Chapter 13

PUBLIC PROCUREMENT IN TTIP: AN OPPORTUNITY TO SET GLOBAL STANDARDS

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INTRODUCTION

The Transatlantic Trade and Investment Partnership (TTIP) is a proposed free trade agreement between the European Union (EU) and the United States (US). Negotiations were launched in June 2013, and are currently ongoing. The procurement chapter has the potential to be a hugely important part of the final agreement, given that public procurement represents a large percentage of economic activity on both sides of the Atlantic; 13% of US's gross domestic product (GDP) and approximately 17% of EU's GDP respectively, according to the Organization for Economic and Cooperation Development's (OECD) 2013 data (European Parliament, 2015). The procurement relationship between the EU and US is currently governed by the World Trade Organisation's (WTO) Government Procurement Agreement (GPA). As a result of this agreement, the EU procurement market is largely open to US firms as much of the EU's procurement is subject to GPA obligations. Indeed, the EU Commission has argued that 95% of its procurement is above the GPA thresholds (European Parliament, 2015). However, the same cannot be said of the US procurement market, which is more heavily protected from foreign firms. Much less of the US procurement market is covered by the GPA, with the EU Commission claiming that the US only commits 32% of procurement as being over the GPA thresholds (European Parliament, 2015). This is primarily because

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around 65% of US procurement takes places at the sub-federal level, and much of this procurement is excluded from the GPA (see below). This lack of reciprocity has led to the EU according less comprehensive access to US firms (through various GPA carve outs) than it accords to other nations. Additionally, the US is constrained in its negotiations on procurement to some extent by its 'Buy American' policies and the Berry Amendment which require public spending authorities to favour American firms and producers in certain circumstances.

In contrast to the EU Commission statements, other studies have suggested that the EU and US markets are fairly equally open, based on the rate of penetration of public sector markets by imports, which stand at 4.5% for the EU and 4.4% for the US respectively (Messerlin & Miroudot, 2012). Even if this study is reflective of an equity in "open-ness" between the US and EU, these relatively low figures of import penetration suggest that there are gains to be had when it comes to transatlantic procurement, and TTIP is the mechanism by which such gains can be realised.

Accordingly, the primary aim of this paper is to provide suggestions as to what the content of the TTIP procurement chapter should include in order that the procurement provisions are as progressive and forward thinking as possible. The procurement chapter of TTIP could serve as a model in future negotiations on procurement (at the bilateral, regional and even multilateral level). Thus, the EU and US have a unique opportunity to contribute to the future of global governance of procurement. In order to make suggestions as to the content of the TTIP procurement chapter, the paper will firstly examine the existing procurement arrangements between the EU and US under the GPA, highlighting that more of the EU procurement market is subject to GPA obligations, and therefore more accessible to foreign firms (including US firms). In light of this, the paper will go on to consider what the respective aims of the EU and US might be as regards the procurement chapter of TTIP, evaluating both publicly available statements from the EU and US and leaked documentation from the negotiations. It will conclude by making specific suggestions as to what should be included in the procurement chapter itself.

CURRENT ARRANGEMENT BETWEEN THE EU AND US – THE GPA

The primary agreement which currently regulates public procurement between the EU and US is the GPA of the WTO. The GPA has its origins in the Government Procurement Code agreed in the 1979 Tokyo Round which established some basic procedural obligations for the award of government contracts, though coverage was limited to goods contracts and central government bodies. Coverage was expanded with the agreement of the GPA 1994 at the Uruguay Round, which also amended some of the procedural rules (Arrowsmith & Anderson, 2011). Revision of the GPA 1994 began relatively soon after its conclusion, in 1996-1997, with a revised text agreed in 2006 and the negotiations on coverage finally concluded in 2012 (WTO Committee on Government Procurement, 2012). This paper will consider this revised agreement (GPA, 2012).

The GPA is a plurilateral agreement and is therefore only binding on those WTO members which have chosen to sign up to it. As of March 2016, the GPA has 17 members: Armenia, Canada, the European Union (covering all 28 Member States), Hong Kong, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Montenegro, the Netherlands in respect of Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei and the United States (World Trade Organisation, 2016). The GPA 2012 has been ratified and is in force for all parties with the exception of Switzerland, which remains covered by the GPA 1994.

