

# 10. TTIP AND PUBLIC PROCUREMENT

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## 1. Introduction

For the past 35 years, the European Union and the United States have played leading roles in the development of international rules that apply to government procurement (or public procurement). They are parties to the WTO Government Procurement Agreement (GPA), which accounts for only a quarter of the membership of the WTO, as well as other bilateral and regional agreements with procurement commitments. Their interest in procurement obligations arises from the significant role that government procurement plays in most economies.

International agreements that provide disciplines for procurement have two elements: one is procurement rules and the second is the procurement that is subject to those rules. The EU and the US share similar views with regard to procurement rules, which are intended to ensure that procurement is conducted in a manner that is transparent, non-discriminatory, predictable and fair. But they have had differences with respect to the procurement that they open to one another. As a consequence, they have engaged in often contentious negotiations on government procurement for more than 20 years now. Their current procurement commitments and unresolved issues provide the basis for the TTIP negotiations.

Under the current state of affairs, the EU does not accord the US its most comprehensive coverage because it is dissatisfied with the level of procurement that the US has opened under the GPA. The US is constrained in responding to the EU's complaints by both its federal structure of government and its domestic purchasing requirements, only a few of which it has removed in international agreements. More often, the US has excluded procurement subject to such restrictions from its international obligations. In contrast to the EU's quest for

access to more US procurement, American suppliers are more or less satisfied with their access to procurement in Europe.

This chapter aims to help the reader understand how the EU-US procurement relationship has reached its current state. It begins with an overview of the nature of government procurement markets, considering the size of the markets and penetration ratios of public procurement. It then examines the international procurement agreements that apply to the EU and the US, looking at both procurement rules and procurement commitments. It will detail the procurement that the EU and the US have agreed to open to one another, and the procurement that they exclude from their respective commitments.

The chapter then turns to how the EU and US might build on their existing commitments and defuse this long-contentious issue. Both sides have articulated objectives with respect to government procurement under the TTIP. The EU has placed a high priority on procurement in the TTIP and has specified a number of areas of interest. While the US has not singled out procurement as a priority, it has identified several objectives. The chapter proposes expansion of existing procurement commitments in several areas. At the same time, it points out some of the hurdles to an expansion of covered procurement, in particular with respect to US states. The report also considers how the TTIP might expand procurement rules that could have ramifications beyond the TTIP and set new international standards.

Given the likely difficulty in resolving all of their outstanding procurement issues in the TTIP negotiations, the chapter proposes ways for the parties to continue addressing these issues with the TTIP as a 'living agreement'. It focuses on the potential use of a forum that the EU and the US established at the end of 2011. The chapter also addresses the possibility of linking progress in the procurement negotiations to other sectors of the TTIP.

## **2. The nature of government procurement markets**

### **2.1 The size of procurement markets**

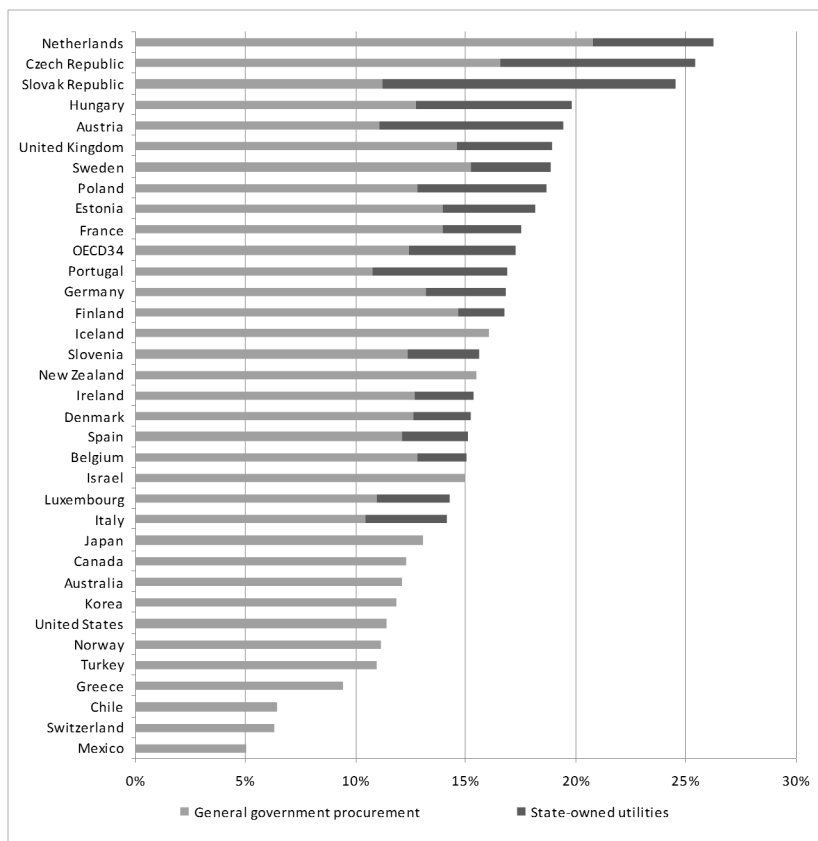
According to OECD Secretariat estimates, public procurement accounted for on average 13% of GDP in the OECD economies in 2011. If one adds state-owned enterprises (SOEs) this can mean an additional 2-12% of GDP, depending on the country. In all economies it is also the

sector that has been least touched by the general liberalisation paradigm of the 1980s and 1990s. There are, therefore, significant potential economic and welfare gains to be achieved from more transparent, competitive and efficient procurement. At first glance, public procurement looks like an area of considerable promise, especially at a time of relatively slow growth and tight public finances. In practice, however, much less than 13% of GDP in procurement is likely to be open to international competition. If one assumes that public spending on health, social and education services, and core areas of defence will remain largely outside of competitive markets, this leaves 3-5% of GDP potentially open to international competition (European Commission (2011a, p. viii). Opening public procurement markets has also proved to be one of the most challenging areas of trade policy. Experience over the past 35 years shows that agreeing on the text of an agreement is only the first step in ensuring increased competition in public contracts. Competitive procurement also requires effective implementation of agreements, institutional and human resources and above all a commitment to open competition on the part of the purchasing entity/government.

Public procurement accounts for a larger share of GDP in the EU (with variations among member states) than in the US, for example. This is largely because the EU public sector is larger than that of the US. Most EU member states also have a state owned enterprises (SOEs) or parastatal sector (see Figure 10.1). In the EU internal procurement regime, central entities, sub-central entities and utilities are all covered by procurement rules and the EU has extended this approach to the plurilateral Government Procurement Agreements (GPA).

This means that the EU approach is more comprehensive than that of the US. As discussed above, not all procurement is subject to competition because large shares go to expenditures on health and social programmes, education, energy or defence. Figure 10.1 shows the total share of public procurement in other major markets.

Figure 10.1 The share of public procurement in GDP for general government and utilities



Data sources: OECD National Accounts Database and Eurostat. Data for Australia are based on a combination of Government Finance Statistics and National Accounts data provided by the Australian Bureau of Statistics.

## 2.2 The debate on the openness of procurement markets

### 2.2.1 The general picture

The relative size and openness of the EU and US procurement markets has been the subject of considerable debate. As in any trade negotiation, reciprocity has been an important factor in past and present discussions, so differences over the relative openness of markets have been a significant complicating factor and there are no unchallenged objective data with which to make a comparison. At a very general

level, a recent study (Messerlin & Miroudot, 2012) takes the overall penetration ratios of public procurement based on imports. This appears to show the EU to have a lower penetration rate than China and India, but higher than that of the US (see Table 10.1). The penetration ratio here is based on direct imports as a share of the total public demand for goods and services, defined as the final consumption expenditure (government final consumption expenditure consists of expenditure, including imputed expenditure, incurred by general government on both individual consumption goods and services and collective consumption services). This definition of market opening therefore considers the general picture for the public sector as a whole.

