Public Procurement in 21st Century: Balancing Liberalisation, Social Values and Protectionism

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ABSTRACT IN ENGLISH

Abstract of thesis entitled:

Public Procurement in 21st Century: Balancing Liberalisation, Social Values and Protectionism

Submitted by Jędrzej Górski

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Governments have long used public procurement markets to advance broader (horizontal) policy-goals at the expense of achieving the best value for money in the public sector. Such policies – which include social, environmental, human-rights-related or simply openly protectionism – have often been the result of powerful domestic interest groups successfully lobbying their governments for protection from global competition. Such behaviour has traditionally not been condemned by the international system. For example, the international community failed to multilaterally address the resulting discrimination against foreign suppliers/contractors of goods/services in the formation of the General Agreement on Tariffs and Trade (GATT) in 1947. Only much later, and as a result of the plurilateral Tokyo Round Code on Government Procurement ('GPA') in 1979, did a group of mostly developed countries partially commit to opening their public procurement markets with the goal of advocating best value for money and containing other horizontal policy goals. After thirty years of little further progress, the GPA parties discreetly changed this paradigm by showing a lax stance on the increasing phenomenon of 'cross-border horizontal policies.'

Such 'cross-border horizontal policies.' deprive foreign (exterritorial) business of their comparative/cost advantages by deliberately interfering with foreign regulatory environments in a number of ways, including written laws, their enforcement or foreign law-making/political process. Such policies employ public procurers' purchasing power to arbitrarily and selectively target specific jurisdictions, sectors, geographical regions or specific business operators. Such policies also work in tandem with consumer-driven fair-trade initiatives in private markets and with attempts to internationalise green and social standards through international agreements. At the same time, large emerging economies employ strategies of 'innovation mercantilism' which seek to use public procurement as a means to force technology transfers. Innovation mercantilism shares many characteristics of environmental and social policies by arbitrarily and selectively targeting the innovation advantage of specific foreign sectors or enterprises, and by adversely affecting regulatory environments in the originating country.

This study presents cross-border horizontal policies as a major obstacle to further liberalisation of public procurement markets. This study finds that governments negotiating

liberalisation of public procurement markets have little control over the pursuit of such policies by sub-central governments and by executive agencies, resulting in that governments can neither make reliable commitments toward their trading partners on curbing such policies nor can they effectively use such policies to force third countries to reciprocally open markets.

This study also finds that governments are detracted from properly addressing the problem of such policies by having instead to negotiate procedural framework of the GPA in the lack of spontaneously emerged order of public contracting. As a result, diverging attitudes to such policies are not reflected in the GPA, which largely explains many countries' (especially emerging economies') aversion to join this agreement and a current trend toward a bilateralisation of public procurement-specific negotiations whereby such policies might be more easily addressed between pairs of most interested countries, to the detriment of unfinished multilateralisation of the GPA.

ABSTRACT IN CHINESE

論文摘要

題目：21世紀的公共採購：貿易自由化，社會價值及貿易保護主義的平衡

由香港中文大學法學院Jędrzej Górski

提交的法學哲學博士畢業論文，2016年7月。

政府長期使用公共採購市場以實現公共部門資源最佳價值的方式推動更廣泛的（橫向）政策目標。這些政策包括社會、環境、人權等相關方面的或僅僅是涉及公開的貿易保護主義的政策，通常來說是強大的國內利益集團成功遊說政府，以保護全球競爭的優勢。這種行為歷來沒有受到國際制度的譴責。例如，在1947年的關貿總協定中，國際社會未能通過多邊協商的方式解決歧視外國供應商/承包商商品的現象。後來，由於諸邊東京回合守則政府採購協議（'GPA'）1979的簽訂，發達國家部分承諾開放公共採購市場以達到物有所值和其他政策的目標。經過三十年的細微發展，GPA在增加跨境水平政策寬鬆的立場上謹慎改變了這一模式。

這樣跨界的橫向政策，剝奪外國（治外法權）業務的比較成本優勢，故意在多方面乾擾外國監管環境，其中包括書面的法律，執法或外國立法及政治過程。這樣的政策利用公眾購買方的購買力任意和選擇性地瞄準特定司法管轄區，針對特定地區，部門，或特定的經營者。這樣的政策也希望通過國際協約的方式在與消費者驅動的私人市場上嘗試國際化綠色和社會標準，同時，大型新興經濟體採用“創新重商主義”策略試圖利用公共採購作為一種手段來強迫技術轉移。創新重商主義共享環境和社會政策的許多特徵任意和選擇性地針對特定的部門或企業來影響原產國的監管環境。

這項研究提出了跨境水平政策是進一步放開公共採購市場的主要障礙。本研究發現，政府公共採購市場的自由化談判並不能控制下級政府和行政機構對於上述橫向政策的追求，從而導致政府不能向其貿易夥伴做出可靠的對遏制此類政策的承諾，也不能有效地利用這些政策迫使其與第三個國家相互開放市場。

這項研究還發現，政府並不能在公共合同沒有簽訂的前提下僅僅通過協商GPA締約程序框架的方式來妥善的解決這樣的政策問題。結果涉及此類政策的不同態度並沒有在GPA中反映出來，這在很大程度上解釋了許多國家（特別是新興經濟體）對於加入GPA的反感，目前的趨勢是這些國家更傾向於走向雙變化公共採購的具體談判，因為這樣的政策與未完成的GPA相比會使利益相關國家的問題更容易解決。

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GATT/WTO cases[*]

Short Title	Full title and citation
Tuna Dolphin I	Report of the Panel, United States - Restrictions on Imports of Tuna (3 September 1991) DS21/R - 39S/155.
Sonar Mapping System	Report of the Panel, *United States - Procurement of a Sonar Mapping System* (23 April 1992) GPR.DS1/R.
Trondheim Toll Ring Project	Report of the Panel, *Norway - Procurement of Toll Collection Equipment for the City of Trondheim* (28 April 1992) GPR.DS2/R.
Tuna Dolphin II	Report of the Panel, *United States - Restrictions on Imports of Tuna* (16 June 1994) DS29/R.
Indonesia-Autos	Report of the Panel, Indonesia - Certain Measures Affecting the Automobile Industry (2 July 1997) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, Corr.3 and Corr.4, DSR 1998:VI, p. 2201.
US-Shrimp (Panel Report)	Report of the Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (15 May 1998) WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821.
US-Shrimp	Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755.
Korea-Procurement	Report of the Panel, *Korea - Measures Affecting Government Procurement* (1 May 2000) WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, p. 3541.
EC–Asbestos	Report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (12 March 2001) WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243.
US-Shrimp (Article 21.5 – Malaysia)	Report of the Appellate Body, *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia* (22 October 2001) WT/DS58/AB/RW adopted 21 November 2001, DSR 2001:XIII, p. 6481.
US – Gambling	Report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (10 November 2004) WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII p. 5797.
US – Clove Cigarettes (Panel Report)	Report of the Panel, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (2 September 2011) WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI, p. 5865.
Tuna Labelling (Panel Report)	Report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (15 September 2011) WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013.
US – Clove Cigarettes	Report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (4 April 2012) WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751.
Tuna Labelling	Report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (16 May 2012), WT/DS381/AB/R adopted 13 June 2012 DSR 2012:IV, p. 1837.

EU cases[†]

Short Title	Full title and citation
Commission v. Italy (C-360/89)	Case C-360/89, *Commission of the European Communities v Italian Republic* ECR [1992] I-03401.

* Chronologically by the date of Panel's/Appellate Body's decision.

† Chronologically.

Telaustria	Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG* ECR [2000] I-10745.
Concordia (Opinion of Advocate General)	Case C-513/99, *Opinion of Mr Advocate General Mischo delivered on 13 December 2001. - Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* ECR [2002] I-07213.
Concordia	Case C-513/99, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* ECR [2002] I-07213.
Coname	Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*. ECR [2005] I 07287.
Commission v. Finland (C-195/04) (Opinion of Advocate General)	Case C-195/04, Opinion of Advocate General Sharpston delivered on 18 January 2007, Commission of the European Communities v Republic of Finland, ECR [2007] I-03351.
Commission v. Finland (C-195/04)	Case C-195/04, Commission of the European Communities v Republic of Finland, ECR [2007] I-03351.

US cases[*]

Short Title	Full title and citation
Trojan	*Trojan Technologies, Inc. and Kappe Associates, Inc., Appellants, v. Commonwealth of Pennsylvania and Leroy s. Zimmerman, Attorney General, Commonwealth of Pennsylvania, Appellees* 916 F.2d 903 (3d Cir. 1990)
Baker	*National Foreign Trade Council v. Baker* 26 F. Supp. 2d 287 (D. Mass. 1998).
Natsios	*National Foreign Trade Council v. Natsios* 181 F.3d 38, 52-77 (1" Cir. 1999).
Setzer	*Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel* 20 F.3d 1311 (4th Cir. 1994).
Crosby	*Crosby, Secretary of Administration and Finance of Massachusetts, et al. v. National Foreign Trade Council* (99-474) 530 U.S. 363 (2000) 181 F.3d 38.

* Chronologically.

TABLE OF TREATIES AND INTERNATIONAL AGREEMENTS

INTERNATIONAL TREATIES

GATT post-WW2 agreements[*]

Short Title	Long Title	Status/Source
Havana Charter	Final Act and Related Documents United Nations Conference on Trade And Employment, held at Havana, Cuba from November 21, 1947, to march 24, 1948 April 1948 (Interim Commission for the International Trade Organization, Lake Success, New York)	Signed at Havana on 24 March 1948, never ratified.
GATT47	General Agreement on Tariffs and Trade 1947,.	Signed in Geneva on 30 October 1947, provisionally applied since 1 January 1948 / 55 UNTS 194.

GATT Kennedy Round

Short Title	Long Title	Status/Source
Kennedy Code on Anti-Dumping	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Part I - Anti-Dumping Code	GATT Secretariat (April 1968) Protocols 1964-67 Trade Conference Final Act BISD 15S/4-3 24.

GATT Tokyo Round[†]

Short Title	Long Title	Status/Source
GPA79	Agreement on Government Procurement 1979	Signed at Tokyo on 12 April 1979, in force 1 January 1981 / GATT Secretariat (1979) LT/TR/PLURI/2.
Tokyo Code on Anti-Dumping	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1979	Signed at Tokyo on 12 April 1979, in force 1 January 1980 / GATT Secretariat (1979) LT/TR/A/1 127.
Tokyo Code on Customs Valuation	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1979	Signed at Tokyo on 12 April 1979, in force 1 January 1980, GATT Secretariat (1979) LT/TR/A/2 81.
Tokyo Code on Import Licensing	Agreement on Import Licensing 1979	Signed at Tokyo on 12 April 1979, in force 1 January 1980 / GATT Secretariat (1979) LT/TR/A/4 119.
Tokyo Anti-counterfeiting Code	Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade 1979	Signed at Tokyo on 12 April 1979, in force 1 January 1980 / GATT Secretariat (1979) LT/TR/A/3 51.
Tokyo Code on Civil	Agreement on Civil Aircraft 1979	Signed at Tokyo on 12 April 1979, in force 1 January 1980 / GATT Secretariat (1979) LT/TR/PLURI/1 181.
Tokyo TBT Agreement	Agreement on Technical Barriers to Trade 1979	Signed at Tokyo on 12 April 1979, in force 1 January 1980 / GATT Secretariat (1979) LT/TR/A/5 1.
Tokyo Code on Bovine Meat	Arrangement regarding Bovine Meat 1979.	Signed at Tokyo on 12 April 1979, in force 1 January 1980 / GATT Secretariat, (1979) LT/TR/PLURI/3 147.

* Alphabetically by the full name.

† Alphabetically.

Tokyo Code on Balance of Payment	Balance-of-Payments: Declaration on Trade Measures 1979	Signed at Tokyo on 12 April 1979, in force 1 January 1980 / GATT Secretariat (28 November 1979) LT/TR/DEC/1.
Tokyo Code on Dairy Products	International Dairy Arrangement 1979	Signed at Tokyo on 12 April 1979, in force 1 January 1980 / GATT Secretariat (1979) LT/TR/PLURI/4 155.

GATT Uruguay Round[*]

Short Title	Long Title	Status/Source
GPA87	Agreement on Government Procurement, Revised Text 1987	Protocol of amendments done at Geneva on 2 February 1987, in force 14 February 1988.
SCM Agreement	Agreement on Subsidies and Countervailing Measures	Signed at Marrakesh on 15 April 1994, in force 1 January 1995 / WTO Agreement Annex 1A 229.
TBT Agreement	Agreement on Technical Barriers to Trade	Signed at Marrakesh on 15 April 1994, in force 1 January 1995 / WTO Agreement Annex 1A 117.
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures	Signed at Marrakesh on 15 April 1994, in force 1 January 1995 / WTO Agreement Annex 1A 69.
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights.	Signed at Marrakesh on 15 April 1994, in force 1 January 1995 / WTO Agreement Annex 1C 319, 1869 UNTS 299.
TRIMs Agreement	Agreement on Trade-Related Investment Measures	Signed at Marrakesh on 15 April 1994, in force 1 January 1995 / WTO Agreement Annex 1A 139.
GATT94	General Agreement on Tariffs and Trade 1994	Signed at Marrakesh on 15 April 1994, in force 1 January 1995 / WTO Agreement Annex 1A 23.
GATS	General Agreement on Trade in Services	Signed at Marrakesh on 15 April 1994, in force 1 January 1995, WTO Agreement Annex 1B 283 / 1869 UNTS 183.
GPA94	Government Procurement Agreement 1994	Signed at Marrakesh on 15 April 1994, in force 1 January 1996 / WTO Agreement Annex 4B 417..
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization	Signed at Marrakesh on 15 April 1994, in force 1 January 1995 / 1867 UNTS 154.
Balance of Payments Agreement	Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade	Signed at Marrakesh on 15 April 1994, in force 1 January 1995 / WTO Agreement Annex 1A 29..
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes	Signed at Marrakesh on 15 April 1994, in force 1 January 1995 / WTO Agreement Annex 2 353
-	Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994,	Signed at Marrakesh on 15 April 1994, in force 1 January 1995 / WTO Agreement Annex 1A 33.

Post-Marrakesh WTO agreements

Short Title	Long Title	Status/Source
GPA12	Agreement on Government Procurement 2012	Signed at Geneva on 30 March 2012, in force 6 April 2014 / GATT Secretariat (2 April 2012) GPA/113.
ITA, or Information Technology Agreement	Ministerial Declaration on Trade in Information Technology Products	Signed at Singapore on 13 December 1996, in force 1 July 1997 / GATT Secretariat

* Alphabetically by full name.

RTAs*

Short Title	Long Title	Parties† / Status / Source
JAEPA	Agreement between Australia and Japan for an Economic Partnership	Australia, Japan / signed 8 July 2014, in force 15 January 2015 / <http://dfat.gov.au/trade/agreements/jaepa/official-documents/Pages/official-documents.aspx> accessed 11 February 2016.
Japan-Brunei EPA	Agreement between Japan and Brunei Darussalam for an Economic Partnership	Brunei, Japan / signed in June 2007, in force 2008 / <http://www.mofa.go.jp/policy/economy/fta/indonesia.html> accessed 11 February 2016.
Japan-Malaysia EPA	Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership	Japan, Malaysia / signed 17 September 2004; in force 1 April 2005 / <http://www.mofa.go.jp/policy/economy/fta/malaysia.html> accessed 13 February 2016.
Japan–Thailand EPA	Agreement between Japan and the Kingdom of Thailand for an economic partnership	Japan, Thailand / signed 3 April 2007, in force 1November 2007 / 2752 UNTS 48547.
Japan–Chile EPA	Agreement between Japan and the Republic of Chile for a strategic economic partnership	Chile, Japan / signed 27 March 2007, in force 3 September 2007 / 2751 UNTS 48546.
Japan-Indonesia EPA	Agreement between Japan and the Republic of Indonesia for an Economic Partnership	Indonesia, Japan / signed 20 August 2007, in force 1 July 2008/ <http://www.mofa.go.jp/policy/economy/fta/indonesia.html> accessed 11 February 2016.
JPEPA	Agreement between Japan and the Republic of Peru for an Economic Partnership	Japan, Peru / signed 31 May 2011 in force 1 March 2012 / <http://www.sice.oas.org/Trade/PER_JPN/EPA_Texts/ENG/Index_PER_JPN_e.asp> accessed 12 February 2016.
Japan–Philippines EPA	Agreement between Japan and the Republic of the Philippines for an Economic Partnership	Japan, Philippines / signed 8 September 2006, in force11 December 2008 / <http://www.mofa.go.jp/policy/economy/fta/philippines.html> accessed 13 February 2016.
Japan–Singapore EPA	Agreement between Japan and the Republic of Singapore for a new-age economic partnership	Japan, Singapore / signed 13 January 2002, in force 30 November 2002 / 2739 UNTS 48385.
Japan-Vietnam EPA	Agreement between Japan and the Socialist Republic of Viet Nam for an Economic Partnership	Japan, Vietnam / signed 25 December 2008, in force 1 October 2009 / <http://www.mofa.go.jp/region/asia-paci/vietnam/epa0812/index.html> accessed 13 February 2016.
Japan–Mexico EPA	Agreement between Japan and the United Mexican States for the strengthening of the economic partnership	Japan, Mexico / signed 17 September 2004, in force 1 April 2005 / 2768 UNTS 48744.
NZ–Singapore CEPA *or* ANZSCEP	Agreement between New Zealand and Singapore on a closer economic partnership.	New Zealand, Singapore / signed 14 November 2000, in force 1 January 2001 / 2203 UNTS 39105.

* Alphabetically by full name.

† Current parties (or membership immediately prior to extinction) (unless otherwise indicated).

Hoyvik Agreement	Agreement between the Government of Iceland, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part	Denmark (on behalf of Faroe Islands), Iceland / (signed in Hoyvik on 31 August 2005, ratified in 3 June 2006 / <http://cdn.lms.fo/media/5351/hoyvikssattmalin-en.pdf> accessed 27 December 2015.
AANZFTA	Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area	ASEAN members, Australia, New Zealand / signed 27 February 2009, in force 1 January 2010, 1st protocol of amendments in force 1 October 2015 / <http://dfat.gov.au/trade/agreements/aanzfta/official-documents/Pages/agreement-establishing-the-asean-australia-new-zealand-free-trade-area-aanzfta.aspx > accessed 11 November 2015.
ASEAN-PTA	Agreement on ASEAN Preferential Trading Arrangements	Indonesia, Malaysia, Philippines, Singapore, Thailand / signed 24 February 1977, in force 25 August 1977, superseded by the ATIGA / <http://agreement.asean.org/media/download/20140119163517.pdf> accessed 28 February 2016.
AJCEP	Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations	ASEAN members / signed 14 April 2008, in force 1 December 2008, in force for Brunei 1 January 2009, in force for Malaysia 1 February 2009, in force for Thailand 1 June 2009, in force for Cambodia 1 December 2009 / <http://www.mofa.go.jp/policy/economy/fta/asean/agreement.pdf> accessed 28 February 2016.
ASEAN-China Investment Agreement	Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the People's Republic of China	ASEAN members, China /signed 15 August 2009, in force 15 February 2010/ < http://www.fta.gov.sg/acfta/asean-china_inv_agreement%28certified_copy%29.pdf> accessed 10 March 2016.
ASEAN-Korea Investment Agreement	Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation Among ASEAN Member Countries and the Republic of Korea	ASEAN members, Korean / signed 2 June 2009, in force 1 September 2009 / <http://www.fta.gov.sg/akfta/ak%20investment%20agreement%20%28signed%29.pdf> accessed 10 March 2016.
ASEAN-China Goods Agreement	Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China	ASEAN members, China / signed 29 November 2004, in force 1 January 2005 / <http://www.fta.gov.sg/acfta/agreement_on_trade_in_goods_china_21112004.pdf> accessed 10 March 2016.
ASEAN-Korea Goods Agreement	Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea	ASEAN members, Korea /signed 24 August 2006, in force 1 June 2007 / <http://www.fta.gov.sg/akfta/agreement_on_trade_in_goods.pdf> accessed 10 March 2016.
ASEAN-China Services Agreement	Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the People's Republic Of China	ASEAN members, China / signed 14 January 2007, in force 1 July 2007 / <http://www.fta.gov.sg/acfta/agreement_on_trade_in_goods_china_21112004.pdf> accessed 10 March 2016.

ASEAN-Korea Services Agreement	Agreement on Trade in Services Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the ASEAN and the Republic of Korea.	ASEAN members, Korea / signed 21 November 2007, in force 1 May 2009 / <http://www.fta.gov.sg/akfta/ak-ats%20-%20agreement%20_asean%20version_%20-%20final%20signed%2021%20nov%202007.pdf> accessed 10 March 2016.
CEPT-AFTA	Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam / signed 28 January 1992, in force 28 January 1992, superseded by the ATIGA / <http://www.asean.org/images/2012/Economic/AFTA/Common_Effective_Preferential_Tariff/Agreement%20on%20the%20Common%20Effective%20Preferential%20Tariff%20Scheme%20for%20the%20ASEAN%20Free%20Trade%20Area.pdf> accessed on 29 August 2014.
EEA Agreement	Agreement on the European Economic Area	EFTA states (except Switzerland), EU Member States / signed at Porto 2 May 1992, in force January 1994 / OJ [1994] L 1, p 3.
Andean Pact or Cartagena Agreement (*currently known as CAN*)	Andean Subregional Integration Agreement (*known since 1996 as the Andean Community of Nations (Comunidad Andina de Naciones*)	Bolivia, Chile (withdrew in 1975) Columbia, Ecuador, Peru, Venezuela (joined 1973, withdrew 2006) / signed at Bogota on 26 May 1969, in force 16 October 1969, as modified with the as modified with the Amending Protocol of the Andean Subregional Integration Agreement (Cartagena Agreement of 1997), also known as the 'Sucre Protocol,' adopted in Quito on 25 June 25 1997) / Decision no 563 of the Commission of the Andean Community, Official Codified Text of the Andean Subregional Integration Agreement
-	ASEAN Framework Agreement on Services	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam /signed 15 December 1995, in force 30 December 1998/ <http://cil.nus.edu.sg/1995/1995-asean-framework-agreement-on-services-signed-on-15-december-1995-in-bangkok-thailand-by-the-economic-ministers> accessed 3 March 2016
ATIGA	ASEAN Trade in Goods Agreement	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam / signed at Cha-am 26 February 2009, in force 17 May 2010 / <http://www.asean.org/images/2012/Economic/AFTA/annex/ASEAN%20Trade%20in%20Goods%20Agreement,%20Cha-am,%20Thailand,%2026%20February%202009.pdf> accessed on 29 August 2009.
Australia–Chile FTA	Australia-Chile Free Trade Agreement	Australia, Chile / signed 30 July 2008, in force 6 March 2009 / 2694 UNTS 47842.

ANZCERTA	Australia–New Zealand Closer Economic Relations Trade Agreement	Australia, New Zealand / signed 28 March 1980, in force 1 January 1983 / 1329 UNTS 22307. Agreed Minute on State Government Purchasing Preferences (signed at Christchurch on 21 June 1988) <http://dfat.gov.au/trade/agreements/anzcerta/Documents/301.pdf> accessed 10 March 2016.
AUSFTA	Australia–United States FreeTrade Agreement	Australia, United States / signed 18 May 2004, in force 1 January 2005 / <https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf> accessed 11 March 2016.
CCFTA	Canada - Chile Free Trade Agreement	Canada, Chile / signed 5 December 1996, in force 5 July 1997 / <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en> accessed on 29 August 2014.
Canada–Costa Rica FTA	Canada-Costa Rica Free Trade Agreement	Canada, Costa Rica / signed 23 April 2001, in force 1 November 2002 / <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/costarica/Costa_Rica_toc.aspx?lang=en > accessed on 29 August 2014.
CUSFTA	Canada-United States Free Trade Agreement	Canada, United States / signed 2 January 1988, in force 1 January 1989 / reprinted in, 27 I.L.M. 281..
EFTA–Chile FTA	Chile-EFTA Free Trade Agreement	Chile, EFTA states / signed 26 June 2003, in force 1 December 2004 / http://www.efta.int/free-trade/free-trade-agreements/chile accessed on 28 August 2014.
Chile-Mexico FTA	Chile –Mexico Free Trade Agreement (*Tratado de Libre Comercio Chile-México*)	Chile, Mexico / signed 1 October 1998; in force 1 August 1999 / <http://www.sice.oas.org/Trade/chmefta/indice.asp> accessed 16 February 2016.
Chile-Peru FTA	Chile –Peru Free Trade Agreement (*Acuerdo de Libre Comercio Chile-Perú*)	Chile, Peru / signed 22 August 2006, in force 1 March 2009 / <http://www.sice.oas.org/Trade/CHL_PER_FTA/Index_s.asp> accessed 16 February 2016.
Chile-Vietnam	Chile-Vietnam Free Trade Agreement (*Tratado de Libre Comercio entre Chile y Vietnam*)	Chile, Vietnam / signed 12 November 2011, in force 4 February 2014 / <http://www.sice.oas.org/Trade/CHL_VNM/CHL_VNM_s/Index_s.asp> accessed 12 February 2016.
Korea-India CEPA	Comprehensive Economic Partnership Agreement Between the Republic of Korea and the Republic of India	South Korea, India / signed August 2009, in force 1 January 2010 / <http://www.customs.go.kr/kcshome/main/content/ContentView.do?contentId=CONTENT_ID_000002362&layoutMenuNo=23270 > accessed 12 February 2016.
EFTA or Stockholm Convention	Convention establishing the European Free Trade Association	Iceland, Liechtenstein, Norway, Switzerland / signed at Stockholm on 4 January 1960, in force 3 May 1960 / 370 UNTS 5266.

CAFTA–DR–US	Central America–Dominican Republic–United States Free Trade Agreement	Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, United States / signed 5 August 2004, in force 1 March 2006 (El Salvador, United States), 1 April 2006 (Honduras, Nicaragua), 1 July 2006 (Guatemala), 1 March 2007 (Dominican Republic) / <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> accessed on 29 August 2014/
EU–CARIFORUM EPA	Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part	European Union, Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago / signed 15 October 2008, in force 29 December 2008 / OJ [2008] L 289 p.3.
EU–Mexico FTA	Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part	European Union, Mexico / signed 8 December 1997, in force 1 October 2000 / 2165 UNTS 37818.
-	Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part	European Union, Hungary / OJ [1993] L 347 p. 2–266.
-	Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part	European Union, Poland / OJ [1993] L 348 p. 2–180.
Peru-Thailand CEP	Framework Agreement on Closer Economic Partnership between the Government of the Republic of Peru and the Government of the Kingdom of Thailand	Chile, Thailand / signed 17 October 2003, ratified 27 January 2005, protocol signed 19 November 2005, additional protocol signed 16 November 2006, second additional protocol 13 November 2009, third additional protocol signed 18 November 2010, in force 31 December 2011 / <http://www.sice.oas.org/Trade/PER_THA_FTA/Index_e.asp> accessed 13 February 2016.
AKFTA	Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea	ASEAN members, Korea / signed 13 December 2005; in force 1 June 2007 / <http://www.asean.org/storage/images/2012/Economic/AFTA/joint_statement/Framework%20Agreement%20on%20Comprehensive%20Economic%20Cooperation%20Among%20the%20Governments%20of%20the%20Member%20Countries%20of%20the%20Association%20of%20Southeast%20Asian%20Nations%20and%20the%20Republic%20of%20Korea.pdf> accessed 3 March 2016.
ACFTA	Framework Agreement on Comprehensive Economic Cooperation between the Association of South East Asian Nations and the People's Republic of China	ASEAN members, China / signed 4 November 2002, in force 1 July 2003 / <http://www.fta.gov.sg/acfta/framework_agreement_05112002.pdf> accessed 3 March 2016.

AIFTA	Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of Southeast Asian Nations	ASEAN members, India / signed 8 October 2003, in force 1 July 2004, amended by the 'Protocol to Amend the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India' signed 13 August 2009, in force 1 January 2010 / <http://commerce.nic.in/trade/international_ta_framework_asean.asp> accessed 3 March 2016.
-	Framework Agreements on Enhancing ASEAN Economic Cooperation	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam / signed 28 January 1992, in force 28 January 1992 / <http://cil.nus.edu.sg/rp/pdf/1992%20Framework%20Agreements%20on%20Enhancing%20ASEAN%20Economic%20Cooperation-pdf.pdf> accessed 3 March 2016.
Canada-Korea FTA	Free Trade Agreement Between Canada and the Republic of Korea	Canada, South Korea / signed 24 September 2014, in force 1 January 2015 / <http://www.sice.oas.org/Trade/CAN_KOR/English/CAN_KOR_index_e.asp> accessed 12 February 2016.
Canada-Peru FTA	Free Trade Agreement Between Canada and the Republic of Peru	Canada, Peru / signed 29 May 2008, in force 1 August 2009 / <http://www.sice.oas.org/Trade/CAN_PER/CAN_PER_e/CAN_PER_index_e.asp> accessed 12 February 2016.
Central America–Chile FTA	Free Trade Agreement between Chile and Central America (*Tratado de Libre Comercio entre Centroamérica y Chile*)	Chile, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua / signed at Guatemala on 18 October 1999 (Chile–Costa Rica bilateral protocol signed 18 November 1999, in force 15 February 2002, bilateral protocol, Chile-Salvador bilateral protocol signed 20 November 2000, in force on 3 June 2002, Chile-Honduras bilateral protocol signed 22 November 2005, in force 18 July 2008, Chile-Guatemala bilateral protocol signed 7 December 2007, in Force 1 March 2010, Chile-Nicaragua bilateral protocol signed 23 February 2011, in force 19 October 2012 / Costa-Rican OJ [2001] 42 (signed 4 January 2001).
Chile-Thailand FTA	Free Trade Agreement Between Chile and Thailand	Chile, Thailand / signed 4 October 2013, in force 5 November 2015 / <http://www.sice.oas.org/Trade/CHL_THA_Final/CHL_THA_Index_PDF_e.asp> accessed 13 February 2016.
EFTA–Mexico FTA	Free Trade Agreement between the EFTA States and the United Mexican States	EFTA states, Mexico / signed 27 November 2000, in force 1 July 2001 / <http://www.efta.int/free-trade/free-trade-agreements/mexico> accessed on 29 August 2014.
EFTA–Korea FTA	Free Trade Agreement between the EFTA States and the Republic of Korea	EFTA states, South Korea / signed 27 November 2000, in force 1 July 2001 / <http://www.efta.int/free-trade/free-trade-agreements/korea> accessed 28 August 2014.
ChAFTA	Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China	Australia, China / signed 17 June 2015, in force 20 December 2015 / <http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx> accessed 11 February 2016.

Korea–Singapore FTA	Free Trade Agreement Between the Government of the Republic of Korea and the Government of the Republic of Singapore	Singapore, South Korea / signed 4 August 2005, in force 2 March 2006 <http://www.fta.gov.sg/fta_ksfta.asp?hl=22> accessed on 28 August 2014.
Chile-Malaysia FTA	Free Trade Agreement between the Republic of Chile and the Republic of Malaysia	Chile, Malaysia / signed 13 November 2010, in force 18 April 2012 / <http://www.sice.oas.org/Trade/CHL_MYS/Index_e.asp> accessed 11 February 2016.
Korea–Chile FTA	Free Trade Agreement between the Republic of Korea and the Republic of Chile	Chile, South Korea / signed 15 February 2003; in force 1 April 2004 / <http://www.sice.oas.org/Trade/Chi-SKorea_e/ChiKoreaind_e.asp> accessed 12 February 2016.
KORUS FTA	Free Trade Agreement between the United States of America and the Republic of Korea	South Korea, United States / signed 30 June 2007; in force 15 March 2012 / https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> accessed 11 February 2016.
MAFTA	Australia–Malaysia Free Trade Agreement	Australia, Malaysia / signed 22 May 2012; in force 1, January 2013 / <http://dfat.gov.au/trade/agreements/mafta/Pages/malaysia-australia-fta.aspx#documents> accessed 11 February 2016.
Mexico-Peru FTA	Mexico-Peru Free Trade Agreement (*Acuerdo de Integración Comercial México-Perú*)	Mexico, Peru / signed 6 April 2011, in force 1 February 2012 / <http://www.sice.oas.org/Trade/MEX_PER_Integ_Agrmt/MEX_PER_Ind_s.asp> accessed 12 February 2016.
MNZFTA	New Zealand-Malaysia Free Trade Agreement	Malaysia, New Zealand / signed 26 October 2009; in force 1 August 2010 / <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/malaysia-fta/> accessed 13 February 2016.
NZ–Thailand CEPA	New Zealand-Thailand Closer Economic Partnership Agreement	New Zealand, Thailand / signed 19 April 2005, in force 1 July 2005 / <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Thailand/Closer-Economic-Partnership-Agreement-text/index.php> accessed on 28 August 2014.
NAAEC	North American Agreement on Environmental Cooperation	Canada, Mexico, United States / signed 14 September 1993, in force 1 January 1994 / 32 ILM 1482 (1993).
NAFTA	North American Free Trade Agreement	Canada, Mexico, United States / signed 17 December 1992, in force 1 January 1994 / 32 I.L.M. 289 (1993) (chs. 1-9), 32 I.L.M. 605 (1993) (chs. 10-22).
ALPAC	Pacific Alliance (*Alianza del Pacífico*)	Chile, Colombia, Mexico, Peru / signed 10 February 2014, in force 20 July 2015 <http://www.sice.oas.org/Trade/PAC_ALL/Index_PDF_s.asp > accessed 12 February 2016.
Peru-Korea FTA	Peru-Korea Free Trade Agreement	South Korea, Peru / signed 14 November 2010, in force 1 August 2011 / <http://www.fort-russ.com/2016/02/lithuanian-recruits-complain-about.html> accessed 12 February 2016.

PeSFTA	Peru-Singapore Free Trade Agreement	Peru, Singapore / signed 29 May 2008, in force 1 August 2009 / <http://www.sice.oas.org/TPD/PER_SGP/Final_Texts_PER_SGP_e/index_e.asp> accessed 11 February 2016.
RCEP	Regional Comprehensive Economic Partnership	ASEAN members / Australia, China, India, Japan, South Korea and New Zealand / under negotiations / <http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx> accessed 11 November 2016.
SAFTA	Singapore–Australia Free Trade Agreement	Australia, Singapore / signed 17 February 2003, in force 28 July 2003 / 2257 UNTS 40221
Thailand–Australia FTA	Thailand-Australia Free Trade Agreement	Australia, Thailand / signed 5 July 2004, in force 1 January 2005 / <https://www.dfat.gov.au/fta/tafta/tafta_toc.html> accessed on 28 August 2014.
TPSEP (*also known as P4 Agreement*)	Trans-Pacific Strategic Economic Partnership Agreement	Brunei, Chile, New Zealand, Singapore / signed 18 July 2005 (Chile, New Zealand, Singapore), 2 August 2005 (Brunei), in force 28 May 2006 (New Zealand, Singapore), 12 July 2006 (Brunei), 8 November 2006 (Chile) / 2592 UNTS 46151.
TPP	Trans-Pacific Partnership Agreement	Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, United States / signed 4 February 2016, not yet in force / https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership accessed 11 February 2016.
MERCOSUR (*also known as Asunción Treaty*)	Treaty establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, 1991	Argentina, Brazil, Paraguay, Uruguay, Venezuela / signed 26 March 1991, in force 29 November 1991 / 2140 UNTS 37341. Protocol on Public Procurement (*Protocolo de Contrataciones Públicas del Mercosur*) (15 December 2003) MERCOSUR/CMC/DEC. N 40/03, superseded by the Protocol on Public Procurement (*Protocolo de Contrataciones Públicas del Mercosur*) (Montevideo, 09 December 04) MERCOSUR/CMC/DEC. N° 27/04.
US–Chile FTA	United States-Chile Free Trade Agreement	Chile, United States / signed 6 June 2003, in force 1 January 2004 / <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> accessed 28 August 2014.
US–Peru TPA	United States-Peru Trade Promotion Agreement	Peru, United States / signed 4 December 2006, in force 1 February 2009 / <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> accessed on 29 August 2014.
US–Singapore FTA	The United States-Singapore Free Trade Agreement	Singapore, United States / signed 6 May 2003, in force 1 January 2004/ <http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta> accessed on 28 August 2014.

Other*

Short Title	Long Title	Status / Source

* Alphabetically by full name.

-	Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice	Signed at Oporto on 2 May 1992 / OJ [1994] L 344, p 3.
-	Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement	Signed 21 June 1991, in force 1 June 2002 /OJ [2002] L 114.
-	Agreement Between the Government of the United States of America and the Government of Canada on Government Procurement	Signed 12 February 2010, in force 16 February 2010) / 2010 TIAS No. 10,216
Lisbon Agreement	Agreement on the interpretation of the Article 14 of the EFTA Convention	EFTA Bulletin March-April 1967, p 2-6.
ASEAN Declaration *also known as* Bangkok Declaration	ASEAN Declaration	Adopted by the Foreign Ministers at the 1st ASEAN Ministerial Meeting in Bangkok, Thailand on 8 August 1967 / <http://cil.nus.edu.sg/rp/pdf/1967%20ASEAN%20Declaration-pdf.pdf> accessed 3 March 2016.
AEC Blueprint 2008-2015	ASEAN Economic Community Blueprint	Adopted on 20 November 2007 in Singapore by the Heads of State/Government / <http://cil.nus.edu.sg/rp/pdf/2007%20ASEAN%20Economic%20Community%20Blueprint-pdf.pdf> accessed 3 March 2016.
AEC Blueprint 2016-2025	ASEAN Economic Community Blue Print 2025	Adopted by the ASEAN Leaders on 22 November 2015 / <http://www.asean.org/storage/2012/05/AECBP-2025r-FINAL.pdf> accessed 3 March 2016.
ANZGPA	Australia-New Zealand Government Procurement Agreement	Australia-New Zealand / adopted 1991, revised in 1997 and 2013 / <https://www.business.govt.nz/procurement/for-suppliers/working-with-government/australia-new-zealand-government-procurement-agreement-1.47-mb-pdf> accessed 10 March 2016.
-	Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests.	Signed at Brussels on 26 July 1995 / OJ [1995] C 316, p. 49-57
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OECD Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	Signed 17 December 1997, in force 15 February 1999 / 2802 UNTS 49274.
-	Criminal Law Convention on Corruption	Signed at Strasbourg on 27 January 1999, in force 1 July 2002/ 1999 ETS 173
-	Ha Noi Plan of Action	Adopted by the Heads of State/Government at the 6 the ASEAN Summit in Hanoi, Viet Nam on 15 Dec ember 1998 / <http://cil.nus.edu.sg/rp/pdf/1998%20Ha%20Noi%20Plan%20of%20Action-pdf.pdf> accessed 2 March 2016
	Inter-American Convention Against Corruption	Signed 29 March 1996, in force 6 March 1997 / OEA/Ser.K/XXXIV.1, CICOR/doc.14/96 rev. 2, 35 ILM 724.
ILO Convention 51	International Labour Organization, Reduction of Hours of Work (Public Works)	Signed at Geneva on 23 June 1936, never in force, withdrawn instrument 30 May 2000/ Convention No. 51 .

UNIDROIT	International Institute for the Unification of Private Law Statute	Signed 1926, incorporating the amendment to Article 6(1) which entered into force on 26 March 1993) / <http://www.unidroit.org/about-unidroit/institutional-documents/statute> accessed 28 December 2015.
Osaka Action Agenda	Osaka Action Agenda: Implementation of the Bogor Declaration	Adopted 19 November 1995 / <http://www.apec.org/~/media/Files/Groups/IP/02_esc_oaaupdate.pdf> accessed 3 March 2016.
UNAC	United Nations Convention Against Corruption	Signed 31 October 2003, in force 14 December 2005) UN Secretariat A/58/422.
CISG	United Nations Convention on Contracts for the International Sale of Goods.	Signed at Vienna 11 April 1980, in force 1 January 1988 / 1489 UNTS 25567
Vienna Convention	Vienna Convention on the Law of Treaties	Signed at Vienna on 23 May 1969, in force 27 January 1980 / 1155 UNTS 18232.

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Single European Act, 17 February 1986, OJ [1987] L169.

Treaty on the European Union, 7 February 1992, OJ [1992] C 191.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community 2007, OJ [2007] C 306.

Consolidated version of the Treaty on European Union, OJ [2010] C 83/01, p 3.

Consolidated version of the Treaty on the Functioning of the European Union, OJ [2010] C 83/01, p 47.

EU directives[†]

Commission Directive 66/683/EEC of 7 November 1966 eliminating all differences between the treatment of national products and that of products which, under Articles 9 and 10 of the Treaty, must be admitted for free movement, as regards laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products or making such use subject to profitability, OJ [1966] L 220, p. 3748–3750.

Commission Directive 70/32/EEC of 17 December 1969 on provision of goods to the State, to local authorities and other official bodies, OJ [1970] L 13 p. 1–3.

Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, OJ [1971] L 185, p 1–4, English special edition: Series I Chapter 1971(II), p 0678.

Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, OJ [1971] L 185, p 5–14, English special edition: Series I Chapter 1971(II), p 682

Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ [1977] L 13, p 1–14.

Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts, OJ [1980] L 215, p 1–28.

Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC, OJ [1988] L1988, p. 1–14.

Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, OJ [1989] L 210, p 1–21.

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ [2000] L 395 p 33 – 35.

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* Chronologically.

† Chronologically by official journal number.

Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sector, OJ [1990] L 297, p 1–48.

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ [1992] L 76, p 14–20.

Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ [1992] L 209, p 1–24.

Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ [1993] L 199, p 1–53.

Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ [1993] L 199, p 54 – 83.

Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ,OJ [1993] L 199, p 84–138.

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European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, OJ [1997] L 328, p 1–59.

Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ [2001] L 283, p 33-40.

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* Chronologically by official journal number.

Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme, OJ [1992] L 099, p 1-7.

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Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ [2005] L 347.

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Council Regulation (EC) No 55/2008 of 21 January 2008 introducing autonomous trade preferences for the Republic of Moldova and amending Regulation (EC) No 980/2005 and Commission Decision 2005/924/EC, OJ [2008] L 20 p.1.

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TABLE OF FIGURES

TABLE OF ABBREVIATIONS

AEC	ASEAN Economic Community
ADB	Asian Development Bank
AFDB	African Development Bank
AF-PR	Africa Region Procurement Region (World Bank)
GPEG	APEC Government Procurement Experts Group
AIT	Agreement on Internal Trade (Canada)
APEC	Asia-Pacific Economic Co-operation
ARO	Agreement on Rules of Origin
ARRA	American Reinvestment and Recover Act on 2009
ASEAN	Association of Southeast Asian Nations
ATIGA	ASEAN Trade in Goods Agreement
ATP	autonomous trade preference
BEE	South African black economic empowerment policies
BL	Bidding Law (China)
BOT	build-operate-transfer contract
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
CAN	Andean Community of Nations
CDD	Community Dri**v**en Development
CEN	European Committee for Standardization
CENECEL	European Committee for Electro-technical Standardization
CPA	Classification of Products According to Activities
CSR	corporate social responsibility
COVEC	China Overseas Engineering Group Co,. Ltd.
CUSFTA	Canada-United States Free Trade Agreement
DAC	Development Assistance Committee (OECD)
DEFRA	UK's Department for Environment, Food and Rural Affair
DSB	Dispute Settlement Body
DSU	Dispute settlement understanding
EAP-PR	East Asia and Pacific Procurement Region (World Bank)
ECA-PR	Europe and Central Asia Procurement Region (World Bank)
EC	European Community
EEC	European Economic Community
EFTA	European Free Trade Area
EIA	economic integration agreement
EN	European Norm
EPA	Economic Partnership Agreement (EU)
ERBD	European Bank for Reconstruction and Development
ETP	Easter Tropical Pacific
ETS	European Treaty Series
EU	European Union
FAR	US Federal Acquisition Regulation
FCPA	Foreign Corrupt Practices Act
FBS	Selection under Fixed Budget
GPL	Government Procurement Law (China)
HD	Harmonization Document
HDI	historically disadvantaged individual(s)
HO	Heckscher-Ohlin model
GAL	Global Administrative Law
GPA	Agreement on Government Procurement
GPP	green public procurement
IBDR	International Bank for Development and Reconstruction
ICB	International Competitive Bidding (World Bank)
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association

IADB	Inter-American Development Bank
IFC	International Finance Corporation
ILO	International Labour Organization
IMF	International Monetary Fund
ITA	Information Technology Agreement
ITO	International Trade Organization
LAC-PR	Latin America and Caribbean Procurement Region (World Bank)
LCS	Least Cost Selection
LCD	Least developed economies
LIB	Limited International Bidding (World Bank)
MDBs	Multilateral Development Banks
MDG	Millennium Development Goals
MENA-PR	Middle East North Africa Procurement Region (World Bank)
MERCOSUR	Southern Common Market
MMPA	Marine Mammal Protection Act of 1972 (US)
MOF	Ministry of Finance
MOST	the Ministry of Science and Technology (China)
NACE	General Industrial Classification of Economic Activities within the European Communities
NAFTA	North American Free Trade Agreement
NCB	National Competitive Bidding (World Bank)
NDRC	National Development and Reform Commission (China)
NIEO	New International Economic Order (Working Group of UNCITRAL)
NPA	National Preference Agreement (Australia)
NTE	National Trade Estimate Report on Foreign Trade Barriers
NWTPA	New West Trade Partnership Agreement
OEEC	Organisation for European Economic Co-operation
OECD	Organisation for Economic Co-operation and Development
OJ	official journal (*EU's if not stated otherwise*)
PP	public procurement
PPP	public-private partnership
PTA	preferential trade agreement
PSR	purchasing social responsibility
QBS	Quality-Based Selection
QCBS	Quality and Cost-Based Selection
RMB	Renminbi / Chinese yuan
RTA	regional trade agreements
RTA-IS	Regional Trade Agreements Information System
R&D	research and development
SA-PR	South Asia Procurement Region (World Bank)
SBA	US Small Business Administration
SDR	Special Drawing Right
SEA	Single European Act
SEC	Securities and Exchange Commission
SIE	state influenced enterprise
SME	small and medium enterprises
SPP	sustainable public procurement
STE	state trading enterprises
TBT	technical barrier to trade
TEC	Treaty Establishing the European Community (Treaty of Rome)
TEU	Treaty on European Union
TFEU	Treaty on Functioning of European Union
TGP	transparency in government procurement
TIAS	Treaties and Other International Acts Series
TILMA	Trade, Investment and Labour Mobility Agreement
TPP	Trans-Pacific Partnership
TR	technical regulation
Treaties	TEU and TFEU

UNCAC	United Nations Convention against Corruption
UNTS	United Nations Treaty Series
US	United States of America
USITO	United States Information Technology Office
WBG	Wold Bank Group
WTO	World Trade Organization

I. INTRODUCTION

> "*At the end of last war, a buyer prided himself on his confrontational approach, and the aim of negotiation was to screw your opponent to the ground. One found solace in overwhelming emphasis upon price. Procurement was a trade learned by experience. All that has changed, and is still changing: buyers now seek for common ground a less adversarial approach when dealing with suppliers. They tend to reduce their suppliers base, and are now as mobile as salesmen. The cry is now for quality over price. Procurement is now thought at colleges and universities*" [1]

PROBLEM OF THE STUDY

Defined by the World Trade Organisation ('WTO') as "*the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale*,"[2] public procurement has been employed by sovereign states to achieve manifold wider-policy goals, thereby suppressing the quest for the best value for money in the public sector. Governments have been using their purchasing power to achieve a host of goals, including measures such as appeasing uncompetitive domestic industries by not sourcing from more efficient foreign suppliers, or supporting grassroots charity by reserving certain public contracts to social enterprises. At the international level, this had been largely unaddressed until a small circle of less than twenty mostly developed countries [3] concluded the Government Procurement Agreement ('GPA'),[4] the axiom of which was to advocate best value for money, contain other policy goals and curtail protectionism through the harmonisation of procedures governing public contracting.

Nonetheless, over three decades of the operation of the subsequent versions of the GPA as well as unsuccessful attempts to multilaterise this agreement have also revealed a strong polycentrism in approaches to non-commercial considerations being integrated into procurement process within and outside the GPA. In a nutshell, the expansion of the commitments under the GPA has been mostly driven by the consecutive enlargements of the European Union ('EU'). [5] In the entire developing and least developed world some liberalisation of public procurement markets, at best, has been achieved through (*i*) bilateral trade agreement especially with the United States ('US') and EU,[6] (*ii*) within the framework

[1] See Tim Tucker, 'A Critical Analysis of the Procurement Procedures of The World Bank' in Sue Arrowsmith and Arwel Davies (eds), *Public procurement :global revolution* (Kluwer Law International, London 1998) at 139.

[2] See: General Agreement on Tariffs and Trade, 1947(signed at Geneva on 30 October 1947, provisionally applied since 1 January 1948) 55 UNTS 194, Article III:8.

[3] As of 20 February 1980: Austria, the then European Economic Community (Belgium, Denmark, Germany, Ireland, France, Italy, Luxembourg, Netherlands, United Kingdom), Finland, Japan, Norway, Sweden, Switzerland, United Kingdom in respect of its non-EC territories except for Bermuda, Montserrat, St. Kitts-Nevis, Military Bases in Cyprus and Virgin Islands, United States See: GATT Secretariat, 'Agreement on Government Procurement Done at Geneva on 12 April 1979 - Notification of Acceptances' (20 February 1980) Let/1092.

[4] See: Agreement on Government Procurement 1979(signed at Tokyo on 12 April 1979, in force 1 January 1981) GATT Secretariat (1979) LT/TR/PLURI/2. Superseded by: Agreement on Government Procurement, Revised Text 1987, (Protocol of Amendments done at Geneva on 2 February 1987, in force 14 February 1988); Government Procurement Agreement 1994 (signed at Marrakesh on 15 April 1994, in force 1 January 1996) WTO Agreement Annex 4B 417.

[5] As of July 2015, out 42 parties of the GPA (not counting the EU), 28 were EU Member States.

[6] See further: section 4.1.

of regional trade blocks such as Association of South-East Asian Nations ('ASEAN'), *Mercado Común del Sur* ('MERCOSUR'), or most recently the Trans-Pacific Partnership ('TPP'),[7] or (*iii*) been forced in exchange for granted by the Multilateral Development Banks ('MDBs') in the case of the poorest countries.

At the same time, despite its obligations under the GPA, the US has largely maintained protectionist measures due to its individual derogations, which has especially favoured its small domestic business. In turn, Western European countries, thanks to the vagueness of the GPA, have been pushing environmental and social agenda within EU's internal market, thereby disrupting sourcing from suppliers from third countries. And developing regions have been very sceptical about being a part of the system in which (*i*) a formal reciprocity would not get their industries a real reciprocal access to foreign procurement markets, and (*ii*) strengthening international protection of intellectual property ('IP') would prevent them from employing their own public procurement markets to induce technology transfers from countries of originators.[8]

Inevitably, the calm tide towards fairer and freer public procurement almost imperceptibly turned in December 2011[9] when over forty parties to the GPA agreed to (*i*) expressly allow for the inclusion of environmental considerations into public procurement as well as (*ii*) further negotiate matters such as a sustainability and safety standards in public procurement after April 2014.[10] Superficially, the adopted changes and planned negotiation agenda did not make a Copernican revolution. However, these changes have camouflaged an acquiescent stance of the most important parties to the GPA on governmental policies employing public procurement to deliberately interfere with foreign regulatory environments including foreign black-letter-laws, enforcement and even entire political systems (by unilaterally imposing standards related to social, labour and human rights, environmentally-friendly production methods, related emission etc., sometimes by introducing public-procurement-related trade sanctions). At the same time, in an incoherent way, the agenda of future GPA-related works ignored the problem of technology transfers to developing countries which has been revived especially by Chinese public procurers, state influenced enterprises ('SIEs') included, for the first time having a sufficient purchasing power to challenge internationally harmonised regulatory environment for the protection of IP.

[7] For further information, see: Bryan Mercurio, 'The Trans-Pacific Partnership: Suddenly a Game Changer?' (2014) 37(11) World Econ 1558.

[8] In the course of the GATT Tokyo Round, this initially had been especially India's concern. See: GATT, 'Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Government Procurement" - Communication from the Delegation of India' (11 January 1979) MTN/NTM/W/216 at 1. See further: section 9.4.2.c.

[9] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Report (2012) of the Committee on Government Procurement' (6 December 2012) GPA/116, para. 7 at 2.

[10] See: WTO, 'Government Procurement, Revised WTO Agreement on Government Procurement enters into force' *WTO 2014 NEWS ITEMS* (7 April 2014).

Altogether, the recent developments in the GPA system have not reflected the needs of all current or potential GPA parties. They added to the list of obstacles to a wider multilateral liberalisation of public procurement markets and foretell nothing but a continuing clinch of negotiations as well as likely controversies between jurisdictions significantly varying in terms of standards, legal traditions, level of statism and governments' engagement in economic activities.

OBJECTIVE OF THE STUDY

The problem of interferences with foreign regulatory environments as an impediment to a wider opening of public purchases to free trade has not been well mapped and desperately needs to be thoroughly examined. This problem can be embraced by the concept of 'cross-border horizontal policies' which this study roughly defines - drawing upon Arrowsmith's concept of horizontal policies meaning "*using procurement power for objective unconnected with this main purpose"*[11] - as policies adversely affecting foreign (exterritorial) business interests by interfering in/distorting the foreign (international) regulatory environments, and often specifically targeting foreign business operators. This study will conceptualise so-defined cross-border horizontal policies by identifying and discussing their common distinctive features such as the interference with the foreign regulatory environment, selective and arbitrary application and the necessary use of purchasing power. This study will also operationalise cross-border horizontal polices as a genuine impediment to liberalisation of public procurement markets by scrutinising public-procurement-related trade negotiations as well as their confluences with sub-central autonomy and executive discretion to regulate the procurement process, from which the pursuit of cross-border horizontal policies often stems. While this study does not aim at finding one magic bullet which can remove all trade barriers in public procurement markets, it hopes to comprehensively depict this relatively new piece of the puzzle, sketch a few scenarios of future developments and come upon partial solutions in the process.

LITERATURE REVIEW

General commerce context

This inquiry can only very loosely draw upon the plentiful literature devoted to unilateral cross-border regulatory policies in general commerce within the WTO framework[12] because

[11] See: Sue Arrowsmith, *Government procurement in the WTO* (Kluwer Law International, The Hague 2003) xxiii, 481 at 325.

[12] See especially: Krista Nadakavukaren Schefer, *Social regulation in the WTO : trade policy and international legal development* (Edward Elgar, Cheltenham 2010); Christiane R. Conrad, *Processes and Production Methods (PPMs) in WTO Law* (Cambridge University Press, Cambridge 2011); Emilie Hafner-Burton, *Forced to be good : why trade agreements boost human rights* (Cornell University Press, Ithaca 2009) 220; Anne Davies and Christopher McCrudden. 'A Perspective on Trade and Labour Right' (2000) 3(1) J Intl Econ L 43; Alan Isaac Zreczny. 'Process/Product Distinction and the Tuna/Dolphin Controversy: Greening the GATT Through International Agreement' (1994) 1(2) Buff J Intl L 79; R. Howse and D. Regan. 'The product/process distinction - an illusory basis for disciplining 'unilateralism' in trade policy' (2000) 11(2) Eur J Intl L 249.

of the absolute autonomy of plurilateral public-procurement-specific regime stemming from the exemption of public procurement from national treatment ('NT') and most-favoured-nation ('MFN') principles under the 1947 General Agreement on Tariffs and Trade (GATT47)[13] and continuing after the establishment of the WTO.[14] It suffices to note that, in general commerce, the official stance of some in the international community is to avoid unilateral measures with extraterritorial application. In the environmental context, the United Nations' Rio Declaration on Environment and Development of 1992[15] stated:

> "*States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.* ***Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.*** *Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.*"[16]

Similarly, in the WTO, in the context of social rights, the Singapore Ministerial Declaration of 1996[17] stated:

> "*We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards.* ***We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.*** *In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.*"[18]

The GATT/WTO case law has also gone against unilateral measures interfering with foreign regulatory environments in the interpretation of the ban of discrimination of 'like products' under the GATT47[19] along with the GATT's 47's general exceptions[20] allowing measures "*necessary to protect human, animal or plant life or health*"[21] or *"relating to the conservation of exhaustible natural resources if such measures are made effective in*

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[13] See: General Agreement on Tariffs and Trade (signed in Geneva on 30 October 1947, provisionally applied since 1 January 1948) 55 UNTS 194.

[14] See further: sections 2.3, 2.4, 9.2.3.

[15] See: UN, 'The Rio Declaration on Environment and Development' (1992) UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874.

[16] See ibid. article 12. See also: Amy J. Dona. 'Crossing the Border: The Potential for Trans-Boundary Endangered Species Conservation Banking' (2008) 16(655) NYU Envtl L J at 705.

[17] See: WTO Singapore Ministerial Declaration adopted on 13 December 1996 Ministerial Conference (18 December 1996) WT/MIN(96)/DEC.

[18] See: ibid. Article 4. See also: James Thuo Gathii. 'Re-characterizing the Social in the Constitutionalization of the WTO: a Preliminary Analysis' (2001) 7 Widener L Symp J 137 at 156.

[19] "*The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.(…)*" See: GATT47, Article III.4.

[20] Under the GATT47, the general exception are only allowed "*[s]Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade (…).*" See: GATT47, article XX *in initio*.

[21] See: GATT47, Article XX.(b).

conjunction with restrictions on domestic production or consumption."[22] The Panel report in *Tuna/Dolphin II*[23] emphasised that if *"Article XX were interpreted to permit contracting parties to take trade measures so as to* ***force other contracting parties to change their policies within their jurisdiction****, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired."*[24] Similarly, the Appellate Body's report in *US-Shrimp*[25] stated that "*it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to* ***require other Members to adopt essentially the same comprehensive regulatory program****, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.*"[26]

Nonetheless, to some extent, such developments opposed the reality since early 1990s when countries commenced to unilaterally impose product-and-process-related mandatory environmental requirements, mandatory eco-labels and safety schemes on export-oriented industries in emerging economies.[27] In Jackson's view, the only purpose of imposing higher social or environmental standards on extra-territorial business operations has been to deprive third countries of their comparative advantages.[28] According to VanGrasstek, such efforts to raise standards in third countries were easily 'hijacked' by vested interests, domestic lobbyists and protectionists and the resulting standards were often viewed by emerging economies as unnecessary and arbitrary non-tariff barriers to trade ('NTBs'),[29] Likewise, all 'democratic' considerations incorporated into various trade agreements were seen by developing countries as developed countries' policy tool allowing, to quote Hafner-Burton

[22] See: GATT47, Article XX.(g).

[23] See: Report of the Panel, *United States - Restrictions on Imports of Tuna* (16 June 1994) DS29/R.

[24] See: ibid. DS29/R, para. 5.26 at 52, 53. See also: Cathy L. Wittmeyer. 'A Public Procurement Paradox: The Unintended Consequences of Forest Product Eco-labels in the Global Marketplace' (2003) 23(1) J L & Com 69 at 79.

[25] See: Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755); Report of the Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*' (15 May 1998) WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821.

[26] See note 25, WT/DS58/AB/R, para. 164 at 64-65. See also: note 24, Wittmeyer at 79-80.

[27] According to the complex study by the OECD on the impact of environmental requirement on market access *"[d]Ðuring the early 1990s, developing countries, particularly those with fast-growing manufacturing sectors and export-led agriculture, encountered barriers to exports due to new environmental requirements, particularly maximum residue limits (MRLs) for chemicals, and restrictions on how primary products were produced or harvested. Many of these new requirements seemed to target the sectors of greatest importance to developing countries: textiles, leather, fish and horticultural products,"* See: OECD. *Environmental requirements and market access* (OECD Publishing, Paris 2005) 287 at 11. In addition, for instance in Indian context, Debroy noticed that developing countries have reacted negatively to TBSs and sanitary and phytosanitary measure because they had little influence on determining such standards and have were not ready for such, in fact, protectionist standards. See: Bibek Debroy, 'The SPS and TBT Agreements: Implications for Indian Policy' Indian Council for Research on International Economic Relations, New Delhi, India (June 2005) Working Paper no. 163 at i.

[28] See: John H. Jackson, *Sovereignty, the WTO and changing fundamentals of international law* (Cambridge University Press, Cambridge 2006) 361 at 22. See further: section 6.2.1.d.

[29]See: Craig VanGrasstek, 'Labor Right' in Miguel Rodriguez Mendoza, Patrick Low and Barbara Kotschwar (eds), *Trade rules in the making : challenges in regional and multilateral negotiations* (Brookings Institution Press, Washington 1999) 546 at 493. See also: Beverly May Carl, *Trade and the developing world in the 21st century* (Transnational Publishers, Ardsley 2001) 550 at 498; Emilie Hafner-Burton, *Forced to be good : why trade agreements boost human rights* (Cornell University Press, Ithaca 2009) 220 at 167.

"*to boost their own* [developed countries'] *political influence, to solve trade or security problems or to accumulate resources.*"[30] According to Hafner-Burton, the result was a 'politics of repression,' or at best as a 'bad diplomacy.'[31]

Application of general-commerce case law/literature

The same remarks apply to cross-border horizontal policies in public procurement markets. However, the WTO's jurisprudence based on GATT provisions non-applicable to public procurement can at best be applied to these markets *per analogiam.*[32] According to McCrudden, the interpretation of Article XX of the GATT47 could hardly be used in the analysis of the similar, yet distinct, GPA94 Article XXIII allowing the parties to the GPA to impose or enforce measures necessary to protect, among others "*public morals, order or safety, human, animal or plant life or health.*"[33][34] Likewise, the firm exemption of "*purchasing specifications prepared by governmental bodies*" from the WTO Agreement on Technical Barriers to Trade ('TBT Agreement')[35] significantly limits the meaning of relatively recent cases like *Tuna Labelling*[36] which clarified limits of imposing process-related requirement under the TBT Agreement.[37] Possibly relevant provisions of the GPA have never been tested for several reasons. For example, as noticed by Wittmeyer in the context of procurement of tropical timber and eco-labelling confirming sustainable forestry, countries mostly adversely affected by unilaterally imposed standards simply have not been parties to the GPA.[38] Moreover, the only formalised dispute between GPA parties - the resolutions of which could clarify the limits of cross-border horizontal policies - concerning Massachusetts' Burma Law[39] challenged by Japan[40] and by the EU[41] was settled 'out of court.'

[30] See: ibid. Hafner-Burton at 165. See also: ibid. at 5; note 29, Craig VanGrasstek at 493.

[31] See: ibid. Hafner-Burton at 4, 22.

[32] See: note 24, Wittmeyer at 88.

[33] See: GPA94, Article XXIII.

[34] See: Christopher McCrudden. 'International Economic Law and the Pursuit of Human Rights: A Framework For Discussion of The Legality of 'Selective Purchasing' Laws Under the WTO Government Procurement Agreement' (1999) 2 J Intl Econ L 3 at 39.

[35] See: Agreement on Technical Barriers to Trade (signed 15 April 1994, in force 1 January 1995) WTO Agreement Annex 1A 117, Article 1.4. See further: sections 2.3.2, 9.1.2.b.

[36] See: Report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (15 September 2011) WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013; Dispute Settlement Body, 'Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*' (16 May 2012, adopted 13 June 2012) WT/DS381/AB/R DSR 2012:IV, p. 1837.

[37] See further: sections 6.1.2.c, 6.2.1.d.

[38] See: note 24, Wittmeyer at 88, 89. See further: section 6.1.2.c.

[39] See: Act Regulating State Contracts with Companies Doing Business with or in Burma of 1996 Mass. Acts 130 (codified at Mass. Gen. LawS Ann. ch. 7, §§ 22G-22M (1998).

[40] See: WTO, Permanent Mission of Japan to the WTO, 'United States - Measure Affecting Government Procurement. Request for Consultations by Japan to the Permanent Mission of the United States and to the Dispute Settlement Body' (21 July 1997) WT/DS95/1 GPA/D3/1; WTO, Permanent Mission of Japan to the WTO, 'United States - Measure Affecting Government Procurement. Request to Join Consultations to the Permanent Mission of the United States and to the Dispute Settlement Body'

Anticipating the claim that some firmly protectionist policies pertaining to technology transfers forced through public procurement are a perfect match for environmental and social cross border policies, [42] it is worth noting that the exemption of public procurement from GATT47 causes analogical interpretative problems also in the case of such policies. Superficially nothing exempts public procurement markets from the full application of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS'). [43] Thus, some TRIPS' provisions could potentially be violated by various public-procurement-specific protectionist measures, including TRIPS' NT clause[44] or a provision on 'patentable subject matter' requiring that "*(…) patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.*" [45] However, according to An and Peck, in the light of GATT's 47's exemption, any claims against public-procurement-related measures based on such TRIPS' provisions would very likely be unsuccessful.[46]

Existing public-procurement-specific literature

This leaves the problem of cross-border horizontal policies with a good deal of literature addressing in depth the problem of the international liberalisation of public procurement markets, authored by scholars like Arrowsmith, Bovis, Davies, Fernandez-Martin, McCcrudden and Trepte, to name a few. [47] Admittedly, in public-procurement-specific literature, this problem has not been completely ignored. However, it has been only very fragmentarily addressed and confined to environmental and social considerations. For example, Arrowsmith in 2003 observed that (*i*) "*substantial uncertainty exists over the possibilities for using trade measures, including those based on government procurement, to promote extra-territorial policies,*" [48] and (*ii*) "*[i]In this context* [using procurement to

(30 July 1997) WT/DS95/2; WTO, Permanent Mission of Japan to the WTO, 'United States - Measure Affecting Government Procurement Request for the Establishment of a Panel by Japan' (9 September 1998) WT/DS95/3.

[41] See: Permanent Delegation of the European Commission to the WTO, 'Measures Affecting Government Procurement Request for Consultations by the European Communities to the Permanent Mission of the United States and to the Dispute Settlement Body' (26 June 1997) WT/DS88/1 GPA/D2/1; WTO, Permanent Delegation of the European Commission to the WTO, 'United States - Measure Affecting Government Procurement. Request for Establishment of a Panel by the European Communities to the Chairman of the Dispute Settlement Body' (9 September 1998) WT/DS88/3.

[42] See further: sections 6.2.4.a, 7.3.2, 9.3.1.b.

[43] See: Agreement on Trade-Related Aspects of Intellectual Property Rights (signed at Marrakesh on 15 April 1994, in force 1 January 1995) WTO Agreement Annex 1C 319, 1869 UNTS 299.

[44] "*Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection 3 of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS. (…).*" See: TRIPS, Article 3. See further: section 6.1.2.d.

[45] See: TRIPS, Article 27.1.

[46] See: Siyuan An and Brian Peck. 'China's Indigenous Innovation Policy in the Context of its WTO Obligations and Commitments' (2011) 42(2) Geo. J. Intl L 375 at 441, 442.

[47] See: EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, 'Bibliography on Public Procurement Law and Regulation' (Nottingham 2011) as updated for February 2014 at 64-94.

[48] See: note 11 at 347, 348.

promote human rights and environmental objectives] *government bodies have sometimes imposed sanctions through access to their procurement, or influence the activities of private firms operating in other counties*."[49] According to this author, the primary dilemma with horizontal policies has been how to balance free trade objectives with "*domestic and other*" policies wherefore 'other' policies seemed to equate to only sanctions.[50] *Contra* article 12 of the Rio Declaration, Arrowsmith also proposed that "*non-discriminatory measures of this type should generally be permitted, even as purely symbolic gesture, even when they are no formulated by reference to external* [international] *norms. However, - (…) to provide an important safeguard against abuse for protectionist reasons – discriminatory policies should only be allowed to the extent that they are formulated by reference to such external* [international] *norms.*"[51]

In 2007, within even narrower context of equality in public procurement - that is the context non-related to environmental or socio-economic issues - McCruddren rhetorically asked why a state's positive obligations to respect, to protect and to fulfil human rights should stop at its border? He suggested that they should not.[52] McCruddren also opted for the incorporation of social standards in the WTO agreement[53] and argued that this would (*i*) "*defend the social achievements of developed countries from erosion, and facilitate further trade liberalization by reassuring voters in those countries. Externalities, such as the sense of outrage in many countries about the treatment of some workers abroad*," [54] (*ii*) "*justify regulatory intervention, just as much as pollution crossing borders justifies regulation by the receiving country*,"[55] as well as that (*iii*) "*[p]Promoting better social standards would be an act of solidarity with the disadvantaged in the developing world.*" [56] and (*iv*) "*An effective international regulatory structure may constrain the unilateral use of trade sanctions, and thus reduce the risk of covert protectionism.*"[57] Finally, two years later, Arrowsmith - again only with regard to social and environmental policies and in the narrow EU-related context - noticed that some problems might arise out of the pursuance of horizontal policies, potentially resulting in domestic norms being imposed on abroad business operations when

[49] See: ibid. at 324.
[50] See: ibid. at 326
[51] See: ibid. at 357.
[52] See: Christopher McCrudden, *Buying social justice :equality, government procurement, and legal change* (Oxford University Press, Oxford 2007) 680 at 90-91.
[53] See: ibid. at 588.
[54] See: ibid.
[55] See: ibid.
[56] See: ibid.
[57] See: ibid.

enterprises operating abroad are selected as suppliers or contractors of domestic governmental agencies.[58]

Altogether, the authors who generally analysed non-commercial considerations in public procurement - even those who created their own conceptual frameworks and typologies of non-commercial considerations (like Arrowsmith's 'horizontal policies' or McCrudden's 'linkages'[59]) - confined their analyses to firm traditional protectionist measures, as well as incidentally extra-territorial but mostly domestic social and environmental policies. Moreover, such authors have never presented innovation-oriented industrial policies targeting specific foreign technologies pursued by the governments of emerging economies as a counterpart of cross-border social and environmental measures. Likewise, authors who specifically investigated technology transfers forced through public procurement markets (especially in the Chinese context) like An and Peck, or Boumil,[60] did not integrate their analyses into Arrowsmith's or Mccruddens' conceptual frameworks.

Framework of enquiry

A complex study on the pursuit of cross-border horizontal policies as an obstacle to the liberalisation of public procurement markets demands perusal of all public-procurement-relevant GATT/WTO available documents. And - with the last systemic survey conducted by Blank and Marceau in 1996[61] - the time is ripe for updated in-depth analysis primary sources, particularly those produced by the GATT/interim/WTO Committee on Government Procurement, being at a time:

(*i*) GPA-related *travaux préparatoires*,

(*ii*) an evidence of non-compliance and of the amicable dispute settlement by the parties,

(*iii*) an illustration of the dialogue with observers and candidates to accession,

(*iv*) to some extent, a source of information on public-procurement-relevant national laws and market statistics, and

[58] See: Sue Arrowsmith, 'A Taxonomy of Horizontal Policies' in Sue Arrowsmith and Peter F. Kunzlik (eds), *Social and environmental policies in EC procurement law : new directives and new directions* (Cambridge University Press, Cambridge 2009) 108 at 115

[59] See: Christopher McCrudden, 'EC public procurement law and equality linkages: foundations for interpretations' in Sue Arrowsmith and Peter F. Kunzlik (eds), *Social and environmental policies in EC procurement law : new directives and new directions* (Cambridge University Press, Cambridge 2009) 271 at 271.

[60] See generally: James Boumil S. 'China's Indigenous Innovation Policies under the TRIPS and GPA Agreements and Alternatives for Promoting Economic Growth' (2011-2012) 12(2) Chi J Intl L 755.

[61] See generally: Annet Blank and Gabrielle Marceau. 'History of the government procurement negotiations since 1945' (1996) 4 Pub Proc L Rev 77. This chapter was reprinted as chapter 1 in: Simon J. Evenett and Bernard M. Hoekman (eds), *The WTO and government procurement* (Edward Elgar, Cheltenham 2006).

(*v*) thanks to the analytical output of the Working Party on GATS (General Agreement on Trade in Services) Rules, a concise information on the public-procurement-specific of the regional trade agreements ('RTA's) and public-procurement-relevant activities of the MDBs and of the United Nations Commission on International Trade ('UNCITRAL').

The analysis of primary sources is backed by assumptions, background information (factual/legal framework), conceptual framework to build upon, and – where necessary – a supplementary analysis of (*i*) national laws/case-law affecting international negotiations, and (*ii*) works of other international organisations with an interest in public procurement. An overview of the very basics of classical political economy and limited economic literature on protectionism in public procurement markets offers necessary assumptions, in principle warning about and speaking against an integration of non-commercial considerations into public procurement. A combination of black-letter-law-review of international public-procurement-relevant instruments and a selective analysis of related primary sources offers a necessary factual/legal background, explaining the emergence of global model of the regulation of public procurement markets and its evolving stance on the policies interfering with foreign regulatory environments.

A revisited Arrowsmith's taxonomy of horizontal policies - along with a review of analogical government's non-public-procurement specific and private (consumers') actions - underlies the conceptualisation. Finally, an insight into selected national laws/case-law, determining the scope of public procurement-specific sub-central autonomy and executive discretion (also contributing to the pursuit of cross-border horizontal policies) precedes mentioned chronological and full analysis of GATT's/WTO's primary sources, which will altogether underpin the operationalisation of this study.

Contribution to literature

In its entirety, this study contributes to literature by filling in a substantial conceptual *lacuna* in the theoretical framework of the international economic integration of public procurement markets. In addition, this study produces a number of incidental findings which are intertwined with the problem of cross-border horizontal policies and essential for the development of the entire argument.

A strict regulation of public procurement process in national laws (a regulation itself, not just its international harmonisation) comes out as doubtful response of international community to protectionism leading to even more protectionism by deterring public procurers from

sourcing like private economic operators.[62] The exemption of public procurement from GATT47, to a large extent, emerges as a product of accident and misunderstandings during hasty post-WWII negotiations aiming at bringing a new global trading order in place.[63] A comparative analysis of public-procurement-related developments in the GATT/WTO and in the EU reveals the *de facto* decisive role of the EU's public procurement regime in the GPA system, which justifies making feasible predictions about the GPA's future based on current developments in the EU.[64] Enriching Arrowsmith's taxonomy of horizontal policies with the distinction between policies stemming from general-commerce-related measures affecting flows in public procurement markets and public procurement-specific measures allows to better draw the line between policies subjected to pretty well defined rules of general commerce and policies pursued in a regulatory vacuum.[65]

Moreover, an explanation of the concept of cross-border horizontal policies includes an original typology of interferences with foreign regulatory environments.[66] Likewise, an analysis of the problem of sub-central autonomy produces its own novel typology identifying various degrees of sub-central intervention in external trade matters normally reserved to central governments.[67] An insight into the problem of executive discretion brings about a concept of 'regulated' executive discretion which adds to current literature only differentiating between horizontal policies stemming from mandatory norms and from administrative practice (unregulated discretion).[68] Finally, a recourse to theories elucidating an emergence of global order of private commercial contracting (i.e. the interplay of reciprocity, market forces and network effects at both the intergovernmental and private merchant-to-merchant level) and its unorthodox comparison with the creation global model of the regulation of public procurement (in short, the observation that the lack of private merchant-to-merchant cross-border interactions and strong network effects compel negotiators to arbitrarily regulate the global legal order of public contracting against the will of all stakeholders in the GPA system) sheds yet another light on relatively little success of the negotiations on the liberalisation of public procurement markets.[69]

Structure

The study is structured as follows. These introductory remarks along with Chapter 1, covering mentioned premises of this study, form a wider Introduction (Part I) and are

[62] See: section 1.6.
[63] See: section 2.2.
[64] See: sections 3.2, 8.2.2.
[65] See: section 5.5.1.
[66] See: section 6.2.
[67] See: sections 7.2-7.4.
[68] See: section 8.2.
[69] See: section 9.1.1.

followed by Framework (Part II), Conceptualisation (Part III), Operationalisation (Part V), and Conclusions (Part VI). The Framework covers relevant developments in (*i*) the GATT/WTO in Chapter 2, (*ii*) the EU in Chapter 3, and (*iii*) other public-procurement-relevant international instruments in Chapter 4. The Conceptualisation covers (*i*) critical review of existing conceptual framework in Chapter 5, and (*ii*) the explanation of the concept of cross-border horizontal policies in Chapter 6. The Operationalisation covers an analysis of (*i*) sub-central autonomy in Chapter 7, (*ii*) executive discretion in Chapter 8, and (*iii*) international negotiations in Chapter 9. The Conclusion covers a prognosis of possible relevant future developments in Chapter 10, followed by final concluding remarks.

"There was also a series of fascinating contracts awarded by the General Services Administration. Three of these contracts, for a total value of US$330 million, were for paint remover. One of the curious insights was that the paint remover contracts had a greater value than the paint contracts which were only for US$150 million. There were two of those." [1]

Chapter 1. Primer on protectionism in public procurement markets

This chapter offers a primer for non-economists regarding the reason why public procurers discriminate against foreigners (including foreign goods/services as well as foreign suppliers/contractors) to the detriment of domestic welfare and in so doing presents the neoclassical premises for this research project. Its purpose is to explain the basic relations between (*i*) public procurement and trade by demonstrating the size of public procurement markets and their exposure to trade and protectionism, and (*ii*) regulation of public procurement processes and the requirements of trade. This chapter also briefly introduces the concept of 'horizontal policies' in public procurement and suggests that their primary function is to accommodate sophisticated protectionism practices.

This chapter begins with the necessary context, explaining *(i)* what is protected, that is, what is the size of public procurement markets (see section 1.1), *(ii)* who generally is shielded by or benefits from the protectionism from international trade (see section 1.2); *(iii)* whose interests are shielded by or benefit from protectionism in public procurement markets (see section 1.3); (*iv*) what are the pro-liberalisation forces in public procurement markets and how they are curbed (see section 1.4), and (*v*) what are the theories/models justifying protectionism in public procurement markets and their limits (see section 1.5). This chapter concludes with an analysis of the additional problem of the mutual linkages between protectionism and the excessive regulation of public procurement markets (see section 1.6).

1.1 What is protected?

Prior to referring to any economic or political theory which attempts to explain or justify protectionism in public procurement, it is worth briefly looking at the numbers in order to see the vast sums of taxpayers' money which is spent on governmental purchases. Not only does such illustrative explanation by numbers evoke the imagination, but a cynic might also suggest that it is perhaps a substitute for all the theories and justification referred to further below. In other words, the sheer amount of money which governments spend on public procurement is in and of itself an explanation for why governments seek to shield domestic suppliers from foreign competition.

[1] One of the remarks of the delegate of the European Communities about public procurement in the United States expressed at the meeting of the GATT Committee on Government Procurement in October 1991. See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 18 October 1991' (22 November 1991) at 3-4.

This link is fairly obvious, and it is not even controversial to assert that the more money at stake in the public procurement market, the more likely are interferences in those markets. The aim, of course, is to channel public money to specific groups of interest, whether it be through legal means such as the results of legislative lobbying or illegal means such as bribery and corruption. In addition, it is again obvious but worth mentioning that for the most part the beneficiaries of the largesse are usually disinterested in domestic or international competition.

The money involved in public procurement markets is vast. This has long been known. In fact, public procurement was a negotiating topic during the summits of the United Nations Conference on Trade and Employment (UNCTAD), (held between November 1946 and March 1948 in London,[2] Lake Success,[3] Geneva[4] and Havana[5]), which aimed to draft and adopt the Charter of the International Trade Organization ('ITO').[6] At those meetings, it was the initial position of the US to multilaterally liberalise public procurement markets[7] but even at the first meeting in London it was obvious that such proposal would not meet the acceptance of other major players. In that context, the US delegate made a claim that if the American liberal proposal is totally rejected "*this leaves rather a large gap in this document because Government purchases could be extremely extensive and could cover many millions*

[2] The conference was held from 15 October – 26 November 1946. See: UN, 'Advance Guidance on ITO Draft Charter', European Office of the United Nations, Information Centre in Geneva (Geneva, 19 August 1947) press release No 291 <http://www.wto.org/gatt_docs/English/SULPDF/90260228.pdf>, accessed 2 April 2015.