Obligations under the GPA

The GPA is focused on preventing the use of government procurement as a tool for national protectionism and fills the gap left by the exclusion of procurement from the national treatment and 'most favoured nation' (MFN) obligations of GATS (Art. XIII.1) and GATT (Art. III.8). Comparable obligations are set out in Art. IV.1 GPA 2012, which requires that all Parties accord to goods and services from every other Party treatment which is "no less favourable" than that accorded to domestic goods or services or to another Party. Art. IV.2 supports this with a prohibition on treating locally established suppliers less favourably because they have a degree of foreign affiliation or ownership or because they supply goods or services from another Party.

In order to support these non-discrimination principles, the GPA sets out a number of procedural obligations for the conduct of a procurement process, intended to ensure transparency in the process (Arrowsmith and Anderson, 2011: 15). These include, for example: requirements to advertise procurement (Art. VII); to hold a transparent tendering procedure (except in exceptional circumstances) (Art. IV.4); rules regulating the types of technical specifications (the details of what is to be purchased) which can be required (Art. X); and requirements relating to the types of award criteria which can be set (Art. XV). The changes made to these obligations in the GPA 2012 reforms were relatively minor, mostly covering issues such as explicit consideration of e-procurement methods and changes to timescales (Reich, 2009; Arrowsmith, 2011; Anderson, 2012). Relevant substantive obligations where there is potential for development in TTIP will be discussed in more detail below.

Remedies – Dispute Settlement and Supplier Challenge

The GPA sets out two methods of enforcement in the case of breach of any of the substantive obligations. Firstly, under Art. XX GPA 2012, Parties may have recourse to the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the Dispute Settlement Understanding", or DSU). The DSU provides a state-to-state dispute settlement mechanism, whereby a member state who believes another member has breached their WTO obligations can initiate proceedings against the offending member. Initially, the parties enter into consultations and attempt to mediate their dispute. If the parties fail to reach agreement, a panel is established and panellists are appointed to hear the case. The panel considers the evidence (documents, hearing and expert evidence) submitted and produces a report within six months of appointment, which is distributed to WTO members and subsequently adopted by the Dispute Settlement Body.

The WTO DSU appears to be utilised very sparsely for procurement related cases. Only three cases have been brought to the Dispute Settlement Body:

- *Japan: Procurement of a Navigation Satellite* (WT/DS73);

- *United States: Measures Affecting Government Procurement (Massachusetts State Law prohibiting contracts with firms doing business with Myanmar)* (WT/DS88); and
- *Korea: Measures Affecting Government Procurement (Procurement Practices of the Korean Airport Construction Authority)* (WT/DSB/M/84).

And only one of these three (Korea) concluded with a panel report. This could be reflective of the fact that the GPA is a relatively weak agreement, which requires a low threshold of open-ness when it comes to government procurement to ensure compliance with the agreement. On the other hand, it could signify a procedure that is ill suited to procurement disputes. After all, it would be the state itself that would need to espouse the case on behalf of aggrieved firms who are not allowed to compete in foreign states. There is no direct right of action for such aggrieved firms, and states would often have little incentive to take up the case on their behalf.

Secondly, Art. XVIII GPA 2012 requires Parties to establish a domestic review procedure for aggrieved suppliers. The review procedure must be "timely, effective, transparent and non-discriminatory" and should enable a supplier to challenge either a breach of the GPA directly or the failure by a procuring entity to comply with a Party's domestic measures implementing the GPA (Art. XVIII.1). The procedure can include an initial review of complaints by the relevant procuring entity but must allow an appeal to an impartial and independent review body (Art. XVIII.2 and 4). Where the review body is not a court, the body must either satisfy certain minimum procedural requirements set out in Art. XVIII.6 or its decision must be open to judicial review.