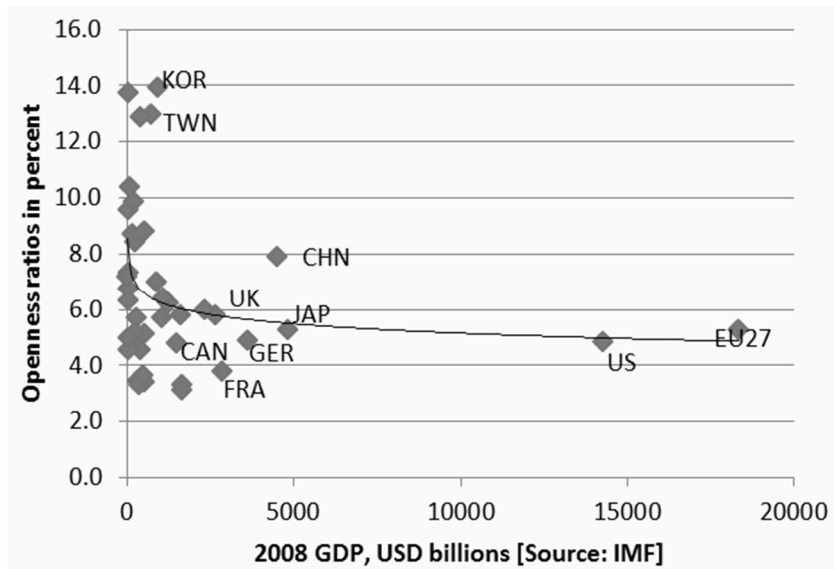
*Table 10.1 Penetration ratios of public procurement markets (selected countries and years)*

<b>Market</b>	<b>1995</b>	<b>2000</b>	<b>2005</b>	<b>2007</b>
European Union	2.6	3.6	4.2	4.5
Brazil	2.1	3.1	3.1	3.0
China	3.8	3.4	5.6	5.2
India	4.2	4.4	5.8	6.3
Japan	1.9	2.3	3.2	4.2
Turkey	5.4	5.8	9.5	10.9
US	2.7	3.6	4.4	4.4

*Source:* Summary of data provided in Messerlin & Miroudot (2012).

As the data in Figure 10.2 show, small markets, including the small EU member states if these are taken as separate markets, tend to have a higher import-penetration ratio. This is to be expected given that smaller economies will not have the local/national capacity to supply all the goods and services required by their governments. If one takes the EU as a single market, one would clearly expect import penetration to be lower than in small markets and lower perhaps than developing-country markets as the EU possesses the capacity to supply the most advanced, high-value contracts, which some developing economies will be unable to do. Figure 10.2, indeed, shows a correlation between market size and 'openness' (in other words, imports to total public consumption) and shows the EU and US as roughly equivalent in terms of their degree of openness on this measure.

Figure 10.2 GDP and openness ratios, 2008



Source: Messerlin & Miroudot (2012).

### 2.3 Access via investment

The import penetration in Table 10.1 also relates to ‘imports’ or what the European Commission has termed direct imports, in other words goods and services crossing borders. It is, however, a feature of procurement markets that access is often achieved through foreign investment in the target market, which helps get around de facto preferences in that contracts awarded to local goods and services create local jobs and economic activity, even if the firm is foreign-owned. In the EU, cross-border supply of public procurement markets accounts for only 1.6% of public contracts and 3.5% of the value of public procurement. But indirect supply via an affiliate accounts for 11% of contracts and about 14% of the value of public procurement (European Commission, 2011b). This indirect access to EU markets appears to be focused on ‘supplies’ (goods) rather than services or works (construction). Indirect imports make up 25% of the value of EU supplies contracts, compared to just 6% for works and 12% for services. Access therefore clearly depends on the ease of establishment and whether inward foreign direct investment (FDI) is blocked or discouraged. This is seldom the case in transatlantic trade as both the EU and the US are open to foreign direct investment except in limited cases when the host state wishes to defend its national champion

against such competition. But the option of setting up an affiliate will be less attractive to small- or medium-sized companies. Unfortunately, there does not seem to be equivalent data for indirect access to the US market, and so again it does not seem possible to conduct an objective comparison of how open markets are. But one can assume that larger EU suppliers wishing to access the US market will have considered doing so via affiliates.

## 2.4 Value of procurement covered under commitments in agreements

In the absence of comparable data, the European Commission has produced an estimate of relative market opening, summarised in Table 10.2 below. This appears to be based on commitments made in international agreements for contestable markets above the thresholds in the GPA. But the US has disputed the accuracy of these figures.

*Table 10.2 Share of procurement covered by commitments*

	EU	US	Japan	Canada	Brazil	India	China
Total procurement Above GPA threshold (€ bn)	370	559	96	59	25	42	20
% of GDP	3%	3%	3%	6%	3%	4%	2%
Percentage of procurement Internationally committed	95%	32%	28%	16%	65%	0	0

*Source:* European Commission (2012).

## 2.5 Strategic market access

These general figures for procurement and the degree of openness do not address the question of what might be called strategic market access. In certain sectors, large public contracts can make a significant difference between business success and failure. In other words winning a large public contract can have a significant effect on the relative competitive position of companies. This is especially the case in sectors such as aerospace where strategic trade policy conditions could be said to apply. The same features, however, are also present in other sectors such as rail transport, energy, non-lethal defence equipment and even construction. In these sectors, therefore, tacit

support for national companies in the awarding of contracts is something that is very difficult to address and even governments that would otherwise follow liberal procurement policies have arguably found ways of awarding contracts to national suppliers. The recent EU debate on a Regulation to enhance the EU's negotiating leverage, which has not been adopted, drew on these kinds of strategic market access objectives.<sup>1</sup>

### **3. International procurement rules and EU and US commitments**

#### **3.1 International procurement agreements**

When the international trading system was established in 1947 under the General Agreement on Tariffs and Trade (GATT), government procurement was explicitly excluded. As a consequence, there were no constraints on the adoption and application of *de jure* and *de facto* 'buy local' policies and practices. This unfettered use continued for more than three decades until procurement was brought under international trade disciplines. In 1981, the first international procurement agreement – the GATT Agreement on Government Procurement (GATT Code) – was implemented. As a plurilateral agreement, it only opened the procurement of the GATT members that accepted it and did not provide most-favoured-nation treatment (MFN) to non-Code parties.<sup>2</sup> It was also limited in scope, applying only to the procurement of goods by the central government entities listed by each party in the agreement. It did not apply to services or other types of entities. The GATT Code was replaced by the Government Procurement Agreement (GPA), which was established under the WTO in 1996.<sup>3</sup>

The GPA significantly expanded procurement subject to international disciplines to include services and construction services, as well as procurement by sub-central government entities, utilities and government enterprises. Currently, the GPA has 15 parties. Given that

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<sup>1</sup> See Regulation on access to international procurement markets COM (2012) 124 final 21.3.2012.

<sup>2</sup> Those members included the US, the European Economic Community and its member states (Belgium, Denmark, Republic of Germany, France, Ireland, Italy, Luxembourg, the Netherlands and the United Kingdom), Austria, Finland and Sweden.

<sup>3</sup> Grier (2013b).



the EU and its 28 member states constitute one party, the GPA covers the procurement of 43 WTO members.

In December 2011, the GPA parties concluded a decade-long negotiation to revise the GPA.<sup>4</sup> The negotiations, which were led by the US and the EU, resulted in an expansion of the procurement covered by the Agreement<sup>5</sup> and an overhaul of its text.<sup>6</sup> In April 2014, the revision entered into force for two-thirds of the GPA parties, including the EU and the US.<sup>7</sup>

### 3.2 The elements of international procurement agreements

The negotiations on procurement in the TTIP are expected to follow the template that has been established over the years in international procurement agreements and is reflected in the GPA and bilateral FTAs. This template has two parts. One concerns coverage or market access commitments, often called 'liberalisation', which are based on negotiations aimed at achieving reciprocal commitments.

Neither the EU nor the US covers all of its procurement under any international procurement agreement. Instead, each specifies the procurement that it promises to conduct in accordance with the provisions of the agreement based on several elements, including lists of procuring entities. The second part of agreements is comprised of the principles such as national treatment and the procedural disciplines that apply to the procurement that is covered. See Box 10.1 for the elements of coverage commitments and the procurement rules.

