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TTIP Negotiations and Public Procurement: Internal Federalist Tensions and External Risks of Marginalisation

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Abstract

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

Keywords

Agreement on Government Procurement – public procurement – TTIP – World Trade Organization

1 Introduction

Government procurement has thus far received only very limited attention in the scholarly literature on European Union (EU)–United States economic relations.¹ At the same time it is arguably one of the most protected economic sectors in both the EU and the United States and hence was one of the thorniest issues addressed during the negotiations on the Transatlantic Trade and Investment Partnership (TTIP) agreement.

To be sure, both the EU and the United States have made considerable efforts to bring their respective procurement markets in line with reciprocal procurement commitments under

¹ The most notable exception is Richard Craven, 'EU–US Transatlantic Trade and Investment Partnership Agreement: The European Commission's Negotiating Position on Public Procurement' (2014) 3 Public Procurement Law Review 65.

the WTO's Agreement on Government Procurement (GPA), and have included procurement provisions in their respective preferential trade agreements (PTAs) with other trading partners. However, the liberalisation and harmonisation of the transatlantic procurement market could not be more ambiguous or controversial. 'Buy American' rules, as well as local and domestic content requirements in the United States' awarding of public contracts, were key issues on the TTIP negotiating table. At the same time, fundamental institutional aspects of the United States and EU procurement systems impede the progress of procurement negotiations, resulting in federal tensions particularly regarding the coverage of these commitments. If the EU procurement regime has been reformed and harmonised between the Member States (thanks to the new 2014/24/EU and 2014/25/EU Directives), the coverage of US central and sub-central procurement authorities – including states and cities – is very limited and their coverage requires substantial reform even for the authorisation of their negotiating powers.

This article takes stock of this fragmented regulatory framework and aims to deepen our understanding of crucial aspects of the current EU–United States procurement relationship. To this end it explores the TTIP negotiations as well as similar PTAs signed by both trading partners and underlines the implications in terms of the fragmentation of the international discipline of procurement. More precisely, the article analyses how the public procurement provisions negotiated in the TTIP offer potential regulatory transformations compared with the procurement commitments previously negotiated and concluded in PTAs and under the GPA, and, for this reason, how their negotiation also gives rise to increasing domestic and local tensions.

The article proceeds by analysing the TTIP procurement negotiations from three perspectives. First, on the horizontal plane, the article conducts a comparative analysis of, on the one hand, the various international multilateral and preferential procurement regulations currently in place, and on the other, the TTIP negotiations, observing potential differences between existing regulations and the regulatory dynamics portended by TTIP. Second, examining the system vertically, the article aims to disaggregate the different levels of economic governance – from central to sub-central government entities – in transatlantic procurement, thus unravelling its complexity and federalist tensions. Third, oriented systemically, the article highlights some broader implications of the TTIP for public procurement: the intended expansion of the EU–United States procurement commitments portends new scenarios of increased fragmentation between different international procurement regimes – no longer coherent with the WTO procurement regulations – and the greater isolation of developing countries.

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

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

2.1 Procurement Commitments in PTAs and the Framework of the Discussion

On average, public procurement accounts for 15–20% of gross domestic product (GDP) in both developed and developing countries and is one of the least liberalised sectors in the realm of trade policy.² At the multilateral and regional levels, however, considerable efforts have been made to liberalise the public procurement sectors. In the context of the WTO, the GPA has introduced in its signatory parties' domestic procurement regulation the principle of non-discrimination, together with some minimum standards of transparency and fairness in how the procurement activities are conducted.³

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

² Denis Audet, 'The Size of Government Procurement Markets' (2002) 2 OECD Journal on Budgeting 149 <www.oecd.org/gov/budgeting/43506020.pdf> accessed 2 December 2015.

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

⁴ Stephanie J Rickard, 'PTAs and Public Procurement' in Andreas Dür and Manfred Elsig (eds), *Trade Cooperation. The Purpose, Design and Effects of Preferential Trade Agreements* (CUP 2015) 275

One general observation about the landscape of PTAs' procurement regulations is that, of all the PTAs notified by the WTO Secretariat between 2000 and 2010, they generally fall into three identifiable categories of bilateral trade agreements: PTAs with no provisions on government procurement; PTAs with a single or few provisions; and PTAs with a detailed regulation of the government procurement sector.⁵ According to the latest WTO data, 37% of the PTAs in force include no procurement provisions, 35% of the agreements merely have aspirational provisions (simply encouraging further liberalisation of the procurement sector), while 28% of the PTAs provide detailed chapters regulating the conduct of the procurement process.⁶

The literature that has analysed the preferential trade agreements including procurement provisions has thus far concentrated on three main aspects. First there is the level of commitments included in the PTAs' procurement provisions.⁷ The determination of the coverage of the procurement commitments is a crucial reference in evaluating the preferential negotiations on public procurement.⁸ The coverage – specifically the thresholds, the governmental entities included and the goods and construction services listed in the PTA parties' schedules of commitments – is fundamental to the evaluation of the procurement market access commitments that have been negotiated and concluded on a preferential basis. Only the contextual evaluation of the minimum volume of procurement value, the governmental bodies and the lists of goods and services of the procurement activities concerned in the negotiations can provide a balanced evaluation of the market access commitments reached in the PTAs' procurement chapters.⁹

A second crucial variable is the typology of the procurement commitments.¹⁰ To date, various types of provisions have been frequently included in the procurement chapters of PTAs:

⁵ Robert D Anderson and others, 'Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to the GPA Accession?' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement. Challenges and Reform* (CUP 2011) 561.

⁶ *ibid.*

⁷ The New Zealand - Singapore Close Economic Partnership Agreement has been described as a bilateral agreement with a very ambitious procurement chapter aiming at creating a the Single Procurement Market in the two countries. Bernard Hoekman and Simon Evenett, 'International Discipline on Government Procurement', Arvid Lukauskas, Robert M Stern and Gianni Zanini (eds), *Handbook of Trade Policy for Development* (OUP 2013) 851.