The precise powers of the review body are somewhat unclear, however. Under Art. XVIII.7, the body should have the power to order interim measures but there is no real indication of what this can include, beyond the fact that it may cover the suspension of the procurement process. The body should also have the power to award compensation, though that compensation may be limited to costs for tender preparation and/or costs of bringing a challenge, significantly limiting the incentive to bring a case. This is a particular problem where the contract has been concluded, as there are no explicit powers set out in connection with this situation and a supplier may

therefore be restricted to only this limited compensation (Zhang, 2011, pp. 492-497).

Overall, the system is hampered by lack of clarity and there is some evidence that these problems have led to a low level of use by suppliers for the GPA system (Reich, 2009: 1015). As regards the EU-US procurement relationship specifically, the effectiveness of the domestic review system is also hampered by limitations imposed by the EU in response to US protectionist policies (see below).

Coverage of the GPA – Market Access

The coverage of the GPA is negotiated separately for each signatory, with each country's agreed coverage set out in Appendix 1. Each coverage schedule identifies the procuring entities which are covered, the goods and services covered, threshold values for a contract to be covered and any exceptions to coverage. Coverage of the GPA was expanded greatly with the negotiations for the 2012 revised text, with the additions to coverage agreed there estimated at being worth US $80-100 billion annually (World Trade Organisation, 2011: 3). Not all coverage set out in the schedules is available to all signatories, however. It is open to each party to negotiate different levels of coverage with each GPA signatory. This is particularly important for the EU-US relationship, with significant disparities in the general GPA coverage for the two countries.

In contrast to the general expansion of coverage with the 2012 revisions, the US had little change to its coverage from the 1994 agreement. The main contentious sector is that set out in Annex 2 of the US Coverage Schedule, which covers sub-central government entities. Within the US, each state must accept the provisions of the GPA separately and as a result there is wide variation in coverage (McNiff, 2015, p. 329). As with the previous 1994 agreement, only 37 US states have accepted the GPA and even for those states there remain some significant restrictions. The number of entities covered within each state is often very small and limited only to executive branch agencies (contrast Annex 2 in the EU Coverage Schedule, which includes not only local and regional contracting authorities but also bodies governed by public law). As an additional restriction, each covered state is able to apply preferences in procurement for programmes "promoting the development of distressed areas or businesses owned by minorities, disabled veterans or women" (Note

2 Annex 2, US Coverage Schedule, Appendix 1 GPA 2012). Finally, the procurement by those state entities contains many restrictions on the type of supplies and services covered. The major restriction here is set out in Note 1, which maintains the pre-existing restrictions in 12 states excluding all procurement of construction-grade steel, motor vehicles and coal, but there are also a number of additional individual restrictions attached to particular states.

Whilst sub-central entities are the major restricted area in the US coverage, there are other limitations which also concern the EU. A very small number of public utilities are covered under Annex 3, limited predominantly to energy providers and port authorities. There are also a number of general exceptions set out in Annex 7 to the US Coverage Schedule, which apply to all covered procurement, including federal procurement. Of particular concern for the EU is the restriction in Note 1, which excludes the operation of the GPA from any set-aside on behalf of small or minority-owned businesses and which therefore significantly limits the application of the GPA in practice.

In response, the EU's Coverage Schedule, whilst generally providing very broad access to other parties, contains some key restrictions specific to the US until the EU is satisfied that the US provides "satisfactory reciprocal access" to EU goods, suppliers, services and service providers (see Note 1 Annex 1, Note 1 Annex 2 and Note 6 Annex 3, EU Coverage Schedule, Appendix 1 GPA 2012). In particular, Annex 2 excludes services procurement by sub-central bodies within the EU from US providers and Annex 3 similarly excludes all utility sectors with the exception of those in the electricity sector. As a response to the set-aside exclusion in the US coverage (and equivalent provisions for Japan and Korea), the EU also includes a specific limitation on the application of the domestic review procedures considered above (Note 2 Annex 1, Note 2 Annex 2 and Note 7 Annex 3, EU Coverage Schedule, Appendix 1 GPA 2012):

> The provisions of Article XVII shall not apply to suppliers and service providers of Japan, Korea and the US in contesting the award of contracts to a supplier or service provider of Parties other than those mentioned, which are small or medium enterprises under the relevant provisions of EU law, until such time as the EU accepts that they no longer operate

discriminatory measures in favour of certain domestic small and minority businesses.