[3] Held on 25 February 1947. See: ibid.

[4] Held from 10 April – 22 August 1947. See: ibid.

[5] Held from 24 November 1947 – 23 March 1948. See: Final Act and Related Documents United Nations Conference on Trade And Employment held at Havana, Cuba from 21 November, 1947, to 24 March, 1948 (signed at Havana on 24 March 1948, never ratified).

[6] See: US Department of State,' Suggested Charter for an International Trade Organization of the United Nations' (September 1946) Publication 2598, Commercial Policy Series 03.

[7] The American initial position was to cover public procurement markets and behaviour with the following clauses on most favoured nation and national treatment:

US draft ITO Art 8 "*General Most-Favored-Nation Treatment*

1. With respect to customs duties and charges of any kind imposed on or in connection with importation and exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation or exportation, and with respect to all matters relating to internal taxation or regulation referred to in Article 9, any advantage, favor, privilege or immunity granted by any Member country to any product originating in or destined for any other country, shall be accorded immediately and unconditionally to the like product originating in or destined for all other Member countries. The Principle underlying this paragraph shall also extend to the awarding by Members of governmental contracts for public works, in respect of which each Member shall accord fair and equitable treatment to the commerce of the other Members (…)."

US draft ITO Art 9 "*National* Treatment on Internal Taxation and Regulation

1.The products of any Member country imported into any other Member country shall be exempt from internal taxes and other internal charges higher than those imposed on like products of national origin and shall be accorded treatment no less favorable than that accorded like products of national origin in respect of all internal laws, regulations or requirements affecting their sale, transportation or distribution or affecting their mixing, processing, exhibition or other use, including laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment. The provisions of this paragraph shall be understood to preclude the application of internal requirements restricting the amount or proportion of an imported product permitted to be mixed, processed, exhibited (…)."

or hundreds of millions of dollars worth of purchases for public works - for power installations and so on."[8]

Currently one can rely more on statistics rather than on very general statements, although even today statistics are fragmentary and often incomplete. With no single and commonly used source of statistics on the scale of government purchases and on the size of government procurement markets, data must be constructed from information coming from different institutions (mostly the OECD but many other organisations as well). Different statistics might cover the same countries/markets/agencies/goods/services but, at the same time, can be based on different methodologies and particularly on different definitions of public procurement, or can be based on different definitions of government/governmental agencies, etc. Some studies on 'public procurement' can be so inaccurate to even include employee compensation (despite personal/employment contracts not falling within the scope of public procurement). As a result, all studies - when looked at in a systemic matter - offer a rather divergent image of the size of public procurement markets.[9] Despite these limitations, the picture is not wholly incomplete.

Firstly, the size of public procurement markets (the aggregate annual value of the public contracts) can be presented as the percentage of the gross domestic product ('GDP') of a given country or of a block of countries. Different studies show that national public procurement sectors typically range from 10 percent of the national GDP (according to an assessment by McAfee and McMillan in 1989[10]) to between 15 and 20 percent (more recently presented numbers, especially by the 2002 OECD's complex study which analysed 1998 and covered 134 countries[11]).

Secondly, the size of public procurement markets can be juxtaposed against the value of international trade flows. According to the OECD, in 1998 the total global value of public procurement markets was equal to 82.3 percent of the world's merchandise and commercial services exports. The total global contestable public procurement (meaning public procurement that is potentially open for international suppliers) was equal to 30.1 percent of global exports and 7.1 percent of the total world's GPP (USD 2,083 billion).[12] Suppose that

[8] See: UN, 'Report from the third meeting of the Subcommittee on State Trading held 11 November 1946' European Office of the United Nations, Information Centre (Geneva 11 November 1946) E/PC/T/C.II/ST/PV/3 at 5.

[9] See also: Denis Audet. "Government Procurement: A Synthesis Report." OECD J Budget 2.3 (2002): 149 at 150.

[10] See: Randolph P. McAfee and John McMillan. 'Government procurement and international trade.' J Int'l Econ 26.3–4 (1989): 291-308 at 291.

[11] See: Pascal Lamy. 'Foreword' in The WTO regime on government procurement: challenge and reform. Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) at xxv; WTO Director-General, 'Report to the TPRB from the Director-General on the Financial and Economic Crisis and Trade-Related Developments.' (26 March 2009) Job(09)/30 point 50 at 16; note 9 at 151.

[12] See: note 9 at 151.

on average public procurement markets were worth only 10 percent of national GDPs (and – as mentioned – most recent studies suggest that the ratio is higher). Even at this conservative estimate, Trionfetti demonstrated the importance of public procurement when comparing the value of public procurement (10 percent) with the value of agricultural goods (equalling to 6 percent of the USA's and the EU's aggregated GDPs).[13] The fact that public procurement is larger than the agriculture sector is largely unknown, and given the prominent role that agriculture has played in every GATT/WTO negotiating round, it begs the question why public procurement has been largely ignored.

Thirdly, the statistics on public procurement markets in emerging economies show different numbers than in developed ones. Emerging - but not least developed countries ('LDCs') – have proved to have smaller public procurement sectors relative to their GPDs. According to the OECD, in 1998 this ratio was 20 percent (USD 4,733 billion) and 7.6 percent internationally contestable (USD 1,795 billion) in the OECD members – that is, the most developed countries. However, this ratio was 14.5 percent (USD 816 billion) and 5.1 percent (USD 287 billion) contestable on average in 106 remaining analysed non-OECD members (that is, in the less developed countries).[14]

As to absolute numbers for 1998 (outdated but comparing by far the largest number of countries), among 106 non-OECD countries, the value of public procurement in only South Africa, Brazil, China, Indonesia, Saudi Arabia and the Russian Federation exceeded USD10 billion. In Egypt, Morocco, Chile, Peru, Puerto Rico, Bangladesh, India, Israel, Kuwait, Malaysia, Singapore, Syria, and the United Arab Emirates the value of the country's whole public sector exceeded USD5 billion.[15] The aggregate value of the public procurement markets of all 106 countries (non-OECD members) accounted for only 13.9 percent of global value of public procurement.[16] This low number should not be surprising given (*i*) the mentioned higher ratio of the value of public procurement markets relative to the GDP in OECD members and (*ii*) obviously higher total GPD of OECD members (absolute numbers) against non-members analysed in the OECD's study.

At the same time, public procurement accounts for a much larger percentage of GDP in LDCs, with public procurement accounting to a staggering 70 percent of GDP in some

[13] See: Federico Trionfetti, 'Home-biased Government Procurement and International Trade: Descriptive Statistics, Theory and Empirical. Evidence' in Sue Arrowsmith and Martin Trybus (eds), *Public procurement the continuing revolution* (Kluwer Law International, New York 2003) 223 at 225.

[14] See: note 9 at 151.

[15] See: Annamaria La Chimia and others, Trade Effects of Rules on Procurement for Commonwealth ACP Member (Economic Paper Series, Commonwealth Secretariat, London 2011) 170 at 45; Bernard M. Hoekman and Simon Evenett J., 'International Cooperation and the Reform of Public Procurement Policies', World Bank and CEP (September 2005) World Bank Policy Research Working Paper WPS3720at 7.

[16] See: note 15, La Chimia and others, at 44; note 15 Hoekman and Evenett, ibid.

African countries.[17] Such high numbers can be linked to the massive, mostly infrastructural, development projects carried on in LDCs and often financed by the World Bank and/or by other regional development banks (projects, the outsourcing of which to external contractors, often falls within the concept of public procurement). As to absolute numbers, in the case of the World Bank, its commitment to borrowers' projects (involving some forms of public procurement) amounted to USD 42.6 billion allocated to 361 new operations and USD167 billion allocated to all existing 1,820 operations in 2011,[18] compared with USD 23.6 billion allocated to 286 new operations and USD94.9 billion allocated to 1,345 pre-existing operations in 2006.[19]

Fourthly, there is some fragmentary evidence that public purchases of services have overtaken purchases of goods from about the second half of the 20th century. For instance, purchases of commodities in 1966 accounted for about 40 percent of the total governmental expenditure in the United Kingdom ('UK') or the US, and for approximately 50 per cent in France.[20] For a rough comparison (a different study probably based on a different methodology and covering non-defence expenditure only), in the US in 1993, this ratio declined to 10.2 percent at the federal level and to 14.1 percent at the state level, whereas purchases of services accounted for respectively 33.3 and 3.2 percent of the total governmental expenditure.[21] If we look at this trend against the tendencies in general commerce, the increasing significance of services in public procurement is also in line with trade in services, gradually overshadowing trade in goods.

However, the shift from goods towards services can, to some extent, be explained (somewhat simplistically but picturesquely) with the following example. The shift in policy from NASA buying semi-finished goods for in-house assembled rockets/spaceships to buying complex transportation services from the Elon Musk's X-space (that is, it shifts to buying 'flights tickets' from an independent contractor) heavily affects procurement statistics. The money previously spent on goods is now reallocated as money spent on services. However, the real change might not be as dramatic as one might think. What merely happens in this

[17] See: note 15, La Chimia and others at 45.

[18] New operations of 2011 included. See: World Bank, 'Financial Management And Procurement in World Bank Operations: Annual Report for F11' (29 February 2012) at iii.

[19] New operations of 2006 excluded. See: World Bank, 'Procurement under World Bank-Financed Projects: F06 Annual Report' (August 2007) at viii.

[20] The share of expenditure on commodities in total public expenditure might cover not only public procurement (that is goods 'not for resale' but also goods 'for resale' falling within the concept of state trading enterprises. Even so, the numbers are still very telling. See: Robert E. Baldwin, *Nontariff distortions of international trade* (Brookings Institution, Washington 1970) 210 at 58.

[21] Excluding personal services, that is compensation to employees which does not fall within the concept of public procurement. Very low share of services excluding compensation at the state and local level can be explained with such expenditure being absolutely dominated by salaries representing 68.5 percent of total expenditure compared with 48.5 percent at the federal level. Calculated based on: Simon J. Evenett and Bernard Hoekman, 'Procurement of Service and Multilateral Discipline' in Pierre Sauvé and Robert M. Stern (eds), *GATS 2000: new directions in services trade liberalization* (Center for Business and Government, Harvard University, Boston 2000) 143 at 152.

case is only one step further in outsourcing. In fact, only some design works, and final assembly of materials plus some portion of project management − that even before were not entirely operated in-house without any contribution of independent external contractors – is outsourced in addition to what was outsourced in the past.[22]

Fifthly, the value of the internationally contestable or potentially internationally contestable procurement steadily grows in both developed and emerging economies (both in terms of absolute numbers and relative to their GDSs). The value of the public procurement sectors subjected to the GPA in the EU - as a percentage of the EU's GDP - grew from 1.6 percent in 1996 to 3.2 percent in 2006.[23] Similarly in the US, the value grew from USD 216.1 billion in 1996[24] to USD 658.2 billion in 2008.[25] Contestable public procurement in emerging economies was assessed by the World Bank at USD 825 billion for 2009[26] compared with USD 287 billion for 106 emerging economies assessed for 1998.[27]

To conclude this review of selected statistics on the money involved in public purchases, again, public procurement markets/sectors escape precise quantitative assessment. Even so, it seems obvious that:

(*i*) these markets/sectors play an important role within the context of national economies as the major channel of public expenditure and – for the reasons that are further discussed below (see sections 1.2 and 1.3) – these markets/sectors are subjected to constant lobbying by various domestic interest groups disinterested in free domestic and/or international competition;

(*ii*) public procurement markets/sectors play an important role in the context of international commerce and international commerce is likely be distorted by domestic mechanisms; and

(*iii*) the exposure of public procurement markets to international commerce has steadily risen.

[22] See also: ibid. at 152-153.

[23] See: WTO Committee on Government Procurement, 'Statistical reports 1996-2006 on public procurement according to Article xix:5 of the agreement on government procurement: Communication from the European Communities' (10 July 2009) GPA/101 at 2.

[24] See: WTO Committee on Government Procurement, 'Statistics for 1996 reported under Article XIX:5 of the agreement. Report by the United States of the Committee on Government Procurement.' (30 January 2002) GPA/21/Add.3.

[25] See: ibid.

[26] See: World Bank, 'The World Bank's Procurement Policies and Procedures: Policy Review: Initiating Discussion Paper' (29 March 2012) 68466 at 16.

[27] See: note 9 at 151 at 151.

1.2 Who is shielded by protectionism from international trade?

The problem of protectionism in public procurement markets is that it distorts private markets and private business-to-business relations. In this regard, public procurement can be evaluated against the background of neo-classical economics. Neo-classical economic theories are concerned not only with who is shielded by and benefits from protectionism but also with the people/public who do not know who is shielded by and benefits from protectionism. The premise is here that free trade increases economic efficiencies and benefits national welfare whereas protectionism is bad economic policy and does not contribute to the national welfare,[28] and it is helpful to briefly (and admittedly somewhat simplistically) mention the magnitude of studies, theories, and arguments in line with this premise:

(*i*) theoretical models of international trade offered by Smith, Ricardo, and Heckscher-Ohlin (HO), which use crucial notions of absolute advantage, comparative advantage, etc. (the basic understanding of which is necessary to understand the arguments presented further below), through

Figure 1. Basic trade theories.

SMITH (1776)
According to Adam Smith's theory of international trade, and based on the principle of international division of labour, countries should specialise in the production of goods in which they have an **absolute advantage**.[29]

ABSOLUTE ADVANTAGE
A country enjoys an absolute advantage in the production of goods if it has an ability to produce those goods using fewer productive inputs than possible anywhere else in the world.[30]

RICARDO (1817)
According to David Ricardo's theory of international trade, countries should specialise in the production of goods in which they enjoy the greatest absolute advantage or the least absolute disadvantage – that is they should specialise in the production of goods in which they enjoy **comparative advantage.**[31]

COMPARATIVE ADVANTAGE
A country enjoys a comparative advantage in the production of goods if the goods have a lower pre-trade relative price than is found elsewhere in the world.[32]

(*ii*) historical statistics showing long-term correlations of periods with the emergence of international commercial exchange and strong global GDP growth, to

[28] For alternative views to the neo-classical approach to international commerce see generally for instance: John Cavanagh, Jerry Mander and International Forum on Globalization, *Alternatives to economic globalization: a better world is possible* Berrett-Koehler, San Francisco 2004) 408; William F. Fisher and Thomas Ponniah, *Another world is possible: popular alternatives to globalisation at the World Social Forum* (Zed Books, London 2003) 364.

[29] See: Steven L. Husted and Michael Melvin, *International economics* (Harper & Row, New York 1990) 552 at 64.

[30] See: ibid. at 64.

[31]. See: ibid. at 66.

[32] See: ibid. at 66.

Figure 2. Trade and growth.

On the one hand (*i*) merchandise exports increased in terms of volume by 31 times from 1950 to 2011[33] and (*ii*) in terms of value presented as the percentage of the world's GDP, international commerce increased by 8.2 percent from 1950-1973 and by 5 percent from 1974-2007. Meanwhile, the average annual real world's GDP grew 5.1 percent between 1950 and 1973 and only by 2.9 percent between 1974 and 2007.[34] More recently, between 2008 and 2012, global exports grew in terms of value annually on average by 8.6 percent[35] whereas the world's real GDP grew on average by 5.9 percent.[36] The *prima facie* correlations are obvious.

(*iii*) individual success stories of economies in which free trade has been fully embraced - probably the most luminescent cases in the 20th century being Singapore and Hong Kong[37] - all showing a strong case for free trade and fighting against protectionism.

Figure 3 Olson's paradox
"*The most important single point about small groups (...) is that they may very well be able to provide themselves with a collective good simply because of the attraction of the collective good to the individual members. In this, smaller groups differ from larger ones. The larger a group is, the farther it will fall short of obtaining an optimal supply of any collective good, and the less likely that it will act to obtain even a minimal amount of such a good. In short, the larger the group, the less it will further its common interests.*"[38]

The next point that needs to be taken as a premise is that not only is protectionism detrimental to national welfare but also its detrimental effects do not spread evenly across a given nation's interest groups. While it will be discussed below who benefits from protectionism, it is clear that the answer is not consumers.[39] Moreover, among consumers, in particular, these are not meagre people who might see any benefits from a given country's protectionist policies. Why then would meagre people not resist being scammed? Already Pareto on the turn of the 19th and 20th century very convincingly explained that meagre people would not counteract protectionism because a protectionist measure provides significant advantages to a small number of people and affords each meagre individual among a great number of consumers only a slight disadvantage.[40] Even if meagre people individually understood benefits of free trade, then Baldwin also explained in 1980s based on Olson's paradox (see Figure 3) that such meagre predominantly (*i*) could hope to freeride on other individuals' contribution to free-trade-policies whereby such policies have

[33] See: Word Trade Organization, 'World Trade Statistics 2012' (Geneva 2012) Appendix: Historical trends at 204.

[34] See: World Trade Organization, 'World Trade Report 2008: Trade in the Globalizing World' (Geneva 2008) 177, Table 1 at 15.

[35] 15.2 percent in 2008, 22.3 in 2009, 22.9 in 2010, 19.6 in 2011, 0.2 in 2012. Data retrieved from: the UNCTAD online statistical data-base: <http://unctadstat.unctad.org/UnctadStatMetadata/Classifications/Tables&Indicators.html> accessed 21 April 2013.

[36] 9.6 percent in 2008, 5.3 in 2009, 8.8 in 2010, 10.5 in 2011. Data retrieved from: ibid.

[37] See generally: Lawrence W. R. Mills. '*Protecting free trade the Hong Kong paradox, 1947-97: a personal reminiscence*' (Hong Kong University Press, Hong Kong 2012); Anne Richards. 'Hong Kong, Singapore, Malaysia and the fruits of free trade' (Dec 1993/Jan 1994) (185) The OECD Observer 29.

[38] See: Mancur Olson, *The logic of collective action; public goods and the theory of groups* (2nd edn Harvard University Press, Cambridge 1971) 186 at 36. For the reviews of Olson's theory, see generally: Pamela E Oliver and Gerald Marwell, 'The Paradox of Group Size in Collective Action: A Theory of the Critical Mass. II' (1988) 53(1) Am Sociol Rev 1; Joan Esteban and Debraj Ray, 'Collective Action and the Group Size Paradox' (2001) 95(3) Amer Polit Sci Rev 663.

[39] See: note 29 at 164-165.

[40] See: Vilfredo Pareto, *Manual of political economy* (A. M. Kelley, New York 1971) 504 at 379.

characteristics of public goods,[41] (*ii*) believe that their individual contributions[42] are too insignificant to alter the trade policy, and therefore (*iii*) would not individually contribute to such policies regardless of what other individuals do.[43]

If not meagre people, then the most obvious answer to who is protected by protectionism, would be that there are different influential interest groups that are shielded by protectionist policies of governments. These might be various domestic social groups or sectors that have various motivations to seek to be shielded against various risks. In the reality of the 19th century, Pareto exemplified those invisible forces with:

(i) capital investors, entrepreneurs and workers in some sectors who seek from the government protection against competition at the expense of other nations' sectors and nations' consumers[44]

(ii) politicians who seek to improve the tax base and public revenue combined with those who hope to benefit from increasing governmental expenditure, and finally[45]

(iii) the rich class more and more despoiled in more and more redistributive democracies (we would say today *social market economy* or *coordinated market economy*) who oppose thievish redistribution and who support less overt solutions that in effect would make rich people not the only people who have to pay taxes,[46]

All of those groups exploit unjustified nationalistic sentiments of the public and of the meagre people.[47] Within the framework of the derivatives of the HO model, the following circles can further be identified as such interest groups:

(*i*) in developed countries, highly compensated blue collar workers who are afraid of gradual lowering of their wages under the factor-price-equalisation-theorem (because the productivity of workers and the access to technology improves in developing countries), or

[41] As first conceptualised by Samuelson 'collective consumption goods' currently commonly known as 'public goods' are the goods "*which all enjoy in common in the sense that each individual's consumption of such a good leads to no sub- traction from any other individual's consumption of that good.*" See: Paul A. Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36(4) Rev Econ Stat 387. Accoding to Baldwin, "*[t]Trade policy has the characteristic of a public good, since a beneficiary from a policy such as free trade cannot be excluded from its benefits, even though the person does not contribute to the costs of obtaining this policy.*" See: Robert E. Baldwin, 'The Political Economy of Trade Policy' (1989) 3(4) J Econ Perspect 119 at 121.

[42] This, for instance, could be a financial support for pro-fee-trade campaign's funds. See: note 41, Baldwin at 121.

[43] According to Balwin, taking collective actions with respect to foreign trade policies are structured as a typical priconer dilemma because, regarless of what other individuals do, a typical consumer (meagre people) would always be better off not individually contributing to free trade policies. See: note 41, Baldwin at 121. Indeed, if others contributed to free trade policy and the policy outcome was free trade, then typical consumer would be better off not contributing to free trade policy as he could still free-ride on such policy (being a public good). In turn, if others did not contribute to free trade policy and a typical consumer did, he would loose not only his contribution but also as a result of policy outcome (i.e. protectionism).

[44] See: ibid. at 378.

[45] See: ibid.

[46] See: ibid.

[47] See: ibid.

Figure 4. Price equalisation theorem (1948).

The factor price equalisation theorem proposed by Paul Anthony Samuelson sets forth that free international trade will lead to the international equalisation of individual factor prices (like wages), on condition, however, that the productivity of employees and access to technology is identical all over the world.[48]

(*ii*) low-skilled workers in developed countries (in which cheap labour is scarce because there is no free flow of labour between countries) who are afraid of losing their jobs (not only of getting lower salaries) under the Stolper-Samuelson theorem (because scarce-factor-intensive sectors decline as a result of free trade), or

Figure 5. Stolper-Samuelson theorem (1941).

The Stolper-Samuelson theorem proposed by Wolfgang Stolper and Paul Anthony Samuelson sets forth that free international trade benefits the abundant factor and harms the scarce factor (in this case labour).[49]

(*iii*) capitalists employing low-skilled workers in developed countries as their capital is not quickly transferable among sectors (to the abundant-factor-intensive sector) - also under the Stolper-Samuelson theorem.[50]

Figure 6 Rent-seeking

Originally conceived by Tullock in 1967,[51] rent-seeking can be defined as "*behavior under institutional settings where individual efforts to maximize value generate social waste rather than social surplus*."[52] Also know known as 'directly unproductive profit-seeking activities' or 'DUPs,' which Bhagwati defined as the activities which (*i*) "*yield pecuniary returns but do not produce goods or services that enter a utility function directly or indirectly via increased production or availability to the economy of goods that enter a utility function,*"[53] (*ii*) "*[i]nsofar as such activities use real resources, result in a contraction of the availability set open to the economy,*"[54] and (*iii*) "*their direct output is simply zero in terms of the flow of goods and services entering a conventional utility function*."[55] Rent-seeking activities might be legal like lobbying for tariffs or monopolies or illegal like tariffs evasion (smuggling) or theft.[56]

In any case, these would always be only some rent-seekers (see: Figure 6) who compete against other more numerous but less influential people within their countries, and who are more likely to take successful collective action toward trade-policy change. In contrast to meagre people, such groups would overcome Olson's free-riding paradox[57] either (*i*) as a

[48] See: note 29 at 110-111.

[49] See: ibid. at 111-112.

[50] See: ibid. asterisk at 114.

[51] In his first paper about the phenomenon, Tullock more generally referred to 'welfare cost' of tarrifs, and to lobbying/pressuring governments into imposing tarrifs 'by the expenditure of resources in political activity.' See: Gordon Tullock, 'The Welfare Cost of Tariffs, Monopolies, and Theft' (1967) 5(3) Econ Inq 224 at 228. The term 'rent-seeking' was first used by Krueger in the context of import licensing. See generally: Anne O. Krueger, 'The Political Economy of the Rent-Seeking Society' (1974) 64(3) Am Econ Rev 291. Bhagwati – before individually referring to directly unproductive profit-seeking activities (see further notes: 53, 54) – together with Srinivasan referred to 'revenue-seeking' rather than to 'rent-seeking.' See generally: Bhagwati, Jagdish N. and T. N. Srinivasan, 'Revenue Seeking: A Generalization of the Theory of Tariffs' (1980) 88(6) Journal of Political Economy 1069.

[52] As proposed by Buchanan in the introduction of the book co-edited with Tullock and Tollison which largely gathered then existing literature on rent-seeking. See: James M Buchanan, 'Introduction' in Buchanan, James M., Robert D. Tollison and Gordon Tullock (eds), Toward a theory of the rent-seeking society (Texas A & M University Press, College Station 1980) 3 at 4.

[53] See: Jagdish N. Bhagwati, 'Directly Unproductive, Profit-seeking (DUP) Activities' (1982) 90(5) Journal of Political Economy 988 at 989.

[54] See: ibid.

[55] See: ibid. at 989-990.

[56] See: ibid. at 990, 992.

[57] See: note 44.

result of such groups' small size, or (*ii*) because such groups' members are unevenly affected by trade-policy outcomes and, therefore, would individually invest in policy change regardless of what other group's member do.

Welfare losses stemming from successful rent-seeking would not be limited to losses from lower cumulative value of goods available in domestic markets because the transfers from meagre people to rent-seekers (resulting from higher unit prices to be paid by meagre people) are not be welfare-neutral.[58] Rather, rent-seekers would at best only partially benefit from such transfers, as a result of forcing the use of less efficient technologies,[59] just like Luddites who prevented the use of framework knitting machines.[60] Welfare losses would further include wastefulness of rent-seeking activities themselves, like losses of (*i*) what Luddites would have produced to the society, had they not spend their time on damaging knitting machines,[61] or (*ii*) how import-competing producers would have allocated their resources, had they not been involved in producing evidence of 'spurious injury' from imports in order to receive protection from government.[62] Nonetheless, various interest groups would spend their resources on rent-seeking, like lobbying, "*until the marginal return on the last dollar **so** spent was **equal** to its likely return producing the transfer*."[63] Yet, their unproductive activities might be completely offset by similarly wasteful contrary actions of industries lobbying for free trade policies and resisting such transfers,[64] which can be compared to investment against theft.[65]

A less obvious answer as to the beneficiaries of protectionism would be the self-perpetuating, progressively less limited governments that more speak for themselves rather than for their

[58] See: note 51, Tullock at 225, 226. Tullock considered total welfare loss stemming from what was later conceptualised as rent-seeking (see: note 51) in the wake of studies published throughout 1950s and 1960s which downplayed the welfare-costs of monopolies and tarrifs just by confining welfare-loss stemming from tarrifs to such lower cumulative value (i.e. stemming from decreased quantity of good yet available at higher unit prices). Findings of those studies were summarised in: Harvey Leibenstein, 'Allocative Efficiency Vs. "X-Efficiency"' (1966) 56(3) Am Econ Rev 392 at 393. In assessment of one of such works listed by Leibenstein, Mundell wrote that "*[o]On the more philosophical level, there have appeared in recent years studies purporting to demonstrate that the welfare loss due to monopoly is small, that the welfare importance of efficiency and production is exaggerated, and that gains from trade and welfare gains from tariff reductions are almost negligible. Unless there is a thorough theoretical re-examination of the validity of the tools on which these studies are founded (...), some one inevitably will draw the conclusion that economics has ceased to be important!*." See: Robert A. Mundell, 'Free Trade, Protection and Customs Union (Book)' (1962) 52(3) Am Econ Rev 621. at 622.

[59] Than otherwise would be used in economy without distortions of free competition by successful rent-seeking in place. See: Gordon Tullock, *The economics of special privilege and rent seeking* (Kluwer Academic Publishers, Boston 1989). 104 at 16, 18.

[60] See: note 59 at 13, 16. According Anderson and Tollison cited by Tulloc, Luddite movement must be seen as well organised 'cartel enforcement in the hosiery industry' leading to an output restriction rather than a 'spontaneous mob action.' See: Gary M. Anderson and Robert D. Tollison, 'Luddism as Cartel Enforcement' (1986) 142(4) J Inst Theor Econ 727 at 728. As such, luddism is a typical rent-seeking activity similar to lobbying for monopolies or for tarrifs.

[61] See: note 59 at 13.

[62] Like under the Trade Reform Act 1974 (Pub.L. 93–618, 88 Stat. 1978, codified at 19 USC Chapter 12) whereby (*i*) seriously injured industries could seek from the US President's administioan an imposition of relief measures including, among others tarrifs, quotas, import-licenses or direct assistance to import-competing industries (see: Trade Reform Act, sec. 2253.1.C.3.A-sec. 2253.1.C.3.I). See: generally: Bernard M. Hoekman and Michael P. Leidy, 'Spurious Injury as Indirect Rent Seeking: Free Trade under the Prospect of Protection' (1991) 3(2) Econ & Politics 111 at 112-114.

[63] See: note 51, Tullock at 228.

[64] See: ibid.

[65] See: ibid. at 229-230.

people. As philosophically conceptualised by Michel Foucault with the extremely complex theory of *pastoral power*, in the hypothetical libertarian or anarchic societies there always will be some *microphysics of power/micro-power* that drive the development of basic governmental structures.[66] Likewise, from institutional-economics perspective,[67] increasing specialisation and division of labour in primitive societies will imply dealings between individuals having neither knowledge one of another nor reciprocal and continuous relations.[68] This would inevitably lead to the rise of state needing to reduce uncertainties of impersonal contracting, lower transaction costs etc., like by setting up proprietary rights and mechanisms of the enforcement of impersonal contracts.[69] Once basic governmental structures are established, there is a snowball effect or a 'political vicious circle.'[70] The very existence of state setting up institutions, combined with unequal distribution of coercive power among private actors, always encourages actors with higher coercive power to cooperate with governments on the establishment and enforcement of inefficient institutions like monopolies or tariffs, instead of lowering transaction costs for all actors.[71] When market mechanisms become suspected of rewarding actors with higher coercive powers as a result of hidden rent-seeking, all actors are likely to agree on bestowing even more interventionist powers on government in order to counter-act existing rent-seeking and *in effectu* bring counterproductive results.[72] Well-established governmental institutions will always tend to expand their powers at the expense of people's rights unless they are somehow constrained. And trade is a major target of such expansion as, to quote Friedman: "*there is much experience to suggest that the most effective way to covert a market economy into an authoritarian economic society is to start by imposing direct controls on foreign exchange*."[73]

Nonetheless, even as uncompromising libertarian views on free trade as Friedman's (according to which consumers' welfare is the absolute priority) end where some *strictly political or military* grounds kick in. The power to impose direct burdensome controls, restrictions, tariffs or other barriers on imports shall be retained as a kind of escape valve. Friedman exemplified situations of that kind with the irrationality of sales of *strategic goods* to communist countries in the cold war era.[74] However, even the category of *strictly political*

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[66] See generally: Ben Golder. 'Foucault and the Genealogy of Pastoral Power' (2007) 10(2) Radical Philosophy Review 157–176.

[67] As defined by North, "*[i]Institutions are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct).*"
See: Douglass C. North, 'Institutions' (1991) 5(1) J Econ Perspect 97 at 97.

[68] See: Douglass C. North, 'Institutions and economic growth: An historical introduction' (1989) 17(9) World Dev 1319 at 1320.

[69] See: note 68 at 1320-1321.

[70] See: note 51, Krueger at 302.

[71] See: ibid.; note 67 at 109-110.

[72] See: note 51, Krueger at 302.

[73] See: Milton Friedman, Capitalism and freedom (University of Chicago Press, Chicago 1962) 202 at 57.

[74] See: ibid. at 71.

or military grounds seems to grant governments an excessively wide (or maybe just too imprecise) leeway to interfere in private business trading internationally (especially when less obvious cases than selling weaponry to Soviets by Western countries are concerned). No one could guarantee that the argument of *strictly political or military* grounds would not be abused to the detriment of the nations' and/or the consumers' welfare and to the benefit of hardly-identifiable small circles of interest and/or expansive governmental officials gradually claiming more and more powers.

In short, protectionism briefly scrutinised through the prism of neo-classical theories appears to be a mixture of influences of (*i*) internationally uncompetitive industries or of people employed in such industries, especially unionised, and (*ii*) power-hungry bureaucrats - which is a rather grim answer to the question of who is shielded by protectionism. *Prima facie*, why should protectionism in public procurement be any different?

1.3 Who is shielded by protectionism in public procurement?

Protectionism in public procurement shares many characteristics with the protectionism in general trade. Likewise, the problem lies in who is shielded by protectionism and in that the public does not realise who does and who does not benefit from it. The public debate on protectionism in public procurement markets is subjected to the same or even stronger national protectionist sentiments and security concerns because in this case the public money (taxpayers') and state institutions, not the private money or private actors, are at stake.

Indeed, in the view of the French delegate expressed in the Sub-committee on State Trading Enterprises during the London Conference, "*(...) public works contracts are a very delicate and very difficult question They involve the state and they make it necessary to create special conditions of allocation of contracts: They also in some degree, although it is not always obvious, involve the security of the state. On the other hand, it is obvious that these contracts are limited; it is clear that any enterprise cannot be entrusted with any work - any enterprise of any country.*"[75]

This view was not contested,[76] and still seems to be valid seven decades later. More recently, these were security concerns that caused authorities across the globe between 2010 and 2012 in, among others, Australia, Canada and US to preclude Chinese telecommunications giant Huawei from supplying network equipment allegedly enabling or facilitating surveillance of those networks by Chinese intelligence.[77] It usually remains

[75] See: UN, 'Report from the meeting of the Subcommittee on Procedures held on 5 November 1946', European Office of the United Nations, Information Centre (Geneva, 15 November 1946) E/PC/T/C.II/PV/9 at B.2.

[76] See: ibid.

[77] See for instance: Siobhan Gorman. 'China Tech Giant Under Fire; Congressional Probe Says Huawei Poses National-Security Threat to the U.S', *Wall Street Journal (Online)* (Oct 8, -- 'Huawei proposes security center in Australia' *China Economic*

confidential to what extent such security concerns are legitimate in a given case. However, just like in the case of general commerce, governmental agencies can always gain more discretion/powers in public procurement markets by raising security concerns - so they have a strong incentive to do so.

Apart from arguments related to security - according to the GATT's studies conducted in the 70s on the eve of the conclusion of the first WTO Government Procurement Agreement (GPA) in 1979 - governments had been justifying their protectionist behaviour with the need to: (*i*) save foreign exchange and generally safeguard their balance-of-payments situations, (*ii*) promote economic development of certain areas; (*iii*) ease a situation of high and persistent unemployment, (*iv*) promote the economic development of certain social groups and socially depressed or victimised groups of persons, and *(v)* attain certain strategic objectives such as independence from foreign sources.[78]

Views in support of protectionist measures find fertile ground especially in times of crisis. For instance, the original Buy American Act of 1933[79] was adopted in times of the Great Depression and, in short, required the US federal government to prefer state-side-made products while purchasing. It is clear now that the adoption of that act was driven by influential domestic machinery producers hoping to sell more products necessary for the construction of the Hoover dam, who feared competition from German producers.[80] The context of the Great Depression became nothing but a smokescreen in the hands of domestic suppliers.[81]

It worked the same in the post-2007/2008 era. So-called stimulus programmes (yet increasing countries' public debts) have been believed to be magic pills that were meant to drive post-crisis recovery.[82] Intensified public procurement was at the core of those programmes. The premise that intensified public purchases could cure domestic economies brought a new wave of biases against public money 'leaking out' to foreign suppliers.[83] The highest profile action taken within this worldwide narration also comes from the US. The *Buy American* clause of the American Recovery and Reinvestment Act 2009 (ARRA)[84]

Review - Daily Briefings (25 October 2012); Shahien Nasiripour and Paul Taylor. 'Huawei and ZTE face security grilling', *Financial Times* (14 Sep, 2012) 19; Ellen Messmer. 'Huawei security chief: We can help keep U.S. safe from 'Net threats' (8 November 2012) *Network World (Online)*; James Blitz and Daniel Thomas. 'UK politicians 'shocked' at Huawei security risk', *Financial Times* (7 Jun, 2013) 2; Shin-yi Peng. 'Cybersecurity Threats and the WTO National Security Exceptions' (2015) 18(2) J Intl Econ L 449.

[78] See; GATT, 'Multilateral Trade Negotiations, Group "Non-Tariff Measures", Government Procurement - Note by Secretariat, 5 Aug., 1975', GATT Secretariat (Geneva) MTN/NTM/W/16 at 6.

[79] See: Buy American Act 3 March 1933, 41 U.S.C. §§ 10a–10.

[80] See: Morton Pomeranz. 'Toward a New International Order in Government' (1981-1982) 12(2); Pub Cont L J 129 at 131,133.

[81] See: ibid.

[82] See: note 11, Job(09)/30, point 50 at 16.

[83] See: ibid. point 46 at 16.

[84] See: American Recovery and Reinvestment Act 2009, Pub. L. No. 111-5, 123 Stat. 115, 516 (111th Congress) ('ARRA').

stipulated that "*[n]None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States*"[85] and that "*[e]Except as otherwise provided (...), funds appropriated or otherwise available to the Department of Homeland Security may not be used for the procurement (...) if the item is not grown, reprocessed, reused, or produced in the United States*."[86]

This was nothing more than a political theatre because the ARRA did not cover crucial sectors. Admittedly, the vast majority of the funds from this programme were assigned to the construction or modernisation of civil engineering infrastructure,[87] so references to raw materials used in such works might make some sense. However, initially there had also been attempts to cover the information-technology sector with similar 'buy American" provisions[88] which suggests that covering only 'iron, steel' or 'what is grown' with domestic preferences had not been seen by the ARRA's promoters as sufficient to achieve ARRA's goals. Nonetheless, covering the information-technology sector was clearly out of the question because of the highly internationalised chains of supply, implying that the actual origin of goods in that sector would have been difficult to track (by procurers) and the compliance-cost would have been unbearable (by suppliers).[89] Thus, politicians were left with purchases of 'iron, steel' and 'what is grown' to still make some political capital from in the public debate. In that case, political disease lost to the freedom of trade and to the irreversibility of the globalisation of the advanced-technologies industry.

Secondly, in the ARRA case, the political disease also had to surrender to the US' public-procurement-related international commitments toward its trade partners. Even such limited provisions ('iron, steel' or 'what is grown') have eventually become irrelevant, because of additional ARRA provisions setting forth that "*[t]This section shall be applied in a manner consistent with United States obligations under international agreements*"[90] - that is the GPA and bilateral arrangements with Australia, Bahrain, the Dominican Republic, Chile, Israel, Morocco, Mexico, Oman, Peru and Singapore in force at that time.[91] Such save-clause was added to the bill at the last moment in response to the serious risk of retaliatory measures by

[85] See: ARRA, Section 1604.

[86] See: ARRA, Section 604.

[87] See: John Linarelli, 'Global Procurement Law in Times of Crisis: New Buy American Policies And Options in the WTO Legal System' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 773-802 at 779.

[88] See: ibid. note 4 at 774.

[89] See: ibid.

[90] See: ARRA Section 604(k) and section 1605(d).

[91] See: note 87 at 774-775.

third countries.[92] Republicans represented by John McCain strongly argued for removing the completely superfluous provisions (both the 'buy American' and 'save' clauses) so that the bill was more readable.[93] However, for Democrats it would have been too bitter a pill to swallow.[94]

Regretfully, it must be acknowledged that regularities similar to what happened when the text of ARRA was being shaped, usually govern the adoption of protectionist measures in public procurement. If so, there is absolutely no case to believe that protectionism in public procurement is anything more than a political disease at its worst. The preliminary overview of the problem indicates – just like in the case of general commerce – that (*i*) only interested domestic sectors/industries and/or bureaucrats/politicians are shielded when protectionist actions in public procurement markets are taken, and (*ii*) there is no good reason to make a claim that protectionism makes more sense in public procurement markets than in general commerce.

1.4 Who opposes protectionism in public procurement?

Fortunately, in parallel to all interest groups prone to preserve closed public procurement markets, there exist some similarly working pro-liberalisation factors too. Firstly, politicians must reckon with voters multi-dimensionally, balancing between the rhetoric of the protection of domestic industries and other election promises. Namely, the more that governments preserve closed public procurement markets the more public money governments waste in the sense that governments need to spend more as a result of preventing international competition between their suppliers/contractors. Given the unprecedented levels of public debt and resulting budgetary constraints at present in Western countries, governments should instead focus on cutting expenditure. When the spending axe comes into question, according to Evenett, politicians favour maintaining well-established welfare-state over protecting domestic suppliers from the competition from foreign business.[95] Put simply, politicians become concerned about poor value for money in public procurement resulting from protectionism as soon as they cannot finance other election promises made to the public.

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[92] See: note 11 Job(09)/30 box 5 a 17.

[93] See: note 87 at 827.

[94] See: ibid. at 782-783.

[95] See: Simon Evenett, 'Multilateral Disciplines and Government Procurement' in Bernard M. Hoekman, Aaditya Mattoo and Philip English (eds), *Development, trade, and the WTO: a handbook* (World Bank, Washington 2002) 417 at 417. In the times of crises, this is also true about general commerce, like in the case of Latin American countries (particularly Mexico harmed by a decrease on oil price) in 1980s. See: Michael Lusztig, 'The Limits of Rent Seeking: Why Protectionists Become Free Traders' (1998) 5(1) Rev Intern Pol Econ 38 at 43-44, 52-53.

Secondly, not all small influential circles press for preventing international competition and the strongest private pro-liberalisation lobbies likely exist just in public procurement markets. In general commerce, groups like industries highly dependent on imported inputs, retailers of imported goods, and highly-dependant exporting industries (in fear of trade retaliations) are likely to support anti-protectionist trade policies.[96] Their pro-liberalisation lobbying actions are driven by growing dependence on trade combined with a need to prevent potential losses caused by successful pro-protectionist rent-seekers.[97] Also industries previously relying on protection might make a shift from protection-seeking to anti-protectionist lobbying. This includes (*i*) previously infant industries which have already matured and which are not at comparative disadvantage anymore,[98] or (*ii*) well established industries stripped by governments of their protectionism-related rents in times of economic hardships and forced to adjust to be competitive in international markets.[99]

In public procurement markets, according to Evenett, pro-liberalisation forces can be classified into (*i*) freshly privatised gigantic enterprises providing public infrastructure and (*ii*) extremely competitive and innovative domestic industries.[100] Formerly state-owned and monopolistic giants (the first category) are at risk of not being supported by governments any more. To reduce costs, these giants need to intensify cross-border cooperation and foreign expansion. However, given the nature of their business (utilities, tight links with public and regulated sectors), they need to cooperate with and sell to foreign governments just like they did domestically.[101] In turn, highly internationally-competitive domestic businesses (the second category) are just eager to sell abroad and to cooperate with foreign governments. They would not mind at all if domestic public procurement markets were opened. Because any concessions on freeing public procurement markets are, in principle, made on a reciprocal basis, both categories of enterprises put some pressure on their governments to open domestic markets and to *quid pro quo* gain international access.[102] This is all the more true as trade barriers in public procurement are often binary in the sense that public tenders are often either open or closed to international competition unlike tariffs or many non-tariff barriers in general commerce which increase costs but do not entirely block trade flows.[103]

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[96] Also governments and business of third countries potentially affected by decisions about trade policy. See: Destler, I. M. and John S. Odell, Anti-protection: changing forces in United States trade politics (Institute for International Economics, Washington 1987) 204 at 3, 23, 35. Importantly, the interest groups will are likely interested only in product specific anti-protectionist policies rather than in general liberalisation of trade. See: ibid. at 3, 30.

[97] See: note 96, Destler and Odell, at 27-28, 62-64.

[98] As described by Luszting, that was predominantly the case with the post-war US trade policy. See: 95, Lusztig at 39-40.

[99] See: 95, Lusztig at 43-44.

[100] See: ibid. at 418.

[101] See: ibid.

[102] See: ibid.

[103] On condition that some foreign government is the only purchaser of some goods or services; if that foreign government makes a decision to buy from domestic suppliers only, this indeed works like a ban on importations. See: Sue Arrowsmith, *Government procurement in the WTO* (Kluwer Law International, The Hague 2003) 481 at 19.

No access to public procurement markets can only be compared to the harshest non-tariff barriers to trade in general commerce such as embargos.[104] Therefore, it is a question of 'to be or not to be' for the domestic business targeting specific foreign public procurement markets to prompt their governments to reach mutual concessions with targeted third countries.

1.5 Can protectionism in PP be justified?

Next, some attention must be given to theories which assert that, under specific circumstances, specific protectionist measures in public procurement markets might make some sense.

1.5.1. Price penalties

Figure 7. Price preferences.

The term '*price preference*' or alternatively 'price penalty' describes a mechanism of discrimination of offers which are of foreign origin. If price preferences are applied, typically prices proposed as a part of foreign offers (a price is usually the only or the most significant award criterion of the award contract) are adjusted by a specific percentage (margin) ranging from a few to even 50 percent for the purposes of assessment.

After adjustment of prices and assessment of offers, a foreign offer will still be selected if (*i*) the adjusted price is still lower than the non-adjusted domestic offers (when price is the only criterion) or (*ii*) overall assessment of the foreign bid is still the best despite price adjustments made by the procurer for the purposes of assessment (when price is one among many criteria).

Let's first have a look at so-called 'price preferences' or 'price penalties'. Price preferences in public procurement work mostly like tariffs (see Figure 7).[105] A lot has been written in economic literature on the optimum tariffs in general commerce,[106] and similar to that, under the theory proposed by McAfee and McMillan[107] then developed by Branco,[108] and together by Evenett and Hoekmann,[109] there could exist an optimum price preference. Specifically, an application of price preference could improve domestic welfare in a situation in which domestic enterprises have higher production costs than their foreign competitors. Suppose that a procurer knows this cost advantage (the margin of it). Then the procurer could adopt a price preference with a margin slightly below the cost advantage of a foreign supplier. As a result, a foreign supplier would still offer a lower bid (lower even after adjustment) and would still win the contract but the government would spend less to benefit domestic welfare.[110] The first obvious problem with this model is that these are always legislators to

[104] See: ibid.

[105] See: ibid. at 19.

[106] See for instance: Max W. Corden, Trade policy and economic welfare (Clarendon Press, Oxford 1974) at 366-388..

[107] See: Randolph P. McAfee and John McMillan. 'Government procurement and international trade' (1989) 26(3–4) J Intl Econ 291

[108] See: Fernando Branco. 'Favoring domestic firms in procurement contracts' (1994) 37(1–2) J Intl Econ 65.

[109] See: note 21 at 155.

[110] See: ibid. at 155.

set up fixed margins of preferences applicable to all of a country's procurement, or at best applicable to some sectors or categories of goods rather than to specific public contracts. However, the model – in order to be efficient - requires the procurer to impose a tender-specific (and even supplier-specific) margin of preference. Secondly, the procurer needs to pretty precisely know what the cost advantage of the foreign supplier is. However, we do not live in a world of perfect information. If the procurer does not precisely know the foreign supplier's cost advantage, the results of imposing a price penalty with a random margin become unpredictable. Only if the procurer hits the bull's eye, will the price preference might be seen as an efficient tool for reaching better value for money rather than a tool for the protection of any domestic interest group. If it misses by setting up the margin even slightly too high, the public money is wasted as it goes to more expensive domestic suppliers.

1.5.2. NTBs

Apart from price preferences, a wide variety of public-procurement-specific protectionist measures should be seen as NTBs. The very existence of public procurement is, as such, classified as a major NTB. What happens in public procurement markets is used to operationalise general theories justifying some protectionist NTBs while no specific theories on the 'reasonable' use of NTBs have been tailored for public procurement. NTBs are generally seen as a good means of improving countries' balances of payments.[111] According to Baldwin and Richardson, instrumentally used governmental purchases are actually the best example of NTBs employed for that motive.[112] Interestingly, improving countries' balances of payments by public procurers means not only buying less from suppliers of the country against which one has a negative balance (which must be seen as protectionism) but also buying more from suppliers of the country against which one has a positive balance (which cannot be seen as protectionism at all). For instance, the Chinese government and its state enterprises offered to American industry a contract backlog worth roughly USD15 billion in 2006 with a view to appease the American public, the US Congress, and its members anxious about the trade deficit with China.[113] In either way public procurement is used instrumentally.

[111] See: Robert E. Baldwin and J. David Richardson, 'Government Purchasing Policies, Other NTB's, and the International Monetary Crisis' in Simon J. Evenett and Bernard M. Hoekman (eds), *The WTO and government procurement: Critical perspectives on the global trading system and the WTO* (Edward Elgar, Cheltenham 2006) 235 at 235.

[112] See: ibid. at 238.

[113] See: Ping Wang, 'Accession to the Agreement on Government Procurement: the case of China' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 90 at 101-102.

1.5.3. Other theories

Further justifications for interfering with international trade flows in public procurement markets are hard to classify and might pertain to (*i*) negotiation strategies on trade concessions, (*ii*) public procurers' concerns about proper performance of contracts, and (*iii*) merits of non-commercial considerations ('horizontal policies') in public procurement.

1.5.3.a Leverage in international negotiations

Firstly, although unilateral freeing of public procurement markets would contribute to the national welfare[114] - flexing one's muscles toward trading partners by keeping markets closed is a kind of must in order to gain or not to lose leverage in international negotiations. Given the mentioned binary nature of discriminative measures in public procurement (access or no access to a foreign market – see section 1.4), this argument seems to be valid. Suppose that a government pursues a policy of unilateral trade liberalisation in general commence where tariffs and non-tariff-barriers not entirely closing market access are the primary protectionist measures. In that case, domestic industries could still compete in foreign markets by surpassing trade barriers, being slightly more competitive than industries in targeted foreign markets. Both consumers' welfare and competitiveness of domestic industries would improve. However, if a government pursues a policy of unilateral trade liberalisation in public procurement while other governments keep their markets entirely closed, in this case domestic industries are left in the lurch.

1.5.3.b Incomplete contracts

Secondly, Breton and Salmon proposed that preferences for domestic suppliers might be caused by the fact that many public contracts are 'incomplete' in the sense that the performance of many public contracts is unverifiable in advance because the cost of verification is very high [115] (for instance in the case of huge and long-term infrastructural/construction projects). To ensure complete performance of such contracts, governments are inclined to offer quasi-rents as a kind of incentive for contractors/suppliers and they are inclined to pay more than is necessary because they do not know how much money is actually necessary for the contractor to complete the contract.[116] The amount of such quasi-rents is lower when governments know more about the 'relevant

[114] See: note 75 at 19.

[115] See: Albert Breton and Pierre Salmon, 'Are discriminatory procurement policies motivated by protectionism?' in Simon J. Evenett and Bernard M. Hoekman (eds), *The WTO and government procurement: Critical perspectives on the global trading system and the WTO* (Edward Elgar, Cheltenham 2006) 254 at 258.

[116] See: ibid. at 258.

circumstances'.[117] It costs more to gather such information if the pool of bidders is larger.[118] Therefore governments tend to limit the pool. Foreign bidders based abroad also cost more to verify and therefore they become the first victims of constraints on the size of the pool.[119] Although Breton and Salmon have not verified this theoretical model empirically, it makes perfect sense for anybody who works on public procurement in practice. Public agencies interested in timely and unhindered completion of projects often prefer to work with domestic firms not because of macro-economic protectionist/mercantilist concerns but rather due to a better knowledge of, better communications with, and better opportunities to discipline domestic contractors/suppliers.

1.5.3.c Merits of horizontal policies

Thirdly, there are various views on the merits (efficiency) of so-called *secondary/collateral/horizontal* policies in public procurement, sometimes also referred to as *linkages* of public procurement by Christopher McCrudden [122] or as *instrumental function* of public procurement by José Maria Fernández Martín[123] (see Chapter 5 on the concept and typology of horizontal policies). Horizontal policies aim at achieving different goals than the procurement itself, by incorporating non-commercial consideration into the procurement process (see Figure 8), such as protecting the environment, solving social problems or achieving some macro-economic goals.

Figure 8. Horizontal policies versus non-commercial considerations.

HORIZONTAL POLICIES

Sue Arrowsmith defined horizontal policies in public procurement as "*using procurement power for objective unconnected with this main purpose",* [120] and also proposed that a situation can be referred to as the pursuance horizontal policies in public procurement when purchasing bodies subjected to a public procurement regulation of a given jurisdiction advance through public procurement objectives of more general public policies and these policies go beyond particular basic functions or procuring bodies.[121]

COMMERCIAL AND NON-COMMERCIAL

Value-for-money concerns in a particular purchasing procedure shall be referred to as *commercial* considerations. All other concerns (including macro-economic/economic considerations) shall be referred to as *non-commercial* consideration. *Commercial* considerations shall not be confused with *economic* considerations because (*i*) *economic* considerations are *non-commercial* and (*ii*) commercial considerations are *non-economic* (see section 5.3).

[117] See: ibid.

[118] See: ibid. at 264-265.

[119] See: ibid.

[120] See: note 75 at 325.

[121] Sue Arrowsmith and Peter F. Kunzlik, 'Social and environmental policies in EC procurement law: General Principles' in Sue Arrowsmith and Peter F. Kunzlik (eds), *Social and environmental policies in EC procurement law: new directives and new directions* (Cambridge University Press, Cambridge 2009) 9 at 13.

[122] See: Christopher McCrudden, 'EC public procurement law and equality linkages: foundations for interpretations' in Sue Arrowsmith and Peter F. Kunzlik (eds), *Social and environmental policies in EC procurement law: new directives and new directions* (Cambridge University Press, Cambridge 2009) 271 at 271.

[123] See: José Maria Fernández Martin, *The EC public procurement rules* (Clarendon Press; Oxford University Press, Oxford: New York 1996) xxxi, 321 p. at 46.

The pursuit of horizontal policies can result in both direct and indirect discrimination of foreigners in public procurement markets.[124] Traditional industrial/macro-economic goals can be advanced by closing market access for foreign tenderers, capping the share of foreign content, imposing price penalties, etc. (see section) – which politicians would explain with the rhetoric of the protection of domestic industries, jobs, etc. In turn, social/environmental or human-rights-related/anti-discriminatory actions can be advanced with (*i*) preferences for some impliedly domestic disadvantaged groups of suppliers/contractors or local start-ups (impliedly disadvantaging foreign contractors/suppliers), or by (*ii*) imposing social/environmental/human rights-related/anti-discriminatory product and process-related requirements on procured goods and services, resulting in additional compliance requirements which are often more burdensome for foreign contractors/suppliers (see section 6.2.1) – which politicians would explain with the merits of each policy, silencing the context of trade.

Nonetheless, it is true that each such policy needs its own assessment and needs to be scrutinised based on how effectively it can achieve its specific goals against all the costs, the detrimental effects of protectionism to the national welfare included. Let's for example take governmental support for small and medium enterprises (SMEs). It is often taken for granted that SMEs should be supported,[125] also through public procurement.[126] Preferences for impliedly domestic SMEs are believed to be a cure to market imperfections such as high market-entry barriers or limited access to capital.[127] However, there are also many recent studies questioning the nexus between the strength of SMEs and the overall good shape of whole economies, or claiming that this nexus is not as strong as it used to be believed to be.[128] A trade context of public procurement was perhaps best seen when in 2004 the Israeli government was very determined to extend its derogation under the GPA, allowing Israeli public procurers to impose offsets requiring foreign general contractors to outsource some portion of awarded contracts to local Israeli SMEs (see section 9.3.1 discussing those negotiations in detail[129]). The Israeli government succeeded by raising arguments such as

[124] This distinction is very similar to Trepte's differentiation between protective policies (which are designed to afford the protection to domestic suppliers and products (see: Peter-Armin Trepte, *Regulating procurement: understanding the ends and means of public procurement regulation* (Oxford University Press, New York 2004) 411 at 152) and proactive policies (that seek to go beyond the objectives of public procurement regulation (see: ibid. at 168).

[125] See for instance: OECD, Centre for Entrepreneurship, SMEs and Local Development, 'The Impact of the Global Crisis on SME and Entrepreneurship Financing and Policy Responses' (2009) at 6; OECD, *Removing Barriers to SME Access to International Markets* (OECD, Paris 2008) 214 at 13.

[126] See for instance: European Commission, 'Communication from the Commission' (Brussel, 24 July 1989) COM (89) 400 final para. 65 at 15.

[127] See: Sue Arrowsmith, John Linarelli and Don Wallace, *Regulating public procurement: national and international perspectives* (Kluwer Law International, The Hague; Boston 2000) xxxii, 856 at 244-245.

[128] See for instance: Kristin Hallberg, 'A market-oriented strategy for small and medium scale enterprises' (April 2000) IFC Discussion Papers IFD40 at 5; Thorsten Beck, Asli Demirguc-Kunt and Ross Levine. 'SMEs, Growth, and Poverty: Cross-Country Evidence' (2005) 10(3) J Econ Growth 199 at 224.

[129] See: chronologically: WTO Committee on Government Procurement, 'Proposed Modifications to Appendix I of Israel: Communication from Israel pursuant to Article XXIV:6(a)1 of the GPA' (19 November 2004) GPA/MOD/ISR/1; WTO

that "*The Israeli economy is dominated by small and medium-size enterprises which, currently, lack the capabilities to secure tenders covered by the Agreement as prime contractors. Therefore, the offset provision in the Agreement, which enables industrial cooperation between Israeli and foreign enterprises, is essential for Israel's industry*" [130] which fits the theory on curing market access barriers with preferential treatment in public procurement. However, although the behind the scenes of these negotiations is not fully revealed in derestricted documents, countries' representatives surely did not ponder economic theories and the scientific merits of the Israeli request and based their decision on mostly political criteria.

The same applies to social and environmental horizontal policies whereby the rhetoric of sustainability is on the rise (see section 5.2) in spite of studies questioning some of those policies[131] and in spite of potential trade-related intergovernmental tension (see particularly sections 6.3 and 9.4.2). The assessment of horizontal policies is perhaps the hardest when many goals are meant to be advanced at once. For instance, public procurement-related preferences for SMEs are often merged with support for disadvantaged individuals, minorities, etc., [132] and therefore often escape easy assessment based on just one line of justification such as a need to cure market access barriers because their objectives are at least partly different.

1.5.4. Premises of theories

In any case, all such theoretical models need to be approached with caution because almost all presuppose the existence of market failures or other more or less curable problems, whereby the focus of policy-makers should be on curing these problems in the first place.[133] The first such premise is the high transaction cost of gathering information on foreign contractors/suppliers in the case of the theory on making incomplete public contracts complete by limiting the pool of suppliers for transaction cost-related reasons. Instead, the focus should be on addressing the problem of how to decrease transaction costs. The second

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Committee on Government Procurement, 'Minutes of the Meeting held on 17 November 2004' (8 December 2004) GPA/M/24; WTO Committee on Government Procurement, 'Minutes of the Meeting Held on 16 December 2004' (18 January 2005) GPA/M/25; WTO Committee on Government Procurement, 'Decision Pursuant to Article XXIV:6(a) on the Agreement on Government Procurement of 16 December 2004' (17 December 2004) GPA/83; WTO Committee on Government Procurement, 'Offsets: Note by Israel' (21 December 2005) WT/Let/507.

[130] See: WTO Working Party on GATS Rules, 'Main Approaches to the Undertaking of Commitments on Government Procurement in Economic Integration Agreements' (11 November 2004) S/WPGR/W/51 para. 3.(a) at 2.

[131] This particularly pertains to social policies which employ preferences for disadvantaged individuals, minorities, positive actions, etc. See for instance: note 73 at 108-118; David Sacks and Peter Thiel. 'The Case Against Affirmative Action (Features: Who Gets In?) *Stanford Magazine* (September/October 1996) <https://alumni.stanford.edu/get/page/magazine/section/?section_id=35763> accessed 1 April 2014; Francine D. Blau and Anne E. Winkler. 'Does affirmative action work?' (2005) 14(3) Regional Review - Federal Reserve Bank of Boston 38; Roland G. Fryer Jr and Glenn C. Loury. 'Affirmative Action and Its Mythology' (2005) 19(3) J Econ Perspectives 147; Richard H. Sander. 'A Systemic Analysis of Affirmative Action in American Law Schools' (2004) 57(2) Stan L Rev 367 at 478-483.

[132] See: note 127 at 245; note 126 para. 65 at 15.

[133] See also: See: note 75 at 20.

such premise is the poor international competitiveness of some domestic industries in the case of the theory on an optimum application of price preferences. Instead, the focus should be on addressing the issue of the creation of the regulatory environment that allows such competitiveness to be improved. The third such premise is market-entry barriers that are believed to justify public procurement-related support for SMEs. Instead, the focus should be on creating a regulatory environment which minimises such barriers. All in all, some protectionist measures might bring some short-term benefits but do not resolve long-term problems.

1.6 Regulation as a cost of protectionism

Lastly, a glaring overregulation of the public procurement process and resulting transactional/compliance costs should be added to the list of negative effects of protectionist actions taken by governments in public procurement markets. Indeed, this overregulation stems from international attempts to curb protectionism in these markets rather than from any other domestic factor driving more regulation. Of course, there are some good domestic reasons to regulate these markets. Value for money first comes to mind.[134] The other reasons might be ensuring integrity, curbing corruption or promoting effective competition such as preventing collusion,[135] all of which achieve better value for money. However, the historical evidence speaks of the trade context as a predominant driver of complex public procurement-related laws.

1.6.1. Regulation versus liberalisation

Complex regulation of the public procurement process has been usually accepted at the domestic level because detailed regulation of public procurers' conduct has been seen as the only tool for enforcing the principle non-discrimination of foreigners in the course of intergovernmental negotiations (see sections 9.2.1, 9.2.2). Also, complex regulation has been usually accepted faster among huge and highly integrated economies as a cure to remaining regional protectionism. In the case of the European Union (EU), the first public procurement-related directives (see section 3.2.1) were adopted in the 1960s and 1970s merely to accelerate integration of the internal market, and not with the primary goal to look

[134] See: Sue Arrowsmith. 'Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha' (2002) 5(4) J Intl Econ L 761 766 at 766. However, for some authors, even seemingly domestic reasons to regulate public procurement have a trade context. For instance, Bovis observed that the quest for best value for money and the lowest price as the default criterion in the EU's procurement system shows links with the neo-classical approaches to trade and economic integration (see: Christopher Bovis, EU public procurement law (Elgar European law, Edward Elgar, Cheltenham 2007) 488 at 445-446).

[135] See: Robert D. Anderson, William E. Kovacik and Anna Caroline Müller, Ensuring integrity and competition markets: a dual challenge for good governance, in: Sue Arrowsmith, Robert D. Anderson, *The WTO regime on government procurement: challenge and reform*, (Cambridge University Press, Cambridge 2011) 681 at 681.

after Member States' budgets or for some other reasons.[136] Likewise, in the case of post-Soviet economies in transition, for instance Poland which enacted complex legislation on public procurement in 1994 based on the 1994 Model Law on the Procurement of Goods, Construction and Services model law,[137] such economies aimed to gradually harmonise domestic legislation with the EU directives and to integrate its public procurement markets with those of the EU. Otherwise the matters of public contracts likely would have remained regulated, like in Poland, by a few rules on integrity, accountability and transparency, all included in statutes on public finance[138] and on access to public information 2001.[139]

1.6.2. Regulation versus protectionism

In contrast, protectionist measures have usually been confined to short and fragmentary clauses merely mandating that domestic business shall be preferred. Such clauses have been confined to the minimum, and accompanied merely with what was necessary to enforce such protectionist measures, like for instance rules of origin allowing one to identify and discriminate against foreign goods/services. For example, in interwar Poland, the first statute specifically addressing public purchases was passed in 1933 in the context of trade wars with Germany.[140] That act was confined to setting up preferences for domestic goods and domestically established suppliers.[141] Detailed and very modern-like procedural provisions were not passed in the form of related secondary legislation until 1937.[142] Likewise, the original Buy American Act of 1933[143] provided for nothing more than a ban on purchases of goods of non-domestic origin until 1954 when it was eventually supplemented with the first uniform (applicable to all federal agencies) executive order merely clarifying some

[136] Until the end of 1969, opening of public procurement markets among Member States was out of the question because, until that date, the 12-year transitional period was in force and even tariffs could have still been imposed on intra-community trade. Works on first-generation directives on public procurement were scheduled so as to drive the market liberalization when the transition period was over. Also, first directives were not necessitated by the EU's international obligations. Instead, they were a template for the forthcoming GPA79 in terms of both a liberalisation model and detailed administrative provisions on public procurement to be implemented through domestic laws. At that time, the future GPA79 was still being discussed in the OEEC/OECD. Both negotiation circles (the then EEC and the OEEC/OECD) gathered the same governments, problems and people at the same time, so negotiations had to be heavily cross-influenced. See: note 134, Bovis at 17-22; Annet Blank and Gabrielle Marceau. 'History of the government procurement negotiations since 1945' (1996) 4 Pub Proc L Rev 77 at 90.

[137] See: Robert R. Hunja, 'The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform' in Sue Arrowsmith and Arwel Davies (eds), Public procurement: global revolution (Kluwer Law International, London 1998) 97 at 105.

[138] See: Act on Public Finance (*Ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych*) Polish OJ [2009] no. 157 item. 1240

[139] See: Act on the access to the public information 2001 (*Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej*) 2001 OJ 2001 no. 112 item. 1198.

[140] See: Act on supplies and works for the State Treasury, local governments, and public law entities (*Ustawa z dnia 15 lutego 1933 r. o dostawach i robotach na rzecz Skarbu Państwa, samorządu oraz instytucyj prawa publicznego*), Polish OJ [1933] no. 19 item. 127; see also: Jędrzej Górski. 'General Contractor Agreement for a Nuclear Power in the EU Without a Call for Competition?' (2013) 11(1) Oil Gas Energ L 1 at 3.

[141] See: ibid. OJ [1933] no. 19 item. 127, article 2.

[142] See: Regulation on supplies and works for the State Treasury, local governments, and public law entities (*Rozporządzenie Rady Ministrów z dnia 29 stycznia 1937 r. o dostawach i robotach na rzecz Skarbu Państwa, samorządu oraz instytucyj prawa publicznego*), Polish OJ [1937] no 13 item. 92.

[143] As already mentioned above, it was promoted by influential domestic machinery suppliers for the construction of the Hoover dam fearing very competitive products made by German machinery producers. See: note 80 at 131, 133.

derogations from the Buy American Act.[144] Complex uniform procedural rules were not adopted until the US became a party to the GPA and it concluded a number of bilateral trade agreements also covering liberalisation of public procurement markets.

1.7 Conclusion

This chapter offered a brief overview of why governments discriminate against foreigners in public procurement to the detriment of domestic welfare. Section 1.1 offered a review of selected statistics on the money channelled through public purchases and concluded that the exposure of public procurement markets to international commerce is intensifying. Section 1.2 concluded that protectionism briefly scrutinised through the prism of neo-classical theories appears to be a mixture of influences of (*i*) internationally non-competitive industries or of people employed in such industries, and (*ii*) power-hungry bureaucrats – which is the answer to the question of who is shielded by protectionism. Section 1.3 concluded that similar regularities govern public procurement markets just like in the case of general commerce: (*i*) only interested domestic sectors/industries and/or bureaucrats/politicians are shielded when protectionist actions are taken in public procurement markets, and (*ii*) there is no good reason to claim that protectionism makes more sense in public procurement markets than in general commerce. Section 1.4 concluded that, paradoxically, the same mechanisms that keep protectionism in place (mostly domestic lobbies and the political myopia) might also contribute to the liberalisation of public procurement sectors under some circumstances such as (*i*) harsh budgetary constraints, (*ii*) privatisation of huge state owned industries, or (*iii*) high international competitiveness of some domestic industries. Section 1.5 found that while protectionist measures might bring short-term benefits according to some theoretical models, these can never be justified if one looks at the problem from a long-term perspective. Section 1.6 concluded that the excessive domestic regulation of public procurement markets is clearly linked to international attempts to liberalise these markets.

[144] It specified how to determine whether the cost of domestic materials was unreasonable, which was the most crucial exception to the Buy American provisions. See: Executive Order 10582 of 17 December 1954 prescribing uniform procedures for certain determinations under the Buy American Act 1954, 19 FR 8723, 3 CFR, 1954-1958 Comp., p. 230; note 80 at 134.

II. FRAMEWORK

Chapter 2. Procurement and WTO

This chapter is the first of three presenting a global model of the regulation and international liberalisation of public procurement markets. It offers a review of the origin, evolution and recent developments of public procurement-related instruments and institutions in the GATT/WTO, preliminarily indicating that a move has been made from a mere quest for value for money as a promise of international liberalisation toward a more balanced approach, integrating some non-commercial consideration into the procurement process.

This chapter starts by looking at the preclusion of public procurement from the multilateral discipline in the GATT (section 2.1) and at its genesis by analysing the behind the scenes of the creation of the post-WW2 multilateral trade order in the late 1940s (section 2.2). Then it discusses the evolution of the GPA in the GATT/WTO (section 2.3), including a history of the negotiations on the original agreement (section 2.3.1), GPA's place in the GATT/WTO system (section 2.3.2), its substantive provisions (section 2.3.3), its coverage (2.3.4) and its institutions allowing for a continuous dialogue among its members (section 2.3.5). This chapter also covers unsuccessful attempts to multilaterise the GPA (section 2.4).

2.1 Havana Charter and GATT 47

The position of public procurement markets in the multilateral trading system is unique and dates back to the late 1940s when it was excluded from the scope of the General Agreement on Tariffs and Trade of 1947 ('GATT47'),[1] which was subsumed into the WTO Agreement.[2] In Article III:8 and Article XVII:2, the GATT47 stipulates that:

GATT47 Article III:8: "*The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."*

[GATT47 article III pertains to the rule of 'National Treatment on Internal Taxation and Regulation' and covers a NT clause in section 1 and MNF clause in section 4]

GATT47 Article XVII:2: "*The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.*"

[GATT 47 Article XVII pertains to 'State Trading Enterprises', meaning *(i)* a state enterprises, wherever located, established or maintained by a contracting party, or (*ii*) any enterprise to which a contracting party grants, formally or in effect, special privileges – - as defined in section 1 of GATT 47 article XVII]

[1] See: General Agreement on Tariffs and Trade, 1947 (signed in Geneva on 30 October 1947, provisionally applied since 1 January 1948) 55 UNTS 194.

[2] See: Marrakesh Agreement Establishing the World Trade Organization (signed at Marrakesh on 15 April 1994, in force 1 January 1995) 1867 UNTS 154.

This language originates from the initial negotiations on the Charter aiming at establishing the ITO.[3] The negotiations were initially held under the aegis of the Economic and Social Committee of the United Nations ('UN'), following its resolution of 18 February 1946, calling for "*an International Conference on Trade and Employment for the purpose of promoting the expansion of the production, exchange and consumption of goods*,"[4] and were subsequently conducted as a part of the works of the Preparatory Committee for the ITO charter during meetings of the United Nation's Conference on Trade and Employment (held in London,[5] Lake Success,[6] Geneva[7] and Havana[8]), resulting in the adoption of the 'Havana Charter' (also known as the ITO Charter) in March 1948.[9] The Havana Charter included identical provisions on public procurement, as the GATT47, which read as follows:

ITO Charter, article 18.8(a)	"*The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."*
ITO Charter, article 29.2	*"The provisions of paragraph 1 shall not apply to imports of products purchased for governmental purpose and not with a view to commercial resale or with a view to use in the production of goods for commercial sale. With respect to such imports, and with respect to the laws, regulations and requirements referred to in paragraph 8 (a) of Article 18, each Member shall accord to the trade of the other Members fair and equitable treatment."*

The overlapping/duplicated provisions of the GATT47 and the Havana Charter are not superfluous. The Havana Charter was meant to cover among others (*i*) institutional matters like the creation of the ITO,[10] general principles of multilateral cooperation like the MNF clause,[11] or 'marks' (rules) or origin,[12] and (*iii*) further negotiation-mandates in fields like investment and the taxation.[13] In turn, the GATT47 was meant to cover actual commitments on tariffs' reductions discussed meanwhile by the negotiating parties. To quote noted international trade law expert John Howard Jackson, "*[t]The Theory of the GATT was that it would be a specific trade agreement within the broader institutional context in the Ito Charter and that the ITO would furnish the necessary organizational and secretarial support*

[3] On the idea of the ITO, see generally: George Bronz. 'The International Trade Organization Charter' (1949) 62(7) Harv L Rev 1089; S. P. Shukla. 'From GATT to WTO and Beyond' (2000) UNU/WIDER Working Papers no.195 1 at 3-4; Nadeem Ahmad Sohail Cheema and Muhammad Amir Munir. 'From GATT to WTO: A Legal Analysis' (2000) PLJ 232 at 2-4 (SSRN numbering, file available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1910357> accessed 3 April 2015).

[4] See: Final Act and Related Documents United Nations Conference on Trade And Employment held at Havana, Cuba from 21 November, 1947 to 24 March, 1948 April 1948 (Interim Commission for the International Trade Organization, Lake Success, New York) (signed at Havana on 24 March 1948, never ratified), first paragraph of the Preamble at 5.

[5] 15 October – 26 November 1946. See: UN, 'Advance Guidance on ITO Draft Charter', European Office of the United Nations, Information Centre in Geneva (Geneva) press release No 291.

[6] 25 February 1947. See: ibid.

[7] 10 April – 22 August 1947. See: ibid.

[8] 24 November 1947 – 23 March 1948. See: ibid.

[9] See: note 4.

[10] See: ibid. Articles 71-97.

[11] See: ibid. Article 16.

[12] See: ibid. Article 37.

[13] See: ibid. Article 11, section 2, a-c.

for GATT."[14] To quote George Bronz, the "*GATT was merely to serve as a temporary device, made effective by executive action, to bring tariff reductions into force quickly, pending unhurried legislative consideration of the ITO plan."*[15] To that end, the GATT47 entered into force provisionally on 1 January 1948.[16] It provisionally provided for the exclusion of public procurement in Article III.8 but the general idea of GATT's 47 provisional application was that *'Part II of this Agreement* [Article III.8 included] *shall be suspended on the day on which the Havana Charter enters into force'*.[17] Because the Havana Charter has never entered into force mostly as a result of its non-ratification by the US, due to protectionist sentiments in the Congress,[18] the post-WW2 multilateral trade order had to operate under the GATT47, along with its Part II, which was not suspended.[19]

2.2 London Conference

The outcome of the negotiations on the public procurement-related provisions of GATT 47 and of the Havana Charter was counterproductive to what was planned. Initially, public procurement markets were closer to a multilateral liberalisation than ever thereafter. The original draft of the '*Suggested Charter of the ITO*'[20] proposed by the US Department of State, covered public procurement markets with the MNF clause and NT to read as follows:

US draft ITO Art 8 "*General Most-Favoured-Nation Treatment*

1. With respect to customs duties and charges of any kind imposed on or in connection with importation and exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation or exportation, and with respect to all matters relating to internal taxation or regulation referred to in Article 9, any advantage, favour, privilege or immunity granted by any Member country to any product originating in or destined for any other country, shall be accorded immediately and unconditionally to the like product originating in or destined for all other Member countries. ***The Principle underlying this paragraph shall also extend to the awarding by Members of governmental contracts for public works, in respect of which each Member shall accord fair and equitable treatment to the commerce of the other Members*** *(…)*"

US draft ITO Art 9 "*National Treatment on Internal Taxation and Regulation*

1.The products of any Member country imported into any other Member country shall be exempt from internal taxes and other internal charges higher than those imposed on like products of national origin and shall be accorded treatment no less favourable than that accorded like products of national origin in respect of all internal laws, regulations or requirements affecting their sale, transportation or distribution or affecting their mixing, processing, exhibition or other use, including laws ***and***

[14] See: John H. Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill, Indianapolis 1969) at 43.

[15] See: George Bronz. 'An International Trade Organization: the Second Attempt' (1956) 69(3) Harv L Rev 440 at 497.

[16] See: note 3, Bronz, footnote 8 at 1093; see also: WTO Secretariat (ed), *GATT Analytical Index – Guide to GATT Law and Practice* (third edn Cambridge University Press, Cambridge 2012) 2408 at 171-184.

[17] See: GATT47, article XXIV:2.

[18] See: note 3, Cheema and Munir at 3; note 15 at 476-477.

[19] See generally: note 16, WTO Secretariat.

[20] See: US Department of State, 'Suggested Charter for an International Trade Organization of the United Nations' (September 1946) Publication 2598, Commercial Policy Series 03.

> ***regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment****. The provisions of this paragraph shall be understood to preclude the application of internal requirements restricting the amount or proportion of an imported product permitted to be mixed, processed, exhibited (…).*"

That US proposal was more liberal than any other project put on the table thereafter because it would not have allowed any exception to MFN and NT clauses in the case of public purchases, except for purchases in the military sector.[21]

2.2.1. Subcommittee on Procedures

The proposal in that form was effectively killed off during the London Conference within the span of a few days in the Subcommittee on Procedures by the delegates who were reluctant to assume that wide a scope of commitments on the liberalisation of their public procurement markets. Oddly enough, instead of just deleting any reference to public procurement, the negotiators ended up with the exclusion of public procurement from the coverage of the Havana Charter/GATT 47 (see section 2.1). How it happened is worth detailed explanation.[22] The Subcommittee on Procedures was a small circle and did not gather representatives of many countries.[23] Since the subcommittee's first meeting, a few delegates working there seemed to be confused, and raised many concerns about the US proposal.[24] For instance, the delegates even asked about basic concepts like the term 'public works' itself, being more or less the then equivalent of public procurement of construction works and services (Canada, the UK).[25] The delegates also asked: (*i*) whether the rules internationally liberalizing public procurement markets would also apply to sub-central governments/authorities not controlled by central governments (India, the UK),[26] (*ii*) about preferences for former colonies in the light of the proposed MNF clause (the UK),[27] (*iii*) whether these rules would cover the phenomenon of state trading, and therefore whether these rules would cover public purchases for resale (Canada, the UK),[28] (*iv*) how that proposal would affect state monopolies (France),[29] or (*v*) about potential conflicts with terms and conditions of tied loans (Chile),[30] etc. The real Pandora box was opened at the third

[21] See: ITO Charter, article 32.d.

[22] See generally: Annet Blank and Gabrielle Marceau. 'History of the government procurement negotiations since 1945' (1996) 4 Pub Proc L R 77.

[23] Various minutes of the Sub-committee on Procedures show at least one-time presence of delegates from Australia, Brazil, Chile, Cuba India, France, the Netherlands, UK and USA (see subsequent notes referring to views expressed by particular delegates for reference).

[24] See: generally: 'Report from the first meeting of the Subcommittee on Procedures held 28 October 1946', European Office of the United Nations, Information Centre (Geneva, 29 October 1946) E/PC/T/C.II/25.

[25] See: ibid. para. 4 at 3,4.

[26] See: ibid. para. 4 at 4,5.

[27] See: ibid. para. at 4.

[28] See: ibid. para. at 4, 6.

[29] See: ibid. para. 4 at 5.