#### *Box 10.1 Elements of International Agreements on Public Procurement*

##### **Coverage**

Rules in international agreements generally cover procurement of supplies (goods), works (construction) and services. Coverage is defined by several elements: 1) thresholds (monetary values at and above which the agreement applies to procurement), which are designed to ensure that the most valuable contracts are open to competition and avoid the significant compliance costs of imposing international disciplines on smaller contracts; 2) the entities covered, as specified in three categories

<sup>4</sup> World Trade Organization (2011).

<sup>5</sup> Grier (2014b and d).

<sup>6</sup> Grier (2013c).

<sup>7</sup> World Trade Organization (2014).

(central government, sub-central governments and other entities, such as utilities and SOEs); 3) negative list of goods, which means that the procurement of all goods is covered except those explicitly excluded; coverage of defence goods is generally based on a positive list; 4) services, including construction services, with coverage based on a positive list (only listed services are covered) or negative list (all services are covered except those listed); and 5) exclusions. [The coverage of the EU and US under the GPA is set out in Table 10.3 below.]

### **National treatment**

A cornerstone of public procurement agreements is non-discrimination. Parties must provide national treatment for all covered procurement. This requires parties to treat the goods, services, and suppliers of other parties no less favourably than domestic goods, services and suppliers. They may not apply domestic preferences and other discriminatory purchasing provisions for procurement covered by an international agreement. National treatment obligations are the main means by which de jure preferences for specific categories of suppliers are tackled.

### **Transparency**

Central to the aim of facilitating increased international competition, more efficient purchasing and reduced scope for corruption in public procurement is the provision of information. Transparency and procedural obligations are aimed at ensuring that procurement covered by an international agreement is conducted in a manner that is transparent, predictable, fair and non-discriminatory. This encompasses both information on the procurement system, as well as information on each stage of the specific procurement, including development of technical specifications, publication of notices of intended procurement and invitations to request participation in procurements, provision of tender documentation, tendering process, use of negotiations and contract awards. It also includes post-contract award transparency in which purchasing entities are obliged to explain contract award decisions and publish awards.

### **Contract award procedures**

In order to ensure flexibility, procurement rules in international agreements tend to provide for open, selective and limited tendering. Open tendering allows all interested suppliers to participate and may be based on price or most advantageous tenders. Selective tendering is used when the procuring entity invites only suppliers that meet certain qualification requirements to submit tenders. It requires competition and transparent procedures for the selection of qualified suppliers. Limited tendering is when the procuring entity invites specific suppliers to submit tenders. Agreements include more or less detailed rules on

how invitations for tender are issued, what information is provided, and what time limits are set for bidding and for awarding contracts. Short time limits may put foreign bidders at a disadvantage, while long time limits may be detrimental to the work of the procuring entity.

#### **Technical specifications**

Through specifications, a procuring entity can tailor the requirements for a procurement to match the capabilities of certain (local) suppliers. To avoid this outcome, rules encourage the use of international standards and performance standards over design (or prescriptive) standards. Where design standards are used, tenders of equivalent goods or services should be allowed.

#### **Exemptions or exclusions**

Agreements generally provide for exclusions of procurement from national treatment obligations for reasons of human health, national security and law enforcement.

#### **Enforcement and compliance**

Experience has shown that without effective compliance, rules on public procurement will have little effect. Given the thousands of contracts that are awarded every day, central compliance monitoring is impracticable. Rules therefore provide bidders who believe they have not been fairly treated with an opportunity to seek an independent review of a contract award decision. Penalties in the case of non-compliance may involve project cancellation, requirements to retender or financial penalties (limited to the costs of bids or exemplary damages). Rules requiring information on contracts awarded and reasons why bids failed can also facilitate compliance.

### **3.3 EU and US commitments under international agreements**

The EU and the US have exchanged extensive procurement commitments under two international agreements, the GPA (see Table 10.3) and a 1995 exchange of letters (see Table 10.4).<sup>8</sup>

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<sup>8</sup> Grier (2013a).

Table 10.3 EU and US coverage under GPA and relevance to TTIP

Elements of coverage	EU coverage	US coverage	Issue in TTIP?
<b>Central government</b>			
Thresholds: goods and services	130,000 Special Drawing Rights (SDRs)	130,000 SDRs	Not likely TTIP issue. EU Directives apply same threshold as GPA; EU has not applied lower thresholds in FTAs. But, US often applies lower thresholds in other FTAs. For example, it applies a \$100,000 threshold in the US-Korea FTA. Since US reserves most federal procurement at and below \$150,000 for small businesses, there would be little value in a threshold below that level.
Thresholds: Construction services	5,000,000 SDRs	5,000,000 SDRs	
Entities	Covers 3 EU-wide entities (Council, Commission and European External Action Service) and all central government entities of member states; withholds approximately 200 entities from access by US	85 federal entities, with several exclusions, including Federal Aviation Administration	Both could expand their coverage. US should be able to cover all federal agencies subject to the Federal Acquisition Regulation. The EU should be able to provide the US with comprehensive coverage of central government entities of member states and cover more EU-wide entities.

<b>Sub-central government</b>				
Thresholds: Goods and services	200,000 SDRs		355,000 SDRs	EU is seeking reduction. US likely to resist because of difficulty of obtaining necessary agreement of states.
Thresholds: Construction services	5,000,000 SDRs		5,000,000 SDRs	
Entities	All regional or local contracting authorities and all contracting authorities that are bodies governed by public law, as defined by EU public procurement directive. Includes indicative lists of entities covered.		37 states (see Table 10.4)	EU seeks expanded coverage of states, including the 13 states not covered by the GPA and greater access to the procurement of the 37-covered states.
Restrictions on coverage	EU denies rights to US suppliers to participate in services procured by its sub-central entities.		Exclusions include domestic content restrictions that apply to federally-funded highway and mass-transit projects and state-specific exclusions	EU seeks removal of the restrictions for mass transit projects.

<p><b>Utilities and government enterprises</b></p>			
<p>Thresholds: Goods and services</p>	<p>400,000 SDRs</p>	<p>\$250,000 for federal enterprises; 400,000 SDRs for other entities</p>	
<p>Thresholds: Construction services</p>	<p>5,000,000 SDRs</p>		
<p>Entities</p>	<p>All contracting entities whose procurement is covered by EU utilities directive and which are contracting authorities covered by the GPA. It also covers public undertakings, which are engaged in activities in sectors that include drinking water, electricity, airports, maritime or inland ports and transportation (railways, urban railways, automated systems, tramway, trolley bus, bus and cable); Includes indicative lists of entities.</p>	<p>Federal electric utilities (Tennessee Valley Authority and four Power Administrations), St. Lawrence Seaway Development Corporation. 3 sub-central entities (Port Authority of New York and New Jersey, Port of Baltimore and New York Power Authority). Waives domestic content requirements for power generation and telecommunication projects financed by Rural Utilities Service.</p>	

<b>Restrictions</b>	Excludes US from all utilities, except electric sector.	Excludes domestic content restrictions that apply to federal funds provided for airport projects.	
<b>Goods</b>	Covers all goods	Covers all goods with several exceptions	
<b>Defence goods</b>	Positive list of goods procured by defence and security entities.	Positive list of goods that are generally covered, subject to national security exception	
<b>Services</b>	Uses positive list which lists only the services that it covers, including most land and air transport services and all telecommunications services. EU does not give US rights to services procured by its sub-central entities. EU also provides US with access to a covered service only if US also covers that service.	Uses negative list to cover all services except transportation services; services associated with management and operation of government facilities, or privately owned facilities used for governmental purposes; public utilities services (except enhanced/value-added telecommunications services); and R&D services. Excludes printing for states. It provides EU with access to a covered service only if EU covers it.	EU could adopt negative list and US could consider expansion of telecommunications services.

Source: Grier (2013a).