The TTIP negotiations therefore provide a valuable opportunity to develop the coverage commitments for the EU and US given the failure of the GPA 2012 to make any major changes to the relationship between the two.

POTENTIAL AIMS OF THE EU AND US FOR TTIP

At the 12th round of TTIP negotiations in February 2016, it was intimated in several stakeholder presentations that the respective offers on procurement of the EU and the US would be somewhat scaled back compared to what had originally been planned. Given the high economic value of procurement to the two states (see above), it was expected that procurement might be high on the list of the EU's negotiating priorities. However, the EU may make concessions as to its demands on procurement in order to secure gains in other areas that it deems more significant. During stakeholder discussions, it was suggested that procurement may be scaled back on the part of the EU as a compromise to the Americans for their acceptance of their newly proposed Investment Court System, which has proved contentious (Corporate Europe Observatory, 2013; European Commission, 2016).

Both the EU and the US published their stated objectives for each chapter of TTIP when the negotiations began (European Commission 2015; Office of the United States Trade Representative, 2013). An additional indication of each state's aims – and what they are likely to be willing to accept – can be seen by examining the treatment of procurement in other free trade agreements recently agreed by the EU and the US. For the US, the most important recent agreement is the Trans-Pacific Partnership, a regional agreement with a number of states agreed in 2015, whilst the EU has signed a number of agreements with individual states. In all cases, both the agreed coverage and specific obligations are heavily based on the GPA, but consideration of the differences can be enlightening.

The EU's Offensive Interests: GPA Plus

The EU's original aims for procurement in TTIP were ambitious, with the Initial Position Paper establishing that the EU was looking for

the TTIP procurement chapter to be a "GPA plus" agreement, with significant developments in both coverage and the substantive obligations (European Commission, 2013b: 1). The leaked Commission Non-Paper made clear, however, that the main focus was on increased coverage, with access to procurement by sub-central bodies in the US being the key target (European Commission, 2014: 4). The only changes to substantive obligations mentioned in the Commission Non-Paper are in relation to prevention of protectionist policies such as Buy America (discussed below) and are designed to boost market access.

An equivalent focus on coverage is also evident in the recent Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. Here, the EU appears to have been very successful, with coverage greatly increased from that available under the GPA. As with the US, a key target for the EU was the low level of sub-central coverage offered under Canada's GPA commitments. Under CETA, in comparison, Canada has included procurement by "regional, local, district or other forms of municipal government" for all provinces and has also removed exemptions set out in the GPA for a number of provinces in relation to procurement for the benefit of school boards, publicly-funded academic institutions, social services entities and hospitals (Annex 19-2 CETA). The General Notes for CETA also contain no mention of the SME exception Canada retained in the GPA, similar to that maintained by the US (Annex 19-7 CETA). Success here suggests the EU will likely be equally as ambitions when dealing the USA, aiming for full (or as close to full as possible) coverage at all levels of the state.

In other agreements, the EU has been less successful. For example, the EU-South Korea Agreement simply sets out scope by reference to the Party's Annexes in the GPA, with no change to the covered sectors (Article 9.2). Equally, for other agreements, there has been relatively little scope for development. For the recent EU-Singapore Free Trade Agreement, for example, there was little change in coverage as both states had already provided very high levels of coverage under the GPA 2012. These agreements nonetheless provide an indication of the potential substantive obligations which the EU might seek to develop in TTIP either in addition to any coverage increase or, alternatively, as a fall-back should coverage negotiations fail.

The common trend in changes to substantive obligations in EU free trade agreements is that the amendments from the GPA obligations are relatively minor; the changes are slight edits rather than major restructuring or development. One requirement common to CETA, the EU-Singapore agreement and the recent EU-Vietnam agreement is the switch from allowing a choice of either paper or electronic contract notices when a procuring entity is advertising potential procurement to mandating electronic notices (Art. 19.6 CETA; Art. 10.6.1 EU-Singapore Agreement; Art. VI.1 EU-Vietnam Agreement). These notices must also, for central government bodies at least, be accessible through a single point of access and be available free of charge, increasing the transparency of available procurement. This has long been the method in the EU, which requires notices for contracts within the scope of the procurement directives to be placed on Tenders Electronic Daily. A similar requirement therefore seems likely to be an aim for TTIP.