⁸ For a more comprehensive analysis of the issue of the coverage of public procurement in the international negotiations and its relevance in the GPA, see Robert D Anderson and Kodjo Osei-Lah, 'The Coverage Negotiations Under the Agreement on Government Procurement: Context, Mandate, Process and Prospects' in Arrowsmith and Anderson (n 4) 149.

⁹ Anderson and others (n 5).

¹⁰ Steve Woolcock, 'Policy Diffusion in Public Procurement: The Role of Free Trade Agreements' (2013) 18 *International Negotiation* 153.

for instance, non-discrimination provisions guaranteeing national treatment and most-favoured-nation treatment, procedural rules similar to the GPA, requirements for the implementation of bid challenge procedures and dispute settlement procedures, regulation of offsets, commitments on further negotiations, and accession to the GPA.

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

2.2 The WTO Government Procurement Agreement and Its Relevance to PTAs

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

Research has shown that there is a clear correlation between the presence of detailed procurement chapters in PTAs and the GPA membership of the parties to the PTAs. The PTAs that include the most detailed provisions on the conduct of the procurement process can rely on there being at least one GPA member between the contracting parties.¹¹ Further, the 1994 WTO Government Procurement Agreement, the Revised Agreement, its preparatory drafts or the negotiating offers put forward by the strongest GPA parties are frequently used as models for the negotiation of the detailed procurement provisions in PTAs, between both GPA and non-GPA parties. Moreover, in the case of detailed procedural provisions, on average the PTAs concluded between 2000 and 2010 tend to incorporate and explicitly refer to the procedural discipline already agreed in international procurement agreements (essentially the 1994 GPA text) in order to avoid conflicting obligations.¹²

Recent OECD data shows that, overall, the level of procurement commitment reached in PTAs does not excessively diverge from the regulatory level reached in the GPA, particularly in terms of the coverage of entities and thresholds.¹³ In general, non-GPA parties have achieved in their PTAs a comparable level of market access commitments and a harmonisation of the domestic procurement legislation to GPA standards – and, in the case of procurement liberalisation in Latin American PTAs and in services coverage commitments, with remarkable

¹¹ Robert D Anderson and Anna Caroline Müller, 'The Revised WTO Agreement on Government Procurement as an Emerging Pillar of the World Trading System: Recent Developments' (2016) 7 Trade, Law and Development 42.

¹² Asako Ueno, 'Multilateralising Regionalism on Government Procurement' OECD Trade Policy Paper 151 (2011) <<http://dx.doi.org/10.1787/5k4618vvq2np-en>> accessed 12 November 2015.

¹³ *ibid.*

results.¹⁴

In the context of the analysis of the convergence between PTAs and GPA procurement commitments, the conclusion of the renegotiation on the Revised Text of the GPA represents an important point of reference. The renegotiation process started in 1994 pursuant to GPA Article XXIV:7(b), but it could only be concluded in December 2011.¹⁵ The adoption of the Ministerial Decision GPA/113 of 2 April 2012, consolidating the lists of commitments and the revised GPA text, represents a milestone in the development of the regulatory framework of public procurement at the multilateral level. Two aspects in the revised GPA text assume crucial importance in this discussion. One is the substantial increase in coverage in the revised schedules of commitments, with central, local and sub-national government authorities being now included in the GPA schedules of commitments by many parties and in particular the EU.¹⁶ The other is the harmonisation of the wording of the WTO Agreement with other international instruments of procurement regulation: the GPA Revised Text recognises the importance of increasing clarity and flexibility in international procurement regulation, following the wording and the flexibilities of provisions included in the UNCITRAL Model Law. The latter will be discussed in more detail below.

2.3 International Regulation of Public Procurement Outside the GPA Agreement

With regards to the possible multilateralisation and harmonisation of the preferential and plurilateral discipline of public procurement, a crucial role has been played so far by the UNCITRAL Model Law on Procurement of Goods, Construction and Services, adopted in 1994 and reformed in 2011.

The UNCITRAL Model Law provides a highly articulate template supporting countries in modernising and improving their national procurement systems, oriented to the achievement of efficiency and competition.¹⁷ The Model Law is not a binding agreement but a traditional soft law instrument, which the parties are free to follow, fully or partially, in reforming national

¹⁴ Robert D Anderson and others, 'The Relationship Between Services Trade and Government Procurement Commitments: Insights from Relevant WTO Agreements and Recent RTAs' WTO Working Paper ERSD-2014-21 (2014) <www.wto.org/english/res_e/reser_e/ersd201421_e.pdf> accessed 29 June 2016.

¹⁵ Robert D Anderson, 'The WTO Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance' (2010) 1(8) Law in Transition Online <www.ebrd.com/downloads/research/news/lit102.pdf> accessed 4 November 2015.

¹⁶ Robert D Anderson, 'The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement: What It Means for the Agreement and for the World Economy' (2012) 21 Public Procurement Law Review 83.

¹⁷ Caroline Nicholas, 'A Critical Evaluation of the Revised UNCITRAL Model Law Provisions on Regulating Framework Agreements' (2012) 21(2) Public Procurement Law Review 19.

legislation.¹⁸ For this reason the UNCITRAL Model Law represents a powerful tool in gradually reforming national procurement regulation, suggesting modern and efficient procurement regulatory solutions and offering great flexibility when it comes to the choice of possible procurement methods. Thus, the Model Law is widely recognised as a ‘global standard’ for good governance in the regulation of government procurement.¹⁹

Because it is a non-binding standard framework for the evaluation and modernisation of national procurement legislation, the UNCITRAL Model Law is frequently used as the basis for domestic procurement reforms in many transitioning economies and in the former Soviet Republics and CIS countries.²⁰ More recently, the UNCITRAL Model Law has been at the centre of the modernisation of domestic procurement systems in developing countries and African countries, often invoked as a condition by major international donor institutions such as the World Bank.