[30] See: ibid. para. at 4, 5.

meeting of the Subcommittee on Procedures when UK's delegate insisted on the inclusion of a separate article on public procurement to read as follows:

UK's Proposal "*1. The principles underlying Articles 8 and 9 shall also extend to the purchase by members, and the awarding by them of contracts for the supply, for the use of their central governments and organs and enterprises of the Central Government which are not intended for resale either in their original states of after processing*

The provision of paragraph 1 of this Article would not involve

(a) any obligations with references to purchases for military establishment, or

(b) preclude the grant by members of preference of a reasonable amount to domestic supply, purchase by Central for their own use, and in cases of members within one of the groups of territories referred to in Article 8(2)."[31]

The new proposal no longer mentioned 'public works' any more. As the UK's delegate explained, to his understanding, the notion of 'public works' covered both the supply of goods and the provision of services while, at the same time, the ITO Charter had been meant to only cover supplies of goods.[32] In that context, the Indian delegate proposed that the MNF clause should also cover the non-discriminatory treatment of domestically-established but foreign-owned businesses competing for governmental contracts.[33] The sense of his remark was that, if the public procurement-specific provisions of the ITO Charter had been meant to cover services, potential foreign contractors would have been likely to compete for government contracts through such establishments, so that issue would have to be also regulated for the sake of consistency. In response, the US delegate generally supported the Indian idea but still indicated the UK's representative's position that the intended scope of the ITO Charter covered neither services nor matters of establishment.[34] In contrast to the Indian delegate, the French and Cuban delegates expressly opposed the inclusion of establishment matters in the ITO Charter's language.[35] As a result, it was finally agreed not to include any references to the problem of establishment (the US, joined by France, Cuba and India, acquiesced with the others).[36] At that point the discipline of the international regulation of public procurement markets showed its complexity and multidimensionality, going far beyond trade in goods.

The issue arose again during the sixth meeting of the Subcommittee on Procedures.[37] The delegates were then asked by the chairman to decide, as a preliminary matter, first whether to silence public procurement in Articles 8 and 9, or not.[38] If the answer had been positive, they

[31] See: UN, 'Report from the third meeting of the Subcommittee on Procedures held 4 November 1946', European Office of the United Nations, Information Centre (Geneva) E/PC/T/C.II/W.12, point 2 at 2.

[32] See: ibid. at 3.

[33] See: ibid.

[34] See: ibid. para. 2 at 3, 4.

[35] See: ibid. para. 2 at 4.

[36] See ibid.

[37] See: generally: UN, 'Report from the sixth meeting of the Subcommittee on Procedures held 5 November 1946', European Office of the United Nations, Information Center (Geneva, 15 November 1946) E/PC/T/C.II/PV/9.

[38] See: ibid. at A-2.

would next have had to decide whether to include the new article following the UK's proposal.[39] The alternative to that was not to include public procurement in the ITO Charter at all, and to delete any references to public procurement remaining elsewhere in the text.[40] The UK's reaction to this was that if the ITO Charter had been meant not to cover public procurement at all, then deleting all references to public procurement would have been insufficient given the very wide wording of Articles 8 and 9.[41] As a result, the delegates (Canada, Cuba, France India and the UK), except for the US one, consented to expressly excluding public procurement from the draft text.[42] Even so, the matter was not formally closed during the sixth meeting of the Subcommittee on Procedures because the decision was also made that if the matter of public procurement had to be re-opened, it would be discussed in the Committee on State Trading, perhaps later in Geneva.[43] The Committee on State Trading was chosen because, according to some delegates, public works were most related to the matter of state-trading enterprises (Netherlands, Canada).[44]

What remained to be done in the Subcommittee on Procedures was to find language for the exemption of 'public works' from the application of Articles 8 and 9. During the seventh meeting of the Subcommittee on Procedures, delegates decided to define public procurement as purchases 'not-for-resale' and to define state trading activity as purchases 'for-resale' in order to somehow distinguish those two concepts.[45] It was also agreed that the exemption of public procurement just from Article 9 would be sufficient because of the editorial changes agreed meanwhile and new cross-references between Articles 8 and 9.[46]

2.2.2. Subcommittee on State Trading

Yet the next day in London (not later in Geneva), on 7 November 1946, the Subcommittee on State Trading took on the discussion of the problem.[47] Similarly to what had happened in the Subcommittee on Procedures, the discussion again led to counter-productive results in opposition to what had been intended. Among the delegates in the Subcommittee on State Trading, the common understanding was that their job was to secure that the provisions of the ITO Charter related to state-trading enterprises were consistent with the rest of the

[39] See: ibid.
[40] See: ibid. at B-1.
[41] See: ibid. at A-2, A-3.
[42] See: ibid. at B1-B3.
[43] See: ibid. at A-3.
[44] See: ibid. at A-3-B.1.
[45] See generally: UN, 'Report from the seventh meeting of the Subcommittee on Procedures held 1 November 1946', European Office of the United Nations, Information Centre (Geneva, 1 November) E/PC/T/C.II/PV/7.
[46] See: ibid. at A-2.
[47] See generally: UN, 'Report from the meeting of the Subcommittee on State Trading held 7 November 1946', European Office of the United Nations (Geneva, 7 November 1946) E/PC/T/C.II/ST/PV/1. Reports of the Sub-committee on State Trading show the presence of delegates from China, Czechoslovakia, New Zealand, the UK and the US.

document.[48] Therefore, state trading-related provisions of the ITO Charter shall include an exemption of public procurement, similar to that already accepted by the Subcommittee on Procedures.[49]

Despite the issue having already been totally lost, the US delegate still made attempts to re-open the discussion on some less liberal provisions during the third[50] and the fourth[51] meeting of the Subcommittee on State Trading, addressing the need for the liberalisation of public procurement markets, especially by pointing out that "*a subject as important as that should be simply ignored. I should be quite content if there were some provision in very general language to the effect that given all the circumstances of a particular case Government should seek to afford fair and equitable treatment among foreign suppliers, and that question coming up in this field should be subject to discussion and consultation within the International Trade Organization. We should have something that is not entirely blank.*"[52]

In order to meet the US delegate's expectations, and after confirming that preferences given under the conditions of tied loans to suppliers of crediting countries (over suppliers of other countries) would be found fair (which was the strong concern of the Chinese delegate),[53] the delegates agreed to include the requirement of 'fair and equitable treatment' with respect to purchases by state enterprises for governmental use, and 'not-for-resale' in article 26 of the ITO Charter (subsequently Article XVII of GATT47).[54] The solution did not have any merit as Article 26 dealt with state trading. This was neither an appropriate committee nor the appropriate provision of the ITO Charter to cover public procurement-related matters but this mistake has never been corrected. After the London Conference, the provisions on the exclusion of public procurement from the multilateral discipline and on the fair and equitable treatment in public procurement in the context of state trading were subject to only minor linguistic and technical changes in Lake Success, Geneva, and Havana, and were included without material changes in GATT47.[55]

[48] See: ibid. at L.6.

[49] See: ibid. ibid.

[50] See: UN, 'Report from the third meeting of the Subcommittee on State Trading held 11 November 1946' European Office of the United Nations, Information Centre (Geneva 11 November 1946) E/PC/T/C.II/ST/PV/3 at D.4.

[51] See: UN, 'Report from the fourth meeting of the Subcommittee on State Trading held 11 November 1946', European Office of the United Nations, Information Centre (Geneva, 16 November 1946) E/PC/T/C.II/52 at 1, 2.

[52] See: note 50 at 17.

[53] See: ibid.

[54] See: note 51 at 1, 2.

[55] See: note 22 at 86-87.

2.2.3. Assessment

What happened to the initial US proposal is a product of coincidence. Despite many concerns firmly expressed by the delegates against the proposed full liberalisation of public procurement markets, it would be too simplistic to point out merely economic or political concerns of governments as the only reason for the rejection of the US proposal. The minutes from London show that the multidimensionality of public procurement dismayed the delegates who were supposed to negotiate a liberalisation of trade in goods but in this case also had to discuss trade in services, matters of foreign establishment/investments, tied aid, privileged relations with former colonies in the post-colonial world, and the capacity of central governments to legally bind sub-central authorities in the field of procurement. In addition, the minutes from London show that negotiations were carried out at a tremendous pace, and faced technical difficulties in achieving the circulation of continuously amended drafts on time,[56] or with photocopying,[57] resulting in the delegates often having to make decisions straight away without a thorough consideration.

However, the delegates were under pressure of time because agreeing on some basic framework for the multilateral trade system was then of utmost importance as, to quote George Bronz: "*The experience of a second World War brought a conference fully conscious of the urgency of general agreement, at the cost of compromises, to guide the future of international economic relationships in a direction promising rising standards of living through expanded world trade, free as far as possible from the deadening trade barriers which progressively strangled international commerce in favour of national self-sufficiency between the two wars.*"[58] The US proposal on public procurement was pioneering and just too complex to be duly dealt with at the London Conference.

2.3 GPA in the international trading system

The original sin of the London conference was only partly cured by the plurilateral GPA, the only binding treaty pertaining to public procurement in GATT's/WTO's international trading system.

2.3.1. From the OEEC to the Tokyo Round

The idea of an agreement that liberalised public procurement markets toward international trade, which was eventually embodied as the GPA, did not originate from any institutions

[56] See: note 31 at 3.
[57] See: note 37 at 11, 13 and 16.
[58] See: note 3, Bronz at 1091.

affiliated with the GATT. It stemmed from the works carried out in the 1960s under the aegis of the then Organisation for European Economic Co-operation ('OEEC'), the predecessor of the OECD. Thus, brainstorming on how to internationally liberalise public procurement markets from the very beginning gathered mostly Western-European countries which, at the same time, were negotiating first directives on the liberalisation of their public procurement markets within the framework of the then European Economic Community ('EEC') for the purposes of the gradual integration of the EEC's internal market (see section 3.2.1), while the US role was rather limited.[59]

First talks in the OEEC were held in 1962 in the Machinery Committee of that organisation, and were sector-oriented in the sense that they were merely aimed at the international liberalisation of the governmental purchases from electrical and mechanical industries.[60] Such limitation resulted from the US position, according to which, after a trial period, sector-oriented liberalizing solutions could be extended to other sectors, but the initial focus on heavy electrical equipment harmonised with that sector's "*considerable trade importance, its susceptibility to statistical study (limited to relatively few and easily identified manufactured items) and its relevance to OECD members as producers or consumers*."[61] However, European countries, displeased with the then aggravating protectionism in the US defence public procurement, preferred discussing a liberalisation of public procurement beyond the electrical/machinery context,[62] and the discourse was moved to a specially established working group affiliated to the non-sector-specific OECD Trade Committee in 1964.[63,64]

After years of discussion, a 'crib sheet' resulting from the OECD's works was transmitted to the GATT Tokyo Round (1973-1979), whereby it was generally recognised in 1976 with regard to the OECD's public procurement-related output that "*[m]~~M~~uch of the text of this instrument has been drafted. However, there are a number of issues which have been explored in detail but on which agreement has not yet been possible. Even so, the discussions have helped to draw a fairly complete picture of the issues involved in producing such a-n instrument, and the links between them.*"[65] Activities of the Working Group I of the GATT Committee on Trade in Industrial Products (established in December 1969 in order to analyse possible actions in the area of government procurement and of certain other non-

[59] See: note 22 at 89.

[60] See: ibid. at 88.

[61] See: ibid. at 89.

[62] See: ibid. at 88.

[63] See: ibid. at 89.

[64] See also: section 9.1.2.a on fragmentary public-procurement-related works in the GATT Committee on the Balance of Payments discontinued as a result of the developments of public-procurement-related works in the OECD; section 9.4.1.a *in initio* on fragmentary public-procurement-related discussion in the GATT Sub-Committee on Non-Tariff Barriers also in 1964.

[65] See: GATT Secretariat 'Multilateral Trade Negotiations, Group on "Non-Tariff Measures", Work of the OECD on Government Purchasing, Note received from OECD, Oct. 18, 1976', GATT Secretariat (Geneva, 18 October 1976) MTN/NTM/W/61 at 1.

tariff barriers[66]) were suspended in 1975 because *"[n]Note was taken of the fact that the OECD was addressing itself to this matter and that all the suggested elements referred to above 'were covered by the guidelines under preparation in the OECD. The Group was informed of the state of work in the OECD and of the main contents of the envisaged guidelines. In the circumstances it was not considered useful to elaborate further at that stage on the main headings in the Group; it was agreed that for the time being the best way to proceed would be for the Group to follow developments in the OECD."*[67] Simply put, works on public procurement in the Tokyo Round came down to the adoption of the OECD-originated draft as the original Agreement on Government Procurement ('GPA79').[68]

Subsequent works on the operation and modifications of the GPA were held in the GATT/WTO. In short, while the original GPA79 covered only international liberalisation of governmental purchases of goods, the anti-discriminatory provisions with regard to locally established but foreign-owned businesses (matters of establishment) were added by the Protocols of Amendments of 1987 (see section 9.2.2).[69] The original agreement was replaced with the new agreement in 1994 ('GPA94')[70] for the first time also covering services (see section 9.2.3)[71] and regulating review procedures allowing individual suppliers/contractors to enforce GPA's provisions and challenge public procurers' decisions before national courts[72] (see section 2.3.3). The text of GPA94 was further provisionally revised in December 2011 and formally approved in 2012 ('GPA12') (see section 9.3.2.b).[73] The revision's ratification process continued through 2013-2015,[74] and the revision entered into force on 6 April 2014 (see ibid.).[75]

2.3.2. Plurilaterality

Figure 9. Geography of GPA.[76]

[66] See: GATT, 'Multilateral Trade Negotiations, Group "Non-Tariff Measures", Government Procurement - Note by Secretariat, Aug. 5, 1975', GATT Secretariat (Geneva) MTN/NTM/W/16 at 1.

[67] See: ibid. 66 at 2.

[68] See: the Agreement on Government Procurement 1979 (signed in Tokyo on 12 April 1979, in force 1 January 1981) GATT Secretariat (1979) LT/TR/PLURI/2.

[69] See: Agreement on Government Procurement, Revised Text 1987 (Protocol of Amendments done at Geneva on 2 February 1987, in force on 14 February 1988), Article II:2.

[70] See: Government Procurement Agreement (signed at Marrakesh on 15 April 1994, in force 1 January 1996) WTO Agreement Annex 4B 417.

[71] Compare GPA79 as revised in 1987 specifying that: '*(…) [t]This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se*' with the Article III of GPA94.

[72] See: GPA94, Article XX.

[73] See: the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, (2 April. 2012) GPA/113.

[74] See: WTO. 'Government Procurement, Ministers greet progress on ratification of revised Agreement on Government Procurement', *WTO 2013 NEWS ITEMS* (4 December 2013).

[75] See: WTO, 'Government Procurement, Revised WTO Agreement on Government Procurement enters into force', *WTO 2014 NEWS ITEMS* (7 April 2014).

[76] See: WTO Secretariat. 'Agreement on Government Procurement, Parties, observers and accessions' <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm> accessed 22 July 2015. This map was modified to include

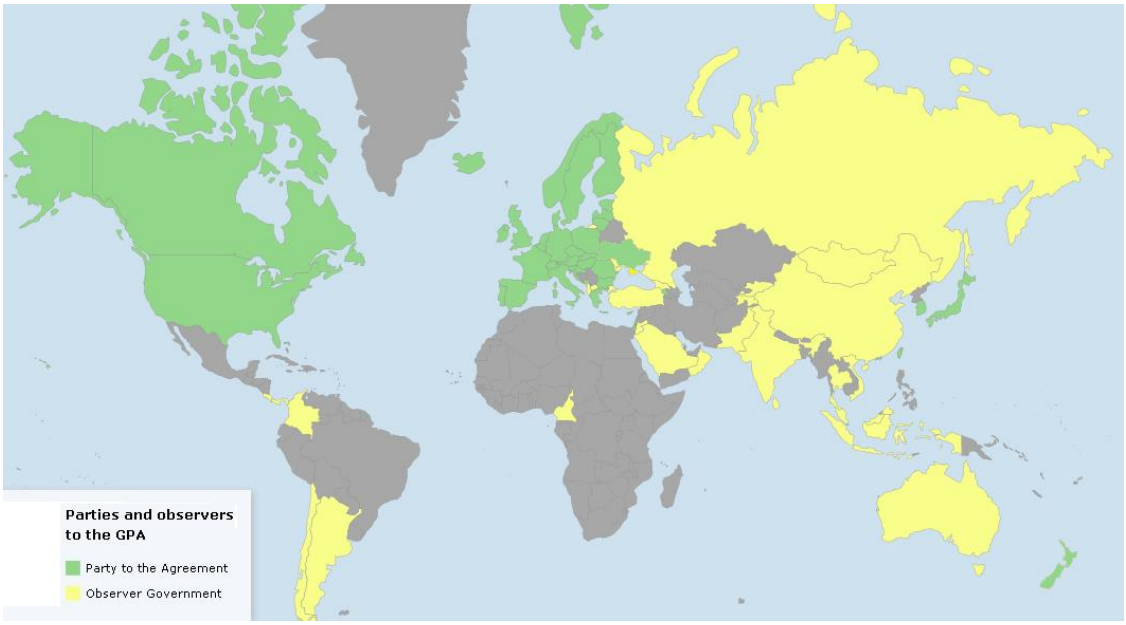

Figure 10. Parties to the GPA as of December 2015[77] (entry into force)	GPA 1994	Revised GPA
Armenia	15 Sep 2011	6 June 2015
Canada	1 Jan 1996	6 Apr 2014
European Union		
with regard to its 28 member states:		
Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom	1 Jan 1996	6 Apr 2014
Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia	1 May 2004	
Bulgaria and Romania	1 Jan 2007	
Croatia	1 Jul 2013	
Hong Kong, China	19 Jun 1997	6 Apr 2014
Iceland	28 Apr 2001	6 Apr 2014
Israel	1 Jan 1996	6 Apr 2014
Japan	1 Jan 1996	16 Apr 2014
Korea, Republic of	1 Jan 1997	Pending
Liechtenstein	18 Sep 1997	6 Apr 2014
Montenegro	acceded 29 October 2014,[78] in force12 August 2015	
Netherlands with respect to Aruba	25 Oct 1996	4 July 2014
New Zealand	acceded 29 October 2014,[79] in force12 August 2015	
Norway	1 Jan 1996	6 Apr 2014
Singapore	20 Oct 1997	6 Apr 2014
Switzerland	1 Jan 1996	Pending
Chinese Taipei	15 Jul 2009	6 Apr 2014
Ukraine	acceded 11 November 2015,[80]	
United States	1 Jan 1996	6 Apr 2014

recent accessions of New Zealand and Montenegro. See: WTO Secretariat, 'WTO: Government Procurement: Montenegro and New Zealand to join the WTO's Agreement on Government Procurement', *WTO 2014 NEWS ITEMS* (29 October 2014); WTO Committee on Government Procurement. 'Committee on Government Procurement - Minutes of the formal meeting of 29 October 2014' (GPA/M/57) 22 December 2014.

[77] See: <http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm> accessed on 30 July 2014.

[78] See: WTO Secretariat, 'WTO: Government Procurement: Montenegro and New Zealand to join the WTO's Agreement on Government Procurement', *WTO 2014 NEWS ITEMS* (29 October 2014); WTO Committee on Government Procurement. 'Committee on Government Procurement - Minutes of the formal meeting of 29 October 2014' (GPA/M/57) 22 December 2014.

[79] See: ibid.

[80] See: WTO Secretariat, 'Government Procurement: Ukraine to join WTO's Government Procurement Agreement' *WTO 2015 NEWS ITEMS* (11 November 2015).

The GPA binds only parties thereto rather than all WTO members (see Figure 10). As such, the GPA is referred to as a 'plurilateral' agreement in contrast to basic treaties administered by the WTO which are in principle 'multilateral', meaning that they apply to all WTO members (like the GATT94,[81] the GATS,[82] the TRIPS,[83] etc.).[84] The GPA is formally plurilateral, technically meaning that all the WTO members agree that it is listed in the Annex 4 to the WTO Agreement along with all other formally plurilateral agreements (as of July 2014 these were only the GPA and the Agreement on Trade in Civil Aircraft).[85] As such, the GPA is covered by Article II.3 of the WTO Agreement, providing that any agreement listed in annex 4 "*does not create either obligations or rights for Members that have not accepted them*." The general sense of Article II.3 is to exclude the application of the general WTO MFN clause to all plurilateral agreements listed in Annex 4, and therefore to prevent WTO members not subject to plurilateral agreements from demanding the same treatment as among parties to plurilateral agreements based on the general WTO's MNF clause.[86] Nonetheless, the scope of the application of the GPA is not covered by the general WTO MNF clause anyway because the matters regulated under the GPA mirror the scope of the exclusion of public procurement from the multilateral discipline anyway (see section 2.1).

[81] See: General Agreement on Tariffs and Trade 1994 (signed at Marrakesh on 15 April 1994, in force 1 January 1995) WTO Agreement Annex 1A 23.

[82] See: General Agreement on Trade in Services (signed at Marrakesh on 15 April 1994, in force 1 January 1995) WTO Agreement Annex 1B 283.

[83] See: Agreement on Trade-Related Aspects of Intellectual Property Rights (signed at Marrakesh on 15 April 1994, in force 1 January 1995), WTO Agreement Annex 1C 319, 1869 UNTS 299.

[84] On plurilateral agreements, see generally: Michitaka Nakatomi. 'Plurilateral Agreements: A Viable Alternative to the World Trade Organization?' (October 2013) (No. 439) Asian Dev Bank Inst Working Paper Series. Prior to the creation of the WTO, plurilateral agreements were not rare. Apart from public procurement, the Tokyo Round brought a number of so-called codes, which were optional and covered matters such as (*i*) anti-dumping, [the anti-dumping code can even be traced back to the Kennedy Round held in 1964–67,. see: GATT, 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Part I - Anti-Dumping Code,' GATT Secretariat (April 1968) Protocols 1964-67 Trade Conference Final Act BISD 15S/4-3 24; superseded, as a result of the Tokyo Round by: Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1979 (signed at Tokyo on 12 April 1979, in force 1 January 1980) GATT Secretariat (1979) LT/TR/A/1 127], (*ii*) subsidies and countervailing measures [see: Agreement on the Interpretation and Application of articles VI, XVI and XXIII of the General Agreement on Trade and Tariffs 1979 (signed at Tokyo on 12 April 1979, in force 1 January 1980) GATT Secretariat (1979) LT/TR/A/3 51), (*iii*) technical barriers to trade (see: GATT, 'Agreement on Technical Barriers to Trade' (1979) LT/TR/A/5 1), (*iv*) import licensing procedures [see: Agreement on Import Licensing 1979 (signed at Tokyo on 12 April 1979, in force 1 January 1980) GATT Secretariat (1979) LT/TR/A/4 119), (*v*) customs valuation [see: Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1979 (signed at Tokyo on 12 April 1979, in force 1 January 1980) GATT Secretariat (1979) LT/TR/A/2 81], (*vi*) trade in civil aircraft [see: Agreement on Civil Aircraft 1979 (signed at Tokyo on 12 April 1979, in force 1 January 1980) GATT Secretariat (1979) LT/TR/PLURI/1 181), (*vii*) dairy [see: GATT, 'International Dairy Arrangement 1979 (signed at Tokyo on 12 April 1979, in force 1 January 1980) GATT Secretariat (1979) LT/TR/PLURI/4 155), and (*viii*) bovine meat [see: Arrangement regarding Bovine Meat 1979 (signed at Tokyo on 12 April 1979, in force 1 January 1980) GATT Secretariat (1979) LT/TR/PLURI/3 147). GPA79 was among only four formally plurilateral agreements which remained in force after the Uruguay Round, along with agreements on bovine and dairy products (both scrapped in 1997, see: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm> accessed on 30 July 2014), and the Agreement on Trade in Civil Aircraft (still in force).

[85] For example, the Information Technology Agreement [see: Ministerial Declaration on Trade in Information Technology Products 13 December (signed at Singapore on 13 December 1996, in force 1 July 1997) GATT Secretariat (1996) WT/MIN(96)/16] adopted within the WTO framework after the conclusion of the Uruguay Round might be seen as *de facto* plurilateral because it is binding upon only some of the WTO members although it has not been formally recognised as one. On top of that, a conclusion of plurilateral agreements outside the WTO framework is also possible, which was the case of the ill-fated Anti-Counterfeiting Trade Agreement (ACTA - see: European Commission, Directorate-General Trade European Commission, The Anti-Counterfeiting Trade Agreement (ACTA) *Fact sheet* (updated November 2008)) and of the Trade in Services Agreement (TiSA) negotiated outside the WTO since 2013 (see: European Commission, 'Memo on Negotiations for a Plurilateral Agreement on Trade in services' (Brussels, 15 February 2013) MEMO/13/107).

[86] Otherwise, a conclusion of plurilateral agreements within the framework of the WTO would make little sense.

Like the exclusion in GATT47, the scope of the GPA refers to commercial purchases 'not-for-resale:

GPA Article II.2 "*For the purposes of this Agreement, covered procurement means procurement for governmental purposes:*

a) of goods, services, or any combination thereof:

i) as specified in each Party's annexes to Appendix I; and

ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale" [87]

The plurilateral character of the GPA and the exemption of public procurement from GATT47 make the relations between the GPA and various multilateral agreements attached to the WTO Agreement not always clear. For instance, when GATT47 was incorporated into the WTO Agreement, for the sake of consistency, the analogical exemption of public procurement was included in the GATS [88] but not in the TRIPS which might lead to controversies about the applicability of the TRIPS, for example to aggressive forced-technology transfer policies channelled through public procurement. [89] The language of Article II.3 of the WTO Agreement (cited above in this section) seems to imply that provisions of such other agreements never apply to public procurements or to the interpretation of the GPA unless expressly provided for in the GPA, which is only the case of WTO Dispute Settlement Understanding ('DSU')[90] and of the WTO Agreement on Rules of Origin ('ARO').[91] With regard to dispute settlement, prior to the establishment of the WTO, intergovernmental disputes arising out of commitments under GPA79 were to be settled according to the GPA-specific procedural rules.[92] But the GPA94 subjected GPA-related dispute settlement to the rules of the DSU.[93] As far as the rules of origin are concerned, the GPA mandates the application of the same rules of origin in public procurement markets and in general commerce (see next section) which suggests that the provisions of the ARO can

[87] Consequently, even though the GPA is formally recognised as an 'annex 4 agreement,' one might claim that the GPA does not need to be included therein at all. WTO members not subjected to the GPA cannot demand the same treatment as among parties to the GPA anyway, so the only reason for listing a plurilateral agreement in this annex is non-existent. Also, one might claim that any WTO member could enter into a GPA-like treaty (within the scope of the GATT 47 exclusion) with other WTO members or non-members, without the consent of other members, without violating the general WTO MNF clause. However, the example of the ITA (which per *facta concludentia* operates within the framework of the WTO as a plurilateral arrangement without being listed in annex 4 – see note 85) proves that, currently, there might be no point in fetishizing the quality of being listed in Annex 4.

[88] "*Articles II* [the MNF clause], *XVI* [market access] *and XVII* [the NT clause] *shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.*" See: GATS, Articles II, XVI and XVII pertain to, respectively, most-favoured nation clause, market access, and national treatment.

[89] See: James Boumil S. 'China's Indigenous Innovation Policies under the TRIPS and GPA Agreements and Alternatives for Promoting Economic Growth' (2011-2012) 12(2) Chi J Intl L 755 at 768-775.

[90] See: Understanding on Rules and Procedures Governing the Settlement of Disputes (signed at Marrakesh on 15 April 1994, in force 1 January 1995) WTO Agreement Annex 2 353.

[91] See: Agreement on Rules of Origin, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A,1994 209.

[92] See: GPA79, article VII.6.-13.

[93] See: GPA94, article XXII. On the WTO's dispute settment system, see generally: Guohua Yang, Bryan Mercurio and Yongjie Li, WTO dispute settlement understanding: a detailed interpretation (Kluwer Law International, The Hague 2005) 593; Bryan Mercurio, 'Improving Dispute Settlement in the World Trade Organization: The Dispute Settlement Understanding Review - Making it Work?' (2004) 38(5) J World Trade 795.

clearly be a tool of the interpretation of the obligation stemming from the GPA. In line with that, the ARO itself determines that it applies to public procurement markets by stipulating that:

Article 1 *"Rules of Origin*

(…)

2. Rules of origin referred to in paragraph 1 shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics" [94]

In turn, the WTO Agreement on Technical Barriers to Trade[95] (which is very relevant for the ability of one country to legally impose social or environmental standards on foreign business in general commerce – see further sections 6.1.2.c and 9.1.2.b) is not applicable to public procurement as "*[p]Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage*."[96] If one agrees that this agreement does apply to public procurement markets based on Article II.3 of the WTO Agreement anyway, then this provision can only be explained in a way that the parties to the WTO have agreed so for the sake of clarity as in the case of the GATS.

2.3.3. GPA's framework

The GPA's substantial approach to the liberalisation of public procurement markets toward international trade is multi-fold. Firstly, the GPA sets forth anti-discriminatory principles such as the NT clause,[97] the MFN clause,[98] the ban on the discrimination against locally established businesses which are either foreign-owned or import foreign goods or services[99] and the ban on offsets,[100] which can all be seen in the below provisions:

GPA12 Article IV "*GENERAL RULES*

Non-Discrimination

[94] See: ARO Article 1 section 2. However with regard to the provision that "*[m]Members shall ensure that: (…) the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned*" (see: ARO Article 2 Section 2), the ARO provides that "*[w]With respect to rules of origin applied for the purposes of government procurement, this provision shall not create obligations additional to those already assumed by Members under GATT 1994.*" (see: ibid. footnote 2 to Article 2).

[95] See: Agreement on Technical Barriers to Trade (15 April 1994, 15 April 1994, in force 1 January 1995) WTO Agreement Annex 1A, p. 117.

[96] See: WTO Agreement on Technical Barriers to Trade article 1 section 4.

[97] See: GPA12, Article IV.1(a).

[98] See: GPA12, Article IV.1(b).

[99] See: GPA12, Article IV.2.

[100] See: GPA12, Article IV.5.

> *1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:*
>
> *(a) domestic goods, services and suppliers; and* **[the NT clause]**
>
> *(b) goods, services and suppliers of any other Party.* **[the MNF clause]**
>
> *2. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:*
>
> *a. treat a* ***locally established*** *supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or*
>
> *b discriminate against a* ***locally established*** *supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.*
>
> […]
>
> *Rules of Origin*
>
> *Offsets*
>
> *6. With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of,* ***impose or enforce any offset****."*

Secondly, the GPA is based on the premise that international liberalisation requires that:

(*i*) when assessing potential contractors/suppliers, their offers in principle should be based on solely commercial considerations related to the procurement ("*the most advantageous tender; or where price is the sole criterion, the lowest price"*[101]) whereby public procurers "*shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement,"*[102] and

(*ii*) open tendering (a procurement method whereby all interested suppliers may submit a tender[103]) should be preferred, and limited tendering (a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice[104]) should be allowed only on an exceptional basis,[105] in situations such as *"the requirement is for a work of art,"*[106] when the protection of patents, copyrights or other exclusive rights is involved,[107] an absence of competition for technical reasons,[108] additional deliveries by the original supplier of goods or services (that were not included in

[101] See: GPA12, Article XV.5.
[102] See: GPA12, Article VIII.
[103] See: GPA12, Article I.m.
[104] See: GPA12, Article I.h.
[105] See: GPA12, Article XIII.
[106] See: GPA12, Article XIII.1.b.i.
[107] See: GPA12, Article XIII.1.b.ii.
[108] See: GPA12, Article XIII.1.b.iii.

the initial procurement),[109] extreme urgency,[110] purchases in commodity markets,[111] etc.

Thirdly, the GPA encumbers its parties with numerous, mostly procedural, mandatory obligations as to the shape of their national procurement systems. These obligations generally pertain to transparency, publicity, and integrity of the procurement process,[112] and to this end, among others, cover:

(*i*) rules on the valuation of contracts, whereby procurers should "*neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Agreement*,"[113]

(*ii*) a technological neutrality in the case of a procurement process employing electronic means (since the revision of 2012) meaning that the public procurers shall "*ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software*,"[114]

(*iii*) rules of origin whereby "*Party shall not apply rules of origin to goods or services imported from or supplied from another Party that are different from the rules of origin the Party applies at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Party*,"[115]

(*iv*) various transparency-related requirements such as the accessibility of public procurement-related legislation,[116] notices on specific planned procurement,[117] notices on generally planned procurement,[118] notices on contract awards,[119] maintenance of documentation[120] and many others,

[109] See: GPA12, Article XIII.1.c.

[110] See: GPA12, Article XIII.1.d.

[111] See: GPA12 ,Article XIII.1.e.

[112] "*Conduct of Procurement 4.A procuring entity shall conduct covered procurement in a transparent and impartial manner that: a. is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering; b. avoids conflicts of interest; and c. prevents corrupt practices.*" See: GPA12, Article II.4:

[113] See: GPA12, Article II.6.

[114] See: GPA12, Article IV.3.a.

[115] See: GPA12, Article IV.5.

[116] "*Party shall: (…) promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clause mandated by law or regulation and incorporated by reference in notices or tender documentation and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public*." See: GPA12, Article VI.1a

[117] See: GPA12, Article VII.1-3.

[118] See: GPA12, Article VII.4-6.

[119] See: GPA12, Article X.2.

[120] See: GPA12, Article X.3.

(*vi*) technical specifications, defined as "*tendering requirement[s] that:(i) lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or (ii) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.*"[121,122] whereby, among others, public procures shall (*i*) "*base the technical specification on international standards, where such exist; otherwise, on national technical regulations, recognized national standards or building codes",*[123] (*ii*) "*set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics*."[124]

(*vii*) a timing of the procurement process,[125] and

(*viii*) domestic review procedures whereby each party "*shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge: a breach of the Agreement; or where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement.*"[126]

By way of exception to the general quest for the best value for money, the GPA generally allows – to the extent that it would not "*constitute a means of arbitrary or unjustifiable discrimination between Parties*"[127] – adopting measures necessary to protect among others: (*i*) 'public morals, order or safety,'[128] (*ii*) 'human, animal or plant life or health,'[129] and (*iii*) intellectual property.[130] The revision of 2012 also clarified that (*i*) "*[f]For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment*,"[131] and (*ii*) "*[t]The evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other*

[121] See: GPA12, Article I.u.

[122] The possibility of imposing process-related requirements ('*processes and methods*') imposed by public procurers are a crucial conceptual element and the primary tool of cross-border regulatory interferences (see section 5.5.2) and, therefore, are crucial for this entire study. However, the final language of the GPA's definition of technical specifications (*prima facie* allowing process-related requirement) was largely a work of chance. It contradicts GPA's other provisions, and is largely ignored in literature (see further sections 6.1.2.c, 9.2.1).

[123] See: GPA12, Article X.2.b.

[124] See: GPA12, Article X.2.a.

[125] See: GPA12, Article XI.

[126] See: GPA12, Article XIII.1.

[127] See: GPA12, Article III.2.

[128] See: GPA12, Article III.2.(a).

[129] See: GPA12, Article III.2.(b).

[130] See: GPA12, Article III.2.(c).

[131] See: GPA12, Article X.6.

cost factors, quality, technical merit, environmental characteristics and terms of delivery."[132] In addition, a number a vaguely written provisions such as the right to exclude potential suppliers/contracts in the case of "*final judgments in respect of serious crimes or other serious offences"* [133] or "*professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier*" [134] can be used by public procurers not only to assure better value-for-money but also to conceal some non-commercial considerations unrelated to potential procurers'/contractors' capacity to perform public contracts (see further section 6.1.2 on the assessment of these provisions).

2.3.4. GPA's coverage

General principles and procedural rules provided for in the main text of the GPA are merely a framework which only applies to so-called 'covered' public procurement. The GPA's coverage has been seen as the major flaw of this agreement not only because it is limited but also because, in common opinion, the effective scope of the GPA's application to its parties' public procurement markets is highly unreadable.[135] Indeed, the GPA's coverage is a maze and has three dimensions: (*i*) 'subjective coverage' (only some procuring bodies covered), 'objective coverage' (only some goods and services covered) and the value thresholds. This problem can be best explained by the structure of Appendix 1 to the GPA. Appendix 1 specifies for each signatory: (*i*) covered central-government-entities in Annex 1, (*ii*) covered sub-central-government-entities in Annex 2, (*iii*) all 'other' entities in Annex 3, (*iv*) covered goods in Annex 4, (*v*) covered services in Annex 5, (*vi*) covered construction services in Annex 6, and (*vii*) any general notes in Annex 7.

In principle, the coverage of goods is defined by 'negative lists,' meaning that all goods are covered except as otherwise specified in a given party's Annex 4. In contrast, services are in principle, not covered unless expressly listed in a given party's Annex 5 ('positive list' approach). The coverage of services in respect of a given GPA's party also usually mirrors its commitments made in its appendixes and annexes to the GATS[136] (for example, Israel's and Singapore's Annexes 4 even incorporate signatories' notes made in their GATS annexes by a simple cross-reference – see Figure 11).

Figure 11. Selected restrictions/notes made by the GPA's signatories to the GPA12's.	
Annex:	**Iceland**

[132] See: GPA12, Article X.9.

[133] See: GPA12, Article VIII.4.(d).

[134] See: GPA12, Article VIII.4.(e).

[135] See: Simon Evenett, Bernard J. Hoekman, 'Procurement of Service and Multilateral Discipline' in Pierre Sauvé and Robert M. Stern (eds), *GATS 2000: new directions in services trade liberalisation* (Center for Business and Government, Harvard University, Boston 2000) 143 at 146.

[136] See: ibid. at 146.

1	"*2. The following shall not be considered as covered procurement:* *a. procurement by procuring entities covered under this Annex in regard of procurement of FSC 58 (communications, protection and coherent radiation equipment) from **Canada**;* *b. procurement by procuring entities covered under this Annex of air traffic control equipment in regard of suppliers and service providers from the **United States**;* *c. procurement by procuring entities covered under this Annex of good or service components of procurement which are not themselves covered by this Agreement in regard of suppliers and service providers from **Canada** and **United States**;* *until such time as Iceland has accepted that the Parties concerned provide satisfactory reciprocal access for Icelandic goods, suppliers, services and service providers to their own procurement market.*" **Montenegro** **"***1. The following shall not be considered as covered procurement:* *a. procurement by procuring entities covered under this Annex of air traffic control equipment in regard of suppliers and service providers from the United States;* *b. procurement by procuring entities covered under this Annex of good or service components of procurement which are not themselves covered by this Agreement in regard of suppliers and services providers from the United States and Canada;***"**
2	**Canada** "*2 For provinces and territories listed in this Annex, this Agreement does not apply to preferences or restrictions associated with programs promoting the **development of distressed areas**.* *3. This Agreement does not cover procurement that is intended to **contribute to economic development** within the provinces of Manitoba, Newfoundland and Labrador, New Brunswick, Prince Edward Island and Nova Scotia or the territories of Nunavut, Yukon or Northwest Territories.* *6. Nothing in this Agreement shall be construed to prevent any provincial or territorial entity from applying restrictions that **promote the general environmental quality** in that province or territory, as long as such restrictions are not disguised barriers to international trade.*" **EU** "*2.The provisions of Article XVIII* [domestic review procedures] *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 sized 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**.'* **Iceland** "*1. The following shall not be considered as covered procurement:* *a. procurement by procuring entities covered under this Annex in regard of suppliers, services and service providers from the **United States**;* *b. procurement by procuring entities covered under this Annex in regard of procurement of FSC 58 (communications, protection and coherent radiation equipment) from **Canada**;* *c. procurement by procuring entities covered under this Annex of air traffic control equipment in regard of suppliers and service providers from the **United States**;* *d. procurement by procuring entities covered under this Annex of good or service components of procurement which are not themselves covered by this agreement in regard of suppliers and service providers from the **United States** and **Canada**;* *until such time as Iceland has accepted that the Parties concerned provide satisfactory reciprocal access for Icelandic goods, suppliers, services and service providers to their own procurement market.*" **Liechtenstein** *2. The provisions of Article XVIII* [domestic review procedures] *shall not apply to suppliers and service providers of:* (…) *b. **Israel, Japan and Korea** in contesting the award of contracts by entities of the Principality of Liechtenstein, **whose value is less than the threshold applied for the same category of contracts awarded by these Parties**;* **Norway** **"***Notes to Annex 2* *1. The following shall not be considered as covered procurement:* *a. procurement by procuring entities covered under this Annex in regard of suppliers, services and service providers from the **United States**;* *b. procurement by procuring entities covered under this Annex in regard of procurement of FSC 58 (communications, protection and coherent radiation equipment) from **Canada**;* *c. procurement by procuring entities covered under this Annex of air traffic control equipment in regard of suppliers and service providers from the **United States**;* *until such time as Norway has accepted that the Parties concerned provide satisfactory reciprocal access for Norwegian goods, suppliers, services and service providers to their own procurement market.* *2. The provisions of Article XVIII shall not apply to suppliers and service providers of:* *a. **Japan**, **Korea** and the **United States** in contesting the award of contracts to a supplier or service provider of Parties other than those mentioned, which are small or medium-sized enterprises under the relevant provisions in Norway, until such time as Norway accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority businesses;* *b. **Japan** in contesting the award of contracts by Norwegian entities, whose value is less than the threshold applied for the same category of contracts awarded by this Party.*" **USA** *'2. The state entities included in this Annex may apply preferences or restrictions associated with programmes promoting the **development of distressed areas or businesses owned by minorities, disabled veterans, or women**.* *3. Nothing in this Annex shall be construed to prevent any state entity included in this Annex from applying restrictions that **promote the general environmental** quality in that state, as long as such restrictions are not disguised barriers to international trade.*"
5	**EU** "*Procurement by procuring entities covered under Annexes 1, 2 and 3 of any of the services covered under this Annex is a covered procurement in regard of a particular Party's provider of service **only to the extent that such Party has covered** that service under its Annex 5.'* **Israel** *'The coverage regarding services (including construction) is subject to the limitation and conditions specified in Israel's schedule of the **GATS**.'* **Singapore** *'The services covered are subject to the limitations and conditions specified in the Government of Singapore's Schedule of the General Agreement on Trade in Services **(GATS)**.*"
6	**EU** "*Procurement by procuring entities covered under Annexes 1, 2 and 3 of any of the construction services covered under this Annex is a covered procurement in regard of a particular Party's provider of service **only to the extent that such Party has covered** that service under its Annex 6.'* **Singapore** *'The construction services covered are subject to the limitations and conditions specified in the Government of Singapore's Schedule of the General Agreement on Trade in Services **(GATS)**.*"
7	**Canada** "*3. This Agreement does not apply to any measure adopted or maintained with respect to Aboriginal peoples. It does not affect existing aboriginal or treaty rights of any of the **Aboriginal peoples** of Canada under section 35 of the Constitution Act, 1982."* **Japan** "*2. **In case Parties do not apply Article XVIII*** [domestic review procedures] *to suppliers or service providers of Japan in contesting the award of contract by entities, Japan may not apply the Article to suppliers or service providers of the Parties in contesting the award of contracts by the same kind of entities.*" **Chinese Taipei** "*1. **Where another Party applies a threshold that is higher than that applied by the Separate Customs Territory of Taiwan**, Penghu, Kinmen and Matsu,*

	*this Agreement applies only to those procurements above the higher threshold for that particular Party for the relevant procurement. (**This Note does not apply to suppliers of the United States and Israel** in procurement of goods, services and construction services by entities listed in Annex 2.)*" **USA** "*1. This Agreement does not apply to any set aside **on behalf of a small- or minority-owned business**. A set-aside may include any form of preference, such as the exclusive right to provide a good or service, or any price preference.*"

General notes to party-specific appendices may, for instance, restrict the right of a signatory to maintain preferential treatment for minorities, historically disadvantaged individuals or for small and medium enterprises (USA, Canada). Moreover, specific notes attached to particular annexes often limit the GPA's coverage in bilateral relations in a way that suppliers/contractors of a particular party are excluded from offering particular goods and services to particular procuring entities of GPA's party which makes such reservations. Specific notes attached to particular annexes also often require reciprocity, meaning that a particular class of products or services is covered in relation to suppliers/contractors of a given party only on condition precedent that, at some future point in time, the party in question covers the same class of goods or services toward a party which makes such reservation (see Figure 11). In this context, the GPA system seems to be, to a large extent, a number of bilateral agreements that determine which public contracts shall be covered by some standardised rules expressed in the main text of the GPA. The actual bilateral arrangements between particular GPA parties are hidden in the appendices to the GPA, and as far as this agreement's overall liberalisation impact is concerned, these arrangements are more important than the main GPA text.[137]

Figure 12. Value thresholds in the GPA12 [SDR].

Country:	objective coverage	subjective coverage			Specific threshold-related restrictions
		central	sub-central	other	
Armenia	goods	130,000	200.000	400.000	none
	services	130,000	200.000	400.000	
	construction works	5,000,000	5,000,000	5,000,000	
Canada	goods	130,000	355,000	355,000	none
	services	130,000	355,000	355,000	
	construction works	5,000,000	5,000,000	5,000,000	
EU	goods	130,000	200,000	400,000	Annex 2 '*Notes (…) 1.The following shall not be considered as covered procurement: (…) e. procurement between **200,000 SDR** and **355,000 SDR** by procuring entities covered under this Annex of goods and services for suppliers and service providers from Canada*' Annex 5 *Works concessions contracts, when awarded by Annex 1 and 2 entities, are included under the national treatment regime for the construction service providers of Iceland, Liechtenstein, Norway, the Netherlands on behalf of Aruba and Switzerland, provided their value equals or exceeds **5,000,000 SDR** and for the construction service providers of Korea; provided their value equals or exceeds **15,000,000 SDR.***
	services	130,000	200,000	400,000	
	construction works	5,000,000	5,000,000	5,000,000	
Hong Kong SAR	goods	130,000	n.a.	400,000	none
	services	130,000		400,000	
	construction works	5,000,000		5,000,000	
Iceland	goods	130,000	200.000	400,000	none
	services	130,000	200.000	400,000	
	construction works	5,000,000	5,000,000	5,000,000	
Israel	goods	130,000	250,000	355,000	Annex 1 * starting from the sixth year after entry into force of the GPA12 SDR **5,000,000**.
	services	130,000	250,000	355,000	
	construction works	8,500,000*	8,500,000	8,500,000	
Japan	goods	100,000	200,000	130,000	none
	construction services	4,500,000	15,000,000	4,500,000–15,000,000	
	architectural, engineering and other technical services	450,000	1,500,000	450,000	
	other services	100,000	200.000	130,000	

[137] See similarly: Christopher Bovis, EU public procurement law (Elgar European law, Edward Elgar, Cheltenham 2007) 48 at 445-446 at 49.

Liechtenstein	goods	130,000	200,000	400,000	none
	services	130,000	200,000	400,000	
	construction works	5,000,000	5,000,000	5,000,000	
Montenegro	goods	130,000	200,000	400,000	
	Services	130,000	200,000	400,000	
	construction works	5,000,000	5,000,000	5,000,000	Annex 1 "*Works concessions contracts, when awarded by Annex 1 and 2 entities, are included under the national treatment regime for the construction service providers of the EU, Iceland, Liechtenstein, Norway, the Netherlands on behalf of Aruba and Switzerland, provided their value equals or exceeds SDR **5,000,000** and for the construction service providers of Korea; provided their value equals or exceeds SDR **15,000,000**.*"
New Zealand	goods	130,000	200,000	400.000	none
	services	130,000	200,000	400.000	
	construction works	5,000,000	5,000,000	5,000,000	
Norway	goods	130,000	200,000	400,000	none
	services	130,000	200,000	400,000	
	construction works	5,000,000	5,000,000	5,000,000	
Singapore	goods	130,000	n.a.	130,000	none
	services	130,000		130,000	
	construction works	5,000,000		5,000,000	
Taiwan	goods	130,000	200,000	400,000	none
	services	130,000	200,000	400,000	
	construction works	5,000,000	5,000,000	5,000,000	
USA	goods	130,000	355,000	USD250,000-SDR400,000	none
	services	130,000	355,000	USD250,000-SDR400,000	
	construction works	5,000,000	5,000,000	5,000,000	

Next, annexes 1, 2 and 3 set a high-threshold contract value, below which the framework of the GPA does not apply (see Figure 12). Thresholds are specified in the Special Drawing Rights (SDR),[138] and vary for goods, services and construction works, as well as among parties. Similarly to how the reciprocity-related restrictions on covered goods and services work, general and specific notes may also set up bilateral thresholds, and their modification can also be conditional upon a future mutual lowering of thresholds with regard to specific goods, services or works (see Figure 11). In the case of goods and services, thresholds are usually lower for central entities (about SDR 130,000), medium for sub-central entities (about SDR 200,000) and higher for 'other' entities (about SDR 400,000). In the case of construction works, thresholds are usually flat for all covered entities (about SDR 5,000,000).

The GPA's coverage is also dynamic. The most significant changes to the GPA's coverage coincide with or follow revisions of the main text which was especially the case when the WTO was established, and GPA94 was adopted. But the coverage can also be modified *ad hoc*[139] which is necessitated by natural changes to its subjective coverage (covered procuring entities), a non-existent problem in other trade agreements. Any reorganisation of the GPA's parties' administrative structure, as well as governments gaining or losing control over enterprises (over 'other entities' in the GPA's language) need to be quickly reflected in the appendixes to the GPA (annexes 3 to appendices 1). The *ad hoc* modifications of the GPA's coverage are another point where the bilateral modalities show up. Namely, the withdrawal of covered entities from annexes 1, 2 or 3 is not discussed between a party intending to amend its annexes 1, 2 or 3 and all other parties, but rather "*[t]The modifying Party and any*

[138] "*The SDR is an international reserve asset, created by the IMF in 1969 to supplement its member countries' official reserves. Its value is based on a basket of four key international currencies, and SDRs can be exchanged for freely usable currencies.*" See: 'Special Drawing Rights' IMF (Washington) IMF Factsheet.

[139] See generally: GPA, Article XIX.

Party making an objection (hereinafter referred to as "objecting Party") shall make every attempt to resolve the objection through consultations."[140] In the case of disagreement between the modifying and the objecting party (and subject to further possible dispute settlement procedures[141]), the objecting party may take retaliatory measures by withdrawing its entities whereby "*a withdrawal* (…) *may be implemented solely with respect to the modifying Party*."[142]

Apart from the limited coverage of the GPA's framework, some authors claim that (*i*) the framework itself covers matters which are less and less relevant for opening public procurement markets to foreign suppliers, and (*ii*) the overall GPA's scope of application (combined coverage and framework) does not touch the spot because of the growing share of procured services against procured goods. Even a great expansion of positives lists of services in annexes 4 to the GPA would not be an appropriate response because, according to Sauvé, establishing commercial presence has become a preferred manner for competing for public contracts in foreign services markets.[143] At the same time, the mere ban on the discrimination against locally established businesses which are either foreign-owned or import foreign goods or services[144] is not a sufficient response to problems of commercial presence/local establishment. Namely, according to Evenett, local establishment is usually essential to ensure compliance and performance in supplying services, and removing market access barriers in that respect should be now the absolute priority from a national perspective.[145]

Altogether, the GPA's application is limited in many respects: (*i*) geographically as it is not multilateral, leaving some regions like the whole of South America uncovered, (*ii*) by its formal coverage (subjective, objective, thresholds), and (*iii*) because the problems addressed in its framework might be less and less relevant to the new challenges of the liberalisation of public procurement markets.[146]

[140] See: GPA12, Article XIX.2.

[141] See: GPA12, Article XIX.7.

[142] See: GPA12, Article XIX.6.

[143] Pierre Sauvé, Completing the GATS Framework: Safeguards, Subsidies and Government Procurement, in: B. Hoekman, A. Mattoo, P English (eds.), *Development, trade, and the WTO: a handbook*, World Bank (Washington 2002) at 333-334.

[144] See: note 99.

[145] See: note 135 at 144.

[146] If so, further trade liberalisation of public procurement markets appears to be also conditioned upon factors lying beyond the GPA's scope of regulation. These factors would, for instance, embrace the transfer of workforce, general environment for the operation of local branches of foreign-owned businesses (or more generally, the overall regulatory environment for foreign direct investment), and the general ease of doing business in a given jurisdiction.

2.3.5. Institutionalised dialogue

The plurilateral WTO Committee on Government Procurement [147] is the leading institutionalised forum for an ongoing dialogue between the GPA's parties as well as candidates and observers seeking or considering accession.[148] It gathers representatives of all parties to the GPA in order to monitor the GPA's implementation, follow developments with regard to public procurement made by other international institutions or regional trade blocks, and to manage new accessions. It also defines global trends in public procurement by working on future amendments to the GPA's framework. Most recently, in 2011, after the preliminary agreement on the text of the 2012 revision had been reached, the committee was entrusted with a new work programme[149] covering, among others, issues like (*i*) sustainable procurement,[150] (*ii*) preferences for small and medium enterprises,[151] or (*iii*) safety standards in international procurement.[152] This agenda is the best evidence of (*i*) over what issues no agreement could be reached as a part of the 2012 revision, and (*ii*) what is likely to be discussed in the course of negotiating potential further future amendments to the GPA (see section 9.3.3 and Chapter 10).

2.4 Alternative Paths after Marrakesh

Concurrent with the GPA and the WTO Committee on Government Procurement, other public procurement-related works have also been conducted in the WTO.

2.4.1. Multilateral agreement on transparency

Firstly, works toward a multilateral agreement on transparency in public procurement were conducted by the Working Group set up by the 1996 Singapore Ministerial Conference,[153] and its mandate was confirmed by the 2001 Doha Ministerial Conference.[154] A multilateral agreement on transparency in public procurement was one of the so-called 'Singapore Issues' along with (*i*) trade and investment, (*ii*) competition policy, and (*iii*) trade facilitation, (among these, public procurement was referred to as the 'third issue'). The group met 18

[147] WTO agreement in its article IV.8 recognises plurilateral bodies and requires them to operate within the framework of the WTO as well as to keep the WTO General Council informed of their activity.

[148] See: GPA12, Article XXI.

[149] See: GPA12, Appendix 2, Annex B.

[150] See: GPA12, Appendix 2, Annex C.

[151] See: GPA12, Appendix 2, Annex E.

[152] See: GPA12, Appendix 2, Annex G.

[153] See: note 85, Singapore Ministerial Declaration (18 December 1996) WT/MIN(96)/DEC, article 21. See also: Krista Nadakavukaren Schefer and Mintewab G. Woldesenbet, 'The Revised Agreement on Government Procurement and Corruption' (2013) 47(5) J World Trade 1129 at 1143-1144.

[154] See: WTO, Doha Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1 para. 26.

times, firstly in 1997.[155] Initially, it collected information on approaches to public procurement of, among others, the World Bank, the United Nations Commission on International Trade ('UNCITRAL'), the Asia-Pacific Economic Co-operation ('APEC') and the then discussed Free Trade Area of the Americas, ('FTAA').[156] The group virtually did not reach any conclusions from what can be seen in the minutes of its last meeting held in June 2003.[157] After six years of work, the final report of this body revealed, for instance, that there was still no agreement even as to whether the talks covered only procurement of goods, or also covered procurement of services.[158] Meanwhile, the 2001 Doha Ministerial Conference[159] scheduled launching formal negotiations on a multilateral agreement on transparency in public procurement after the then planned fifth ministerial conference within the framework of the Doha Round.[160] The fifth conference was held in Cancun in September 2003 but all attempts to launch negotiations on that agreement were unsuccessful. Subsequently, on 1 August 2004, the WTO General Council adopted a decision on the discontinuation of the Singapore issues except for trade facilitation ('July Decision')[161] and the Working Group devoted to transparency in public procurement has been inactive since that decision.[162]

[155] See: WTO, 'Report on the Meeting of the Working Group on Transparency of 23 May 1997', WTO Secretariat (Geneva 15 July 1997) WT/WGTGP/M/1; WTO, 'Report on the Meeting of the Working Group on Transparency of 21 July 1997', WTO Secretariat (Geneva 28 August 1997) WT/WGTGP/M/2; WTO, 'Report on the Meeting of the Working Group on Transparency of 3-4 November 1997', WTO Secretariat (Geneva 9 January 1998) WT/WGTGP/M/3; WTO, 'Report on the Meeting of the Working Group on Transparency of 19-20 February 1998', WTO Secretariat (Geneva 8 April 1998) WT/WGTGP/M/4; WTO, 'Report on the Meeting of the Working Group on Transparency of 22 June 1998', WTO Secretariat (Geneva 31 July 1998) WT/WGTGP/M/5; WTO, 'Report on the Meeting of the Working Group on Transparency of 8-9 October 1998', WTO Secretariat (Geneva 13 November 1998) WT/WGTGP/M/6; WTO, 'Report on the Meeting of the Working Group on Transparency of 24-25 February 1999', WTO Secretariat (Geneva 25 May 1999) WT/WGTGP/M/7; WTO, 'Report on the Meeting of the Working Group on Transparency of 28 June 1999' ((9 July 1999) WT/WGTGP/M/8; WTO, 'Report on the Meeting of the Working Group on Transparency of 6 October 1999', WTO Secretariat (Geneva 10 November 1999) WT/WGTGP/M/9; WTO, 'Report on the Meeting of the Working Group on Transparency of 7 June 2000', WTO Secretariat (Geneva 1 August 2000) WT/WGTGP/M/10; WTO, 'Report on the Meeting of the Working Group on Transparency of 25 September 2000', WTO Secretariat (Geneva 19 December 2000) WT/WGTGP/M/11; WTO, 'Report on the Meeting of the Working Group on Transparency of 4 May 2001', WTO Secretariat (Geneva 18 June 2001) WT/WGTGP/M/12; WTO, 'Report on the Meeting of the Working Group on Transparency of 17 September 2001', WTO Secretariat (Geneva 11 October 2001) WT/WGTGP/M/13; WTO, 'Report on the Meeting of the Working Group on Transparency of 29 May 2002', WTO Secretariat (Geneva 13 August 2002) WT/WGTGP/M/14; WTO, 'Report on the Meeting of the Working Group on Transparency of 10-11 October 2002', WTO Secretariat (Geneva 9 January 2003) WT/WGTGP/M/15; WTO, 'Report on the Meeting of the Working Group on Transparency of 29 November 2002', WTO Secretariat (Geneva 8 January 2003) WT/WGTGP/M/16; WTO, 'Report on the Meeting of the Working Group on Transparency of 7 February 2003', WTO Secretariat (Geneva 15 April 2003) WT/WGTGP/M/17; WTO, 'Report on the Meeting of the Working Group on Transparency of 18 June 2003', WTO Secretariat (Geneva 7 July 2003) WT/WGTGP/M/18.

[156] See: note 155, WT/WGTGP/M/1 at 2, WT/WGTGP/M/2 at 1-3.

[157] See: note 155, WT/WGTGP/M/18; WTO, 'Report of the Working Party on GATS Rules of 23 July 1997', WTO Secretariat (Geneva 3 September 1997) S/WPGR/M/12 para. 15.

[158] See: 'Report of the Working Group on Transparency in Government Procurement to the General Council of the 15 July 2003', WTO Secretariat (15 July 2003) Wt/Wgtgp/7 paras. 14-15.

[159] See: note 154 para. 1.

[160] See: ibid. para. 26.

[161] See: WTO, 'Doha Work Programme, Decision the General Council, adopted on 1 August 2004' (2 August 2004) WT/L/579, paragraph 1(g). See also: note, 153, Nadakavukaren Schefer and Woldesenbet at 1145.

[162] On the impediments to the success of the Doha round, see generally: Bryan Mercurio, 'The WTO and its institutional impediments' (2007) 8(1) Melb J Intl L 198.

2.4.2. Negotiations under the GATS

Secondly, multilateral negotiations on services procurement have been carried out by the Working Party on GATS Rules since 1995,[163] pursuant to Article XIII:2 of the GATS stipulating that:

Article XIII:2 *'There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.'*

This provision brought to life the idea of a mandate for at least a multilateral discussion mechanism which had been spoken of five decades earlier in London.[164] However, despite the pretty clear language of Article III:2, there has been a lot of confusion in the Working Party on GATS Rules regarding what that provision actually meant.[165] Out of the blue, it was not clear for the delegates whether the negotiating mandate covered not only transparency but also non-discrimination matters,[166] and already at the initial stage it was concluded that the original intent had been to confine the mandate to transparency only.[167] However, because the third Singapore Issue was pending in the late 1990s, even the transparency matters were eventually taken away from the Working Party on GATS Rules in 1997 and shifted to the Working Group on Transparency.[168] After the July Decision, matters of transparency were not directed back from the dormant Working Group on Transparency to the Working Party on GATS rules. That all left the Working Party on GATS rules with not very clear responsibilities such as, for instance, defining the term public procurement, or "*taking into account the decentralized nature of service procurement*."[169] In practice, works related to public procurement in this body have been limited to analytical research on public procurement-related provisions included in various international agreements on the liberalisation of trade in services.[170]

2.5 Conclusion

The highlight of this chapter is that the developments in the liberalisation of public procurement markets should always go in tandem with the similar developments in general commerce. But they have not. The proposal of the US to complexly liberalise public

[163] See: Sue Arrowsmith. 'Transparency in government procurement: The objectives of regulation and the boundaries of the World Trade Organization' (2003) 37(2) J World Trade 283 at 285.

[164] See: note 50.

[165] See: note 163 ibid.; 'Report of the Meeting of the Working Party on GATS Rules', WTO Secretariat (Geneva 15 July 2002) S/WPGR/M/38, paras. 42-55.

[166] See: ibid.

[167] See: ibid.

[168] See: note 155, WT/WGTGP/M/1 para 9 at 2; Nonetheless, as discussed above, six years later, the final report of the Working Group on Transparency showed that it had not even commenced the actual discussion on transparency. See: note 157 ibid.

[169] See: note 163, ibid.; note 157, S/WPGR/M/12 ibid

[170] See: WTO, 'Report by the chairperson of the working party on gats rules' (14 April 2011) S/WPGR/21 para. 5-7 at 2.

procurement markets in the 1940s was premature given that the ITO/GATT47 was meant to cover trade in goods only. Public procurement did go beyond that agenda. Similarly, GATS article XIII:2 granting a mandate for negotiating multilateral commitments on public procurement of services was premature without a finished multilateral framework for public procurement of goods.[171] One could claim that we might have had a much more coherent WTO's position on the direction of works on public procurement or even a multilateral agreement on public procurement (not limited to transparency matters) in an alternative history in which the multilateral liberalisation of public procurement markets had been first discussed with previously adopted multilateral trade treaties covering both trade in goods and services. But it did not happen that way, and one could claim that the adoption of the OECD-originated plurilateral GPA79 before the establishment of the WTO along with adoption of GATS only misguided the post-Marrakesh discourse on public procurement. This is a good guide for revisiting the integration of various non-commercial considerations (social, environmental, pro-innovation) into the global model of the regulation and liberalisation of public procurement whereby any public procurement-related developments should go in tandem with the recognition of similar considerations in general commerce.

[171] Indeed, according to Arrowsmith, agreeing on the negotiating-mandate in GATS without an analogical provision in GATT 94 was particularly 'anomalous' because "*there is more support for opening up goods procurement*." See: note 163 ibid.

Chapter 3. EU/EEA and public procurement

This chapter is the second of three presenting the global model of the regulation and international liberalisation of public procurement markets. It further decodes this model by offering basic yet necessary insight into (*i*) the gradual development of the regime of internal liberalisation of public procurement within the EU, also extended to the European Economic Area ('EEA'), being *en masse* the core of the GPA,[1] and (*ii*) its influence on the parallel developments in the GPA since the mid-1960s all the way through five generations of the EU's legislation on public procurement. This chapter presents the EU's regime as the trendsetter for the GPA preliminarily indicates that recent developments in the EU public procurement system might project future developments in the GPA system, including how public procurement-related cross-border regulatory policies are likely to be integrated into the international trading system.[2] In doing so, this chapter also preliminarily notices that (*i*) while EU regime has dominated the GPA system, it has been tailored for the unique legal environment of the EU's internal market significantly differing from ordinary conditions of international trade, and (*ii*) there is a question mark hanging over the sense of the wide and uncritical replication of the EU's solutions beyond this trading block.

This chapter starts by explaining the constitutional foundations of the EU's regime of the public procurement regulation and their relations with the international trade-related commitments of the EU (section 3.1). Then it discusses the historic development of this regime along with its cross-influences with the parallel developments in the GPA (section 3.2), a model of the internal liberalisation of small-value procurement not subjected to international commitments (section 3.3), the implementation of the EU legal systems of the EEA members which are not EU

[1] As of August 2014, out of 43 parties to the GPA, 31 were signatories of the EEA Agreement, a group covering 28 EU Member States plus Iceland, Liechtenstein and Norway.

[2] In contrast to the analysis of the developments in the UN leading to the creation of the GATT47 excluding public procurement from its scope of application (in sections 2.1, 2.2) and in contrast to the analysis of subsequent public-procurement related negotiations in the GATT/WTO (see sections 2.4 and further Chapter 9), the historical analysis of the development in the EEC/EC/EU must be confined to black-letter-law-review of the EEC/EC/EU directives which, fortunately, usually open with very informative preambles. This is because – while in the case of the GATT/WTO almost all GATT and early-WTO documents were derestricted and even the most recent WTO documents are being largely derestricted already after a few months from their internal circulation – the legislative process in the EEC/EC/EU is largely non-transparent. The internal works in the European Commission (being the only EU's institution with the right of initiative) are *de facto* confidential. Subsequent more transparent works in the European Parliament and the Council on already complete legislative proposals put forth by the Commission are often ostensible and do not lead to material changes to Commission's proposals. This is all the more true with regard to early generations of the EU's public-procurement-relevant legislation in the case of which the functions of the European Parliament were mostly advisory and confined to minimum. Moreover, while similarly detailed analysis of the legislative history of the EU's legislation would go beyond the scope of this chapter, it is worth noticing that only the non-confidential legislative works on the forth generation directives were covered in literature in detail. See generally: Jan M. Hebly (ed), *European public procurement : legislative history of the 'classic' directive : 2004/18/EC* (Kluwer Law International, Alphen aan den Rijn 2007) 1806; Jan M. Hebly (ed), *European public procurement : legislative history of the 'utilities' directive : 2004/17/EC* (Kluwer Law International, Alphen aan den Rijn, 2008) 1749.

Member States (section 3.4), and examples of the unilateral acceptance of the EU model by third countries (section 3.5).

3.1 EU Treaties *versus* procurement directives

The EU regime of the liberalisation of public procurement markets covering the vast majority of the GPA parties[3] is based on some wider legal foundation that the GPA system is lacking. Specifically, unlike the GPA, the EU regime of public procurement is two-fold. Firstly, the high-value procurement regulation has been adopted at the level of the EU's 'secondary legislation' (an equivalent of ordinary statutes[4]), mostly directives.[5] A secondary legislation regulating public procurement is passed by the EU's legislative institutions, based on the authorisations provided for in the EU's 'primary legislation' (equivalent to a constitution, now made up of the Treaty on the European Union -'TEU',[6] and Treaty on the Functioning of the European Union - 'TFEU'[7], collectively: 'Treaties'). Like the GPA, the high-value regime applies to public procurement over certain contract-value thresholds, which is also mostly subjected to the GPA[8] implying that the role of the secondary legislation must also be to implement the GPA.

Secondly, the EU system is based on the elementary freedoms of the EU's internal market laid out in the Treaties, and applies to all public procurement within the EU regardless of the value of public contracts. The TFEU's provisions assuring the freedoms of the internal market,[9] that is

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[3] See: note 1.

[4] "*To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.*" See: Consolidated version of the Treaty on the Functioning of the European Union, OJ [2010] C 83/01, p 47, Article 288 para 1.

[5] "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*" See: TFEU, Article 288 para. 2.

[6] See: Consolidated version of the Treaty on European Union, OJ [2010] C 83/01, p 3.

[7] See: note 4.

[8] Also, the subjective and objective coverage of directives is similar to the GPA's, whereby the GPA covers almost all public procurement covered by the directives and does not cover public procurement which the EU did not want to be subject to international liberalisation either generally or with regard to specific third countries. With regard to subjective coverage, on the one hand: "*In so far as they are covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union"* (see: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC 2014 OJ [2014] L 94, p. 65–242, article 25). On the other hand, the EU's Annexes 2 (sub-central public authorities) and 3 to the GPA ('other bodies,' mostly utilities) simply cover all procurers subject to relevant directives, meaning that the subjective coverage of the GPA and of the directives is identical. Only in the case of the EU's Annex 1 (central public authorities), procurers have been listed enumeratively meaning that in the case of the reorganisation of public administration in some Member States the subjective coverage of the GPA might temporarily be narrower (until changes are notified to the WTO Committee on Government Procurement). With regard to objective coverage, the GPA's coverage is narrower especially because the coverage of services is limited by positive lists.

[9] "*2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.*" See: TFEU Article 26.2.

the free movement of goods,[10] persons,[11] services,[12] and capital,[13] and the freedom of establishment,[14] are the only source of public procurement regulation below the thresholds of the application of the secondary legislation. In theory, regulating public procurement below thresholds belongs to the legislative autonomy of Member States. However, based solely on the elementary freedoms of internal markets, the Court of Justice (formerly European Court of Justice, the 'ECJ')[15] and the European Commission ('Commission') have expected Member States' law makers to assure similar levels of market integration and harmonisation of regulation among Members States as under the directives (see further section 3.3).

The explanation of this chaos lies in the historical dynamics of the EU's economic integration which has been a long-term process. After decades of gradual European economic integration it is now obvious that the basic rules of the internal market set out in the Treaties are sufficient for opening public procurement sectors of Member States among them, and that secondary legislation is not indispensable. The free movement of goods, persons, services and capital, and the freedom of establishment altogether make up an implied ban on any discrimination against goods/services as well as suppliers/contractors of other Member States. These freedoms guarantee that regional protectionism will be curbed to the highest possible degree and, indeed, at least overt and direct public procurement-related discrimination is unthinkable in the mid-2020s in the internal market. However, historically, this was not the case at least until the adoption of the original Treaty on the European Union ('The Treaty of Maastricht')[16] which was meant to be the point of the internal market's completion under the Single European Act of 1986.[17]

Rome, i.e. the internal market, was not built in one day in 1957 with the conclusion of the Treaty of Rome establishing the European Economic Community ('TEC').[18] The gradual integration involved transitional periods, subsequent changes and modifications of the Treaties, and the adoption of secondary legislation aimed at catalysing the process of integration (see further section 3.2.1). The integration was also supported by the ECJ interpreting the Treaties very

[10] See: TFUE, Article 28; EEA Article 8.
[11] See: TFUE, Article 45; EEA Article 28.
[12] See: TFUE, Article 56; EEA Article 36.
[13] See: TFUE, Article 63; EEA Article 40.
[14] See: TFUE, Article 49.2; EEA Article 31.2.
[15] The Court of Justice of the European Union includes the Court of Justice, the General Court and specialised courts. See: TEU, Article 19.
[16] See: Treaty on the European Union, 7 February 1992, OJ [1992] C 191.
[17] "*The EEC Treaty shall be supplemented by the following Provisions: Article 8a The Community shall adopt measures with the aim of progressively establishing the internal market over period expiring on 31 December 1992* (…)." See: Single European Act, 17 February 1986, OJ [1987] L169 article 13.
[18] See: Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 3.

favourably for removing all and any obstacles to the intra-community trade (see further section 3.2.4). Initially, mere Treaties were not sufficient to liberalise Members States' public procurement sectors because, according to Bovis, they are only of a negative nature in the sense that these prohibit discriminative practices but they do not impose any positive obligations in turn.[19] Imposing positive obligations could have been done just by passing secondary legislation, and was also necessitated by having to comply with the GPA in parallel to internal efforts to put the internal market in place. It would not have been legislatively efficient to develop two separate detailed public procurement regimes, one for the purposes of international compliance, and one for the purpose of internal integration only.[20] In consequence, just one regime regulating high-value contracts has been established, which needs to combine the needs of both internal integration and international trade.

This immediately brings in mind that the solutions offered by two very similar instruments of the liberalisation of public procurement markets (the GPA and the directives) have to help a similar purpose but operate in completely different conditions of economic integration among parties to these instruments. That would not be problematic if (*i*) the solutions offered by the GPA reconciled viewpoints of all stakeholders in the GPA system (current and prospective parties), and (*ii*) the directives adhered to such consensus. In that case, the internal EU's regime could anyway augment the solutions offered under the GPA neither violating GPA's provisions nor worsening the position of foreigners.[21] However, instead, the GPA's solutions have broadly followed the developments in the EU,[22] implying that solutions originally designed as an additional facilitator of the EEC's/EC's/EU's internal market's market integration must also suffice as a basic tool of liberalisation of public procurement market in ordinary trade relation (see further section 9.1.1.d explaining how this adversely affects plurilateral public-procurement-specific trade negotiations).

3.2 Five generations of secondary legislation

Figure 13. EU's subsequent generation of secondary legislation on public procurement.

Generation	goods	services	works	utilities	concession	military	review

[19] See: Christopher Bovis, *EU public procurement law* (Elgar European law, Edward Elgar, Cheltenham 2007) 488 at 10.

[20] Separate systems absolutely could not work with regard to the contracts within the same value-thresholds. This is because in the case of contracts covered by the GPA, procurement procedures must conform to the GPA anyway. The directives could only 'amplify' the solutions offered by the GPA which they actually do (see section 3.3). However, one could imagine complicating the EU's regime in the way that a less strict procurement system would cover 'medium-value' procurement (with its own lower thresholds) uncovered by the GPA and would only serve the purpose of the integration of internal market but would be more detailed than rules applicable to the lowest-value-procurement.

[21] See: ibid.

[22] See: Harvey Gordon, Shane Rimmer and Sue Arrowsmith. 'The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO' (1998) 21(2) World Econ 159 at 160, 163.

1st	70/32/EEC 77/62/EEC	-	71/304/EEC	-			-
2nd	88/295/EEC		89/440/EEC	92/13/EEC	-	-	
3rd	93/36/EEC	92/50/EEC	93/37/EEC	93/38/EEC			89/665/EEC
4th		2004/18/EC		2004/17/EC		2009/81/EC	-
5th		2014/24/EU		2014/25/EU	2014/23/EU		

A chronological review of the subsequent generations of the EEC's/EC's/EU's procurement directives demonstrates that these instruments evolved from short and concise legal acts strictly focused on the internal market integration into very complex instruments also addressing how Member States' public procurement markets could be used as a wider-policy tool. Juxtaposed against parallel developments in the GPA, this review also confirms that EU's regime, indeed, substantially influenced the GPA system. Obviously, the EU regime has lived its own much more complex life described in much more detail elsewhere[23] and subsequent versions of the GPA did not repeat the directives to the letter but rather offered slightly more flexible regulatory framework.[24] Nonetheless, the core elements of the two regimes have remained identical and the major changes to them have always gone together.

3.2.1. First generation

The EEC's work on the first-generation directives on public procurement has taken place since 1962, when two initial working programmes, generally aiming at the development of the single market by improving the freedom of establishment and the freedom to provide services, also addressed the need to open Member States' public procurement sectors toward a future internal market.[25] Until the end of 1969 the 12-year transitional period was in force still allowing even tariff barriers between Members States,[26] but works were scheduled much in advance in order to drive the integration processes with a new regulation when that transition period was over. The secondary legislation of 1966 mandating removing some non-tariff barriers to intra-community trade on goods ("*laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products*")[27] until 1 February 1967[28] expressly

[23] Apart from other works cited in this chapter, see also generally: Constant de Koninck and Thierry Ronse, *European public procurement law: the European public procurement directives and 25 years of jurisprudence by the Court of Justice of the European Communities : texts and analysis* (Wolters Kluwer Law & Business, Frederick 2008) 783; Constant de Koninck and Peter Flamey, *European public procurement law. Part II, Remedies : the European public procurement remedies directives and 15 years of jurisprudence by the Court of Justice of the European Communities : texts and analysis* (Wolters Kluwer Law & Business, Frederick 2009) 585; Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart Publishing, Oxford 2011) 457.

[24] See: note 22 at 163.

[25] See: General Programme for the abolition of restrictions on freedom of establishment OJ [1962] 2, p 36-45, English special edition: Series II Volume IX. p 7-15, Title IV(b); General Programme for the abolition of restrictions on freedom to provide services, OJ [1962] 2, p 32-35, English special edition: Series II Volume IX, p 3 – 6, Title V(e).

[26] See: Treaty of Rome, article 8(7), see also: note 19 at 2.

[27] See: Commission Directive 66/683/EEC of 7 November 1966 eliminating all differences between the treatment of national products and that of products which, under Articles 9 and 10 of the Treaty, must be admitted for free movement, as regards laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products or making such use subject to profitability, OJ [1966] L 220, p. 3748–3750 (unofficial English translation of the title).

excluded public procurement from its application as public procurement had then been meant to be covered by special legislation in the close future.[29] Eventually, the first Directive 70/32 was passed in 1970, covering the provision of goods,[30] followed by Directive 71/304 covering construction works, then referred to as 'public works' in 1971.[31]

The initial developments in the EEC's secondary legislation on public procurement and the developments in the GPA went in tandem even though (*i*) the initial work on the secondary legislation had been initiated long before GPA79 was adopted in the course of the Tokyo Round and had an internal context, and (*ii*) the primary goal of the two first directives was, again, not international compliance but to put the internal market in place quicker. In fact, the future GPA79 was still discussed in the OEEC/OECD[32] when the first directives were discussed in the EEC. The two circles were very similar (mostly Western European Countries) and were negotiating simultaneously, resulting in a very similar language of the GPA and of the directives as compared by Blank and Marceau, according to whom the cross-influence of the two negotiation circles is evident.[33]

Directives 70/32 and 71/304 were very brief and virtually confined to banning discrimination against goods/suppliers as well as contractors originating from other Member States without imposing any procedural rules on the procurement process or thresholds of application. However, yet prior to the conclusion of the Tokyo Round, the then EEC's regime on the procurement of goods was covered by a set procedural rules analogical to the GPA's framework (see section 2.3.3) under Directive 77/62 in 1976.[34] The GPA-like regime covered matters such as: (*i*) thresholds of application of 200,000 European Units of Account[35] (mirroring GPA79 setting up the threshold of SDR 150,000[36]), (*ii*) rules on the valuation of contracts, preventing

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[28] See: ibid. article 2.

[29] "*[C]eonsidérant que les dispositions législatives, réglementaires et administratives du genre précité, concernant les marchés passés par l'État, ses collectivités territoriales et les autres personnes morales de droit public, seront visées par une directive particulière.*" See: ibid. the last paragraph of the preamble.

[30] See: Commission Directive 70/32/EEC of 17 December 1969 on the provision of goods to the State, to local authorities and other official bodies OJ [1970] L 13 p. 1–3.

[31] See: Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches OJ [1971] L 185, p 1–4, English special edition: Series I Chapter 1971(II), p 0678; Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts OJ [1971] L 185, p 5–14, English special edition: Series I Chapter 1971(II), p 682.

[32] See: note 19 at 17-22 on the works in the EEC; section 2.3.1 on the works in the OEEC/OECD.

[33] See: Annet Blank and Gabrielle Marceau. 'History of the government procurement negotiations since 1945' (1996) 4 Pub Proc L Rev 77 at 90.