Beyond this, the only other common trend is the extension of the substantive obligations to contracts known as public works concessions in EU terminology or "Build-Operate-Transfer" (BOT) contracts in other jurisdictions, with both the EU-Singapore and EU-South Korea agreements including such contracts (Art. 9.2 EU-South Korea Agreement; Art. 10.2 EU-Singapore Agreement). The EU-Singapore agreement also refers to public-private partnerships (PPPs) more widely (Art. 10.2). The potential methods for and benefits of including such contracts within TTIP will be considered in the section below.

Overall, then, it is difficult to determine what the EU intends to include within TTIP to make it a "GPA plus" agreement, particularly if the negotiations on extension to coverage are not successful. The Commission's Initial Position Paper mentions developments in areas such as allowable technical specifications, qualification procedures and acceptable award criteria (European Commission, 2013: 2). No details are provided on what this would involve, however, and no similar developments can be seen in any other recent EU free trade agreement, which are predominantly GPA standard. Section IV below considers potential options to ensure TTIP genuinely advances from the GPA.

The US: Maintenance of the Status Quo?

The US has a long history of enacting legislation which requires the giving of preference to US made products in procurement decisions. The Buy American Act 1933 applies to all US federal agency purchases of goods (services are not covered) over the minimum contract price threshold. Such goods which are intended for public use must be produced and manufactured in the US, using US materials (unless one of the exceptions applies). Many states and municipalities have similar requirements when it comes to public procurement. The federal law has three main exceptions which enable federal agencies to purchase from foreign firms: (i) the public interest exception; (ii) the non-availability exception; and (iii) the unreasonable cost exception. This Act clearly contravenes the WTO's GPA, though the US can waiver the provisions of the Buy American Act by entering a waiver on the Federal Register. Each time the US signs a new relevant Free Trade Agreement or a new country signs the GPA, that new country is added to the list of waivers on the Federal Register.

Further restrictions come from the Buy America Act and the Berry Amendment. The Buy America Act was enacted in 1982 as part of the Surface Transportation Assistance Act and requires that transit related procurement purchases of over $100,000 which are funded by the Federal Transit Authority or Federal Highway Administration make use of 100% American manufactured iron, steel and manufactured products. The Berry Amendment requires the Department of Defense to give preference to the purchase of US manufactured products in its procurement activities. Both are subject to a number of limited exceptions.

The US has shown little inclination to move away from such protectionist policies in recent agreements. For example, the Trans-Pacific Partnership (TPP) maintains all the exclusions currently set out in the GPA, including the relevant Buy America/n exclusions for certain states. It equally retains the exclusion set out in the GPA enabling measures for the promotion of SMEs (Note 1, Section G). Nor has the US displayed any willingness to increase the scope of its coverage for any of the TPP countries, with sub-central entities excluded entirely from the agreement and the level of central government bodies and other entities included being similar to that in the GPA. The general indications, then, are that the US is content to

maintain the status quo in relation to procurement coverage. However, this lack of willingness to extend coverage within the TPP should not be necessarily viewed as the US "position" in all procurement negotiations. The TPP is an agreement between twelve nations that represent very different economies and states at different levels of development. The US may have different goals for procurement when it comes to other agreements e.g. TTIP. Nonetheless, TPP procurement provisions should not be entirely overlooked when it comes to examining the current thinking on procurement within the US.

PROCUREMENT IN TTIP – A MODEL FOR THE FUTURE

An agreement between the EU and the US is important not only for the direct benefits of the agreement itself, but also given its potential to set standards for future agreements between other states (and potentially also its influence on domestic policy). For this reason, it is important that the agreement be not only soundly designed but also ambitious, establishing a high base line for regulation for others to follow. This section will consider the benefits of striving for a GPA plus agreement, as well as considering specific target areas for TTIP to develop to ensure it is indeed a "GPA plus" agreement, and fulfils its potential for high level standard setting in procurement.

