commitments under the WTO's Government Procurement Agreement (GPA) and have included procurement provisions in their respective Preferential Trade Agreements (PTAs) with other trading partners. However, the liberalisation and harmonisation of the transatlantic procurement market could not be more ambiguous or controversial. 'Buy American' rules, as well as local and domestic content requirements in the EU's awarding of public contracts, are key issues on the TTIP negotiating table. At the same time, fundamental institutional aspects of the US and EU procurement systems impede the progress of procurement negotiations, particularly regarding their coverage. If the EU procurement regime has been uniformed between the Member States (also thanks to the new 2014/24/EU and 2014/25/EU Directives), the coverage of US procurement central and sub-central governmental entities, including states and cities, is very limited and requires substantial reform even for the authorisation of their negotiating powers.

This paper takes stock of this fragmented regulatory framework and aims to deepen our understanding of crucial aspects of the current EU–US procurement relationship.

1 The research leading to this paper has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP/2007-2013) – ERC Grant Agreement n. 312304.

2 The most notable exception is Richard Craven, 'EU–US Transatlantic Trade and Investment Partnership Agreement: The European Commission's Negotiating Position on Public Procurement' (2014) 3 Public Procurement Law Review.

To this end it explores the TTIP negotiations as well as similar PTAs signed by both trading partners and underlines the implications in terms of the fragmentation of the international discipline of procurement. More precisely, the paper analyses in how the public procurement provisions negotiated in the TTIP are innovative and offer potential regulatory transformations compared with the procurement commitments previously negotiated and concluded in PTAs and under the GPA.

The paper proceeds by analysing the TTIP procurement negotiations from two perspectives. First, on the horizontal plane, the paper conducts a comparative analysis of, on the one hand, the various international multilateral and preferential procurement regulations currently in place, and on the other, the TTIP negotiations, observing potential differences between existing regulations and the regulatory dynamics experienced now in TTIP. Second, examining the system vertically, the paper aims to disaggregate the different levels of economic governance – from central to sub-central entities – in transatlantic procurement governance, and thus unravels its complexity.

## 2 Procurement Chapters in Preferential Trade Agreements: The Regulatory Landscape Before the TTIP

In order to fully appreciate and understand the relevance of the procurement negotiations in the TTIP, this section first analyses the regulatory treatment that public procurement has received until now in PTAs. Second, it addresses the relationship between the regulation of public procurement in PTAs and the WTO's GPA. Finally, it focuses on the existence of other instruments of procurement regulation at the international level, particularly the UNCITRAL Model Law.

### 2.1 Procurement Commitments in PTAs and the Framework of the Discussion

On average, public procurement accounts for 15–20 % of GDP in both developed and developing countries and is one of the least liberalised sectors in the realm of trade

policy. At the multilateral and regional levels, however, considerable efforts have been made to liberalise the public procurement sectors. In the context of the WTO, the GPA has introduced in GPA Signatory Parties domestic procurement regulation the principle of non-discrimination, together with some minimum standards of transparency and fairness in how the procurement activities are conducted.<sup>3</sup>

Alongside such plurilateral efforts, an increasing number of PTAs have included various chapters and provisions that explicitly address the regulation of government procurement activities. These regulations are aimed at the liberalisation of the public procurement market between their contracting parties. In terms of their general regulatory purposes, procurement chapters in preferential trade negotiations aim to achieve three main objectives: i) opening international procurement markets, ii) increasing transparency and competitiveness in national procurement regulations and iii) ensuring reciprocal market-access commitments. However, the actual procurement commitments in PTAs vary considerably in terms of coverage, types of provisions and trade significance.<sup>4</sup>

One general observation about the landscape of PTAs' procurement regulations is that, of all the PTAs notified by the WTO Secretariat between 2000–10, they are generally included in three identifiable categories of bilateral trade agreements: PTAs with no provisions on government procurement, PTAs with a single or few provisions, and PTAs with a detailed regulation of the government procurement sector.<sup>5</sup> According to the latest WTO data, 37 % of the PTAs in force include no procurement provisions, 35 % of the agreements merely have aspirational provisions (simply encouraging further liberalisation of the procurement sector), while 28 % of the PTAs provide detailed chapters regulating the conduct of the procurement process.