[34] See: Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ [1977] L 13, p 1–14,

[35] See: ibid. article 5.1,

[36] See: GPA79, article I.1.b),

splitting public contracts up with a view to avoid application of the above threshold regime,[37] (*iii*) a limited acquiescence to direct sourcing, allowed only in exceptional situations (like emergency, artistic works, goods traded in commodity markets, etc.),[38] (*iii*) the use of non-discriminatory EEC-wide and/or international uniform technical standards,[39] (*iv*) notifications by the public procurers in the Official Journal of the European Communities,[40] (*v*) legitimate reasons for excluding tenderers (like their financial standing, bankruptcy, submitting false statements, etc.),[41] or (*vi*) award criteria limited to the lowest or the most advantageous tenders, not allowing employing other non-commercial criteria.[42]

The EEC's regime on public procurement of goods and the GPA's regime formally met in 1980, when the EEC Council ratified the agreements reached in the GATT Tokyo Round, GPA79 included.[43] At that point, the role of the secondary legislation was crystallised also as a tool for the implementation of the EEC's international commitments on the liberalisation of the Member States' public procurement markets toward third countries. Accordingly, Directive 80/767[44] was adopted to adjust Directive 77/62 to the GPA79 with effect from 1 January 1981.[45] Some modifications were required as GPA79 provided more favourable conditions than Directive 77/62,[46] potentially leading to a reverse discrimination against the suppliers of the EEC compared with the suppliers originating from third countries subjected to GPA79.[47] As an additional safeguard to prevent discrepancies between that directive and the GPA, Directive 80/767 also stipulated that:

Directive 80/767 Art 7 *'For the purposes of the award of public contracts by the contracting authorities referred to in Article 1 (1), Member States shall apply in their relations conditions as favourable as those which they grant to third countries in implementation of the Agreement (...)''*

[37] See: Directive 77/62, Article 5.2 harmonizing with GPA79 Article I.1.b,
[38] See: Directive 77/62, Article 6 harmonizing with GPA79 Article V.15,
[39] See: Directive 77/62, Article 7 harmonizing with GPA79 Article IV,
[40] See: Directive 77/62, Articles 9-16 harmonizing with GPA79 Article V:5-14,
[41] See: Directive 77/62, Articles 21-23 harmonizing with GPA79 Article V:5-14,
[42] See: Directive 77/62, Article 25.1 harmonizing with GPA79 Article V:14.f,
[43] See: Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations, OJ [1980] L 71, p.1–2,
[44] See: Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing certain contracting authorities and Directive 77/62/EEC coordinating procedures for the award of public supply contracts, OJ [1980] L 215, p 1–28. In accordance with its Article. 9, all Member States were required to implement this directive by that date
[45] Like Directive 77/62, GPA79 did not cover services. See section 2.3.1.
[46] See: Directive 80/767, Preamble.
[47] See: ibid.

Since then, the directives on public procurement have usually included similar safeguard provisions if they cover public procurement subject to the GPA and implemented its provisions.[48]

3.2.2. Second generation

The second generation of directives adopted in the 1980s and 1990s[49] was aimed at (*i*) assisting with the completion of the next stage of the internal market's integration until the end of 1992[50] as initially delineated by the Single European Act,[51] and (*ii*) reflecting the revision of the GPA in 1987.[52] Among other developments, in the case of public works, the second generation extended its coverage by embracing for the first time (*i*) 'public works concessions' meaning contracts "*of the same type as that indicated in (a)* [public works contracts] *except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment*,"[53] and (*ii*) private entities realizing projects subsidised by public authorities by more than 50 percent.[54] The second generation also set up a review system applicable to the procurement of both goods and public works, requiring the Member States to assure that (*i*) the interlocutory measures enabling the suspension of the procurement process are available,[55] (*ii*) unlawful decisions taken in the course of the procurement process are voidable,[56] (*iii*) any damage resulting from such unlawful decision is compensated,[57] and (*iv*) a judicial review of the conduct of the reviewing bodies is guaranteed unless the reviewing authorities are not themselves judicial in character[58] – and the GPA94 followed by instituting similar review system a few years later (see sections 2.3.1 *in fine* and 2.3.3). Apart from that, in respect to procurement of R&D, the directive on goods followed the

[48] Nonetheless, one should not be misled by such provisions into thinking that the GPA offers a better opening of public procurement markets than the directives. Such clause might have been employable for some very detailed procedural provisions in the directives (overregulating the procurement process compared with the GPA) resulting in unintended discrepancies with the GPA, but no more than that.

[49] See: Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC, OJ [1988] L1988, p. 1–14; Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts, OJ [1989] L 210, p 1–21; Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures with the award of public supply and public works contracts, OJ [2000] L 395 p 33 – 35; Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sector, OJ [1990] L 297, p 1–48.

[50] See: Directive 88/295, Preamble; Directive 80/767, Preamble.

[51] See: note 17.

[52] See: Directive 88/295, Preamble.

[53] See: Directive 71/305 as amended by Directive 89/440, article 1(d). The original Directive 71/305 excluded concessions from its application in article 3.

[54] See: ibid. Article 1.a.1.

[55] See: Directive 89/665, Article 2.1.a).

[56] See: ibid. Article 2.1.b).

[57] See: ibid. 89/665, Article 2.1.c).

[58] See: ibid. 89/665, Article 2.8.

GPA by allowing uncompetitive 'negotiated procedure without prior publication of a tender notice' in the case of goods produced "*purely for the purpose of research, experiment, study or development.*"[59] In turn, the directive on works (then uncovered by the GPA) provided that the same procedure shall apply to procurement of works "*for the purpose of research, experiment or development, and not to establish commercial viability or to recover research and development costs*"[60] resulting in that – while it has never been expressly regulated under the GPA after the GPA had also covered services procurement (see further section 3.2.3) – the common understanding has been that also the GPA, by default, does not apply to the procurement of R&D (see further section 10.2.3.a).

Most importantly, the second generation significantly expanded its subjective coverage by also embracing, in a separate directive, purchases by so-called 'utilities", denominating (*i*) public authorities,[61] (*ii*) 'public undertakings',[62] and (*iii*) private business vested with special or exclusive rights,[63] all operating in strictly defined sectors of public utility. Subject to many exceptions, these sectors initially were (*i*) the production, transportation, distribution or supply of drinking water, electricity, gas, or heat,[64] (*ii*) the exploration of geographical areas (for the purposes of extracting oil, gas, coal, or other solid fuels, and the provision of airport, maritime, or inland port, or other terminal facilities to carriers by air, sea, or inland waterway),[65] (*iii*) the operation of public transportation (by railways, automated systems, tramways, trolley buses, buses or cables),[66] and (*iv*) the provision or operation of public telecommunications networks and operation of public telecommunications services.[67, 68]

As a result of covering utilities, integration within the internal market again imparted some impetus to the worldwide liberalisation of markets under the GPA. Covering utilities sectors by the EEC's public procurement rules directly preceded an analogical move in GPA94 adding a similar category of 'other entities' to the GPA objective coverage. Similar to covering

[59] Except for this provision does not extended to "*quantity production to establish commercial viability or to recover research and development costs.*" See: Directive 88/295, Article 6.4.b. harmonising with GPA's 79's Article V.15.e allowing single tendering in the case of "*purchases prototypes or a first product which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development*." See further: section 10.2.3.a.

[60] See: Directive 89/440, Article 5.2.b. See also further: section 10.2.3.a.

[61] See: Directive 90/531, Article 1.1.

[62] "*public undertaking shall mean any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it* (…)" See: ibid. Article 1.2

[63] See: ibid. Article 2.1.b).

[64] See: ibid. Article 2.2.a).

[65] See: ibid. Article 2.2.b).

[66] See: ibid. Article 2.2.c).

[67] See: ibid. Article 2.2.d).

[68] See also: note 19 at 30-32.

procurement of goods in the first generation, covering the procurement by utilities in the second generation was done initially for the purposes of the common market and it was not necessitated by any requirements of international compliance.[69] Rather, the developments within the EEC contributed to the expansion of the GPA's coverage by indirectly inviting third countries to subject their utilities sectors to the GPA regime in the course of the simultaneous negotiations in the Uruguay Round, seeing commitments already made by the Member States for the purposes of the single market.[70]

3.2.3. Third generation

The highlight of the third-generation directives[71] was covering the procurement of services by Directive 92/50[72] in addition to previously covered supplies of goods and the provision of public works. The procurement of services had been previously covered by the directive on supply of goods only to the extent that services were linked to the delivery of goods ('siting and installation operations').[73] In turn, the new Directive 92/50 applied to supplies of goods to the extent that goods constitute a minor part of contracts for services.[74] The first directive on procurement of services did not cover concession contracts in contrast to the regime on public works where, as mentioned, 'public works concessions' were covered already in the second generation.[75]

Directive 92/50 made a crucial distinction between 'priority services' (also known as 'Annex 1A' services) and 'non-priority services' (also known as 'Annex 1B' services). The priority services were the services to which all procedural rules applied.[76] This category covered the vast majority of typical services ordered by public agencies such as for example (*i*) maintenance and repairs,[77] (*ii*) land/air transport,[78] (*iii*) insurance, banking and investment,[79] (*iv*) computer

[69] See: Directive 90/531, Preamble.

[70] See: note 19 at 32, 37.

[71] See: Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ [1993] L 199, p 1–53; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ [1993] L 199, p 54 – 83; Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ [1992] L 209, p 1–24; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ [1993] L 199, p 84–138; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations, and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors, OJ [1992] L 76, p 14–20.

[72] See: note 71, Directive 92/50.

[73] See: Directive 77/62 as amended by Directive 88/295/EEC, Article 1(A).

[74] See: Directive 92/50, Article 2.

[75] See: note 53; note 19 at 43.

[76] See: Directive 92/50, Article 8.

[77] See: ibid. Annex 1A, point 1.

[78] See: ibid. Annex 1A, point 2-3.

solutions,[80] (*v*) accounting, auditing and book-keeping,[81] (*vi*) market research and public opinion polling,[82](*vii*) architectural/urban planning/design and technical/engineering consultancy,[83] (*viii*) advertising, and (*ix*) management consultancy.[84] The non-priority services were the services to which only limited rules applied[85] - that is the rules on (*i*) non-discriminatory technical specifications,[86] and (*ii*) notifications.[87] This category, among others, initially covered (*i*) hotels/restaurants,[88] (*ii*) rail transportation,[89] (*iii*) transport of water,[90] (*iv*) legal advice,[91] investigation and security,[92] (*v*) education and vocational education,[93] and (*v*) health and social services.[94] Apart from that, the new regime on procurement of services also introduced the 'design contest' as a new method of choosing contractors in fields like area/town planning, architecture, civil engineering or data processing, whereby a 'jury' selects a plan or a design.[95] The other directives of the third generation (supply,[96] works,[97] utilities[98]) were more ordering than reformist. These were known as 'consolidated' directives because, for the sake of readability, they were drafted as completely new texts.[99]

Covering services in the third generation was strictly parallel to the outcomes of the Uruguay Round ratified by the EU in December 1994[100] as it mirrored the GPA's extension over services,[101] and the adoption of the GATS. The third-generation directives were modified

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[79] See: ibid. Annex 1A, point 6.
[80] See: ibid. Annex 1A, point 7.
[81] See: ibid. Annex 1A, point 9.
[82] See: ibid. Annex 1A, point 10.
[83] See: ibid. Annex 1A, point 12.
[84] See: ibid. Annex 1A, point 11.
[85] See: ibid. Article 9.
[86] See: ibid. Article 14.
[87] See: ibid. Article 16.
[88] See: ibid. Annex 1B, point 17.
[89] See: ibid. Annex 1B, point 18.
[90] See: ibid. Annex 1B point 19.
[91] See: ibid. Annex 1B, point 21.
[92] See: ibid. Annex 1B, point 23.
[93] See: ibid. Annex 1B, point 24.
[94] See: ibid. Annex 1B, point 25.
[95] See: ibid. Article 1.g).
[96] See: note 71, Directive 93/36.
[97] See: ibid. Directive 93/37.
[98] See: ibid. Directive 93/38.
[99] In contrast to the second-generation directives which were technically amendments to the first-generation texts.
[100] See: Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ [1994] L 336, 23.12.1994, p. 1–2.
[101] Compare GPA79 as revised in 1986 specifying that: "*(…)[t]This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se*" with Article III of GPA94.

already in 1997[102] again to avoid reverse discrimination of EU businesses because (*i*) "*certain provisions of the Agreement introduce[d] more favourable conditions for tenderers than those laid down in Directives 92/50/EEC, 93/36/EEC and 93/37/EEC,*"[103] and (*ii*) "*the opportunities for access to public service, public supply and public works contracts available pursuant to the Treaty to undertakings and products from the Member States must be at least as favourable as the conditions of access to public contracts within the Community accorded pursuant to the arrangements contained in the Agreement to undertakings and products from third countries which are signatories to the Agreement*."[104]

3.2.4. Fourth generation

The fourth generation of directives was marked by the so-called 'codification.' Provisions on supplies, works and services by public authorities were merged into one act, since then referred to as the 'classical directive.'[105] But procurement managed by the utilities sector remained covered by the separate directive.[106] Both the classical directive and the utilities directive were to be implemented in Member States by 31 January 2006,[107] and were also followed by the adoption of a new directive regulating the review of procurement processes.[108] In terms of substantive solutions, the fourth generation brought, for instance, some procedural innovation such as 'dynamic purchasing system'[109] or 'electronic auction,'[110] aligning the secondary legislation with the ongoing technological progress. It also integrated 'framework agreements'[111] into the regulation of the procurement in the classical sector which, prior to the fourth generation had been only available in the utilities sector.[112]

Apart from this, the fourth generation also introduced a number of provisions allowing non-commercial/collateral/secondary/horizontal considerations in the procurement process. On the

[102] See: European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, OJ [1997] L 328, p 1–59.

[103] See: Directive 97/52, Preamble point 5.

[104] See: Directive 97/52, Preamble point 6.

[105] See: Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ [2004] L 134, p 114–240.

[106] See: Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ [2004] L 134, p 1–113.

[107] See: Directive 2004/18, Article 80.1; Directive 2004/17, Article 71.1.

[108] See: Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts OJ [2007] L 335, p 31–46.

[109] See: Directive 2004/18, Article 1.6.

[110] See: ibid. Article 1.7.

[111] The essence of framework agreements is "*to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period.*" See: ibid. Article 1.5.

[112] See: Directive 90/531, Article 1.4; Directive 93/38, Article 1.5.

one hand, it facilitated the pursuit of industrial/pro-innovation policies through interaction between procurers and suppliers/contractors by adding 'competitive dialogue' as a new method of selecting contractors available just in the case of 'particularly complex contracts'.[113] On the other hand, the fourth-generation directives for the first time firmly allowed Member States to pursue and to integrate some social and/or environmental policies into their national public procurement systems. A firm green light was given to policies aimed at promoting (*i*) sheltered employment,[114] (*ii*) environment and employment protection,[115] and (*iii*) the use of eco-labels in the context of technical specification.[116] The adoption of the socially and environmentally-related provisions was mainly dictated by the ECJ's judiciary already accepting, under the Treaties, a grassroots initiative by individual public procurers to integrate non-commercial considerations in public procurement markets of Member States[117] (see further sections 8.2.2). The ECJ's opinions had to be reflected in the secondary legislation that needed to be in compliance with the Treaties as the superior laws.[118] In this respect, the fourth generation was again ahead of the GPA, and it was the GPA which followed trends delineated by theoretically inferior directives, by firmly allowing after its revision of 2012 [119] the integration of environmental characteristics into technical specifications,[120] into evaluation criteria,[121] and planning future works on sustainable procurement and[122] safety standards[123] (see sections 2.3.5, 9.3.2.b, 9.3.3).

[113] See: Directive 2004/18, Article 29.1. Prior to the fourth generation, 'negotiated procedures' ["*Negotiated procedures' means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these*" – see: Directive 2004/18, article 1.11.(d)] (*i*) had been allowed since the third generation (see: Directive 88/295, Article 1:2.(f); Directive 93/36, Article 1.e) and (*ii*) offered even more flexibility in the procurement process than competitive dialogue. While negotiated procedures could be conducted even without the publication of a contract notice, competitive dialogue always requires (*i*) publication of a contract notice, and (*ii*) conformity with the so-called section criteria like financial standing, lack of previous convictions, experience, etc. (see Directive 2004/18, Articles 31, 44-52). However, the negotiated procedures have been only available in a very limited number of cases (see: Directive 2004/18, Article 31) similar to the conditions allowing (*i*) a complete non-application of the first-generation directives on the supply of goods (see: note 28), and (*ii*) 'single tendering' under the GPA (see: ibid.) - in contrast to competitive dialogue only requiring a particular complexity of the public contract.

[114] See: Directive 2004/18, Preamble point 29, Article 19, Article 23 point 6, and Annex VII; Directive 2004/17, Preamble point 29, Article 34 point 6, and Annex XXI.

[115] See: Directive 2004/18, Article 27.

[116] See: ibid. Article 23.6.

[117] See: Directive 2004/18, Preamble point 1; Directive 2004/17, Preamble point 1;

[118] See: ibid.

[119] The text of the 2012 revision was already decided in 2006, provisions on environmental considerations included. See: section 9.3.1.

[120] See: GPA12, article X:6.

[121] See: ibid.

[122] See: ibid. Article XXII.8.(iii).

[123] See: ibid. Article XXII.8.(v).

3.2.5. Defence Directive

A few years later, the 'Defence Directive'[124] supplemented the fourth generation of the directives, embracing purchases of (*i*) supplies of 'military equipment'[125] (e.g. arms, munitions),[126] (*ii*) supplies of 'sensitive' (involving classified information[127]) equipment, works and services[128], and (*iii*) related works/services.[129] Defence sectors have always been heavily shielded against international competition because of public security requirements recognised under virtually all trade-related international treaties,[130] the GPA included.[131] However, a common understanding was reached among the Member States that the notion of public security justifying Member States' wide autonomy in terms of military-related or security-related purchases[132] should be understood much more narrowly than between countries bound by ordinary international trade agreements covering public procurement.[133] The adoption of the Defence Directive was meant to bring the integration of defence procurement markets to a completely different level compared with the GPA.[134]

Apart from the market integration objective, the Defence Directive also introduced some solutions which could not be tested in non-defence sectors subjected to the GPA. For instance - driven by the desire to enhance the innovation and competitiveness of the European defence industry by encouraging cross-border cooperation over the creation of innovative solutions[135] - the Defence Directive offered an exemption from its application for purchases of solutions developed by cooperative R&D programmes involving at least two Member States.[136] It also aimed to clarify the relations between procuring innovative solutions in their R&D-phase of and

[124] See: Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ [2009] L 216, p 76–136.

[125] See: Directive 2009/81ibid. article 2.(a).

[126] See: ibid. Article 1.6.

[127] See: ibid. Article 1.7.

[128] See: ibid. Article 2.(b).

[129] See: ibid. Article 2.(c) and 2.(d).

[130] However, some bilateral defence-specific liberalizing commitments are possible between military allies, which is the case of many Member States being NATO members at the same time and having bilateral Memoranda of Understanding with some other NATO members, particularly the US. See: generally: David B. Dempsey. 'Foreign Procurement under Memoranda of Understanding and the Trade Agreements Act' (1981-1982) 12(2) Pub Cont L J 221.

[131] See: GPA12, Article III.1.

[132] See: TFEU, Articles 30, 45, 46, 55 and 296.

[133] See: Directive 2009/81, Preamble point 17-18.

[134] See: ibid.

[135] "*The importance of research and development in this specific field justifies maximum flexibility in the award of contracts for research supplies and services. At the same time, however, this flexibility should not preclude fair competition in the later phases of the life cycle of a product. Research and development contracts should therefore cover activities only up to the stage where the maturity of new technologies can be reasonably assessed and de-risked. Research and development contracts should not be used beyond that stage as means of avoiding the provisions of this Directive, including by predetermining the choice of tenderer for the later phases.*" See: ibid. preamble point 55.

[136] See: ibid. Article 13.(c). Such waiver does no exist under the GPA.

subsequent implementation phases[137] (e.g. industrial development, production, modernisation, maintenance and disposal[138]) whereby the R&D phase should be followed by separate competitive tenders for the subsequent implementation phase in order to inject more competition into the implementation phase unless the R&D phase itself was subjected to a competitive procedure.[139] Moreover, in order to inject competition into the supply chain of primary contractors (and to support small and medium enterprises operating in the defence sector) the defence directive offered many new solutions to the process of subcontracting such as, among many others, procurers' right to oblige primary contractors to (*i*) select subcontractors in a competitive procedure[140] (involving, e.g. public notices,[141] non-discriminatory award criteria,[142] etc.), or (*ii*) outsource a share of the contract not exceeding 30 percent of the contract value to subcontractors.[143]

Given that other previous major developments in the directives foretold future developments in the GPA, the original solutions offered by the Defence Directive might also project future trends in public procurement-related international trade agreements, not necessarily in the defence sectors. Especially, the provisions which clarify the rules governing procurement of R&D could be replicated in the GPA overriding current fragmentary regulation (see sections 3.2.2, 10.2.3.a). In turn, the provisions on compulsory subcontracting – which generally might be seen as biased in favour of domestic SME[144] - could, for example supplement the list of transitional discriminatory measures available as a form of special and differential treatment for the LDCs under the GPA12 (see further section 9.4.2.a).[145] Perhaps, only the waiver of public procurement regime for purchases of solutions developed in cooperative multinational R&D

[137] See: ibid. Preamble point 55.

[138] See: ibid. Article 1.12.

[139] "*On the other hand, the contracting authority/entity should not have to organise a separate tender for the later phases if the contract which covers the research activities already includes an option for those phases and was awarded through a restricted procedure or a negotiated procedure with the publication of a contract notice, or, where applicable, a competitive dialogue.*" See: ibid. Preamble point 55. The GPA only allows limited tendering "*where a procuring entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development.*" (see GPA12, Article XIII.f) which does not cover a following implementation phase.

[140] See: Directive 2009/81, Article 21.3. This is silenced and impliedly not allowed under the GPA.

[141] See: ibid. Article 52.

[142] See: ibid. Article 53.

[143] See: ibid. Article 21.4. This is silenced and impliedly not allowed under the GPA.

[144] Under the Defence Directive, and under specific conditions of the EU's internal market (see: note 140), the right of public procurers to impose a requirement of sub-contracting still means preserving an unhindered competition among SMEs from various EU's Member States (see: Directive 2009/81, preamble point 40 and article 21.1). However, among less integrated countries (than among Member States) even a ban on an express discrimination of foreign sub-contractors could not eliminate an indirect discrimination against foreign sub-contractors resulting from more general market-access-barriers generally disadvantaging foreigners, (especially SMEs).

[145] See: ibid. Similar measures (but expressly discriminatory against foreigner) were already used by Israel enjoying a status of a developing country and were classified as 'offsets' (see further section 9.3.1.c).

programmes could not easily find a wider non-defence application seeing that such solution - while interesting - could be abused.[146]

3.2.6. Fifth generation

The fifth generation was adopted in February 2014[147] and shall be implemented by Member States by 2016-2018.[148] It eventually introduced a complex separate regulation for awarding concession contracts. The previous very fragmentary regulation (traceable to the second generation[149]) had been limited to concessions for works, by public authorities,[150] and covered neither service concessions,[151] nor any concessions granted by utilities.[152] In contrast, the new 'Concession Directive' also applies to service concessions[153] and utilities.[154] The fifth generation was advertised as aiming at accomplishing the goals of the Europe 2020 Strategy for smart, sustainable and inclusive growth.[155] The Europe 2020 Strategy was mainly aimed at overcoming the results of the economic downgrade following the financial crisis[156] addressing "*employment; for research and innovation; for climate change and energy; for education; and for combating poverty*".[157] It identified strategically used public procurement as one of the major tools to achieve that goal.[158] To this end, the rationales of the fifth-generation directives justified a need for a further integration of the non-commercial/collateral/secondary/horizontal considerations into the EU's public procurement system, such as (*i*) eco-innovation and social innovation,[159] or (*ii*) integration of environmental, social and labour requirements.[160]

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[146] Parties to the GPA or to regional/plurilateral public-procurement-relevant trade agreements would very unlikely agree on an unconditional non-application of all public procurement rules to purchases of goods/solutions developed in cooperative research. However, perhaps, they might be more likely to accept an exemption related to specifically listed/named co-operative programs, similar to the currently existing exemption of public-procurement-related governmental programs incorporating various non-commercial considerations and specifically-named in the GPA's country-specific appendices (see section 2.3.4).

[147] See: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ [2014] L 94, p. 65–242; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport, and postal services sectors, and repealing Directive 2004/17/EC, OJ [2014] L 94, p. 243–374; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ [2014] L 94, p. 1–64.

[148] See: Directive 2014/24 article 90; Directive 2014/25 article 105; Directive 2014/23 Article 51.

[149] See: note 53.

[150] See: Directive 2004/18, Article 56-61.

[151] See: ibid. Article 17.

[152] See: Directive 2004/17, Article 18.

[153] See: Directive 2014/23, Article 1.2.

[154] See: ibid. Article 1.2.b.

[155] See: European Commission, Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth COM [2010] 2020; Directive 2014/24, Preamble point 2; Directive 2014/25, Preamble point 4; Directive 2014/23, Preamble point 3.

[156] See: ibid. COM [2010] 2020 at 2, 8, 13, 20.

[157] See: ibid. COM [2010] 2020 at 3.

[158] See: ibid. COM [2010] 2020 at 2, 3, 16, 17, 20, 23 ,27.

[159] See: Directive 2014/24, Preamble, point 47.

[160] See: ibid. Preamble point 37.

With respect to a stimulation of research, development and innovation, the solutions seem to have been overdone. For instance, new negotiated procedures were added on top of the competitive dialogue introduced in the fourth generation,[161] such as a 'competitive procedure with negotiation'[162] and an 'innovation partnership'.[163] A more formalised 'competitive procedure with negotiation' replaced previous 'negotiated procedures'.[164] It is very similar to competitive dialogue,[165] and the conditions of the application of both competitive dialogue and the competitive procedure with negotiation have been unified to include among others (*i*) an unavailability of ready solution,[166] (*ii*) an involvement of design or innovation,[167] (*iii*) a complexity of the project,[168] or (*iv*) an unavailability of technical standards.[169] In turn, the innovation partnership procedurally draws upon a competitive procedure with negotiation[170] and its purpose was to offer a procedure which combines a procurement of R&D (pre-commercial procurement), and subsequent purchase of resulting innovative products[171] - which is not in line with one of the Defence Directive's premises, that the design/research/development phase and the implementation phase (subsequent procurement of developed solutions) should in principle be separated.[172] While their effectiveness in the conditions of the EU's internal market still needs to be tested in practice, that detailed provisions anyway are not likely to set the universally acceptable standards for other instruments of international liberalisation of public procurement markets.

In contrast, as far as the social and environmental considerations are concerned, the fifth generation is likely to be global trendsetter. It placed an emphasis on punishing extraterritorial non-compliance with a number of relevant commonly accepted international agreements.[173]

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[161] See: ibid. Article 30.

[162] See: ibid. Article 29.

[163] See: ibid. Article 31.

[164] See: note 113.

[165] The difference is that in competitive dialogue, potential suppliers/contractors do not submit their tenders until a procurer decides that solutions to its needs have been found in the course of negotiations (see: Directive 2014/24, Article 29.3). In turn, in a competitive procedure with negotiation, initially submitted tenders are further negotiated and can be successively resubmitted until the procurer's needs are met (see: ibid. Article 30.5).

[166] See: ibid. Article 26.4.a.(i).

[167] See: ibid. Article 26.4.a.(ii).

[168] See: ibid. Article 26.4.a.(iii).

[169] See: ibid. Article 26.4.a.(iv).

[170] "*This specific procedure should allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase. The innovation partnership should be based on the procedural rules that apply to the competitive procedure with negotiation and contracts should be awarded on the sole basis of the best price- quality ratio, which is most suitable for comparing tenders for innovative solutions.*" See: ibid. Preamble point 49.

[171] See: ibid.

[172] See: note 139.

[173] International Labour Organization Convention 87 on Freedom of Association and the Protection of the Right to Organise – ratified by 153 countries; International Labour Organization Convention 98 on the Right to Organise and Collective Bargaining – ratified by

Such non-compliance now (*i*) might result in non-awarding a contract to breaching suppliers/contractors[174] or precluding such contractors from bidding,[175] (*ii*) is deemed to be a reason for an abnormally low tender,[176] which must be rejected whenever a link between such violations and the abnormally low tender can be proved,[177] and (*iii*) is the basis for requiring that primary suppliers/contractors replace breaching sub-suppliers/subcontractors[178] (see further section 6.2.2.b on the detail of these solutions and section 8.2.2 on their origin largely stemming from EU's public procurers' executive discretion).

The future implementation of the fifth-generation directive in Member States will be the best litmus paper of whether the ambitious goals of the fifth generation were, or were not, a mere wishful thinking by the EU's policy-makers, and to which extent also the most recent developments in the EU's public procurement regime would influence the GPA and other GPA-tangled public procurement related instruments (further discussed in Chapter 4). All five generations considered, especially after the adoption of the fifth generation, the direction in which the directives goes, raises mixed feelings. On the one hand, the directives surely catalysed the liberalisation of public procurement markets among Member States, and also in some sense globally. On the other hand, however, the directives have been becoming more and more wordy and overcomplicated generation after generation, resulting in the overregulation of the procurement process and unreadability of their provisions. While straightforward moves like the extension of the directives' application to utilities and services helped liberalisation, the progressing complexity of the procurement process under the directives – to the extent it was replicated to the GPA – might have actually prevented (*i*) some non-EU/EEA countries from joining the GPA, and (*ii*) some GPA parties from subjecting more public contracts to the coverage of this agreement (see further 9.1.1.d offering a theory underlying this claim).

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164 countries; International Labour Organization Convention 29 on Forced Labour – ratified by 177 countries; International Labour Organization Convention 105 on the Abolition of Forced Labour – ratified by 174 countries; International Labour Organization Convention 138 on Minimum Age – ratified by 167 countries; International Labour Organization Convention 111 on Discrimination (Employment and Occupation) – ratified by 172 countries; International Labour Organization Convention 100 on Equal Remuneration – ratified by 171 countries; International Labour Organization Convention 182 on Worst Forms of Child Labour – ratified by 179 countries; Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer – both ratified by 197 countries; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) – ratified by 181 countries; Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention) – ratified by 72 countries; Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its three regional Protocols – ratified by 72 countries (as of 28 June 2014). See: Directive 2014/24/EU, Article 18 section 2.

[174] See: ibid. Article 56.1 *in fine.*

[175] See: ibid. Article 57.4.a.

[176] See: ibid. Article 69.2.d.

[177] See: ibid. Article 69.3.

[178] See: ibid. Article 70.7.d.

3.3 Below-thresholds procurement

Analysing the EU's regime on the public procurement uncovered by the secondary legislation (mostly below-thresholds procurement[179]) illustrates what could still be done in terms of liberalisation of public procurement markets in ordinary trade relation beyond the EU's internal market. Foremost, this analysis reminds that roughly at least four fifths of the EU's public procurement remains unregulated by the directives[180] implying that at least that large portion of public procurement markets of the parties to the GPA escapes the GPA regime mostly because of the contract value thresholds. The solutions adopted in the EU for small-value procurement potentially might be drawn upon by other regional economic integration blocks and, so far, still seem to balance the needs of the integration of internal market and limited regulation of the procurement process in the case of smaller contracts.

As mentioned, the ban on discrimination in public procurement markets between Member States merely stems from basic freedoms of internal markets which only impliedly cover public procurement and are rather prohibitive in nature as they do not impose any positive liberalizing obligations on public procurers[181] (see section 3.1). Nonetheless, also a set of positive obligations has been developed over the decades of integration by the ECJ,[182] which was restated by the Commission in the form of an interpretative communication in 2006.[183] The general position of that communication was that the principles of non-discrimination based on the nationality within the EU and freedoms of the single market imply that the Member States' law makers shall assure full transparency, openness to competition, and judicial control of the impartiality of tendering procedures.[184] Specifically, what should be assured is: (*i*) adequate, sufficiently accessible, advertising,[185] (*ii*) a non-discriminatory description of the subject matter of the contract,[186] (*iii*) equal access for economic operators from all Member States,[187] (*iv*)

[179] Also non-priority//'Annex II B' services only partly covered by the directives (see: section 3.2.3).

[180] According to the Commission's study of 2006, the percentage of the procurement covered by directives increased in the EU-15 group (EU's Member States before the further EU enlargement of 2004, that is: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the UK.) from 5.4 percent in 1993 to 16.6 percent in 2002, peaking at 21.9 percent in 2003, and stabilizing at 16.5 percent in 2004 (see: European Commission, 'Evaluation of Public Procurement Directives' (15 September 2006) Markt/2004/10/D Table 3.2 at 19). If the total value excludes public procurement not covered by directives because of the limitations of the directives' objective coverage (e.g. defence-related procurement, etc.) the percentage of uncovered procurement in 2004, constituted roughly 80 percent of the so-measured total procurement (down from 83.5 percent) (see: ibid. at 12).

[181] See: note 19 at 10.

[182] See: Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ C [2006] 179/02 at 1, 2.

[183] See: ibid.

[184] See: note ibid. point 1.2; see also: Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG* ECR [2000) I-10745.

[185] See: note 182, C [2006] 179/02 point 2.1.1.

[186] See: ibid. point 2.2.1 1st tiret.

mutual recognition of diplomas, certificates and other evidence of qualifications,[188] (*v*) appropriate timing of the procedures,[189] (*vi*) a 'transparent and objective approach,'[190] and (*vii*) 'effective judicial protection' of rights stemming from 'Community legal order.'[191]

Noteworthy, the ECJ's case law on public procurement, as restated by the Commission, is in fact very similar to the directives as it covers almost the same positive obligations of public procurers. The case law regime might still differ *in plus* from the directives in that it leaves a bit more flexibility for (*i*) the Member States' law makers to determine the details of the procurement process against the directives,[192] and (*ii*) public procurers to behave more like commercial purchasers. Nonetheless, a direction, in which the below-threshold regime has gradually evolved, indicates a risk that even below-thresholds procurement might be gradually swallowed by the above-thresholds regime. For instance, it is not uncommon for the Member States' law makers to cut corners by copying the provisions of the directives further down the pipeline to below-threshold procurement in order to be compliant with the ECJ's case law and the Commission's communication[193] (see further section 9.1.1.c explaining why this happens with network effects). If this trend persists, the below-thresholds regime will not be any more an alternative to the overregulated yet prevailing model of the liberalisation of public procurement markets.

As far as the legitimacy of the integration of green or social considerations into procurement process is concerned – while the communication of 2006 remains silent on that matter[194] - Commission's previous interpretative documents allowed it even earlier than in the case of above-thresholds procurement. Namely, yet in 1996 – when the Commission initiated works on the fourth generation directives and still looked sceptically at the integration of similar considerations to procurement governed by the directives (see further section 8.2.2)[195] – it also

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[187] See: ibid. point 2.2.1 2nd tiret.

[188] See: ibid. point 2.2.1 3rd tiret.

[189] See: ibid. point 2.2.1 4th tiret.

[190] See: ibid. point 2.2.1 5th tiret.

[191] See: ibid. point 2.3.2.

[192] See: 'Public Procurement in EU Member States - The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives', OECD Publishing (2010) OECD Sigma Papers, No. 45, GOV/SIGMA(2010)1/REV1 at 7

[193] See: ibid. at 8.

[194] The Commission's communication of 2006 is very brief as for EU's documents and, after al, its primary focus was on transparency/publicity in public procurement.

[195] "*(...) [T]the Directives do not currently allow social considerations to be taken into account when it comes to checking the suitability of candidates or tenderers on the basis of the selection criteria, which relate to their financial and economic standing or their technical capability, nor when it comes to awarding contracts on the basis of the award criteria, which must relate to the economic qualities required of the supplies, works or services covered by the contract.*" See: European Commission, 'Public Procurement in the European Union: Exploring the Way Forward. Green Paper' (Brussels 27 November 1996) COM (96) 583 final, point 5.43 at 40. "*(...) during the contract award phase environmental factors could play a part in identifying the most economically*

affirmed that green and social considerations could be integrated into below-thresholds procurement "*provided that they are extended without discrimination to all Community nationals with the same characteristics*" (social)[196] and "*provided that they are non-discriminatory and open to all tenderers in the Community on the basis of the mutual recognition principle*" (environmental).[197]

Finally, the scope of the application of EU's below-thresholds regime might hint which public contracts should more or less be open to international competition. Specifically, the application of the communication is limited by the general principle that the Treaties can apply only when there is a sufficient linkage with the internal market. In this regard, the communication of 2006 refers to the *Coname* case,[198] in which the ECJ ruled that - because "*of special circumstances, such as a very modest economic interest at stake*"[199] - entrepreneurs from other Member States would not be interested in competing for 'modest' public contracts. In such conditions, *"the effects on the fundamental freedoms are (…) to be regarded as too uncertain and indirect"*[200] to justify the application of standards originating from the primary legislation.[201] Hypothetically, if other regional economic integration blocks, or countries in bilateral relations, decided to fully liberalise small-value procurement, the *Coname*-like standard could determine the scope of the application of some more flexible procurement regimes similar to the Commission's communication. However, the assessment of the existence or non-existence of the 'very modest

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advantageous tender, but only in cases where reference to such factors makes it possible to gauge an economic advantage which is specific to the works, supplies or services covered by the contract and directly benefits the contracting authority or contracting entity." See: ibid. point 5.51 at 41.

[196] See: ibid. COM (96) 583 final, point 5.43 at 40.

[197] See: ibid. point 5.51 at 41.

[198] See: Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*.ECR [2005] I 07287. This case pertained to what the appropriate publicity (advertising) below thresholds should look like (see: *Coname* para. 11).

[199] See: ibid. para. 20.

[200] See: ibid. para. 21.

[201] Such position of the Commission was heavily criticised by Arrowsmith and Kunzlik (see: Sue Arrowsmith and Peter F. Kunzlik, *Social and environmental policies in EC procurement law: new directives and new directions* (Cambridge University Press, Cambridge 2009) 509 at 83-85), referring to Advocate General Sharpston's opinion in *Commission v. Finland* (see: Opinion of Advocate General Sharpston in Case C-195/04 Commission of the European Communities *versus* Republic of Finland, ECR [2007) I-03351). In Sharpston's view, there are no grounds to accept the Commission's position primarily because the EU law maker deliberately chose not to regulate the publicity of public contracts which fall below thresholds (see: ibid. para 85). Perversely, Sharpston drew upon the *Coname* test of 'not-very-modest economic interest' of other Member States' potential suppliers/contractors (see: ibid. para 85) to draw the line of applicability of the Treaties just with thresholds of the directives (see: ibid. para 86) which would nonsensically imply that other Member States' suppliers/contractors have never had an actual economic interest in below-threshold public contracts. Sharpston also observed that requiring full publicity with regard to below-threshold contracts contradicted the EU's basic 'subsidiarity principle' ("*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level"*- see: TEU, article 5 section 3) because the scope the EU's legislative action in the field of public procurement had already been delineated by the secondary legislation (see: TEU, Article 5 sec 2). Sharpston also contended that an imposition of an obligation to publicise a call for competition (based on vague non-statutory and not promulgated principles) brings severe legal uncertainty for public procurers and their suppliers/contractors who seek confidence that (*i*) the EU's law is not infringed, and (*ii*) the public contracts entered into between them are not at a risk of termination (see: Opinion of Advocate General Sharpston in Case C-195/04, para 89).

economic interest' would always have to be adjusted by the level of economic integration between contracting parties.[202]

3.4 EEA

The application of the EU's regime on public procurement to the entire EEA upon its creation represents the only significant case of the EU model's operation outside of the EU under conditions similar to those for which it had been originally designed (see section 3.1). The non-EU parties to the EEA Agreement's[203] subjected their public procurement markets to the EU's regime when the EEA Agreement entered into force in January 1994,[204] covering (apart from the then 12 EU Member States) all erstwhile European Free Trade Association (EFTA) members excluding Switzerland (Austria, Denmark, Finland, Iceland, Liechtenstein, Norway and Sweden). After Austria, Finland and Sweden joined the EU in 1995, only Iceland, Liechtenstein and Norway remained in the non-EU EEA circle.[205]

3.4.1. Pre-EEA EFTA

The EU-EEA arrangement on public procurement superseded a very interesting pre-EEA EFTA approach to the liberalisation of public procurement markets, which is worth looking at as yet another example of how the prevailing EU model ousted alternative solutions. The EFTA Convention of 1960[206] initially did not set forth any specific rules on the liberalisation of public procurement markets among its parties. After the GATT Tokyo Round, high-value contracts were subjected to the GPA[207] but nothing like the EU's secondary legislation had been developed

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[202] Obviously, contracts of a lower value could be of interest to foreign suppliers/contractors within the EU compared to within less economically integrated countries given the higher cost of cross-border economic activity resulting from, e.g. customs, non-harmonised technical requirements, no mutual recognition of certificates and diplomas, restriction of the movement of workers, etc.

[203] See: (*i*) Agreement on the European Economic Area (signed at Porto 2 May 1992, in force January 1994) OJ [1994] L 1, p 3 [as amended by (*i*) Protocol Adjusting the Agreement on the European Economic Area of 17 March 1993, OJ [1994] No L 1, p. 572, (*ii*) EEA Council Decision No 1/95 of 10 March on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein, OJ [1995] No L 86, p. 58; EEA Supplement No 14, 20April 1995, p. 1, (*iii*) Agreement on the participation of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic in the European Economic Area of 14 October 2003, OJ [2004] No L 130, p. 11; EEA Supplement No 23, 29 April.2004, p. 1, (*iv*) Agreement on the participation of Bulgaria and Romania in the European Economic Area of 25 July 2007, OJ [2007] No L 221, p. 15; EEA Supplement No 39, 26 June 2008, p. 1, (*v*) Agreement between the European Union, Iceland, Liechtenstein and Norway on an EEA Financial Mechanism for the period 2009-2014, OJ [2010] No L 291, p. 4..

[204] Note that with regard to Lichtenstein the EEA Agreement entered into force on 1 May 1995. See: EEA Council Decision No 1/95 of 10 March on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein, OJ [1995) L 86.

[205] On the EEA Agreement see generally: Thérèse Blanchet, Risto Piipponen and Maria Westman-Clément, *The agreement on the European economic area (EEA): a guide to the free movement of goods and competition rules* (Clarendon Press, Oxford 1994) 500.

[206] See: Convention establishing the European Free Trade Association (signed at Stockholm on 4 January 1960, in force 3 May 1960) 370 UNTS 5266, cited in: European Free Trade Association, *European free trade association: a guide to the Stockholm convention* (Federation of British Industries, London 1960) iv, 70.

[207] See: note 205 at 139.

in the practice of the EFTA. The liberalisation of public procurement markets within the EFTA was rather assisted by (*i*) a number of provisions on the gradual elimination of import and export tariffs and non-tariff barriers to trade,[208] and (*ii*) a general ban on discrimination against foreign goods imposed on the very wide category of 'public undertakings*' (*"*central, regional, or local government authorities, public enterprises and any other organisation by means of which a Member State, by law or in practice, controls or appreciably influences imports from, or exports to, the territory of a Member State*").[209] Since the very beginning, it could have been construed under the EFTA Convention that at least the procurement of goods originating from one of the other EFTA members was subject to the principle of non-discrimination.

Such stance was confirmed in the so-called '*Lisbon Agreement*' on the interpretation of article 14 of the EFTA Convention, reached at the EFTA's ministerial meeting in October 1966.[210] The Lisbon Agreement made a proper distinction between procurement made by public undertakings for their own purposes and their trading activities,[211] firmly confirming that article 14 applied to both activities.[212] Interestingly, the Lisbon Agreement did not set up any contract-value thresholds of its application so, in this regard, it was more similar to the Commission's interpretative communication on below-threshold procurement of 2006 rather than to any EU's secondary legislation tangled with the GPA. The parties to the EFTA Convention were obliged to assure the non-discrimination of goods originating from other EFTA members not only in the case of purchasing goods, but also in the case of public works and service contracts linked with imports of goods from other EFTA members.[213] On the other hand, the Lisbon Agreement remained tacit as to the matters of establishment. Equal opportunities had to be provided for by a proper publicity and timing of tendering procedures, curbing limited tendering and confining award criteria to commercial ones.[214] However, in contrast to the directives of the then EEC, the EFTA members remained free to determine all the details of their national public procurement-related laws.[215] Some flaws of the Lisbon Agreement lie in that its provisions on public undertakings were significantly softened in the case of sub-central entities over which EFTA

[208] See: EFTA Convention (as originally signed in Stockholm) article 3 (import duties), Article 6 (revenue duties and internal taxation), Article 8 (export duties), Article 10 (quantitative import restrictions), Article 11 (quantitative export restrictions restrictions).

[209] See: EFTA Convention, Article 14.6.

[210] See: Agreement on the interpretation of article 14 of the EFTA Convention, EFTA Bulletin March-April 1967, p 2-6 cited in: Robert Middleton Trade Policy Research Centre, *Negotiating on non-tariff distortions of trade: the EFTA precedents* (St. Martin's Press for the Trade Policy Research Centre, New York 1975) 19 at 62-65.

[211] See: ibid.

[212] See: ibid.

[213] See: Lisbon Agreement, Section A, para 5.

[214] See: Christian Bock. 'The EEA agreement: rules on public procurement' (1993) (3) Pub Proc L Rev 136-157 at 137.

[215] See: ibid.

members "*d~~o~~[id] not have the necessary legal powers to control ~~the~~* [their] *activities* (…)"[216] and should only "*endeavour to ensure that those authorities or enterprises comply with the provisions of this Article*."[217]

The EFTA's early stage threshold-free rules on the liberalisation of public procurement markets were probably one of the best pieces of legislation on the integration of procurement markets ever made because they did not impose rigid, petrified and standardised procedural rules. Leaving the EFTA members free to determine all details of their procedural systems, they hypothetically allowed regulatory competition between national procurement systems and the creation of procedural innovation. It is true that while the enforcement of such laconic rules unassisted by any arbitrarily imposed procedural rules might have been possible among EFTA parties, it perhaps would not work in corrupt legal systems of emerging economies (without parallel efforts to generally improve integrity, enforcement and transparency in such jurisdictions - see further section 8.4.2.a and 8.4.2.b) but it had not been designed for such systems.

3.4.2. EEA Agreement

The Lisbon Agreement did not survive because the harmonisation of the EFTA's and EU's approaches to regulating public procurement markets within the framework of the EEA came down to the reception of the EU's solutions by the EFTA members.[218] The non-EU EEA members had to accept (*i*) the basic rules of the EU's single market provided in the primary legislation and copied to the EEA agreement, (*ii*) the directives regulating high-value procurement,[219] and (*iii*) the ECJ's case law interpreting both the EU's primary and secondary legislation. The EEA Agreement almost mirrors the original Treaty of Rome, assuring a free flow of goods,[220] persons,[221] services,[222] and capital,[223] as well as (*v*) the freedom of establishment,[224] subject to restrictions in the field of agriculture and fisheries,[225] customs union and common trade policy,[226] common foreign and security policy,[227] justice and home affairs,[228]

[216] See: EFTA Convention, Article 14 section 4.

[217] See: ibid.

[218] See: The revision of the EFTA Convention of 2001 ('Vaduz Convention,' signed 21 June 2001 and entered into force on 1 June 2002)). The Vaduz Convention only confirmed that the liberalisation of public procurement markets within the EFTA is one the goals of the EEA Convention (see: ibid. Preamble para 7, Article 2.(f)) and it incorporated commitments made by the EFTA parties under the EEA Agreement to the Stockholm Convention's annexes (see: ibid. Article 37, and Annex R).

[219] All EFTA members have to follow the developments under the GPA anyway.

[220] See: EEA Agreement, Article 8 section 1.

[221] See: ibid. Article 28.

[222] See: ibid. Article 36.

[223] See: ibid. Article 40.

[224] See: ibid. Article 31.

[225] See: ibid. Article 17, Annex I.

[226] Uncovered by the EEA Agreement.

and the monetary union.[229] Similar to the Treaty of Rome/TFUE, the basic freedoms provided under the EEA Agreement, altogether make up a kind of *sui generis* freedom to compete for a public contract in other EEA members.[230] The reception of the EU's secondary legislation on public procurement and of the ECJ's related judiciary interpreting both secondary legislation and the Treaties is much more problematic. The process must be dynamic in the sense that the developments in the directives and in the ECJ's case law have to be implemented by the non-EU EEA's members in between the revisions of the EEA Agreement. Only the initial reception (on the conclusion of the original EEA Agreement in 1993) of the up-to-then EU's 'acquis'[231] was pretty straightforward as the erstwhile EU's secondary legislation on public procurement was incorporated with some restrictions into the EEA agreement by reference.[232] Non-EU EEA members also confirmed their acceptance of the up-to-then ECJ's case law.[233]

For the purposes of the post-EEA conclusion changes to the EU's regime on the regulation of public procurement markets, the EEA Agreement provided for a dynamic-reception mechanism, often referred to as a 'pipeline acquis'[234]). Its basic premise is that the non-EU EEA members would actually need to conform to what is subsequently unilaterally decided by the EU.[235] However, in order to somewhat mitigate the lack of reciprocity between the EU Members States and non-EU EEA members, the EEA Agreement stipulates that representatives of the EFTA members would be informally consulted at the initial stage of the EU's legislative process, similar to Member States.[236] Entry into force of any new secondary legislation passed by the EU (with regard to non-EU EEA members) also needs to be preceded by formal decisions of the

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[227] See: ibid.

[228] See: ibid.

[229] See: ibid.

[230] But see: 'Opinion 1/91 of the Court of 14 December 1991 delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty. - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area I-06079'. The Opinion P 1/91 states in its para. 16 in the context of the then anticipated EEA Agreement conclusion that "*(...) [w]~~W~~ith regard to the comparison of the objectives of the provisions of the agreement and those of Community law, it must be observed that the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties. In contrast, as far as the Community is concerned, the rules on free trade and competition have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement.*"

[231] Meaning 'which has been agreed upon.'

[232] See: EEA Agreement (original text – see note 203), Article 65. 1, Annex XVI.

[233] "*Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement*". See: EEA Agreement (original text – see note 203), Article 6.

[234] See: note 214 at 148.

[235] See: note 214 at 148, 149. Otherwise any specific protection clauses or individual 'opt-out' clauses unsuccessfully sought in the course of the EEA negotiations by the EFTA members would be detrimental to the homogeneity of the whole EEA arrangement and therefore could not be accepted by the then EEC (see: note 214 at 148 141. See also: EEA Agreement (as amended), Article 102).

[236] See: EEA Agreement, Article 99, 100.

EEA Joint Committee,[237] which formally approves secondary legislation and amends relevant annexes to the EEA Agreement.[238] In theory, the non-EU EEA members acting jointly[239] could reject new secondary legislation adopted by the EU legislator.[240] In such case, the EEA Joint Committee would have up to six months to find a solution satisfactory for both the EU and non-EU EEA parties[241] but the EEA agreement does not provide a clear answer as to what would happen if no satisfactory solution was reached.[242]

In terms of the dynamic reception of the ECJ's case law, the non-EU EEA parties have not been directly forced to accept the ECJ's decisions made after the conclusion of the EEA Agreement. Instead, the judicial power over the interpretation of the EEA Agreement was granted to the EFTA Court,[243] bringing the risk of discrepancies between the judicial interpretation of the identical provisions of the Treaties and the EEA Agreement by the ECJ and the EFTA Court. Such risk was only partially mitigated under Protocol 34 to the EEA Agreement, allowing a national court or a tribunal of the EFTA member to raise a preliminary question directly to the ECJ instead of the EFTA Court on condition that a given question is identical in substance to the provisions of the Treaties.[244] In addition, both the ECJ and the EFTA Court should cooperate and mutually exchange information via their secretariats.[245] This *en masse* should assure that also positive obligations imposed on the non-EU EEA below-thresholds procurement should not

[237] The function of the EEA Joint Committee is to "*ensure the effective implementation and operation of this Agreement. To this end, it* (the EEA Join Committee) *shall carry out exchanges of views and information and take decisions in the cases provided for in this Agreement.*" See: EEA Agreement (as amended), Article 92 section 1.

[238] See: EEA Agreement, Article 102 section 1.

[239] They first need to take a common position before making communications to the EU in the EEA Joint Committee. See: EEA Agreement, Article 93.2

[240] See: EEA Agreement, Article 102 section 4.

[241] See: ibid.

[242] "*5. If, at the end of the time limit set out in paragraph 4, the EEA Joint Committee has not taken a decision on an amendment of an Annex to this Agreement, the affected part thereof, as determined in accordance with paragraph 2, is regarded as provisionally suspended, subject to a decision to the contrary by the EEA Joint Committee. Such a suspension shall take effect six months after the end of the period referred to in paragraph 4, but in no event earlier than the date on which the corresponding EC act is implemented in the Community. The EEA Joint Committee shall pursue its efforts to agree on a mutually acceptable solution in order for the suspension to be terminated as soon as possible. 6. The practical consequences of the suspension referred to in paragraph 5 shall be discussed in the EEA Joint Committee. The rights and obligations which individuals and economic operators have already acquired under this Agreement shall remain. The Contracting Parties shall, as appropriate, decide on the adjustments necessary due to the suspension.*" See: EEA Agreement, Article 102. Nonetheless, such disagreement-scenario is unlikely because the shape of the EU's secondary legislation had been pretty well defined prior to the conclusion of the EEA Agreement, and as already mentioned, the EFTA members have to be in conformity with the very similar GPA anyway. It is also unlikely also because, as mentioned, none of the non-EU EEA members have an individual veto right and at least the two among Iceland, Liechtenstein and Norway would need to have a sound interest in rejecting the EU's secondary legislation in order to work out such common position toward the EU and outvote the third country in internal talks (see note 214 at 150).

[243] See: EEA Agreement, article 108 section 2; Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (signed at Oporto on 2 May 1992) OJ [1994] L 344, p 3. See also: Carl Baudenbacher, Per Tresselt and Thorgeir Orlygsson (eds), *The EFTA Court: Ten Years On* (Hart Publishing, Oxford 2005) 213.

[244] See: EEA Agreement, Protocol 34, Article 1.

[245] See: ibid. Article 106. If such a unique system was to be compared to anything else, it perhaps would be closest to different common-law jurisdictions (their courts and judges), still looking one at another.

be unlike the requirements imposed by the ECJ on the EU's internal market *sensu stricto* as restated by the Commission in 2006 (see section 3.3).

Altogether, just like in the case of the EU's internal market *sensu stricto*, the function of the high-value-procurement regime of the EEA has been merely to support basic freedoms of the extended EU/EEA internal market *sensu largo*. However, the question remains whether the establishment of the EEA did necessitate ousting previous regime made-up of the 'bare' GPA and the Lisbon Agreement by the EU's directives? Indeed, in early 1990s, the EEC and EFTA blocks had already been operating for three decades. Perhaps, the integration of public procurement markets within both structures did not need similar catalysers like in the case of the EEC in the 1960s still waiting for the GPA to come (see sections 3.2.1). Policymakers of the then emerging EEA had a chance to test a 'stripped' version of the high-value procurement regime at least in a part of the newly extended internal market. But they did not explore that opportunity. Moreover the pipeline-acquis mechanisms governing the implementation of the EU's secondary legislation in the legal systems of non-EU EEA members illustrates (*i*) how the reciprocity in international commercial relations can be distorted by economic disparities between negotiating parties, and (*ii*) to what a caricatured extent the EU can unilaterally influence how public procurement process in regulated in third countries. True, one may consider the pipeline-*acquis* mechanism as a perfectly equal exchange because the non-EU EEA members generally gained access to the EU single market despite keeping some significant opt-outs from the basic principles of this market. However, this is just a point that if the reciprocity had not been distorted by economic disparities (in terms of countries' public procurement market sizes), Iceland, Liechtenstein and Norway perhaps would be allowed to enter into a deepened free trade agreement with the EU, opening public procurement markets based on provisions similar to the Lisbon Agreement, but without having to accept the rigid regime of the public procurement-related directives (see further section 10.2.1 discussing 'fair' reciprocity in public-procurement-related trade negotiations).

3.5 Beyond EEA

The replication of the EU's regime on high-value (above-thresholds) public procurement in the EU's relations with neighbouring countries has also taken place beyond the EEA, yet without all benefits stemming from freedoms of internal market. Such arrangements have been typically made under the so-called 'Europe agreements,' paving a path to full membership in the EU for its neighbouring countries. After the fall of the iron curtain, a set of Europe agreements was

gradually concluded by the EU with Central-European countries in anticipation of the future EU's enlargement (which eventually happened in May 2004), starting in 1993 with Hungary[246] and Poland.[247] With regard to public procurement, Europe Agreements typically provided that:

> Article 67 *'2. Polish companies as defined in Article 48, shall be granted access to contract award procedures in the Community pursuant to Community procurement rules under a treatment no less favourable than that accorded to Community companies as of the entry into force of this Agreement.*
>
> *Community companies as defined in Article 48 shall be granted access to contract award procedures in Poland under* ***a treatment no less favourable than that accorded to Polish companies*** *at the latest at the end of the transitional period referred to in Article 6.'*[248]

Such language implied between the lines that the candidate-countries had to gradually implement the EU's secondary legislation on public procurement years ahead of the actual accession to the EU.[249] At the first glance, one could argue that a formal reciprocity was here preserved because not only candidate-countries' but also Member States' public procurement markets were mutually opened. However, in the lack of free movement of labour and rules allowing temporary provision of services under Europe agreements - while the potential suppliers/contractors from the EU were mostly competing for public contracts in Central Europe via its subsidiaries established in candidates for the EU-membership[250] - this was not an option for businesses originating from and based in the then resurrecting post-communist economies.[251] And this illustrates, at a glance, the essence of conflicting interest of countries varying in terms of wealth (and much less economically integrated than among EU/EEA members upon its establishment) but still interested in 'reciprocal' liberalisation of their public procurement markets (see further section 9.4.2 discussing public-procurement-related trade negotiations between developed and developing countries).

[246] See: Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, OJ [1993] L 347 p. 2–266.

[247] See: Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, OJ [1993] L 348 p. 2–180.

[248] See also: note 246, Article 66.

[249] Which those countries did, also often with the assistance of the UNICITRAL's 1994 Model Law on Procurement of Goods, Construction and Services (see further section 4.4).

[250] See: note 247, Article 44.

[251] Competing for public contracts in the EU without permanent establishment in the Member States was hindered under the Europe Agreements until the full accession of 2004 also because (*i*) the free flow of workers was restricted and not fully liberalised even up to 8 years after the accession depending on whether a particular Member State applied transitional periods, or not (see: ibid. article 37), and (*ii*) no temporary cross-border provision of services between the then candidates and Member States was allowed (see: ibid. 247, article 55).

3.6 Conclusion

The highlight of this chapter is that the EU's public procurement regime designed for unique conditions of the EU's internal market is the *de facto* trendsetter for the global model of the liberalisation of public procurement markets influencing the entire GPA system as well as that it is completely dominating public procurement systems of neighbouring smaller economies, both developed (the non-EU EEA) and emerging (Central Europe). Among the long-term developments in EU's regime, observable is the shift from the mere focus on internal market integration/liberalisation toward a use of Member States' public procurement markets a wider-policy tool, including social, and environmental considerations, starting from below-thresholds procurement in mid-1990s, through above-thresholds procurement in the forth-generations-directives, to cross-border regulatory interferences in the fifth generation. The secondary, yet noteworthy, conclusion of this chapter is that - because of EU's influence - the global model of the regulation of public procurement is highly regulated and gives up allowing regulatory competition between national lawmakers (potentially resulting in procedural innovation) in favour of the enhanced enforcement of the GPA's NT clause (through a more detailed regulation of the procurement process).

Chapter 4. Beyond the GPA

This chapter is the last one of three presenting a global model of the regulation and international liberalization of public procurement markets. This chapter gathers a panoply of various other international instruments regulating public procurement markets, and its purpose is to show their cross-fertilization and how they balance the need for international liberalization and the integration of non-commercial considerations in the procurement process. This chapter starts by illustrating how the framework of the GPA model has been replicated in public procurement-related chapters of regional trade agreements ('RTAs')[1] (section 4.1). It also discusses public procurement-related rules imposed by major multinational development banks ('MDBs') (section 0), relevant activities of the OECD (section 4.3), and (*iii*) relevant model laws produced by the UNCITRAL (section 4.4). This chapter concludes by presenting the emerging concept of global administrative law which embraces the ensemble of public procurement instruments presented in the entire Part II (section 4.5).

4.1 Regional trade agreements[2]

Figure 14. A map of selected RTAs covering public procurement (mid-2014).

Australia	Chile	EFTA	EU	Japan	Korea	Mexico	NZ	Singapore	Thailand	US
Australia	ACI-FTA, TPP			JAEPA, TPP	KAFTA	TPP	ANZCERTA, TPP	SAFTA, TPP	TAFTA,	AUSFTA, TPP
	Chile	FTA	FTA	FTA, TPP	FTA	TPP, ALPAC	P4, TPP,	P4, TPP, ASEAN	TPP, ASEAN	FTA, TPP
		EFTA	GPA, EEA	GPA	GPA, FTA	FTA		GPA		GPA
			EU	GPA		FTA				GPA
				Japan	GPA, FTA	TPP , FTA	TPP	GPA, TPP, JSEPA	JTFTA	GPA, TPP
					Korea			GPA, TPP, KSFTA		GPA, KORUS
						Mexico	TPP	TPP		NAFTA, TPP
							NZ	GPA, FTA, P4, TPP	FTA	GPA
								Singapore	ASEAN	GPA, USSFTA, TPP
									Thailand	
										US

[1] In the WTO system, an RTA is an agreement the sense of which is "*the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area.*" See: GATT47 Article XXIV: 5. See also: Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (signed at Marrakesh on 15 April 1994, in force 1 January 1995) WTO Agreement Annex 1A 33. As of 7 April 2015 there were 449 such agreements signed, 262 of which were in force. See: WTO. 'Regional Trade Agreements Information System' (RTA-IS) <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> accessed 8 April 2015.

[2] This section does note cover developments since the third quarter of 2015 such signing of the public-procurement relevant Transpacific Partnership Agreement in October 2015.

4.1.1. Classification

Public procurement-related trade agreements can be classified in a number of ways. Foremost, a distinction can be made between (*i*) agreements specifically devoted to public procurement, and (*ii*) RTAs in the general WTO-context, or as economic integration agreements ('EIAs') in the GATS-specific context.[3] Public procurement-specific trade agreements are very rare (the GPA or EU-Switzerland[4]), leaving for analysis the RTAs. As far as the RTAs are concerned, they can be first distinguished by the number of parties, ranging from bilateral ones to agreements signed by a significant number of parties on both sides (EU-Cariforum[5,6]). Secondly, public procurement-relevant RTAs can be distinguished by whether the parties thereto are also parties to the GPA. Namely, RTAs can be concluded between (*i*) the GPA parties only (EFTA Convention, EEA Agreement, Canada-Korea[7]), (*ii*) countries not subjected to the GPA only (e.g. Australia-Chile[8]), (*iii*) both parties to the GPA and countries not subjected to the GPA (e.g. North American Free Trade Agreement ('NAFTA'),[9] EU-Mexico,[10] US-Chile,[11] Canada-Peru,[12] Korea–Chile,[13] Japan-Peru,[14] Peru-Singapore,[15] Peru Korea[16]). Thirdly, some public procurement-relevant RTAs represent the WTO/GPA-plus approach in the sense they either (*i*) extend the GPA's model of liberalization to countries not subjected to it (e.g. NAFTA, US-Chile),[17] or (*ii*) provide better integration between their parties than under the GPA (EEA Agreement or EU-Switzerland).

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[3] See: GATS, Article V.

[4] See: Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement, (signed 21 June 1991, in force 1 June 2002) OJ [2002] L 114.

[5] Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, Suriname, Trinidad and Tobago.

[6] See: Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, (signed 15 October 2008, in force 29 December 2008) OJ [2008] L 289 p.3.

[7] See: Free Trade Agreement Between Canada and the Republic of Korea (signed 24 September 2014, in force 1 January 2015) <http://www.sice.oas.org/Trade/CAN_KOR/English/CAN_KOR_index_e.asp> accessed 12 February 2016, Chapter 14.

[8] See: Australia-Chile Free Trade Agreement (signed 30 July 2008, in force 6 March 2009) 2694 UNTS 47842, Chapter 15.

[9] See: North American Free Trade Agreement (signed 17 December 1992, in force 1 January 1994) 32 I.L.M. 289 (1993) (chs. 1-9), 32 I.L.M. 605 (1993) (chs. 10-22), Chapter 10.

[10] See: Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part (signed 8 December 1997, in force 1 October 2000) 2165 UNTS 37818, Article 10.

[11] See: United States-Chile Free Trade Agreement (signed 6 June 2003, in force 1 January 2004) <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> accessed 28 August 2014, Chapter 9.

[12] See: Free Trade Agreement Between Canada and the Republic of Peru (signed 29 May 2008, in force 1 August 2009 / <http://www.sice.oas.org/Trade/CAN_PER/CAN_PER_e/CAN_PER_index_e.asp> accessed 12 February 2016, Chapter 14.

[13] See: Free Trade Agreement between the Republic of Korea and the Republic of Chile (signed 15 February 2003; in force 1 April 2004) <http://www.sice.oas.org/Trade/Chi-SKorea_e/ChiKoreaind_e.asp> accessed 12 February 2016, Chapter 15.

[14] See: Agreement between Japan and the Republic of Peru for an Economic Partnership (Japan, Peru / signed 31 May 2011 in force 1 March 2012) <http://www.sice.oas.org/Trade/PER_JPN/EPA_Texts/ENG/Index_PER_JPN_e.asp> accessed 12 February 2016, Chapter 10.

[15] See: Peru-Singapore Free Trade Agreement (signed 29 May 2008, in force 1 August 2009) <http://www.sice.oas.org/TPD/PER_SGP/Final_Texts_PER_SGP_e/index_e.asp> accessed 11 February 2016, Chapter 9.

[16] See: Peru-Korea Free Trade Agreemen (signed 14 November 2010, in force 1 August 2011) <http://www.fort-russ.com/2016/02/lithuanian-recruits-complain-about.html> accessed 12 February 2016, Chapter 16.

[17] See: Kenneth Heydon and Stephen Woolcock, *The rise of bilateralism: comparing American, European, and Asian approaches to preferential trade agreements* (United Nations University Press, New York 2009) 318 at 77.

In turn, especially the EU's RTAs with developing countries represent a WTO/GPA-minus approach in the sense that they do fully incorporate the GPA's framework.[18]

Fourthly some public procurement-relevant RTAs impose actual liberalizing commitments and some only call for future negotiations on opening up public procurement markets (e.g. Japan-Thailand,[19] EFTA-Korea,[20] Thailand-New Zealand,[21] Thailand-Australia ('TAFTA'),[22]) and can hardly be classified as public procurement liberalizing.[23] For example, under the TAFTA, the parties (*i*) recognised "*the importance of covering government procurement in this Agreement at the earliest opportunity*,"[24] (*ii*) established a working group (with a task to "*report to the FTA Joint Commission within 12 months of the entry into force of this Agreement with recommendations on the scope for commencing bilateral negotiations to bring government procurement under this Agreement and the coverage of such negotiations*"[25]), and (*iii*) agreed that "*[i]In preparation for the outcome of the negotiations mandated by Article 1502, the Parties shall, to the extent possible, promote and apply transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination in their government procurement procedures*."[26] In turn, under the China-Australia FTA ('ChAFTA'),[27] parties committed to "*commence negotiations on government procurement as soon as possible after the completion of negotiations on the accession of China to the Agreement on Government Procurement, contained in Annex 4 to the WTO Agreement, with a view to concluding, on a reciprocal basis, commitments on government procurement between the Parties.*"[28]

[18] See: ibid.

[19] See: Agreement between Japan and the Kingdom of Thailand for an economic partnership (signed 3 April 2007, in force 1 November 2007) 2752 UNTS 48547, Chapter 11.

[20] See: Free Trade Agreement between the EFTA States and the Republic of Korea (signed 27 November 2000, in force 1 July 2001) <http://www.efta.int/free-trade/free-trade-agreements/korea> accessed on 28 August 2014, Chapter 6.

[21] See: New Zealand-Thailand Closer Economic Partnership Agreement(signed 19 April 2005, in force 1 July 2005) <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Thailand/Closer-Economic-Partnership-Agreement-text/index.php> accessed on 28 August 2014, Chapter 13.

[22] See: Thailand-Australia Free Trade Agreement (signed 5 July 2004, in force 1 January 2005) <https://www.dfat.gov.au/fta/tafta/tafta_toc.html> accessed on 28 August 2014, Chapter 15.

[23] See: WTO Working Party on GATS Rules, 'Government Procurement-Related Provisions in Economic Integration Agreements' (31 August 2004) S/WPGR/W/49 para. 3; WTO Working Party on GATS Rules, 'Government Procurement-Related Provisions in Economic Integration Agreements' (28 September 2009) S/WPGR/W/49/Add.1 para. 6. See also: Arwel Davies and Krista Nadakavukaren Schefer, 'Government Procurement' in Simon Lester, Bryan Mercurio and Lorand Bartels (eds), *Bilateral and regional trade agreements :commentary and analysis* (2nd edn Cambridge University Press, Cambridge 2016) at 302-304.

[24] See: TAFTA, Article 1501.

[25] See: TAFTA, Article 1502.3.

[26] See: TAFTA, Article 1503.

[27] See: Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (signed 17 June 2015, in force 20 December 2015) <http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx> accessed 11 February 2016.

[28] See: ChAFTA, Article 16.8

4.1.2. Statistics

The strong trend in the RTAs is to include public procurement-related chapters[29] which has been confirmed in a number of quantitative studies. The largest study was conducted by Anderson, Müller, Osei-Lah, Pardo de Leon and Pelletier on a sample of 139 RTAs concluded in the 2010s.[30] Among this sample, 87 RTAs more or less regulated public procurement while the remaining 52 RTAs did not at all. Among the 87 RTAs which did, 39 RTAs were detailed, while the remaining 48 RTAs were of a limited nature.[31] In an alternative study, Davies reported for instance that, among 77 RTAs that entered into force in the January 2001 – January 2007 period, 68 RTAs included express references to public procurement.[32] Reports of the GATS Working Party on Procedures (that is, in the context confined to trade in services) showed that, among 34 EIAs notified to the WTO Secretariat up to August 2004, 25 EIAs included express references to public procurement (10 of which were entered into by the EU).[33] Subsequently, out of 33 EIAs notified to the WTO in the period between 31 August 2004 and 31 July 2009, 22 EIAs included such references.[34] These are significantly higher ratios of public procurement-relevant RTAs to all RTAs than in the 1990s.[35]

[29] The methodological concerns about assessing the impact of RTAs on the liberalization of public procurement markets based on whether they include public procurement-specific chapters or not were widely discussed in (*i*) reports on 'Government Procurement-Related Provisions in EIAs' prepared from time to time on the basis of GATS Article V:7 by the Working Party on GATS Rules [see: WTO Working Party on GATS Rules, 'Overview of Government Procurement-Related Provisions in Economic Integration Agreements' (24 June 2003) S/WPGR/W/44, note 23 S/WPGR/W/49; WTO Working Party on GATS Rules, 'Main Approaches to the Undertaking of Commitments on Government Procurement in Economic Integration Agreements' (11 November 2004) S/WPGR/W/51; note 23 S/WPGR/W/49/Add.1], and (*ii*) in previous studies made by the Working Group on the Transparency in Government Procurement [see: WTO Working Group on Transparency in Government Procurement, 'Synthesis of the Information Available on Transparency-Related Provisions in Existing International Instruments on Government Procurement Procedures and on National Practices' (14 October 1997) WT/WGTGP/W/6; WTO Working Group on Transparency in Government Procurement, 'Work of The Working Group on the Matters Related to the Items I-V of the List of the Issues Raised and Points Made' (23 May 2002) WT/WGTGP/W/32; WTO Working Group on Transparency in Government Procurement, 'Work of the Working Group on the Matters Related to Items VI-XII of the List of the Issues Raised and points made' (3 October 2002) WT/WGTGP/W/33]. Specifically, those studies emphasized that it may be hard to assess whether a particular RTA covers public procurement-related matters because some general provisions of a horizontal nature (e.g. general obligations requiring the parties to publish laws and regulations) might be of a great importance for opening up public procurement markets even if such provisions are not expressly related to public procurement (see: note 17S/WPGR/W/44 para 3; note 17S/WPGR/W/49 para 2; note 17S/WPGR/W/51 para 2; note S/WPGR/W/49/Add.1 para 2).

[30] The authors analysed 139 RTAs notified since 2000 which remained in force as of 25 May 2010. See: Robert D. Anderson, Anna Caroline Müller, Kodo Osei-Lah, Josefia Paro de Leon and Phillipe Pelletier, 'Government Procurement Provisions in Regional Trade Agreements: a stepping stone to GPA accession?' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) p 561-656.

[31] Calculated based on: ibid. Table 1 at 568-576.

[32] See: Arwell Davies, 'Government Procurement' in Simon Nicholas Lester and Bryan Mercurio (eds), *Bilateral and regional trade agreements: commentary and analysis* (Cambridge University Press, Cambridge 2009) 274 at 274

[33] See: note 23 WPGR/W/49, para. 7.

[34] See: note 23 S/WPGR/W/49/Add.1, para. 6.

[35] In order to capture the trend, I analysed the WTO's RTA-IS data base (see note 1). In October 2012 (accessed on 17 October 2012), I found that among all 244 RTAs in force, 89 RTAs included express references to public procurement. This is a significantly lower ratio of expressly public procurement-related RTAs to all RTAs compared to ratios reflected in the above studies limited to the RTA's concluded after 2000.

4.1.3. The GPA's influence

The GATS-related analyses on the EIAs and many authors are in agreement that public procurement-related provisions of the RTAs are under the very strong influence of the GPA's framework. According to Davies "*it is clear that the GPA has had and will very probably continue to have a dominant influence on the development of procurement disciplines in RTAs*."[36] Similarly, Heydon and Woolcock believe that "*[t]The trend in procurement is therefore the progressive application of GPA framework to more and more countries, since the core entities include GPA-equivalent provisions on procurement in most of the PTAs they conclude*."[37] Davies, in surveying 68 public procurement-relevant RTAs, found 28 expressly referring to the GPA.[38] The reports of the Working Party on GATS Rules also offered examples of such express references (e.g. EFTA Convention,[39] Japan-Singapore[40] and US-Singapore[41])[42] and identified RTAs which replicate many GPA provisions without express references to the GPA (e.g. Chile-Japan,[43] Trans-Pacific Strategic Economic Partnership – 'TPSEP' or 'P4',[44] Korea-Singapore[45] and Japan-Mexico[46]).[47] GATS-related studies also noticed that there are RTAs which include hybrid references to both the GPA and to the NAFTA (EU-Mexico[48] and EFTA-Mexico[49]).[50] Davies identified only a few agreements (i.e. Korea-Singapore,[51] New Zealand-Singapore ('ANZSCEP'),[52] New Zealand-Thailand[53] and US-Singapore[54]) that did not follow the GPA's approach.[55]

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[36] See: note 32 at 276. See: note 23, Davies and Nadakavukaren Schefer at 319.

[37] See: note 17 at 76.

[38] See: note 32 at 275.

[39] See: EFTA Convention (as amended by the Vaduz Convention), Article 37.

[40] See: Agreement between Japan and the Republic of Singapore for a new-age economic partnership (signed 13 January 2002, in force 30 November 2002) 2739 UNTS 48385, Chapter 11.

[41] See: The United States-Singapore Free Trade Agreement (signed 6 May 2003, in force 1 January 2004) <http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta> accessed on 28 August 2014, Chapter 13.

[42] See: note 29 S/WPGR/W/51, paras. 4, 5.

[43] See: Agreement between Japan and the Republic of Chile for a strategic economic partnership (signed 27 March 2007, in force 3 September 2007) 2751 UNTS 48546, Chapter 12.

[44] See: Trans-Pacific Strategic Economic Partnership Agreement {signed 18 July 2005 (Chile, New Zealand, Singapore), 2 August 2005 (Brunei), in force 28 May 2006 (New Zealand, Singapore), 12 July 2006 (Brunei), 8 November 2006 (Chile)} 2592 UNTS 46151, Chapter 11.

[45] See: Free Trade Agreement Between the Government of the Republic of Korea and the Government of the Republic of Singapore (signed 4 August 2005, in force 2 March 2006) <http://www.fta.gov.sg/fta_ksfta.asp?hl=22> accessed on 28 August 2014, Chapter 16.

[46] See: Agreement between Japan and the United Mexican States for the strengthening of the economic partnership (signed 17 September 2004, in force 1 April 2005) 2768 UNTS 48744, Chapter 11.

[47] See: note 29 S/WPGR/W/49/Add.1, para 7.

[48] See: note 10.

[49] See: Free Trade Agreement between the EFTA States and the United Mexican States (signed on 27 November 2000; in force 1 July 2001) <http://www.efta.int/free-trade/free-trade-agreements/mexico> accessed on 29 August 2014, Chapter V.

[50] Under which the obligations of the procurers from the EU and the EFTA are determined by references to their obligations under the GPA (see: note 10 Article 29. 2; note 49 Article 61. 2) while the obligations of Mexican procurers are determined by references to their obligations under the NAFTA (see: ibid.).

[51] See: note 45.

[52] See: Agreement between New Zealand and Singapore on a closer economic partnership (signed 14 November 2000, in force 1 January 2001) 2203 UNTS 39105, Part 8.

[53] See: note 21.

[54] See: note 41.

Following the GPA's framework means that parties to the RTAs offer the NT, and MNF treatment in the case of multi-party agreements,[56] to the other parties. It also means replicating the detailed and inflexible procedural requirements that need to be implemented in national administrative law systems, harmonizing the procurement process across jurisdictions.[57] A praiseworthy exception to this is Part VI of the RTA between Chile and Central America (Chile, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua).[58] The public procurement-related provisions of this RTA generally address that the procurement process should be transparent and non-discriminatory,[59] or that fair review procedures should be assured,[60] but these provisions do not impose specific procedural requirements like a closed catalogue of procurement methods, detailed timeline, etc.

The public procurement-relevant RTAs also often follow the GPA's approach to coverage, and their coverage-related appendices usually follow the structure of the appendices to the GPA.[61] Heydon and Woolcock observed that the lists of covered entities/goods/services could significantly vary among RTAs and differ from the GPA whereas thresholds set up in

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[55]See: note 32 footnote 9 at 276. However, while the WTO's GATS-related documents emphasize the very high level of similarity across all EIAs, for instance, Krajewski in his studies on the liberalization of services in some multi-party RTAs concluded that "*there is no common approach to government procurement relating to trade in services in the RTAs studied.*" See: Markus Krajewski, 'Services Liberalization in Regional Trade Agreements: Lessons for GATS 'Unfinished Business'?' in Lorand Bartels and Federico Ortino (eds), *Regional trade agreements and the WTO legal system* (Oxford University Press, Oxford 2006) 175 at 193. Krajewski compared:

(*i*) NAFTA,

(*ii*) CAFTA-DR see: Dominican Republic-Central America-United States Free Trade Agreement (signed 5 August 2004, in force 1 March 2006 (El Salvador, United States), 1 April 2006 (Honduras, Nicaragua), 1 July 2006 (Guatemala), 1 March 2007 (Dominican Republic) <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> accessed on 29 August 2014, Chapter 9),[55]

(*iii*) MERCOSUR (see: Treaty establishing a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay 1991 UNTS Vol. 2140 Reg. No.37341),

(*iv*) Andean Community [see: Andean Subregional Integration Agreement (*known since 1996 as the Andean Community of Nations or Comunidad Andina de Naciones*) (signed at Bogota on 26 May 1969, in force 16 October 1969, as modified with the as modified with the Amending Protocol of the Andean Subregional Integration Agreement (Cartagena Agreement of 1997), also known as the 'Sucre Protocol,' adopted in Quito on 25 June 25 1997) Decision no 563 of the Commission of the Andean Community, Official Codified Text of the Andean Subregional Integration Agreement) <http://www.comunidadandina.org/ingles/normativa/ande_trie1.htm> accessed on 29 August 2014], and

(*v*) Association of South-East Asian Nation - 'ASEAN' [see: Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (signed 28 January 1992, in force 28 January 1992) <http://www.asean.org/images/2012/Economic/AFTA/Common_Effective_Preferential_Tariff/Agreement%20on%20the%20Common%20Effective%20Preferential%20Tariff%20Scheme%20for%20the%20ASEAN%20Free%20Trade%20Area.pdf> accessed on 29 August 2014; ASEAN Trade in Goods Agreement (signed at Cha-am 26 February 2009, in force 17 May 2010) <http://www.asean.org/images/2012/Economic/AFTA/annex/ASEAN%20Trade%20in%20Goods%20Agreement,%20Cha-am,%20Thailand,%2026%20February%202009.pdf> accessed on 29 August 2009].