Economic Benefits

General Economic Benefits

International procurement agreements such as the GPA and the procurement chapter of TTIP are designed to ensure liberalisation of the procurement market. As with free trade more generally, this is primarily based on economic theories such as the theory of competitive advantage (Arrowsmith, Linarelli & Wallace, 2000). Following this theory, liberalisation of procurement would enable the EU and US to specialise in those industries for which they have a competitive advantage, providing economic benefits to both states. It is therefore to the state's benefit to restrict protectionism in procurement.

However, it would appear that the USA has not been convinced by this argument. Linarelli (2011) recently evaluated the Buy America/n

policies. He notes that the theory of competitive advantage is not always convincing because, "economic efficiency is not the only value at stake" because procurement liberalisation is often requiring a government to "spend taxpayer funds to stimulate the economies of other countries" and there will be little political incentive to do so (Linarelli, 2011, p. 801). It is therefore important for TTIP to not focus entirely on the issue of trade liberalisation, but rather, to ensure that the methods for ensuring that liberalisation contains sufficient safeguards for the protection of other sensitive interests, including social and industrial benefits such as promotion of SMEs and worker protection. This will allow for gaining the majority of the economic benefits of liberalisation, crucially, without compromising values in other areas.

It is also worth noting that reciprocity is important when considering the potential economic benefits of TTIP. Detractors of the agreement, and particularly those of strong procurement provisions, would undoubtedly bemoan that the US (federal, and possibly state and municipal government bodies) will potentially be spending money to stimulate the growth of EU companies. However, it is crucial to remember that, in turn, EU states will also be spending money which will stimulate the US economy and growth.

Value for Money

Increased Value for Money (VFM) when it comes to procurement could also be achieved with TTIP. As set out in the previous section, protectionism is not economically beneficial. By reducing the use of protectionist policies and promoting more competitive procedures for procurement, TTIP can potentially increase VFM in contracts, thus providing greater benefit for the taxpayer. This would, however, require a change of approach from the current system based on the GPA. As with most international procurement regulations, the GPA is not directly concerned with VFM, but rather, is concerned with limiting national discrimination and, whilst often this will also promote VFM given the reliance on competitive procedures to limit the potential for discrimination, it is not *per se* designed to do so.

The European Commission has previously claimed that VFM is an integral part EU legal regime on procurement (2011, p. 39). It is likely that the EU will push for TTIP to be developed along the same lines as the EU regime, which, if the Commission is correct, would naturally

encourage the promotion of VFM. There is little evidence to support the Commission's claim, however, and little legal support for promotion of competition and VFM in the EU directives (Arrowsmith, 2011-2012, pp. 36-40). In practice, the EU regime can sometimes run entirely counter to VFM principles. In particular, the overly detailed obligations in the directives (particularly the limited scope for negotiation) can limit the ability to gain the best commercial deal. It is therefore important that TTIP does not similarly over-regulate to the extent that VFM becomes difficult to achieve. Rather, TTIP should focus on the establishment of general principles to promote competition and enhance transparency obligations could bring benefits in this area.

Linked to this, the procurement provisions of TTIP will necessarily overlap considerably with its competition provisions. The TTIP negotiations on competition provisions have attracted little attention thus far, probably because the EU and US competition regimes are similar enough to enable the avoidance of contention. The EU textual proposal on Competition is predictably based on EU Competition Law contained in Articles 101 and 102 on the Treaty on the Functioning of the European Union (TFEU) and the merger regulation. The US has not published its own textual proposal, but it is likely that it will be based on US anti-trust legislation as contained in the Sherman Act and the Clayton Act. Although there are many similarities and crossovers with the EU and US competition regimes, there are some notable differences which will presumably need to be addressed in TTIP e.g. differing approaches to enforcement issues (public vs private enforcement). Such issues may be significant for public procurement in TTIP when it comes to collusion, bid rigging, corruption and fraud.