Under those agreements, the US gives the EU the best access to its procurement that it offers any trading partner. In fact, it gives the EU better access than others because the 1995 agreement opens up procurement not provided to any other party. Under the GPA, the US does not withhold any of its procurement from the EU. But the EU does not reciprocate by providing the US with its best coverage. Instead, it denies the US the legal rights to participate in a significant portion of its GPA-covered procurement. This denial of *de jure* access applies to the procurement of services by its sub-central entities, procurement by EU utilities (except in the electric sector) and at least 200 central government entities of its member states. The EU withholds this procurement in response to US coverage. This disparity is less significant than it appears because US companies often have *de facto* access to the excluded procurement.<sup>1</sup>

*Central government entities:* Under the 1994 GPA, both the EU and the US used positive lists to specify their coverage of central government entities. The US continued that approach in the revised GPA, with the addition of 11 entities, to bring its total of covered entities to 85 – the most it offers in any agreement. However, in the negotiations on the revision of the GPA, the EU changed its approach and offered comprehensive coverage of the central government entities of its member states, that is, all existing entities, whether or not listed, as well as those created in the future. But it reserved this comprehensive coverage for members of the European Free Trade Association (Iceland, Norway, Liechtenstein and Switzerland) and the Netherlands with respect to Aruba. For the US and other GPA parties, the EU not only continued to use a positive list, but it also withheld some of the listed entities – more than 200 listed entities in the case of the US.<sup>2</sup>

*Sub-central coverage:* With regard to sub-central entity coverage, the EU provides comprehensive coverage of the sub-central entities of its member states, but withholds their purchases of services from the US. US sub-central coverage is not as comprehensive. Under the GPA, it covers 37 of its 50 states<sup>3</sup> and not all of the procurement of those

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<sup>1</sup> Grier (2014k).

<sup>2</sup> Grier (2014f).

<sup>3</sup> The 13 states that are not covered by the GPA are: Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Virginia and West Virginia.



states. A variety of restrictions apply to the states.<sup>4</sup> For example, the US takes an exception for the domestic content restrictions that are attached to federal funds given to states for mass-transit and highway projects. In addition, the states open their procurement at a threshold that is almost twice that of the EU's sub-central entities (355,000 SDRs versus 200,000 SDRs). See Table 10.4 on US states covered under GPA and the 1995 exchange of letters.

*Table 10.4 US states covered under GPA and 1995 Exchange of Letters*

State	GPA	State-specific exclusions in GPA	1995 Exchange of Letters
Arizona	X	None	
Arkansas	X	Construction services	
California	X	None	
Colorado	X	None	
Connecticut	X	None	
Delaware	X	Construction-grade steel (including requirements on subcontracts), motor vehicles, coal	
Florida	X	Construction-grade steel (including requirements on subcontracts), motor vehicles, coal	
Hawaii	X	Construction services; software developed in state	
Idaho	X	None	
Illinois	X	Construction-grade steel (including requirements on subcontracts), motor vehicles, coal	X
Iowa	X	Construction-grade steel (including requirements on subcontracts), motor vehicles, coal	
Kansas	X	Construction services, automobiles, aircraft	
Kentucky	X	Construction services	

<sup>4</sup> Grier (2014n).

Louisiana	X	None	
Maine	X	Construction-grade steel (including requirements on subcontracts), motor vehicles, coal	
Maryland	X	Construction-grade steel (including requirements on subcontracts), motor vehicles, coal	
Massachusetts	X	None	
Michigan	X	Construction-grade steel (including requirements on subcontracts), motor vehicles, coal	
Minnesota	X	None	
Mississippi	X	Services	
Missouri	X	None	
Montana	X	Goods	
Nebraska	X	None	
New Hampshire	X	Construction-grade steel (including requirements on subcontracts), motor vehicles, coal	
New York	X	Construction-grade steel (including requirements on subcontracts), motor vehicles, coal; procurement by public authorities and public benefit corporations with multi-state mandates; transit cars, buses and related equipment	
North Dakota		None	X
Oklahoma	X	Construction services, construction-grade steel (including requirements on subcontracts), motor vehicles, coal	
Oregon	X	None	
Pennsylvania	X	Construction-grade steel (including requirements on subcontracts), motor vehicles, coal	

Rhode Island	X	Boats, automobiles, buses, related equipment	
South Dakota	X	Beef	
Tennessee	X	Services, including construction services	
Texas	X	None	
Utah	X	None	
Vermont	X	None	
Washington	X	Fuel, paper products, boats, ships, vessels	
West Virginia		None	X
Wisconsin	X	None	
Wyoming	X	Construction-grade steel (including requirements on subcontracts, motor vehicles, coal	

Source: Grier (2014n).

In addition to the GPA, the US opens procurement of several sub-central entities under a 1995 US-European Communities Exchange of Letters.<sup>5</sup> That Agreement, which does not include any EU commitments, provides EU suppliers with access to the procurement of two states not covered by the GPA (North Dakota and West Virginia) and Illinois state procurement that is not covered under the GPA. The obligation in the Exchange of Letters is limited to best of out-of-state treatment for EU suppliers, but only if the state considers non-state suppliers in a procurement. It also commits to best of out-of-city treatment by seven cities (Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville and San Antonio), if they consider bids from suppliers outside of their cities. Finally, that Agreement provides that the Massachusetts Port Authority will provide best of out-of-state treatment if it considers non-Massachusetts suppliers. That agreement does not include thresholds or any exclusions.<sup>6</sup>

<sup>5</sup> Office of the US Trade Representative ([www.ustr.gov/trade-topics/government-procurement/us-european-communities-1995-exchange-letters](http://www.ustr.gov/trade-topics/government-procurement/us-european-communities-1995-exchange-letters)).

<sup>6</sup> Grier (2014g).

*Other entities (utilities and government enterprises):* Under the GPA, the EU covers a broad spectrum of utilities in sectors that include drinking water, electricity, airports, maritime or inland ports and transportation (railways, urban railways, automated systems, tramway, trolley bus, bus and cable). But it withholds US access to all except the electric sector in response to the limitations in US coverage. The US covers only federal electric utilities plus several other entities in other sectors. In the revision of the GPA, the US expanded its coverage by extending its waiver of domestic content requirements that apply to funding by the Rural Utilities Services, a unit of the Department of Agriculture, to include telecommunications projects, (see Table 10.3).

*Exclusions:* Since its implementation of the GATT Code, the US has excluded procurement that it sets aside for its small and minority businesses from the GPA and FTAs. The federal government uses set-asides to help it meet the directive in the Small Business Act of 1953 to award a portion of its procurement to small and minority businesses. The current target is almost a quarter (23%) of federal procurement. The US Congress has explicitly prohibited waiver of the small business set-asides.<sup>7</sup>

### **3.4 EU and US commitments under bilateral and regional FTAs**

In addition to their GPA membership, the EU and the US have undertaken procurement commitments with other trading partners in bilateral and regional free trade agreements (FTAs). The US is a party to 13 FTAs that cover the procurement of 19 countries on terms and conditions similar to those in the GPA. Several of those countries (Canada, Israel, Republic of Korea and Singapore) are also GPA parties. The only US FTA that does not include robust procurement commitments comparable to the GPA is its FTA with Jordan. That FTA's procurement provision is limited to a commitment that the parties engage in negotiations on Jordan's accession to the GPA. In addition to FTAs, in 2010, the United States and Canada negotiated a procurement agreement in which they exchanged sub-central coverage, and Canada opened up the procurement of its provinces and territories for the first time.<sup>8</sup>

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<sup>7</sup> Grier (2014i).

<sup>8</sup> Grier (2013b).

The EU has included public procurement provisions in all of its comprehensive bilateral trade agreements. The agreements negotiated with GPA signatories such as the Republic of Korea, Canada and Singapore, simply apply the GPA rules but extend commitments. In the case of Canada in the CETA agreement, Canada extended its commitments to include its municipalities, municipal organisations, school boards and publicly funded academic, health and social service entities (MASH sector) for the first time. In preferential agreements signed with middle developing countries, such as those with Colombia and Peru and Central America, the EU has included procurement rules largely based on the GPA. With these partners the EU has accepted a degree of asymmetry in commitments in that it has offered more or less the same level of commitments to these countries as to GPA signatories but accepted more limited commitments from the countries concerned. The EU-CARIFORUM agreement also includes rules very similar to those of the GPA, but it does not include coverage commitments, which are to be decided by the parties in the future. In its preferential agreements with developing countries such as the other ACP states procurement is envisaged for a later stage.<sup>9</sup>

## 4. Enhancing access to procurement markets

### 4.1 *De jure* and *de facto* barriers to access

The *de jure* preferences take the form of, for example, 'buy national' policies, which grant national suppliers a price preference as in the case of the US since the 1930s, in the case of the utilities Directive in the EU and in many other countries today. There are also *de jure* preferences for small- and medium-sized companies, used by developed as well as developing countries, such as US set-asides for its small and minority businesses. There is also a trend towards the use of public contracts to promote other policy objectives, such as through the use of 'green procurement' that can constitute a potential barrier to access. Such *de jure* preferences can be targeted by national treatment commitments, such as in the GPA or a bilateral agreement such as the TTIP.