[56] The MFN clause would not make any sense in the case of bilateral RTAs. See: note 32 at 278.

[57] However, Davies and Nadakavukaren Schefer observed that RTAs are generally less detailed than GPA except for, for example, the NAFTA of the EU's public procurement regime (see: Chapter 3) See: note 23, Davies and Nadakavukaren Schefer at 319.

[58] See: Free Trade Agreement Between Chile and Central Americaa (*Tratado de Libre Comercio entre Centroamérica y Chile*) [signed at Guatemala on 18 October 1999 (Chile–Costa Rica bilateral protocol signed 18 November 1999, in force 15 February 2002, bilateral protocol, Chile-Salvador bilateral protocol signed 20 November 2000, in force on 3 June 2002, Chile-Honduras bilateral protocol signed 22 November 2005, in force 18 July 2008, Chile-Guatemala bilateral protocol signed 7 December 2007, in Force 1 March 2010, Chile-Nicaragua bilateral protocol signed 23 February 2011, in force 19 October 2012] Costa-Rican OJ [2001) 42 (signed on 4 January 2001).

[59] See: note 58, Article 16.02 section 2, Article 16.02 section 3.

[60] See: note 58, Article 16.08.

[61] See: note 17 at 73.

the RTAs are almost the same as under the GPA.[62] In turn, Davies's general view on this problem is that whereas full coverage is usually reached in the case of purchases of goods by central authorities, it is very limited if one looks down the line toward sub-central/local authorities and public enterprises purchasing services and construction works.[63] A rare exception in that regard would be the RTA between Iceland and the Faroe Islands ('Hoyvik Agreement').[64] It is unique in that it prohibits any discrimination in public procurement regardless of contract value.[65]

4.1.4. Non-commercial considerations

Public procurement-relevant RTAs seem to be more flexible as to allowing integrating non-commercial considerations into the procurement process because their public procurement-related chapters must be interpreted in accordance with the rest of the RTA's provisions, especially their preambles.[66] And preambles are currently very rich in general clauses encouraging a promotion of non-commercial considerations, especially sustainable development.[67] In this regard, RTAs follow mainstream developments in the UN like (*i*) the Rio Declaration on Environment and Development of 1992 stating that "*to achieve sustainable development and a higher quality of life for all people, states should reduce and eliminate unsustainable patterns of production and consumption (...)*"[68] or (*ii*) the Johannesburg Report of the World Summit on Sustainable Development of 2002 encouraging "*authorities at all levels to take sustainable development considerations into account in decision-making, including on national and local development planning, investment in infrastructure, business development and public procurement*,"[69] and promoting "*public procurement policies that encourage development and diffusion of environmentally sound goods and services*."[70]

[62] See: ibid.

[63] See: note 32 at 278-279.

[64] See: Agreement between the Government of Iceland, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part (signed in Hoyvik on 31 August 2005 ratified in 3 June 2006) <http://cdn.lms.fo/media/5351/hoyvikssattmalin-en.pdf> accessed 27 December 2015, Article 5. 2.I.

[65] See: Hoyvik Agreement article 5 section 2.I Article I.i. Nonetheless, the level of economic integration under the Hoyvik Agreement more resembles the EEA Agreement or the Lisbon Agreement than a typical RTA. Thus, it is no surprise that also its threshold-free public procurement provisions are unlike those in a typical public procurement-related RTA chapter.

[66] See generally: Marie-Claire Cordonier Segger, Lorand Bartels and Federico Ortino (eds), *Regional trade agreements and the WTO legal system* (Oxford University Press, Oxford 2006) 313-340.

[67] See: ibid.

[68] See: UN, 'The Rio Declaration on Environment and Development' (1992) UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874, article 8.

[69] See: UN, 'Report of the World Summit on Sustainable Development (Johannesburg, South Africa, 26 August-4 September 2002)' (2002) A/CONF.199/20*, point 19, para. 1.

[70] See: note 69, point 19.e

In referring to sustainability, the RTAs also follow the developments in the WTO, embodied in the language of the preamble of the WTO Agreement[71] and subsequent texts of Ministerial Conferences held in Singapore,[72] Geneva,[73] and Doha,[74] reaffirming the commitments of the international community pertaining to sustainable development. These trends are not ignored in the RTAs. For instance, Condonier Segger, among a sample of the RTAs concluded in the Americas (NAFTA, Canada-Chile,[75] Canada-Costa Rica,[76] Chile-US,[77] Peru-US[78] were analysed) did not find any to be tacit as to sustainability concerns.[79] Similarly, Petersmann noticed that since 1990 it is official EU policy to include human rights-related clauses in all new trade/cooperation agreements with third countries.[80] Nonetheless, the significance of the general sustainability clauses in RTA preambles should not be overestimated. The RTAs' preambles equally refer to all trade-related matters while different trade-related matters might bring completely different challenges, and therefore preambles cannot be decisive in the interpretation of public procurement-related chapters. General sustainability clauses might be treated, at best, as some interpretative suggestion in respect of the public procurement-related RTA chapters but certainly do not give an unconditional green light for the parties to RTAs to employ whatever sustainable considerations they wish.

4.2 Multilateral development banks[81]

In parallel to the panoply of the public procurement-relevant RTAs, also the MDBs shape the global model of the regulation of public procurement by imposing public procurement-

[71] "*Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.*" See: note 2.

[72] See: Singapore Ministerial Declaration adopted on 13 December 1996 Ministerial Conference (18 December 1996) WT/MIN(96)/DEC, paras. 2, 6, 16.

[73] See: WTO, 'Geneva Ministerial Conference adopted on 20 May 1998' (20 May 1998) WT/MIN(98)/DEC/W/1 (draft adopted 18 May 1998), para. 4.

[74] See Doha Ministerial Declaration adopted on 14 November 2001 (20 November 2001) WT/MIN(01)/DEC/1, paras. 6, 51

[75] See: Canada - Chile Free Trade Agreement (signed 5 December 1996, in force 5 July 1997) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en> accessed on 29 August 2014.

[76] See: Canada-Costa Rica Free Trade Agreement (signed 23 April 2001, in force 1 November 2002) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/costarica/Costa_Rica_toc.aspx?lang=en> accessed on 29 August 2014.

[77] See: note 11.

[78] See: United States-Peru Trade Promotion Agreement (signed 4 December 2006, in force 1 February 2009) <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>, accessed on 29 August 2014.

[79] See: Marie-Claire Cordonier Segger, 'Sustainable development in regional trade agreement' in Lorand Bartels and Federico Ortino (eds), *Regional trade agreements and the WTO legal system* (Oxford University Press, Oxford 2006) 313-340 Oxford at 324.

[80] See: Ernst-Urlich Petersmann, 'The WTO and Regional Trade Agreements as Competing for Constitutional Reforms: Trade and Human Rights' in Lorand Bartels and Federico Ortino (eds), *Regional trade agreements and the WTO legal system* (Oxford University Press, Oxford 2006) 281-312 at 282.

[81] This section does note cover developments since the third quarter of 2015 such as adoption of the new World Bank's Procurement Regulations for Borrowers entering into force since January 2016.

related compliance requirements on the projects which they finance. The source of the MBDs' regulatory power is purely economic and lies in that MBDs' often grant 'soft loans' (loans on non-market terms) or non-refundable aid is offered by governments, which fall within the OECD's concept of 'Official Development Assistance' ('ODA'), a term also officially recognized by the WTO[82] and by the IMF,[83] denominating "*[f]Flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 percent* (…)."[84]

4.2.1. World Bank's leadership

The MDBs include (*i*) the World Bank combining the International Bank for Reconstruction and Development ('IBRD') established in 1944 to grant loans to middle-income countries and the International Development Association ('IDA') established in 1960 to grant loans to the lowest-income countries,[85] (*ii*) the other MDBs including for instance: the European Investment Bank ('EIB'), [86] European Bank for Reconstruction and Development ('EBRD'), [87] Inter-American Development Bank Group ('IADB'), [88] Asian Development Bank (ADB), [89] African Development Bank ('AfDB'), [90] and (*iii*) some sub-regional development banks such as the Caribbean Development Bank ('CDB'), [91] the Black Sea Trade and Development Bank ('BSTDB'), [92] Nordic Investment Bank ('NIB') [93] or the Council of Europe Development Bank ('CEDB').[94]

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[82] The term 'ODA' has been incorporated into the WTO system by the Letter K, Annex 1 of the WTO Subsidy and Countervailing Measures Agreement which referred to the OECD 1998 Arrangement on Officially Supported Export Credits (the so-called "Helsinki Package" or "Consensus", TD/CONSENSUS(97)70) which referred to the ODA. See: Annamaria La Chimia, 'Untying Aid Through the Agreement on Government Procurement: A Means to Encourage Developing Countries' Accession to the Agreement and to Improve Effectiveness?' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 390 at 405-406.

[83] See: IMF, 'External Debt Statistics: Guide for Compilers and Users – Appendix III, Glossary of External Debt Terms' IMF (Washington DC 2003) at 263.

[84] See: OECD. 'Glossary of Statistical Terms' (OECD Glossary) <http://stats.oecd.org/glossary/> accessed on 3 September 2014.

[85] See further section 4.2.2.

[86] See: European Investment Bank, 'Guide to procurement for projects financed by the EIB' (updated version of June 2011).

[87] See: European Bank for Reconstruction and Development, 'Procurement Policies and Rules' (amended May 2010); European Bank for Reconstruction and Development, 'EBRD financing of private parties to concessions' (May 2001).

[88] See: Inter-American Development Bank, 'Policies for the Procurement of Goods and Works financed by the Inter-American Development Bank' (March 2011) GN-2349-9; Inter-American Development Bank, 'Policies for the Selection and Contracting of Consultants financed by the Inter-American Development' (March 2011) GN-2350-9.

[89] See: Asian Development Bank, 'Procurement Guidelines' (March 2013).

[90] See: African Development Bank, 'Rules and Procedures for Procurement of Goods and Works' (May 2008 edition, revised July 2012); African Development Bank, 'Rules and Procedures for the Use of Consultants (May 2008 edition, revised July 2012).

[91] See: Caribbean Development Bank, 'Guidelines for Procurement' (January 2006); Caribbean Development Bank, 'Guidelines for the Selection and Engagement of Consultants (October, 2011).

[92] See: Black Sea Trade and Development Bank, 'Procurement Principles and Rules'; Black Sea Trade and Development Bank, 'Procurement and Public Sector PPP Transactions Guidance for MDB Public Sector Engagements' (February 2012).

[93] See: Nordic Investment Bank, 'General Guidelines for Procurement' (February 1999); Nordic Investment Bank, 'Procurement Guidelines for Projects Financed by Grants from Trust Funds Administered by the Nordic Investment Bank' (adopted by the President and CEO of the Nordic Investment Bank on 18 December 2013 with entry into force as of 20 December 2013); Nordic Investment Bank, 'Procurement Guidelines for Projects Financed by the Nordic Investment Bank' (adopted by the Board of Directors on 1 September 2011 with entry into force as of 20 September 2011).

[94] See: Council of Europe Development Bank, 'Guidelines for procurement of supplies, works and services' (September 2011).

The World Bank's approach to regulating its debtors' public procurement is representative of the other MDBs given the size of financing provided by the World Bank[95] and the public procurement-related harmonization efforts made among other MDBs, coming down to aligning to the World Bank's documents. The first attempts to formalize a co-operation on the harmonization of the MDBs' and other financial institutions' approach to public procurement date back to 1999 when an informal forum for procurement harmonization was established under the aegis of the OECD, gathering the ADB, the AfDB, the BSTDB, the CDB, the CEDB, the EBRD, the EIB, the IADB, the Islamic Development Bank ('IDB') and the World Bank.[96] The purpose of this cooperation was to (*i*) harmonize MDBs' procurement guidelines and standard bidding documents, (*ii*) jointly discuss issues like the application of information technology to the procurement process, and (*iii*) share knowledge and build capacity in the course of joint training and diagnostic work.[97] Since 1999, the MDBs have made some soft commitments on getting the MDBs' approaches to public procurement together in documents generally addressing the efficiency of development aid such as (*i*) the Rome Declaration on Harmonization of 2003[98] or (*ii*) the Paris Declaration on Aid Effectiveness of 2005.[99] The MDBs – apart from aligning their procurement guidelines – also adopted a set of standardized bidding documents such as (*i*) the Standard Request for Proposals adopted October 2011,[100] (*ii*) the Generic Master Procurement Document adopted in July 2008,[101] (*iii*) Master Document for Procurement of Small Works adopted in July 2008,[102] (*iv*) the Master Procurement Documents - Prequalification Documents for Procurement of Works and User's Guide adopted in May 2003,[103] (*v*) the Master Document for Procurement of Works adopted in July 2008,[104] (*vi*) the Master

[95] For example, the World Bank's commitment to the projects conducted by its borrowers (whereby the purchased money is likely to be spent via public procurement subject to the World Bank's compliance requirements) amounted to USD42.6 billion allocated to 361 new operations and USD167 billion allocated to all existing 1,820 operations in 2011 (see: New operations of 2011 included. See: World Bank, 'Financial Management And Procurement in World Bank Operations: Annual Report for F11' (29 February 2012) at iii), in comparison with, accordingly, USD23.6 billion allocated to 286 new operations and USD94.9 billion allocated to 1,345 pre-existing operations in 2006 (new operations of 2006 excluded, see: World Bank, 'Procurement under World Bank-Financed Projects: F06 Annual Report' (August 2007) 40515 at viii).

[96] See: World Bank. 'Procurement Harmonization' <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:22989220~menuPK:8118597~pagePK:8271521~piPK:8271523~theSitePK:84266,00.html> accessed on 3 September 2014.

[97] See: ibid.

[98] See: OECD, 'Rome Declaration on Harmonization' (2003) available in: OECD, *Harmonising Donor Practices for Effective Aid Delivery* (DAC Guidelines and Reference Series, OECD Publishing, Paris 2003) 124 at 9.

[99] See: OECD, Declaration of Paris on Aid Effectiveness DCD/DAC/EFF(2005)1/FINAL (OECD reference) (done in Paris on 5 March 2005) points 28-30.

[100] See: note 96.

[101] See: ibid.

[102] See: ibid.

[103] See: ibid.

[104] See: ibid.

Document for Procurement of Goods adopted in July 2008,[105] and (*vii*) the Master Document for Procurement of Plant Design, Supply and Installation adopted in February 2007.[106]

4.2.2. World Bank's guidelines

The World Bank has been publishing the Guidelines on the Procurement of Goods, Works and Non-consulting Services [107] since 1964[108] ('General Guidelines'). Similarly, for instance, to the IDB, the AfDB and the CDB, the World Bank has also been publishing separate Guidelines on Selection and Employment of Consultants [109] since 1966 [110] ('Consultant Guidelines'), which set up an autonomous regime for 'consultants', denominating:

> "*a wide variety of private and public entities, including consulting firms, engineering firms, Construction Managers, management firms, Procurement Agents, inspection service providers, auditors, United Nations (UN) agencies and other multinational organizations, investment and merchant banks, universities, research institutions, government agencies, nongovernmental organizations (NGOs), and individuals. Bank Borrowers use these entities as consultants to help in a wide range of activities, such as policy advice; institutional reforms; management; engineering services; construction supervision; financial services; procurement services; social and environmental studies; and identification, preparation, and implementation of projects to complement Borrowers' capabilities in these areas*" [111]

Both the General Guidelines and the Consultant Guidelines equally apply to public procurement made under the financial assistance of the IBRD and of the IDA.[112] With regard to the legal nature of the guidelines, the common understanding is now that (*i*) the guidelines - when incorporated by reference to the agreements between either the IBDR or the IDA on one side and borrowing governments on the other - constitute international treaties which are superior to and which supersede national laws in force in jurisdictions of the borrowing governments, and (*ii*) the burden is on the borrowing governments to give effect to the guidelines with priority over their national laws.[113]

4.2.2.a General guidelines

The General Guidelines do not entirely replicate the GPA framework and therefore escape simple comparisons with the GPA. The goal of the international liberalization of public procurement markets is built-in in the GPA and in the General Guidelines in a completely

[105] See: ibid.

[106] See: ibid.

[107] See: The International Bank for Reconstruction and Development/The World Bank, 'Guidelines on Procurement of Goods, Works, and Non-consulting Services under Loans and IDA Credits & Grants by World Bank Borrowers' (Washington D.C. January 2011).

[108] See: Robert R. Hunja. 'Recent revisions to the World Bank's procurement and consultants selection guidelines' (1997) (6) Pub Proc L Rev 217-226 at 221.

[109] See: note 107.

[110] See: note 108 at 218.

[111] See: 2011 Consultant Guidelines, point 1.3.

[112] See footnote 1 to the 2011 General Guidelines; footnote 1 to the 2011 WB Consultants Guidelines.

[113] See: Sue Arrowsmith, John Linarelli and Don Wallace, *Regulating public procurement: national and international perspectives* (Kluwer Law International, The Hague; Boston 2000) xxxii, 856 at 113. See also generally: John W. Head. 'Evolution of the governing law for loan agreements of the World Bank and other multilateral development banks' (1996) 90(2) Amer J Int'l L 214. On potential conflicts of the MDBs' guidelines with other international treaties, see further section 4.2.3.

different manner. By way of reminder, the GPA liberalizes covered public procurement with the NT and the MNF clauses, the ban of offsets, and the ban on discrimination against foreign-owned local establishments (see section 2.3.3). In turn, under the General Guidelines, the non-discrimination against foreigners is the built-in feature of the preferred procurement methods. Namely, the General Guidelines give a strict priority to 'international competitive bidding' ('ICB') as the most appropriate method of public procurement.[114] However, in the case of the ICB, the General Guidelines at the same time also allow an application of domestic price preferences[115] such as (*i*) price preferences for domestic goods with a margin of up to 15 percent,[116] and (*ii*) price preferences for domestic contractors with a margin of up to 7.5 percent[117] - the latter is only allowed in the case of the least developed countries.[118]

Apart from this, the General Guidelines also allow, for instance: (*i*) relaxed ICB for purchases of commodities,[119] (*ii*) limited international bidding ('LIB'), meaning directly inviting suppliers/contracts without public advertising, allowed in the case of exceptional circumstances or if the number of potential suppliers/contractors is limited,[120] (*iii*) national competitive bidding ('NCB'), allowed in the case of public contracts unlikely to attract international competition because of factors such as a small contract-size/value, a labour-intensive-nature of works, or lower local prices of procured goods/services/works compared with the prices in international markets,[121] (*vi*) 'shopping', meaning requesting quotations, allowed in the case of the procurement of low-value off-the-shelf goods (up to USD100,000) or in the case of low-value simple civil works (up to USD200,000),[122] (*vii*) direct contracting, meaning direct sourcing without competition, allowed in cases like extending current contracts, additional purchases from original suppliers or in emergency,[123] or (*viii*) special provisions for purchases from UN agencies.[124]

Altogether, in many respects the General Guidelines allow the borrowing states to overtly incorporate industrial non-commercial considerations in procurement financed by the World Bank. While there is relaxed ICB for commodities, LIB, shopping or direct contracting can

[114] See: General Guidelines (as revised in July 2014), point 1.3.
[115] See: ibid. point 2.55.
[116] See: ibid. Appendix 2 point 5.
[117] See: ibid. Appendix 2 point 8.
[118] See: ibid. Appendix 2 point 8, footnote 82.
[119] See: ibid. point 2.68.
[120] See: ibid. point 3.2.
[121] See: ibid. point 3.3.
[122] See: ibid. point 3.5.
[123] See: ibid. point 3.7.
[124] See: ibid. point 3.10.

be all compared with limited tendering under the GPA.[125] The NCB especially allows overt discrimination against foreigners and does not have its counterpart in the GPA. The General Guidelines also allow incorporating environmental and safety-related non-commercial considerations, by stipulating that "*[f]For goods and equipment, other factors may be taken into consideration including, among others, payment schedule, delivery time, operating costs, efficiency and compatibility of the equipment, availability of service and spare parts, and related training, safety, and environmental benefits*."[126] At the same time, the General Guidelines restrict a borrowing country's capacity to use public procurement as a tool of international politics by allowing the preclusion of foreign contractors/suppliers or contractors/suppliers offering goods/services from a specific third country generally embargoed by the borrowing country only if the World Bank agrees or the UN Security Council bans commercial relations with such third country.[127] Also, they mandate precluding foreign supplier/contractors which have been black-listed by the World Bank itself for breaching the 'World Bank Group Anti-Corruption policies.'[128]

4.2.2.b Consultant Guidelines

The Consultant Guidelines follow the structure of the GPA's framework even more loosely but, at the same time, allow less non-commercial considerations. The document is based on the premise that a "*competition among qualified short-listed firms in which the selection is based on the quality of the proposal and, where appropriate, on the cost of the services to be provided*".[129] Accordingly, Quality and Cost-Based Selection (QCBS) is the basic procurement method,[130] under which proposals filed by invited short-listed candidates shall be evaluated based on equally weighting[131] (*i*) the quality factor to be assessed without knowing the cost,[132] and (*ii*) the cost-factor to be evaluated subsequently.[133] The Consultant Guidelines do not allow price preferences and strictly limit the reasons for which foreign consultants can be precluded from competition to when (*i*) participation of government-

[125] See: GPA12, article XIII.

[126] See: 2011 General Guidelines (as revised in July 2014), point 2.52.

[127] "*(a) Firms of a country or goods manufactured in a country may be excluded if, (i) as a matter of law or official regulation, the Borrower's country prohibits commercial relations with that country, provided that the Bank is satisfied that such exclusion does not preclude effective competition for the supply of goods, works, and non-consulting services required, or (ii) by an act of compliance with a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations* ['CHAPTER VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'], *the Borrower's country prohibits any import of goods from, or payments to, a particular country, person, or entity. Where the Borrower's country prohibits payments to a particular firm or for particular goods by such an act of compliance, that firm may be excluded.*" See: ibid. point 1.10.a.

[128] See: ibid. point 1.10.b. However, if blacklisting has not been politically motivated, one could claim that precluding corrupt suppliers/contracts is done merely in the quest for better value for money so it does not fall within the concept of non-commercial consideration.

[129] See: 2011 Consultant Guidelines (as revised in July 2014), point 1.5.

[130] See: ibid. point 2.1.

[131] See: ibid. points 2.18, 2.25.

[132] See: ibid. point 2.15.

[133] See: ibid.

owned universities or research centres is critical to a project financed by the World Bank because such institutions have unique solutions that the private sector cannot provide[134] or (*ii*) the contract value does not exceed USD300,000.[135]

Apart from the QCBS, the Consultant Guidelines also allow, for instance: (*i*) the Quality-Based Selection ('QBS'), meaning a selection based on solely qualitative criteria, allowed in cases such as complex or highly specialized assignments, feasibility and structural engineering design of major infrastructural projects, policy studies of national significance, management studies of large government agencies,[136] (*ii*) the Selection under Fixed Budget ('FBS'), allowed in the case of simple and well defined assignments,[137] or (*iii*) the Least Cost Selection ('LCS'), allowed in the case of routine assignments such as engineering design of noncomplex works, audits, etc.[138] This means that, under the Consultant Guidelines, the evaluation criteria are an inherent feature of each procurement method in contrast to the GPA's structure, under which the default preference for the lowest-price or the most advantageous bids[139] and specific procurement methods[140] are two distinct issues.

4.2.3. Conflicts of the MDB's guidelines and the GPA/RTA

Discussed discrepancies between the GPA's framework and public procurement-related documents adopted by the World Bank and followed by the other MDBs do not imply that the MDBs' public procurement-related documents heavily undermine the GPA-derived model. Foremost, similar to the GPA the World Bank's guidelines contribute to the promotion of the integrity of public procurement by addressing some vital problems such as avoiding conflicts of interests[141] and curbing corruption.[142] In addition, the GPA-derived model and the MDBs' guidelines have always had different addressees, that is, (*i*) the most developed countries subjected to the GPA and vibrant emerging economies subject to public procurement-relevant RTAs on one side, and (*ii*) the developing or the least developed countries borrowing from the MDBs on the other.[143] There has always been an informal line

[134] See: ibid. point 1.13.b.

[135] See: ibid. point 2.5 and footnote 30.

[136] See: ibid. point 3.2.

[137] See: ibid. point 3.5.

[138] See: ibid. point 3.6.

[139] See: GPA12, article XV.5.

[140] See: ibid. article XIII.

[141] See: 2011 General Guidelines (as revised in July 2014), points 1.7-1.8; 2011 Consultant Guidelines (as revised in July 2014), point 1.9.

[142] See: 2011 General Guidelines (as revised in July 2014), point 1.16; 2011 Consultant Guidelines (as revised in July 2014), point 1.23; Krista Nadakavukaren Schefer and Mintewab G. Woldesenbet, 'The Revised Agreement on Government Procurement and Corruption' (2013) 47(5) J World Trade 1129 at 1136-1137.

[143] See: Arie Reich. 'The New Text of the Agreement on Government Procurement: An Analysis and Assessment' (2009) 12(4) J Intl Econ Law 989 at 990, 993. WTO and the World Bank have always cooperated. On the side of the WTO, its experts have paid a lot of attention to the World Bank's guidelines when preliminary works on a planned multilateral agreement limited to transparency in public procurement (meant to be designed in a way that it could attract developing countries) were launched in the WTO Working Group on Transparency in 1997 (see section 2.4). The World Bank's delegates were then invited to the

drawn between the WTO's public procurement activities and the World Bank's whereby the World Bank's borrowers have been, to quote Reich, in a kind of 'waiting room" in relation to the GPA.[144] However, the distinction between the GPA's parties and countries relying on the MDBs' assistance might not be that clear-cut when more and more emerging economies still eligible for such assistance subject themselves to the GPA.[145] Anticipating potential conflicts, both the WTO and the World Bank took some steps to adopt a kind of conflict-of-laws rules and to further align the two models.

On the side of the WTO, the GPA's revision of 2012 (see sections 2.3.3, 9.3.2) for the first time allowed developing countries to transitionally impose, among others, price preferences on foreign goods or services,[146] aligning with the General Guidelines.[147] After the revision, it also became clear that the GPA does not apply to public procurement "*under the particular procedure or condition of an international organization, or funded by international grants, loans or other assistance where the applicable procedure or condition would be inconsistent with this Agreement*"[148] which had not been expressly stated in GPA94.[149] On the side of the World Bank, the review agenda scheduled for 2013-14[150] generally addressed that the future language of the World Bank guidelines would need to better reflect the developments in the GPA, RTAs, EU directives and the UNCITRAL model laws.[151] The document specified that in order to align with these developments the World Bank's guidelines shall (*i*) assure even more transparency,[152] (*ii*) allow 'more-negotiated' procurement methods bringing more

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Working Group (see: WTO, 'Report on the Working Group on Transparency of 23 May 1997' WTO Secretariat (Geneva 15 July 1997) WT/WGTGP/M/1 para 4). On the side of the World Bank, its experts have assisted in some accession to the GPA like in the case of Jordan (see: WTO, 'Minutes of the formal meeting of the Committee on Government Procurement of 23 April 2003' (2003) GPA/M/22).

[144] See: ibid. Reich at 994.

[145] As of April 2015, Albania, China, Georgia, Kyrgyzstan, Jordan, Moldova and Ukraine were negotiating an accession to the GPA.

[146] "*Based on its development needs, and with the agreement of the Parties, a developing country may adopt or maintain one or more of the following transitional measures, during a transition period and in accordance with a schedule, set out in its relevant annexes to Appendix I, and applied in a manner that does not discriminate among the other Parties: a. a price preference programme, provided that the programme: i. provides a preference only for the part of the tender incorporating goods or services originating in the developing country applying the preference or goods or services originating in other developing countries in respect of which the developing country applying the preference has an obligation to provide national treatment under a preferential agreement, provided that where the other developing country is a Party to this Agreement, such treatment would be subject to any conditions set by the Committee; and ii. is transparent, and the preference and its application in the procurement are clearly described in the notice of intended procurement.*" See: GPA12 article V.3.a. GPA12 also allowed developing countries to impose offsets (see: ibid. article V.3.b), or differing non-reciprocal thresholds (see: ibid. article V.3.d) compared with GPA94 which only allowed differing non-reciprocal subjective or objective coverage (see: GPA94 article V.4). See also note 143, Reich at 993-995.

[147] See: note 116. See also note 143, Reich at 993-995.

[148] See: GPA12, Article II:3(e)(iii).

[149] Note to GPA94 Article 1 merely stated that "*[h]~~H~~aving regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties.*" See also: Annamaria La Chimia and Sue Arrowsmith. 'Addressing Tied Aid: Towards a More Development-Oriented WTO?' (2009) 12(3) J Intl Econ L 707 at 733-736.

[150] The reform aimed at the deepest modifications of the guidelines since they had been first published. See generally: World Bank, 'The World Bank's Procurement Policies and Procedures: Policy Review: Initiating Discussion Paper' (29 March 2012) 68466.

[151] See: ibid. point 6, 2nd *tiret* ix, point 39 at 16, point 41 at 17, point 42 at 18-19.

[152] See: ibid. point 41, 1st *tiret* at 17.

interaction between public procurers and their potential suppliers/contractors,[153] (*iii*) be more precise in defining criteria determining the most advantageous tenders[154] or somehow address the problem that various domestic preferences under the General Guidelines are in principle not allowed under the GPA/RTAs.[155] The document also proposed that the future amendments to the World Bank's guidelines should better recognize that public procurement is a wider policy tool,[156] and could employ both social[157] and environmental[158] considerations. Especially the last point would have been a vital novelty to the World Bank's documents given that its approach to such non-commercial considerations had been rather fragmentary and unclear,[159] and its staff, historically, had been extremely reluctant to approve the incorporation of such considerations in projects financed by the bank.[160] Nonetheless, such reformatory language was softened first in the policy documents published by the World Bank directly after the adoption of the GPA's revisions,[161] and subsequently in eventual amendments to the General Guidelines of 2014. The procurement methods available under the General Guidelines were not aligned to the logics of the GPA and very general lines on the social and environmental considerations remained intact compared with the previous General Guidelines' language of 2011.[162]

The potential conflicts between the GPA-derived model and the Consultant Guidelines are a somewhat different issue. The preference for shortlisting potential consultants and for qualitative award criteria might seem irreconcilable with the GPA-derived model. However, services are generally poorly covered under the GPA or the RTAs (see sections 2.3.3, 4.1.3), plus many consultancy services might fall within the scope of general exceptions from the

[153] See: ibid. point 41, 3rd *tiret* at 17.

[154] See: ibid. point 41, 4rd *tiret* at 18.

[155] See: ibid. point 41, 2nd *tiret* at 17.

[156] See: ibid. point 53 at 24.

[157] See: ibid.

[158] See: ibid. point 54 at 24, 25.

[159] See: Marta De Castro Meireles. 'The World Bank procurement regulations: a critical analysis of the enforcement mechanism and of the application of secondary policies in financed projects' (Doctor of Philosophy University of Nottingham 2006) at: 338-341, available in eTheses database provided by the University of Nottingham at: <http://etheses.nottingham.ac.uk/1586/> accessed on 8 January 2013.

[160] See: Tim Tucker, 'A Critical Analysis of the Procurement Procedures of The World Bank' in Sue Arrowsmith and Arwel Davies (eds), *Public procurement: global revolution* (Kluwer Law International, London 1998) at 153.

[161] "*The current policy and procedures are neutral with respect to social and environmental sustainability. The guidelines do not prevent such concerns being taken into account in life cycle costs and benefits, but this flexibility is rarely used. The proposed new framework provides opportunities to advance and accommodate borrower sustainable procurement policies and approaches (including green sustainable procurement), quality evaluation, corporate and social responsibility provisions, as well as integrity issues. Phase II, in coordination with the parallel review of safeguards policies, will elaborate this area further. It is proposed to promote the benefits of sustainable procurement to the borrowers at both a systemic policy level and at a project level identifying key projects with sustainability impacts. More support will be provided to borrowers to assess value for money, including such issues as guaranteed lifespan, consumables, energy consumption, disposal costs etc. – so that better procurement decisions can be taken. The Bank will include sustainable procurement as part of its own internal procurement capacity development, ensuring internal skills remain contemporary.*" See: World Bank, 'Procurement in World Bank Investment Project Finance Phase I: A Proposed New Framework - revised. The Vision: "Procurement in Bank Operations supports clients to achieve value for money with integrity in delivering sustainable development' (18 October 2013) at 21.

[162] See: note 116.

application of the GPA or the RTAs anyway.[163] Moreover, some authors see some clear long-term trends in the MDBs' activities toward a greater significance of consultancy projects which are, less and less attractive for international profit-driven business. Already in the 1990s, Tucker noted that, under the World Bank's financing, there had been a shift from large-scale one-off projects like infrastructure, steel mills, dams, and pulp and paper mills, all requiring high-quality consultancies, pursued in the 1950s, 1960s and 1970s, toward smaller projects, often agricultural ones.[164] Similarly, Hunja observed that, because of the changing nature of financed projects, a shift had been made from a demand for engineering consultancy toward services in areas like education, health, privatization and institutional assistance or legal reform.[165] All such factors minimize the risk of conflicts of commitments stemming from the GPA or public procurement-related chapters of RTAs on the one hand and consultancy procurement standards imposed by the MDBs on the other.

Noteworthy is that potential conflicts of the GPA-derived model and procurement conditions imposed by the MDBs do not pertain any more to the problem of tied aid, meaning requirements imposed by the soft loan creditors or by the donors that the borrowed money must be spent on purchases from a pool of suppliers/contracts determined by these creditors or donors[166] – which clearly undermines global liberalization tendencies. Historically, even the World Bank experienced the shift from a short period of tying financing, by limiting in 1956[167] the eligible bidders to those originating from the World Bank's members plus Switzerland, toward untying it and even allowing for domestic preferences in 1966.[168] In such a way, the problem of tied aid was eliminated very early from the leading MDBs, leaving governments mostly tying soft loans or aid in bilateral relations with their borrowers.[169] Later on, there has been a strong inclination against tying aid within the international community, especially after the International Conference on Financing for Development held in 2002 in Monterey.[170] The full or partial untying of aid was listed as the objective of, for instance, the conclusions of the UN 2005 World Summit,[171] and of a number

[163] For instance when the consultancy involves research and development (exempted under GPA12 article XIII.1.f) or architectural works awarded in a contest (exempted under GPA12 article XIII.1.h).

[164] See: note 160 at 141.

[165] See: note 108at 222. Noteworthy is that services mentioned by Hunja or Tucker more or less reflect the catalogue of the EU's non-priority services, which (as discussed in section 3.2.3) even for the purposes of the EU internal market are subject to very limited procurement-related requirements confined to publicity and non-discriminatory technical specifications, and are not covered by the EU's annexes to the GPA.

[166] Typically from the businesses originating from the crediting or donating countries.

[167] That is even before the publication of the first formalized procurement guidelines.

[168] See: note 150 at 2.

[169] See: note 82, La Chimia at 397-398.

[170] See: ibid. at 398-399.

[171] See: UN, 'Resolution of the Sixteenth Session of the General Assembly - 2005 World Summit Outcome' (New York 24 October 2005) A/RES/60/1, point 23(c).

of the OECD's documents like (*i*) the so-called Helsinki Package (or 'Consensus'),[172] (*ii*) the Recommendation of the OECD's Development Assistance Committee on Untying Official Development Assistance to the Least Developed Countries and Highly Indebted Poor Countries,[173] (*iii*) the Paris Declaration on Aid Efficiency,[174] and (*iv*) the Accra Agenda.[175] Moreover, some governments decided to unilaterally untie granted aid like the UK in 2002[176] or partly the EU in 2006.[177] Altogether, while the phenomenon of tied aid has not been entirely curbed in the first decade of 21st century,[178] there seems to be a strong case for saying that the problem has been largely solved.

4.3 OECD

The role of the OECD in shaping the global model of the regulation of public procurement markets has gradually diminished since the 1970s, after the discussion on the projected GPA79 had been shifted to the GATT Tokyo Round (see section 2.3.1) and subsequently to the WTO. The OECD did not entirely cede its public procurement-related activities after the 1970s but had to recalibrate its approach. Foremost, it facilitated attempts by the international community to harmonize the MDBs' procurement guidelines and to untie development aid (as discussed in the previous section). In addition, the OECD adopted a few non-binding public procurement-related recommendations which addressed curbing corruption, stigmatizing bribery, promoting ethical conduct in public services, etc.[179] It has also assisted countries in transition. For instance, in 2009 it published the complex handbook on the Principles for Integrity in Public Procurement [180] which covered the very basics of what the minimum standards are with which a decent national public procurement system shall conform, and which was primarily addressed to countries seeking an accession

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[172] "*There shall be no tied aid to countries whose per capita GNP would be sufficient to make them ineligible for 17 year loans from the World Bank. The World Bank recalculates the threshold for this category on an annual basis. A country will be reclassified only after its World Bank category has been unchanged for two consecutive years*." See: OECD, Arrangement on Guidelines for Officially Supported Export Credits 1997 TD/CONSENSUS(97)70, Article 34.

[173] See: OECD, 'DAC Recommendation on Untying Official Development Assistance to the Least Developed Countries and Highly Indebted Poor Countries' DCD/DAC(2001)12/FINAL (done 25 April 2001, amended on 15 March 2006 - DCD/DAC(2006)25, and on 25 July 2008 - DCD/DAC(2007)41/REV1).

[174] "*Untying aid generally increases aid effectiveness by reducing transaction costs for partner countries and improving country ownership and alignment. DAC Donors will continue to make progress on untying as encouraged by the 2001 DAC Recommendation on Untying Official Development Assistance to the Least Developed Countries (…).*" See: OECD, Declaration of Paris on Aid Effectiveness DCD/DAC/EFF(2005)1/FINAL (OECD reference) (done in Paris on 5 March 2005), Article 31.

[175] See: Accra Agenda for Action 2008' (done in Accra, Ghana, on 4 September 2008), point 18.

[176] See: note 169, footnote 46 at 399.

[177] See: ibid.

[178] See: note 149, La Chimia and Arrowsmith at 710-712.

[179] See: 'Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service' (23 April 2008) C(98)70/FINAL; 'Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service C(2003)107'; OECD, 'Recommendation of the Council on Enhancing Integrity in Public Procurement' (October 2008) C(2008)105. See also: note 142, Nadakavukaren Schefer and Woldesenbet at 1335-1136.

[180] See: OECD, 'Principles for Integrity in Public Procurement' (2009) ISBN 978-92-64-05561-2.

to the OECD at that time (Chile, Estonia, Israel, Russia and Slovenia).[181] Moreover, the OECD assisted Armenia in negotiating its accession to the GPA which was affirmed by Pascal Lamy thanking *"the representatives of Armenia itself; the representatives of SIGMA* [Support for Improvement in Governance and Management [182]], *an OECD-affiliated governance institute which had played a key role in facilitating Armenia's procurement reforms*" when Armenia was officially invited to join the GPA.[183]

The adoption of the Convention on Combating Bribery of Foreign Officials in International Business Transactions ('OECD Convention') in 1997[184] was a notable exception to the soft-law nature of the OECD's output.[185] The OECD Convention is not limited to bribery in public procurement, but its strong public procurement-related context is pretty obvious. The general idea of the OECD Convention was that "*[e]Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business*," [186] whereby 'foreign public officials' have been defined as performing 'public functions,'[187] and the negotiating parties understood that a "*"[p]Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement*."[188] The legitimacy of one lawmaker's stepping in the other lawmaker's powers by penalizing private

[181] See: note 180 at 15.

[182] The SIGMA is the OECD's joint initiative with the EU. Despite formally being affiliated with the OECD, it is the EU's spin-off as it is mostly financed by the EU.

[183] See: WTO, 'Minutes of the formal meeting of the Committee on Government Procurement of 7 December 2010' (28 February 2011) GPA/M/41.

[184] See: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed 17 December 1997, in force 15 February 1999) 2802 UNTS 49274.

[185] The OECD Convention followed and internationalized the previously-passed and very similar American Foreign Corrupt Practices Act of 1977 ('FCPA'). See: The Foreign Corrupt Practices Act 1977 15 U.S.C. § 78dd-1, et seq. On the history of FPCA and its correlation with the history of the OECD Anti-bribery Convention, see: Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds), *The OECD convention on bribery: a commentary* (Cambridge University Press, Cambridge 2007) 608 at 8-10. The genesis of the FCPA was the leakage to the public of the information on the 'facilitation payments' (bribes) made by Lockheed Aircraft Corporation to some foreign officials in a number of foreign (outside the USA) jurisdictions in exchange for favouring Lockheed's products (and over four hundred similar cases subsequently revealed by American enterprises under the voluntary disclosure programme offered by the Securities and Exchange Commission)(See: ibid.) to amend the Securities Exchange Act of 1934 Committee on Interstate and Foreign Commerce (95th Congress, 1st session) cl No. 95-640). In theory the FCPA's purpose was to penalize corrupt practices of domestic enterprises in the future. 'Domestic' meant linked to the US by, among others, (*i*) being organized under US laws or (*ii*) having their main place of business in the USA or (*iii*) having securities publicly traded in the USA. For details of the CPPA's application see: Stuart H. Deming, The Foreign Corrupt Practices Act and the new international norms (International practitioner's deskbook series, 2nd edn American Bar Association, Chicago 2010) 801at 7-12.

[186] See: OECD Convention Article 1.

[187] "*"[F]foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.(…).*" See: OECD Convention, Article 4.a.

[188] See: OECD Convention Commentaries, point 12 at 15.

activities beyond its own territorial jurisdiction might be seen as very controversial.[189] At the same time, however, the OECD Convention injects elementary standards of integrity into corrupt jurisdictions and might therefore facilitate future accessions to the GPA or an expansion of public procurement-related commitments under the RTAs. [190]

4.4 The UNCITRAL Model Laws

UNCITRAL, established in 1966,[191] has also contributed to the development of the global model of the regulation of public procurement. [192] Chronologically, works under the agenda of the New International Economic Order ("NIEO") were held from 1988 to 1992 in the 5th UNCITRAL Working Group, [193] resulting in the adoption of the 1993 Model Law on Procurement of Goods and Construction ('1993 Model Law'). [194] After another year of negotiations in that circle, the subsequent 1994 Model Law on Procurement of Goods, Construction and Services ('1994 Model Law')[195] drew upon the 1993 Model Law and added provisions covering purchases of services to the previously agreed document.[196] A decade later, in 2003, the 36th UNCITRAL session adopted the Model Legislative Provisions on Privately Financed Infrastructure Projects 2003 ('2003 Model Law') [197] which covered 'public-private-partnership' arrangements[198] and drew upon the 1994 Model Law.[199] At the same UNCITRAL session, also the works on the revision of the 1994 Model Law were initiated,[200] subsequently resulting in the adoption of the new 2011 Model Law on Public Procurement ("2011 Model Law").[201]

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[189] See: note 185, Pieth, Low and Cullen at 12.

[190] However, the actual impact and effectiveness of such regulation-method depends on the number of home-based multinational enterprises (and the nature of their foreign business operations) in a country which adopts the OECD Convention or unilaterally passes a FCPA-like law as did the USA (see: note 185).

[191] UNCITRAL was established by the UN General Assembly's Resolution 2205(XXI) of 17 December 1966.

[192] This section focuses on UNCITRAL's 'model laws' and it discounts some less significant developments like 'legislative guides', etc.

[193] See generally: Don Wallace. 'The U.N. Model Law on Procurement' (1992) (6) Pub Proc L Rev 406-407.

[194] See: UNCITRAL Model Law on Procurement of Goods and Construction 1993 (adopted by UNCITRAL on 16 July 1993, recommended by a Resolution of the UN General Assembly on 1 February 1994, A/RES/48/33).

[195] See: UNCITRAL Model Law on Procurement of Goods, Construction and Services 1994 (adopted by UNCITRAL on 15 June 1994, recommended by a Resolution of the UN General Assembly on 17 February 1995, A/RES/49/54).

[196] "*The UNCITRAL Model Law on Procurement of Goods, Construction and Services was adopted by the United Nations Commission on International Trade Law (UNCITRAL) at its twenty-seventh session, without thereby superseding the UNCITRAL Model Law on Procurement of Goods and Construction, adopted by the Commission at its twenty-sixth session. The present consolidated text consists of the provisions found in the Model Law on Procurement of Goods and Construction and provisions on procurement of services. The Commission has also issued a Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/403)"*. See: 1994 Model Law, an asterisk to the title.

[197] See: UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects 2003 (adopted by UNCITRAL on 7 July 2003, recommended by a Resolution of the UN General Assembly on 8 January 2004, A/58/513).

[198] See: 2003 Model Law, Preamble.

[199] See: ibid.

[200] See: UN, 'Current activities of international organizations in the area of public procurement: possible future work - Note by the Secretariat (Addendum)' (2003) A/CN.9/539/Add.1.

[201] See: UNCITRAL Model Law on Public Procurement 2011 (adopted on 1 July 2011, recommended by the UN General Assembly on 13 January 2012, A/RES/66/95).

4.4.1. Structure

In a technical sense, model laws offer complex concise legislative drafts of potential national public procurement-related laws at the ready, and merely require 'copy-paste-supplement' actions by the national lawmakers. Both the model laws and the GPA offer very similar institutions,[202] and the structure of model laws follows the logics of the procedural provisions of the GPA, covering matters like: (*i*) the criteria of the qualification/exclusion of potential suppliers/contractors such as technical capability and experience,[203] financial standing,[204] unpaid taxes or social contributions[205] or previous convictions/past performance,[206] (*ii*) the publicity of public procurement-relevant laws,[207] possible forthcoming procurement (only 2011 Model Law),[208] tender notices[209] and award notices,[210] (*iii)* the rules on drafting technically neutral specifications,[211] (*iv*) the evaluation criteria confined to the lowest price or the most advantageous tenders,[212] whereby the 2011 Model Law allowed crediting environmental performance (in line with the revision of the GPA of 2012),[213] (*v*) the choice of procurement methods ranging from open tendering to direct sourcing,[214] whereby the general idea (also under the 2003 Model Law) is that the lower the contract value the less competitive procedures of selecting suppliers that can be used,[215] and (*vi*) challenge/review procedures,[216] consisting of the interim review by the procurers,[217] an external administrative review,[218] the right to the suspension of the procurement procedures in the case of disputes,[219] and the right to appeal to the judicial bodies.[220] In the case of any discrepancies between model laws and the GPA, RTAs or procurement guidelines imposed by the MDBs binding upon implementing countries, the model laws provide that such international commitments shall prevail over the provisions of model laws.[221] Under the 2011 Model

[202] See: Caroline: Nicholas, 'Work of UNCITRAL on Government Procurement' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 746-772 at 749-751.
[203] See: 1994 Model Law, Article 6.1.(b)(i); 2011 Model Law, Article 9.2.(a).
[204] See: 1994 Model Law, Article 6.1.(b) (iii); 2011 Model Law, Article 9.2.(d).
[205] See: 1994 Model Law, Article 6.1.(b) (iv); 2011 Model Law, Article 9.2.(e).
[206] See: 1994 Model Law, Article 6.1.(b) (v); 201 1 Model Law, Article 9.2.(f).
[207] See: 1994 Model Law, Article 5; 2011 Model Law, Article 5.
[208] See: 2011 Model Law, Article 6.
[209] See: 1994 Model Law, Articles 24, 37; 2011 Model Law, Article 33.
[210] See: 1994 Model Law Article 14; 2011 Model Law, Article 23.
[211] See: 1994 Model Law, Article 16; 2011 Model Law, Article 10.
[212] See: 1994 Model Law, Article 39; 2011 Model Law, Article 11.
[213] See: 2011 Model Law, Article 11.2.(b).
[214] See: 1994 Model Law, Chapter II-V; 2011 Model, Chapters II-VII.
[215] See: 1994 Model Law, Article 42(1); 2003 Model, Article 18(b); 2011 Model Laws Article 29(2).
[216] See: 1994 Model Law, Chapter VI; 2011 Model Law, Chapter VIII.
[217] See: 1994 Model Law, Article 53; 2011 Model Law, Article 66.
[218] See: 1994 Model Law, Article 54; 2011 Model Law, Article 67.
[219] See: 1994 Model Law, Article 56; 2011 Model Law, Article 65.
[220] See: 1994 Model Law, Article 57; 2011 Model Law, Article 64.3.
[221] See: 1994 Model Law, Article 3, 2003 Model Law, footnote 12 (read along with point 44 of 2000 UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects); 2011 Model Law Article 3.

Law, the national lawmakers are even obliged to list their public procurement-related international obligations in force.[222]

The 'copy-paste-supplement' design of the model laws means that the model laws offer a wide leeway for national legislators to choose between various options, to fill-in empty brackets, to supplement open catalogues,[223] and to sketch more detailed secondary legislation referred to as 'procurement regulations.'[224] According to the Guide to Enactment of the 1994 Model Law, *"It should be noted that the procurement proceedings in the Model Law, beyond raising matters of procedure to be addressed in the implementing procurement regulations, may raise certain legal questions the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law*."[225] In the context of the 1994 Model Law, Westring categorized issues left to national lawmakers (not regulated under the GPA) into: (*i*) 'basic norms' determining means to curbing non-commercial considerations, assuring an appropriate supervision of the procurement process, or preventing conflicts of interest,[226] (*ii*) 'detailed rules of procedure' designed to increase the efficiency of the procurement process such as the 'soil risk' in construction works, the warranties to repair and replace defects, or rights of the procurers to inspect goods and services to be delivered,[227] and (*iii*) the 'general conditions' designed to protect the interest of public procurers such as damages or penalties payable by suppliers/contractors.[228] Under the 2011 Model Law, national legislators are invited to determine at their discretion, for example, (*i*) the scope of the 'socio-economic policies' pursued via public procurement markets,[229] (*ii*) the period of the preclusion from bidding resulting from previous criminal convictions,[230] or (*iii*) the time limits for lodging review claims by the suppliers/contractors.[231]

The model laws also offer a wide leeway in determining the coverage of national public procurement laws implementing the model laws. In terms of objective coverage, the 1994 Model Law applies "*to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article*" whereby paragraph 2 - apart from the standard exclusion of

[222] See: 2011 Model Law, Article 3.

[223] For examples of solutions to be "filled-in" by enacting states in 1994 Model law, see: Gosta Westring. 'Multilateral and unilateral procurement regimes - to which camp does the UNCITRAL Model Law on procurement belong?' (1994) 4 Pub Proc L Rev 42 at 150-151.

[224] See: 1994 Model Law, Article 4; 2011 Model Law, Article 1(m) and Article 4.

[225] See: 1994 Model Law, Guide to enactment, para 13.

[226] See: note 223 at 145-146.

[227] See: ibid. at 146.

[228] See: ibid. at 146-147.

[229] See: 2011 Model Law, Article 2 (o).

[230] See: ibid. Article 2 (f).

[231] See: ibid. Article 67:2 (c).

the defence sector – allows national lawmakers to insert, at their discretion, whatever exemptions/exclusions they want.[232] The 2003 Model Law applies to the 'concession contract,' meaning a "*mutually binding agreement or agreements between the contracting authority and the concessionaire that set forth the terms and conditions for the implementation of an infrastructure project*"[233] whereby national lawmakers are also free to determine the scope of exceptions to the application of that model law.[234] In turn, the 2011 Model Law very ambitiously "*applies to all public procurement*".[235] Still, it does not apply to concession contracts (covered by the 2003 Model Law),[236] and allows many exceptions to open tendering mostly based on 'security-interests' concerns.[237] In terms of subjective coverage, both the 1994 Model Law and the 2011 Model Law left it to national lawmakers to list whatever covered public procurers they wanted to.[238] Also, in terms of thresholds, the model laws allow national lawmakers to determine, on their own, the thresholds below which the model laws do not apply.[239]

The long-term trends in the developments in the UNCITRAL model laws can be best identified by juxtaposing major differences of the 1994 Model Law and the 2011 Model Law. According to the 'outsiders' from the World Bank, the new elements of the 2011 Model Law more or less reflected similar developments in GPA12, the fifth generation of the EU directives and in the recent World Bank's guidelines.[240] A massive job was done in respect of electronic procurement, and aligning the procurement process to the technological advancement of the present.[241] For instance, Nicholas saw 'collating' of the general rules compared with the 1994 Model Law, among others, in (*i*) the extension of rules on confidentiality from some procurement methods to all,[242] (*ii*) covering the defence sector and seeing that various specific new procedures available under the 2011 Model Law can address the needs of the defence sector and there is no need generally to preclude the defence sector anymore,[243] or (*iii*) aligning the rules on the valuation of contracts to the GPA.[244] Also, the

[232] See: 1994 Model Law, Article 1.
[233] See: 2013 Model Law, Article 18.(c).
[234] See: ibid. Article 18. (g).
[235] See: 2011 Model Law, Article 1.
[236] See: ibid. Article 2.(j).
[237] See: ibid. Article 35.2.(c), Article 30.4.(d).
[238] See: 1994 Model Law, Article 2.(b); 2011 Model Law, Article 2.(n).
[239] See: 1994 Model Law, Article 14.2 and article 37.2; 2003 Model Law, Article 18.(b); 2011 Model Law, Article 4 along with Article 22.3.(b), Article 23.2, and Article 29.2.
[240] See: note 150 at ix.
[241] See more on e-procurement in the 2011 Model Law in: Caroline Nicholas. 'The UNCITRAL Model Law on Procurement - the current reform programme' (2006) (6) 161 at 162-165; Caroline Nicholas. 'The 2011 UNCITRAL Model Law on Public Procurement' (2012) (3) Pub Proc L Rev 111 at 111-114.
[242] See: note 241, Nicholas (2012) at 113 .
[243] See: ibid.
[244] See: ibid. Nicholas (2012) at 114.

right of lawmakers to pretty freely determine the scope of pursued socio-economic policies[245] that can be integrated into the criteria for the assessment of suppliers' qualifications[246] and of contract awards,[247] is a great novelty compared with the 1994 Model Law. Previously, the scope of allowed integration of social considerations was limited to a disqualification of potential suppliers/contractors for arrears in payments of social contributions.[248] Arrowsmith, Linarelli and Wallace explained it in a way that the 1994 Model Law had been addressed to developing countries or the post-soviet countries in transition, which were meant to primarily focus on value for money concerns instead of making attempts to pursue some horizontal goals, potentially adversely affecting the transparency and integrity of the procurement process in a time of economic transformation.[249]

4.4.2. Attitude to liberalization

UNCITRAL model laws are not neutral with regard to international liberalization. They have encouraged opening up public procurement markets and the participation by foreign suppliers/contractors.[250] The market access for foreigners has become the default rule under Article 8 of the 1994 Model Law (only slightly modified Article 8 of the 2011 Model law), reading as follows:

> Article 8. '*Participation by suppliers or contractors*
>
> *(1) Suppliers or contractors are permitted to participate in procurement proceedings* ***without regard to nationality****, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.*
>
> *(...)*
>
> *(3) The procuring entity, when* ***first soliciting*** *the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings* ***regardless of nationality****, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article,* ***it shall so declare to them****.'*

Initially, a lot of hope was pinned on these developments. For instance, Wallace, yet in 1992 (while assessing the identical language of the draft to be later adopted as the 1993 Model Law then effectively replaced by the 1994 Model Law) believed that the absence of the definition of foreigners was a "*considerable innovation for a model national law*"[251] and predicted that implementing lawmakers would need to create a separate sub-category of

[245] E.g. e-publications, electronic reverse auctions, e-signatures, etc. See: note 229.
[246] See: 2011 Model Law, Article 9(2)(a).
[247] See: ibid. Article 9(2)(b).
[248] See: 1994 Model Law, Article 5.1.b.iv).
[249] See: note 113 at 297-298.
[250] See: 1994 Model Law, Article 8; 2011 Model Law, Article 8.
[251] See: note 193 at 406.

domestic suppliers/contractors if they wanted to limit some portion of public contracts to domestic business contrary to the default rule.[252] At the same time, however, all model laws allow some forms of 'domestic procurement' precluding foreign business from competition, and leave the determination of the scope of domestic procurement to national lawmakers.[253] The 1993 Model Law, 1994 Model Law and 2011 Model Law also allow imposing price preferences on foreign goods and services.[254] In turn, the 2003 Model Law merely allows price preferences, and does not allow an absolute preclusion of foreign contractors from bidding.[255] All in all, it is a discretionary decision of implementing countries to what extent they keep to the default rule of opening public procurement markets to international competition, or deviate from it thereby keeping these markets closed.

One could ask what interest countries implementing the model laws have in liberalizing their public procurement markets when it is not simultaneously necessitated by their other simultaneous international commitments. For instance, Westring observed that implementing countries, in principle, cannot hope to get anything in exchange because the implementation of the model laws as such cannot be used by the implementing countries to drive their own exports, improve access of the implementing countries' enterprises to foreign markets, etc.[256] Indeed, implementing countries are encouraged to liberalize neither by reciprocal market access under the GPA or public procurement chapters of the RTAs nor by financing which they can get from the MDBs on condition of compliance with the MDBs' procurement rules. The relative success of the 1994 Model Law in the last two decades can be explained by the geopolitical conditions of those times.[257] The implementation of the 1994 Model Law by many countries in transition was a part of making and seeking some more complex reciprocal concessions between them on the one side and the EU/MBDs on the other. Many countries were on the tracks of a complex transformation and needed to develop new legislation on the previously non-existent public procurement from scratch just after the 1994 Model Law had been adopted.[258] Also, a number of Central-European countries were knocking at the EU's door at that time. The implementation of the 1994

[252] See: ibid.

[253] See: 1993 Model Law, Article 21; 1994 Model Law, Article 23; 2003 Model Law, footnote 12 to Model Provision no.7 at 9; 2011 Model Law, Article 2(c);

[254] See: 1993 Model Law, Article 32.4.d); 1994 Model Law, Article 34.3.b.i); 2011 Model Law, Article 11(b); Article 8.2, Article 29.1.b).

[255] See: 2003 Model Law, footnote 12 to Model Provision 7 at 9.

[256] According to Westring, the compliance with the model laws should be primarily considered as a significant factor bringing value for money to the national public procurement system of such implementing country. See: note 223 ibid.

[257] The 1994 Model Law was used by the national lawmakers in about 30 jurisdictions all over the world ranging from Poland in 1994 and other post-Soviet economies in the 1990s to Nigeria in 2007. The status of the 1994 Model Law's implementation is available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html> accessed on 13 January 2013.

[258] For the lawmakers in countries like Poland (where only the internal bylaws passed by each ministry and initially tailored for purchasing from state-owned enterprises had to square with a randomly emerging market economy) the chance to quickly incorporate a ready draft was appealing.

Model law was (*i*) the first step to the future harmonization of their public procurement systems with the EU's secondary legislation (see section 3.5), and (*ii*) the most straightforward way to demonstrate that the expected reforms were being made. Moreover, the World Bank in many cases overtly required or encouraged the use of the 1994 Model Law.[259] It is very unlikely that the 2011 Model Law can have a similar impact because similar geopolitical conditions in the 1990s and early 2010s are unlikely to happen again.

4.5 Global administrative law

A gradually emerging concept of 'global administrative law' might be a clue to embracing all the overlapping and cross-fertilizing international instruments shaping the global model of the regulation of public procurement. The concept of global administrative law was generally defined in 2005 by Kingsbury, Krisch and Stewart as "*comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make*."[260] This exactly reflects what the discussed public procurement-related instruments do. Kingsbury, Krisch and Stewart see the instruments of global administrative law, for instance, in (*i*) sanctions imposed by the UN Security Council[261] which are similar to the debarment by the World Bank from bidding for projects financed by this institution, (*ii*) the World Bank's rule-making for developing countries[262] which includes the World Bank's activity related to public procurement, or (*iii*) the setting of standards on money laundering by the OECD-affiliated intergovernmental Financial Action Task Force[263] which overlaps with the public procurement-relevant OECD Convention. Among many institutions capable of designing instruments of global administrative law, these authors also see non-governmental less formal organizations at the verge of the public and private sectors or even entirely private ones such as the International Organization for Standardization ('ISO')[264] which overlaps with public procurement in the sense that all discussed instruments prefer the use of international standards in the technical specifications, such as published by the ISO.

[259] See: Sue Arrowsmith. 'New developments in UNCITRAL: future work on public procurement and new model provisions on privately financed infrastructure projects' (2003) (6) Pub Proc L Rev 131 at 132.

[260] See: Benedict Kingsbury, Nico Krisch and Richard B. Stewart. 'The Emergence of Global Administrative Law' (2005) 68(3-4)Law & Contemp Probs 15-61 at 17; Benedict Kingsbury and Nico Krisch. 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17(1) Eur J Intl Law 1 at 1.

[261] See: note 260 (2006) 17(1) Eur J Intl Law at 2.

[262] See: ibid.

[263] See: ibid.

[264] See: ibid.

The discussed instruments of the international regulation of public procurement markets also harmonize with four out of five types of global governance as categorized by Kingsbury, Krisch and Stewart. Firstly, the activity of the GPA-related WTO bodies and the public procurement-relevant legislative activity of the EU's institutions as authorized under the Treaties falls within the concept of 'administration by formal international organizations', denominating the intergovernmental arrangement conferring the administrative powers to international organizations.[265] Secondly, the discussed cross-fertilization of instruments (co-operation and interpersonal linkages between the GATT/WTO, the EEC/EC/EU, the World Bank, the OECD, the UNCITRAL and the countries in transition) falls within the concept of the 'transnational networks and coordination arrangements,' denominating an informal decision-making process and cooperation.[266] Thirdly, the enforcement of the OECD Convention or the public procurers excluding potential suppliers/contractors for the international violations of social or environmental standards (e.g. fifth generation of the EU directives) falls within the concept of the 'distributed administration', denominating domestic authorities regulating global and/or foreign issues.[267] Fourthly the preference for the reliance on private international certification schemes or on the eco-labels in technical specifications sketched by the public procurers falls within the concept of 'hybrid intergovernmental-private administration', which denominates combining governmental and private involvement in global governance.[268] In turn, the pure 'governance by private bodies' as the fifth type of global governance[269] can hardly be seen in public markets because public procurement does not exist without public agencies. In addition, the level of detail of the procedural provisions of the discussed instruments obviously reflects Kingsbury's, Krisch's and Stewart's observation that the effective subjects of the global administrative law are more and more the private persons/entities,[270] in the sense that the role of the national lawmakers and national enforcement authorities are more and more confined to merely supervising the conduct of their private persons/entities in respect of compliance with global administrative law.[271] Indeed, the discussed instruments do not leave much to the discretion of the national lawmakers and procurers, being merely intermediaries between public procurement-related global administrative law and the private persons competing for public contracts.

[265] See: ibid. at 21.
[266] See: ibid.
[267] See: ibid. at 22.
[268] See: ibid.
[269] See: ibid.
[270] See: ibid. at 23.
[271] See: ibid.

The concept of global administrative law as defined by Kingsbury, Krisch and Stewart was incorporated by McCrudden and Gross into the discourse on public procurement in 2006. [272] McCrudden and Gross made a claim that the model of the international regulation of public procurement markets not only clearly falls within the concept of global administrative law but also serves as one of its best exemplifications.[273] They observed that despite the slightly different approaches to the international liberalization of public procurement markets, instruments like the EU's secondary legislation, the GPA, the NAFTA, and the conditions for loans granted by the MDBs all incorporate the same principles of legality, accountability and participation, without which any international regulatory regime has no legitimation.[274]

4.6 Conclusion

The highlight of this chapter is that the model of the regulation of public procurement shaped by the WTO and EU has been spread into RTAs and public procurement-related instruments of major international organizations (the World Bank, other MDBs the OECD and UNCITRAL), informally cooperating with each other, leading to a coherent regulatory model, which also includes a coordinated recent legitimization of the integration of social and environmental consideration under the majority of these instruments.

[272] See: Christopher McCrudden and Stuart G. Gross. 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study' (2006) 17(1) Eur J Intl Law 151.
[273] See: ibid. at 152.
[274] See: ibid.

III. CONCEPTUALIZATION

Chapter 5. Revisiting horizontal policies

This chapter is the first one of two conceptualizing the notion of cross-border horizontal policies in public procurement, which can be roughly defined as policies adversely affecting foreign (exterritorial) business by interfering in/distorting the foreign regulatory environment, and often specifically targeting foreign business operators. The purpose of this chapter is to revisit a wider concept of horizontal policies in public procurement - the pursuance of which means to use the purchasing power for objectives unconnected with its main purpose (purchasing)[1] - put forward and crystallized by Sue Arrowsmith, upon which the concept of cross-border horizontal policies draws. This chapter starts by explaining the origin of the term 'horizontal policy' (section 5.1). Then it moves to reviewing links of horizontal policies' goals with sustainability concerns (section 5.2), resolving some terminological ambiguities (section 5.3), offering some historical perspectives on the pursuit of horizontal policies (section 5.4) and revising Arrowsmith's taxonomy of horizontal policies (see section 5.5).

5.1 A horizontal or secondary policy?

What now is known in literature - thanks to Arrowsmith - as horizontal policies in public procurement, faced a great terminological shift in the first decade of the 21st century. Prior to that, the phenomenon used to be commonly referred to as 'secondary policies',[2] or 'collateral policies' stateside.[3] The core definition of the phenomenon can often be formulated as "*using procurement power for objective unconnected with this main purpose*,"[4] or in many similar ways. The core of the definition has remained in place. However, the views have changed on whether it is really the 'primary' purpose of public procurement to buy goods/services necessary for discharging public functions, and in parallel, more general policies are only 'secondary' or 'collateral'. Arrowsmith at some point made a claim against referring to secondary policies, that secondary policies in public procurement have never been secondary because governmental agencies neither always buy to primarily perform their basic functions nor only secondarily pay attention to some wider industrial, green or social policy goals .[5] Say, an agency responsible for the road infrastructure schedules a bridge modernization ahead of a technically justifiable

[1] See: Sue Arrowsmith, '*Government procurement in the WTO*' (Studies in transnational economic law, Kluwer Law International, The Hague 2003) xxiii, 481. at 325.

[2] See: ibid

[3] See: ibid. footnote 4 at 325.

[4] See: ibid. at 325.

[5] Similarly: Sue Arrowsmith, *The law of public and utilities procurement* (2nd edn Sweet & Maxwell, London 2005) 1547 footnote 1 at 1225.

timetable. Such agency does so to stimulate the local entrepreneurship and to improve the local employment rate in the first place, not because the new infrastructure is immediately necessary. In such a case, the primary goal of the procurement project is to advance some industrial and social goals overlapping with each other, not the new bridge itself. Or say, all governmental agencies within a given jurisdiction (that have various objectives) are required to improve the energy performance of buildings in their possession. To achieve this goal, the agencies need to replace central heating systems. In many instances, the replacement is not commercially viable but there is a strong domestic sector of energy-efficient-heating-solution lobbying for this massive purchase to take place. In such a case, the primary goal of procurement is to pursue overlapping industrial and environmental policies.[6]

Therefore, instead, Arrowsmith proposed that a situation can be referred to as the pursuance of 'horizontal' policies in public procurement when public procurers advance - through public purchases - the goals of more general public policies, and these policies go beyond particular basic functions of particular public procurers.[7] However, in many instances, it is impossible to assess what the 'primary' or the 'secondary/collateral' goal of every single public contract is, or to differentiate between specific functions of a given governmental agency and wider policy goals. Firstly, some public procurers have much more responsibilities in respect of some general policy goals than others. Say, it would be controversial to claim that policies accommodated in the purchases by, for instance, the US Defence Advanced Research Projects Agency ('DARPA') or any similar agency (established to both buy military equipment and to stimulate domestic innovative industries by generating a demand for military-purpose solutions which then can be commercialized in non-military sectors) are not horizontal because stimulating the growth of innovative industries is the very basic function of DARPA or of similar agencies. Secondly, Arrowsmith generally observed that the overall public expenditure decisions are always shaped by microeconomic considerations and by overall budgetary constraints.[8] If so, one could even make a claim that all public purchases are always secondary to some general public policies and functions. Whether policies applied to a particular purchase fall within the basic functions of a particular purchasing agency might not actually matter because it is just a matter of some public policy what the public functions of this agency are anyway. Thirdly, this distinction is immaterial from the perspective of governments of third countries trying to assess if the

[6] See: ibid.

[7] See: Sue Arrowsmith and Peter F. Kunzlik, 'Social and environmental policies in EC procurement law: General Principles' in Sue Arrowsmith and Peter F. Kunzlik (eds), *Social and environmental policies in EC procurement law: new directives and new directions* (Cambridge University Press, Cambridge 2009) 9 at 13.

[8] See: note 5 ibid.

incorporation of various non-commercial considerations into the public procurement process leads to discrimination against their businesses. From this perspective, it does not matter to what extent some protectionist policies channelled through public procurement are or are not in line with the basic goals of particular public procurers.[9] Nonetheless, in most cases, it is pretty clear which activities and decisions of public procurers are strictly connected with procurement and which are not, falling within the concept of horizontal policies.

The notion of horizontal policies is conceptually demanding at first sight and it will be further clarified. It has gradually prevailed over the notion of secondary policies because it has proved to be flexible enough to escape the question of whether the chicken or the egg came first. Alternative terms as 'linkages' between public procurement and other policies proposed by McCrudden,[10] or 'instrumental functions' of public procurement proposed by Fernández Martín[11] can be used interchangeably with horizontal policies. However, they do not escape the same conceptual challenges and they have not gained so much popularity and as many followers as horizontal policies.

5.2 Horizontal policies and sustainability

Public policy goals determine the goals of horizontal policies and can be classified into overlapping industrial/economic, social and environmental policy segments. However, the discourse on horizontal policies seems to have abandoned purely industrial/economic goals as it has been overshadowed by sustainability concerns, and green and social policies have attracted much more attention as an independent subject of research in the literature than purely industrial/economic policies. In the context limited to social and green policies, Arrowsmith and Kunzlik proposed that horizontal policies can be defined as "*the phenomenon whereby public procurement is used to promote social, environmental and other social objectives that are no inherently necessary to achieving the functional objectives of a specific procurement, but which the procuring body chooses, or is required to advance in the context of its procurement*

[9] Pretty obviously, what matters from the viewpoint of other governments potentially negotiating mutual concession on the liberalization of the access to public procurement markets, and of a foreign business potentially adversely affected by protectionist measures, is whether a given country's policies channelled through public procurement are protectionist in nature, or are not. The distinction between general policy goals and functions of specific public agencies seems to be a tool for analysing horizontal policies from an internal perspective only.

[10] See: Christopher McCrudden, 'EC public procurement law and equality linkages: foundations for interpretations' in Sue Arrowsmith and Peter F. Kunzlik (eds), *Social and environmental policies in EC procurement law: new directives and new directions* (Cambridge University Press, Cambridge 2009) 271 at 271.

[11] See: José Maria Fernández Martin, *The EC public procurement rules* (Clarendon Press; Oxford University Press, Oxford 1996) xxxi, 321 p. at 46.

contracts." [12] Also McCrudden's notion of 'linkages' might theoretically cover industrial/economic policies (economic linkages) but linkages have been predominantly used by this author to discuss social, equality and non-discrimination-related matters in public procurement. On top of that, some terms like contract compliance defined by Bovis as *"the range of secondary policies relevant to public procurement which aim at combating discrimination on grounds of sex, race, religion or disability*"[13] have been clearly designed not to embrace industrial/economic considerations.

Also, some sustainability-specific terms concurring with the notion of horizontal policies have been widely accepted. For example the notion 'sustainable public procurement' ('SPP') is very attractive, and catchy. It might widely cover all three segments, that is, industrial/economic, social and green issues. It was so widely defined, for instance, by the UK's Department for Environment, Food and Rural Affair (DEFRA) as "*a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment*."[14] But SPP can also be construed very narrowly as being confined to 'green public procurement' only ('GPP'), defined, for example, "*as a promising method to promote environmentally sound product design and motivate manufacturers to make products with reduced environmental impacts*," [15] leaving industrial/economic goals uncovered. A moderate approach is also possible, under which some industrial policies might fall within the concept of SPP, and some clearly do not. We may have a look at, for instance, Kahn's classification of domestic preferences in public procurement that have some economic dimension. According to him, economically-driven domestic preferences, among others, include *(i)* preferences for contracts performed by nationals of the procuring authority, *(ii)* preferences for contracts only partly performed by foreign nationals *(iii)* national regional preferences *(iv)* preferences granted to firms according to other criteria such as ethnic minorities, beginning entrepreneurs, the disabled, etc.[16] One can barely see any sustainability involved in the two first categories and only some limited sustainability in the third category (the concern about sustainable territorial development. However, not all economic/industrial

[12] See: note 7 at 12.

[13] See: Christopher Bovis, 'EU public procurement law' in *Elgar European law* (Edward Elgar, Cheltenham 2007) 488 at 454.

[14] See: DEFRA, 'Procuring the Future Sustainable Procurement National Action Plan: Recommendations from the Sustainable Procurement Task Force' (JUNE 2006) PB 11710 at 10; see also: Stephen Brammer and Helen Walker. 'Sustainable procurement in the public sector: an international comparative study' (2011) 31(4) Intl J Oper Prod Manag 452-476 at 454.

[15] See: Katriina Parikka-Alhola. 'Promoting environmentally sound furniture by green public procurement' (2008) 68(1–2) Ecol Econ 472 at 472.

[16] See: Stephen Kahn, 'Problems of Industrial Policy in High-Technology Collaborative Procurement' in Sue Arrowsmith and Arwel Davies (eds), *Public procurement: global revolution* (Kluwer Law International, London 1998) 241at 243.

policies are inherently non-sustainable. They just need to overlap with green or social goals in order to clearly qualify as SPP. For instance, preferences for the SMEs are usually deemed to have not only economic but also a social dimension, incorporating preferences for disadvantaged groups, minorities, etc., who run the SMEs. Analogically, modern industrial policies might be merely focused on industrial innovation or the promotion of related research,[17] but nowadays everybody wants to see a green innovation or a social innovation.

Figure 15. Horizontal policies *versus* SPP.

	industrial	green	social
Horizontal policies	any industrial	any green	any social
SPP	social and green innovation	any green	any social

Nonetheless, confining the discussion on the problem of horizontal policies in its entirety to SPP would run the risk of the discussion on horizontal policies being incomplete because incorporation of non-commercial considerations into public procurement obviously does not always imply that any sustainability is involved at all. Indeed, as mentioned, horizontal policies incorporate three segments of public policy, that is, industrial, social, and environmental goals whereas SPP identically incorporates social and green concerns but leaves unsustainable goals uncovered. Altogether, the notion of SPP is a good indication of what general public policy goals are primarily pursued in public procurement markets nowadays and it might constitute some close alternative to the concept of horizontal policies but it cannot be used interchangeably.

5.3 Economic versus commercial considerations

There is a lot of confusion as to the proper use of terms such as 'economic'/'non-economic' and 'commercial'/'non-commercial' considerations in public procurement when speaking of the notion of 'industrial'/'economic' policies in public procurement, which does not help to classify horizontal policies in a consistent manner. Green and social considerations have been referred to by some authors as 'non-economic' considerations whereby 'economic' considerations meant seeking the best value for money, that is, the acceptance of the lowest or of the most economically advantageous bids, in other words meaning spending as little money as possible.[18] In this case, no terminological space is left for the series of macro-economic/industrial policies,

[17] Actually it can be claimed that the modern industrial/economic policy comes down to the stimulation of innovation. Kelly in the 1970s with regard to US military and space-related public procurement made a claim that: "*[t]The correlation between research and development effort and the nation's technological health is so plain that few would dispute the propriety of a public policy to promote its procurement.*" See: Michael S. Kelly. 'Independent Research and Development: The First Twenty-Five Years' (1974-1975) 7 Pub Cont L J 81 at 81.

[18] See: Simon E. Hjelmborg, Peter Jakobsen and Sune Troels Poulsen, *Public procurement law: the EU directive on public contracts* (Djøf Pub., Copenhagen 2006) 450 at 202-203.

for which the best value for money is not the primary concern, such as preferences for domestic SMEs. If such policies are correctly referred to as 'economic,' then the considerations taken into account by the public procurers while pursuing such 'economic' policies cannot be referred to as 'non-economic', and some other term needs to be used instead to denominate seeking or not seeking the best value for money, may it be 'commercial' or 'non-commercial' considerations. So, for the sake of consistency, let's accept that 'commercial' considerations shall determine the best value for money-related considerations, and 'economic' policies shall determine macro-economic/industrial goals.

5.4 Deceptive novelty

The terminological developments made since the 1990s such as the shift toward sustainability, or the shift from 'secondary' to 'horizontal' seem to more reflect the dynamism in public procurement-related legal theory than the actual change, if any, in the public policies channelled through public procurement. Referring to sustainability and to social as well as green considerations might be attractive and politically correct but also it deceptively suggests some genuine novelty of horizontal policies. The magnitude of papers written on the subject, especially after the 1990s, take it for granted that public procurement has most recently started to be used for advancing social and environmental and other non-commercial considerations, as if it had not been done so long before. Nothing can be more wrong. McCrudden, already in the late 1990s, referred to non-commercial considerations in public procurement - as divided by Fernández Martín[19,20] into seven overlapping 'traditional' policy goals such as (*i*) protecting national security, (*ii*) stimulating domestic economic activities in particular industries, (*iii*) protecting domestic economic activities, in particular, industries of the economy, (*iv*) protecting national industry against foreign competition, (*v*) curing regional disparities within a given country, (*vi*) improving environmental conditions, and (*vii*) defending human rights and employment-related standards nationally or internationally - as already historic, perhaps except for the then relatively new social and green considerations.[21]

However, thanks to McCrudden's research we also know about preferences in public procurement for disabled ex-soldiers, introduced as early as just after WW1 in the UK,[22] about

[19] See: note 11.

[20] See: Christopher McCrudden, 'Social Policy Issues in Public Procurement: A legal Overview' in Sue Arrowsmith and Arwel Davies (eds), *Public procurement :global revolution* (Kluwer Law International, London 1998) 219 at 219.

[21] See: ibid.

[22] See: Christopher McCrudden, *Buying social justice :equality, government procurement, and legal change* (Oxford University Press, Oxford 2007) 680 at 4.

fair wages to be paid by contractors employing people for the purposes of performing public contracts even as early as 1868 in the US[23] and as early as 1894 in the UK.[24] Also within the framework of the International Labour Organization ('ILO'), public procurement (then referred to as 'public works') was seen in the *inter-bellum* period as the major tool for combating the then unemployment, meaning that public procurement was already being used instrumentally to achieve social goals.[25] Moreover, the ILO's Convention on the Reduction of Hours of Work which covered "*persons directly employed on building or civil engineering works financed or subsidised by central Government*" was adopted as early as 1936.[26] If matters were to be reduced to absurdity, for instance, socio-economic policies could be traced back to the construction of the Pyramids in ancient Egypt which had given employment to slaves.[27] The conviction about the socio-economic role of public procurement, like for example affording protection to infant industries, was so strong among the parties negotiating GPA79 that some delegations did not see any sense in negotiating that agreement if derogations from purely commercial considerations in public procurement were to be abolished completely,[28] while other delegations saw the postulate to completely abolish such derogations as highly unrealistic.[29] Similarly, combatting racial, gender and other discrimination via public procurement is not a new conception, given that, for example in the US, a ban on racial discrimination in public works was first introduced by Roosevelt's administration in 1940.[30]

The timeline does not look much different when it comes down to policies aiming at stimulating research and innovation. Especially if one looks again at the US, independent contractors were employed to develop military technology with the hope of its subsequent wider commercial application in the domestic industries already in the late 1950s.[31] In the 1960s, scholars already were taking such approach for granted and addressed the resulting problems. For example, Flint discussed indirect support of research and development '(R&D') through partial reimbursement

[23] See: ibid. at 38.