Build-Operate-Transfer Contracts

Coverage of BOT contracts/public works concessions and other PPPs in TTIP is likely to be an important part of the procurement chapter and one which could bring significant economic benefits to both states and bidders. BOT contracts have been included in the EU-Korea (Art. 9.2) and EU-Singapore (Art. 10.2) agreements, along with TPP on the US side (Art. 15.2.2.). Following the definition in TPP, such contracts are defined as any contractual arrangement for construction for which the consideration for that construction includes the grant to the supplier of "temporary ownership or a right

to control and operate, and demand payment for the use of those works" (Art. 15.1). Including such contracts within TTIP offers a widening of coverage even at the federal level and could therefore be a more realistic target for the EU than other options. Limiting coverage only to BOT contracts may also make the agreement less likely to be challenged by stakeholders. The EU has encountered some political difficulty with its recent extension of the procurement regime to services concessions due to public fears of hidden privatisation and similar problems would be likely to occur with such an extension in TTIP (Craven, 2014: 191). Works concessions such as those covered by BOT contracts have, however, been covered by the EU legal regime for much longer without concerns being raised, making them the safer option for TTIP.

Social and Industrial Benefits

Labour

Labour benefits could be expected under a carefully crafted TTIP procurement chapter. Such benefits could include both greater protections for workers, as well as increased employment. Liberalisation in the procurement market is often seen as damaging to the national workforce, who lose contracts to suppliers from other states with lower labour standards and therefore have a competitive advantage (known as social dumping). It can, however, lead to greater opportunities for work, with a wider range of contracts available to an existing workforce and innovative contracts helping to develop new jobs. In order to develop this benefit and limit the risk of social dumping (and thus making TTIP more attractive to individual US states), TTIP should be designed to enable procuring entities to not only guarantee minimum labour protection standards on contracts (e.g. through limiting participation in the tender process subject to qualification criteria such as limiting participation to those suppliers which meet set labour standards). Additionally, TTIP should promote the development of higher labour standards or improvement of the workforce (e.g. by including labour issues as a criterion for tender evaluation). This could push up employment standards in both the EU and the US, and avoid the "race to the bottom" feared by many.

SMEs

SME development is an important aspect of both the TTIP negotiations and public procurement generally. As noted above, one particular area of contention is the use of procurement policy to promote the development of SMEs, for which the US currently has an exclusion under the GPA. There is, however, conflicting evidence on the economic efficacy of set-asides as a method of developing SMEs (Yukins and Schnitzer, 2015: 114-117). It is possible instead for SME participation in procurement to be promoted through methods which are consistent with the general principle of non-discrimination and one compromise for the EU and US could be to include explicit provisions dealing with non-discriminatory protection of SMEs in TTIP. For example, large public procurement contracts could be split into smaller ones in order to make them more attractive to SMEs. Some similar protection is set out in TPP, suggesting the US might (at least in principle) be amenable to the suggestion. Here, Art. 15.21 of the TPP establishes that any preferential treatment of SMEs must be transparent and sets out a number of methods which could be used to facilitate SME participation without a domestic preference, including providing tender documentation free of charge and conducting procurement electronically. Similar provisions should be included in TTIP with the extra step (absent in TPP) of removal of the set-aside exclusion for the US, providing support for SMEs in a way which is consistent with free trade principles.

Environmental Benefits

The protection of the environment is obviously an important issue. Trade and investment agreements of the past have been criticised for failing to take into account the environmental impact of increased trade and investment activities e.g. greater levels of pollution owing to increased production of goods (Frankel, 2008). The large size of the sector alone would make procurement an excellent target for promoting environmental protection but in addition many sectors are environmentally sensitive, particularly the construction and utilities sectors. There is strong potential for development here using the EU-Singapore Agreement as a model. Art. 10.9.7 allows procuring entities to set out environmental technical specifications using EU recognised eco-labels or green labels existing in Singapore. Additionally, Art. 10.9.10 of the agreement allows the setting of

environmental conditions relating to the performance of the contract. The EU and US could also generally aim to enshrine "green procurement" within the TTIP agreement, by ensuring that the Green Directorate-General is actively involved in the TTIP negotiations in order to facilitate knowledge transfer between Green DG and DG Trade.