Parallel to the WTO renegotiations on government procurement, the UNCITRAL Working Group on Procurement simultaneously successfully finalised the reform of the Model Law in 2011.²¹ The convergence in the wording and regulation offered by the 2011 UNCITRAL Model Law and the 2012 Revised GPA text is an important indication of a process of progressive harmonisation of the procurement regulations between the different international instruments of procurement negotiations.²² Moreover, the increased coherence between these two international disciplines of public procurement has also opened new scenarios for future accessions to the GPA and the possible extension of its limited membership beyond the plurilateral status of the GPA in the WTO architecture.

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

The overview in the previous section of the various preferential and international instruments

¹⁸ John Linarelli, ‘The WTO Agreement on Government Procurement and the UNCITRAL Model Procurement Law: A View from Outside the Region’ (2006) 1 *Asian Journal of WTO & International Health Law and Policy* 317.

¹⁹ Sue Arrowsmith, ‘Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard’ (2004) 53 *The International and Comparative Law Quarterly* 17.

²⁰ Maria Anna Corvaglia, ‘Accession of Post-Soviet Republics to the WTO Government Procurement Agreement: Commitments and Expectations for Developing Countries’ (in Russian) (2014) 7 *ICTSD Мосты* 8 <www.ictsd.org/sites/default/files/review/Mosty_October4.pdf> accessed 14.11.2015.

²¹ Caroline Nicholas, ‘The 2011 UNCITRAL Model Law on Public Procurement’ (2012) 21(3) *Public Procurement Law Review* 111.

²² Caroline Nicholas, ‘Work of UNCITRAL on Government Procurement: Purpose, Objectives and Complementarity with the Work of the WTO’ in Arrowsmith and Anderson (n 4) 746.

of public procurement revealed that the TTIP negotiations on public procurement started in a fairly coherent and harmonised regulatory context. The procurement chapters included in the PTAs concluded up to 2010 were negotiated on the basis of the GPA. In this framework, PTAs work as vehicles for the diffusion of the GPA standards of transparency and competitiveness as well as for the harmonisation of commitments and coverage in the liberalisation of the international procurement markets. Moreover, the parallel reform and convergence of the GPA and the UNCITRAL Model Law cleared the path for a possible extension of the GPA discipline of public procurement outside its hitherto limited plurilateral membership.²³

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

3.1 Regulatory Asymmetry Between the EU and US Internal Public Procurement

Regulations

Within the range of the various international instruments of procurement regulation – at international and regional level – the EU regulation of public procurement displays some unique characteristics.

First, the EU – as a model of regional trade integration at its most advanced – paradoxically belongs to the category of PTAs that do not address the field of government procurement at all (corresponding to around 37% of the PTAs registered in the WTO). It is worth noting that EU treaties do not contain any distinct public procurement provisions.²⁴ The specific EU regulation of public procurement – probably the most evolved and coherent regional regulatory framework of procurement – has been developed only through secondary EU legal sources. Since the 1970s, EU Directives have progressively shaped, integrated and reformed the regulatory framework of public procurement in the European context.²⁵

Second, the EU procurement regime represents an extremely coherent set of rules

²³ Robert D Anderson and Anna Caroline Müller, ‘Competition Policy and Poverty Reduction: A Holistic Approach’ World Trade Organization Staff Working Paper ERSD-2013-02 (2013) <www.wto.org/english/res_e/reser_e/ersd201302_e.pdf> accessed 30 October 2015.

²⁴ Without specifically addressing public procurement, the provisions of the Treaty on the Functioning of the European Union (TFEU) concerning the free movements of goods (Article 28 TFEU), the freedom of establishment (Article 43 TFEU) and the freedom to provide services (Article 49 TFEU), represent the core documentation concerning the award of public contracts in the EU. For a more extensive overview of the EU procurement regime, see Christopher Bovis, *EU Public Procurement Law* (Edward Elgar 2012).

²⁵ For a more in-depth analysis, Sue Arrowsmith and Peter Kunzlik, ‘EC Regulation of Public Procurement’ in edited by Sue Arrowsmith and Peter Kunzlik, *Social and Environmental Policies in EC Procurement Law* (CUP 2009) 55.

founded on the regulation of the economic freedoms of the EU's internal market, recently subject to an extensive reform. The current EU procurement regime is composed of two Directives (namely Directive 2014/24/EU on public procurement and Directive 2014/245/EU on procurement in the water, energy, transport and postal services sectors).²⁶ This regulatory regime aims to guarantee the cohesion of public procurement across the Member States and in the Common Market through the establishment of the prohibition of discrimination, the principle of transparency and the removal of barriers to access.²⁷

Third, in terms of implementation, the EU procurement framework represents an exceptionally coherent regulatory system. As the reformed 2014 EU procurement Directives had to be fully transposed by all the EU Member States by April 2016, the Member States progressively harmonised their domestic regulation of procurement activities above the EU thresholds and adopted the same regulatory procurement instruments covering supply, services and works contracts.²⁸

Unfortunately, a comparable level of harmonisation does not exist in the US internal procurement system, either at the federal or state level. If the Federal Acquisition Regulation²⁹ represents the main regulatory reference for the acquisition and procurement activities of the US Federal Government, the 50 US States each have their own public procurement regulations in place.³⁰ The freedom of the US States to adopt preferential and distinctive procurement practices has also been confirmed in the jurisprudence of the US Supreme Court, particularly *Hughes v. Alexandria Scrap Corp* in 1976, which equated the States with private actors procuring goods and services on the market.³¹

Moreover, the Federal Acquisition Regulation is applicable only when the state authorities are included in the schedules of commitments under the GPA. However, the

²⁶ Roberto Caranta, 'The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works' (2015) 52 *Common Market Law Review* 391.