The literature that has analysed the preferential trade agreements including procurement provisions has thus far concentrated on three main aspects.<sup>6</sup> First there is the level of commitments included in the PTAs' procurement provisions. The determination of the coverage of the procurement commitments is a crucial reference in the evaluation of the preferential negotiations on public procurement. The coverage

3 Simon J. Evenett and Bernard M. Hoekman, 'International Cooperation and the Reform of Public Procurement Policies', World Bank Policy Research Working Paper 3720 (September 2005) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=821424](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=821424) accessed 20 November 2015.

4 Robert D. Anderson and others, 'Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to the GPA Accession?' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO Regime on Government Procurement: Challenges and Reform* (CUP 2011) 561–656.

5 *ibid.*

6 Stephanie J. Rickard, 'PTAs and Public Procurement' in Andreas Dür and Manfred Elsig (eds), *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (CUP 2015) 275–94.

– specifically the thresholds, the governmental entities covered and the goods and construction services listed in the schedules of commitments of the PTAs Parties – is fundamental to the evaluation of the procurement market access commitments negotiated and concluded on a preferential basis. Only the contextual evaluation of the minimum volume of procurement value, the governmental bodies and the lists of goods and services of the procurement activities concerned in the negotiations can provide a balanced evaluation of the market access commitments reached in the PTAs' procurement chapters.<sup>7</sup>

A second crucial variable is the typology of the procurement commitments. To date, various types of provisions have been included in the procurement chapters of PTAs with some frequency: for instance, non-discrimination provisions guaranteeing national treatment and most-favoured-nation treatment, procedural rules similar to the GPA, requirements for the implementation of bid challenge procedures and dispute settlement procedures, regulation of offsets, commitments on further negotiations, and accession to the GPA.

Third, a crucial variable in this analysis is the relationship of these preferential procurement regulations to the WTO's Government Procurement Agreement. This will be discussed in greater detail in the following section.

## 2.2 The WTO Government Procurement Agreement and its Relevance to PTAs

As stated above, an important aspect to take into consideration when studying procurement provisions in PTAs is the relationship with the GPA and the other preferential procurement instruments.

Research has shown that there is a clear correlation between the presence of detailed procurement chapters in PTAs and the GPA membership of the Parties to the PTAs. The PTAs including the most detailed provisions on the conduct of the procurement process can rely on at least one GPA member between contracting parties.<sup>8</sup> Further, the 1994 WTO Government Procurement Agreement, the Revised Agreement, its preparatory drafts or the negotiating offers placed by the strongest GPA Parties are

<sup>7</sup> Anderson and others (n 3).

<sup>8</sup> Robert Anderson and Anna Caroline Müller, 'The Revised GPA as Emerging Pillar of the World Trading System: Recent Developments', Public Procurement: Global Revolution VII Conference (Nottingham, UK June 2015).

frequently used as a model for the negotiation of the detailed procurement provisions in PTAs, between both GPA and non-GPA Parties. Moreover, in the case of detailed procedural provisions, on average the PTAs concluded between 2000–10 tend to incorporate and explicitly refer to the procedural discipline already agreed in international procurement agreements (essentially the 1994 GPA text) in order to avoid conflicting obligations.<sup>9</sup>

Recent OECD data shows that, overall, the level of procurement commitment reached in PTAs does not excessively diverge from the regulatory level reached in the GPA, particularly in terms of coverage of entities and thresholds.<sup>10</sup> In general, non-GPA Parties have achieved in their PTAs a comparable level of market access commitments and a harmonisation of the domestic procurement legislation to GPA standards – and, in the case of procurement liberalisation in Latin American PTAs and in services coverage commitments, with remarkable results.<sup>11</sup>