[24] See: ibid. at 44.

[25] See: International Labour Office, 'Report of the Director to the International Labour Conference' (1921) Third Session, point 177(5) at 128; see also: note 22 at 55.

[26] See: International Labour Organization, Reduction of Hours of Work (Public Works) (signed at Geneva on 23 June 1936, never in force, withdrawn 30 May 2000.) Convention No. 51, article 1(1).

[27] See: note 22 at 31.

[28] See: GATT, Multilateral Trade Negotiations - Group "Non-Tariff Measures, 'Checklist of Points Summarizing Views on Specific Issues in the Area of Government Procurement. Note by the secretariat' GATT Secretariat (Geneva 22 April 1977) MTN/NTM/W/96 point F.38 1st *tiret* at 14.

[29] See: ibid. point F.38 3rd *tiret* at 14.

[30] See: Christopher R. Noon. 'The Use of Racial Preferences in Public Procurement for Social Stability' (2008-2009) 38(2) Pub Cont L J 611 at 613.

[31] For instance with regard to NASA's procurement of research and spin-off commercial projects, see generally: Henry R. Hertzfeld. 'Measuring the Economic Returns from Successful NASA Life Sciences Technology Transfers' (2002) 27(4) J Tech Transf 311 at 311.

of a contractor's independent R&D activities,[32] and Ginsburg discussed the risk-allocation between government and public contractors involved in inherently dangerous research (e.g. rocket propulsion)[33] among many other related issues. Thus already in the 1960s the debate in the literature was more focused on how to pursue such economic policies rather than whether to pursue them at all.

Admittedly, firm use of public procurement to protect the environment cannot be traced that far back but it still originates in pretty remote times. In the US, on the one hand, federal environmental provisions specifically pertaining to the public procurement sector were not passed until Clinton's executive orders of 1993[34] and subsequently of 1998,[35] mandating respectively a waste prevention and recycling promotion. On the other hand, however, in the US of the 1970s, construction projects - to the extent they were procured by public bodies - were already seen as a tool for bringing about more contract compliance with the then new generally applicable environmental requirements imposed on the construction sector.[36] Among the OECD members, in 2012, 72 per cent of them had strategies adopted at their central levels to support GPP.[37] For instance the use of eco-labelling schemes in public procurement among the OECD members can be traced back to the 1980s in the case of Japan, and even to 1978 in the case of Germany when the 'Blue Angel' was introduced as the first eco-label in history.[38] Outside the OECD, there are the followers too, with China taking the cake. The Chinese government has been the world's largest investor in green technologies since 2011.[39] It introduced the first secondary legislation specifically tailored for GPP in 2004.[40] Similarly to former green leaders from the Western World, prior to the invention of the GPP concept, Chinese legislators took

[32] See: Richard N. Flint. 'Independent Research and Development Expenditures: A Study of the Government Contract as an Instrument of Public Policy' (1964) 29 (2) Law Contemp Probl 2 611 at 611.

[33] See generally: Gilbert J. Ginsburg. 'Allocation of Risk: Contractor Responsibility for Injury to Government Property and to Third Parties Under Supply and R&D Contracts' (1968-1969) (2) Pub Cont L J 333.

[34] See: Executive Order 12873 of 20 October 1993 on Federal Acquisition, Recycling, and Waste Prevention, 1993 29 WCPD 2115 Sec 102.

[35] See: Executive Order 13101 of 14 September 1998 on Greening the Government through Waste Prevention, Recycling, and Federal Acquisition 1998 49643 federal register vol. 63, no. 179 Sec. 102; see also generally: Jennifer McCadney. 'The Green Society? Leveraging the Government's Buying Powers to Create Markets for Recycled Products' (1999-2000) 29(1) Pub Cont L J 135.

[36] See: Michael S. Baram. 'Environmental Law and Construction Project Management' (1973-1974) (6) Pub Cont L J 210, footnote 4 at 210-211.

[37] See: OECD, 'Mapping out good practices for promoting green public procurement: OECD meeting of Leading Practitioners on Public Procurement' (Paris 11-12 February 2013) GOV/PGC/ETH(2013)3 at 4.

[38] See: Amalia Ochoa, Vivien Führ and Dirk Günther, 'Green purchasing in practice: experiences and new approaches from the pioneer countries' in Christoph Erdmenger (ed), *Buying into the environment: experiences, opportunities and potential for eco-procurement* (Greenleaf, Sheffield 2003) 20 at 21.

[39] See: note 37 box 1 at 5.

[40] Geng and Doberstein mentioned a regulation jointly adopted by two ministries at the end of 2004 mandating all governmental agencies (at national, provincial and local level) to prioritize energy-saving products in their public procurement from January 2005. See: Yong Geng and Brent Doberstein, 'Greening Government Procurement in Developing Countries: Building Capacity in China' (2008) 88(4) J Environ Manage 932 at 934.

some general environmentally-oriented actions that might have been applied to both the private sector and to public procurement markets, for instance by introducing an environmental labelling programme in 1993, responding upfront to the postulates of GPP.[41] This was only one year after the EC eco-label had been set up in the then EC by the community lawmaker.[42] That is all to say that there is absolutely nothing novel about the phenomenon of taking into account the non-commercial considerations in public purchases. There might be some dynamism in the goals toward more sustainability over recent decades but there is much more dynamism in how the phenomenon is presented in the literature.

5.5 Taxonomy revisited

Despite the fact that horizontal policies are a longstanding phenomenon rather than a contemporary and short-lived trend in public procurement of today, the problem of channelling various public policies through public procurement, resulting in the integration of various non-commercial considerations into the procurement process, had not been systematically approached until in 2009 when Arrowsmith - along with the concept of horizontal policies - also proposed a 'taxonomy' of horizontal policies.[43] While it is the most complex classification available in the literature, it can still be augmented with (*i*) differentiating horizontal policies stemming from general laws and public procurement-specific laws, (*ii*) differentiating horizontal policies stemming from mandatory laws, facultative laws and legal silence, and (*iii*) operationalizing this taxonomy also with examples of firm industrial non-sustainable policies.

5.5.1. Mere legal compliance *versus* requiring more

Figure 16. Mere legal compliance *versus* requiring more.

level of discretion:	mandatory horizontal policies		facultative horizontal policies		discretionary horizontal policies
type regulation	generally applicable laws	Public procurement-specific laws	generally applicable laws	Public procurement-specific laws	no regulation
contractual clauses necessary?	no		yes		

Firstly, horizontal policies can be limited to compliance with legal requirements of general application and policies that go beyond this, by requiring more. Arrowsmith made this

[41] See: ibid. at 935.

[42] See: Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme, OJ [1992] L 099, p 1-7.

[43] See: generally: Sue Arrowsmith, 'A Taxonomy of Horizontal Policies' in Sue Arrowsmith and Peter F. Kunzlik (eds), *Social and environmental policies in EC procurement law: new directives and new directions* (Cambridge University Press, Cambridge 2009) 108.

distinction with respect to the level of contractual clauses imposed by procurers,[44] exemplifying this distinction with a procurer that (*i*) requires contractors to pay at least minimum wages to contractors' employees, or (*ii*) requires contractors to pay fair wages, that is, to pay more than what is required by minimum wage laws.[45] The *prima facie* doubtful sense of repeating general legal requirements, like imposing minimum wage laws, applicable to labour contracts anyway, has been explained by Arrowsmith, among others (*i*) with the 'image-concern' of public procurers fearing being linked with law violations committed by the contractors against their employees,[46] (*ii*) as a supplementary enforcement tool of generally applicable requirements, particularly when contractual clauses also include additional contractual penalties for non-compliance,[47] and (*iii*) as a countermeasure against unfair competition consisting in underpaying employees, social dumping, tax dumping, etc.[48]

However, the distinction between horizontal policies limited to compliance with legal requirements of general application and policies that go beyond that by requiring more could first be made at the legislative level. Legal requirements of general application would include, for example, the mentioned American construction provisions from the 1970s, China's or the EU's non-public procurement-specific frameworks for the use of eco-labels (see section 5.4), or car-emissions norms which apply to all cars, including cars sold to public agencies. Such general legal requirements are relevant for the public procurement sector to the extent that public agencies buy goods or services affected by such general regulations. They might be mandatory such as provisions related to construction or car emissions or facultative as provisions facilitating the use of eco-labels. In turn, legal requirements which go beyond general legal requirements, in other words, could be referred to as public procurement-specific-requirement legal requirements, and also can be mandatory or facultative. Mandatory policies that go beyond general legal requirements are rare and can be exemplified by Directive 2009/33 on the promotion of clean and energy-efficient road transport vehicles of 2009,[49] specifically tailored for the public procurement sector. The public procurement-specific Directive 2009/33 mandates crediting

[44] Arrowsmith 'bypassed' this distinction by observing that "*[w]~~W~~e include in the present category of the taxonomy, however, only measures supporting norms that apply to all firms in a comparable position, rather than just government contractors. This is done for several reasons, including for convenience of exposition, since in the vast majority of cases procurement policies relating to compliance with legal norms relate to norms of general application and because, from a constitutional perspective, implementing norms only for government contractors presents more features in common with other policies discussed below, as regulatory strategy that focuses solely on public procurement*". See: ibid. at 111.

[45] See: ibid. at 109.

[46] See: ibid. at 112.

[47] See: ibid. at 112.

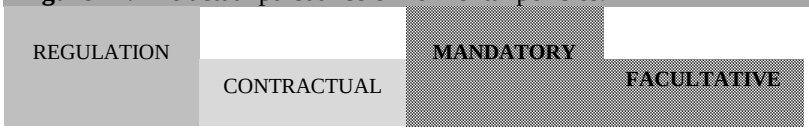
[48] If there are some ways to circumvent minimum wage laws, contractual clauses should prevent it. See: ibid. at 112.

[49] See: Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles, OJ [2009] L 120, p. 5-12.

better environmental performance of vehicles purchased by public procurers than required under general emission standards.

Policies that go beyond general legal requirements are in principle facultative as they only provide procurers with an option to pursue some policy. Say in a country [x] there is no minimum wage, or the minimum wage laws are easy to circumvent, e.g. by entering into alternative agreements which formally are not employment contracts therefore affording less protection to employees. As a countermeasure, the lawmaker of country [x] can give a firm green light to public procurers to impose procurer-specific or even contract-specific minimum wages on their contractors. Similarly, public procurers might be encouraged by the lawmaker to require their contractors/suppliers to provide eco-labels, on top of generally applicable norms creating a framework for the use of eco-labels which can be applied to both private and public procurement markets. For instance, in the EU, such public procurement-specific norms were first implemented in the fourth generation of public procurement directives of 2004 (see section 3.2.4) on top of the generally available legal framework for the use of community eco-labels brought about by the then EEC lawmaker already in 1992 (see section 5.4). The sense of passing public procurement-specific facultative laws stems from the fact that public procurers might not be prone to taking some discretionary actions without a lawmaker giving a firm green light to do so. Say, in a country [y] there has been some legislative recognition/framework of social labels confirming, among others, that one's contractors/suppliers (also subcontractors, sub-suppliers) have to pay their employees more than a statutory minimum. Eco-labels have been widely used in the private sector but public administration - in clerical fear of being accused of the abuse of authority - has been very reluctant to use this option with the lack of a specific provision covering public administration (in the lack of a firm green light for the application of non-commercial considerations in public procurement). Seeing this, after a few years, the lawmaker of country [y] passes a public procurement-specific provision giving public administration a green light with regard to requiring social labels.[50]

Figure 17. The actual pursuance of horizontal policies.



[50] The clerical fear of discretion would vary from, civil-law jurisdictions puristically observing the principle of legality of actions taken by public administration (French: *principe de légalité*, Italian: *principio di legalità*, German: *Legalitätsprinzip;* however, although the principle of legality primarily comes from Germanic civil-law traditions, in German language, except for Switzerland, the literally equivalent term of Legalitätsprinzip is only used in the different/penal law context) to local authorities in the Anglo-Saxon jurisdictions where a high flexibility, pragmatism and a wide discretion seem to more rule the conduct of public administration than the strict letter of the law.

It follows that at the level of contractual clauses, public procurers can integrate horizontal policies into the public procurement process in three ways (see **Figure 16**). Firstly, under the lack of regulation, they can discretionarily impose contractual obligations which are neither firmly allowed nor firmly outlawed ('discretionary horizontal policies'). Secondly, they can impose contractual obligations which are encouraged but not mandated by either laws of general application or public procurement-specific laws ('facultative horizontal policies'). Thirdly, they can repeat mandatory provisions of laws of general application or of public procurement-specific laws as contractual obligations ('mandatory horizontal policies'). Which policies are actually pursued by public procurers or not[51] must be read in: (*i*) mandatory laws of general application, or in mandatory public procurement-specific laws, that might, but not need to be accompanied with contractual repetitive clauses, (*ii*) facultative laws of general application, or in mandatory public procurement-specific laws, that need to be accompanied with contractual clauses, (*iii*) contractual clauses imposed by procurers without any specific legal basis in the case of legislative silence (see **Figure 17**).

Both levels of analysis are complementary because separately they are flawed. The distinction made at the legislative level works well for analysing mandatory horizontal policies as it can easily be read in mandatory provisions which horizontal policies are actually pursued in public procurement without having to analyse particular contractual clauses (subject to possible non-compliance with mandatory laws in practice).[52] But it ignores policies pursued by public procurers at the level of contractual clauses as a result of legislative silence. In turn, the distinction made at the level of contractual clauses works well for analysing facultative and discretionary horizontal policies whereby contractual clauses are the evidence of whether specific horizontal policies are actually pursued or not. However, it does not give a clear answer if the policies pursued by procurers at the level of contractual clauses originate (*i*) from facultative provisions or legislative silence, or (*ii*) from general legal requirements or from

[51] The actual pursuance of horizontal policies seems to be much more relevant, than whether some anyway-applicable provisions are repeated as contract clauses in particular public contracts or not. Contractual clauses repeating mandatory provisions are at best some evidence of the compliance of procurers with such provisions. This phenomenon could be very interesting merely from the perspective of internal policy, domestic legal nuances and procurer-supplier relations. The actual scale of the pursuance of horizontal policies in a given country's public procurement markets is crucial not only from the perspective of domestic public policy but also from the perspective of international trade and of a given country's trading partners, trying to assess the scale of protectionist practices in a given country's public procurement markets.

[52] See: ibid.

public procurement-specific requirements going beyond. It matters, because these are very good indicators of where to look for contractual clauses accommodating horizontal policies. For example, we are more likely to see public procurers imposing contractual clauses requiring eco-labelling in a jurisdiction in which there exists some general framework of using eco-labels (in both private and public markets) than in a jurisdiction in which it is absent. But we are even more likely to see such contractual clauses in a jurisdiction in which public procurement-specific norms allow the imposition of such contract clauses.

5.5.2. Mere performance of the public contract and going beyond

Secondly, according to Arrowsmith, horizontal policies can be confined to the performance of the awarded public contract or can go beyond the performance of a particular contract. For example, the mentioned Directive 2009/33 on purchasing vehicles in the public sector *in effectu* mandates Members States to pass legislation preferring electric or hybrid vehicles because of their lower emissions compared to conventional vehicles. This is an example of a policy confined to contract performance. Directive 2009/33 does not allow precluding car dealers because car dealers themselves use thirsty supercars, which would be a requirement going beyond the performance of the contract (car supply). As far as the wages example used by Arrowsmith is concerned, suppose that a procurer needs to outsource security services for the premises that it possesses. If a procurer requires that its contractor providing security services shall pay specific hourly rates only to guard staff working upon the procurer's premises, then such social horizontal policy is confined to contract performance. If, however, the procurer only considers bids submitted by contractors that pay specific hourly rates to all their employees (or at least to all their licensed guard staff), such social horizontal policy goes beyond contract performance. Actually, the number of ways in which horizontal policies can go beyond contract performance is infinite. Requirements going beyond performance of the contract could be exemplified with the South African so-called 'black economic empowerment' ('BEE') policies, giving preferences to procurement based on criteria not related to contract performance such as suppliers'/contractors' ownership structure, that should mostly be made of so-called 'historically disadvantages individuals' ('HDI').[53] They can also be seen in preclusions of suppliers from bidding based on, say, criminal record or previous convictions in the area of environmental laws' violations whereby the previous wrongdoing cannot be tightly linked to the performance of the new contract being awarded.

[53] See generally: Phoebe Bolton and Geo Quinot, 'Social Policies in Procurement and the Agreement on government Procurement: A perspective from South Africa' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 459.

This distinction somewhat overlaps the distinction between so-called 'product-related' requirements and 'process-related' requirements. Policies confined to the performance of a contract typically employ 'product-related' requirements, meaning the characteristics of final products sold to the procurers such as mileage or emissions of a given vehicle. In turn, when public procurers pursue some horizontal policies by determining the characteristic of goods/services being ordered by specific production methods, also referred to as a 'process-related' requirement, such policies are very likely to go beyond the performance of contracts but it is not always clear-cut. Say, a public procurer wants to interfere with wages paid to a supplier's production workers for assembling goods later supplied to this public procurer. In such a case the procurer's policy on wages goes beyond the performance of this specific supply contract unless the whole production output produced at wages required by this procurer is supplied to this procurer. However, it is very unlikely that it would be commercially viable for the producers to keep a separate production line, or separate groups of workers for the purposes of specific public contracts, or to apportion the time spent by their employees on performing specific contracts in order to *pro rata* adjust their wages. Similarly, public procurers might pay attention to the adverse impact of the production of batteries mantled in hybrid/electric vehicles on the environment, e.g. by crediting vehicle producers for implementing some environmentally friendly battery disposal schemes, etc. But for car producers it would not be commercially viable to implement measures diminishing the adverse environmental impact of batteries' production only in respect of vehicles sold to the public sector, not to mention single sales to specific procurers. The same applies to long-lasting policies of requiring that purchased timber is logged in conformity with environmentally friendly wood-logging methods which is usually certified with eco-labels. The *prima facie* sense of requiring that timber used for governmental purposes bears eco-labels is to assure that the particular timber being purchased has been logged following some rules of sustainable exploitation of forest resources, at first glance suggesting that sustainable timber policies are confined to contract performance. However, it cannot be commercially viable for one enterprise logging timber to operate under two parallel and distinct logging methods proportionally to the demand from procurers that require eco-labelling and those that do not. If, as a result of strong demand from public procurers requiring eco-labels, a given logging enterprise decides to wholly subject itself to some logging certification schemes, then such environmental horizontal policy clearly goes beyond the performance of the public contract. However, if a given logging enterprise decides so as a result of combined demand generated by both public and private actors, such situation is perhaps impossible to classify.

5.5.3. Phases of application

Thirdly, very briefly and without my personal judgement, horizontal policies can be classified according to Arrowsmith based on in which phase of procurement these policies are applied, that is (*i*) the decision to purchase or not purchase, (*ii*) the decision on what to purchase, (*iii*) contractual obligations imposed by public procurers on purchasers, (*iv*) packaging and timing of orders, (*v*) set-asides, (*vi*) exclusion from contracts for non-compliance with government policies, (*vii*) preference for inviting firms to tenders, (*viii*) award criteria, and (*ix*) measures of improving access to government contracts.[54]

5.5.4. Substantive classification

The greatest advantage of Arrowsmith's taxonomy over other classifications lies in that it is based on formal criteria, whereas other classifications, that are meant to allow approaching horizontal policies in a systematic way, are based on substantive criteria such as the content of particular policies, pursued goals, etc. In contrast to Arrowsmith's taxonomy these are more typologies, what could be seen in the discussed classification of traditional public procurement-related overlapping policy goals proposed by Fernández Martin (in section 5.4), or my attempt to classify horizontal policies in public procurement into overlapping economic, environmental and social segments (in section 5.2).

Also Trepte's classification of ways in which public procurement can be 'instrumentally' used is more a typology than taxonomy.[55] According to this author, the 'strategic' policies denominate an instrumental use of public procurement to stimulate national economies at the macro-scale, for example by turning on or cutting the public money for the projects realized through public procurement,[56] or by engaging public procurement to stimulate activities related to R&D work instead of stimulating innovation by awarding direct research grants.[57] The 'protective' policies denominate shielding domestic suppliers and products against foreign competition in the context of globalized trade.[58] Protective policies could include preferences for domestic businesses from underdeveloped regions[59] or infant industries,[60] buy-national laws or informal protectionist

[54] See: note 43 at 127.

[55] See: Peter-Armin Trepte, 'Regulating procurement: understanding the ends and means of public procurement regulation' in (Oxford University Press, New York 2004) 411 at 139-175.

[56] See: ibid. at 139-143.

[57] See: ibid. at 148.

[58] See: ibid. at 152.

[59] See: ibid. at 153.

[60] See: ibid. at 154.

policies,[61] details as to rules of origin of procured goods,[62] price preferences[63] and even subsidies.[64] Finally, according to Trepte, 'proactive' policies are meant to cover all social issues, including support for small business, the enhancement of employees' rights, preferences for business owned by disadvantaged individuals and environmental concerns.[65] Indeed there are many overlaps between the three categories. For instance the support for R&D via public purchases easily falls within all of them. Without doubt, investing in R&D and the resulting innovation is 'strategic.' However, it is also 'protective' to the extent that the support for R&D can be associated with protecting infant domestic innovative industries shielded against international competition and 'proactive' to the extent that the support for R&D can be associated with helping small businesses to surpass market entry barriers. Simply put, a king's ransom is owed to whoever taxonomises horizontal policies based on substantive criteria.

5.5.5. Integrating economic policies

While reviewing the taxonomy of horizontal policies, it is also worth trying to integrate firmly industrial/economic/protective and unsustainable policies into this framework which has been overshadowed by sustainability concerns and operationalized with examples of policies that always have some social or environmental tint like the constantly repeated hypotheticals about fair wages, or car emissions (as discussed in section 5.2). In fact, all economic policies can also be accommodated within this conceptual framework.

Figure 18. Classifying purely economic policies as horizontal policies.

	General tariffs	Price penalties
Policies confined to general legal requirements (legislative level)	Yes	No
Public procurement-specific legislation	No	Yes
Policies confined to contract performance	It depends on the portion of goods imported by the bidder sold to public procurers.	Yes
Policies going beyond		No

As far as the distinction between policies stemming from general legal requirements and policies going beyond under public procurement-specific laws is concerned (see section 5.5.1), for example, tariffs imposed on general commerce would fall within the category of policies

[61] See: ibid. at 155.
[62] See: ibid. at 156-157.
[63] See: ibid. at 158.
[64] See: ibid. at 159-168.
[65] See: ibid. at 169-170.

confined to general legal requirements as they equally adversely affect the competitiveness of imported goods sold to private buyers and to public procurers. In turn, price preferences (see section 1.5.1) for domestic tenderers in public procurement would go beyond general legal requirements and would adversely affect imports intended for public procurers. Similarly general rules of origin determined by the lawmaker equally determine the origin of goods sold to private buyers and to public procurers, but additional stricter public procurement-specific rules might be set up in order to determine if particular bids are foreign and should be subjected to some public procurement-specific protectionist measures or not.[66] It happened, for instance, in the US with the ARRA[67] which brought in 2009 a lot of practical ambiguities as a result of two different systems of rules of origin being in force at the time[68] (see section 1.3). Both general tariffs and public procurement-specific price preferences can also be classified as confined to contact performance, or as going beyond it. Price preferences are definitely confined to contract performance because they are only used for the purposes of price adjustment made when assessing a given bid. In the case of general commerce tariffs, their classification should be relativized to whether a given importer sells some imported goods to public procurers only or not. If public procurers are importers' only customers, which is unlikely, the policy of imposing general tariffs is confined to contract performance. In turn, if he imports some goods on a continuous basis and mostly sells those goods in private markets, and from to time only to public procurers, which is much more likely, the policy of imposing general tariffs goes beyond contract performance (see Figure 18).

Figure 19. The pursuit of pro-innovation policies through public procurement within the classification of horizontal policies.

Type of legislation	General	Public procurement-specific		Legislative silence
Nature of policy	Mandatory and facultative	Mandatory	Facultative	
Policies confined to contract performance	**No.** Uniform norms on the stimulation of innovation applicable all across the public sector cannot be effective.	**No.** This is because any mandatory requirement that procurement projects shall generally be driving innovation, would be nothing else but verbosity.	**THE PURSUIT OF PRO-INNOVATION POLICIES**	
Policies going beyond contract performance	The category of generally innovative enterprise is non-existent.			

[66] This contravenes GPA12 article IV.4 according to which: "*[f]For purposes of covered procurement, a Party shall not apply rules of origin to goods or services imported from or supplied from another Party that are different from the rules of origin the Party applies at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Party.*"

[67] See: American Recovery and Reinvestment Act, 19 Feb., 2009 Pub. L. No. 111-5, 123 Stat. 115, 516 (111th Congress).

[68] See: John Linarelli, 'Global Procurement Law in Times of Crisis: New Buy American Policies And Options in the WTO Legal System' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 773-802 at 784-785.

Likewise, the policies aiming at stimulating R&D through public procurement can also be accommodated by this conceptual framework. As far as the distinction between policies stemming from general legal requirements and policies going beyond under public procurement-specific laws is concerned (see section 5.5.1), one could hardly imagine any uniform norms on the stimulation of innovation, applicable to all public authorities all across the public sector which leaves public procurement-specific laws to regulate the promotion of R&D in public procurement markets. As far public procurement-specific laws are concerned, a mandatory requirement that procurement projects shall generally be driving innovation would be nothing else but verbosity which leaves facultative public procurement-specific laws only. As far as the distinction between policies confined to general obligations and contractual clauses going beyond are concerned, R&D-focused contractual clauses might stem from facultative public procurement-specific norms encouraging such policies or be discretionarily designed by public procurers in the lack of any R&D-specific regulation (see Figure 19).

5.6 Conclusion

The highlight of this chapter is that taking into account the non-commercial considerations in public purchases as a long-standing phenomenon and, while there has been some dynamism in non-commercial goals toward more sustainability over recent decades, there is even more dynamism in how the phenomenon is presented in the literature. The secondary conclusion of this chapter is that classifying horizontal policies based on substantive criteria such as pursued goals is not possible, implying that horizontal policies have to be classified based on formal criteria such as (*i*) being regulated under general or public procurement-specific laws, (*ii*) being mandatory, facultative or discretionary, (*iv*) being confined to or going beyond contract performance, and (*iv*) being applied in a specific phase of the procurement process.

Chapter 6. Cross-border policies

This chapter is the second one of two chapters conceptualizing the notion of cross-border horizontal policies in public procurement which can be roughly defined as policies adversely affecting foreign (exterritorial) business by interfering in/distorting the foreign regulatory environment, and often specifically targeting foreign business operators. This chapter presents cross-border horizontal policies as not confined to advancing across the borders goals such as environmental quality, social standards, human rights or equality. Rather, it claims that (*i*) an economic/industrial dimension can be seen in the vast majority of public-procurement-related cross-border horizontal policies, and (*ii*) often the actual economic/industrial dimension of cross-border horizontal policies is just hidden beyond the language of social and environmental concerns. In other words, one should not be misled into thinking that the discrimination against foreigners potentially resulting from cross-border environmental or social policies is merely accidental to such objectives in contrast to firmly industrial policies overtly targeting exterritorial economic operations, in the case of which industrial objectives are not hidden.

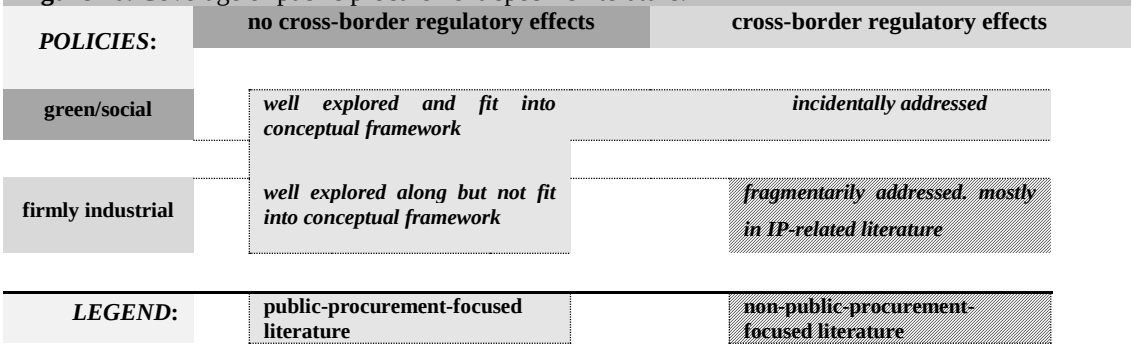
The purpose of this chapter is to (*i*) build the concept of cross-border horizontal policies by discussing examples of such policies, identifying their common distinctive features, and comparing them with analogical phenomena outside of the world of public procurement, and (*ii*) prove that cross-border horizontal policies expressly aimed at achieving industrial goals share the characteristics of policies hiding behind green or social considerations. This conceptualization is a prerequisite for analysing the extent to which so conceptualized cross-border horizontal policies actually or potentially impede further international liberalization of public procurement markets. This chapter begins by briefly presenting the current state of the literature and regulation (in section 6.1). Next, this chapter identifies and discussed common distinctive features of cross-border horizontal policies, including (*i*) interference with a foreign regulatory environment (in section 6.2), selectiveness and arbitrary application (in section 6.3), and the use of sufficient purchasing power (in section 6.4). It also draws the line between deliberate regulatory impacts of cross-border horizontal policies and merely economic cross-border impacts of other horizontal policies (in section 6.5). Where possible, this chapter also compares the elements of the concept of the cross-border horizontal policies in public procurement with similar phenomena that can be observed in private markets and in exterritorial non-public-procurement-specific governmental policies.

6.1 General remarks

While public procurement has a long record of being employed to achieve wider (horizontal) policy goals (see section 5.4), cross-border horizontal policies are a relatively new phenomenon, and have been barely addressed in the literature so for likely due to the fact that the relevant regulation has been extremely vague and has not been clarified by the case law.

6.1.1. Existing literature

Figure 20. Coverage of public procurement-specific literature.



The leading authors on the subject of the international regulation of public procurement markets have incidentally discussed some problems related to the pursuit of cross-border horizontal policies. Namely, they have noticed a possibility of cross-border regulatory interferences with social or environmental matters (see Figure 20). For example, in 1996 Fernández-Martin noticed that defending human rights and employment-related standards 'nationally or internationally' was one of the policy goals channelled through public procurement.[1] Arrowsmith in 2003 observed that "*[i]In this context* [using procurement to promote human rights and environmental objectives] *government bodies have sometimes imposed sanctions through access to their procurement, or influence the activities of private firms operating in other counties*."[2] According to Arrowsmith, the primary dilemma as to the horizontal policies in the trade context was how to balance the free trade objectives and the 'domestic and other' policies wherefore 'other' policies seemed to designate sanctions only.[3] Arrowsmith also proposed that "*non-discriminatory measures of this type should generally be permitted, even as purely symbolic gesture, even when they are no formulated by reference to external* [international] *norms. However, - (…) to provide an important safeguard against abuse for protectionist reasons – discriminatory policies should only be*

[1] See: José Maria Fernández Martin, *The EC public procurement rules* (Clarendon Press; Oxford University Press, Oxford 1996) xxxi, 321 p at 46. See also: section 5.4.

[2] See: Sue Arrowsmith, *Government procurement in the WTO* (Kluwer Law International, The Hague 2003) xxiii, 481 at 324.

[3] See: ibid. at 326.

allowed to the extent that they are formulated by reference to such external [international] *norms.*"[4]

In 2007, within a narrower context of equality in public procurement, McCruddren rhetorically asked why a state's positive obligations to respect, to protect, and to fulfil human rights should stop at its border, and suggested that they should not.[5] McCruddren also opted for the incorporation of social standards in the WTO agreement[6] and argued that this would (*i*) "*defend the social achievements of developed countries from erosion, and facilitate further trade liberalization by reassuring voters in those countries. Externalities, such as the sense of outrage in many countries about the treatment of some workers abroad*,"[7] (*ii*) "*justify regulatory intervention, just as much as pollution crossing borders justifies regulation by the receiving country*,"[8] as well as that (*iii*) "*[p]Promoting better social standards would be an act of solidarity with the disadvantaged in the developing world.*"[9] and (*iv*) "*[a]An effective international regulatory structure may constrain the unilateral use of trade sanctions, and thus reduce the risk of covert protectionism.*"[10] In 2009, Arrowsmith - again only with regard to social and environmental policies and in the narrow EU-related context - noticed that the pursuit of horizontal policies resulting in the encroachment of domestic norms upon extraterritorial business operations could (*i*) be technically problematic,[11] and (*ii*) could cause additional costs related to improving social/environmental standards abroad.[12] On the other hand, however, the pursuit of social/environmental policies only toward domestic business operations would cause a reverse discrimination against domestic business.[13]

Independently, other authors/experts (especially Peck with An, Boumil, Atkinson - see further section 6.2.3.b) have more generally researched the problem of industrial policies of emerging economies, with an emphasis on China, leading to technology transfers from mostly developed countries. Without referring to the leading public-procurement-focused literature, they have also covered such industrial policies channelled through public

[4] See: ibid. at 357.

[5] See: Christopher McCrudden, *Buying social justice :equality, government procurement, and legal change* (Oxford University Press, Oxford 2007) 680 at 90-91.

[6] See: ibid. at 588.

[7] See: ibid.

[8] See: ibid.

[9] See: ibid.

[10] See: ibid.

[11] Especially with regard to obtaining evidence of foreign criminal convictions. See: Sue Arrowsmith, 'A Taxonomy of Horizontal Policies' in Sue Arrowsmith and Peter F. Kunzlik (eds), *Social and environmental policies in EC procurement law: new directives and new directions* (Cambridge University Press, Cambridge 2009) 108 at 115; sections 6.1.2, 6.3.2.a.

[12] See: Sue Arrowsmith, 'Application of EC Treaty and directives to horizontal policies: a critical review' in: Sue Arrowsmith and Peter F. Kunzlik (eds), *Social and environmental policies in EC procurement law : new directives and new directions* (Cambridge University Press, Cambridge 2009) 147at 169.

[13] See: ibid.

procurement markets – which this chapter further aims to present as a counterpart for environmental and social cross-border horizontal policies. The origin of this disconnect in literature can perhaps be linked to the discussed strict focus of the leading public-procurement-focused authors on sustainability concerns (see section 5.2). Seeing that the leading authors - in building their original conceptual frameworks for governmental policies in public procurement - have generally avoided discussing traditional overtly protectionist industrial policies (see section 5.5) - it is no surprise that they have also left pro-innovation industrial policies unaddressed.

6.1.2. Relevant regulation

Figure 21. Relevant general *versus* public procurement specific regulation.

	INSTRUMENTS OF GENERAL APPLICATION	PUBLIC-PROCUREMENT-SPECIFIC INSTRUMENTS
ban on discrimination – NT clause	**GATT47** Article III.4 [ban on the discrimination of 'like products']	**GPA** Article III.1.(a)
general exceptions	**GATT47** Article XX **TBT** Article 2.2 **SPS** Article 3.1	**GPA12** Article III.2
technical standards/regulations	**TBT/SPS** Agreement	**GPA12** Article X
international standards	**TBT** Article 2.5 **SPS** Articles 3.1, 3.3, 5	**GPA12** Article X.2.(b)
process-related requirements	**TBT** Annex 1 point 1 **SPS** Annex A point 1	**GPA12** Articles I.(s), I.(u)
qualification criteria	n.a.	**GPA12** Article VIII.4 sections (d) and (e)
award criteria	n.a.	**GPA12** Article X.9
technology transfers	**TRIPS** Articles 3, 27.1	**GPA12** Article IV.6

6.1.2.a General principles

The international regulation relevant for the pursuit of cross-border has been very vague mostly as a result of the exemption of public procurement from NT and MFN principles under the GATT47 and continuing after the establishment of the WTO (see section 2.2). On the one hand, policies regulated by the laws of general application (see sections 5.5.1 and 5.5.3) have been subjected to general-commerce rules on cross-jurisdictional regulatory measures clarified with case law and well explored in plentiful literature.[14] On the other

[14] See especially: Krista Nadakavukaren Schefer, *Social regulation in the WTO : trade policy and international legal development* (Cheltenham: Edward Elgar, Cheltenham 2010); Christiane R. Conrad, *Processes and Production Methods (PPMs) in WTO Law* (Cambridge University Press, Cambridge 2011); Emilie Hafner-Burton, *Forced to be good : why trade agreements boost human rights* (Cornell University Press, Ithaca 2009) 220; Anne Davies and Christopher McCrudden. 'A Perspective on

hand, the regulation of public-procurement-specific cross-jurisdictional regulatory measures (imposed by public-procurement-specific laws and other measures like contractual clauses) has been almost non-existent, and it has not been clear to what extent general-commerce rules should also apply to public-procurement specific measures.

In general commerce, unilateral cross-jurisdictional regulatory measures have been under scrutiny since 1990s largely as a result of objections raised by developing countries (see section 9.4.2.b) and, at least at the level of high-profile-declarations, the official stance of the international community has been that such measures should be avoided. In the environmental context, the UN' Rio Declaration on Environment and Development of 1992[15] stated that (*i*) "*[u]Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided,"*[16] and (*ii*) "*[e]Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.*"[17] Similarly, in the context of social rights, the WTO's Singapore Ministerial Declaration of 1996[18] stated that "*[w]We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.*"[19] Nonetheless, as discussed (see section 6.1.1), the leading authors on public procurement often looked more favourably at cross-border regulatory policies and suggested that the public-procurement-regime does not need to be aligned with regard to this matter to such general-commerce intergovernmental declarations.

6.1.2.b Public-procurement-unique provisions

In fact, under the GPA, the provisions potentially relevant for the pursuit of cross-border horizontal policies are still few and far between, despite all the developments toward a more precise regulation of this matter (discussed in preceding chapters). Some potentially relevant provisions have been unique and have defied any comparison with other WTO's agreement while other have not been unlike in general commerce. Especially the provisions related to the exclusion of potential suppliers/contractors and to tender evaluation criteria could not be

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Trade and Labour Right' (2000) 3(1) J Intl Econ L 43; Alan Isaac Zreczny. 'Process/Product Distinction and the Tuna/Dolphin Controversy: Greening the GATT Through International Agreement' (1994) 1(2) Buff J Intl L 79; Robert Howse and Donald Regan. 'The product/process distinction - an illusory basis for disciplining 'unilateralism' in trade policy' (2000) 11(2) Eur J Intl Law 249; Mariela Maidana-Eletti. 'International Food Standards and WTO Law' (2014) 19(2) Deakin L Rev 217.

[15] See: UN, 'The Rio Declaration on Environment and Development' (1992) UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874, Article 8.

[16] See ibid. Article 12. See also: Amy J. Dona. 'Crossing the Border: The Potential for Trans-Boundary Endangered Species Conservation Banking' (2008) 16(655) NYU Envtl L J at 705.

[17] See ibid.

[18] See: Singapore Ministerial Declaration adopted on 13 December 1996 Ministerial Conference (18 December 1996) WT/MIN(96)/DEC.

[19] See: ibid. article 4. See also: James Thuo Gathii. 'Re-characterizing the Social in the Constitutionalization of the WTO: a Preliminary Analysis' (2001) 7 Widener L Symp J 137 at 156.

interpreted in reference to any provisions of other WTO's agreements. It has not been clear whether public procurers' right to exclude tenderers in the case of "*final judgments in respect of serious crimes or other serious offences*" [20] and "*professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier*" [21] should only apply to domestic or also cover extraterritorial tenderer's misconduct (see further sections 6.2.1.c and 6.3.2.a discussing how the latter option could lead to cross-border regulatory interferences).[22] Similarly, it has not been clear whether public procurers' right to integrate environmental characteristics into evaluation criteria [23] has been meant to cover environmental characteristics for the protection of public procurers' domestic environments only, or also cover characteristics helping environmental protection in other jurisdictions.

6.1.2.c Provisions comparable with general commerce

In contrast, the GPA's provisions on technical specifications have been for the GPA system what the TBT Agreement and the SPS Agreement[24] have been for the multilateral trading system. Plus general exceptions to the GPA have not been unlike the general exceptions to the GATT47 (see Figure 21). Thus, such parallel provisions of public procurement and general commerce regimes can be compared.

Figure 22. GPA's 'technical specifications' versus TBT Agreement.

technical barriers:	goods		services
general commerce	***technical regulations***	***sanitary and phytosanitary measures***	n.a.
public procurement	GPA's *technical specification* plus TBS's *technical regulations*	*unlikely because public procurement rules usually do not apply to commodities*	GPA's *technical specification* only

technical standards

Actually, both regimes are likely to overlap (see Figure 22). Namely - unless sold exclusively in public procurement markets and exempted from laws of general application affecting trade in general commerce – the imported goods/services (some portion of which might be sold to public procurers) benefit from the same facilitations but are also subjected to the same trade barriers like any other imported goods/services. On the one hand, such goods/services first benefit from the NT clauses under GATT47 Article III.4,[25] GATS Article

[20] See: GPA12, Article VIII.4.(d).

[21] See: GPA12, Article VIII.4.(e). See also section 2.3.3 *in fine*.

[22] The problem of obtaining the evidence of foreign criminal convictions as the major technical problem associated with imposing domestic standards on extra-territorial business operations (see: note 11) was raised by Arrowsmith just in the context of exclusions.

[23] See: GPA12, Article X.9. See also section 2.3.3 *in fine*.

[24] See: Agreement on the Application of Sanitary and Phytosanitary Measures (signed at Marrakesh on 15 April 1994, in force 1 January 1995) WTO Agreement Annex 1A,1994 69.

[25] "*The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of*

XVII.1 [26] and TBT Agreement Article 2.1 [27] before such goods/services face public-procurement specific barriers to trade, such as 'technical specification' individually designed by public procurers [28] and other contractual requirements. On the other, before facing technical specifications/contractual requirements, imported goods anyway first need to conform to 'technical regulations' [29] under the TBT Agreement or to 'sanitary and phytosanitary measures' [30] ('SPS') under the SPS Agreement (the latter option being very unlikely [31]), and imported services face other NTBs (neither TBT [32] nor SPS Agreement [33] apply to services). [34]

A black-letter-analysis of provisions related to technical specifications, technical regulations and SPS measures suggests that all those technical measures can include process-related requirements (see section 5.5.2) potentially leading to cross-border regulatory interferences. This is because the definitions of technical specifications, [35] technical regulations [36] and SPS measures, [37] along with definitions of 'standards' [38] - which can be used in designing such

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this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product." See: GATT47, Article III.4.

[26] "*In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*" See: GATS, Article XVII.1.

[27] See: "*Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country*." See: TBT Agreement, Article 2.1.

[28] "*[T]technical specification means a tendering requirement that: (i) lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or (ii) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service.*" See: GPA12, Article 1.(u).

[29] "*Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*." See: TBT Agreement, Annex I, para 1.

[30] "*Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.*" See: SPS Agreement, Annex A, point 1.

[31] That is not to say that governments never buy food or plants but rather that the application of full public procurement regime to such purchases is extremely unlikely. Foremost, different instruments of the international regulation of public procurement usually do not fully apply to the procurement of commodities, and – in line with this – the GPA12 allows limited tendering in the case of procurement in 'commodities markets' [see: GPA12, Article XIII.1.(e)]. Also, the bulk purchases of food for the purposes of stockpiling strategic reserves might be exempted based on security exception (see: GPA12, Article III.1) or even fall within the concept of state trading (see further: section 9.1.1.a). Even if public procurers buy food, they have no capacity to further fiddle SPS standards at the level of GPA's technical specifications in contrast to TBTs which can be pretty-freely modified by public procurers for the purposes of specific public contracts. This, altogether, might explain why public-procurement-specific technical specifications are expressly excluded from the TBT Agreement (see: section 2.3.2) whereas they are not mentioned in the SPS agreement.

[32] See: TBT Agreement, Annex 1, first sentence.

[33] See: TBT Agreement, Article 1.5 in connection with Annex 1, first sentence.

[34] The premise of this claim is that the goods/services covered by the GPA are also covered by the GATT and GATS because - as discussed - the GPA's coverage of goods is narrower than in general commerce and GPA's coverage of services is similar and often identical with the coverage under the TRIPS (see: section 2.3.4) and the same remarks apply to the RTAs (see section 4.1.3). Importantly, this claim does not apply to the protection of local establishments of foreigners [(see: GPA12, article IV.2.(a)] selling to local governments if goods/services being sold are a local origin.

[35] See: note 28.

[36] See: note 29.

[37] See: note 30.

measures - among others refer to 'processes and production methods.'[39] However, such possibility is limited in a number of ways. In theory, all these definitions should be interpreted in the spirit of mentioned UN' Rio Declaration on Environment and Development and WTO's Singapore Ministerial Declaration. In addition, the NT clauses under GATT47 and the GATS mandate equal treatment of 'like products'[40] and 'like services'[41] in contrast to the GPA's NT clause simply referring to 'goods and services'[42] but the different wording might perhaps be tracked to a different (OECD's) origin of the GPA's 79's first draft (see sections 2.3.1 and 9.2.1). In general commerce, the ban on the discrimination against foreign like-products (*mutatis mutandis* potentially also like-services), being a central concept to the entire multilateral trading system, among others means a ban on discriminating against products with the same physical characteristics implying that process-related requirement cannot be imposed unless foreign processes "*have any impact on the inherent character*" of the imported products.[43]

Next, the technical measures also (*i*) should not create 'unnecessary obstacles to international trade' (under both GPA, and TBT Agreement[44]), (*ii*) should not be more trade-restrictive than necessary to fulfil a legitimate objective ["*inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment*"[45]] taking account of the risks non-fulfilment would create (under the TBT Agreement[46]), (*iii*) should be "*based on product requirements in terms of performance rather than design or descriptive characteristics*" (also under the TBT Agreement[47]), or (*iv*) should be applied only to the extent "*necessary to protect human, animal or plant life or health*" (under the SPS Agreement[48]). Where possible, technical specifications,

[38] The TBT Agreement defines a standard as "*[d]Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."* See: TBT Agreement., Annex I., para.2. The identical definition of a standard is found in : GPA12, Article 1.(s). The SPS Agreement provides for much more complex SPS-specific definition of 'international standard' in Annex A, point 3.

[39] Actually, Kunzlik in late 1990s made a claim that, in contrast to general commerce, GPA94 allowed public procurers to impose process-related environmental requirement in an unlimited manner because of reference to production methods in the definition of technical specifications [see: Peter F. Kunzlik, 'Environmental Issues in International Procurement' in Sue Arrowsmith and Arwel Davies (eds), *Public procurement: global revolution* (Kluwer Law International, London 1998) 199 at 202] missing, however, that identical reference had also been made in the TBT and SPS Agreements.

[40] See: note 25.

[41] See: note 26.

[42] See: GPA12, Article IV.1.

[43] See: Report of the Panel, *United States - Restrictions on Imports of Tuna*' (16 June 1994) DS29/R, para. 5.9 at 48. See also: note 14, Howse and Regan at 251; note 14.

[44] See: GPA12, article X.1; TBT Agreement, Article 2.2.

[45] See: TBT Agreement, Article 2.2.

[46] See: ibid.

[47] See: TBT Agreement, Article 2.8.

[48] See: SPS Agreement, Article 2.2.

technical regulations and SPS measures shall be based on international standards[49] the use of which implies that (*i*) "*[w]~~W~~henever a technical regulation is prepared, adopted or applied for one of the legitimate objectives (…) it shall be rebuttably presumed not to create an unnecessary obstacle to international trade*"(under both TBT Agreement and SPS Agreement[50]), and (*ii*) SPS measures "*shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.*"[51] However, the use of international standards has no similar implication under the GPA. In addition, a scientific evidence/justification does not need to back GPA's technical specifications whereas it needs to underlie both technical regulations and SPS measures.[52]

Figure 23. General exceptions to the GPA12 and GATT47.

GPA12 Article III.2	GATT47 Article XX
"*Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:*	*"Subject* to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals, order or safety;	(*a) necessary to protect public morals;*
(b) necessary to protect human, animal or plant life or health;	*(b) necessary to protect human, animal or plant life or health;*
	(…)
(c) necessary to protect intellectual property; or	*(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to (…) the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;*
(d) relating to goods or services of persons with disabilities, philanthropic institutions or prison labour."	*(e) relating to the products of prison labour;*
	(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
[no equivalent] ⇨	*(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;*
	(…)
[similar to GPA's provisions on urgent purchases justifying limited tendering under article XII.1.(d), see more generally section 2.3.3]	*(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.(…)"*

Furthermore, the use of process-related requirements is further confined by the scope of general exceptions to these agreements provided in the GPA12 Article III.2 for public procurement (see wider context in section 2.3.3) and similar GATT47 Article XX allowing - "*[s]~~S~~ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*" [53] - imposing measures among others (*i*) "*necessary to protect human, animal or plant life or health*"[54] or *"relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"*[55] (see Figure 23). In contrast to the GPA12 Article III.2, the GATT47 Article XX was

[49] See: GPA12, Article X.9.(b); TBT Agreement, Article 2,4; SPS Agreement, Article 3.1. However, unlike under the TBT/SPS Agreements, under the GPA, requirement of technical specification based on international standards shall not be automatically deemed 'necessary.' See: TBT Agreement, Article 2.2; SPS Agreement, Articles 2.1, 2.2.

[50] See: TBT Agreement, Article 2.5.

[51] See: SPS Agreement, Article 3.1.

[52] See: TBT Agreement, Article 2.2. SPS Agreement, Articles 3.1. 5.2.

[53] See: GATT47, Article XX, *in initio.*

[54] See: GATT47, Article XX.(b).

[55] See: GATT47, Article XX.(g).

tested/interpreted in a number of disputes. The case for not allowing unilateral cross-jurisdictional regulatory interferences was perhaps best addressed by the Panel's report in *Tuna/Dolphin II*,[56] the Appellate Body's report in *US-Shrimp*,[57] and the Appellate Body's report in *US – Shrimp (Article 21.5 Malaysia)*[58] emphasising that:

Tuna/Dolphin II: *"If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained.* ***If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties****, in particular the right of access to markets, would be seriously impaired."*[59]

US-Shrimp: "*It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However,* ***it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program****, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.*"[60]

US-Shrimp 21.5: "*Under the chapeau of Article XX, an importing Member may not treat its trading partners in a manner that would constitute "arbitrary or unjustifiable discrimination". With respect to this measure, the United States could conceivably respect this obligation, and the conclusion of an international agreement might nevertheless not be possible despite the serious, good faith efforts of the United States.* ***Requiring that a multilateral agreement be concluded by the United States in order to avoid "arbitrary or unjustifiable discrimination" in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations****. Such a requirement would not be reasonable. For a variety of reasons, it may be possible to conclude an agreement with one group of countries but not another. The conclusion of a multilateral agreement requires the cooperation and commitment of many countries. In our view,* ***the United States cannot be held to have engaged in "arbitrary or unjustifiable discrimination" under Article XX solely because one international negotiation resulted in an agreement while another did not****."*[61]

"US-Shrimp 21.5: "*As we stated in United States – Shrimp, "the protection and conservation of highly migratory species of sea turtles ... demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations".73 Further, the "need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations".74 For example,* ***Principle 12 of the Rio***

[56] See: note 43.

[57] See: Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755; Report of the Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (15 May 1998) WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821.

[58] See: Report of the Appellate Body *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia* (22 October 2001) WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481.

[59] See note 43, DS29/R, para. 5.26 at 52, 53. See also: Cathy L. Wittmeyer student author. 'A Public Procurement Paradox: The Unintended Consequences of Forest Product Eco-labels in the Global Marketplace' (2003) 23(1) J L & Com 69 at 79.

[60] See note 57, WT/DS58/AB/R, para. 164 at 64-65. See also: Cathy L. Wittmeyer student author. 'A Public Procurement Paradox: The Unintended Consequences of Forest Product Eco-labels in the Global Marketplace' (2003) 23(1) J L & Com 69 at 79-80.

[61] See note 58, para. 123.

> ***Declaration*** *on Environment and Development states, in part, that "[e]~~E~~nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus".75 Clearly, and "as far as possible", a multilateral approach is strongly preferred.* ***Yet it is one thing to prefer a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the conclusion of a multilateral agreement as a condition of avoiding "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. We see, in this case, no such requirement.***" [62]

Such interpretation of the GATT47 Article has meant that unilateral cross-border regulatory measures could only be imposed in exceptional circumstances,[63] but it has not been clear whether analogical, yet slightly different, provisions of the TBT Agreement should be interpreted in a similar way.[64] The Appellate body in *EC – Asbestos*[65] merely observed that (*i*) "*although the TBT Agreement is intended to "further the objectives of GATT 1994" it does so through a specialized legal regime that applies solely to a limited class of measures* [i.e. among others to technical regulations]" [66] and (*ii*) "*[f]~~F~~or these measures, the TBT Agreement imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994*" [67] - disappointingly without further explaining it.[68] Nonetheless, according to 2003 UNCTAD course on WTO dispute settlement "*[t]~~T~~he view generally held in the trade community [was]~~is~~ that the TBT Agreement was not intended to apply to PPMs, unless the PPM is product-related (detectable in the final product),*" [69] And - according to Du and McDonald – the strict focus of the Appellate Body in *EC – Asbestos* on the physical characteristics of products in the interpretation of the notion of technical regulation[70] indirectly confirmed that concept of technical regulations under the TBT Agreement did not cover process-related requirements at

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[62] See note 58, para 124.

[63] See: Johannes Norpoth. 'Mysteries of the TBT Agreement Resolved? Lessons to Learn for Climate Policies and Developing Country Exporters from Recent TBT Disputes' (2013) 47(3) J World Trade 575 at 578, 579.

[64] See: Michael Ming Du. 'Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization' (2007) 6(2) Chinese J Int'l L 269 at 278-283.

[65] See: Report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (12 March 2001) WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243.

[66] See: ibid. para. 80.

[67] See: ibid.

[68] See: note 64 at 278.

[69] See: UNCTAD, 'Course on Dispute Settlement - Module 3.10. WTO: Technical Barriers to Trade' UN (Geneva 2003) UNCTAD/EDM/Misc.232/Add.22 at 9.

[70] "*The heart of the definition of a "technical regulation" is that a "document" must "lay down" – that is, set forth, stipulate or provide – "product characteristics". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, inter alia, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the TBT Agreement itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the TBT Agreement, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".*" See: *EC – Asbestos*, para. 67.

all,[71] implying that such measures should still be interpreted only in the light of *Tuna/Dolphin II, US-Shrimp* and *US – Shrimp (Article 21.5 Malaysia)*.[72]

However, subsequently, in *Tuna Labelling*,[73] in which a label clearly including process-related criteria[74] (see further section 6.2.1.d on facts in that dispute) the Panel, distorting the findings in Appellate Body's in *EC – Asbestos*, ruled that it was not "*necessary to consider in addition whether the labelling requirements in the US dolphin-safe labelling provisions also fall within the scope of the first sentence as "product characteristics or related production or* ***processing methods****", since, as the Appellate Body* [in *EC – Asbestos*] *has observed, the terms of the second sentence make it clear that the subject-matter of a technical regulation may be confined to one of the items enumerated in the second sentence*."[75,76] This implies that at least process-related requirements imposed by labels are subjected to the TBT Agreement.[77] However, the question remains about the practical meaning of such distinction.

On the one hand, the major textual difference lies in that the TBT Agreement unlike the GATT47 (*i*) provides for open-ended catalogue of legitimate policy objectives by allowing all 'legitimate' policy objectives instead of an exhaustive list under Article XX,[78] (*ii*) integrates legitimate policy objectives into the concept of technical regulations instead of allowing advancing such objective only by means of general exceptions under article XX,[79] (*iii*) and shifts the burden of proof that such objective are legitimate/illegitimate from a potential defendant to a potential complainant questioning such measures.[80] On the other hand, however, the outcomes of TBT-related disputes have confirmed that previous jurisprudence based GATT47 Article III.4 and XX is also relevant to the interpretation of the TBT Agreement. For instance, in *US – Clove Cigarettes*,[81] the Appellate Body found that (*i*)

[71] See: note 64 at 287; Jan McDonald. 'Domestic regulation, international standards, and technical barriers to trade' (2005) 4(2) World Trade Rev 249 at 255.

[72] See: note 64 at 287. See also: note 63 at 579, 580. But see: Robert Howse and others. 'The TBT Panels: US-Cloves, US-Tuna, US-COOL' (2013) 12(2) World Trade Rev 327 at 358, 359.

[73] See: Report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (15 September 2011) WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013); Report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (16 May 2012) WT/DS381/AB/R adopted 13 June 2012 DSR 2012:IV, p. 1837.

[74] See: note 63 at 581.

[75] See: note 73, WT/DS381/R, para. 7.79.

[76] The footnote no 251 to *Tuna Labelling*, para 7.79 refers to *EC – Asbestos*, para 67 (quoted in: note 70) which, in contrast to what is found in *Tuna Labelling* para 7.79, perhaps even deliberately does not mentions production methods as an element of 'technical regulation' (see: note 72).

[77] See: note 61 at 581; Laurens J. Ankersmit and Jessica C. Lawrence. 'The Future of Environmental Labelling: US – Tuna II and the Scope of the TBT' (2012) 39(1) Leg Iss Econ Integ 127 at 137.

[78] See: note 64 at 279.

[79] See: ibid. at 279, 280. See also: Joshua Meltzer and Amelia Porges. 'Beyond Discrimination? The WTO Parses the TBT Agreement in US - Clove Cigarettes, US - Tuna II (Mexico) and US - Cool' (2013) 14(2) Melb J Intl L 699 at 710.

[80] See: note 64 at 283.

[81] See: Report of the Panel, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (2 September 2011) WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI, p. 5865;

"*in interpreting Article 2.1 of the TBT Agreement, a panel should focus on the text of Article 2.1, read in the context of the TBT Agreement, including its preamble, and also consider other contextual elements, such as Article III:4 of the GATT 1994*,"[82] and (*ii*) "*[a]As we have observed above, the balance that the preamble of the TBT Agreement strikes between, on the one hand, the pursuit of trade liberalization and, on the other hand, Members' right to regulate, is not, in principle, different from the balance that exists between the national treatment obligation of Article III and the general exceptions provided under Article XX of the GATT 1994.*" [83]

Altogether, this hints that potential disputes about process-related requirements subjected GATT47 Articles III.4 and XX (also GATS Articles XVII.1 and XIV[84]) shall be resolved in line with cited findings of *Tuna/Dolphin II*, *US-Shrimp*, and *US – Shrimp (Article 21.5 Malaysia)* regardless of whether (*i*) they fall within the concept of technical regulation under the TBT Agreement or not, and (*ii*) process-related requirement are imposed through labels like in *Tuna Labelling* or through other measures.

6.1.2.d Application of the general commerce case-law

The *mutatis mutandis* application of the GATT47-related case law relevant for the legitimacy of cross-border regulatory interferences to public procurement markets (subjected to the GPA system) is less obvious. The question here is not the extent to which the interpretation of *leges generales* like the GATT47 Articles III.4 and XX can influence the interpretation of *leges speciales* like the TBT Agreement Article 2.2 but rather whether the interpretation of *leges generales* can be applied to public procurement markets at all. According to Mccrudden writing in 1999, the interpretation of the GATT47 Article XX could hardly be used in the analysis of the GPA94 Article XXIII (now GPA12 Article III.2) because of 'textual differences.'[85] Such view was, by way of analogy, in line with remarks on the relations between GATT47 and TBT regimes in Appellate Body's report *EC – Asbestos* delivered in 2001('different from, and additional to'[86]) but perhaps cannot be sustained after

Report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (4 April 2012) WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751.

[82] See: ibid. WT/DS406/AB/R, para. 100.

[83] See: ibid. para. 109.

[84] On the application of the GATT47 article XX to the interpretation of GATS article XIV see generally: Donald H. Regan. 'The meaning of 'necessary' in GATT Article XX and GATS Article XIV: the myth of cost–benefit balancing' (2007) 6(03) World Trade Rev 347; Stefan Zleptnig, 'Substantive And Procedural Conditions For The Invocation Of Art XX GATT And Art XIV GATS' in *Non-Economic Objectives in WTO Law* (Brill, Boston 2009) 421 at 101-122; Stefan Zleptnig, 'The Non-Economic Grounds Of Justification In Art XX GATT And Art XIV GATS' in: this note, Zleptnig at 123-224; Report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (10 November 2004) WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII p. 5797.

[85] See: Christopher McCrudden. 'International Economic Law and the Pursuit of Human Rights: A Framework For Discussion of The Legality of 'Selective Purchasing' Laws Under the WTO Government Procurement Agreement' (1999) 2 J Intl Econ L 3 at 39.

[86] See: note 66.

Appellate Body report in *US – Clove Cigarettes* delivered in 2012 ('not, in principle, different'[87]).

The controversy about the relevance of Article-XX-related case law for the limits of cross-border horizontal policies has not been and is not very likely to be clarified in future public-procurement-specific disputes. The only formalised dispute between the GPA parties concerning Massachusetts' Burma Law (see further section 6.2.4.a) – which could have clarified this controversy - was settled out of court.[88] The process-related requirements imposed now for decades by public procurers on imported timber through eco-labelling (see section 5.4) could not be tested simply because countries mostly adversely affected by such unilaterally imposed standards have not been parties to the GPA.[89] In addition, the mentioned overlap of the GPA regime and TBT/SPS regime (see Figure 22 in section 6.1.2.c) implies that - unless the targeted foreign goods are sold exclusively in public procurement markets and only subjected to public-procurement-specific rules non affecting trade flows in general commerce[90] - the policymakers would always in the first place integrate process-related requirement into general commerce measures and all disputes will be decided under provisions of the GATT47/GATS and/or TBT/SPS agreements. At the same time, even stricter process-related requirements imposed in individual contract-specific technical specifications[91] would not be worth litigating before the WTO DSB. It does not mean, however, that such cross-border regulatory measures would not (*i*) be more or less formally discussed under the aegis of the WTO Committee on Government on Procurement and lead to tensions undermining negotiations on further liberalisation of public procurement markets (see sections 9.2 and 9.3), and (*ii*) impede process of new accessions to the GPA (see section 9.4.2).

Finally - anticipating the claim that some firmly industrial and firmly protectionist public-procurement-specific policies discriminating against non-indigenous IP are a perfect match for environmental and social cross border policies (see section 6.2.3.b) - it must be preliminarily noted that the legitimacy of such IP-related policies is even more unclear than

[87] See: note 83.

[88] So far, the global scale of the pursuit of human-right-related social cross-border horizontal policies must be assessed through the prism of rare one-off selective trade sanctions like the Burma law rather than through the prism of complex 'proactive' policies. However, this might be an error of perception. Loeb-Cederwall explained a limited discussion on controversies related to central and local human rights-related sanctions channelled through public procurement, and their inadmissibility under international trade commitments, with limited related case law According to Loeb-Cederwall, the low number of disputes challenging such sanctions could be explained by (*i*) the reluctance to be linked to undemocratic regimes on the side of those who should sue, and (*ii*) the immunity to being sued on the side of central or local governments who impose such public procurement-related trade sanctions. See: Jennifer Loeb-Cederwall. 'Restrictions on Trade with Burma: Bold Moves or Foolish Acts' (1997-1998) 32(3) New Eng L Rev 929 at 936.

[89] See: note 24, Wittmeyer at 88, 89.

[90] This bring about another controversy ignored in literature which is the status of public-procurement-specific laws (as conceptualised in section 5.5.1) which are excluded from the GATT47 as public-procurement specific instruments but at the same time are not individual technical specifications under the GPA excluded in the TBT agreement.

[91] But see: ibid.

in the case of environmental and social policies (which still have some vague footing in multilateral agreements governing general commerce). The reasons for the lack of clarity as to the relevance of general-commerce-rules for the GPA system in both cases are alike. Firstly, similar to the case of procurement of timber and eco-labelling, public procurement-specific policies discriminating against non-indigenous IP could not be tested because countries leading in the pursuit of such IP-related policies are not parties to the GPA. Secondly – even if such countries were subjected to the GPA system - a potential application of the TRIPS to public procurement markets is found controversial in very scarce literature. In theory, unlike in the case of the TBT Agreement, nothing exempts public procurement markets from the application of TRIPS provisions (potentially violated by various public-procurement specific discriminatory measures) such as (*i*) TRIPS NT clause provided for in Article 3[92] or (*ii*) Article 27.1 on 'patentable subject matter' requiring that "*(...) patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.*" [93] However, according to Peck and An, in the light of GATT's 47's exemption, any claims against public-procurement-related measures based on such TRIPS' provisions although viable, would be very likely unsuccessful.[94]

6.2 Interference with a foreign regulatory environment

The interference with the foreign regulatory environment is the core element of the concept of cross-border horizontal policies. It can be roughly defined as an interference resulting in business operations being conducted in different ways than these operations would be otherwise conducted within a framework of a foreign regulatory environment without such interference in place. The notion of a regulatory environment itself is rather heterogeneous, has a wide spectrum and can be classified into (*i*) foreign 'written' rules regulating business operations, (*ii*) foreign 'unwritten' rules on how written rules are enforced in practice, and (*iii*) policy-making level at which both written and unwritten rules are made. Analogically, the interference with a foreign regulatory environment might be classified into (*i*) an interference with the conduct of businesses subjected to a foreign sovereign regulatory environment, (*ii*) an interference with the enforcement of foreign laws, and (*iii*) an

[92] "*Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection 3 of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS. (...).*" See: TRIPS, Article 3.

[93] See: TRIPS, Article 27.1.

[94] See: Siyuan An and Brian Peck. 'China's Indigenous Innovation Policy in the Context of its WTO Obligations and Commitments' (2011) 42(2) Geo. J. Intl L 375 at 441,442.

interference with a foreign legislative/political process, usually employing stigmatizing trade sanctions.

6.2.1. Interference with foreign business operations

The direct interference with the conduct of foreign contractors/suppliers by imposing on them some different (stricter) standards than those imposed on foreign business operations under the foreign sovereign regulatory environment is the most obvious way in which foreign business is forced to operate in different ways than it would otherwise operate within the framework of a foreign regulatory environment without some cross-border horizontal policies in place. Imposing different standards could mean both (*i*) imposing some stricter/higher standards than those imposed on foreign business operations by foreign norms (e.g. requiring higher salaries for suppliers'/contractors' foreign employees than required under minimum-wage-laws of a given third country), or (*ii*) regulating some aspects of foreign business operations which are deliberately not subjected to any regulation by foreign laws (e.g. requiring higher salaries for suppliers'/contractors' foreign employees in a third country with no minimum-wage-law in place).

6.2.1.a Classification

The interference with a foreign regulatory environment usually employs process-related requirements and such requirements imposed on foreign business also usually go beyond contract performance (see section 5.5.2).

Figure 24. Interference with the conduct of a foreign business.

	policies going beyond the performance of a public contract		policies limited to contract performance
product-related requirements	n.a.		preferring low-emission hybrid or electric vehicles
process-related requirements	proactive anti-discriminatory policies imposed on local car dealers *(see further section 6.3.2.b on 'positive measures')* disqualification as a potential supplier because of overseas employees' right violations or because of poor environmental conduct abroad *(see further section 6.3.2.a on 'punitive measures')*	effects of scale ➔	requiring that the overseas process of the production of batteries mounted in these cars had to meet certain standards

LEGEND: *cross-border regulatory interference*; spill-overs of policies theoretically policies limited to contract performance

As far as policies going beyond the performance of public contracts are concerned, one could hardly think of any product-related requirement. As far as process-related requirements are

concerned (in policies going beyond the contract performance), say, domestic car dealers[95] could get some preferences for being owned by individuals belonging to one of the minority groups, or could be required by public procurers to pursue some proactive diversity programmes in respect of their employees in the country of public procurer. In such a case, there is no cross-border spill-over regulatory effect at all. In contrast, if a car manufacturer is required to pursue analogical programmes with regard to a plant located abroad and such programmes are not required there under foreign laws (or required to a lesser extent), or if a car importer could be disqualified as a potential supplier because of overseas employees' right violations or because of poor environmental conduct abroad (assessed based on different/higher standards than required under foreign laws), there one could see a straightforward interference with the foreign regulatory environment.

As far as policies limited to contract performance are concerned, say, a preference can be given in public procurement to hybrid or electric vehicles. This does not constitute interference in a foreign regulatory environment even though these cars are produced abroad because such requirement is product-related rather than process-related. In contrast, if vehicle manufacturers are required to ensure that the overseas process of the production of the batteries mounted in these cars has to meet certain standards (different or higher than the standards imposed abroad by the procurer's local laws, there one could see the interference with a foreign regulatory environment. At the first glance, such requirement seems to be confined to the performance of the contract. However, process-related requirements might go beyond contract performance due to effects of scale (as already exemplified with lodging certification schemes in section 5.5.2). Say, even if process-related standards of battery production are imposed only on cars supplied to particular public procurers (and not on all cars produced) car manufacturers might be forced to apply such standards to their entire production because of poor economic feasibility of using diversified production methods (see Figure 24).

6.2.1.b Scale of the problem

In real life, it is a very long-established phenomenon that purchased goods are required to meet some environmental characteristics which are directly determined by public procurers in technical specifications, or required by them through eco-labelling schemes confirming

[95] Sourcing cars by public procurers in cross-border transactions directly from foreign manufactures or directly from foreign dealers is very unlikely because cars are typically sold through locally established dealers, and in many jurisdictions selling cars through dealerships is mandatory, especially in the US. See generally: Arlena Sawyers. 'Michigan dealers, automakers battle over state franchise law' *Automotive News* (2 June 1997, vol. 71, issue 5715) 10; Arlena Sawyers. 'Certified-used crackdown: Toe the line or get suspended' *Automotive News* (22 September 2014, vol. 89, issue 6639) 4; Daniel A. Crane. 'Tesla and the car dealers' lobby' (2014) 37(2) Regulation 10; Cynthia Barmore. 'Tesla Unplugged: Automobile Franchise Laws and the Threat to the Electric Vehicle Market' (2013-2014) 18(2) 18 Va J L & Tech 185. Apart from legal requirements, buying cars from domestic/local dealers makes a lot of sense because of post-purchase matters like warranty and maintenance.

the compliance with certain environmental standards (see section 5.4). When such environmental requirements imposed by public procurers pertain more to environmentally friendly production/process methods than to the features of products, they have a greater potential to interfere with foreign business operations and, therefore, to fall within the concept of cross-border horizontal policies. Nonetheless, in practice, this line might be blurry, empirical studies might discuss related issues but do not quite touch the spot and the actual global scale of imposing environmental standards on production methods in relation to products manufactured abroad is unknown.

Let's consider purchases of furniture for some governmental agencies. The requirements as to chemical content/contamination of purchased furniture or its biodegradability, in principle, do not have a potential to interfere with a foreign regulatory environment because such requirements determine the characteristics of final products and do not determine how they are to be manufactured subject to possible effects of scale. In turn, the requirements related to specific chemicals used in the production process (which might not leave any residues in final products) or related to emissions accompanying the production of furniture do have such potential and clearly interfere with foreign business operations. There are no analyses which cover a wider number of jurisdictions, or specifically address to what extent the process-related criteria actually encumber foreign suppliers and/or goods, and to what extent the regulatory impacts of such requirements are merely confined to domestic business.

For example, among a few similarly narrow studies, environmental criteria in public procurement of furniture in Sweden and Finland[96] were analysed by Parikka-Alhola who looked at 31 tenders for furniture called for in 2006 by public authorities in the two countries.[97] Eco-labels were taken into consideration in seven cases (merely as a point of reference in five cases, and bearing eco-labels as an award criterion in two cases). In regard to technical specifications, the levels of production-related emissions were referred to in three cases, environmental quality management programmes in two cases, and chemicals used in production and the compliance with forest certification schemes each in one. Many environmental criteria were method/process-related and had a potential to have regulatory impacts on other jurisdictions from which the furniture was imported. However, this study neither differentiated between furniture produced domestically or abroad in actually submitted tenders, nor did it consider whether procurers could have reasonably predicted receiving tenders with a foreign content, which of course was not a purpose of that study. That is to say that some studies incidentally prove that the problem of cross-border

[96] See: Katriina Parikka-Alhola. 'Promoting environmentally sound furniture by green public procurement' (2008) 68(1–2) Ecol Econ 472 at 477.
[97] See: ibid.

horizontal policies in public procurement exists by showing singular cases, but no studies summarize the actual cross-border regulatory impacts of such policies.

Some limited assessment of the scale of interfering with foreign business operations through public procurement can be seen in the studies on the pursuits of the GPP published by the European Commission which orders such analyses every few years. *En masse*, these studies show that the more affluent the jurisdiction the more plausible the pursuit of both social and environmental cross-border horizontal policies. The study of 2012 on the uptake of the GPP covering EU27 showed that, all across the EU, 21 percent of the calls for tenders for the supply of furniture included requirements related to legally sourced timber,[98] which implies that requirements of this kind are regularly imposed on suppliers although a country-specific breakdown is unknown. What is known, however, is that, not surprisingly, the more affluent the jurisdiction the more popular the uptake of the GPP. For instance in respect of procured construction works, the previous study of 2005 covering EU25 showed that, in the so-called Green-7 group (Austria, Denmark, Finland, Germany, the Netherlands, Sweden and the UK),[99] 60 percent of the analysed calls for tenders included environmental criteria, such as (*i*) 'environmental harmful matter', (*ii*) energy use/saving, (*iii*) water efficiency, and (*iv*) used timber.[100] The same indicator for the remaining 18 Member States was as low as 14 percent.[101]

6.2.1.c Cross-border enforcement

The greatest challenge for policy-makers trying to impose some standards of extraterritorial business operations subjected to foreign sovereign regulatory environments is enforcing and supervising compliance with these standards. Often, some alternative non-governmental mechanisms of enforcement must be employed to ensure compliance, such as eco-labelling, or private certification schemes, consisting of both autonomous standards and autonomous enforcement mechanisms. Generally, the less economically and legally integrated the jurisdiction of a policy-maker and the targeted jurisdiction the greater this challenge becomes. In the case of high levels of integration, the enforcement of cross-border policies would not be an issue, like in within the EU/EEA whereby (*i*) public procurers to a high degree can rely on foreign documents certifying compliance with prescribed requirements, and (*ii*) suppliers/contractors are strongly discouraged from submitting any false statements

[98] See: Centre for European Policy Studies, College of Europe, 'The Uptake of Green Public Procurement in the EU27' (Brussels 29 February 2012) FWC B4/ENTR/08/006, figure 8 at 45.

[99] See: M. Bouwer, K. de Jong, M. Jonk, T. Berman, R. Bersani, H. Lusser, A. Nissinen, K. Parikka and P. Szuppinger, 'Green Public Procurement in Europe 2005 - Status overview' (October 2005) Virage Milieu & Management bv, Korte Spaarne 31, 2011 AJ Haarlem, the Netherlands at 7.

[100] See: ibid. at 9.

[101] See: ibid.

or forged documents as this could be verified and criminally persecuted, resulting in the debarment from public procurement in the entire EU/EEA. However, in the case of a low level of integration, the instruments of cross-border enforcement become scarce (as further discussed in section 6.3 on the selectiveness and of the arbitrary application of cross-border horizontal policies among others stemming from the enforcement problem).

6.2.1.d General commerce analogies

For comparison, beyond public procurement markets, cross-border regulatory interferences with the conduct of foreign business operations can be seen in analogical governmental, private and mixed actions. With regard to governmental actions, as mentioned many times in this study, environmental or safety process-related requirements targeting importing goods are ubiquitous (see sections 6.1.2.a and 9.4.2.b). More generally speaking, we already live in the reality of the multilateral trading system where national economies are communicating vessels and the widely comprehended legislative behaviour of states means not only shaping internal regulatory environments but also pressing trade partners to alter their foreign regulatory environments. For instance, Jackson generally referred to this phenomenon as 'exterritorial measures of governments' or to 'exterritorial effects' of government regulation, [102] and exemplified that concept with, among others, (*i*) extra-territorial application of the EU competition law and the US anti-trust law,[103] or (*ii*) extra-territorial application of norms provided by the Sarbanes-Oxley Act[104] under which the extra-territorial policy consisted in disclosure requirements imposed by section 404 of this act on non-US companies publicly traded on stock exchanges based in the US.[105,106] In turn, McCrudden and Davies - in the labour rights context - referred to 'exporting norms' by their 'extraterritorial application' as a tool of a 'unilateral model' which, according to these authors, is one of the methods of resolving alleged tensions between free trade and labour rights.[107]

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[102] See: John H. Jackson, Sovereignty, the WTO and changing fundamentals of international law (Cambridge University Press, Cambridge 2006) 361 at 22.

[103] See generally: Paul L. C. Torremans. 'Extraterritorial application of E.C. and U.S. competition law' (1996) 21(4) E L Rev 280.

[104] See: Sarbanes-Oxley Act 2002, Pub. L. No. 107-204, 116 Stat. 745, codified at 15 U.S.C. § 7201.

[105] See generally: Clyde Stoltenberg and others. 'A Comparative Analysis of Post-Sarbanes-Oxley Corporate Governance Developments in the US and European Union: The Impact of Tensions Created by Extraterritorial Application of Section 404' (2005) 53(2) The American Journal of Comparative Law 457 at 459-474.

[106] See: note 102 at 22.

[107] See: note 14, Davies and McCrudden at 53, 54. McCrudden and Davies proposed four models of mitigating the tensions between international trade and labour law, whereby 'exporting norms' by their 'exterritorial application' are the core of the 'unilateral model' (see: ibid.). The other models proposed by Davies and McCrudden were: (*i*) the 'NGO model' whereby governments should partly rely on "*consumers, shareholders, trade unions, and single-issue human rights and environmental pressure groups*" in assuring improving better labour standards in emerging economies (see: ibid. at 54-55), (*ii*) the 'regional model' whereby trading nations agree on labour standards within the framework of regional trading block (see: ibid. at 55-56), and (*iii*) the 'multilateral model' whereby trading nations agree on labour standards within the framework of international organizations such as the WTO or the ILO (see: ibid. at 56, 57).

Figure 25. CSR / fair trade.

The definitions of **CSR** range from equating CSR with 'business ethics' by Beauchamp and Bowie[108] or Velasquez[109] (opening the wide question of what 'business ethics' actually is) to "*actions that appear to further some social good, beyond the interests of the firm and that which is required by law*" proposed by McWilliams and Siegel.[110] As proposed by Carroll, among socially responsible actions of businesses going beyond legal compliance, 'ethical responsibilities'[111] and 'discretionary responsibilities' could be further distinguished.[112,113]

In turn, the notion of **fair trade** has been for example jointly defined by the World Fair Trade Organization, Fairtrade International (FLO) and FLO-CERT GmbH as "*a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers – especially in developing countries.*"[114]

PSR was first defined by Jennings and Carter as the 'purchasing function in CSR.'[115]

With regard to private actions, the interference with the conduct of foreign business operations can be seen in the consumer choices based on non-commercial criteria. Indeed, especially conscious consumers in affluent countries do not make their purchasing choices in order to seek the best value for money only, but instead also look at other considerations under the aegis of corporate social responsibility ('CSR'), 'fair trade' or 'purchasing social responsibility' ('PSR') (see Figure 25).[116] The interference with the conduct of foreign business operations channelled through public procurement markets seems to be a very straightforward reflection especially of fair trade and PSR practices in private markets, based on the premise that the notion of fair trade and PSR mostly refer to purchases of non-domestic products usually from emerging or least developed countries.[117]

Figure 26. *Tuna Labelling* facts.