²⁷ Sue Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space For Commercial and Horizontal Procurement Policies' (2012) 14 *Cambridge Yearbook of European Legal Studies* 1.

²⁸ European Commission, Internal Market and Service, 'Public Procurement Legislation: Delivering Results: Summary of Evaluation Report' Staff Working Paper SEC(2011) (2011) <http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf> accessed 25 November 2015.

²⁹ 'Federal Acquisition Regulation' is the wording of Chapter 1, Title 48 of the US Code of Federal Regulations <www.gpo.gov/fdsys/pkg/CFR-2015-title48-vol1/pdf/CFR-2015-title48-vol1-chap1.pdf> accessed 15 November 2015.

³⁰ Danielle M Conway, *State and Local Government Procurement* (American Bar Association 2012).

³¹ Leif Hoffmann, 'Land of the Free, Home of the (Un)regulated: Public Procurement in the EU and the USA' (2010) *American Political Science Association Annual Meeting Paper* 1642401 <<http://ssrn.com/abstract=1642401>> accessed 15 November 2015.

inclusion of US central and sub-central government entities under the GPA is very limited: only 37 US States are bound by GPA commitments,³² and only in their executive branch agencies or specific state departments. Construction services are very often excluded from the GPA coverage, and many other restrictions apply to the procurement activities covered, such as the ‘Buy America’ requirements imposed on transit infrastructure funded by federal grants.³³

3.2 External Procurement Regulations and the Precedents of the TTIP Procurement

Chapter: Korea and CETA

To complete the overview of the regulatory framework in which the TTIP negotiations began, it is important to integrate the internal discipline of public procurement with the EU’s and US’s external regulations of public procurement. Both transatlantic parties have a consolidated tradition of including public procurement in the negotiation of their preferential agreements. Thus, after the conclusion of the NAFTA, almost all the US preferential agreements contain substantive public procurement chapters,³⁴ and, since the adoption in 2006 of the strategy ‘Global Europe: Competing in the World’, public procurement has been pursued as a priority in the EU external trade policy.³⁵ More recently, the conclusion of comprehensive PTAs by the EU and the United States paved the way for the launch of the ambitious TTIP negotiations on public procurement. The most relevant agreements are (for the US) the Korea–United States Agreement (KORUS) and (for the EU) the Korea–EU Agreement (KOREU) and the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada.³⁶

It is interesting to observe that, in many respects, the KORUS and KOREU and their negotiating outcomes in the specific field of public procurement served as testing grounds for

³² The US States not included in the GPA coverage are Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Virginia and West Virginia.

³³ Jean Heilman Grier, ‘State Procurement Restrictions in Agreements’ Perspective on Trade (14 October 2014) <<http://trade.djaghe.com/?p=906>> accessed 29 June 2016.

³⁴ Gary Clyde Hufbauer and Tyler Moran, ‘Government Procurement in US Trade Agreements’ Robert Schuman Centre for Advanced Studies Research Paper RSCAS PP 2015/09 (2015) <http://cadmus.eui.eu/bitstream/handle/1814/37320/RSCAS_PP_2015_09.pdf?sequence=1> accessed 24.06.2016.

³⁵ The ‘Global Europe’ strategy describes public procurement as “an area of significant untapped potential for EU exporters. EU companies are world leaders in areas such as transport equipment, public works and utilities. But they face discriminatory practices in almost all our trading partners, which effectively close off exporting opportunities. This is probably the biggest trade sector remaining sheltered from multilateral disciplines.” Commission of the European Communities, ‘Global Europe: Competing in the World’ COM(2006) 567 final (2006) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0567:FIN:en:PDF>> accessed 24.06.2016.

³⁶ Jeffrey J Schott and Cathleen Cimino, ‘Crafting a Transatlantic Trade and Investment Partnership: What Can Be Done’ (2013) Policy Brief 13 <www.iie.com/publications/pb/pb13-8.pdf> accessed 14 November 2015.

possible future TTIP negotiating dynamics in procurement liberalisation. With reference to the WTO, Korea has been a GPA signatory party since 1997 and both the agreements signed with the EU and the United States are grounded in the WTO regulatory framework of public procurement. Both the KOREU and KORUS incorporate the GPA standards of competition and transparency and, at the same time, both agreements include some ‘GPA+’ commitments.

In terms of coverage, the KOREU substantially increased the coverage of public contracts and public work concessions of many central and sub-national procuring authorities in Korea and the EU, alongside the extension of the coverage beyond conventional goods, services and construction compared with the respective GPA Commitments.³⁷ However, any similar extension on the GPA standards achieved by the KORUS was limited to thresholds: even though it was at the centre of Korea’s negotiating requests, the procurement of federal authorities and government-owned enterprises was prevented from being included in the KORUS coverage by strong US opposition.³⁸

The EU’s active negotiating position in enabling the liberalisation of public procurement beyond central governmental authorities was also demonstrated during the negotiation of the CETA concluded in September 2014. The EU’s negotiating objective was to secure the coverage of sub-federal entities, provinces and local territories, because Canada, similar to the US, had only included federal procurement in the GPA. It also excluded crown corporations – quasi-governmental bodies that represent a peculiar characteristic and a significant economic percentage of the Canadian procurement system.³⁹ Procurement assumed an important role in the EU–Canada negotiations and the inclusion of the Canadian Provinces in any agreement on procurement was one of the EU’s conditions for opening the negotiations in 2010. In the CETA, the EU was therefore able to negotiate an extension of coverage to include Provinces and Territories as well as federal- and provincial-level crown corporations, facilitated by the adoption of the Agreement on Internal Trade (AIT) extending the non-discrimination treatment to the procurement activities of the province suppliers in Canada.⁴⁰

It is worth noting that the preferential agreements concluded with Canada represent far-

³⁷ Sangeeta Khorana and Maria Garcia, ‘Procurement Liberalization Diffusion in EU Agreements: Signalling Stewardship?’ (2014) 48 *Journal of World Trade* 481.