In the context of the analysis of the convergence between PTAs and GPA procurement commitments, the conclusion of the renegotiation on the Revised Text of the GPA Agreement represents an important point of reference. The renegotiation process started in 1994 pursuant to GPA Article XXIV:7(b), but it could only be concluded in December 2011.<sup>12</sup> The adoption of the Ministerial Decision GPA/113 of 2 April 2012, consolidating the lists of commitments and the revised GPA text, represents a milestone in the development of the regulatory framework of public procurement at the multilateral level. Two aspects in the revised GPA Agreement text assume a crucial importance in this discussion. First, the increased coverage offered in the revised Schedule of Commitments of the GPA Parties: the renegotiation of the GPA Agreement achieved a substantial increase of its coverage, particularly with the inclusion of central, local and sub-national governmental authorities in the GPA Schedules of Commitments by many Parties and in particular the EU.<sup>13</sup> Second, the harmonisation of the wording of the WTO Agreement with other international instruments of

9 Asako Ueno, 'Multilateralising Regionalism on Government Procurement', OECD Trade Policy Paper 151 (2011) || <http://dx.doi.org/10.1787/5k46l8vvq2np-en> (accessed 12 November 2015).

10 *ibid.*

11 *ibid.*

12 Robert D. Anderson, 'The WTO Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance' (2010) 1(8) *Law in Transition Online* || <http://www.ebrd.com/downloads/research/news/lit102.pdf> (accessed 04 November 2015).

13 Robert D. Anderson, 'The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement: What It Means for the Agreement and for the World Economy' (2012) 21 *Public Procurement Law Review* 83-94.

procurement regulation: that GPA Revised Text recognises the importance of increasing clarity and flexibility in the international procurement regulation, following the wording and the flexibilities of the provisions included in the UNCITRAL Model Law. The latter will be discussed in more detail below.

### 3 Regulation of Public Procurement Between the TTIP Parties: Internal and External Public Procurement Regulations

The overview in the previous section of the various preferential and international instruments of public procurement revealed that the TTIP negotiations on public procurement started in a fairly coherent and harmonised regulatory context. On one hand, the procurement chapters included in the PTAs concluded up to 2010 were negotiated on the basis of the GPA Agreement. That is, PTAs are vehicles for the diffusion of the GPA standards of transparency and competitiveness as well as for the harmonisation of commitments and coverage in the liberalisation of the international procurement markets. On the other hand, the parallel reform and the convergence of the GPA Agreement and the UNCITRAL Model Law opened the possibility to create the positive ground for a possible extension of the GPA discipline of public procurement outside its limited plurilateral membership.<sup>14</sup>

Based on these preliminary general considerations, we will now explore in more detail the specific context of the TTIP procurement negotiations, looking at the internal and external regulatory framework of public procurement in the two negotiating parties.

14 Robert D Anderson and Anna Caroline Müller, 'Competition Policy and Poverty Reduction: A Holistic Approach' (2013) World Trade Organization Staff Working Paper ERSD-2013-02 26  
|| [https://www.wto.org/english/res\\_e/reser\\_e/ersd201302\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201302_e.pdf) (accessed 30 October 2015).



### 3.1 Regulatory Asymmetry Between the EU and US Internal Public Procurement Regulations

Within the broad discussion concerning the various international instruments of procurement regulation, the EU regulation of public procurement features some unique characteristics.

First, the European Union – a model of regional trade integration at its most advanced – paradoxically belongs to the category of PTAs that do not address the field of government procurement at all (corresponding to around 37 % of the PTAs registered in the WTO). It is worth noting that the EU founding treaties and the EU enlargement treaties do not contain any public procurement provisions. The EU regulation of public procurement – probably the most evolved and coherent regional regulatory framework of procurement – has been developed only in secondary EU legislations (Directives).