Compliance and Enforcement

As highlighted above, one of the major problems in relation to the remedies system for the EU-US relationship at the moment is the EU limitation of the system for certain US suppliers in response to the US SME exclusion. If, as recommended above, the parties can agree on a less protectionist approach to promotion of SMEs such that the exclusion is removed, the domestic review system can apply equally to all suppliers. There remain other areas for improvement, however – as noted above, the powers of the review bodies would benefit from clarification. CETA contains an agreement on the part of the EU to provide access to pre-contractual remedies to Canadian suppliers for 10 years under Annex 19-7, on the basis that during that period Canada and the EU will negotiate "to further develop the quality of remedies", including the issue of pre-contractual remedies (Art. 19.17). A similar arrangement in TTIP is arguably the minimum level which should be agreed. It also provides a valuable opportunity to clarify the powers in relation to concluded contracts (i.e. should the review body be able to set aside a concluded contract or should the state be able to limit remedies to damages in such circumstances?).

The EU Commission's recent review of the remedies system under the EU regime suggests that strengthening the supplier remedies system has led to reduction in breaches (European Commission, 2013a, pp. 117-119). It also appears to improve stakeholders' perception of the effectiveness and transparency of the procurement process (European Commission, 2013b: pp. 109-117). Improving the remedies system for TTIP may bring similar benefits to international procurement disputes.

Additionally, avoidance of WTO-style state-state dispute settlement (as discussed above in section II) should be sought. State-state mechanisms are reliant upon individuals being able to convince their home state to take action against the offending state. This can have wider ramifications for international relations between the two

states in question, and effectively politicises the dispute. Instead, direct access to dispute settlement mechanisms should be granted to aggrieved firms who have encountered problems in procurement procedures when attempting to do business abroad.

CONCLUSION

As has been demonstrated, there is significant inequity in the procurement relationship between the EU and the US at present. The relationship is governed by the WTO GPA agreement, and the statistics demonstrate that the EU is much more open to US firms (as a much higher level of its procurement reaches the GPA threshold). The US is less open to EU firms for a number of reasons, including a US tendency towards protectionist policies and the federalist organisational system of the US (meaning that less procurement meets GPA thresholds). Going into the TTIP procurement negotiations then, it is clear that the EU and US are likely to have very different aims. The EU will surely wish to push for greater access to public procurement in order that its relationship with the US (as regards procurement arrangements at least) becomes much more reciprocal in nature. On the other hand, the US will likely wish to maintain the status quo in its procurement relationship with the EU, in so far as this is possible. At present, US firms enjoy fairly good access to the EU, and at the same time, the US is able to avoid granting the same level of access to incoming EU firms. How then will this chasm between the two negotiating parties be filled? Perhaps the more pertinent question is why it should be filled; why should the EU and US strive to negotiate a true GPA plus chapter on procurement in TTIP?

In short, TTIP could be an important vehicle of change for procurement on a broader level. TTIP has the potential to be an agreement that sets global standards for procurement, the provisions of which could, in turn, be replicated in other bilateral negotiations and/or used as a model for reform of the WTO GPA. Additionally, TTIP represents an important opportunity to examine procurement provisions closely, in order to ensure that they maximise benefits in terms of market access and financial opportunities for firms abroad. Beyond this, procurement provisions could contribute to broader public interest goals, such as the improvement of labour/employment conditions and protection of the environment. This would mirror the

current trend towards trade and investment agreements furthering such public interest goals, as well as traditional economic ends. This trend towards the negotiation of more rounded and inclusive trade and investment agreements is a positive phenomenon; trade and investment policies can and do affect so many different things, such as labour/employment, the environment, infrastructure and human rights for example. It therefore seems sensible to incorporate the regulation of these matters in together, in context (in so far as this is possible). Clearly, for practical reasons, a trade and investment agreement cannot regulate every single issue upon which it may touch, however, consideration of some of these issues in a single treaty/agreement would enable greater integration of different regulatory regimes e.g. trade and the environment, which may in turn lead to increased consistency and better overall regulation.

If the will to negotiate a true GPA plus agreement is there, the US and EU negotiators could make use of the suggestions proposed in the preceding section in order to achieve that goal e.g. BOT contract and remedies provisions (amongst others). This will ensure that the TTIP agreement procurement chapter/provisions work for the benefit both the EU and the US, and promote the agreement as a model for future procurement negotiations.

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