³⁸ Hong-Sik (Justin) Chung, ‘Government Procurement in the United States–Korea Free Trade Agreement: Great Opportunities for Both Sides?’ (2014) 34 *Nw JILB* 299.

³⁹ John-Justin McMurtry, ‘The Political Economy of Procurement’ (2014) 40 *Canadian Public Policy* 26.

⁴⁰ European Parliament Directorate General for Internal Policies, ‘TTIP: Opportunities and Challenges in the Area of Public Procurement’ IP/A/IMCO/2014-14 (2015) <[www.europarl.europa.eu/RegData/etudes/IDAN/2015/542226/IPOL_IDA\(2015\)542226_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/542226/IPOL_IDA(2015)542226_EN.pdf)> accessed 3 December 2015.

reaching models of preferential procurement regulation. The cross-border liberalisation of the procurement sector of the Canadian provinces, in fact, was included for the first time in the 2010 Canada–United States Agreement on Government Procurement, in exchange for substantial extension of sub-central coverage and the non-application of the 2009 American Recovery and Reinvestment Act on manufactured goods, steel and iron coming from Canada.⁴¹

4 TTIP and Public Procurement: Economic Opportunities and Institutional Challenges

4.1 The Economic Relevance of Public Procurement in the TTIP Dynamic

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

The size and relative openness of the EU and US procurement markets have progressively and recently attracted the attention of economic research.⁴² Even though the EU and the United States are both signatory parties of the GPA, the difference between their commitments under the GPA is extremely significant. According to an evaluation by the EU Commission, 95% of EU procurement activities are covered by the GPA rules of transparency and non-discrimination, while only 32% of the US procurement is bound by the WTO discipline because only 37 US States agreed to be included in the annexes of the GPA.⁴³ In terms of reciprocal market access opportunities, the difference between the openness of the procurement markets is even more striking: only 3.2% of the US public procurement market appears to be open to EU suppliers, while the EU has offered open access to around 15% of its public procurement's market opportunities to US suppliers.⁴⁴

Outside the respective GPA commitments, the US's 'Buy American' provisions – the most famous example is the American Recovery and Reinvestment Act, used as a strategic

⁴¹ Steve Woolcock and Jean Heilman Grier, 'Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations' Centre for European Policy Studies Special Report 100 (2015) <<https://www.ceps.eu/system/files/SR100PublicProcurementandTTIP.pdf>> accessed 28 November 2015.

⁴² Partick Messerlin and Sébastien Miroudot, 'EU Public Procurement Markets: How Open Are They?' (2012) <http://gem.sciences-po.fr/content/publications/pdf/Miroudot-Messerlin-EU_public_procurement072012.pdf> accessed 29 June 2016.

⁴³ See COM, SWD 57, 2012, as reported in Lionel Fontagné, Julien Gourdon and Sébastien Jean, 'Transatlantic Trade: Whither Partnership, Which Economic Consequences?', CEPII Policy Brief 2013-01 (2013) <www.cepii.fr/CEPII/en/publications/pb/abstract.asp?NoDoc=6113> accessed 3 December 2015.

⁴⁴ European Commission, 'Trade and Investment Barriers Report 2011: Engaging Our Strategic Economic Partners on Improved Market Access: Priorities for Action on Breaking Down Barriers to Trade', COM(2011)114, s 3.1 (2011) <http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147629.pdf> accessed 3 December 2015.

political economy instrument during periods of financial crisis – represents the most significant barrier to trade for EU producers and suppliers in the procurement field.

4.2 The TTIP Negotiating Agenda on Public Procurement and Resulting Difficulties

As stated above, public procurement was a crucial negotiating issue in the TTIP negotiations. From the outset the EU had a clear objective, as developed in the US–EU High Level Working Group (HLWG) on Jobs and Growth, to consolidate the TTIP negotiating mandate to ‘enhance business opportunities through substantially improved access to government procurement opportunities at all levels of government on the basis of national treatment’. During all the rounds of discussion and mediation, even up to the latest negotiation rounds (the 14th round of negotiations on 11–15 July October 2016⁴⁵ and the 15th round on 03–07 October 2016⁴⁶), public procurement proved to be a consistently central issue.

From the opening of the TTIP talks, specific discussion about procurement market access during the negotiating rounds was driven by the EU’s three negotiating objectives.⁴⁷ The first of the EU’s requests was the abolition of restrictions in the United States that affect the market access of European suppliers (and their goods and services) and, in particular, the elimination of US domestic preferences in the procurement of federally funded infrastructure. Second, the expansion of market access commitments at both federal and state levels. Third, the facilitation of access to procurement markets for small and medium-sized enterprises.⁴⁸

The specific coverage commitments raised in the discussions seemed to go beyond the extent of the current US commitments under the GPA. As emerged from the HLWG initial document, the extension of the national treatment obligation to sub-federal, state and city level represents already a consistent increase on the GPA commitments. And, as reported in 2009 before the start of the TTIP talks (and mentioned above), only 3.2% of the US public procurement market is currently open to EU suppliers.⁴⁹

⁴⁵ European Commission, ‘Report of the 14th Round of Negotiations for the Transatlantic Trade and Investment Partnership’ (July 2016) <http://trade.ec.europa.eu/doclib/docs/2016/august/tradoc_154837.pdf> accessed 26 September 2017.

⁴⁶ European Commission, ‘Report of the 15th Round of Negotiations for the Transatlantic Trade and Investment Partnership’ (October 2016) <http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_155027.pdf> accessed 26 September 2017.

⁴⁷ European Commission, ‘EU–US Transatlantic Trade and Investment Partnership: Public Procurement: Initial EU Position Paper’ (2013) <http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151623.pdf> accessed 29 June 2016.

⁴⁸ European Commission, ‘Note for the Attention of the Trade Policy Committee: Transatlantic Trade and Investment Partnership (TTIP)’ 238/13 (2013) <www.iatp.org/files/TPC-TTIP-non-Papers-for-1st-Round-Negotiations-June20-2013.pdf> accessed 5 December 2015.