Second, the EU internal procurement regulation represents an extremely coherent set of rules based on the regulation of the four economic freedoms of the common market and three main Directives, adopted under the EU's internal market provision:<sup>15</sup> the Public Sector Directive 2004/18, the Utilities Directive 2004/17 and the Defence and Security Directive 2009/81, recently subjected to a comprehensive revision concluded in 2014.<sup>16</sup> The integrated EU procurement system aims to guarantee the cohesion of the public procurement sectors of the Member States and in the common European market through the establishment of the prohibition of discrimination, the principle of transparency and the removal of barriers to access.<sup>17</sup>

Third, in terms of implementation, the EU procurement framework represents an exceptionally coherent regulatory system: all the 2004 EU procurement directives are

15 The three Procurement Directives were adopted specifically on the basis of Article 47(2) EC, Article 55 EC and Article 95 EC now translated in Articles 53, 62 and 114 TFEU.

16 The new EU procurement regimes is based on three new Directives entering into force in 2016: i) on public procurement and the public sector, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; ii) on concessions, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; and iii) regarding utilities, Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. Roberto Caranta, 'The Changes to the Public Contract Directives and the Story They Tell about How EU Law Works' (2015) 52(2) *Common Market Law Review* 391–460.

17 Sue Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space For Commercial and Horizontal Procurement Policies' in C. Barnard, M. Gehring and I. Solanke (eds), *Cambridge Yearbook of European Legal Studies* 14 (Hart Publishing 2011–12), 1 [the page span is 1–48].

fully transposed by all the EU Member States. Most of the Member States even use the same legal instrument for the classical and utilities sectors in the regulation of procurement activities above the EU thresholds, and have the same regulatory instrument covering the supply, services and works contracts.<sup>18</sup>

Unfortunately, a comparable level of harmonisation does not exist in the US internal procurement system, at neither the federal nor the state level. If the US Federal Acquisition Regulation<sup>19</sup> represents the main regulatory reference for the acquisition and procurement activities of the US Federal Government, the 50 US States each have their own public procurement regulations in place.<sup>20</sup> The freedom of the US States to adopt preferential and distinctive procurement practices has been also confirmed in the jurisprudence of the US Supreme Court, particularly *Hughes v. Alexandria Scrap Corp* in 1976, equating the states with private actors procuring goods and services on the market.<sup>21</sup> At the moment, the US Federal Acquisition Regulation is applicable beyond the federal governments and to US States only in the case that the state authorities are covered in the Schedules of Commitments under the GPA Agreement. However, only 37 US States are bound by the GPA commitments, the coverage including only executive branch agencies or specific state departments.

### 3.2 External Procurement Regulations and the Precedents of the TTIP Procurement Chapter: Korea and CETA

To complete the our analysis of the TTIP negotiations we need to integrate the internal discipline of public procurement in the EU and US with the external regulations of public procurement in the most recent PTAs signed by both transatlantic Parties. In many specific trade-related fields including public procurement, in fact, the foundations of the TTIP negotiations have been developed in the conclusion of recent comprehensive PTAs. The most evident examples are (for the US) the Korea–United

18 European Commission Internal Market and Services, 'EU Public Procurement Legislation: Delivering Results: Summary of Evaluation Report' (2011) [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/executive-summary\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf) (accessed 25 November 2015).

19 'Federal Acquisition Regulation' is the wording of Chapter 1, Title 48 of the US Code of Federal Regulations <https://www.gpo.gov/fdsys/pkg/CFR-2015-title48-vol1/pdf/CFR-2015-title48-vol1-chap1.pdf> <accessed 15 November 2015.

20 Danielle M. Conway, *State and Local Government Procurement* (American Bar Association 2012).

21 Leif Hoffmann, 'Land of the Free, Home of the (Un)regulated: Public Procurement in the EU and the USA' (2010) American Political Science Association 2010 Annual Meeting Paper 1642401 <http://ssrn.com/abstract=1642401> (accessed 15 November 2015).