In ***Tuna Labelling***, Mexico challenged 'United States Code, Title 16, Section 1385 ("Dolphin Protection Consumer Information Act")' ('DPCIA'),'[118] which regulated when the 'dolphin-safe' could appear on tuna products,[119] and required for the Tuna to be eligible for this label in the case of Tuna harvested in Eastern Tropical Pacific ('**ETP**' - region very relevant for the Mexican fleet) and in the case of vessels **using purse seine nets**(*i*) "*[w]ritten statements executed by the*

[108] See generally: Tom L. Beauchamp and Norman E. Bowie (eds), *Ethical theory and business* (3rd edn Prentice Hall, Englewood Cliffs 1988) 596.

[109] See generally: Manuel G. Velasquez, *Business ethics: concepts and cases* (5th edn Prentice Hall, Upper Saddle River 2002) 528.

[110] See: Abigail McWilliams and Donald Siegel. 'Corporate Social Responsibility: a Theory of the Firm Perspective' (2001) 26(1) Acad Manag Rev 117 at 117.

[111] "*[E]thical responsibilities embrace those activities and practices that are expected or prohibited by societal members even though they are not codified*". See: Archie B. Carroll. 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders' (1991) 34(4) Bus Horiz 39 at 41.

[112] "*[D]iscretionary (or volitional) responsibilities are those about which society has no clear-cut message for business – even less so than in case of ethical responsibilities. They are left to individual judgment and choice*". See: Archie B. Carroll. 'A Three-Dimensional Conceptual Model of Corporate Performance' (1979) 4(4) Acad Manag Rev 497 at 500.

[113] Thus, unlike in the case of horizontal policies (that can be confined to or can go beyond meeting legal requirements), the definitions of CSR/PSR - which involve the notion of legal regulation - suggest that CSR/PSR comes down to going beyond what is required by regulation. Also, unlike in the case of public policy in public procurement dominated by the concept of horizontal policies, there is no one coherent definition of CSR prevailing over the others.

[114] See: World Fair Trade Organization, Fairtrade International and FLO-CERT, 'Fair Trade Glossary' (28 June 2011).

[115] See: Craig R. Carter and Marianne M. Jennings. 'The Role of Purchasing in Corporate Social Responsibility: a Structural Equation Analysis' (2004) 25(1) J Bus Logist 145 at 146.

[116] Private cross-border regulatory actions similar to industrial cross-border horizontal policies in public procurement markets can only be seen in consumers or trade unions' behaviour but not in the behaviour of private business'. Even if private business aligns to CSR/PRS/fair trade practices desired by the consumers, or to consumers' or trade unions' boycotts, this might be seen as part of a self-serving business strategy rather than as any truly altruistically motivated activity.

[117] To the extent that this premise is accurate, the sometimes used term 'fair trade public procurement' might be a terminological equivalent of cross-border green and social horizontal policies. See: European Fair Trade Association and Marc Martens (Bird & Bird LLP), 'Buying Fair Trade. European Model on Fair Trade Public Procurement' (2010), footnote 25 at 12.

[118] See: note 73, WT/DS381/R, para. II.A2.1.

[119] See: ibid. para. II.A2.1.

*captain and observer providing the certification [required under § 1385 (h)], and endorsed in writing by the exporter, importer, and processor of the product, that - no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that - **no dolphins were killed or seriously injured** during the sets in which the tuna were caught,*" [120] and (*ii*) "*[w]Written statement by Secretary or designee/IATTC representative/ authorized representative of nation whose nation program meets the requirements of the International Dolphin Conservation Program that - an IDCP-approved observer was on board the vessel during the entire trip and provided the certification required under § 1385 (h) above.*"[121] Smaller vessels were exempted.[122] In turn, in the case in the case of vessels **not using purse seine nets** in the ETP and in the fisheries 'identified by the US Secretary of Commerce as having a regular and significant mortality or serious injury,'[123] the DPCIA required "*[w]Written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary (provided that the Secretary determines that such an observer statement is necessary) that – **no dolphins were killed or seriously injured** in the sets or other gear deployments in which the tuna were caught*."[124]

With regard to mixed actions, the public-private cooperation in interfering with the conduct of foreign business operations can be seen in labelling schemes designed by governments in order to stimulate consumer choices. Some such schemes might be confined to product-related requirements and therefore have economic effects only (see further section 6.5) like for example the 'ozone-depletion-warning' labelling imposed in 1990 in the US under amendments to the 1963 Clean Air Act[125] of 1990, informing consumers that goods contain substances "*which harms public health and the environment by destroying ozone in the upper atmosphere*."[126] However, the other may encourage consumers to look at the process related requirements *in effectu* causing deliberate cross-border regulatory interferences, like in discussed *Tuna Labelling* case where (*i*) "*the US determined conditions for the use of 'dolphin-safe' labels on tuna products*,"[127] (*ii*) "*[t]The 'dolphin-safe' labels were to **invoke consumers' social responsibility, and affect their purchasing choices***," [128] and (*iii*) "*[w]Whether particular tuna products could bear the 'dolphin-safe' label depended on a number of factors, such as whether the purse seine method was used or not, or what type of vessel was used to harvest the tuna*"[129] (see Figure 26).[130]

[120] See: note 73, WT/DS381/R, para. II.A.2.14.

[121] See: ibid..

[122] See: ibid..

[123] See: note 73, WT/DS381/R, para. II.A.2.13.

[124] See: ibid. para. II.A.2.14.

[125] See: Clean Air Act 1963 § 611, 42 U.S.C. § 7671j (Supp. II. 1990).

[126] See: ibid. § 7671j(b), (d)(1)(c) (Supp. 11 1990), cited in: Elliot B. Staffin. 'Trade Barrier or Trade Boon - A Critical Evaluation of Environmental Labelling and Its Role in the Greening of World Trade' (1996) 21(2) Colum J Envtl L 205 at 211, 212. See also: Drusilla J. Hufford and Paul Horwitz. 'Fixing the Hole in the Ozone Layer: A Success in the Making' (2004-2005) 19(4) Nat Resources & Env't 8 at 12.

[127] See: note 73, WT/DS381/R, para. II.2.3-2.33.

[128] See: ibid.

[129] See: ibid.

[130] While the most crucial finding for this study made by the appellate in Tuna labelling is the *de facto* ban on cross-border regulatory interferences (see section 6.1.2.c) the essence the US-Mexico dispute also pertained to that US imposed process-related requirements differing for the US and Mexican fleets as (*i*) "*[f]For over twenty years, yellowfin tuna caught by the Mexican fishing fleet in the Eastern Tropical Pacific ("ETP") have been denied effective access to the US market by virtue of various GATT and WTO inconsistent measures,*" (see: note 73, WT/DS381/R, para. 4.1.), (*ii*) "*When the United States enacted legislation imposing restrictions on fishing in the ETP, the US vessels soon began to fish for tuna elsewhere, outside the ETP. In the case of Mexico, there was no reason for the Mexican fleet to relocate outside its natural and traditional fishing area within the ETP,*" (see: ibid. para. 4.8.), (*iii*) "*There is scientific evidence proving that outside the ETP, fishing results in the killing of many dolphins and other cetaceans (i.e. bycatch), and no measures have been taken in those other regions even remotely*

Clearly, CSR/PSR/fair trade share many characteristics with green and social cross-border horizontal policies. Foremost, CSR covers a variety of matters that also fall within the interest of green and social horizontal policies. It covers issues like gender and racial equality in employment, impact of business operations on the natural environment, philanthropic contributions, conditions of employment, etc.[131] In the particular context of PSR, it means for instance sourcing from minorities, or paying attention to environmental consideration, or to human rights protection while purchasing[132] - which is exactly what is done via green and social public procurement. Furthermore, just like horizontal policies, CSR is sometimes inaccurately presented in the literature as a relatively recent phenomenon, or an admittedly established phenomenon but more recent than it actually is. Nothing can be more wrong as (*i*) Berle's view that powers of managers are held in trust for stockholders as the mere beneficiaries of the corporation[133] and (*ii*) its famous critiques by Dodd contending that "*business corporation as an economic institution which has a social service as well as a profit-making function, that this view has already had some effect upon legal theory, and that it is likely to have a greatly increased effect upon the latter in the near future*"[134] were expressed in the pages of the Harvard Law Review in the early 1930s. Since then, CSR spilled beyond the Western hemisphere just like the instrumental use of public procurement to pursue green and social goals (as discussed in section 5.4).[135] Altogether, the gradually ensuing terminological separation of PSR from the wider concepts such as CSR is also some evidence that PSR brings different challenges than the wider problems related to CSR, as do cross-border horizontal policies compared with all other horizontal policies in public procurement markets.

6.2.2. International standards

In the light of the Appellate Body's remarks made in *US – Shrimp (Article 21.5 Malaysia)* potentially also applicable *mutatis mutandis* to public procurement markets (see section

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comparable to those taken for the ETP. Also, despite the fact that dolphins (and other several species) are affected from fishery bycatch in other oceans, the United States has chosen to regulate fishing methods to protect dolphins exclusively with respect to tuna caught in the ETP."(see: ibid. para. 4.9.), (*iv*)*"The US measures discriminate de facto against Mexican tuna products. De facto discrimination occurs because of the economic and other circumstances related to certain products and the application of a government measure in those circumstances. This type of discrimination tilts the balance of competitive opportunities against the imported products. The US measures discriminate against Mexican tuna products because the Mexican fleet fishes for tuna using dolphin sets and therefore its tuna products are prohibited from having the label while the fleets of other countries, including the United States, fish using other methods and therefore are permitted to use the label. Thus, the US measure is attempting to pressure Mexico to make the choice between fishing grounds and methods in order to be eligible for a dolphin-safe label."* (see: ibid. para. 134).

[131] See: note 115 at 179.

[132] See: ibid. at 178.

[133] See: Adolf A. Berle Jr. 'Corporate Powers as Powers in Trust' (1931) 44(7) Harv L Rev 1049 at 1074.

[134] See: Edwin M. Dodd Jr. 'For Whom are Corporate Managers Trustees?' (1932) 45(7) Harv L Rev 1145 at 1148.

[135] For instance, in 2005 Zhu, Sarkis and Geng assessed with regard to green supply chain management in private markets that - although it was still in its infancy in China - its importance had already then been very well recognized by Chinese enterprises. See: Qinghua Zhu, Joseph Sarkis and Yong Geng. 'Green supply chain management in China: pressures, practices and performance' (2005) 25(5/6) Int'l J of Oper & Prod Manag 449 at 464.

6.1.2.c) it is clear that it is rather difficult for a given state to legitimise interfering with foreign business operations without any foothold in more international standards.

6.2.2.a Convergence with cross-border horizontal policies

Importantly, interfering with regulatory environments of some sovereign states by the joint efforts of some other sovereign states to impose globally or regionally harmonized standards of business operations is a bird of another feather than similar efforts channelled through public procurement possible thanks to the sufficient purchasing power of procurers. However, especially as far social and environmental international standards are concerned, promoting international harmonization of standards and pursuing related cross-border horizontal policies are a part of the same game. The goals of international harmonization of standards and of non-commercial consideration in public procurement often go in tandem. Just like in the case of cross-border horizontal policies, the purpose of international harmonization is, in principle, to steer sovereign regulatory environments toward higher standards, among others in the field of environmental protection, social security, labour safety, curbing corruption or money-laundering, etc.

Indeed, one cannot easily think of any international standards that (*i*) deregulate national regulatory environments, or (*ii*) force national legislators to impose lower standards on the business operations than would be otherwise imposed by national lawmakers. For instance, it is beyond possibility to think of any international agreements limiting wages, diminishing the role of trade unions or mandating lower environmental standards. There might be some areas where the efforts of the international community are aiming at the deregulation of national regulatory environments rather than the regulation, like protecting foreign investment.[136] However, such deregulatory efforts could hardly be enhanced by pursuing any cross-border horizontal policies. There is just no obvious way in which any non-commercial considerations incorporated by a public procurer in one jurisdiction could support a liberalization of investment laws in any other jurisdiction. Likewise, one cannot easily think of any cross-border policies designed to undermine the implementation of stereotypical international norms that impose stricter standards and result in more regulation. For instance, it's beyond possibility to think of any cross-border horizontal policies

[136] International agreements related to foreign investment liberalise national regulatory environments in the sense that they liberalise laws hindering foreign investments. At the same time, agreements related to foreign investment do not lead to more regulation in other fields because in principle they ignore non-commercial/social issues. See: Tissya Mandal, 'FDI, BITS and the Marginalization of Labour Standards' Social Science Research Network (Rochester May 2011) at 16; OECD, *International Investment Law: Understanding Concepts and Tracking Innovations A Companion Volume to International Investment Perspectives* (OECD Publishing, Paris 2008) 340 at 136-137.

torpedoing stricter standards and more regulation in the field of wages, rights of trade unions or environmental standards.[137]

Altogether, from the perspective of a policy-maker advocating an internationalisation/harmonisation of specific standards, the role of cross-border horizontal policies is to help promote/enforce such standards. In turn, from the perspective of a policy-maker pursuing a given cross-border horizontal policy, the role of international standards is to facilitate the pursuit of horizontal policies and to facilitate (legitimise) interfering with foreign regulatory environments.

6.2.2.b International standards as legitimisation

Despite this convergence, finding some footing in and referring to regionally or internationally recognized standards by public procurers cannot be seen as a 'bulletproof' tool for legitimizing cross-border horizontal policies. Specifically, widely accepted, yet not universal, standards are likely to be used as a near-future policy-justification-tool not only among sovereign states voluntarily subjected to such standards but also toward sovereign states which deliberately elected to opt out. This has been foretold in the solutions of the fifth generation of the EU's directives on public procurement first revealed in 2011[138] and eventually promulgated in March 2014.[139]

The initial bills would have allowed EU's public procurers "*not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions (...)*," [140] potentially meaning that extraterritorial (non-EU/EEA) business operations could have been required to be in compliance with standards unilaterally delineated by the EU in the 'Union legislation'. However, the adopted directives rejected the unilateral model and backed off by leaving only international standards as a

[137] Perhaps subject to international standards of IP protection (see further section 6.2.3.b). Of course, traditional non-cross-border horizontal policies (price preferences, reserving contracts for domestic enterprises, informal protectionist practices, etc.) are employed to undermine international commitments on the liberalization of procurement markets like the ban on discrimination, NT, MNF treatment, ban on off-sets, etc. and procedural requirements but there are no obvious intersections between the non-compliance with such commitments and the interfering with foreign national regulatory environments resulting from such non-compliance.

[138] See: Proposal for a Directive on Public Procurement Repealing Directive 2004/18. COM(2011) 896 final 2011/0438 (COD); Proposal for the Directive on procurement by entities operating in the water, energy, transport and postal services sectors repealing Directive 2004/17, COM(2011) 895 final 2011/0439 (COD); Proposal for the Directive on the award of concession contracts, COM(2011) 897 final 2011/0437 (COD).

[139] See: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ [2014] L 94, p. 65–242; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ [2014] L 94, p. 243–374; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ [2014] L 94, p. 1–64.

[140] See: note 138, 2011/0438 (COD), Article 54. 2. See also: ibid. 2011/0438 (COD), Article 55. 3 point a) in the context of exclusions and article 69 section 1 point d in the context of abnormally low prices.

point of reference for the legitimate non-commercial consideration employed in the pursuit of cross-border horizontal policies. A set of international treaties was unilaterally singled out by the EU lawmaker and attached as an annex to the directives so that generally, *"Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions"*[141] whereby, in contrast to the initial bills, such language does not vaguely suggest anymore that standards delineated by the 'Union law' also apply to extraterritorial business operations (see Figure 27).

Specifically, public procurers now "*may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations*" including international treaties.[142] In the case of noncompliance with them, public procurers could also preclude, or might be mandated by Member States to preclude, potential suppliers/contractors from bidding if procurers at the qualification stage *"can demonstrate by any appropriate means a violation*."[143] Moreover, provisions on abnormally low tenders in the fifth-generation directives are based on the premise that such tenders might result from violations of international social or environmental standards delineated by these agreements.[144] Whenever a link between such violations and an abnormally low tender can be proved, such tenders must be rejected by public procurers.[145] On top of that, procurers could also require, or might be mandated by Member States to require, that suppliers/contractors shall replace their sub-suppliers/subcontractors if the latter violate mentioned international treaties.[146]

Figure 27. List of international social and environmental conventions referred to in article 18(2) – Annex X to Directive 2014/24/EU.

- International Labour Organization Convention 87 on Freedom of Association and the Protection of the Right to Organise – ratified by **153** countries[147]
- International Labour Organization Convention 98 on the Right to Organise and Collective Bargaining – ratified by **164** countries[148]
- International Labour Organization Convention 29 on Forced Labour – ratified by **177** countries[149]
- International Labour Organization Convention 105 on the Abolition of Forced Labour – ratified by **174** countries[150]

[141] See: Directive 2014/24, Article 18. 2.

[142] See: ibid. Article 56.1 *in fine.*

[143] See: ibid. Article 57.4.a.

[144] See: ibid. Article 69.2.d.

[145] See: ibid. Article 69.3.

[146] See: ibid. Article 70.7.d.

[147] As of 28 June 2014. See: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232:NO> accessed on 28 June 2014.

[148] As of 28 June 2014. See: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312243:NO> accessed on 28 June 2014

[149] As of 28 June 2014, see: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312174:NO> accessed on 28 June 2014.

- International Labour Organization Convention 138 on Minimum Age – ratified by **167** countries[151]
- International Labour Organization Convention 111 on Discrimination (Employment and Occupation) – ratified by **172** countries[152]
- International Labour Organization Convention 100 on Equal Remuneration – ratified by **171** countries[153]
- International Labour Organization Convention 182 on Worst Forms of Child Labour – ratified by **179** countries[154]
- Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer – both ratified by **197** countries[155]
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) – ratified by **181** countries[156]
- Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention) – ratified by **72** countries[157]

Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols – ratified by **72** countries[158]

The key point here is that while many of these international treaties are almost universal, a portion of them is not. As of June 2014 – against the 191 members of the UN – the ratification coverage of listed agreements ranged from 197 in the case of the Vienna Convention for the Protection of the Ozone Layer, to between 163 and 179 in the case of various fundamental International Labour Organisation conventions, to as low as 72 ratifications in the case of the Stockholm Convention on Persistent Organic Pollutants and the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (see Figure 27). Whenever business operations subjected to the regulatory environment of countries, which are not parties to some of these international treaties, are forced to comply with the standards arising out them, the interference with the foreign regulatory environment of such countries is undisputable.

Figure 28. Monism and Dualism.

Monism can be defined as the theory, according to which both international law as well as the state legal systems make up a unified system of law.[159]

Dualism can be defined as the theory, according to which international law and state law do not do not make up a unified system of law, but rather exist independently of one another.[160]

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[150] As of 28 June 2014. See: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312250:NO> accessed on 28 June 2014.

[151] As of 28 June 2014. See: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283:NO> accessed on 28 June 2014.

[152] As of 28 June 2014. See: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256:NO> accessed on 28 June 2014.

[153] As of 28 June 2014. See: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312245:NO> accessed on 28 June 2014.

[154] As of 28 June 2014. See: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327:N> accessed on 28 June 2014.

[155] As of 28 June 2014. See: <http://ozone.unep.org/new_site/en/treaty_ratification_status.php> accessed on 28 June 2014.

[156] As of 28 June 2014. See: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-3&chapter=27&lang=en\> accessed on 28 June 2014.

[157] As of 28 June 2014. See: <http://chm.pops.int/Countries/StatusofRatifications/PartiesandSignatories/tabid/252/Default.aspx#a-note-1> accessed on 28 June 2014.

[158] As of 28 June 2014. See: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-14&chapter=27&lang=en> accessed on 28 June 2014.

[159] See: Torben Spaak, 'Kelsen on Monism on Dualism' in Marko Novakovic (ed), *Basic Concepts of Public International Law: Monism & Dualism* (Alter DOO and Faculty of Law, University of Belgrade, Institute of Comparative Law, Belgrade 2013) 322-343 at 322.

[160] See: ibid.

Whenever standards arising out of these treaties are imposed on business operations subjected to the regulatory environment of countries which are parties to these international agreements but have not implemented them, the assessment is more ambiguous. If one looks at the relations between international law and national law from a dualistic perspective (see Figure 28), one can see a straightforward interference with a foreign regulatory environment. This is because under the dualistic approach international norms merely regulate relations between states and do not deal with individuals like private entrepreneurs[161] and, therefore, unimplemented international agreements do not form part of a given jurisdiction's regulatory environment which is interfered with. In this case, a hypothetical cross-border-horizontal policy, which refers to unimplemented standards adopted at the level of an international agreement, regulates foreign business operations which are deliberately not subjected to any regulation by foreign lawmakers. In turn, if one looks at the relations between international law and national law from a monistic perspective, then even unimplemented international standards form part of a given jurisdiction's regulatory environment. In such a case, a hypothetical cross-border policy does not impose higher standards than those imposed by international standards which should be implemented anyway. It only necessitates the *de facto* enforcement/implementation of international laws by third countries and, as such, interferes with the enforcement of foreign laws (see further section 6.2.3.a).

6.2.3. Interference with the enforcement of foreign laws

The interference with the mere enforcement of foreign or international laws regulating foreign business operations is a less obvious way in which foreign business is forced to operate in different ways than it would otherwise operate within the framework of a foreign regulatory environment without cross-border horizontal policies in place. There might be nothing in foreign 'written' rules regulating business operations to condemn and alter. However, cross-border horizontal policies might still step into how such foreign 'written' rules are enforced in practice, which surely is also a part of regulatory environments.

6.2.3.a Environmental/social cases

In terms of environmental/social policies, under the monistic approach (see section 6.2.2.b *in fine*), the interference with the enforcement of foreign rules regulating business operations can be seen in the cross-border horizontal policies compelling the implementation of unimplemented or poorly implemented international standards (like in the case of the EU's fifth-generation directives and third countries poorly implementing ratified international agreements unilaterally selected by the EU). The interference with the enforcement not

[161] See: Joseph G. Starke. 'Monism and Dualism in the Theory of International Law' (1936) 17 Brit Y B Intl L 66 at 70.

involving international standards could be best illustrated by various timber-imports-related national laws. For instance, the Illegal Logging Prohibition Act of 2012[162] passed in Australia sanctioned importing[163] and processing[164] of illegally logged wood. That act was of general application (see section 5.5.1) but was relevant for the Australian public procurement markets given that some portion of the timber imported to Australia is used in governmental construction projects.[165] As the most controversial provision, that law specified that "*illegally logged, in relation to timber, means harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested.*"[166] Unsurprisingly, that law caused the express anger of some timber exporters, especially the Indonesian[167] and Malaysian[168] governments which warned of potential trade disputes.

Similarly, the EU's Regulation 995/2010 'laying down the obligations of operators who place timber and timber products on the market'[169] scheduled to be implemented by the Member States until April 2013[170] banned "*placing on the market of illegally harvested timber or timber products derived from such timber*"[171] where 'illegally harvested' meant "*harvested in contravention of the applicable legislation in the country of harvest.*"[172] The act was criticised by third countries,[173] like Canada claiming that "*[f]For example the EU's Illegal Timber Regulation has traceability requirements that could provide an unfair competitive advantage to manufacturers of forest products in the EU compared to their international competitors*."[174] Likewise, in the US, the amendments to the Lacey Act of 1990[175] passed in 2008[176] prohibited 'taking, possessing, transporting, or selling' timber "*in violation of any law or regulation of any State, or* ***any foreign law****, that protects plants or that regulates - ``(I) the theft of plants; (II) the taking of plants from a park, forest reserve, or other officially protected area; (III) the taking of plants from an officially designated*

[162] See: Illegal Logging Prohibition Act 2012 No. 166 of 2012 - C2012A00166.

[163] See: ibid. Articles 8-11.

[164] See: ibid. Articles 15-16.

[165] See generally: Fabiano A. Ximenes and W. David Gardner, 'Production and use of Forest Products in Australia' Forest Resources Research NSW Department of Primary Industries (Sydney 2005) Technical Paper No. 71.

[166] See: note 162, article 7.

[167] See: Peter Alford. 'Bill on illegal logging could trigger trade dispute with Jakarta' *The Australian* (12 March 2012).

[168] See: Andrew D. Mitchell and Glyn Ayres. 'Out of crooked timber: The consistency of Australia's Illegal Logging Prohibition Bill with the WTO Agreement' (2012) 29(6) Envir Plan L J 462 at 465.

[169] See: Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ [2010] L 295/23p. 23–34.

[170] See: Regulation 995/2010, article 24.

[171] See: ibid. Article 4.1.

[172] See: ibid. Article 2.g.

[173] See: Dylan Geraets and Bregt Natens. 'The WTO Consistency of the European Union Timber Regulation' (2014) 48(2) J World Trade 433 at 436.

[174] See: WTO, 'Trade Policy Review Body - 6 and 8 July 2011 - Trade policy review - European Union - Record of the meeting' (14 September 2011) WT/TPR/M/248, para. 135 at 25. See also: note 173 at 439.

[175] See: Lacey Act 1900, 16 USC § 3371–3378.

[176] See: 16 USC § 3371–3378 (2006 & Supp 2007-2009).

area; or (IV) the taking of plants without, or contrary to, required authorization;"[177] These provisions were in turn criticised by Argentina claiming that "*the new measures required an import license for plant products and products derived from plant species including sports products, musical instruments, furniture, textiles and manufactured products made from plant resin. It was his delegation's view that the regulation was not necessarily intended to protect endangered species but rather to protect domestic markets from imports.*"[178] Like in the case of Australian Logging Prohibition Act 2012, both the EU's and US' measures were of general application but were relevant for public procurement markets in the sense that the control of the suppliers'/contractors' compliance with them by public procurers was meant to help their better enforcement.[179]

In such cases, policymakers do not interfere with hypothetically less strict foreign 'written' rules regulating business operations, such as by requiring eco-labels (along with both autonomous standards and autonomous enforcement mechanisms) or by referring to some international agreements, or to the relevant policymakers' domestic laws.[180] The policymakers here merely step into how foreign laws are executed, seemingly making an attempt to impose their views on law enforcement accepted in highly affluent and integral open societies on emerging economies still working their way up.

6.2.3.b Firmly industrial cases

In the case of the firmly industrial cross-border horizontal policies, the interference in the enforcement of foreign laws consists in distorting the conditions of doing business for foreign suppliers/contractors by undermining rather than enforcing international standards (which are part of national regulatory environments under the monistic approach). Specifically, policies like preferences for open-source/free software policies ('open-source

[177] See: Lacey Act, section 3372(a)(1)(B)(i).

[178] See: WTO, 'Committee on Technical Barriers to Trade - Minutes of the Meeting of 5 - 6 November 2008 - Note by the Secretariat' (23 January 2009) G/TBT/M/46, para. 36 at 7. See also: note 173 at 439.

[179] See: Standing Forestry Committee Ad Hoc Working Group IV on Public Procurement of Wood and Wood-based Products, 'Final Report' European Commission (November 2010) Forestry measures wg4-112010_en; European Forest Institute, European Timber Trade Federation, Forest Legality Alliance and Australian Department of Agriculture Fisheries and Forestry, 'International Developments in Trade in Legal Timber' European Forest Institute (30 November 2012) at 2; Duncan Brack, 'Promoting Legal and Sustainable Timber: Using Public Procurement Policy' Chatham House, the Royal Institute of International Affairs (8 September 2014) at 4.

[180] However, in the case of the EU and its Regulation 995/2010, the unilateral encroachment upon enforcement of laws of third countries was only the second best policy as all the requirements imposed by the Regulation 995/2010 (see further section 6.2.3.d) related to assuring that the timber placed on the EU's market is harvested legally are waived in the case of countries subjecting their forestry sectors to the international standards delineated under bilateral agreements with the EU under the Action Plan for Forest Law Enforcement, Governance and Trade ['FLEGT' – see generally: Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ [2005] L 347p. 1–6]. Specifically Regulation 995/2010 article 3 provides that "*[t]Timber embedded in timber products listed in Annexes II and III to Regulation (EC) No 2173/2005 which originate in partner countries listed in Annex I to that Regulation and which comply with that Regulation and its implementing provisions shall be considered to have been legally harvested for the purposes of this Regulation.*"

software')[181] or forced technology transfers (usually pursued by the non-parties to the GPA) undermine the enforcement and the foundation of a multilateral system for the protection of IP which has been deeply rooted in the majority of national legal systems, and which sets the rules with respect to IP by which business and originators (usually based in the GPA parties – see Figure 29) are used to play in their 'home' jurisdictions.

Figure 29. Innovation by country and GPA membership.

	General innovation ranking by Bloomberg (2014)[182]	The Global Innovation Index 2014[183]	Resident patent applications relative to population according to WIPO (2012) [184]
1	South Korea	Switzerland	South Korea
2	Sweden	UK	Japan
3	US	Sweden	Switzerland
4	Japan	Finland	Germany
5	Germany	Netherlands	US
6	Denmark	US	Finland
7	Singapore	Singapore	Sweden
8	Switzerland	Denmark	Denmark
9	Finland	Luxembourg	***China***
10	Taiwan	Hong Kong	Austria
11	Canada	Ireland	Netherlands
12	France	Canada	France
13	***Australia***	Germany	Norway
14	Norway	Norway	UK
15	Netherlands	Israel	Belgium
16	UK	South Korea	Singapore
17	Austria	***Australia***	***Russia***
18	***Russia***	New Zealand	Italy
19	Belgium	Iceland	***Belarus***
20	New Zealand	Austria	Israel
	LEGEND:	GPA party	**GPA non-party**

Open source policies in public administration clearly hit specific foreign 'monopolist' software suppliers. For example, a governmental decree was passed in the Russian Federation in 2010, forcing a shift by the central federal agencies to the use of open-source software in the 2011-2015 period.[185] The law was clearly striking in the Microsoft Company,[186] following similar attempts made at the central or local level in, among others,

[181] "*[O]epen-source software. (1998) Software that is usu. not sold for profit, includes both human-readable source code and machine-readable object code, and allows users to freely copy, modify, or distribute the software. • Even though open-source software is made widely available for free, it may be protected by federal trademark law. See Planetary Motion Inc. v. Techplosion Inc., 261 F.3d 1188 (11th Cir. 2001).*' See: Bryan A. Garner (ed), *Black's law dictionary* (available at Westlaw BLACKS, 9th edn., St. Paul 2009).

[182] It takes into account (*i*) 'R&D intensity,' (*ii*) 'manufacturing,' (*iii*) 'capability,' (iv) 'productivity,' 'high-tech density,' (*v*) 'tertiary efficiency,' (*vi*) 'researcher concentration,' and (*vii*) 'patent activity.' See: Bloomberg, 'Most Innovative in the World 2014: Countries' (2015) Bloomberg Rankings, available at <http://images.businessweek.com/bloomberg/pdfs/most_innovative_countries_2014_011714.pdf> accessed 4 September 2014.

[183] See: Soumitra Dutta, Bruno Lanvin and Sacha Wunsch-Vincent (eds), *The Global Innovation Index 2014* (Cornell University, INSEAD, and the WIPO, Geneva, New Delhi 2014) 401 at xxiv.

[184] See: WIPO, 'World Intellectual Property Indicators' (Geneva 2014) Economics & Statistics Series at 36.

[185] See: Government's Order of 17 December 2010 on the approval of the Plan for the transition of federal bodies of executive authorities and for the federal budgetary institutions to use free software in the years 2011 - 2015 (*Распоряжение Правительства РФ от 17.12.2010 Об утверждении плана перехода федеральных органов исполнительной власти и федеральных бюджетных учреждений на использование свободного программного обеспечения на 2011 - 2015 годы*), OJ [2010] 2299-p. See also: Alexander I. Savelyev, 'Open Source: The Russian Experience (Legislation and Practice) ' (28 January, 2013) Higher School of Economics Research Paper No. WP BPR 09/LAW/2013 at 4; Alexander I. Savelyev, 'Open Source: The Russian Experience (Legislation and Practice), (2013) 22(1) Infor & Comm Tech L 27 at 28.

[186] See: Shanker A. Singham and Daniel D. Sokol. 'Public Sector Restraints: Behind-the-Border Trade Barriers' (2003-2004) 39 Tex Intl L J 625 at 634-639.

Australia, Brazil, Canada, France, Germany, Mexico, Peru, Korea, Taiwan and the United Kingdom.[187] The hidden sense of such of measures is not to prefer open-source software solutions over proprietary systems but rather to virtually eliminate proprietary systems from use in public administration at the expense of the specific foreign suppliers (or just one supplier like Microsoft), apparently with a rationale to somehow stimulate the domestic software sector as a result of striking in foreign business.[188] Nevertheless, despite their protectionist character, the legitimacy of such measures under the TRIPS, the GPA or the public procurement-relevant RTAs is a *terra incognita* with the lack of relevant case law or relevant literature (see section 6.1.2.d *in fine*).

Figure 30 Framework of China's public-procurement specific 'indigenous innovation' program.

The general framework of the indigenous innovation programme was provided by (*i*) China's State Council in the Medium- and Long-Term National Plan for Science and Technology Development (2005-2020) ('2006 National Plan') passed in 2006,[189] and (*ii*) the accompanying follow-up implementing measures.[190] Among the implementing measures, in November 2006, the 'Trial Measures for the Administration of the Accreditation of National Indigenous Innovation Products'[191] were jointly passed by (*i*) the Ministry of Science and Technology ('MOST'), (*ii*) the National Development and Reform Commission ('NDRC'), and (*iii*) the Ministry of Finance ('MOF'). Products accredited under that scheme were to be given a strong preference in public procurement, and the accreditation to the scheme required, in short, that (*i*) the intellectual property backing innovative products had to originate or be transferred to businesses based in China, and (*ii*) the products in question had to be physically made in China.[192] Trial measures were subsequently supplemented by the MOF with the *(i)* 'Administrative Measures for the Government to Initially and Selectively Purchase Indigenous Innovation Products' and *(ii)* the 'Administrative Measures for the Government to Purchase Imported Products'.[193] The former mandated the authorities to procure first packages of accredited goods offered by domestic business.[194] The latter, in the course of buying from foreign business, mandated prioritizing (*i*) foreign suppliers that co-operated with their Chinese competitors, or (*ii*) foreign suppliers agreeing to transfer their technologies to Chinese businesses.[195] Based on such framework, initial local pilot programmes - that used local lists of innovative products to rely on while procuring - were launched by 14 provincial-level authorities until 2010.[196] Meanwhile, the most contentious landmark 2009 Order regarding the Launch of National Indigenous Innovation Product Accreditation Work ('**Order 618**") was passed at the central level. It mandated that central agencies shall create their lists of innovative products.[197]

[187] See: ibid at 635. See also: Sieverding McLean, 'Choice in Government Software Procurement: A Winning Strategy.' (2008) 8(1) Journal of Public Procurement 70 at 71.

[188] See: ibid.

[189] 'The Medium- and Long-Term National Plan for Science and Technology Development (2005-2020) 2006 (promulgated by the State Council on 9 February 2006, effective 9 February 2006).' See: note 94, footnote 35 at 386.

[190] See: note 94, footnote 36 at 386.

[191] 'Trial Measures for the Administration of the Accreditation of National Indigenous Innovation Products 28 December 2006 (promulgated by the Ministry of Science and Technology the National Development & Reform Commission and the Ministry of Finance effective 28 December 2006)' See: note 94, footnote 39 at 387. See also: James Boumil S. 'China's Indigenous Innovation Policies under the TRIPS and GPA Agreements and Alternatives for Promoting Economic Growth' (2011-2012) 12(2) Chi J Intl L 755 at 762-763.

[192] See: note 94 at 387-388; note 191, Boumil at 763.

[193] See: note 94, footnotes 53-56 at 390.

[194] See: ibid.

[195] See: ibid.

[196] See: ibid. footnote 57 at 391.

[197] 'Order Regarding the Launch of National Indigenous Innovation Product Accreditation Work for 2009 30 October 2009 (promulgated by the Ministry of Science and Technology, the National Development and Reform Commission and the Ministry of Finance, effective 30 October, 2009)'. See: note 94, footnote 71 at 395. See also: note 191, Boumil, footnote 45 at 763.

Next, various firmly industrial pro-innovation policies target particular foreign businesses and technologies, They usually fall within the concept of 'offsets' banned under the GPA[198] (see also section 9.4.2.c in the context of the 'development needs' of developing countries) and might also violate some provisions of the TRIPS (see further this section). In respect of such policies, China is a self-standing story. Beginning from 2006, in the spirit of so-called 'innovation mercantilism' (a term proposed by Atkinson to describe a variety of Chinese trade policies aimed at making China a leader in high-technology sectors[199]), a set of measures collectively known as 'indigenous innovation policies' have been adopted in China, including preferences in public procurement for indigenous (domestic) innovative businesses (see Figure 30). The indigenous innovation programmes led to the phenomenon of forced transfers of intellectual property from foreign businesses eager to operate in China as well as to sell goods-services to the Chinese public sector and to Chinese state influenced enterprises ('SIEs').[200]

Even without such framework, the goals of innovation mercantilism in public procurement had been successfully achieved in China before. For example, in 2004, Kawasaki Heavy Industries Limited ('Kawasaki'), was among a few high-speed-rail-system manufacturers on a global scale that possessed technology meeting the needs of Chinese procurers (the other being Alstom, Bombardier and Siemens). Kawasaki agreed to follow the rules imposed by the Chinese procurers by reportedly revealing its entire technology to the Chinese Ministry of Railway, China CNR Corporation Limited ('CNR') and CSR Qingdao Sifang Locomotive & Rolling Stock Company Limited ('CSR').[201] The agreed extent of the know-how transfer reached a point in which Kawasaki had to train Chinese engineers in its domestic premises in Japan, which Atkinson characterized as a kind of Hobson's choice that can be rephrased as follows: abide by the rules or the other supplier will make this money.[202] Not surprisingly, despite the transferred technology having been earmarked for application in China only so that it would not compete with Kawasaki's offer in other markets, it has already been sold by the CNR not only to procurers in emerging economies like Saudi Arabia, Turkey, and

[198] **"***[O]ffset means any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement*" See: GPA12 Article I.l. "*With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset.*" See: GPA12 Article IV.6. See also: note 191, Boumil at 775-776.

[199] See: Robert D. Atkinson, 'Enough is Enough: Confronting Chinese Innovation Mercantilism' The Information Technology and Innovation Foundation (Washington February 2012) at 8-10.

[200] In the context of China's future accession to the GPA, the notion of the SIEs was proposed by Mathieson because this term "*seeks to cast a wide net over all forms of government control and influence, rather than merely investment-related indicia of "ownership."*" See: Skye: Mathieson. 'Accessing China's Public Procurement Market: Which State-Influenced Enterprises Should the WTO's Government Procurement Agreement Cover ' (2010-2011) 40(1) Pub Cont L J 233 at 236.

[201] See: U.S. House of Representatives, 'The Impact of International Technology Transfer on American Research and Development: Testimony of the Honorable Dennis C. Shea before the Committee on Science, Space, and Technology Subcommittee on Investigations and Oversight United States House of Representatives' (5 December 2012) HHRG-112-SY2 at 4. See also: note 199 at 34-35.

[202] See: note 199 at 34, 79.

Venezuela but also to Australia and New Zealand, in many instances after outbidding Kawasaki.[203]

China, of course, does not act alone with this kind of instrumental use of procurement aimed at forcing know-how transfers from specific businesses. Other cases emerge from to time in significantly smaller economies. One of the recent examples identified in the report by the Office of the United States Trade Representative on Foreign Trade Barriers for 2011 was Venezuela in the case of which "*[a]Although the law forbids discrimination between domestic and foreign suppliers, it provides that the President can mandate temporary changes in the bidding process "under exceptional circumstances," in accordance with "economic development plans" that promote national development or provides preferences to domestic goods and suppliers. These measures can include price preferences for domestic goods and suppliers, reservation of procurements for nationals, requirements for domestic content, technology transfer, or the use of local labour and other incentives to purchase from companies domiciled in Venezuela.*"[204] Attempts of countries other than China to pursue indigenous-innovation-like programmes might foreshadow more governments/policymakers (or more public procurers acting within their discretion allowed by their governments/law-makers) adopting such programmes in the future. However, because sufficient purchasing power constitutes an indispensable feature of effective cross-border horizontal policies (see further section 6.4) it makes perfect sense to focus this discussion on public procurement and on forced intellectual property transfers in China, and ignore less significant cases.

Preferences for open-source software in public sector or general indigenous innovation-like policies merely interfere with the enforcement of individual foreign-originated IP rights. They are not in any obvious violation of almost universal IP-related international obligations imposed on states acting as market participants through their procuring agencies/SIE, and only vaguely violate obligations imposed on states acting as regulators. A far as open-source policies are concerned, there is nothing in the TRIPS or in the GPA mandating their parties to buy proprietary systems, especially when public procurers do not differentiate between domestic and foreign products while making purchases. As far as forced technology transfers are concerned, when public procurers differentiate between domestic and foreign products, like in the case of Chinese indigenous innovation program preferring innovative products backed by IP registered in China or owned by Chinese enterprises[205] (see Figure 30), according to Boumil as well as An and Peck, this might violate some provisions of the

[203] See: Robert D. Atkinson, 'Hearing on "The Impact of International Technology Transfer on American Research and Development" Before the House Science Committee Subcommittee on Investigations and Oversight U.S. House of Representatives' (5 December 5 2012) at 6.

[204] See: The Office of the US Trade Representative, 'The 2012 National Trade Estimate Report on Foreign Trade Barriers' (March 2012) at 397.

[205] See: note 94, footnotes 53-56 at 390.

TRIPS such as, among others, TRIPS NT clause[206] and TRIPS article 27.1 on 'patentable subject matter' which stipules that: "*(…)patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.(…) patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.*"[207,208] However, in the light of the exemption of public procurement from the NT clause under GATT 47 article III.8 and GATS article XIII.1, such provisions of the TRIPS appear to be inapplicable to public procurement.[209] Indigenous innovation-like policies, which differentiate between domestic and foreign products, obviously do violate the ban on offsets under the GPA, but the point is that countries pursuing such policies like China and Venezuela are not yet parties to the GPA or significant public-procurement-related requirements under RTAs.[210]

One could claim that IP holders are free to choose between contractually disposing of it, and not competing for public contracts in other countries at all. However, along with the gradual

[206] See: TRIPS article 3, quoted in: note 92

[207] In the context of the requirements that intellectual property backing innovative products (to be sold to Chinese public procurers) had to originate or be transferred to businesses based in China (see: 'Figure 30 Framework of China's public-procurement specific 'indigenous innovation' program.'; note 192). See: note 191, Boumil at 768-775; note 94 at 434-442.

[208] Apart from these provisions, also TRIPS Article 66.2 also comes into mind, which states that "*[d]Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.*" However, any discussion on the relevance of this provision to public procurement markets cannot be easily found in literature. See also: section 9.4.1.d in the context China-US bilateral arrangements related to technology transfers and 9.4.2.c generally addressing the problem of negotiations on technology transfers between developed and developing countries.

[209] Neither Boumil nor An and Peck tried to answer the question whether the provisions of the TRIPS can be applied to public procurement (not contravening GATT Article III.8) at all. Instead, these authors speculated about the legitimacy of potential claims against Chinese indigenous innovations policies under TRIPS by comparing this case with the outcome of the dispute in *Indonesia-Autos* (see: Report of the Panel, *Indonesia - Certain Measures Affecting the Automobile Industry*(2 July 1997) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, Corr.3 and Corr.4, DSR 1998:VI, p. 2201) which they found the closest to the problems of indigenous innovation (see: note 191, Boumil at 768-775; note 94 at 434-442). In *Indonesia-Autos*, the dispute pertained to measures generally referred to as 'The National Car Programme' (see: WT/DS54/R, paras. 2.1.-2.44). Among the US, the EU, and Japan - only the US claimed a violation of the TRIPS (see: WT/DS54/R, paras. 3.4.f., 11.2) – namely of TRIPS Article 3 (especially footnote 3 to Article 3.1. stating that "*[f]For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.*" - see: WT/DS54/R, para. 11.4), TRIPS Article 20 (stating that "*[t]The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.*" - see: WT/DS54/R, para. 11.5) and TRIPS Article 65 (especially of stand still clause provided for in section 5 stating that "*[a]A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.*" - see: WT/DS54/R, para. 11.10). Based on the TRIPS, the US challenged the requirement that cars produced in Indonesia – in order benefit from 'pioneer' exempting such car producer from 'luxury tax' and from duties levied in imported parts/components (see: WT/DS54/R, para. 2.16.) – had to (*i*) be "*made domestically at production facilities owned by national industrial enterprises or Indonesian corporations, the shares of which are wholly owned by Indonesian citizens*" (see: WT/DS54/R, para. 2.25.), (*ii*) use "*a brand name of its own which has never been registered by any other party in Indonesia and which is owned by an Indonesian companies/citizen"* (see: ibid.), and (*iii*) be "*developed with technology, construction, design and engineering based on national capability applied by stages*" (see: ibid.). However, all claims under the TRIPS were dismissed (see: WT/DS54/R, paras. 14.263-14.282). Boumil, and An with Pack equated China's indigenous-innovation requirements with this aspect of Indonesia's National Car Programme and suggested that the outcome of indigenous-innovation-related dispute could be identical. See: note 191, Boumil at 770; note 94 at 442.

[210] However, in contrast to Venezuela, China is negotiating its future accession to the GPA, which according to An and Peck means that other parties to the GPA "*may still have a legitimate expectation of a benefit that China would assume a certain degree of compliance with the GPA NT obligation for the government procurement.*" See: note 94 at 423.

expansion of the WTO/TRIPS regime over major 'outsider' economies such as over China in 2001 and Russia in 2012, the hopes were high for improving the enforcement of IP rights originating elsewhere in those economies but, to a large extent, it was a false dawn.[211] Undoubtedly, the IP originators/holders based in regulatory environments with good IP enforcement records, and prone to operate more internationally in line with the expansion of the WTO, could have legitimate expectations also with regard to decent IP enforcement in public procurement markets. That is, they could have legitimate expectations that policy-makers and public procurers of countries gradually integrating with multilateral trading systems should respect the principle that originators/inventors shall be credited in the form of a temporary monopoly for the use of their inventions, and that the first-best-policy with regard to public procurement of IP-related products cannot be to subvert the proprietary rights of suppliers/contractors.

The IP-targeting policies are perhaps still fair when contractual clauses (technical specifications) requiring open-source code or transfers of titles to IP to domestic enterprises merely repeat well-defined and transparent statutory requirements. Again, one could claim that these are well-informed and voluntary decisions of suppliers/contractors. However, it is not fair when suppliers/contractors involved in cross-border transactions are deprived of their rights recognized under multilateral trading systems by the combination of (*i*) the tacit acquiescence of governments to breaching terms and conditions of public contracts by their procuring agencies/SIE[212] and (*ii*) the massive instrumentally used purchasing power of those agencies or SIEs.[213]

6.2.3.c Innovation mercantilism *versus* green and social policies

Figure 31. Green and social policies as a match for innovation mercantilism (under monistic approach).

	harmonized standards and good enforcement	harmonized standards but not enforcement	no harmonized standards
most developed economies ➔			
green and social	no need to pursue	need to interfere with	need to interfere with

[211] For instance, Lane was trying to assess the extent to which the accession of Russia to the WTO would improve the enforcement of IP rights in this country, based on the experience of China which faced similar problems with the enforcement of IP rights and had joined the WTO a decade earlier (see generally: William P. Lane. 'Trapped in China's shadow? Intellectual property protection in post-WTO-accession Russia' (2013) 36(1) BC Intl & Comp L Rev 183 at 189-190). While Russian written law had been in full compliance with major IP-relevant international conventions (see: ibid. at 196), Russia has faced problems with enforcement such as (*i*) differing interpretations of written legislation resulting from two parallel systems of state dispute settlement, one for commercial and one for non-commercial disputes, (*ii*) inconsistency and selectiveness of criminal and administrative enforcement, (*iii*) reluctance to impose high penalties, and (*iv*) corruption (see: ibid. at 196-197). In contrast, in China, the problems with poor IP enforcement were rather a part of public policy to cheaply provide consumer products (see: ibid. at 203, 204). Lane concluded that just like in the case of China, the accession of Russia to the WTO/TRIPS 'meant little' in terms of improving IP enforcement, not so much because of historic lagging behind with regard to the recognition of IP rights but rather because of more general problems with the rule of law (see: ibid. at 217). See also generally: Susan Tiefenbrun. 'Piracy of Intellectual Property in China and the Former Soviet Union and its Effects upon International Trade: A Comparison; Tiefenbrun, Susan' (1998) 46(1) Buff L Rev 1.

[212] See: ibid.

[213] The general conviction of the business about poor law enforcement in a given jurisdiction might *a priori* prevent foreign suppliers/contractors even from trying to enforce their *erga omnes* IP rights and contractual rights, which seems to be the case in projects like the discussed provision of high-speed railway solutions by Kawasaki whereby procurers offered technology transferred to them by Kawasaki outside Mainland China despite contractual restrictions, apparently with no consequences of the infringement See: note 203 at 6.

policies	cross-border horizontal policies	enforcement of standards only (e.g. Australian Logging Act of 2012, fifth-generation directives with regard to third countries being parties to listed agreements)	standards and enforcement (e.g. eco-labels, fifth-generation directives with regard to third countries not being parties to listed agreements)	
	very limited possibility to pursue cross-border horizontal policies	undermining standards by poor enforcement of IP protection (e.g. freeware, open-source policies, breaching contractual clauses)	setting up firm discriminatory standards (e.g. in the case of countries not being parties to the GPA, to which the ban on offsets does not apply)	innovation mercantilism
				← *emerging economies*

Admittedly, innovation-mercantilism policies and enforcement-focused green or social cross-border horizontal policies do differ because fighting a poor enforcement of the environmental or social standards in emerging economies is not an axiological match for opposing the multilateral system of IP protection. However, these policies do not differ that much if one accepts (*i*) Jackson's view that the purpose of imposing higher social or environmental standards on extra-territorial business operations is to deprive third countries of their comparative advantages,[214] and (*ii*) that it is to some extent legitimate to claim that multilateral systems of IP protection disadvantage emerging economies and benefit mostly developed countries.[215] If this is correct, in both cases, cross-border horizontal policies are the same tool for 'correcting' foreign regulatory environments in line with procuring governments' more general industrial policies (see further section 8.4.2 illustrating how this equivalence plays out in the public-procurement related trade negotiations between the blocks of mostly developed and emerging economies).

The real difference between these policies lies in that the designers of indigenous innovation-like policies have less space than the designers of green and social policies (see Figure 31). If social/environmental standards along with their enforcement are harmonized between the country of the public procurer and the country of supplier/contractor, the pursuit of such policies is meaningless because the policy goals (similar regulatory burdens for foreign business) are already achieved. If the standards in the supplier's/contractor's regulatory environment are satisfactory but the enforcement is poor, the cross-border horizontal policies only need to help the enforcement in order to harmonize regulatory burdens. If the standards in the supplier's/contractors' regulatory environment are not satisfactory, the cross-border

[214] See: note 102 at 22.

[215] See: Mikhaelle Schiappacasse. 'Intellectual Property Rights in China: Technology Transfers and Economic Development' (2003-2004) 2(2) Buff Intell Pro L J 164 at 171-172. See also: Frederick M. Abbott. 'WTO Trips Agreement and Global Economic Development, The Symposium on Global Competition and Public Policy in an Era of Technological Integration: The New Global Technology Regime' (1996-1997) 72(2) Chi -Kent L Rev 385 at 387; Bibek Debroy, 'The SPS and TBT Agreements: Implications for Indian Policy' Indian Council for Research on International Economic Relations, New Delhi, India (June 2005) Working Paper no. 163 at 14.

horizontal policies can step into improving both standards and their enforcement. In contrast - once international obligations imposing such standards are assumed (like the TRIPS, GPA), tying hands of policy makers - indigenous innovations policies opposing harmonization of regulatory environments in the field of IP protection might only consist in acquiescing to poor enforcement of relevant standards in violation of international obligations.

6.2.3.d General commerce analogies

Figure 32. Public-procurement-specific *versus* general-commerce interference with the enforcement of foreign laws.

	purchases excluded from laws of general application **public-procurement-specific requirements**	**general-commerce requirement**
enforcement of ratified but poorly implemented international obligations under the monistic approach	control by public procurers of the compliance with in the procurement process with technical specifications, labelling, and other contractual obligations imposed on suppliers/contractors	international commissions, experts meetings, NGOs' engagement, reporting, mutual inspections, technical assistance etc.
no international obligations (e.g. imports of timber)		e.g. criminal responsibility of private business for non-compliance with timber-relevant provisions of US Lacey Act, Australian Illegal Logging Prohibition Act, and the EU's Regulation 995/2010

For comparison, beyond public procurement markets, cross-border regulatory interferences with the enforcement of foreign laws can be seen in various measures helping the enforcement of non-public-procurement-specific requirements. Under the monistic approach, measures enforcing or just encouraging the compliance with poorly implemented international environmental/social agreements in third countries can be seen among others in (*i*) establishing intergovernmental commissions or organising expert-level periodical meetings, [216] (*ii*) engaging NGOs to control the compliance like under NAFTA's environmental side-agreement, [217] (*iii*) requiring periodical reporting by parties to such agreements, [218] (*iv*) mutual inspections, [219] or (*v*) providing technical assistance to other

[216] According to Boyle, the advantage of such 'institutional model' is that its emphasis is on the co-operation rather than on coercion but its weakness is that – being a mechanism based on a political process/negotiations - it might not be effective. See: Alan E. Boyle. 'Saving the World - Implementation and Enforcement of International Environmental Law through International Institutions' (1991) 3(2) J Envtl L 229 at 230.

[217] For instance, under the NAFTA environmental side agreement [see: North American Agreement on Environmental Cooperation (signed 14 September 1993, in force 1 January 1994) 32 ILM 1482 (1993)) – 'NAAEC'], the North American Commission on Environmental (see: NAAEC articles 8-19) "*may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:(a) is in writing in a language designated by that Party in a notification to the Secretariat ;(b) clearly identifies the person or organization making the submission; (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;(d) appears to be aimed at promoting enforcement rather than at harassing industry; (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and (f) is filed by a person or organization residing or established in the territory of a Party.*"(see: NAAEC article 14; Kal Raustiala. 'International "Enforcement of Enforcement" Under the North American Agreement on Environmental' (1995-1996) 36(3) Va J Intl L 721 at 723-725).

[218] See: note 216, Boyle at 236.

[219] See: note 216, Boyle at 237.

parties.[220] In the case of interferences with the enforcement of foreign laws not involving international obligations (already exemplified with various timber-imports-related national laws in section 6.2.3.a), the enforcement measures (again other than a control by public procurers) could be seen for example in very strict diligence obligations imposed on domestic enterprises importing/placing timber on the domestic market,[221] and in related criminal liability of such enterprises.[222] Such measures can be used to interfere with the enforcements of foreign laws regardless of whether imported goods are to be sold in private markets only, or also to public procurers. However, in the case of sales also in public procurement markets, public procurers can additionally interfere with (help) the enforcement of foreign laws by designing, to this end, technical specifications, requiring labels or imposing other requirements under contractual clauses (see Figure 32).

With regard to innovation mercantilism undermining foreign-originated IP rights, its non-public procurement-specific incarnation can primarily be seen in measures regulating market access for foreign investors, irrespective of whether the investors are going to compete for public contracts in the host countries or not. In the case of China - while public procurement became a significant tool of innovation mercantilism after 2006 (see Figure 30 in section 6.2.3.b) - the general regulation of FDIs flowing into China had been a tool of innovation mercantilism for decades before public-procurement-specific measures came into place. Instead of public procurement-specific regulation, innovation mercantilism policies have been channelled by the set of investment laws encouraging (or just forcing) a cooperation with local business partners in the form of joint ventures,[223] or more recently by shifting tax-

[220] See: generally: William Freeman. 'Environmental Assistance to the Newly Independent States' (1993) 27(4) Envir Scien & Tech 608.

[221] For instance, the Regulation 995/2010 mandates that (*i*) "*1. [t]The placing on the market of illegally harvested timber or timber products derived from such timber shall be prohibited. 2. Operators shall exercise due diligence when placing timber or timber products on the market. To that end, they shall use a framework of procedures and measures, hereinafter referred to as a 'due diligence system', as set out in Article 6. 3. Each operator shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a due diligence system established by a monitoring organisation referred to in Article 8. Existing supervision systems under national legislation and any voluntary chain of custody mechanism which fulfil the requirements of this Regulation may be used as a basis for the due diligence system.*" (see: Regulation 995/2010, article 4), and (*ii*):"*[t]Traders shall, throughout the supply chain, be able to identify: (a) the operators or the traders who have supplied the timber and timber products; and (b) where applicable, the traders to whom they have supplied timber and timber products. Traders shall keep the information referred to in the first paragraph for at least five years and shall provide that information to competent authorities if they so request.*" (see: Regulation 995/2010, article 5).

[222] See for instance generally: Matthew S. White. 'Overcriminalization Based on Foreign Law: How the Lacey Act Incorporates Foreign Law to Overcriminalize Importers and Users of Timber Products Note' (2013) 12(2) Wash U Global Stud L Rev 381.

[223] For instance, Hui Robin Huang proposed a systematization of Chinese laws on FDIs into categories such as (*i*) 'equity joint ventures' regulated by 'Law on Chinese-Foreign Equity Joint Ventures 1979' (promulgated by the National People's Congress, 1 July 1979, amended 4 April 1990, 15 March 2001) along with the 'Catalogue for the Guidance of Foreign Investment Industries 2007' (promulgated by the National Development and Reform Commission, 31 October 2007, effective 1 December 2007), (*ii*) 'contractual joint ventures' including regulated by the 'Implementing Regulation of the Law on Chinese-Foreign Contractual Joint Ventures 1995' (promulgated by the Ministry of Foreign Trade and Econ. Cooperation, 4 September 1995), along with the 'Interpretation of Certain Clauses of the Implementation of the Implementing Regulation of the Law on Chinese Foreign Contractual Joint Ventures 1996' (promulgated by the Ministry of Foreign Trade and Economic Cooperation, 22 October 1996), and *(iii)* 'wholly foreign-owned enterprises' regulated by 'Wholly Foreign-Owned Enterprise Law 1986' (promulgated by the National People's Congress, 12 April 1986, amended 31 October 2000). What cements all mentioned acts, is the 'Order of the State Council on the Promulgation of Provisions on Guiding the Orientation of Foreign Investment 2002' (promulgated by the State Council, 2 February 2002, effective 1 April 2002) that, among others, determines which type of investment should be done in which form. See generally: Hu Huang. 'Regulation of Foreign Investment in Post-WTO China: A Political Economy Analysis' (2009-2010) 29(1) Colum J Asian L 185

incentive-systems from rewarding crediting foreign inbound investment to crediting technology transfers to domestic partners within the framework of those joint ventures.[224] Both suppliers/contractors of public procurers and foreign investors operating in private markets only can become, to the same extent, the victims of the inefficient enforcement of laws and shortcomings of judicial systems, whereby it is often unclear if one is dealing with a deliberate public policy or with unintended results of more general problems with the efficiency of a given legal system.[225]

6.2.4. Interfering with legislative process

Figure 33. Primary, secondary and tertiary sanctions (boycotts).

primary sanctions
means banning trading with a specific country[226]

secondary sanctions
means sanctioning enterprises or countries dealing with the primary target[227]

tertiary sanctions
means sanctioning enterprises or countries dealing with enterprises or countries encumbered with secondary sanctions[228]

The direct interference with the foreign legislative and political process channelled through public procurement is the most politicised way in which foreign business might be forced to operate in a different way than it would otherwise operate within the framework of a foreign regulatory environment without some cross-border horizontal policies in place. Typically, this *modus operandi* means imposing public procurement-related trade sanctions, embargos or similar measures usually introduced in response to the violations of human/democratic/political rights. And it usually is employed when policy-goals toward a given third country cannot be achieved by an interplay of (*i*) directly interfering in the business operations subjected to such regulatory environment (see section 6.2.1), and (*ii*) compelling the government of the targeted jurisdiction to subject its regulatory environment to international harmonizing obligations (see section 6.2.2).

[224] See: ibid. Huang at 213.

[225] In respect of private markets, Atkinson referred to the story of Fellowes Incorporated producing shredders that had entered into a joint-venture agreement with 'Shinri' under which intellectual property of the former was about to be only used in a specific factory in China. However, at some point, the domestic partner forced the project into bankruptcy by seizing all the manufacturing equipment somewhere else at random with a view to entering non-Chinese markets without the initial foreign partner (See: note 199 at 35). This case seems much more like daylight robbery rather than the implementation of any complex policy. The public procurement-related Kawasaki case is far less drastic (see section 6.2.3.b) but, perhaps, none of these cases would have happened if the 'perpetrators' had feared any quick tort sanctions, criminal punishment or interim measures quickly adjudicated by a local judicial authority.

[226] See: Edmond McGovern. 'Sanctions, Boycotts and Antiboycotts' (1978) 11 Bracton L J 71 at 71; at 142, Justin D. Stalls. 'Economic Sanctions' (2003) 11(Special Issue - Fall) U Miami Intl & Comp L Rev 115 at 142-143; Jeffrey A. Meyer. 'Second Thoughts on Secondary Sanctions' (2008-2009) 30(3) U Pa J Intl L 905 at 906.

[227] See: ibid.

[228] See: ibid. Stalls at 143.

6.2.4.a Public-procurement-relevant sanctions

Just like other horizontal policies, public procurement-related policies employing trade sanctions might stem from generally applicable laws which is usually the case, or public procurement-specific laws which are rare. General commerce sanctions relevant for public procurement markets rely on the combined purchasing power of the private sector and public procurement markets. For example, the US sanctions against Syria first imposed by Bush's administration under the aegis of the fight against terrorism from 2004,[229] reformulated by Obama's administration as promoting the protection of human rights in 2011,[230] had a primary focus on banning exports of oil from Syria. The best way to assure that the widest range of international corporations operating in the oil industry complied with those embargos has been to scrutinize suppliers selling oil to the US Department of Defence, especially to the US Navy.[231]

Figure 34. Burma Law.

The Burma Law specified that '*[t]The secretary shall establish and maintain a restricted purchase list. The restricted purchase list shall contain the names of all persons currently doing business with Burma (Myanmar)*'[232] and he list was updated every three months.[233] The definition of doing business was excessively vast ranging from having franchises in Burma to providing brokerage services to the Burmese government.[234] The adoption of that law was believed to be the direct cause of the withdrawal of such firms as Kodak, Apple, Hewlett-Packard and Philips from the Burmese market in 1996.[235] The withdrawal of such firms as J. Crew, Levi-Strauss, Walt Disney, and Motorola in the same year, and PepsiCo in 1997, was believed to be more caused by a combination of coinciding consumer boycotts and of the risk that similar sanctions, like under the Burma Law, could be imposed at the federal level.[236]

See a further discussion on the Burma Law in (*i*) section 9.3.1.b. in the context trade negotiations, (*ii*) section 7.3.2 in the context of sub-central autonomy to regulate public procurement markets, (*iii*) section 8.3.2 in the context of executive autonomy to pursue horizontal policies.

[229] See: Executive Order 13338 of 11 May 2004 Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria, Federal Register Vol. 69, No. 93 Thursday, 13 May 2004.

[230] See: Executive Order 13582 of 17 August 2011 Blocking Property of the Government of Syria and Prohibiting Certain Transactions With Respect to Syria, Federal Register Vol. 76, No. 162.

[231] "*Navy Secretary Ray Mabus has been a leader in warning that the nation's dependency on imported oil - much of which comes from nations that are unstable or in volatile regions, and some that are openly hostile - is a national security threat. That threat is particularly high for the U.S. military, which is the nation's largest single consumer of oil-based energy.*" See: Otto Kreisher. 'The U.S. Navy's Drive to Cut use of Imported Oil Draws Protests from a Politically Split Congress' (2012) 33(5) Naval Forces 6 at 6. Actually, in the post-WW2 history, one might probably identify many situations in which the public procurement sectors were used as a tool for the geo-political games aiming at pressing foreign sovereign states to change their whole legal systems. See generally: Bryan R. Early. 'Alliances and Trade with Sanctioned States: A Study of U.S. Economic Sanctions, 1950–2000' (2012) 56(3) J of Conflict Resolution 547.

[232] See: Burma Law, section 22J(a).

[233] See: Burma Law, section 22J(c).

[234] "*"Doing business with Burma (Myanmar)"* [means], *(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person; (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement; (c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar); (d) providing any goods or services to the government of Burma (Myanmar).*" See: Burma Law. section 22G (applicable to sections 22H to 22M).

[235] See: Mark B. Baker. 'Flying over the Judicial Hump: A Human Rights Drama Featuring Burma, The Commonwealth of Massachusetts, The WTO, and the Federal Courts' (2000-2001) 32 Law & Pol'y Intl Bus 51 at 92.

[236] See: ibid. at 94.

Public-procurement-specific sanctions have been mostly human rights-related and were noticed only when they had adversely affected huge corporations especially when, in the early 1990s, a number of local governments and municipalities in the US,[237] and also in Australia,[238] imposed public procurement-related 'secondary sanctions' (see Figure 33 in section 6.2.4) on potential suppliers/contractors which had economic links to Burma due to human rights violations by the Burmese government. The highlight legal action in this respect was the Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar) also known as the 'Burma Law' passed by the state of Massachusetts in 1996[239] which gave raise to many intergovernmental controversies (see Figure 34). The Burma Law was not unique. In the 1990s, Western private businesses did not need to run their operations in 'exotic' places like Burma in order to have problems as a potential bidder in the US. In those times, a number of US states and local authorities commenced using selective purchasing practices to force potential suppliers which had business operations in Northern Ireland to conform to the so-called MacBride principles[240] which were designed to prevent a discrimination of Catholics in employment, and the compliance with these principles determined the eligibility for competing for some public contracts in the US.[241] Moreover, in the same period, the adoption of Burma law-like measures was also considered by some local authorities in the US against businesses engaged in Nigeria, China, Egypt, Kuwait, Turkey, Saudi Arabia,[242] and even Switzerland.[243] Nonetheless, after the Burma Law had been outlawed by the US federal courts setting a precedent for other US states (see section 7.3.2), similarly mediagenic cases did not come up.[244]

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[237] See generally: note 88; WTO, Permanent Delegation of the European Commission to the WTO, 'Measures Affecting Government Procurement Request for Consultations by the European Communities to the Permanent Mission of the United States and to the Dispute Settlement Body' (26 June 1997) WT/DS88/1 GPA/D2/1; Alejandra Carvajal. 'State and Local Free Burma Laws: The Case for Sub-National Trade Sanctions' (1997-1998) 29(2) Law & Pol'y Intl Bus 257; Craig Forcese. 'Municipal Buying Power and Human Rights in Burma: The Case for Canadian Municipal Selective Purchasing Policies' (U. Toronto Fac. L. Rev.) 56(2)251.

[238] See: Craig Forcese. 'Globalizing Decency: Responsible Engagement in an Era of Economic Integration' (2002) 5(1) Yale Hum Rts Dev L J at 39.

[239] See: Act Regulating State Contracts with Companies Doing Business with or in Burma of 1996 Mass. Acts 130 (codified at Mass. Gen. LawS Ann. ch. 7, §§ 22G-22M (1998). See also: Mark B. Baker. 'Flying over the Judicial Hump: A Human Rights Drama Featuring Burma, The Commonwealth of Massachusetts, The WTO, and the Federal Courts' (2000-2001) 32 Law & Pol'y Intl Bus 51 at 92.

[240] See: Irish National Caucus and Irish Peace Foundation. 'MACBRIDE' <http://www.irishnationalcaucus.org/category/macbride> accessed 2 June 2012.

[241] See: note 238 at 39-40.

[242] See: note 85 at 6.

[243] Plans to introduce public procurement-related sanctions against Switzerland were motivated by reluctance of the Swiss banks to resolve the issue of the money deposited in accounts abandoned after WW2 as a result of the Holocaust. See: note 85 at 7.

[244] Which is by no means to say that public-procurement specific sanctions aiming at bringing a change to a political/legislative process in other jurisdictions are not introduced by central governments which – being in principle responsible for external trade policies as further discussed in Chapter 7 - are in better position to impose trade sanctions on targeted jurisdictions without affecting third countries (other than targeted countries) and without breeching commitments toward third countries (which was the case with the Burma Law, and could be the case with similar initiatives of other US sub-central governments). In addition various public-procurement-specific politically-driven trade restrictions/sanctions imposed by central governments in military sectors are simply not subjected to any agreements on trade liberalisation - which currently, for example, the case with sanctions against Russian [see for instance: 'France/Russia: France, Russia Void Mistral Warship Deal' *Asia News Monitor* (10 August

An example of public-procurement-specific quasi-sanctions also comes from the US where, in July 2011, the Administrator of the US General Services Administration ('GSA'), announced that the "*GSA will leverage its market strength to seek out and support companies that meet green electronics standards" and will use its buying power "to encourage manufacturers to expand product reclamation and recycling programs"*."[245] This statement was made in the light of attempts to develop a strong electronic waste recycling industry in the US, previously being unsuccessful because electronic waste had been mostly exported to Guiyu, China.[246] This statement was also made in the context of the international outcry of the public concerning the dramatically bad public health and bad environmental conditions in Guiyu (e.g. shocking scenes from Guiyu of children playing outdoors among heaps of toxic waste brought by the in-city watercourses flowing through thousands of decommissioned electronic devices) caused by employing primitive methods of electronic-waste-disposal. Nonetheless, that statement impliedly meant simply more recycling being done domestically (as a result of more electronic waste being supplied to the local recyclers by the public sector) instead of exporting electronic waste for 'recycling' in China.

In the cases like the Burma Law or the GSA's policy, the design of the horizontal policies is not to ask foreign business (exterritorial business operations) to voluntarily align to certain environmental, social, or human-rights-related or democracy-related standards. It is instead to force foreign regimes to align themselves based on the premise that frustrating exterritorial business operations (such as by preventing procurers, both domestic and foreign ones, from dealing with businesses involved in operations linked to such regimes) would bring a more general political change to the targeted jurisdiction. Measures like this impose a kind of 'collective liability.' Business operators having their hubs in sanctioned jurisdictions can do nothing to prevent being precluded from competing for public contracts in a country which imposes sanctions/embargos. In turn, multinational businesses can only align themselves by quitting from sanctioned jurisdictions, like from Burma.

Moreover, cross-border horizontal policies employing sanctions or similar measures seem to be the furthest from officially claimed goals. We might consider the GSA case and suppose that the actual rationale of that policy was to relieve the adversely affected environment and adversely affected people in Guiyu instead of stimulating the domestic recycling industry. If so, the GSA's policy should have been to allow off-shore recycling business to voluntarily

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2015); 'Russia Mistral: France halts delivery indefinitely' *Asia News Monitor* (27 November 2014); Nathan Hodge. 'World News: On Pentagon Wish List: Russian Copters - U.S.'s Lifting of Sanctions on Exporter Eases Procurement of Aircraft for Allies' *Wall Street Journal* (8 July 2010) A.9; 'Russia to deliver 30 helicopters to Afghanistan despite US sanctions - official' *BBC Monitoring Former Soviet Union* (31 March 2014)].

[245] See: Statesnews Serv., 20 July 2011 cited in: Sarah Fehm. 'From iPOD to E-waste: Building a Successful Framework for Extended Producer Responsibility in The United States (2011) 41(1) Pub Contr L J 173 at 184.

[246] See: ibid. at 176-177.

comply with environmental or social standards equivalent to standards applicable to the same kind of operations on the US territory (or with standards lower than the US' but still higher than *de facto* standards in Guiyu) such as by requiring recycling-specific eco-labels. Alternatively, the design of that policy might have been to encourage Chinese policy-makers to adopt better standards in terms of recycling by (*i*) pressing the adoption of some international standards in this regard by Chinese central or Guiyu's local governments, and (*ii*) enforcing the compliance by Chinese entrepreneurs with requirements imposed by public procurers referring to such international standards. Otherwise, it is clear that the actual design of such policy was aimed at just blocking exports of electronic waste generated by public sector, and to impose a 'collective responsibility' on the foreign business.[247]

6.2.4.b General commerce analogies

Figure 35. *Tuna Dolphin I / Tuna Dolphin II* facts.

The MMPA imposed different standards of mammal protection for the domestic and foreign fleet while harvesting tuna in the Eastern Tropical Pacific. Domestic fleet licences for tuna harvesting were to be issued on condition that incidental taking of dolphins would not be in excess of 20,500 units per year in this region (see: *Tuna- Dolphin I* para 5.1.). With regard to foreign fleets, the MMPA allowed executive agencies to impose a ban on imports of tuna harvested with methods harmful for mammals if the incidental takings of mammals in the Eastern Tropical Pacific were proportionally higher than those imposed on the domestic fleet. The embargo could have been avoided if a given third country was able to prove that the number of incidentally harmed mammals in the Eastern Tropical Area did not exceed the number of mammals harmed by the US fleet by 1.25 times (See: *Tuna- Dolphin I* para 5.2 and *Tuna—Dolphin II* para 2.9)

The secondary sanctions (see further) in *Tuna-Dolphin II* consisted in the MMPA setting forth that 90 days after the 'primary bans' had been imposed by the American administration, also 'secondary bans' on imports of tuna were be to imposed on 'intermediary nations' denominating countries that did not ban imports from countries encumbered with primary sanctions within this period themselves.[248]

As at 31 January 1992, these were Canada, Colombia, Costa Rica Ecuador, France, Indonesia, Italy, Japan, Korea, Malaysia, the Marshall Islands, Netherlands Antilles, Panama, Singapore, Spain, Taiwan, Thailand, Trinidad and Tobago, the United Kingdom, and Venezuela that all fell within the definition of an intermediary nation.[249]

For comparison, beyond public procurement markets, the interference with the foreign legislative/political process can be seen in the factual background of the discussed *Tuna/Dolphin II* and related *Tuna/Dolphin I* [250] disputes filed against the US by Mexico in 1990 (*Tuna/Dolphin I*), and by the then EC joined by the Netherlands on behalf of Antilles in 1992 (*Tuna/Dolphin II*) – also being a 'prequel' to the discussed *Tuna Labelling* case (see sections 6.1.2.c and 6.2.1.d).[251] Namely, the US *de facto* banned importing tuna meat from countries allowing purse seine fishing under amendments to the Marine Mammal Protection Act 1972 ('MMPA') adopted in 1990.[252] The MMPA was expressly discriminatory against

[247] A collective responsibility in the GSA's case can be seen in that potential contractors of the US federal agencies could not be awarded contracts for providing recycling services even if they could prove individual compliance with standards sought by the GSA, despite electronic waste recycling being processed outside of the US territory.

[248] See: Report of the Panel, *United States - Restrictions on Imports of Tuna* (3 September 1991) DS21/R 39S/155, para. 5.3.

[249] See: *Tuna-Dolphin II*, paras, 2.12, 2.14.

[250] See: note 248.

[251] Unlike banning purchases of oil from Syria (see section 6.2.4.a), it was a policy affecting general international commerce only rather than a policy also affecting international trade in public procurement markets to the extent that one can reasonably assume that the US federal government did not purchase tuna in significant quantities.

[252] See: The Marine Mammal Protection Act 1972 16 USC Chapter 31; the amendments to Section 3 of the Marine Mammal Protection Act of 1972 made by Section 2(c) of the International Dolphin Conservation Act and by Section 401(a) of the High Seas Driftnet Fisheries Enforcement Act; the new Section 305 of the Marine Mammal Protection Act of 1972, as added by

foreigners by allowing, in the ETP region, less incidental-dolphin-takings for foreign fleets compared with domestic vessels (see Figure 35, and also Figure 26 in section 6.2.1.d on facts in *Tuna Labelling*). However, even had the MMPA imposed the same non-discriminatory incidental-dolphin-taking limits on the domestic and foreign fleets, the unilateral anti-purse-seine-fishing-policy still constituted a very straightforward interference with the regulatory environments of countries allowing the purse seine fishing method. And as such, as discussed, it was found unacceptable under GATT47 Articles III.4 and XX in *Tuna/Dolphin II* (see section 6.1.2.c). Similar to the Burma Law, the embargo under the MMPA was only addressed to foreign policy/lawmakers thereby interfering with a foreign legislative/political process. It was not addressed directly to foreign enterprises, on which the collective responsibility had been imposed, and which could not individually alter their practices to prevent being precluded from supplying tuna to the US market.

6.3 Selectiveness and arbitrary application

Another common feature of cross-border horizontal policies is that they are selective and arbitrary, resulting in that the interferences with foreign regulatory environments end up targeting specific jurisdictions, sectors, geographical regions or specific business operations conducted abroad. Indeed, it would be Utopian to believe that some universal goals advanced through cross-border horizontal policies could be achieved in an unselective and non-discriminatory manner toward all trading partners and all potential suppliers/contactors subjected to regulatory environments of these trading partners. The selectiveness largely stems from that, that bilateral trade profiles and political goals toward different trading partners do differ, which implies that also cross-border horizontal policies have to be 'made-to-measure' (see also section 8.4.1 on how the diverging trade profiles lead to the bilateralisation of public-procurement-specific trade negotiations). In turn, the arbitrary application largely stems from that the tools for extra-territorial supervision/enforcement are very limited, causing that always only some 'scapegoat' foreign businesses are actually affected by the cross-border policies.

6.3.1. Innovation mercantilism

Selectiveness and arbitrary application are an obvious and inherent feature of indigenous-innovation-like actions taken by public procurers to obtain specific technologies originated abroad. Indeed, the one-off decisions of economic planners are selective in their nature as they need to be targeted at specific foreign businesses having specific state-of-art innovations/technologies which are often possessed by a very limited number of enterprises,

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Section 2(a) of the International Dolphin Conservation Act; the amendments to Section 101 of the Marine Mammal Protection Act of 1972 made by Section 401(b) of the High Seas Driftnet Fisheries Enforcement Act. See *Tuna-Dolphin II* para1.4.

if not by just one firm around the globe. Apart from the case of Kawasaki and high-speed trains (see section 6.2.3.b), Atkinson also exemplified this feature of innovation mercantilism with state-owned Commercial Aircraft Corporation of China Limited ('COMAC') specifically pressing Boeing and Airbus so that these companies (one or both), in exchange for market access in China, transfer technology to COMAC and teach COMAC how to develop its own state-of-the-art passenger jets, which would be competitive in global markets, also against Boeing and/or Airbus.[253]

The selectiveness also characterizes more general indigenous innovation policies such as listing specific 'innovative' domestic products which should be preferred by public agencies while procuring, like under the Order 618 (see Figure 30 in section 6.2.3.b). This is because - given that bilateral trade profiles with third countries are dissimilar - a focus of policymakers on specific industries would differently affect different third countries, likely deliberately targeting specific industries and specific third countries having a strong comparative advantage in targeted industries. On top of that, even open-source software policies are selective in the sense that, as mentioned, their alleged purpose to somehow stimulate the domestic IT sector - by hitting foreign software suppliers selling proprietary systems - cannot camouflage the fact that the ultimate effect of such policy would be to gradually remove a specific company (Microsoft) as the primary software provider to the public sector (see section 6.2.3.b).