⁴⁹ European Commission (n 43).

Both the EU and the United States reported that in all the negotiating rounds, the starting point for the discussions around the table was the text of the GPA, to which both the EU and the United States are signatories. However, the clear intention of both parties was to build on the GPA rules and push for further liberalisation regarding the coverage of the reciprocal commitments. During the latest negotiating rounds, alongside the issue of coverage, the EU raised some questions that are even more clearly ‘GPA+’. The most evident example was the EU’s request for discussion on including environmental and social considerations in procurement procedures. And it is worth noting in this respect that the use of public procurement for socio-environmental purposes was one of the main features of the 2014 reform of internal public procurement, which resulted in Directive 2014/24/EU on the public procurement sector and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.⁵⁰

With respect to the inclusion of non-economic considerations in public procurement regulations, the major difference between the TTIP negotiating agenda and the GPA Revised Text was the equal treatment of environmental and social policy objectives. One of the most acclaimed changes in the Revised GPA is its acknowledgement of the growing practice of the environmental use of public procurement.⁵¹ Article X.6 of the Revised GPA allows the procuring entities of the contracting parties to specifically ‘prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment’. While there is a clear textual reference to the implementation of environmental policy objectives, the instrumental use of public procurement for social and labour policy objectives is not explicitly mentioned in the Revised GPA regulation and is only included in the Future Work Program annexed to the Agreement.⁵² Contrary to the approach taken in the GPA, the TTIP negotiations seemed to move in the direction of treating environmental and social considerations in public procurement regulations on an equal footing, setting a significant precedent of divergence from the WTO context, where considerations regarding social policies and in particular labour rights have traditionally been treated with extreme caution.⁵³

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

⁵⁰ Caranta (n 25) 396-403.

⁵¹ Sue Arrowsmith, ‘The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions’ in Arrowsmith and Anderson (n 4) 285.

⁵² Anderson (n 10) 32-40.

⁵³ Christine Kaufmann, *Globalisation and Labour Rights. The Conflict Between Core Labour Rights and International Economic Law* (Hart Publishing 2007).

In an historical perspective, the TTIP negotiations can be interpreted as a new chapter in a longstanding institutional dialogue between the EU and the United States on public procurement.⁵⁴ The institutional analysis of the recent transatlantic negotiations, and particularly the specific area of public procurement, necessarily implies important considerations with regards to legitimacy, subsidiarity and domestic participation and, in broader terms, to federalism.⁵⁵

As was explored earlier, the transatlantic dialogue between the legal and constitutional regimes of the EU and the United States has a very broad scope, embracing crucial trade and investment issues and involving different levels of trade and investment governance. Serious concerns about transparency and democratic legitimacy were raised at various stages of these ambitious transformative transatlantic negotiations.⁵⁶ From a more institutional perspective, a crucial aspect of this transatlantic dialogue consists in the involvement of the EU and US parliamentary bodies in both the negotiations and the ratification of the future transatlantic trade deal. The parliamentary organs' lack of democratic involvement was at the centre of strong criticism of the deficiency of democratic oversight in the TTIP negotiations.⁵⁷ Yet both the European Parliament and US Congress seem to have the political and legal instruments to affect and block the developments of the transatlantic negotiations 'in a fairly protectionist fashion' and on the basis of mere domestic and national interest.⁵⁸

On the European side, following the provisions set in Articles 207 and 218 in the Treaty on the Functioning of the European Union (TFEU), TTIP would require the approval of the European Parliament and European Council to ratify the final text.⁵⁹ However, the EU negotiating position on the coverage of procurement liberalisation seemed strictly linked to the coherence and harmonisation of internal procurement regulation in the European territory, used as an important instrument to enhance the cohesion of the internal common market.⁶⁰ The US

⁵⁴ Elaine Fahey and Deirdre Curtin, *A Transatlantic Community of Law. Legal Perspectives on the Relationship between the EU and US Legal Orders* (CUP 2014).

⁵⁵ For a broader overview of the concept of federalism, as adopted in this article, see Robert Schütze, *Foreign Affairs and the EU Constitution. Selected Essays* (CUP 2014) 11-44.

⁵⁶ Ernst-Ulrich Petersmann, 'Citizens and Transatlantic Free Trade Agreements: How to Reconcile American "Constitutional Nationalism" with European "Multilevel Constitutionalism"?' *EUI Working Paper LAW (2016)* <http://cadmus.eui.eu/handle/1814/41345> accessed 09 February 2018.

⁵⁷ Ernst-Ulrich Petersmann, 'Transformative Transatlantic Free Trade Agreements Without Rights and Remedies of Citizens?' (2015) 18 *JIEL* 579.

⁵⁸ Davor Jančić, 'Transatlantic Regulatory Interdependence, Law and Governance: The Evolving Roles of the EU and US Legislatures' (2015) 17 *Cambridge Yearbook of European Legal Studies* 334.

⁵⁹ Richard Parker and Alberto Alemanno, 'Towards Effective Regulatory Cooperation Under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems' (2014) <<http://ec.europa.eu/trade/policy/in-focus/ttip/resources>> accessed 26 November 2015.

⁶⁰ Arrowsmith (n 26) 20-22.

congressional approval appears more problematic in respect of public procurement negotiations: as an executive agreement, the majority in both Houses of Congress have to agree. Moreover, in June 2015 the US Congress granted to the US president the Trade Promotion Authority for the conduct of TTIP under specific guidelines and negotiating objectives.⁶¹ With regards to procurement regulatory practices, Congress asked for increased transparency in developing guidelines, rules, regulations and laws for government procurement. Yet even in a context of increased transparency in procurement negotiations, it cannot be denied that the biggest challenge would lie in garnering a congressional majority on the abolition of the ‘Buy American’ provisions and de facto preference for domestic producers in the award of federal contracts.