States Agreement (KORUS) and (for the EU) the Korea–EU Agreement (KOREU) and the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada.<sup>22</sup>

It is interesting to observe that the KORUS and the KOREU and their negotiating outcomes in the specific field of public procurement can serve as a testing ground for the possibly future TTIP negotiating dynamics in procurement liberalisation. Korea has been a GPA Signatory Party since 1997 and both the agreements provide a regulatory framework based on the GPA standards of competition and transparency. However, both agreements included some ‘GPA+’ provisions in the coverage of reciprocal commitments of public contracts. KORUS improved market access commitments in terms of thresholds, while KOREU, compared with the respective GPA Schedule of Commitments, substantially increased the coverage of public contracts and public work concessions of many central and sub-national procuring authorities in Korea and the European Union.<sup>23</sup>

The EU’s aggressive negotiating position in tackling the liberalisation of public procurement beyond central governmental authorities is also confirmed in the development of the negotiation of the CETA between the EU and Canada concluded in September 2014. In the CETA, the EU had a similar negotiating objective of securing the inclusion of the coverage of sub-federal entities, provinces and local territories, because Canada, similar to the US, had only included federal procurement in the GPA coverage. It also excluded crown corporations – quasi-governmental bodies that represent a peculiar characteristic and a significant economic percentage of the Canadian procurement system.<sup>24</sup> Procurement assumed an important role in the EU–Canada negotiations and the inclusion of the Canadian Provinces in any agreement on procurement was one of the EU’s conditions for opening the negotiations in 2010. In CETA, the EU was therefore able to negotiate an extension of coverage to include Provinces and Territories as well as the coverage of federal- and provincial-level crown corporations, facilitated by the adoption of the Agreement on Internal Trade (AIT) expending the non-discrimination treatment to the procurement activities of the province suppliers in Canada.<sup>25</sup>

22 Jeffrey J. Schott and Cathleen Cimino, ‘Crafting a Transatlantic Trade and Investment Partnership: What Can Be Done’ (2013) Policy Brief 13-26 || <http://www.iie.com/publications/pb/pb13-8.pdf> (accessed 14 November 2015).

23 *ibid.*

24 J.J. McMurtry, ‘The Political Economy of Procurement’ (2014) 40(1) *Canadian Public Policy* 26–38.

25 European Parliament Directorate General for Internal Policies, ‘TTIP: Opportunities and Challenges in the Area of Public Procurement’ (2015) IP/A/IMCO/2014-14

## 4 TTIP and Public Procurement: Economic Opportunities and Institutional Challenges

### 4.1 The Economic Relevance of Public Procurement in the TTIP Dynamics

The importance of public procurement at the TTIP negotiating table is strictly related to the potential (in terms of economic impact) inherent in the liberalisation of the field of public procurement in bilateral trade relations across the Atlantic.

Even though the EU and US are both Signatory Parties of the GPA, the difference between the EU and US commitments under the GPA is extremely significant. According to an evaluation by the EU Commission, 95 % of the EU procurement activities are covered by the GPA rules of transparency and non-discrimination, while only 32 % of the US procurement is bound by the WTO discipline because only 37 US States agreed to be included in the annexes of the GPA Agreement.<sup>26</sup> In terms of reciprocal market access opportunities, the difference between the openness of the procurement markets is even more striking: only 3.2 % of the US public procurement market appears to be open to EU suppliers, while the EU has offered open access to around 15 % of its public procurement's market opportunities to US suppliers.<sup>27</sup>

Outside the respective GPA commitments, the US's 'Buy American' provision – the famous American Recovery and Reinvestment Act, used as a strategic political economy instrument during periods of financial crisis – represents the most significant barrier to trade for EU producers and suppliers in the procurement field.

|| [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/542226/IPOL\\_IDA\(2015\)542226\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/542226/IPOL_IDA(2015)542226_EN.pdf) (accessed 3 December 2015).

26 See COM, SWD 57, 2012, as reported in Lionel Fontagné, Julien Gourdon and Sébastien Jean, 'Transatlantic Trade: Whither Partnership, Which Economic Consequences?' (2013) CEPII Policy Brief 2013-01 || <http://www.cepii.fr/CEPII/en/publications/pb/abstract.asp?NoDoc=6113> (accessed 3 December 2015).