But experience suggests that the main barriers to public procurement markets are less obvious, *de facto* discrimination that exists as a result of the discretion available to contracting authorities or costs and other disincentives to bid. Such discretion is built into even

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<sup>9</sup> Woolcock (2013).

the most extensive rules as a result of the flexibility necessary to accommodate the diverse nature of public procurement. Cost effective means of addressing such *de facto* discrimination are not easy to develop, although the OECD has developed a set of Principles for Integrity in Public Procurement that begin to address some of the *de facto* barriers.<sup>10</sup> Requiring transparency is one approach, as is the specification of objective criteria for contract awards, the use of standard documentation and award procedures. The OECD Principles also include recommendations to ensure a proper cost-benefit analysis of the use of procurement in the pursuit of other policy objectives, better planning across the whole procurement cycle, promotion of procurement as a profession and tighter control of exceptional cases. Experience, including that with the EU internal market, suggests that much more than commitments to national treatment is required if there is to be increased competition. It may indeed, only come as a result of a paradigm shift in national policies towards acceptance of open, competitive markets and away from explicit or implicit policies of support for national champions and then usually as a result of indirect supply or exports, in other words via local affiliates.

#### 4.2 *De jure* barriers to access

As described above, the EU and the US have exchanged extensive commitments under the GPA that provide substantial market opportunities in their respective government procurement markets. However, there are significant barriers to access in public procurement in both the EU and the US, and a tendency for such measures to grow, especially in the US, with the 'Buy American' provision in the American Recovery and Reinvestment Act of 2009 (ARRA) as a prominent example. The barriers are summarised in the following tables.

Table 10.5 Restrictions on market access in the US

Procurement Restriction	Description	Treatment in Trade Agreements
American Recovery and Reinvestment Act of 2009 (ARRA)	Required US-produced iron, steel and manufactured goods to be used in ARRA-funded projects	Did not apply to projects covered by trade agreements

<sup>10</sup> OECD (2009).

Berry Amendment	Requires DoD to purchase US-produced food and clothing, fabrics, specialty metals, stainless-steel flatware and hand-measuring tools.	Covered goods are excluded from trade agreements
Buy American Act of 1933	Requires federal agencies to purchase US goods unless a waiver applies	Waived for goods covered under trade agreements
Buy American Act	Requires use of US-produced iron, steel and manufactured products (with 100% domestic content) in highway, transit, railway and airport projects funded by DoT, unless a waiver applies.	Restriction is excluded from trade agreements
Small Business Act of 1953	Requires federal government to award a portion of federal procurement to US small and minority businesses	Set-asides for small and minority businesses are excluded from trade agreements
US-flag vessels requirements	Items procured by the military must be shipped in US-flagged vessels	Procurement of transportation services are excluded from trade agreements
Sub-central procurement not covered by trade agreements	Use of domestic content requirements and insufficient transparency	Not covered by trade agreements

Table 10.6 Barriers to market access in the EU

Cross-cutting NTM	Sectors where it applies	Other observations
Favouritism of EU firms	Construction	
Diverse national and local practices	All sectors	
Unavailability of procurement statistics (regarding foreign bidders)	All sectors	This NTM is decreasing in importance.
Local (domestic) content requirements in the bid (at least 50% European)	Water (production, transport, and distribution of drinking water), energy (gas and heat), urban transport (urban, railway, automated systems, tramway, bus, trolley bus, and cable), and postal services	
Excessive delays in finalising the contract and beginning of work	Infrastructure projects	
High level of bureaucracy and corruption	Public works	
Onerous qualification requirements	Government procurement	
Use of offsets in defence procurement	Defence	

Source: Authors' own compilation.

## 5. Potential Expansion of Procurement under TTIP

### 5.1 Procurement objectives of the EU and US in TTIP

In the February 2013 final report of the United States-European Union High Level Working Group on Jobs and Growth (HLWG), the EU and US shared the goal to substantially improve access on the basis of



national treatment.<sup>11</sup> Subsequently, each side has elaborated on their objectives for the TTIP. In March 2013, the US notified the Congress of its intention to launch negotiations of TTIP and its objectives.<sup>12</sup> It subsequently pointed to its interests in expanded access to procurement in construction, engineering and medical devices.<sup>13</sup> In July 2013, the European Commission published initial TTIP Position Papers, including one on public procurement.<sup>14</sup> See Table 10.7 for a comparison of the EU and US objectives in the negotiations.

*Table 10.7 EU and US procurement objectives in the TTIP*

<b>Joint HLWG objectives</b>	<b>EU objectives</b>	<b>US objectives</b>
Enhance business opportunities through substantially improved access to government procurement contracts at all levels of government on the basis of national treatment	<p><i>Central government entities</i></p> <ul style="list-style-type: none"> <li>- Use negative list</li> <li>- Coverage of US federal government entities not covered under GPA</li> <li>- Access to procurement subject to specific policies, such as those related to small businesses (small business set-asides)</li> </ul> <p><i>Sub-central entities</i></p> <ul style="list-style-type: none"> <li>- Coverage of the 13 states not covered by the GPA; removal of restrictions maintained by the 37 states covered under the GPA</li> <li>- Coverage of municipalities, airports, ports, transit authorities and railway authorities</li> </ul>	<p>Expand market access opportunities for US goods, services and suppliers to procurement markets of the EU and its MSs</p> <p>Ensure that US suppliers are treated as favourably as domestic and other foreign goods, services, and suppliers in the EU and member states</p> <p>Ensure procurement is conducted in a fair, transparent &amp; predictable manner</p>

<sup>11</sup> See USTR (2013).

<sup>12</sup> See letter from Acting USTR Demetrios Marantis to Speaker of the US House of Representatives John Boehner, dated 20 March 2013 (Marantis, 2013).

<sup>13</sup> See USTR (2014).

<sup>14</sup> European Commission (2013).

	<p>- Coverage of sub-central government entities “operating at the local, regional or municipal level, as well as any other entities whose procurement policies are substantially controlled by, dependent on, or influenced by sub-central, regional or local government and which are engaged in non-commercial or non-industrial activities”</p> <p><i>Other entities:</i> coverage of “all entities governed by public law, state-owned companies and similar operating in particular in the field of utilities” (special interest in transit/railways, urban railways and urban transport)</p> <p>Services: Coverage of all services, with specific interest in Information society services, particularly cloud-based services</p> <p><i>Buy American restrictions</i></p> <p>- Removal of existing domestic content requirements on mass-transit and highway projects</p> <p>- Commitment to not impose any new Buy American requirements on federal funds given to states or other sub-central government entities, such as were imposed by the American Recovery and Reinvestment Act of 2009 (ARRA)</p>	<p>Expand opportunities to bid on government contracts in areas that include construction, engineering and medical devices</p>
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	<i>Procedural disciplines:</i> GPA-plus disciplines, including access to procurement information, technical specifications, award criteria, qualification procedures, domestic challenge mechanisms	
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Sources: Grier (2014a); USTR (2013 and 2014); European Commission (2013) and Marantis (2013).

In addition to its stated objectives, the US may be expected to seek access to the procurement that the EU covers under the revised GPA, but to which it does not provide access to the US. That includes the procurement of services by the EU's sub-central government entities, procurement by EU utilities, access to EU works concessions and procurement of more than 200 central government entities of member states.

Expanding procurement under the TTIP will be difficult since most of the easily covered procurement has already been offered. Moreover, the EU and the US have engaged in extensive negotiations over many of the remaining issues, most recently in the revision of the GPA. Nonetheless, there are some areas in which the two parties should be able to build on their existing commitments (see Table 10.3). The potential areas are explored in this section, along with the constraints.