What made the US Congress’s approval of the procurement negotiations within TTIP even more uncertain is the political difficulty in persuading state- and other sub-federal-level procurement entities to agree on the extension of the coverage of the transatlantic procurement liberalisation.⁶² As was shown in the conclusion of the EU–Canada agreement, the role of sub-federal levels of government has acquired an increasing importance in the development and conclusion of trade negotiation, particularly in the field of public procurement.

Usually disregarded in analyses of the negotiation of international trade agreements, the role of provincial and territorial governments proved to be a crucial variable in achieving the final agreement on the text of the CETA, mainly based on the regular bilateral consultation conducted between the federal government and the Canadian provinces.⁶³ A formal institutional mechanism of cooperation under the Agreement on Internal Trade (AIT) was established to foster the intergovernmental cooperation between the Canadian government, provinces and local territories and to develop a coherent negotiating position.⁶⁴ Further, thanks to the AIT system, it is particularly interesting to note that the (federal) Canadian Government forced some concessions from the EU in crucial industrial sectors (namely dairy and beef) – important at a provincial level – under the threat of the non-implementation of the CETA procurement provisions in the provinces of Ontario and Quebec, the largest procurement market for EU firms in Canada.⁶⁵

⁶¹ US Senate, S.995: Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (HR 1890/S 995).

⁶² Woolcock and Heilman Grier (n 40).

⁶³ Christopher J Kukucha, ‘Canadian Sub-Federal Governments and CETA: Overarching Themes and Future Trends’ (2013) 68 *International Journal: Canada’s Journal of Global Policy Analysis* 528.

⁶⁴ Bernard Hoekman, ‘Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization’ (2015) 18 *JIEL* 609.

⁶⁵ Patrick Fafard and Patrick Leblond, ‘Closing the Deal: What Role for the Provinces in the Final Stages of the CETA Negotiations?’ (2013) 68 *International Journal: Canada’s Journal of Global Policy Analysis* 553.

It is very likely that similar political dynamics would have played out in the TTIP procurement chapter negotiations, and with even fiercer political tensions given the lack of a formal federal type of trade coordination between the federal and state authorities.

4.4 External Implications of the TTIP Negotiations on Third Countries

Having examined in detail what the central issues in the TTIP negotiations of public procurement were, and having explored the main institutional difficulties faced by the EU and the US, we must now address the possible implications of these negotiations external to the TTIP negotiating parties. Even without knowing the ultimate outcome of the suspended TTIP negotiations it is possible to envisage at least two major risks for third countries, alongside more systemic implications for the international regulatory framework of public procurement.

Apart from the political challenges and strategic considerations in terms of the shift of regulatory trade powers (issues that lie outside the scope of this article), it is clear that a future procurement chapter in the TTIP may carry the risk of causing significant negative implications for third parties. Regardless of the efforts taken by the EU Commission to downplay the impact of the negotiations on developing countries,⁶⁶ it cannot be denied that the first and most likely consequence of a TTIP procurement chapter can be measured in terms of its direct economic discriminatory effect. In line with the TTIP objectives on market access, future TTIP commitments on public procurement would have the effect of discriminating against the products and services originating from countries outside the transatlantic partnership, to be assessed on the basis of the rules of origin set in the future agreement.⁶⁷

However, the impact of the future TTIP procurement chapter's discrimination against third parties must be evaluated taking into consideration a wide range of other factors as well, including the existence of preferential agreements between TTIP parties and other countries, the extension of the preferential procurement discipline between the parties, the national legal framework of public procurement in the external countries and the legal capacity for these countries to conform with the procurement regulatory standards adopted in the TTIP. All these variables seem to suggest that the impact of the transatlantic partnership would manifest itself not only in economically discriminating against non-TTIP parties, but would also involve a

⁶⁶ European Commission, TTIP and Developing Countries, Speech by Cecilia Malmström (22 June 2016) <http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154669.pdf> accessed 23 January 2018.

⁶⁷ Joseph Francois, Bernard Hoekman and Doug Nelson, 'TTIP, Regulatory Diversion and Third Countries' in M Sait Akman, Simon J Evenett and Patrick Low (eds), *Catalyst? TTIP's Impact on the Rest* (CEPR Press 2015) 19–26.

considerable risk of increasingly marginalising developing countries within the international regulatory architecture of public procurement, due to the reluctance of developing countries to join preferential and multilateral instruments of public procurement regulation, as in the case of the GPA.⁶⁸

First, as was seen in the WTO data on PTAs between 2000 and 2010 above, public procurement was deliberately excluded from the preferential agreements signed by developing countries.⁶⁹ This, however, is not an incontrovertible trend and it could be changed in the future. As the EU has emerged as a ‘global regulator’ exporting its regulatory standards through preferential trade agreements, it is possible to speculate that it will try to export its approach to public procurement regulation in the PTAs to be negotiated after the TTIP with third parties. As proven in the emerging ‘new generation’ of EU agreements with Canada, South Korea and Singapore, the EU has constantly exported, through bilateral PTAs, the most stringent EU regulatory standards as a means of liberalising trade, for instance as regards competition, environmental and labour market regulation.⁷⁰ Public procurement has been a crucial component of the conclusion of the recent bilateral agreements with Korea, CARICOM and Central America, suggesting the development of a ‘model of procurement liberalisation’ to be included also in the EU’s current negotiations with India, Vietnam, Malaysia, Japan and Thailand.⁷¹

Second, developing countries have not only been hesitant to conclude preferential trade agreements with detailed procurement disciplines, they have been particularly reluctant to comply with the WTO discipline of public procurement. Regardless of the efforts during the GPA’s renegotiation to create incentives and flexibilities in the accession, the GPA is still perceived as a developed countries’ ‘club’ with no developing or emerging economies in its membership.⁷² In this context, if the TTIP should manage to reach even higher standards of non-discrimination and transparency in the liberalisation and integration of the public procurement market, the risk of opening up an even larger regulatory gap between TTIP parties and developing countries is particularly significant.