27 European Commission, 'Trade and Investment Barriers Report 2011: Engaging Our Strategic Economic Partners on Improved Market Access: Priorities for Action on Breaking Down Barriers to Trade' (2011) COM(2011)114, s 3.1 || [http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc\\_147629.pdf](http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147629.pdf) (accessed 3 December 2015).

## 4.2 TTIP Negotiating Agenda on Public Procurement and Current Difficulties

As stated above, public procurement is a crucial negotiating issue in TTIP negotiations. From the outset the EU had a clear negotiating objective, as developed in the US–EU High Level Working Group on Jobs and Growth (HLWG), consolidating the TTIP negotiating mandate to ‘enhance business opportunities through substantially improved access to government procurement opportunities at all levels of government on the basis of national treatment’. During all the rounds of discussion and mediation, public procurement proved to be a constantly central issue – such as in the 11th negotiation round (19–23 October 2015) when public procurement was discussed for three full days, as revealed in the EU Commission’s most recent report.<sup>28</sup>

Once again, during the 11th round of TTIP negotiations specific discussion on procurement market access was driven by the EU’s request of three negotiating objectives. First, the abolition of restrictions in the US which affect market access for European suppliers (and their goods and services) and, in particular, the elimination of the US domestic preferences in the federal funding of US infrastructure procurement. Second, the expansion of market access commitments at both the federal and the state level. Third, the facilitation of access to procurement markets for small and medium enterprises.<sup>29</sup>

The specific coverage commitments raised in the latest negotiating round (October 2015) go beyond the extent of the coverage of the current US commitments under the GPA. As emerged in the HLWG documents, the extension of the national treatment obligation to sub-federal, state and city level represent already a consistent increase of the GPA commitments. As mentioned above, and as reported in 2009 before the start of the TTIP talks only the 3.2 % of the US public procurement market is currently open to EU suppliers.<sup>30</sup>

Both the EU and US reported that in all the negotiating rounds, the starting point for discussions around the table was the text of the WTO Agreement on Government Procurement (GPA), to which both the EU and US are signatories. However, the clear

28 European Commission, ‘Report of the 11th Round of Negotiations on TTIP’ (2015) || [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153935.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf) (accessed 3 December 2015).

29 European Commission, ‘Note for the Attention of the Trade Policy Committee: Transatlantic Trade and Investment Partnership (TTIP)’ (2013) 238/13 || <http://www.iatp.org/files/TPC-TTIP-non-Papers-for-1st-Round-Negotiations-June20-2013.pdf> (accessed 5 December 2015).

30 European Commission (n 31).

intention of both Parties was to build on the GPA rules and push for further liberalisation on the coverage of the reciprocal commitments. During the latest negotiating rounds, together with the issue of the coverage, the EU raised some questions that are even more clearly 'GPA+'. The most evident example is the request by the EU to discuss the possibility of including environmental and social considerations in procurement procedures. And it is worth noting in this respect that the use of public procurement for socio-environmental purposes is one of the main characteristics of the 2014 reform of the internal public procurement reform, which resulted in Directive 2014/24/EU on the public procurement sector and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.<sup>31</sup>

With respect to the inclusion of non-economic considerations in public procurement regulations, the major difference between the TTIP negotiating agenda and the GPA Renegotiated Text is represented by the equalisation of environmental and social policy objectives. One of the most acclaimed changes in the Revised Text of the GPA consists in the acknowledgement of the growing practice of the environmental use of public procurement.<sup>32</sup> Art X.6 of the Revised GPA allows the procuring entities of the Contracting Parties to specifically 'prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment'. While there is a clear textual reference to the implementation of environmental policy objectives, the instrumental use of public procurement for social and labour policy objectives is not explicitly mentioned in the Revised GPA regulation and is only included in the Future Work Program, annexed to the Agreement.<sup>33</sup> Contrary to the approach taken in the GPA, the TTIP negotiations seem to move in the direction of equally treating environmental and social considerations in public procurement regulations, setting a significant precedent of divergence from with the WTO context, where social policies and in particular labour rights considerations have been traditionally treated with extreme caution.<sup>34</sup>

31 Caranta (n 20).

32 Sue Arrowsmith, 'The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (CUP 2011) 285–336.

33 Anderson (n 11) 32–40.

34 Christine Kaufmann, *Globalisation and Labour Rights: The Conflict Between Core Labour Rights and International Economic Law* (Hart Publishing 2007).