## 5.2 Comprehensive central government coverage

In the TTIP, the EU and the US should exchange comprehensive coverage of central government entities, providing one another with the best coverage of central government entities that they offer any trading partner. This could be accomplished with the EU proposal to base TTIP coverage of central government coverage in the TTIP on a negative list. For the EU that would mean providing the US with the same comprehensive coverage of the central government entities of its member states that it provides to favoured parties under the revised GPA (see section 3.3). Comprehensive coverage could also extend beyond the three EU-wide entities that the EU covers under the GPA.<sup>15</sup>

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<sup>15</sup> Grier (2014f).

The US may not be able to mirror the EU approach by offering coverage of *all* federal entities since there is no comprehensive list of federal agencies and, without such a list, the US could not ensure full compliance. Nonetheless, the US should be able to offer comprehensive coverage of all federal entities subject to the Federal Acquisition Regulation (FAR). The FAR is the primary federal regulation that applies to the procurement of most federal agencies and is intended to provide “uniform policies and procedures for acquisition by all executive agencies”.<sup>16</sup> Basing US coverage on the entities subject to the FAR should address US uncertainty of ascertaining all the entities that would be captured by an overly broad category, while fulfilling the EU request for comprehensive coverage. If there are certain agencies that are subject to the FAR that the US is not able to cover for security or other reasons, they could be put on the negative list and excluded from the TTIP. It may be noted that the Federal Aviation Administration is not subject to the FAR, even though most of its regulations are consistent with the FAR.

The US approach should be acceptable to the EU as it is similar to central government coverage used by Japan and Armenia in the GPA. Both provide comprehensive coverage of all entities subject to a specified law. In Japan’s case, it is covered by the Accounts Law and for Armenia, it is the Law on Procurement of the Republic of Armenia.

If the TTIP is to set a new standard for procurement obligations, one step that would contribute to that goal is for the EU and the US to exchange comprehensive coverage of central/federal entities and to offer one another their best coverage.

### 5.3 Constraints on broader sub-central entity coverage

Less promising for expansion of commitments is sub-central coverage. The EU has placed a high priority on coverage of the 13 states not covered by the GPA and access to more procurement of the states covered by the GPA. But it will likely be very difficult for the US to meet fully – or perhaps even partially – the expectations of the EU for several reasons.<sup>17</sup>

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<sup>16</sup> Federal Acquisition Regulation (FAR) 1.101 (<http://www.acquisition.gov/far/loadmainre.html>).

<sup>17</sup> Grier (2013d).

The first hurdle is the process for covering state procurement under trade agreements. As a consequence of the US federal system of government, the Administration only covers procurement of sub-central governments, including states and cities, with that government's authorisation.<sup>18</sup> In negotiations of prior agreements, the US Trade Representative has requested such authorisation from the state governors (or city mayors), on a state-by-state (or city-by-city) basis. Where a state has authorised coverage of its procurement, it has been allowed to limit its covered procurement to specific agencies and to exclude procurement of sensitive goods or services, such as those subject to domestic preferences.

A second hurdle is declining state interest in covering procurement under FTAs. The US covers state procurement under the GPA and eight FTAs, with the number of states covered varying by agreement. It lists 37 states under the GPA, and it covered those same states in the first two FTAs to cover state procurement – the US-Chile FTA<sup>19</sup> and the US-Singapore FTA,<sup>20</sup> without seeking additional authorisation from the states. However, in the subsequently negotiated FTAs, states were covered only with their authorization, and state participation declined. Thirty-one states were covered under the 2005 US-Australia FTA,<sup>21</sup> but the number dropped to 23 states in the 2006 US-Morocco FTA<sup>22</sup> and to 22 states (plus Puerto Rico) in the US-Central American-Dominican Republic FTA.<sup>23</sup>

In the latest FTAs – with Peru, Colombia and Panama, the US applied a reciprocity policy, which was aimed at encouraging state participation and avoiding the so-called 'free-rider' problem.<sup>24</sup> Under

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<sup>18</sup> USTR (2011).

<sup>19</sup> US-Chile FTA, Annex 9.1, Section B, Schedule of the United States.

<sup>20</sup> US-Singapore FTA, Annex 13A, Schedule 1, For the United States, Section B.

<sup>21</sup> US-Australia FTA, Annex 15-A, Section B, Schedule of the United States.

<sup>22</sup> US-Morocco FTA, Annex 9-A-2, Schedule of the United States.

<sup>23</sup> US-DR-CAFTA, Annex 9.1.2(b)(i), Section B, Schedule of the United States, List A. The United States provides Honduras with access to only 16 states plus Puerto Rico. CAFTA, Annex 9.1.2(b)(i), Section B, Schedule of the United States, List A.

<sup>24</sup> The 'free rider' situation arises where states that do not authorise coverage of their procurement in an FTA nonetheless gain the same access to the procurement covered under an FTA as the states that agreed to cover their procurement under the FTA.

that policy, the FTA gave rights to a state's suppliers to participate in the FTA partner's sub-central procurement only if that state authorised its procurement to be covered under the FTA.<sup>25</sup> Unfortunately, the use of the reciprocity policy did not accomplish its aim, as only eight states and Puerto Rico agreed to bring their procurement under those FTAs.<sup>26</sup> (Subsequently, two more states were added to the FTA with Peru.<sup>27</sup>)

Another hurdle exists in states that have enacted legislation transferring the authority to cover a state's procurement in a trade agreement from the governor to the legislature. Beginning in 2005, several states, including Hawaii, Maryland, Minnesota and Rhode Island, have enacted such legislation. Seeking the authorisation of states with this legislation is likely to result in a longer and more complicated process, and one that may be more politicised.

A fourth obstacle is the lack of a mechanism that would bring states together to develop a unified approach to covering state procurement under agreements, and perhaps lay a foundation for more comprehensive coverage.<sup>28</sup> Canada has such a mechanism under its Agreement on Internal Trade (AIT), an intergovernmental agreement among its federal government, provinces and territories. The AIT's chapter on procurement establishes a framework to ensure that all Canadian suppliers have equal access to the country's procurement above certain thresholds, and that such procurement is conducted in an open and transparent manner. The AIT even extends to Canada's so-called 'MASH sector', which includes all municipalities, municipal organisations, school boards and publicly funded academic, health and social service entities.

As a consequence of the AIT, Canada has been able to expeditiously develop negotiating positions on opening procurement by its provinces and territories. This was evident in two recent negotiations. First, in the negotiations of the US-Canada Agreement on Government Procurement in 2010, Canada was able to move quickly – in only six months – to reverse its long-standing refusal to open the procurement of its provinces to foreign firms. With the agreement of its

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<sup>25</sup> See for example, Peru TPA, Annex 9.1, Section B, Schedule of Peru, Notes 7 and 8 to the Schedule of Peru and Notes 1 and 2 and Schedule of the United States.

<sup>26</sup> Colombia TPA, Annex 9.1, Section B, Schedule of the United States; Panama TPA, Annex 9.1, Section B, Schedule of the United States.

<sup>27</sup> US-Peru TPA, Annex 9.1, Section B, Schedule of the United States.

<sup>28</sup> Grier (2014c).

provinces, Canada offered permanent access to its provincial procurement, and to bind that coverage under the GPA, as well as temporary access to additional provincial and municipal construction projects. Canada undertook those commitments in exchange for access to the US states covered under the GPA and – most important – US agreement to not apply the Buy American requirement in the American Recovery and Reinvestment Act of 2009 (ARRA) to Canadian iron, steel and manufactured goods in a number of ARRA-funded programmes. More recently, in 2013, Canada was able to mobilise its provinces and MASH sector to open the procurement of both provincial utilities and the MASH sector under an agreement with the EU.<sup>29</sup>

The US does not have any similar means for developing common negotiating positions with its states. The US should consider setting up a forum for state consultations on covering procurement under international agreements. Such a mechanism could build on the US advisory committee system that the US Congress established 40 years ago to ensure that US trade policy and trade negotiation objectives adequately reflect US economic and commercial interests. That system includes an Intergovernmental Policy Advisory Committee (IGPAC), composed of state and local representatives from the three branches of government (executive, legislative and judicial), to provide advice on the impact of trade issues on state and local governments. While that Committee serves an important role, it is not sufficient for the type of consultations needed with respect to covering state procurement under trade agreements. Its broad membership includes only a few representatives from state governments.<sup>30</sup> A broader procurement consultation mechanism could be used for both the education of states on the consequences and benefits of coverage, and development of US positions. It would not be a panacea but it could facilitate discussions with the states.