⁶⁸ For a complete list of the parties and observers to the GPA see World Trade Organization, ‘Parties, Observers and Accessions’ <www.wto.org/english/tratop_e/gproc_e/memobs_e.htm> accessed 21 June 2016.

⁶⁹ Anderson and others (n 5) 578.

⁷⁰ Alasdair R Young, ‘Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-ordination in the EU’s “New Generation” Preferential Trade Agreements’ (2015) 22(9) *Journal of European Public Policy* 1253.

⁷¹ Khorana and Garcia (n 36).

⁷² Robert D Anderson and Kodjo Osei-Lah, ‘Forging a More Global Procurement Market: Issues Concerning Accession to the Agreement on Government Procurement’ in Arrowsmith and Anderson (n 4) 61-89.

However, a few encouraging signs about GPA accession have recently emerged, significantly from some BRICS economies. While Brazil and South Africa are still yet to make any strides towards acceding to the GPA, Russia⁷³ and India⁷⁴ have recently gained the status of GPA Observers, opening the possibility of future accession. Unfortunately it is very difficult to predict emerging countries' chances of accession as the process has proven to be excessively lengthy, requiring the alignment of national procurement systems to the GPA regulatory standards of competition and transparency.⁷⁵ China's GPA accession process is emblematic: beginning in 2007, it is still blocked on issues of coverage and national compliance after various revised offers.⁷⁶

The lack of involvement in preferential and multilateral agreements regulating public procurement can be interpreted in the light of the regulatory difference that is emerging between GPA members and developing countries. This regulatory gap between, on one hand, the procurement regulation in BRICS and developing countries and, on the other, the high regulatory standards adopted in developed countries, could be mitigated by the incremental diffusion of alternative models of procurement governance. So far, as was explained above, the UNCITRAL Model Law has served as an instrument to gradually reform the national procurement regulations of developing countries and to progressively disperse minimum international standards of procurement regulation. And the renegotiation of the GPA has shown a tendency towards convergence in terms of the wordings and regulations of these two international agreements.

If the TTIP imposes a new model of procurement regulation, different from or even more stringent than the regulatory standards shared by the GPA and the UNCITRAL Model Law, the risk of the fragmentation of different international instruments of procurement regulation, and emerging and developing economies' regulatory marginalisation, becomes very

⁷³ The Russian Federation became an official Observer to the GPA in May 2013 following its commitment, as set out in the Working Party report of its accession to the WTO, to launch negotiations to join the GPA. **WTO, Report of The Working Party on The Accession of The Russian Federation To The World Trade Organization, WT/ACC/RUS/70 (17 November 2011) para 1143**: 'The representative of the Russian Federation ... confirmed that the Russian Federation would request observership in the WTO Agreement on Government Procurement at the time of its accession to the WTO and would initiate negotiations for membership in the WTO Agreement on Government Procurement by tabling an Appendix 1 offer within four years of accession. He confirmed that, if the results of the negotiations were satisfactory to the interests of the Russian Federation and the other Members of the Agreement, the Russian Federation would accede to that Agreement.'

⁷⁴ India became a Government Observer to the GPA in 2010. No formal step to accession has been achieved since then as the Indian procurement system is still not centralised and is lacking in minimum standards of transparency. For a more detailed analysis see Sangeeta Khorana and Sujitha Subramanian, 'Potential Accession to the WTO Government Procurement Agreement: A Case-Study on India' (2012) 15(1) JIEL 287.

⁷⁵ Anderson and Osei-Lah (n 7) 149-174.

⁷⁶ Ping Wang, 'Accession to the Agreement on Government Procurement: The Case of China' in Arrowsmith and Anderson (n 4) 92-115.

significant. The regulatory convergence scenario no longer revolves around multilateral models of procurement regulations, such as the GPA text or the UNCITRAL Model Law, but instead is felt to be the initiative of single countries, and mainly the EU, to unilaterally export new procurement regulatory standards.

5 Conclusions

This article has examined how the field of government procurement has been approached in an increasing number of PTAs and in the TTIP negotiations to date. To this end, and regardless of the uncertain outcome of the transatlantic trade agreement's procurement negotiations in the TTIP, the article has established four different modes of analysis: i) it provided an overview of the public procurement regulation in PTAs and explored how the PTAs' discipline of public procurement has progressively integrated and disseminated the GPA regulatory standards of public procurement regulation; ii) it explored the impact on the international procurement negotiation of the internal regulations of public procurement at different levels of governance (federal, national and sub-national) and in both US and EU contexts; iii) the article underlined the innovative content of the TTIP procurement negotiations beyond the WTO regulation of public procurement; and, on this basis, iv) the article has outlined the possible implications in terms of regulatory marginalisation that could be suffered by developing countries.

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

1. From an institutional perspective, the ambitious and transformative TTIP negotiations have suffered from federalist tensions. The regulatory discrepancy in the internal regulation of public procurement and the incoherence between central and sub-federal levels of procurement regulation represent crucial aspects of the transatlantic dynamic of public procurement negotiations. On the one hand, the considerable difference between the US's federal and state levels of procurement regulation has acted as a major blockage; on the other hand, the level of harmonisation in the EU internal procurement market is one of the main factors behind the rigid negotiating position assumed by the EU in the CETA and later in the TTIP.

2. The innovative and extensive TTIP negotiating agenda on public procurement – in terms of coverage of sub-national entities, elimination of 'Buy American' policies and inclusion of socio-environmental considerations in public procurement – has opened up a new scenario of fragmentation between the different international instruments of procurement regulation. The regulatory gap between the TTIP negotiating agenda, the GPA and the UNCITRAL Model

Law seems destined to widen the distance between the EU and the United States and developing countries, which will be very difficult to overcome if and when the future accessions of these countries to the GPA become possible.

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