### 4.3 Internal Institutional and ‘Federal’ Aspects of the TTIP Procurement Negotiations

In an historical perspective, the TTIP negotiations can be interpreted as a new chapter in a long-standing institutional dialogue between the EU and the US on public procurement.<sup>35</sup> As was explored earlier, the next stage of the transatlantic dialogue between the EU’s and the US’s legal and constitutional regimes has a very broad scope, embracing crucial trade and investment issues and involving different levels of trade and investment governance. The institutional analysis of the current transatlantic negotiations, and particularly in the specific area of public procurement, necessarily implies important considerations in regards to legitimacy, subsidiarity and domestic participation and, in broader terms, to federalism.<sup>36</sup>

Under this institutional perspective, a crucial aspect of this transatlantic dialogue consists in the involvement and impact of the EU and US parliamentary bodies on the transatlantic trade negotiations. The parliamentary organs’ lack of democratic involvement has been at the centre of the strong criticism of the deficiency of democratic oversight in the TTIP negotiation.<sup>37</sup> Yet both the European Parliament and the US Congress seem to have the political and the legal instruments to affect and block the developments of the transatlantic negotiations ‘in a fairly protectionist fashion’ and on the basis of mere domestic and national interest.<sup>38</sup>

On the European side, following the provisions set in Article 207 and 218 in the Treaty on the Functioning of the European Union (TFEU), TTIP requires the approval of the European Parliament and the Council to ratify the final text.<sup>39</sup> However, the aggressive EU negotiating position on the coverage of procurement liberalisation seems strictly linked to the coherence and harmonisation of the internal procurement regulation in the European territory, used as an important instrument to enhance the cohesion of

35 Elaine Fahey and Deirdre Curtin, *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (CUP 2014).

36 Robert Schutze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009).

37 Ernst-Ulrich Petersmann, ‘Transformative Transatlantic Free Trade Agreements Without Rights and Remedies of Citizens?’ (2015) *Journal of International Economic Law*.

38 Davor Jančić, ‘Transatlantic Regulatory Interdependence, Law and Governance: The Evolving Roles of the EU and US Legislatures’ (2015) 17 *Cambridge Yearbook of European Legal Studies* 334–59.

39 Richard Parker and Alberto Alemanno, ‘Towards Effective Regulatory Cooperation Under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems’ (2014) *European Commission* || <http://ec.europa.eu/trade/policy/in-focus/ttip/resources/> (accessed 26 November 2015).



the internal common market.<sup>40</sup> The US parliamentary approval appears more problematic when it comes to public procurement negotiations: as an executive agreement, the majority in both Houses of Congress have to agree. Moreover, in June 2015 the US Congress granted the US president the trade promotion authority for the conduct of TTIP under specific guidelines and negotiating objectives.<sup>41</sup> With specific regard to procurement regulatory practices, the US Congress asked for increased transparency in developing guidelines, rules, regulations and laws for government procurement. Yet even in a context of increased transparency in procurement negotiations, it is undeniable that the biggest challenge consists in gathering the Congress majority on the abolition of the 'Buy American' provisions and de facto preference for domestic producers in the award of federal contracts.