But, whether or not the US develops a new consultative approach to the states, greater state participation in the TTIP will be possible only if states are convinced that there are substantial benefits in a commitment to open procurement to foreign suppliers and to refrain from adopting new measures that would favour local suppliers. From a state's perspective, it does not need a trade agreement in order to accept bids from foreign suppliers. For potential suppliers from the

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<sup>29</sup> Grier (2014m).

<sup>30</sup> Grier (2014j).

EU however, the diversity of purchasing practices does not enhance transparency and could well discourage them from bidding.

A potentially more fruitful area of expansion of US sub-central procurement commitments is cities. The 1995 Exchange of Letters may be a model for coverage of more cities because it only imposes a national treatment obligation and does not impose any other procedural obligations. This approach could focus on cities of a certain size or cities of particular interest to EU suppliers.

#### **5.4 Coverage of utilities and government enterprises**

Of the three categories of entity coverage, the EU and the US have exchanged the narrowest coverage with regard to ‘other entities’, namely utilities and government enterprises. As described above, the EU has broad coverage of utilities under the EU’s regime and in the GPA, but limits US access to just its electric utilities. This limited access reflects the EU aim of offering only reciprocal access to US suppliers given that US coverage extends only to its federal electric utilities and a handful of other entities. For example, it covers a few airports, most prominent of which are those under the jurisdiction of the Port Authority of New York and New Jersey (PANYNJ) (La Guardia, JFK and Newark) and three port authorities (PANYNJ, Port of Baltimore and the Port Authority of Massachusetts), as well as a scattering of transit entities under covered states.

With regard to other entities, the EU is particularly interested in coverage of transit and railway authorities, urban railways and urban transport entities. Unless they are transit agencies covered under states, their participation would have to be solicited. More importantly, even if authorised, their coverage would be limited as long as they are subject to Buy American requirements that apply to railway and transit projects funded by the federal government.<sup>31</sup> See section 5.5.

One of the possible approaches to expanding procurement obligations by utilities and government enterprises may be to limit the commitments to national treatment, and not require GPA-type procedures, as in the 1995 Exchange of Letters. The primary benefit of such an approach for the entities would be that they would not have to alter their procurement procedures. The requirement to adopt GPA-type procedures, in particular, the time periods for tendering, may serve as a deterrent to participation by such entities. For the EU, the

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<sup>31</sup> Grier (2014k).



benefit would be access to the procurement of the entities. The fact that procedures do not conform to GPA rules would be less of an impediment for the kind of large companies that would supply railway or public transport equipment. The EU's identification of those entities of greatest interest should facilitate US engagement with a workable number of entities.

## **5.5 Buy American requirements attached to federal funding to states**

A major aim of the EU in the TTIP negotiations is to remove the application of domestic content requirements that apply to state and local projects, especially transit projects, undertaken with federal funds. Those requirements, which are often referred to as Buy American<sup>32</sup> requirements, apply to iron and steel, as well as to manufactured products, used in non-federal infrastructure projects. European firms want to be able to participate in these projects without having to meet the Buy American requirements. The US has never waived these domestic content requirements in any agreement. Instead, it has consistently excluded them from its GPA and FTA obligations.<sup>33</sup> There would be strong opposition to any alteration of the US position on this issue from the iron and steel industry and their supporters in the Congress.

The US may be more amenable to a second EU aim – to obtain a US commitment that it will not impose any new Buy American requirement on EU suppliers when the federal government provides new funds to states and other sub-federal entities. In essence, the EU is seeking to avoid a repeat of the Buy American requirements in the American Recovery and Reinvestment Act of 2009 (ARRA). Even though the ARRA Buy American requirement did not apply to procurement covered by international agreements, its effect was wide-reaching as it disrupted EU and other country's participation in projects, such as water projects, not covered by agreements.

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<sup>32</sup> The term "Buy America" is often used to refer to domestic content requirements in US federal government funding of state and local projects. This is in contrast to the term "Buy American," which generally refers to the Buy American Act that applies to US federal government procurement of goods. In this chapter, Buy American is used to refer to both situations.

<sup>33</sup> Grier (2014h).

A commitment to not impose any new Buy American requirements in legislation authorising funding to states and other sub-federal entities may be more than the US Congress could accept. However, such a commitment that was limited to EU goods, services and suppliers may be acceptable. As such a measure would constitute a significant US concession, the EU could be expected to reciprocate with an equally difficult concession in procurement, or some other element of the TTIP negotiations.<sup>34</sup>

## 5.6 Services coverage

The coverage of services provides another opportunity for the EU and US to expand their commitments. The US bases its coverage of services in the GPA and its FTAs on the use of a negative list. The EU has to date used a positive list. To align their commitments to the extent possible, they should consider basing their services coverage on a negative list.<sup>35</sup> That would provide an important foundation for them to seek similar services coverage in the next round of GPA negotiations.

Use of a negative list ensures more comprehensive coverage than a positive list, because it means that when new services, such as cloud computing, become available, they are automatically covered. By contrast, when a positive list is used, a new service is covered only if it fits within a category that is already covered. Since it is not always easy to fit a new service into existing categories, the issue of coverage of a new service can be subject to disputes.

In addition, the EU and the US should seek as comparable coverage of service categories as possible. One area that warrants close consideration is telecommunications. Until the revision of the GPA, the EU did not cover all telecommunications services. In the revision, the EU offers all such services, but conditions access on reciprocal coverage. The US continued its limited offering of telecommunications services, opening only enhanced or value-added services. The description of its covered telecommunications services has not changed since the GPA entered into force in 1996. Yet, there have been significant advances in telecommunications in the intervening two decades. Thus, the US should re-examine its coverage of such services with the aim of updating and broadening its coverage. It could exclude specific services as needed for national security or other purposes.

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<sup>34</sup> Grier (2014l).

<sup>35</sup> Grier (2014k).

## 5.7 Exchange coverage of build-operate-transfer (BOT) contracts and works concessions

The EU and the US should also expand their commitments with respect to construction services. Currently, they open all construction services to one another, with two exceptions. The US excludes dredging and the EU does not extend its coverage of works concessions to the US. The latter would appear to be an area in which they could exchange commitments. While the US does not cover works concessions under the GPA, it covers build-operate-transfer (BOT) contracts and public works concessions under its FTAs, including in the US-Korea FTA (KORUS FTA). In its FTA with the EU, Korea provides that same BOT coverage. Since the EU has treated Korean coverage of BOT contracts as reciprocal to its coverage of public works concessions in both the GPA and their bilateral agreement, it should be able to accept US coverage of BOT contracts in the TTIP.<sup>36</sup>

## 6. Impact of broader procurement coverage

As discussed in the previous section, the prospects for government procurement in the TTIP are for relatively modest, incremental expansions of procurement commitments, but not a wholesale change in the EU-US procurement relationship or resolution of all the outstanding issues. While the sub-central level is of particular interest to the EU, it is also the most difficult for the US, as described above.

A challenge of the TTIP procurement negotiations is the fact that the United States has opened most of the procurement that is within the authority of the Administration. Many of the EU's requests are beyond the authority of the Administration, however, and would require changes in US laws or commitments by sub-central entities to bring their procurement in line with the discipline of the TTIP. For the US to undertake such a heavy burden, the EU would need to provide a strong incentive either in the procurement sector – or perhaps in other areas of the TTIP where the US is making demands on the EU.

While the EU imposes significant limitations on US rights to EU-covered procurement, those legal restrictions do not necessarily dictate what is happening on the ground. They do not prohibit EU entities from procuring US goods and services in the restricted areas, such as services purchased by EU sub-central entities. Even where purchasing entities retain the right to discriminate against foreign suppliers, this

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<sup>36</sup> Grier (2014e).

does not mean that they do so. Purchasing entities are also interested in obtaining the best value for money and often find that this aim can best be achieved by purchasing from abroad. As a consequence, it would appear that US suppliers are relatively satisfied with their current access to EU procurement markets, notwithstanding their lack of legal rights.

Moreover, market access can also be achieved in the absence of any legal commitments to not discriminate against foreign suppliers. As noted above, access is very often indirect via affiliates established in the target market. EUROPEBUSINESS, a leading EU business organisation, has acknowledged that EU businesses have access to more procurement than is covered by agreements.<sup>37</sup>

The projections offered by the impact studies of welfare gains from the TTIP provisions on procurement are relatively small compared to the potential gains from measures addressing regulatory and technical barriers to trade. The estimates put welfare gains at €10.8 billion per year (in the long run) from the reduction of barriers in the field of public procurement. The benefits derived from economic changes are expected to be higher for the EU at €9.7 billion per year and the US €0.9 billion (Ecorys, 2009).

Trade flows are projected to grow slightly in procurement on both sides, but in percentage terms more growth will occur in the US. This is not unexpected; as discussed above, the nature of the procurement markets on both sides of the Atlantic is such that indirect supply is more the norm. The long-term household impact and wage-level effects range between 0.0% and 0.01% for the US and between 0.03% and 0.07% for the EU. With regard to the impact on the sectoral level, the motor vehicles, chemicals and food and beverages sectors in the EU are projected to benefit the most in percentage terms. In the US, electronics, metal production and machinery would gain the most (in line with the general results). In particular, construction is also expected to benefit in both the EU and US. These projections need to be treated with caution, however, as they may not have picked up some potential gains. Competition in procurement markets depends on potential suppliers bidding for contracts. When there are entrenched *de facto* preferences for local suppliers, this does not happen. International commitments such as an ambitious agreement on procurement in TTIP could provide potential suppliers with the confidence they need to bid for contracts they otherwise would not have. Nevertheless, in the field

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<sup>37</sup> BUSINESSEUROPE (2013).

of procurement, we have a classic example of the political economy of liberalisation in which the benefits of liberalisation are widely diffused through society but the costs in terms of increased foreign competition are heavily concentrated.

## 7. Impact of TTIP procurement provisions on third parties and the trading system

A second core aim of TTIP is to shape broad international trade rules. As in other policy areas, the US and the EU have been doing this for decades through the GPA (and its predecessor) as well as the OECD, including the work on integrity in public procurement discussed above. The comprehensive preferential trade agreements negotiated by the US and the EU have effectively exported the GPA framework of rules to many other countries. These norms have also shaped other more voluntary approaches such as the UNCITRAL Model Procurement Law. So in terms of the framework of rules governing the procurement process, such as transparency and due process, the US and the EU have effectively shaped the international rules. By pressing ahead with efforts to effectively apply best practice in public procurement at all levels of government, such as those set out in the OECD principles, bilateral efforts promoted through TTIP would then offer a means for the EU and the US to address *de facto* barriers to competition in public procurement and reduce corruption in procurement. Whilst estimates of corruption are inevitably very approximate, surveys by the World Economic Forum have shown that bribes are more prevalent in procurement than any other activity. It has been estimated that as much as 20-25% of the value of public contracts could be lost due to corrupt practices (OECD, 2013).

TTIP procurement commitments would not have a direct impact on multilateralism because there is no multilateral agreement that covers government procurement. Where there are government procurement agreements, commitments are made on a reciprocal basis. In so far as TTIP succeeds in extending liberalisation commitments, there could be some trade-diversion effects on third countries. These are likely to be incremental given the extended commitments under the revised GPA.

Extending transparency provisions, such as to more US states, and ensuring better implementation of existing transparency requirements by EU member states or applying best practice in procurement could well benefit third-country suppliers that participate

in such procurement. Although third-country suppliers may not benefit from national treatment provisions, they would, for example, have the benefit of bidding for a contract from a US- or EU-based affiliate. In this sense there could well be positive externalities from TTIP provisions on procurement.

In terms of shaping international rules in the field of procurement, the EU and the US have effectively done so through their contributions to the development of the GPA and through the promotion of those agreed GPA rules in their respective FTAs. However, the TTIP could contribute to the international procurement arena by setting a new standard for procurement agreements. If the terms of the TTIP go beyond current procurement agreements, in particular, the GPA, it would likely provide the basis for the inclusion of its liberalisation of procurement in other agreements. If the US expands its sub-central coverage in the TTIP from its GPA coverage, it would set a baseline for future FTA and GPA negotiations. If the TTIP includes procurement rules that go beyond the revised GPA, they could provide the basis for incorporation in a subsequent revision of the GPA. Also, such new rules would likely be incorporated in any new FTAs that the EU and the US negotiate.

## 8. A living agreement

A Bilateral Procurement Forum, which the EU and the US established at the conclusion of the negotiations on the GPA revision, could provide the foundation for on-going dialogue, cooperation and collaboration on outstanding procurement issues. In December 2011, the EU and the US set up the Forum to continue work on procurement issues that were not resolved during the GPA negotiations. The Forum sets out three tracks: a dialogue on regulatory procurement issues, a dialogue on international procurement issues and exploration of possible expansion of their procurement commitments on a reciprocal basis.

The Forum's regulatory element provides an opportunity for an enhanced understanding of the respective procurement systems. It could also be used to address specific issues raised by either party's private sector with regard to their respective procurement markets. In this respect, bilateral efforts could support and draw on work carried out in the OECD. The OECD has developed a number of principles for integrity in public procurement, which could contribute to addressing *de facto* barriers to competitive procurement markets. The OECD principles include, for example, the provision of adequate transparency

throughout the entire procurement cycle, so covering how contracts are managed as well as calls for tenders and contract award procedures. They also call for greater professionalism in procurement, proper auditing and the empowerment of civil society, the media and wider public opinion to scrutinise procurement (OECD, 2009).

Bilateral efforts could also promote common approaches to new challenges. For example, the increased tendency of governments to use public procurement as an instrument of environmental or other policies, such as promoting small- and medium-sized companies, could result in new distortions to competition if not adequately addressed. The increased use of public-private-partnerships (PPPs) could also pose a challenge and is another area where the development of agreed norms or codes could help to avoid the creation of new restrictions. The use of TTIP to promote compatibility between procurement systems such as in the use of e-procurement could enhance supplier confidence.<sup>38</sup> The furtherance of such principles by the EU and the US could then set a standard for wider international practice.

Under the international leg of the Forum, the EU and the US could also explore and coordinate positions on a variety of international procurement issues, such as China's accession to the GPA. Cooperation on preparing requests for improvements in China's offers (and for Russia when it begins its GPA accession in 2016) would strengthen their leverage. They could also develop a coordinated approach to encourage other countries, such as the other BRICS (Brazil, India and South Africa) to join the GPA.

The Forum's third part – exploration of expansion of procurement commitments – could be used to add new entities after the Agreement is concluded. The US has used this approach for states in several FTAs, in which it has a continuing obligation to add states after the FTA enters into force. For example, the US added five states to the US-Australia FTA after it entered into force and two states to its FTA with Peru after it was implemented.

## 9. Conclusion

Public procurement poses challenges when it comes to 'liberalisation'. Most of the low-hanging fruit has been picked, so that further progress will not be easy. As outlined above, there are several areas in which the US and EU could make, at least, modest expansions in their respective

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<sup>38</sup> See OECD (2013).

procurement commitments and seek to accord one another with the best treatment that they provide under trade agreements.

But if the US and EU are unable in the TTIP negotiations to reach a level of commitments that sets a higher standard for international commitments, there would appear to be two broad options. The first option would be to continue to negotiate on procurement as part of a living agreement. Here reciprocal concessions would be within the procurement sector. As this chapter has illustrated, however, this is unlikely to be done quickly given the work required at the domestic level, such as to get US states or cities to authorise coverage. The second option would be to make further progress on liberalisation of procurement markets by linking with other policy areas under negotiation in the TTIP. If the TTIP aim of contributing to welfare gains and economic growth are to be achieved, this would be the option to follow.

In terms of the TTIP's second broad objective of shaping the rules for international trade, the US and the EU have effectively done this through the plurilateral GPA and the extension of GPA rules to other countries through their bilateral FTAs. At issue in the procurement field is less setting the rules that would be applied in national procurement laws, which has arguably already been achieved, but more promoting best practices in procurement by fully applying principles such as those developed by the OECD throughout all public procurement in the US and EU.

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