What makes the US Congress's approval of the procurement negotiations within TTIP even more uncertain is the political difficulty in persuading state and other sub-federal level procurement entities to agree on the extension of the coverage of the transatlantic procurement liberalisation.<sup>42</sup> As proven in the conclusion of the EU–Canada agreement, the role of sub-federal levels of government has acquired an increasing importance in the development and conclusion of trade negotiation, particularly in the field of public procurement. Usually disregarded in analyses of the negotiation of international trade agreements, the role of provincial and territorial governments has proven to be a crucial variable in achieving the final agreement on the text of the CETA, mainly based on the regular bilateral consultation conducted between the federal government and the Canadian provinces.<sup>43</sup> It is particularly interesting to note that the (federal) Canadian Government was forced to negotiate some concessions with the EU in crucial industrial sectors (namely dairy and beef) – important at a provincial level – under threat of the non-implementation of the CETA procurement provisions in the provinces of Ontario and Quebec, the largest procurement market for EU firms in Canada.<sup>44</sup>

40 Arrowsmith (n 21).

41 S.995 – Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (HR 1890/S 995).

42 Steve Woolcock and Jean Heilman Grier, 'Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations' (2015) Centre for European Policy Studies Special Report 100  
 || <https://www.ceps.eu/publications/public-procurement-transatlantic-trade-and-investment-partnership-negotiations> (accessed 26 November 2015).

43 Christopher J. Kukuca, 'Canadian Sub-Federal Governments and CETA: Overarching Themes and Future Trends' (2013) 68 *International Journal: Canada's Journal of Global Policy Analysis* 528–35.

44 Patrick Fafard and Patrick Leblond, 'Closing the Deal: What Role for the Provinces in the Final Stages of the CETA Negotiations?' (2013) 68 *International Journal: Canada's Journal of Global Policy Analysis* 553–59.



It is very likely that similar political dynamics will play out in the negotiation of the TTIP procurement chapter, with even more radicalised political tensions due to the lack of a formal federal type of coordination between the federal and state authorities, due to their importance in the implementation of the new procurement provisions.

## 5 Conclusions

The paper has examined how in an increasing number of PTAs and in the TTIP negotiations the field of government procurement has been approached to date. To this end, and regardless of the uncertain outcome of the procurement negotiations in the transatlantic trade agreement, the paper has established four different modes of analysis:

- i) it provided an overview of the public procurement regulation in PTAs and explored how the PTAs' discipline of public procurement has progressively integrated and disseminated the GPA regulatory standards of public procurement regulation
- ii) the paper explored the impact on the international procurement negotiation of the internal regulations of public procurement at different levels of federal, national and sub-national governance and in both US and EU contexts and, on this basis;
- iii) the research underlined the innovative content of the TTIP procurement negotiations beyond the WTO regulation of public procurement.

On the basis of these different levels of analysis, it is possible to draw some preliminary and more general observations, to be tested against the TTIP negotiations' future development.

1. From an institutional perspective, the regulatory discrepancy in the internal regulations of public procurement, particularly at sub-federal level, represents a crucial aspect of the transatlantic dynamics of public procurement negotiations. On the one hand, the considerable difference between the US's federal and state levels of procurement regulation has worked as a major blockage; on the other hand, the level of harmonisation in the EU internal procurement market is one of the main variables

behind the rigid negotiating position assumed by the EU in the CETA and now in the TTIP.

2. The innovative aspects of the TTIP negotiations of public procurement – in terms of coverage of sub-national entities, elimination of ‘Buy American’ policies and inclusion of socio-environmental considerations in public procurement – have opened up a new scenario of fragmentation between the different international instruments of procurement regulation. The regulatory gap between the TTIP negotiating agenda, the GPA Agreement and the UNCITRAL Model Law seems destined to widen the distance between the EU and the US and developing countries, which will be very difficult to overcome if and when the future accessions of these countries to the GPA Agreement become possible.

3. At a more systemic level, the GPA has symbolised the main instrument of harmonisation of public procurement regulation, regardless of its plurilateral status inside the WTO framework. The text of the GPA has been used as a negotiating basis and regulatory model for the procurement chapters in PTAs and the parallel reform of the UNCITRAL Model Law extended its regulatory influence to many developing countries and transition economies. However, the development of an even more advanced model of procurement regulation, as emerging from the TTIP negotiations, seems to signal a new state of affairs: the regulatory marginalisation of developing countries, and a threat to the converging role that the GPA Agreement has tried to play so far.