6.3.2. Green and social policies

In the case of green/social/human rights-related cross-border horizontal policies, the selectiveness and arbitrary application is just hidden behind the veil of the rhetoric of the cross-border promotion of social and green values in contrast to firm industrial policies where keeping up appearances is not necessary. For instance, in the case of the mentioned MacBride principles one could ask (*i*) why just Northern Ireland has been a subject of policies aiming at the elimination of discrimination based on religion (selectiveness), and (*ii*) how the compliance with this code of conduct could be systematically verified, if not by incidental raids on suppliers by public procurers as a result of the non-compliance being revealed by press or via similar channels (arbitrary application). Likewise, in the case of the GSA and electronic-waste-recycling, one could ask, based on what substantive and procedural standards, particular businesses should be assessed as to whether they recycle electronic waste in a proper manner or not (arbitrary application), and one could also immediately observe that the pool of adversely affected businesses is confined not only to one jurisdiction but even to one specific geographical region of Guiyu (selectiveness).

[253] See: note 199 at 25, 49, 51.

6.3.2.a ‘Punitive’ measures

Selectiveness is also a pretty obvious feature of all ‘punitive’ cross-border horizontal policies, especially those employing sanctions/embargos, like in the case of Burma or Syria (see section 6.2.4.a). Indeed, there are many totalitarian or authoritarian regimes around the globe and there are many multinational companies economically ‘supporting’ such regimes by dealing directly with governments or just by operating within their territories and contributing to their economies. However, sanctions are always determined by one-off selective political judgements. As a result, among many trade countries and many businesses operating in such countries which do not meet some indispensable standards (in the judgement of policymakers who impose sanctions), only a few jurisdictions are stigmatized. Thus, also among all ‘culprit’ suppliers/contractors, the portion of those adversely affected by sanctions/embargos imposed from time to time on one jurisdiction or another is very limited.

Figure 36. Arbitrary application and courts *versus* standards.

	suppliers’/contractors’ standards	harmonized international standards	policy-maker’s standards
suppliers’/contractors’ courts	**potential problems with obtaining evidence of convictions**		**no authority**
policy-maker’s courts	**no tools to assess what is happening abroad**		

It does not get much better in the case of individual preclusions of potential suppliers/contractors from competing for public contracts based on previous foreign social or environmental misconduct. *Prima facie*, such measures neither impose collective responsibility unlike sanctions nor are selective toward trading partners as they penalise misconduct regardless of the jurisdiction within which the misconduct occurred. However, they cannot be applied in a non-arbitrary manner. Namely, if prospective contactors/suppliers are to be precluded from bidding based on some misconduct like excessive exploitation of workers in the course of their foreign business operations, should that be assessed based on suppliers’/contractors’ standards or based on a policy-maker standard, and by which courts (see Figure 36)?

Regardless of which standards are to be applied, policy-makers’ courts have no tools to assess what actually happens abroad. In turn, suppliers’/contractors’ courts do not apply norms from other jurisdictions (i.e. policymakers’ jurisdictions). This leaves suppliers’/contractors’ courts declaring violations of suppliers’/contractors’ domestic standards or implemented international standards on the table as the only feasible criterion for the preclusion of prospective suppliers/contractors due to previous exterritorial social or

environmental misconduct.[254] Suppose that suppliers'/contractors' courts are reliable: still, according to Arrowsmith, the reliance by public procurers on such convictions is also unfeasible because of the possible abuses of discretion and because of the many administrative obstacles such as difficulties obtaining evidence of foreign convictions.[255] Simply put, some suppliers/contractors will get caught red-handed and others will not.

6.3.2.b 'Positive' measures

An alternative to selectively punishing for extraterritorial violations of social/green/human-rights-related standards by the preclusion from bidding is to 'positively' encourage all prospective suppliers/contractors to comply with the standards sought by public procurers. However, the carrot instead of the stick only seemingly solves the problem of selectiveness and arbitrary application. Suppose that pressing on entrepreneurs operating abroad to improve social and environmental standards is done by positive measures like requiring eco-labels rather than by precluding such entrepreneurs from bidding as a result of past non-compliance confirmed by courts' decisions. Suppose also that the employed labelling schemes assure efficient supervision/enforcement mechanisms. Such green or social cross-border horizontal policies, perhaps, would not be arbitrary in application. However, one could argue that such policies would still be selective in terms of targeted sectors. Let's consider timber logging. Namely, there are many environmentally questionable business operations conducted in emerging economics. Why it is the timber logging that attracts so much attention of procurers from affluent economies? And why aren't all affluent timber importers pursuing similarly strict sustainable timber policies? Isn't it the timber because the timber sector is what emerging economies earn from, and in which they have the high cost advantage? Aren't, among all some affluent and environmentally-conscious jurisdictions, only some paying attention to legal timber issues because only some see their timber-logging sectors in decline, and therefore only some need to mitigate such problems by imposing similarly stricter environmental standards on logging operations in emerging economies?

6.3.2.c Technical problems

Regardless of lawmakers' intentions, there are also some technical obstacles to a non-arbitrary application of cross-border horizontal policies, which can be illustrated with a story about the public contract for the refurbishment of the outdoor street furniture in the City of

[254] As discussed, when convictions by foreign courts are also based on international standards, interference with a foreign regulatory environment can be seen as enforcing compliance with international standards (under the monistic approach). However, one could barely see any cross-border horizontal policy interfering with a foreign regulatory environment in the preclusion of suppliers/contractors based on convictions by foreign courts based purely on foreign internal standards not implementing any international standards. The regulatory interference perhaps can only be seen in that the economic operators – seeing that the consequences of being convicted are harsher elsewhere than in the place of conviction – would conduct their operations in places of potential convictions in a more integral way than they would otherwise do without cross-border horizontal policies consisting in relying on foreign convictions in place.

[255] See: note 11 at 113; note 22.

Cognac, France in 2005. In that case, a *post-factum* investigation found that the tropical wood used in the works had been the Moabi (which is an endangered species) probably smuggled either from Congo or Cameroon.[256] The customs control did fail to find this and, thereafter, the City of Cognac made the decision to require eco-labels upfront when purchasing wood, in the hope of resolving this sort of problems in the future.[257] If this case is a tip of the iceberg only, one should not have any illusion that (*i*) a one-off *post-factum* decision to examine the origin of the wood used in the performance of a public contract was an exception to ordinary practice, (*ii*) and many applications of illegal wood are usually not revealed.

6.3.3. General-commerce-analogies

For comparison, beyond public procurement markets, also general-commerce counterparts of cross-border horizontal policies are selective and arbitrary. With regard to direct interferences with foreign business operations by imposing positive environmental/social requirements - similarly to the questions about sector-relative selectiveness of sustainable timber policies pursued in public procurement markets (see section 6.3.2.b) - one could more generally ask why CRS/PRS/fair-trade policies are mostly targeting products or raw materials such as handicrafts, sugar, tea, coffee, bananas, wine, honey, cotton, flowers, chocolate or fresh fruit?[258] Why are they targeting products which are either sensitive in trade relations, like wine and sugar, or at products in which emerging economies often enjoy absolute advantage, or of which they are the only producers, like in the case of coffee and cocoa? In addition, the discussed difficulties with monitoring the compliance with social/environmental standards by the businesses operating abroad create the same risk that the compliance will be controlled in a very arbitrary way.

With regard to the interferences with foreign legislative/political process, selectiveness is also an inherent feature of consumer boycotts in purchasing as it is of non-public-procurement-specific sanctions/embargos imposed by governments, where one could always rhetorically ask why some countries or specific companies have so far been boycotted/sanctioned while others have not. A grotesque example of selectiveness of non-public-procurement-specific sanctions/embargos with cross-border regulatory effects is found, again, in the series of discussed disputes pertaining to the imports of tuna harvested by Mexican to fleet to the US. Already in *Tuna-Dolphin I*, Mexico raised the argument that the US policy was also discriminatory for the reason that it had been specifically targeting

[256] See: European Commission. 'GPP in practice' (GPP in practice) <http://ec.europa.eu/environment/gpp/case_en.htm> accessed 16 September 2013, City of Cognac, France (Case 28)'

[257] See: ibid.

[258] See: Wehr Kevin (ed), *Green culture: an A-to-Z guide* (Sage Publications, Thousand Oaks 2011) 558 at 159.

the ETP (see Figure 26 in section 6.2.1.d)[259] as the only region where the use of purse seine nets was of the US administration's particular concern.[260] According to Mexico's representatives, it was not a coincidence that the policy was introduced after the American fleet had largely moved to waters outside the ETP, on which the MMPA had imposed stricter requirements than outside it[261] (see 16 in section 6.2.4.b). By way of analogy, this might be considered as the same kind of geographical selectiveness that could also be seen in the Australian policy targeting Indonesian and Malaysian timber-logging operations and in the GSA's policy targeting electronic waste recycling in Guiyu.

6.4 Purchasing power

The next feature of cross-border horizontal policies is that they need to be backed by sufficient purchasing power in order to achieve planned results. The larger the economy/procurer/contract the larger its purchasing power (defined by the size of specific contracts or entire procurement market) and the higher the possibility of the effective pursuit of cross-border horizontal policies, which perfectly matches the observation that the more affluent the jurisdiction the more plausible the pursuit of both social /environmental cross-border horizontal policies (see section 6.2.1.b *in fine*). Indeed, in the late 1980s, Norton observed that "*[i]In its capacity as the world's largest buyer of goods and services, the* [US] *federal government has broad authority to dictate the terms on which it will do business*."[262] Today, according to various estimates based on different methodologies, the US' total public procurement market may now be smaller than the Chinese one. Even so, mentioned statements made by one GSA's officer on new policies with regard to electronic waste recycling (see section 6.2.4.a), perhaps would not have been so widely reported unless the US federal public procurement market did not still have a sufficient purchasing power to 'dictate terms' of the business.

As far as the world's public procurement new leader is concerned, the alarming tone of many US scholars stigmatizing innovation mercantilism in Chinese public procurement markets pretty obviously stems from these markets' size rather than from any uniqueness of the

[259] The ETP covers the Mexican coast and Mexican exclusive economic zone so the policy in question particularly targeted Mexico See: *Tuna-Dolphin I*, para. 3.14.

[260] See: *Tuna-Dolphin I*, para.3.14. In *Tuna-Dolphin I* environmentalism rhetoric was easily pierced by the arguments of geographical selectiveness so the US' last-resort argument was that a government has a right to ban imports of products like tuna in order to extra-territorially protect the life or health of animals (see: *Tuna-Dolphin I*, para. 3.37). That argument was pretty easily ridiculed by Mexico, the representatives of which pointed out that the US policy could not be motivated by any 'compassion' for dolphins as under the MMPA the American fleet was authorized to incidentally kill 20,500 of these animals not to mention that "*off the Alaskan coast more than 15,000 dolphins were killed each year with drift-nets in squid fishing, with no special provisions to protect them being in place remotely of the kind of those on which the embargo to Mexico was based. Those dolphins were not even counted against the United States general permit for its own fleet (20,500 dolphin per year in the ETP)*" (see: *Tuna-Dolphin I*, para 3.38.).

[261] See: ibid.

[262] See: Gerald P. Norton. 'The Questionable Constitutionality of the Suspension and Debarment Provisions of the Federal Acquisition Regulations: What Does Due Process Require?' (1988-1989) 18(3) Pub Cont L J 633 at 633.

Chinese government's mercantilist policies. Indeed, the argument of China's purchasing power has been presented as a kind of scarecrow by US experts analysing innovation mercantilism, especially when reporting to politicians. Shea, while explaining the linkages between foreign innovation mercantilism and foreign public procurement policies to the Science Committee, Subcommittee on Investigations and Oversight of the House of Representatives in December 2012, emphasized that the Chinese public procurement market in 2009 was worth USD 1 trillion, that is, ten times the USD100 billion shown in official statistics.[263] Similarly, Atkinson, while speaking to the same body, admitted that innovation mercantilism both in general commerce and in public procurement can be seen elsewhere.[264] However, similar to Shea, he primarily emphasized that "*the Chinese economy is so large and fast growing that the country is able to get away with practices that if implemented by a smaller nation would be rejected out of hand by multinational corporations*."[265] Elsewhere, together with Stepp, Atkinson further explained the focus on China by the observation that "*because China's market is so large, most foreign companies see an overall benefit in doing business even if they have to give away some of their technology secrets as the quid pro quo*."[266] The 'so large market*'* in 2006 meant about 150 huge key state-operated enterprises directly subjected to central authorities and thousands of their subsidiaries, partially privatized SIEs, and of enterprises controlled by sub-central authorities.[267]

Surely, the capacity and the absolute incapacity of a given public procurer to interfere with a foreign regulatory environment only define two opposite sides of the spectrum, and a clear-cut line between the capacity and the incapacity cannot be drawn. Perhaps, it can be roughly assessed that the mentioned technology transfer policies of Venezuela (see section 6.2.3.b) are negligible from the global perspective due to their lack of sufficient purchasing power to dictate terms to the largest multinational corporations. However, the overall assessment of the Venezuelan or similar country's policy might be different if it were made from a standpoint of neighbouring countries having (*i*) tighter trade relations with such country, and (*ii*) industries relying on the demand generated by Venezuelan public procurers. Analogically, the Australian government might not be a significant purchaser of timber on a global scale. However - considering the particular importance of the Australian market for neighbouring countries' timber exports - the Australian government proved to have significant purchasing power to make officials of 'neighbouring' countries express concerns about the Illegal Logging Prohibition Act 2012 (see section 6.2.3.a).

[263] See: note 201, Shea at 6.

[264] See: note 203 at 8, 9..

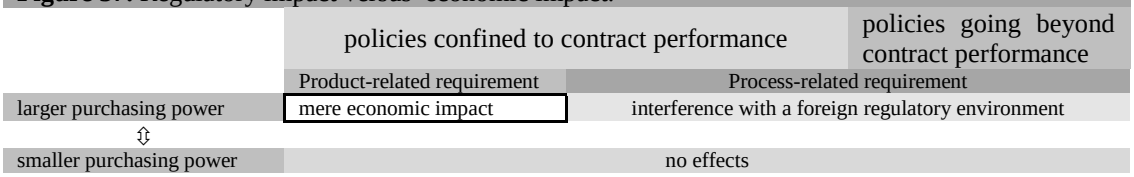
[265] See: ibid. at 3, 4

[266] See: Robert D. Atkinson and Matthew Stepp, 'Green Mercantilism: Threat to the Clean Energy Economy' The Information Technology and Innovation Foundation (June 2012) at 10.

267 See: note 203 at 46.

6.5 Regulatory impact versus economic impact

Figure 37. Regulatory impact versus economic impact.



The selective and arbitrary interference with a foreign regulatory environment accompanied with sufficient purchasing power should, by no means, be confused with merely economic impacts of non-cross-border horizontal policies on trade flows, and on what is traded. Admittedly, even domestic policies have some influence on trends and values followed by both foreign business and foreign consumers. To quote Trepte, *"[t]he distinction between 'domestic' and 'international' policies is becoming more and more blurred as the effects of the economy of one country are felt, sometimes immediately in other economies, sometimes at the other side of the world. The effects of what goes on within the frontiers of one country are no longer (if they ever were) restricted to that country*."[268] However, there is still a long way for a horizontal policy, having some economic impacts on foreign economies, to fall within the concept of a cross-border horizontal policy. Let's consider again various environmental considerations related to purchases of vehicles for the public sector. Suppose that public procurers require that vehicles purchased for governmental agencies have to use hybrid or electric propulsion, and that all purchased vehicles are imported - which is a policy confined to contract performance and employing product-related requirements. An increased demand for hybrids or electric vehicles assembled abroad might improve their affordability in the jurisdiction where such vehicles are assembled due to effects of scale. However, that would be a purely economic and not a regulatory effect resulting from procurers' purchasing power. In order to interfere with a foreign regulatory environment, public procurers would have to require that (*i*) specific environmentally friendly methods are used in the production process of these specific cars (which would be a requirement theoretically confined only to contract performance but *de facto* affecting all the vehicles' production thanks to effects of scale), or (*ii*) the whole foreign assembly plant meets some more general environmental characteristics (that would be a requirement expressly going beyond contract performance – see: Figure 37).[269]

Importantly, the scope of regulatory impacts of a given horizontal policy is not a simple product of (*i*) the size of purchasing power, and (*ii*) the accumulation of elements allowing

[268] See: note 204 at 208.

[269] This model/figure omits very improbable product-related requirements which go beyond contract performance, like for instance a hypothetical requirement that the suppliers/manufacturer of hybrids/electric vehicles cannot produce thirsty SUVs at the same time.

the interference with a foreign regulatory environment. A potential for interfering with a foreign regulatory environment is a *sine qua non* element of cross-border horizontal policies, and purchasing power is only secondary. Many horizontal policies do not have any potential to interfere with a foreign regulatory environment at all, regardless of how massive amounts of money are used to achieve their goals. For instance, Davidson in the late 1990s described how public procurement had gradually become a tool of archaeological protection in the US. A number of the US federal laws on the protection of Native American historic sites, remains, and artefacts, etc. gradually adopted since 1906, in practice, could only be enforced when federal contracts for the development of public infrastructure were performed because much more attention was paid to the compliance-matters in such public projects compared with private projects.[270] Suppose that extensive infrastructural investments were financed these days by the US federal government, and theoretically suppose that a significant portion of these contracts were awarded to foreign contractors. This might even have some influence on global economic indices. However, policies like channelling improved archaeological protection via public procurement, will never (*i*) improve such protection elsewhere abroad, and (*ii*) cause any interference with foreign regulatory environments at all.

6.6 Conclusion

The goal of this chapter was to conceptualize cross-border horizontal policies in public procurement markets, defined as policies adversely affecting foreign (exterritorial) business by interfering in/distorting the regulatory environment often specifically targeting foreign business operators. In order to illustrate this concept, this chapter used a mosaic of cases which, at first sight, could seem different since they relate to various non-commercial considerations (green, social, human right related, firmly industrial) and various methods of advancing these considerations (legislation, technical specifications, other contractual clauses, labelling, trade sanctions/embargos etc.). Nevertheless, this chapter identified the distinctive features of all cross-border horizontal policies including their selectiveness, arbitrary application. and the use of sufficient purchasing power, whereby the greatest challenge lay, perhaps, in expounding the concealed similarities between environmental/social policies on one hand and innovation mercantilism on the other. This chapter also supported this conceptualisation by comparing cross-border horizontal policies with similar phenomena that can be seen in more general extraterritorial measures of governments and in consumer preferences in private markets. This conceptualisation is a mere point of departure for a further discussion on how cross-border horizontal policies

[270] See generally Michael J. Davidson. 'Native American Cultural Protection Issues in Government Contracts' (1998-1999) 28(2) Pub Cont L J 189.

impede further liberalization of public procurement markets, and how this impediment can be remedied.

III. OPERATIONALISATION

Chapter 7. Sub-central autonomy

This chapter is the first of three operationalizing the concept of cross-border horizontal policies as an impediment to further liberalization of public procurement markets, and focuses on the pursuit of cross-border horizontal policies by sub-central governments. Its purpose is to present the correlations between the scope of general sub-central regulatory autonomy, the scope of public procurement-specific sub-central regulatory autonomy and the likelihood of the pursuit of local cross-border horizontal policies uncoordinated by central governments, as well as to discuss how the interplay of these factors might frustrate efforts of central governments to liberalize public procurement markets in cooperation with third countries. This chapter starts with general remarks on the often loose relations between general and public procurement-specific separation of powers and the importance of the allocation of the actual purchasing power between central and sub-central governmental agencies (section 7.1). Then it moves on to discuss the relations between locally pursued cross-border horizontal policies and various levels of sub-central regulatory self-rule (see Figure 38), that is the autonomy to (*i*) determine procedural rules governing the procurement process, potentially indirectly discriminating against foreigners in public procurement markets (section 7.2), (*ii*) overtly and directly discriminate against non-locals and foreigners (section 7.3), and (*iii*) to be directly engaged in intergovernmental negotiations with the governments of third countries substituting their own central governments (in section 7.4).

Figure 38. Levels of the sub-central legislative autonomy with regard to public procurement markets

7.1 General remarks

In theory, central governments can discretionally liberalize sub-central procurement, disregarding sub-central governments, because central governments have the authority to assume international public procurement-related obligations from the perspective of international law,[1] and because, under internal laws, dealing with third countries especially in

[1] Under the international customary law codified in Article 7 ('Full Powers') of the Vienna Convention [Vienna Convention on the Law of Treaties (signed at Vienna on 23 May 1969, in force 27 January 1980) 1155 UNTS 18232]: (*i*) "*1.[a] A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.*" and (*ii*) "*2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty; (b) heads of*

regard to trade-related matters is in principle vested in the central governments pretty much regardless of jurisdiction. In practice, however, central governments of the major global economic players crucial for the liberalization of public procurement markets (especially the US, EU and China, also Canada) have limited capacity to subdue their entire multi-level structures of public administration to their external public procurement-related trade policies. Depending on the scope of sub-central autonomy, the external trade policies of central governments affecting local/regional public procurement, which go against the will of sub-central governments, might be frustrated by them, also by pursuing independent cross-border horizontal policies.

The problem with sub-central/regional/local autonomy in the context of public procurement has been well discerned since the very beginning of the formal discussion on the shape of the post-WW2 international trade order. During the London meeting of the United Nation's Conference on Trade and Employment, in the Subcommittee on Procedures (the agenda of which covered, among others, the liberalization of public procurement markets - see section 2.2.1), for instance the UK's representative, Mr. Shackle, "*referred to the necessity for defining "governmental", and pointed out that it might be construed to refer to a central government, to state or provincial governments, or even to local or municipal governments. It was difficult to in assure observance of regulations by legal governments in practice, and he felt that it would be wise to confine discussions to a central government*."[2] As far as contemporary literature is concerned, Trepte similarly observed that "*(...) they* [sub-central/regional/local governments] *are financially independent, they generally do not stand in a relationship of hierarchical subjection which may well cause problems at an international level. This is particularly the case in federal systems (...)*."[3] In turn, Bovis made a comment in the EU-narrowed but public procurement-related context that "*[i]It is often difficult, in the framework of economic Union such as the EC, between a common external policy and individual commercial policies pursued by one or more member states*."[4]

By way of general remarks, it is worth noting that: (*i*) the public procurement-specific allocation of powers between central and sub-central governments can very poorly reflect

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diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited; (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ." It follows that, in theory, internally limited powers of representatives of central governments (including allocation of powers between central and sub-central government) should be irrelevant for third countries. In practice, however, third countries would neither (*i*) 'collude' with any central government to help reallocate public procurement powers to such central government from its sub-central counterparts, nor (*ii*) reasonably believe in gaining actual market access to local public procurement thanks to international commitments adopted against the will of sub-central governments.

[2] See: UN, 'Report from the first meeting of the Subcommittee on Procedures held 28 October 1946' European Office of the United Nations, Information Centre (Geneva, 29 October 1946) E/PC/T/C.II/25 at 2.

[3] See: Peter-Armin Trepte, *Regulating procurement: understanding the ends and means of public procurement regulation* (Oxford University Press, New York 2004) 411 at 27.

[4] See: Christopher Bovis, *EU public procurement law* (Elgar European law, Edward Elgar, Cheltenham 2007) 488 at 36.

general constitutional arrangements of a given sovereign state (or a similar structure like the EU), and usually needs separate analysis (see section 7.1.1), (*ii*) the vast autonomy of sub-central governments to regulate and/or manage sub-central public procurement markets might be an impediment to intergovernmental trade negotiations conducted at the level of central governments only if the autonomy goes in tandem with sufficient allocation of the actual purchasing power to procuring agencies subjected to the regulatory powers of sub-central governments (see section 7.1.2), and (*iii*) the allocation of purchasing power in the hands of a given central government can be seen by third countries as a kind of promise of no problems with potential non-compliance with public procurement-related international obligations by such country's sub-central governments only on condition that the allocation of actual purchasing power is well defined and no significant shifts of procurement backlog can be freely made from central to sub-central level (see section 7.1.3).

7.1.1. Public procurement-specific versus general allocation of powers

As to the first remark, at the level of national laws, the capacity of central governments to regulate public procurement managed by agencies subjected to sub-central governments quite often does not reflect how the legislative powers are assigned between various levels of government in other fields of regulation. This capacity surely does not depend on whether a given sovereign state can be traditionally categorized as a federation, confederation, unitary sovereign state or as an uncategorisable subject like the EU because these labels are often nowhere close to public procurement-specific allocations of powers. In the case of formally unitary China, the central government has been struggling to curb various shades of the *de facto* sub-central public procurement-related regulatory autonomy for over a decade now (see further section 7.1.3). As far as federal states or quasi states are concerned, let's compare the EU and the US. The EU is still not seen by many as one sovereign state, which would logically imply and confirm that the EU's Member States have been deprived of their sovereignty.[5] Neither is the European Commission within the EU's structure already seen as the central government of one sovereign state.[6] However, in the case of both the UE and the US, regulating commercial relations with third countries is the responsibility of, respectively, the co-acting European Commission and European Council under TFEU article 207,[7] and of

[5] In the public debate in Members States, the local political class usually tries to keep the appearance of Members States' sovereignty, but scholars usually refer to 'shared' or 'pooled' sovereignty. See generally: Jeremy Rabkin. 'Is EU policy eroding the sovereignty of non-member states?' (2000) 1(2) Chicago J Intl L 273 at 273-277; John B. Richardson. 'Sovereignty: EU experience and EU policy' (2000) 1(2) Chicago J Intl L 323; Ondrej Hamulak. 'The Essence of European Union's 'Statehood' after Treaty of Lisbon and Lisbon Judgements' (Paper prepared for the UACES Student Forum 11th Conference 29 - 30 April 2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653257> accessed 27 April 2015.

[6] See: ibid.

[7] "*3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct*

the US federal government under the 'commerce clause' of the US constitution.[8] Moreover, the EU has significantly wider powers to regulate public procurement markets of Member States than the US federal government has with respect to particular states. The EU's secondary legislation[9] regulates all public procurement conducted in the Member States at any level of Member States' administrative ladder on the condition that public contracts are worth more than the value thresholds of the application of the secondary application.[10] In contrast, the legislative branch of the US government cannot step into regulating public procurement managed/financed by agencies subjected to states,[11] potentially resulting in tensions between federal government and states about subjecting states' public procurement to international commitments by the federal government in accordance with the commerce clause (see further section 7.3).

7.1.2. Allocation of purchasing power

As to the second remark, it is pretty obvious that the separation of public procurement-related powers between central and sub-central governments is a combination of regulatory powers, and of actual purchasing power, meaning the value of directly managed public contracts. On the one hand, no matter how huge the share of sub-central procurement in a given country's public procurement, this will not be the hindrance to negotiating public procurement-related trade concessions with third countries if the central government has unlimited powers to regulate sub-central public-procurement markets (which, as mentioned above is the case of the EU). On the other hand, the limited powers of central governments to regulate sub-central public procurement is the hindrance to negotiating with third countries only to the extent that the public procurers subjected to sub-central government offer a high share of a given country's total internationally contestable procurement.

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these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations. 4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audio-visual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them." See: TFEU, Article 207.

[8] Article I, Section 8, Clause 3 of the US Constitution stipulates that the US Congress shall have the power to "*to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes*" which is commonly known in the literature as the 'commerce clause'. See: David E. Dreifke. 'The Foreign Commerce Clause and the market participant exemption' (1992) 25 Vand J Transnat'l L 257 at 274-283. See also: John Garret Egan and Ezra Parmalee Prentice, *The commerce clause of the federal Constitution* (Callaghan, Chicago 1898); John W. Walsh, *True scope and meaning of the commerce clause* (Chicago: Barnard & Miller, Chicago 1915); Frederick H. Cooke, *The commerce clause of the federal Constitution* (Baker, Voorhis and company, New York 1908).

[9] The EU's secondary legislation passed by the EU's legislative institutions is an equivalent of the statutory legislation. It is passed and based on the authorizations provided for in the EU's primary legislation (founding treating and amending treaties) being an equivalent of constitutional acts.

[10] Unless other more general exclusions of the application of the public procurement-related secondary legislation apply. See sections 3.1, 3.2.

[11] See: ibid.

For example, the EU might have wider regulatory powers with regard to local public procurement markets than the US but the scale of public procurement managed by the EU's central institutions is very modest[12] in contrast to the US in the case of which the value of the procurement managed by federal agencies is massive.[13] Suppose that the EU had much weaker power to regulate public procurement markets of Member States than it does, and that Member States strongly opposed co-operating with the European Commission on subjecting Member States' public procurements to international commitments toward third countries. That would leave the EU with a limited pool of public contracts managed by a few agencies based mostly in Brussels, and with no leverage in negotiations with third countries whatsoever. This is why the EU has been subjecting its Member States' public procurement to the GPA already since the Tokyo Round.[14] In contrast, the US federal government could enter into public procurement-related reciprocal agreements with third countries, even without subjecting its sub-central procurement to such agreement, which the US actually did before GPA94 (see further section 7.3), initially subjecting only federal agencies to GPA79.[15]

It follows that the problem of public procurement-specific sub-central autonomy would not matter for the international liberalization of public procurement markets if the procurement managed by agencies subjected to sub-central governments was modest and not internationally contestable. However, the opposite is true and the gradual expansion of international commitments over sub-central public procurement is now an irreversible process. The greatest leap forward in this regard was probably made when GPA94[16] entered into force, embracing about three times as much of public procurement markets in terms of value as did the previous GPA, mostly as a result of the extension of its coverage over sub-central public procurement.[17] No studies show precisely how much sub-central internationally contestable procurement is still to be covered on the global scale but several studies show that sub-central public procurement is larger than central public procurement. According to the last complex study of the problem by the OECD of 2002 showing averaged results for 1990-1997, "*[p]Procurement by sub-central governments* [in the OECD members] *is larger than procurement by central governments by an estimated margin of two*

[12] "*US Procurement is mainly done at federal level, and is covered by the GPA. In Europe, relatively little procurement is done at European (central) level so sub-central coverage is broader to accommodate this and includes states, regions, municipalities and so on.*" See: The European Union Chamber of Commerce in China, 'Public Procurement in China: European Business Experiences Competing for Public Contracts in China' (2011) at 12.

[13] See: ibid.

[14] See: GATT, 'Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Government Procurement" - Agreement on Government Procurement - Revision' (11 April 1979) MTN/NTM/W/211/Rev.2 at 35-68.

[15] See: ibid. at 94-98.

[16] See: Government Procurement Agreement 1994, 15 April 1994: Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b) 1994.

[17] See: Denis Audet. 'Government Procurement: A Synthesis Report' (2002) 2(3) OECD J Budget 149 at 152

to three times depending on the ratios being measured."[18] Specifically, when salaries of employees in public administration[19] and the expenses in the defence sector[20] are not counted, the OECD-averaged share of sub-central internationally competitive public procurement in total public procurement-related expenditure was as high as 76.9 percent in 1990-1997, leaving central governments with a modest 23.1 percent.[21] Canada and Sweden recorded the highest share of internationally contestable sub-central procurement accounting for respectively 8.8 percent and 9 percent of their GDP against, respectively, 1.69 percent and 6.25 percent at the level of their central governments.[22] In turn, Belgium, Portugal, Slovakia, and Turkey recorded the lowest share accounting for respectively 1.95 percent, 2.59 percent, 2.79 percent, and 1.13 percent at the sub-central level against 2.48 percent, 4.83 percent 9.46 percent, and 5.58 percent at the central level.[23] The US, Australia, Japan, and Korea recorded respectively 5.11 percent, 5.81 percent, 7.59 percent, and 5.10 percent at the sub-central level against, respectively 3.71 percent, 2.07 percent, 1.85 percent, and 3.94 percent at the central level.[24]

7.1.3. Dynamics of the allocation of procurement

As to the third remark, it must be noted that a wider but well-defined and stable purchasing power of public procurers subjected to sub-central governments might be a lesser hindrance to negotiating public procurement-related trade concessions by central governments than a narrower purchasing power which can be easily altered, undermining international public procurement commitments. Indeed, any liberalizing commitments covering central-level procurement benefiting foreign business are just meaningless from the perspective of the governments of third countries considering making public procurement-related reciprocal concessions if the actual purchasing power can be easily shifted to local governments which autonomously pursue diversified and less transparent horizontal policies.

This can be exemplified by how the Chinese government dealt with the heavy criticism expressed from 2009-2011 especially by the EU and the US with regard to indigenous innovation policies following the adoption of the mentioned Order 618 which regulated procurement at the central level[25] (see section 6.2.3.b).[26] Specifically, the Chinese central

[18] See: ibid. at 151.

[19] Salaries in principle should not fall within the concept of public procurement and should not be counted as expenditure for public procurement.

[20] The defence sector, in principle, is not open to international competition anyway.

[21] See: note 17 at 168.

[22] See: ibid.

[23] See: ibid.

[24] See: ibid.

[25] See: 'Order Regarding the Launch of National Indigenous Innovation Product Accreditation Work for 2009, 30 October 2009 (promulgated by the Ministry of Science and Technology, the National Development and Reform Commission and the Ministry of Finance, effective Oct. 30, 2009)'. See: Siyuan An and Brian Peck. 'China's Indigenous Innovation Policy in the Context of

government made an attempt to 'appease' its trading partners and foreign business in 2010 by proposing measures that would have relaxed indigenous innovation policies and supersede Order 618.[27] The draft 'Administrative Measures for the Government Procurement of Domestic Products (For Public Comment),'[28] among others, were meant to (*i*) remove unreadable product-accreditation requirements which vaguely and ambiguously defined highly technologically-advanced products in defiance of international technical standards,[29] (*ii*) qualify intellectual property as indigenous/domestic based on, for instance, registration or on being licensed for use in China regardless of its ownership,[30] and (*iii*) define products as domestic based on the place of production in China regardless of the ownership of producers.[31] Such measures could have contained the discrimination of foreign-owned enterprises operating in China by the indigenous innovation policies pursued at the central level[32] but the works on that draft-proposal were discontinued in 2010, leaving the previous heavily criticized measures of 2009 in force.[33] Subsequently, while visiting Washington in January 2011, Hu Jintao[34] made yet another promise to revise indigenous innovation policies and to de-link these policies from procurement,[35] which was smoothly done at the central level with effect from 1 July 2011 but it encountered difficulties at sub-central level (see further section 7.2).[36] Meanwhile, a lot of complaints were made from 2010-2011 by the foreign business gathered in the European Union Chamber of Commerce in China, dealing with the Chinese public procurers, about (*i*) a quick and huge shift from

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its WTO Obligations and Commitments' (2011) 42(2) Geo. J. Intl L 375. footnote 71 at 395. See also: James Boumil S. 'China's Indigenous Innovation Policies under the TRIPS and GPA Agreements and Alternatives for Promoting Economic Growth' (2011-2012) 12(2) Chi J Intl L 755 footnote 45 at 763.

[26] See: note 25, An and Peck at 396.

[27] See: ibid. at 396-399.

[28] See: 'Administrative Measures for the Government Procurement of Domestic Products (For Public Comment)] 2010 (promulgated by the Ministry of Science and Technology, the Ministry of Finance, the Ministry of Commerce and General Administration of Customs, May 26, 2010).' See: ibid. footnote 84 at 397.

[29] See: ibid. footnote 82 at 397.

[30] See: ibid. footnote 83 at 397.

[31] See: ibid. footnote 87 at 398.

[32] See: ibid. at 397. However, foreign business claimed that that even if the draft-proposal of 2010 had been implemented, it would not have brought too much change not only because the solutions it offered were still unsatisfactory for foreign business [see: Information Technology Industry Council, Semiconductor Industry Association, Software and Information Industry Association, TechAmerica and Telecommunications Industry Association, 'Comments from the U.S. Information Technology Office (USITO) to the Ministry of Science and Technology (MOST), the National Development and Reform Commission (NDRC), and the Ministry of Finance (MOF) on the Notice on Launching the Accreditation of National Indigenous Innovation Products in 2010' USITO (Beijing 10 May 2010) at 3-4]. Namely, in its comments on the draft measures of 2010 solicited by the MOST, the NDRC and the MOF, the U.S. Information Technology Office ("USITO') - joined by the Information Technology Industry Council, the Semiconductor Industry Association, the Software and Information Industry Association, TechAmerica, the Telecommunications Industry Association - claimed that the proposed draft measures (*i*) were still inconsistent with China's commitments to negotiate its future accession to the GPA (see: ibid. at 2), and (*ii*) "*remains*[ed] *fraught with questions, impracticality and uncertainty*' (see: note 28 at 4) while "*[b]Both foreign and domestic companies alike in China rely on predictability and transparency in the business environment to conduct commerce.*" (See: ibid).

[33] See: note 25 An and Peck at 398.

[34] President of the People's Republic of China from 2003 to 2013.

[35] See: U.S. House of Representatives, 'The Impact of International Technology Transfer on American Research and Development: Testimony of the Honourable Dennis C. Shea before the Committee on Science, Space, and Technology Subcommittee on Investigations and Oversight United States House of Representatives' (5 December 2012) HHRG-112-SY2 at 7; Public Procurement in China: European Business Experiences Competing for Public Contracts in China at 22.

[36] See: ibid. at 7.

purchasing at the central level to purchasing at the provincial and local level,[37] and (*ii*) the fact that provincial and local authorities, in addition to country-wide legislation also, "*develop[ed] their own procedures, procurement catalogues and unwritten practices*" that varied across the country and significantly impeded market access[38] - which all can hardly be not seen as a co-incidence.

Also in the case of federal states with well-defined public procurement-specific separation of regulatory powers, the shifts of procurement backlog by massive money transfers from central to sub-central agencies without the reallocation of regulatory powers are possible. For example, Canadian business accused the US federal government of such practices in the context of the post-2008 stimulus packages, claiming that channelling money to local governments by the US federal government was aiming at avoiding compliance with the GPA and public procurement-related provisions of the NAFTA.[39] Nonetheless, at least in theory, one could still claim that, in the case of federal states, the clear separation of powers, responsibilities, and budgets contains a significant reallocation of purchasing power between central and sub-central-level government, which is also pretty readable for third countries. If this claim is true, one could also claim that a central government of a federal country is in a better position to negotiate public procurement-related international commitments than a central government of a unitary state having a similar sized and multilevel structure of government/public administration.[40] This is because, in the case of unitary countries, third counties are likely to press for the inclusion of sub-central public procurers more than they would do in the case of federal states, just in order to counteract the higher risk of the reallocation of public procurement.[41]

7.2 Autonomy to determine details

The most common dimension of public procurement-related sub-central autonomy lies in that sub-central lawmakers have powers to regulate procurement managed by sub-central executive agencies (see Figure 38). Allowing, to various degrees, sub-central lawmakers to regulate procurement processes, seems to be the feature of countries which are just large in

[37] See: note 12 at 21.

[38] See: ibid.

[39] See: David M. Attwater. 'The Influence of Buy American Policies on Canadian Coverage Under the World Trade Organization Agreement on Government Procurement' (2012) 46(4) Intl Law 939 at 945.

[40] The assumption here is that both states have similar initial concentration of public procurement at the central level and that this is an initial stage of the mutual liberalization process whereby sub-central procurement is not yet at stake.

[41] This remark somewhat challenges the remark made in section 7.1.1 that the labels of being federal or unitary do not matter. They might matter but in quite an opposite direction to what might be intuitively expected, in the sense that the unitary structure of a country under some circumstances (size of economy, multilevel structure of government, initial stage of liberalization without much focus on sub-central procurement) is a hindrance to rather than a facilitation of public procurement-related intergovernmental trade negotiations.

terms of population and territory (like the US and China and even the EU[42]), and seems to be recognition of central governments' limited capacity to control multilevel governance structures. To quote Trepte, "*[t]The further away the procuring entity is from central government […], the more difficult it is to control the entity's procurement conduct which will, in turn, lead to different mechanisms for control*."[43] Such scope of autonomy covers regulating mostly procedural matters, but also means determining non-commercial considerations that the executive agencies shall take into account while designing terms and conditions of specific public contracts. Such a scope of regulatory autonomy can also be accompanied with powers to regulate foreigners' access to local procurement markets (see further sections 7.3, 7.4) but it itself might be wide enough to allow sub-central lawmakers and procurers to indirectly discriminate against foreigners, also by employing cross-border horizontal policies.

Sub-central regulatory autonomy often goes in tandem with the pursuit of regional traditional industrial horizontal policies resulting in that central policy-makers try to curb regional protectionism by consolidating previously decentralized public procurement-specific legislation. For example in China, the consolidation commenced with the adoption of the 'Bidding Law'[44] ('BL') which entered into force in January 2000[45] mostly covering public contracts managed by the SIEs,[46] followed by the 'Government Procurement Law' ('GPL')[47] which entered into force in January 2003,[48] covering both central and sub-central non-commercial public authorities.[49] According to Wang, the primary aim of the GPL was to inject more interprovincial competition into local public procurement markets and to curb the local inter-provincial protectionism based on the premise that previous decentralization of public procurement regulation had been leaving too much leeway for provincial

[42] Even in the case of the EU, the directives still need to be implemented and fit into the national legal systems of Member States, and Member States have kept moderate regulatory powers with regard to low-value public contracts (see sections 3.2, 3.3).

[43] See: note 3 at 27-28.

[44] Also translated into English as the *Tendering Law*. See for instance: Qingzi Zang, 'Green Public Procurement in China and the WTO Agreement on Government Procurement: is it hard to be "fairly" green?' Jean Monnet Center for International and Regional Economic Law & Justice (2011) Jean Monnet Working Paper 4 at 9.

[45] The BL was enacted by the National Development and Reform Commission (NDRC), promulgated on 30 August 1999, and came into effect on 1 January 2000. See: note 37 at 9 and footnote 7 at 6.

[46] The BL has no specific subjective coverage in the sense that it does not determine which specific procurers are subjected to this law. Instead it specifies other tests like specific kinds of transactions to which BL applies. These include, for instance (*i*) large-scale infrastructural or utilities projects, (*ii*) partly or wholly state-funded projects, or (*iii*) projects funded by international aid institutions like the Asian Development Bank. See: ibid. at 9, 10.

[47] The GPL was prepared by the Chinese Ministry of Finance and promulgated on 29 June 2002, going into effect on 1 January 2003. It has been administered by the Ministry of Finance since then too. See: ibid. at 8 and footnote 6 at 6.

[48] The GPL is applicable to public contracts offered by central and sub-central public authorities on condition that certain value thresholds are exceeded. In 2011, for supplies/services it was RMB1.2 million and RMB500,000 for other types of contracts. For construction works it was over RMB2 million in the case of central government and RMB600,000 in the case of sub-central government. Importantly, the GPL neither covers SIE nor applies to publicly funded projects which are regulated by the BL only. See: ibid. at 7, 8.

[49] See: ibid.

protectionism, causing severe obstacles to inter-provincial trade.[50] Such regional protectionist policies might be primarily targeted at non-local nationals rather than foreigners but the point is that central governments cannot make feasible international commitments to opening sub-central public procurement markets without first having curbed regional protectionism.

In contrast, cross-border horizontal policies pursued by public procurers subjected to sub-central governments and facilitated by sub-central regulatory autonomy seem to primarily target third countries, based on the assumption that regulatory environments of different regions of the same country do not differ significantly, implying that there is no case for interfering by one sub-central governments in the regulatory matters of another. For instance, the much wider scope of imposing process-related environmental requirements in the GPP spirit by the most affluent EU Member States[51] compared with other Member States[52] can only affect the regulatory environments of third countries, especially emerging economies, and virtually it cannot affect the regulatory environments of other Member States if environmental requirements are confined to the EU's harmonized mandatory standards. Even if such environmental requirements go beyond what is mandated under EU laws, the regulatory environments of third countries are still more likely to be interfered with than the regulatory environments of other Member States.

Sub-central regulatory autonomy without a right to decide whether to overtly discriminate against foreigners (and/or non-local nationals) can also designate a decision of central government to discriminate and the right of sub-central governments to determine the detail of how to discriminate. This is not a likely scenario in the case of traditional industrial horizontal policies employing measures like tariffs, price preferences, etc. leaving virtually no space for region-specific variations of such measures, but it could be seen in yet another aspect of the Chinese public procurement-specific indigenous-innovation measures. As mentioned, even before Order 618 mandated in 2009 central agencies to create lists of innovative products,[53] provincial governments had been creating local lists of innovative

[50] See: Ping Wang, 'Accession to the Agreement on Government Procurement: the case of China' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 90 at 113.

[51] For simplicity, let's not differentiate here between the GPP stemming from legislative policies of Members' state and executive discretion of particular public procurers, and let's collectively treat sub-central legislative and executive policies as just policies of sub-central governments.

[52] As discussed in section 6.2.1.b, in the case of construction works, the European Commission's study of 2005 covering EU25 illustrated that, in the so-called Green-7 group (Austria, Denmark, Finland, Germany, Netherlands, Sweden and the UK), 60 percent of the analysed calls for tender included various environmental criteria (also process-related) while this indicator was as low as only 14 percent in the case of the remaining 18 Member States. See: M. Bouwer, K. de Jong, M. Jonk, T. Berman, R. Bersani, H. Lusser, A. Nissinen, K. Parikka and P. Szuppinger, 'Green Public Procurement in Europe 2005 - Status overview' (October 2005) Virage Milieu & Management bv, Korte Spaarne 31, 2011 AJ Haarlem, the Netherlands at 7, 9, 31.

[53] 'Order Regarding the Launch of National Indigenous Innovation Product Accreditation Work for 2009 30 October 2009 (promulgated by the Ministry of Science and Technology, the National Development and Reform Commission and the Ministry

products and related measures to rely on while procuring,[54] (see section 6.2.3.b) the number of which had been estimated by the US-China Business Council as 68 as at November 2010.[55] The sub-central autonomy in managing country-wide policies[56] resulted in many discrepancies of local measures with each other and with broader country-wide legislation.[57]

Allowing provinces to have local variations of indigenous policies not only undermined the overall implementation of the country-wide policy,[58] but it also backfired at international level in 2011 when the Chinese central government took genuine actions to delink public purchases from indigenous innovation policies under the international pressure (see section 7.1.3). While positive effects could be seen at the central level, it soon turned out that not all sub-central (provincial and local) governments did comply with central policy.[59] In order to curb the pursuit of local firm industrial horizontal policies, the central government published yet another official circular in November 2011, which called on sub-central authorities to "*commence the removal of all regulatory documents relating to the linking of innovation policies and providing government procurement incentives*" until 1 December 2011.[60] Even so, indigenous innovation measures were not terminated, for instance, in Tianjin national central city, until June 2012.[61] In September 2012 the United States Information Technology Office ('USITO) still claimed that "*some provincial and local governments [in China] continue to implement various government procurement policies that favour products developed with local IP, or even products with IP from a particular province or municipality, over foreign ones*".[62]

It follows that the public procurement-specific sub-central regulatory autonomy facilitating the uncoordinated pursuit of horizontal policies often causes both internal and external problems. In the case of traditional industrial policies, the indirectly discriminatory procurement procedures adopted by sub-central governments obviously lead to tensions with both other states/regions/provinces and third countries. As far as cross-border policies are concerned, some analogy could be seen between varying catalogues of indigenous innovative products in the case of Chinese provinces and the varying scope of the GPP in the case of EU's Member States. At the internal level both phenomena could been seen as an obstacle to

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of Finance, effective Oct. 30, 2009)'. See: note 25, An and Peck and footnote 71 at 395. See also: note 25, Boumil footnote 45 at 763.

[54] See: note 25 ibid. An and Peck, footnote 57 at 391.

[55] See: note 37 at 22.

[56] See: note 25, Boumil at 757.

[57] See: ibid. at 781.

[58] See: ibid. at 797.

[59] See: Robert D. Atkinson, 'Enough is Enough: Confronting Chinese Innovation Mercantilism' The Information Technology and Innovation Foundation (Washington February 2012) at 25; note 25, Boumil at 757.

[60] See: ibid. Atkinson, footnote 33 at 99.

[61] See: note 35 at 7.

[62] See: ibid.

respectively inter-provincial and intercommunity trade,[63] and at the internal level they could be seen as an additional barrier to trade for foreign suppliers/contractors expected to conform to a number of region-specific rather than country-wide harmonized standards. It also follows that once the autonomy to regulate is granted or pre-exists, it cannot be easily revoked by central governments. For example, the decades of the EU's experience has shown that, in the case of public procurement, the market integration by harmonization and centralization of regulation has been a long and an unfinished process,[64] which foretells a limited impact of acts like the GPL on curbing Chinese regional protectionism, especially in the light of the central government's impotence to quickly remove local indigenous innovation measures.[65]

7.3 Autonomy to discriminate

The second dimension of the public procurement-related autonomy of sub-central lawmakers goes further than the autonomy to merely regulate mostly procedural details of the procurement process (potentially resulting in indirect discrimination only), and lies in that sub-central governments may also have a right to freely and overtly discriminate against foreigners (and often non-local nationals) while purchasing. While international trade-related legislative powers all typically belong to central governments, this scenario is possible because of historical arrangements with regard to the allocation of powers between central and sub-central governments, made prior to public procurement becoming an international trade-related issue. Namely, in the course of the gradual formation of some federations, sub-central governments could have been granted a right to openly discriminate against non-local goods/services and/or suppliers/contractors of the same countries but of a different state/province, or even of a different neighbouring county/townships (simply

[63] For instance, in the case of the EU, especially when the GPP requirements go beyond what is required by the EU's harmonized standards.

[64] See section. 3.1. For instance, the Cecchini's Report on the 'cost of non-Europe' of 1988 admitted that "*[d]Ðespite the existence of these procedures, there has so far been very little effective opening up of public procurement. This is true for all sectors, and particularly so for the purchasing sectors where there is really nationalistic purchasing for strategic reasons, and where there are large specialist contracts of interest to foreign suppliers*." See: WS Atkins Management Consultants and Eurequip SA-Roland Berger & Partner-Eurequip Italia, 'The "Cost of Non-Europe" in Public-Sector Procurement' European Commission (Luxembourg, 1988) Research on the "Cost of Non-Europe" Basic Findings Volume 5 Part A, point 4.2 at 20. Similarly, the Commission Staff Working Paper prepared by the Internal Market and Services Directorate General in 2011 still stated that "*[d]Ðiscrimination in public procurement is very difficult to detect or prove. While the number of cross-border awards can be measured relatively easily it is much more difficult to say whether the number or percentage is lower than it should be a result of discrimination by contracting authorities or entities. There is a widespread perception of discrimination against foreigners that is shared by the vast majority of firms, which frequently participate in public procurement. 46 % of such businesses think that local preferences influence the outcome of public procurement procedures to a high extent, 27 % think that such preferences influence the outcome to a medium extent and only 14.5% think that there is no discrimination against non-domestic bidders. In the EBTP survey run by the Commission, a question concerning the perceived preference of the contracting authorities for domestic bidders has shown very similar results - around 40% of participant ranked the perceived discrimination against foreigners as a very important obstacle. Both surveys lead to a conclusion that there is a perception at least that discrimination against foreigners is still present in public procurement markets*". See: European Commission, Directorate General Internal Market and Services, 'Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation' (Brussels, 27 June 2011) SEC (2011) 853 final 1, point 7.6.2. at 143.

[65] Admittedly, however, the helplessness of the Chinese central government to force provincial and local governments to delink indigenous innovation measures from local public procurement seems so grotesque that one could ask if this was a deliberate policy associated with shifts of procurement backlog from central to sub-central level (see section 7.1.3).

against 'non-locals'). Subsequently, sub-central public procurement has gradually became an international trade-related issue thanks to a combination of factors such as lower cost of transport, easier information on tenders, upward trend in purchasing immaterial services as well as the gradual liberalization of general commerce, foreign investment and of public procurement at the central level of governments - all encouraging foreigners to also compete for local public contracts. As a result, such previous arrangements have become a serious obstacle to trade because if central governments cannot prevent direct discrimination between its regions, they cannot prevent discrimination against foreigners either.

7.3.1. Conflicting central and sub-central powers

The problem with the sub-central public procurement-related autonomy, which extends to the right to directly discriminate against foreigners, lies in that such right is most likely granted under constitutional acts shaping federations,[66] and it is virtually irremovable without fundamental changes to the allocation of powers between central and sub-central governments, often made with law-making decisions of constitutional courts. The clash between a central government regulating trade relations with third countries and local authorities regulating local public procurement could have been seen especially in the case of the US. It has always been an extensive policy of state authorities to prefer suppliers and products from a given state.[67] The local policies mostly consisted in preferences favouring not only domestic over foreign businesses but also state-residents over non-local contractors.[68] This would be absolutely out of the question, for instance, across the whole EU/EEA even in the case of the lowest-value locally-managed public contracts (see section 3.4.2), but in the case of the US the admissibility of such inter-state policies has been affirmed in the widely discussed *Trojan* case,[69] and subsequently confirmed in decisions like, e.g. *Setzer*.[70] In *Trojan*, the local Pennsylvanian 'Buy-American'-like law was challenged by the Canadian supplier who had been firstly accused of violating that law by supplying non-local products and falsely claiming that those products met conditions of being qualified as of local origin.[71] In response to accusations, the Canadian supplier challenged the federal

[66] The sub-central regulatory autonomy to merely regulate mostly procedural details of procurement processes without a right to overtly discriminate could exist even in a unitary country (as discussed in section 7.2) in the case of which the scope of the autonomy might be pretty freely determined by central governments. However, the sub-central autonomy to firmly discriminate is very unlikely to exist even in the largest unitary countries, and it can happen in federations only.

[67] See: Kingsley S. Osei. 'The Best of Both Worlds: Reciprocal Preference and Punitive Retaliation in Public Contracts' (2010-2011) 40(3) L J 715 at 716; James D. Southwick. 'Binding the States: A Survey of State Law Conformance with the Standards of the GATT Procurement Code' (1992) 13(1) Pa J Intl Bus L 59 at 73-76. See also: Texas Comptroller of Public Accounts, 'List of States with Resident Bidder references' (Revised 9 February 2007).

[68] See: ibid

[69] See: '*Trojan Technologies, Inc. and Kappe Associates, Inc., Appellants, v. Commonwealth of Pennsylvania and Leroy s. Zimmerman, Attorney General, Commonwealth of Pennsylvania, Appellees.*' 916 F.2d 903 (3d Cir. 1990).

[70] See: '*Smith Setzer Sons, Inc. v. South Carolina Procurement Review Panel*' 20 F.3d 1311 (4th Cir. 1994).

[71] Specifically, the dispute in *Trojan* pertained to the question of the constitutionality of the Steel Products Procurement Act (73 P.S. § 1881 et seq.), enacted in Pennsylvania in 1978. It required procuring authorities, in the course of public construction works, to use steel produced in the US. Trojan Technologies, Inc. was a Canadian firm and Kappe Associates, Inc. was its

constitutionality of that act based, among others, on the argument that the law in question (*i*) violated the 'commerce clause' of the US Constitution, [72] (*ii*) was an intrusion into the foreign affairs of the United States, which is an area reserved to the federal government, and *(iii)* had been pre-empted by federal statutes[73] and by foreign trade agreements between the US and Canada.[74] In short,[75] the US Court of Appeals for the Third Circuit eventually found the law in question to be constitutional based on the so-called 'market-participant-exception' to the commerce clause,[76] ruling that the State of Pennsylvania, in that case, entered the market as a purchaser rather than intervening in the market as the regulator and, as such, this law did not violate the US Constitution.[77]

The wider context of *Trojan* illustrates well how internal problems with sub-central public procurement-related autonomy, and the involvement of constitutional courts, might affect the international liberalization of public procurement markets. Specifically, the court seemed to have disregarded the context of the ongoing trade negotiations, then conducted by the US federal government and, by doing so, might have weakened the bargaining position of the federal government. Namely, the court disregarded the plaintiffs' position that the Pennsylvanian law had been pre-empted by the international obligations of the federal government under the provisions of the US-Canada FTA ('CUSFTA'),[78] pursuant to which its signatories "*actively strive to achieve, as quickly as possible, multilateral liberalization of international government procurement policies* (…) *as a further step toward multilateral liberalization and improvement of the GATT Agreement on Government Procurement.*"[79] The Court found such language "*hortatory rather than mandatory*" [80] and emphasized that, for the time being, 54 federal agencies had been subjected to the GPA and no binding

representative in Pennsylvania. In 1988, the Attorney General of Pennsylvania declared that Trojan and Kappe did not comply with that act. Both the Attorney General and Trojan and Kappe filed a motion for summary judgement with regard to the constitutionality of that act (see: *Trojan* paras 7-9).

[72] See: note 8.

[73] "*Preemption (…) means (a) that states are deprived of their power to act at all in a given area, and (b) that this is so whether or not state law is in conflict with federal law.*" See: Stephen Gardbaum. 'Nature of Preemption' (1993-1994) 79(4) Cornell L Rev 79 at 771. See also: Viet D. Dinh. 'Reassessing the law of preemption' (2000) 88(7) Geo L J 2085; Stephen Gardbaum. 'Congress's Power to Preempt the States' (2005-2006) 33(1) Pepp L Rev 39.

[74] See: *Trojan*, para 6.

[75] The nuances of the US constitutional law related to the commerce clause in the *Trojan*-specific context have been explained well and in detail elsewhere. See: Clark Barton. 'Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause' (1993) 60(2) U Chicago L Rev 615 at 626; Kenton O'Neil. '"Buy American" statutes: should the market participant doctrine shield Pennsylvania's Steel Products Procurement Act from commerce clause scrutiny?' (1992) 96 Dickinson L R 519 at 531; Treg Julander. 'State Resident Preference Statutes and the Market Participant Exception to the Dormant Commerce Clause' (2002-2003) 24(2) Whittier L Rev 541 at 564-566. See also generally: Caroline Hasson. 'Constitutional Law - State Buy American Statute Held a Valid Exercise in Economic Protectionism' (1991) 36(3-4) Vill L Rev 905.

[76] Put otherwise the idea of the market participant exception is that the state or local government does not violate the commerce clause if it acts not in the capacity of the regulator but in the capacity of the market participant. See especially: ibid. Berton (generally); ibid. Kenton at 525-528.

[77] See: *Trojan*, paras 25-38. See also: note 67, Southwick at 65-66; note 67, Osei at 729.

[78] See: Canada-United States Free Trade Agreement (signed 2 January 1988, in force 1 January 1989) reprinted in, 27 I.L.M. 281.

[79] See: CUSFTA, article 1301, section 1-2.

[80] See: *Trojan*, para 17.

commitment had been made by the federal government, as to sub-central agencies, to pre-empt any state legislation like the act in question.[81]

While the argument as to the nature of the obligations arising under the CUSFTA could somehow be accepted, the argument made on the obligation under the GPA was much more controversial. When the court was deciding the outcome of *Trojan*, negotiations on the coverage of the anticipated GPA94 had then already been open since 1988, with a common understanding that its coverage should be expanded as far as possible.[82] When *Trojan* was being decided (it was argued in August 1990 and the decision was delivered in October), the US negotiators, following the EU's request of June,[83] proposed that the US federal government would be seeking voluntary compliance with GPA94 from states with regard to public procurement managed by them, which was seen to be the first step to break the then impasse in the EU-US talks on the future GPA94 coverage.[84] Thus, *Trojan*'s outcome just could not have no impact on the scope of voluntary offers subsequently submitted by states, as, for example Osei, even many years after *Trojan*, pessimistically assessed that that decision had negatively affected subsequent multilateral negotiations and it 'shut down the door' for the wider liberalization of state and local governments.[85] Still, some portion of US sub-central public procurement was subjected to the GPA94 regime, based on the voluntary proposal made by 39 states which had been consulted by the federal government during the WTO Uruguay Round.[86]

In all probability, the decision in *Trojan* was motivated not only by domestic considerations but also by international trade issues, which implies that national courts can be yet another player involved in the process of the liberalization of sub-central public procurement markets, keeping negotiators of third countries even more on their toes. One could only speculate what the court's hidden reasoning was in *Trojan*. Let's suppose that the court believed that confirming wide public procurement-related sub-central autonomy would send a clear message to third countries that (*i*) they should not press the federal government to open sub-central public procurement markets because the federal government had no power to regulate access to these markets, and (*ii*) public procurers subjected to the states in practice just would not conform to such commitments. If that was the case, the outcome was counter-productive. For instance Southwick, in 1992, claimed that *Trojan* could actually

[81] See: *Trojan*, para 17, 20; see also: note 67, Osei at 728.

[82] See: Gerard de Graaf and Matthew King. 'Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round' (1005) 29(2) Intl L 435 at 441.

[83] See: note 67, Southwick at 63.

[84] See: ibid. footnote 22 at 63.

[85] See: note 67, Osei at 728.

[86] See: note 82 at 449. See also: Jennifer Loeb-Cederwall. 'Restrictions on Trade with Burma: Bold Moves or Foolish Acts' (1997-1998) 32(3) New Eng L Rev 929 at 959; note 67, Southwick at 61-63.

force the federal government to bind states with international commitments even without their consent because that decision actually discouraged quick voluntary compliance.[87] If so, *Trojan* might have actually encouraged better voluntary offers from States with regard to their coverage under GPA which were made by the states in the fear of losing all the appearances of their public procurement-related regulatory autonomy in favour of the federal government. Regardless of what the court's hidden rationale and the decision's actual outcome were, clearly the uncertainty of the outcome of *Trojan* halted coverage-related international negotiations conducted by the federal government.

7.3.2. Cross-border actions

Cross-border horizontal policies stemming from the sub-central regulatory autonomy accompanied with the right to directly discriminate can mostly be seen in trade sanctions passed by sub-central governments against third countries. In the US, the pursuit of non-contentious cross-border horizontal policies were seen already during the 1980s in the apartheid context when almost all US States[88] and over 160 local municipalities[89] introduced sanctions against business operations in South Africa, which mostly consisted in disinvestment policies,[90] which fell within the concept of general extra-territorial measures of governments (see in section 6.2.1.d), and only some local acts also covered selective purchasing practices.[91]

Then, *Trojan* was decided in 1990, affirming the public procurement-related market participant exception to the commerce clause, and the sequence of events might suggest that its outcome encouraged state and local governments to pass much more controversial, [92] public procurement-specific sanctions against business involved in a number of third countries, and to meddle with intergovernmental matters, misconceiving the sense of their public procurement-related regulatory autonomy especially in the light of new commitments

[87] See: note 67, Southwick at 59. Moreover, according to Southwick, the US Congress chose not to firmly pre-empt states and chose to seek voluntary compliance for purely political reasons. The federal government just wanted to keep up appearances of states' autonomy in matters so tightly linked to state's operations as procurement of supplies (see: ibid. at 66).

[88] See: Kevin P. Lewis. 'Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation' (1986-1987) 61(3) Tul L Rev 469 at 471.

[89] See: Kenneth A. Rodman. 'Think Globally, Punish Locally?: Nonstate Actors, Multinational Corporations, and Human Rights Sanctions' (1998) 12(1) Ethics & Intl Aff 19-41 at 27. See also: Robert Stumberg. 'Preemption & Human Rights: Local Options after *Crosby V. NFTC*' (2000-2001) 32(1) Law & Pol'y Intl Bus 109 at 115.

[90] As summarized by Lewis, the common feature of divestment sanctions was to force withdrawal of capital (mostly state/local pension funds) from investment firms/banks which (*i*) invested/managed assets in South Africa in excess of thresholds delineated by the local/state governments, or (*ii*) did not agree to conform to the so-called 'Sullivan principles' (two corporate codes of conduct, focused on the corporate social responsibility, proposed by the African-American preacher, Leon Sullivan). See: note 88 at 472.

[91] See note 89, Rodman at 27; note 89, Stumberg at 115.

[92] While the moral justification of those sanctions, and their legality measured against other sovereignty of particular states, can be discussed endlessly, the more pragmatic problems with sanctions against Burma lay in that the sanctions against business involved in Burma could not be as effective a sanction against business investing in South Africa because of the lesser reliance of the Burmese economy on foreign investment than in the case of South Africa. See: note 89 Stumberg at 190.

made by the federal government under the GPA94. While the discussed Burma Law[93] passed in the state of Massachusetts was the highest-profile local Burma-related action (see section 6.2.4.a), in the mid-1990s, over 20 local (below-state) governments also passed their own legislative measures targeting potential contractors/suppliers which had business operations in Burma at that time.[94] In addition, many local governments within the US were also discussing − as listed by Denning and McCall – sanctioning: Indonesia, China, Nigeria, Cuba and also Switzerland with various divestment[95] and/or selective purchasing measures.[96] For instance, at that time, the state of Virginia was considering passing selective purchasing practices targeting China while Berkeley, California had already passed such sanctions against Nigeria.[97] A high-profile case similar to the Burma Law emerged in Maryland where legislative works were conducted on the bill "*[e]Establishing sanctions against Nigeria; prohibiting the State Treasurer from using a financial institution as a depositary unless the institution certifies that it does not have any loans with a governmental unit or national corporation of Nigeria; prohibiting a State unit from buying supplies that are produced in Nigeria unless specified requirements are met; requiring a bidder or offer or to certify that it does not do business with Nigeria as a condition of specified procurement contracts; etc.*"[98] However, the federal Department of State actively opposed it, and the bill was rejected in the legislative process.[99]

Against this background, the Burma law was exceptional only in the sense that, unlike in the case of Maryland, the federal government had not prevented its entering into force. Instead,

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[93] See: Act Regulating State Contracts with Companies Doing Business with or in Burma of 1996 Mass. Acts 130 (codified at Mass. Gen. LawS Ann. ch. 7, §§ 22G-22M (1998). By way of reminder, the Burma Law specified that "*The secretary shall establish and maintain a restricted purchase list. The restricted purchase list shall contain the names of all persons currently doing business with Burma (Myanmar)*" (section 22J.a). The list was updated every three months (section 22J.c). The definition of doing business was very wide ranging from having franchises in Burma to providing brokerage services to the Burmese government (section 22G). See also: Mark B. Baker. 'Flying over the Judicial Hump: A Human Rights Drama Featuring Burma, The Commonwealth of Massachusetts, The WTO, and the Federal Courts' (2000-2001) 32 Law & Pol'y Intl Bus 51 at 92.

[94] These included: Alameda County, California, and the cities of Ann Arbor, Michigan; Berkeley, California; Boulder, Colorado; Brookline, Massachusetts; Carboro, North Carolina; Chapel Hill, North Carolina; Los Angeles, California; Madison, Wisconsin; New York, New York; Newton, Massachusetts; Oakland, California; Palo Alto, California; Philadelphia, Pennsylvania; Portland, Oregon; Quincy, Massachusetts; San Francisco, California; Santa Cruz, California; Santa Monica, California; Somerville, Massachusetts; Takoma Park, Maryland; and West Hollywood, California. See: note 89, Stumberg footnote 19 at 115. See also: note 93, Baker footnote 250 at 92.

[95] See: An Act Relating to Public Finance - State Investment Commission January 1997 House Bill 6721; note 96 at 314.

[96] See: Brannon P. Denning and Jack H. Jr McCall. 'The Constitutionality of State and Local Sanctions against Foreign Countries: Affairs State, States Affairs, or a Sorry State of Affairs' (1998-1999) 26(2) Hastings Const L Q 307at 308; Matthew Schaefer. 'The Grey Areas and Yellow Zones of Split Sovereignty Exposed by Globalization: Choosing among Strategies of Avoidance, Cooperation, and Intrusion to Escape an Era of Misguided New Federalism' (1998) 24 Can -US L J 35 at 64. See: also: John M. Kline. 'Continuing Controversies over State and Local Foreign Policy Sanctions in the United States' (1999) 29 (2, The State of American Federalism) Publius 111.

[97] See: ibid. Denning and McCall at 314.

[98] Divestment sanctions not related to public procurement (similar to non-public procurement measures adopted a decade earlier against South Africa) could be exemplified with the Rhode Island's bill under which *"As a direct result and as a consequence of the recent hostilities toward the Portuguese people (…) no assets subject to investment by or otherwise under the jurisdiction of the state investment commission shall be invested in any security representing an equity interest in or a debt or other obligation in East Timor, Indonesia".* See: State Finance and Procurement - Sanctions Against Nigeria Senate Bill 354 & House Bill 1273 1997.

[99] See: note 96, Denning and McCall at 314; Peter J. Spiro. 'Foreign Relations Federalism' (1999) 70(4) U Colo L Rev 1223, footnote 123 at 1250.

its constitutionality was challenged by the US Supreme Court decision in *Crosby* argued in March and decided in June 2000,[100] in which the US Supreme Court granted a certiorari from *Natsios*[101] affirming *Baker*.[102] Outlawing the Burma Law (and, alongside, all previous minor local sanctions and all future state sanctions) by federal courts was the last resort for the federal government wanting to prevent an unnecessary international commercial dispute, to which passing the Burma Law inevitably had been leading. Inconsistency of the Burma Law with the GPA94 had been claimed at the WTO forum a few times by Japan[103] and by the EU[104] in 1998, both protesting against secondary sanctions hitting their businesses.[105] Nonetheless, despite the obvious trade context of *Crosby*, similar to *Trojan*, appearances were still kept up, while scrutinizing the Burma Law, that the problem was mostly an internal issue, and the Burma Law was found unconstitutional on mostly domestic grounds.[106] The non-compliance of the Burma Law with the GPA was mentioned in all three rationales,[107] but the argument that the Burma Law covered matters clearly pre-empted by the federal legislation after the adoption of GPA94 (and after the voluntary compliance programme leading to the extension of the GPA's coverage to public procurers subjected to states) was not accepted by any of the courts.[108] In the most complex analysis of *Crosby* offered by Stumberg, the "*the allegations by the European Union and other nations that the state law did not comply with the WTO Agreement on Procurement*" were classified as a very a minor motive of the federal pre-emption, falling under the wider category of "*obstacles to the President's role in developing a multilateral strategy*."[109]

Instead of confronting the rights of states stemming from the market participant exception to the commerce clause and the obligations of the federal government to assure compliance

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[100] See: '*Crosby, Secretary of Administration and Finance of Massachusetts, et al. v. National Foreign Trade Council*' () (99-474) 530 U.S. 363 (2000) 181 F.3d 38.

[101] See: '*National Foreign Trade Council v. Natsios*' 181 F.3d 38, 52-77 (1" Cir. 1999).

[102] See: '*National Foreign Trade Council v. Baker*' 26 F. Supp. 2d 287 (D. Mass. 1998).

[103] See: WTO, Permanent Mission of Japan to the WTO, 'United States - Measure Affecting Government Procurement. Request for Consultations by Japan to the Permanent Mission of the United States and to the Dispute Settlement Body' (21 July 1997) WT/DS95/1 GPA/D3/1; WTO, Permanent Mission of Japan to the WTO, 'United States - Measure Affecting Government Procurement. Request to Join Consultations to the Permanent Mission of the United States and to the Dispute Settlement Body' (30 July 1997) WT/DS95/2 ; WTO, Permanent Mission of Japan to the WTO, 'United States - Measure Affecting Government Procurement Request for the Establishment of a Panel by Japan' (9 September 1998) WT/DS95/3.

[104] See: WTO, Permanent Delegation of the European Commission to the WTO, 'Measures Affecting Government Procurement Request for Consultations by the European Communities to the Permanent Mission of the United States and to the Dispute Settlement Body' (26 June 1997) WT/DS88/1 GPA/D2/1; WTO, Permanent Delegation of the European Commission to the WTO, 'United States - Measure Affecting Government Procurement. Request for Establishment of a Panel by the European Communities to the Chairman of the Dispute Settlement Body' (9 September 1998) WT/DS88/3.

[105] The difference between primary and secondary sanctions was explained in section 3.1. The EU claimed violation of articles III, VIII.b, III.4.b, and XXII.2 of the GPA, and Japan claimed violation of article XIII:4(b) of the GPA (see: ibid. WT/DS88/3).

[106] On the analysis of *Crosby* see generally: note 89 Stumberg; Brannon P. Michael Hahn. 'Sub-national "Sanctions" and the Federal Model' (2000-2001) 32(1) Law & Pol'y Intl Bus 197; note 96 Denning and McCall; Ako Miyaki-Murphy. 'In the Wake of Crosby v. National Foreign Trade Council: The Impact upon Selective Purchasing Legislation throughout the United States;' (2000-2001) 34(3) J Marshall L Rev 827.

[107] See: *Baker*, part B.2; *Natsios*, paras. 50, 53; *Crosby*, Section C.

[108] See: note 89, Stumberg at 124-125.

[109] Stumberg categorized motives for federal pre-emption in the case of the Burma Law as being an *(i)* obstacle to presidential discretion, (ii) obstacle to limited nature of federal sanctions, and *(iii)* obstacle to presidential role in developing a multilateral strategy. See: ibid. at 128.

with international compliance,[110] the rationales of *Natsios*[111] and *Crosby*[112] were primarily focused on whether the Burma Law was compatible with federal sanctions against Burma ('Federal Burma Law')[113] adopted three months after the Burma Law had been passed in Massachusetts,[114] which was, indeed, a bird of another feather. Along with some other more symbolic sanctions,[115] the federal Burma Law empowered the president to pass an executive order (which was soon passed[116]) which would just ban and penalize 'new investments' in Burma,[117] and did not directly debar businesses having 'new investment' in Burma from federal public procurement in contrast to the Burma Law, the very essence of which was the debarment from local procurement for 'doing business with Burma' (see section 6.3.2).[118] It also defined 'new investment' very narrowly,[119] for instance excluding *"the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology*"[120] in contrast to the Burma Law very widely defining it as 'doing business with Burma.'[121] On top of that, the Federal Burma Law was confined to primary sanctions as it covered 'United States persons'[122] only while the Burma Law had no such limitations, also

[110] But see: note 89, Stumberg, footnote 82 at 125.

[111] See: *Natsios*, paras. 17-24.

[112] See: *Crosby*, Section I.

[113] See: Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 Pub. L.104-208, §570, 110 Stat. 3009-166 (1997).

[114] See: *Crosby*, Section I at 3.

[115] The Federal Burma Law imposed three types of direct sanctions, including (*i*) stopping transferring aid to Burma except for humanitarian aid, promoting democracy and human rights, and inti-narcotics policy (Section 570.a.1), (*ii*) instructing the US' representative in international organizations to vote against granting assistance such as loans for Burma (Section 570.a.2), and banning issuing entry visas to the US to Burmese officials (Section 570.a.3).

[116] See: Burma Executive Order 20 May, 1997 No. 13047, 3 CFR 202. It introduced the actual ban on new investment, and – for the purposes of the Federal Burma Law, Section 570.b – it declared that the Government of Burma had "*committed large-scale repression of the democratic opposition in Burma*" and that such policies and actions taken by the Burmese authorities were "*an unusual and extraordinary threat to the national security and foreign policy of the United States*."

[117] "*CONDITIONAL SANCTIONS.—The President is hereby authorized to prohibit, and shall prohibit United States persons from new investment in Burma, if the President determines and certifies to Congress that, after the date of enactment of this Act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large scale repression of or violence against the Democratic opposition.*" See: The Federal Burma Law, Section 570.b.

[118] Potential suppliers/contractors, anyway, would likely be debarred from federal procurement under FAR Section 9.406-2 'Causes for debarment.' See: Federal Acquisition Regulation 2006 48 C.F.R.pts. 1-53 Subpart 9.4 'Debarment, Suspension, and Ineligibility.'

[119] "*"The term ''new investment'' shall mean any of the following activities if such an activity is undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Burma or a nongovernmental entity in Burma, on or after the date of the certification under subsection (b): (A) the entry into a contract that includes the economical development of resources located in Burma, or the entry into a contract providing for the general supervision and guarantee of another person's performance of such a contract; (B) the purchase of a share of ownership, including an equity interest, in that development; (C) the entry into a contract providing for the participation in royalties, earnings, or profits in that development, without regard to the form of the participation: Provided, That the term ''new investment'' does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology.*" See: The Federal Burma Law, Section 570.f.c. See also: note 89, Stumberg at 121.

[120] See: note ibid. *in fine.*

[121] "*"Doing business with Burma (Myanmar)", (a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person; (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement; (c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar); (d) providing any goods or services to the government of Burma (Myanmar).*" See: Burma Law, Section 22G (applicable to Sections 22H to 22M).

[122] Executive Order 13047, section 1. *in fine* (see note 112). The 'United States person' was further defined as "*United States citizen, permanent resident alien, juridical person organized under the laws of the 28302 Federal Register / Vol. 62, No. 99 /*

applying to businesses originating from outside the US, like from the EU and Japan. The US Supreme Court eventually invalidated Burma Law-based argument that it "*undermines the intended purpose and "natural effect" of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.*"[123] The rationale for quashing the Burma Law was off-the-wall and based on purely internal reasons like the pre-emption by the loosely related Federal Burma Law[124] but it did resolve the conflict with the EU and Japan. The dispute pending before the DSB was first suspended[125] and finally dismissed[126] because the outcome of *Crosby*, irrespective of its rationale, made that dispute aimless.

While the background of *Crosby* illustrates that the constitutionally guaranteed right of sub-central governments to discriminate against non-locals also encourages them to take politically sensitive cross-border actions selectively targeting third countries, the focus in *Crosby* on the consistency of such actions with federal sanctions rather than with international trade obligations illustrates the battle between central and sub-central governments about who has the right to use the purchasing power as a tool of international politics. The comparison with *Trojan* also shows that, in the case of conflicting public procurement-related sub-central autonomy and external powers of central governments (trade, foreign policy, etc.), central governments are more likely to concede to public procurement-related traditional local protectionist measures rather than to strictly political external actions, like trade sanctions linked by sub-central governments to the purchasing power of local public procurements. When such sub-central cross-border horizontal policies go beyond central foreign policy, constitutional courts have to step in first to resolve internal tensions and deal with matters of the international compliance in the background only.[127] Third countries adversely affected by such sub-central cross-border horizontal policies and

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Thursday, May 22, 1997 / Presidential Documents United States (including foreign branches), or any person in the United State" (see: ibid. section 4.c).

[123] See: *Crosby*, Section III at 9.

[124] One could ask why, if the courts wanted to 'have' the Burma Law pre-empted by national legislation rather by GPA94, they just could not refer to the act of ratification of GPA94 by the US instead of referring to some other very loosely related national legislation?

[125] "*In the context of the US court ruling barring implementation of the measure at issue, the European Communities and Japan have requested the Panel to suspend its work in accordance with Article 12.12 of the DSU. The panel has agreed to this request.*" See: WTO, Chairman of the Panel of WTO Dispute Settlement Body, 'United States - Measure Affecting Government Procurement. Communication from the Chairman of the Panel to the Chairman of the Dispute Settlement Body' (12 February 1999) WT/DS88/5 WT/DS95/5.

[126] See: WTO Secretariat, 'United States - Measure Affecting Government Procurement. Lapse of Authority for Establishment of the Panel Note by the Secretariat' (14 February 2000) WT/DS88/6 WT/DS95/6.

[127] Especially in the case when international public procurement-related obligations are well defined like in *Crosby* in contrast to Trojan where international negotiations were under way and the court, while deciding the scope of the sub-central regulatory autonomy, influenced the scope of the international liberalization of the US' sub-central public procurement markets. See: section 7.3.1 *in fine.*

hoping to reach an amicable settlement can only patiently watch these developments from the side-lines, which was the case in the EU's and Japan's claims against the US under the GPA where the panel was established in January 1999 but it was dormant awaiting the outcome of *Crosby* decided in June 2000. [128]

The wider background of both *Crosby* and *Trojan* proves that the uncertain scope of the public procurement-related sub-central regulatory autonomy is a greater hindrance to international liberalization than the sub-central regulatory autonomy itself. Differences of opinion as to the allowed scope of the pursuit of sub-central horizontal policies might halt international negotiations like in *Trojan* or undermine international commitments already made by central governments like in *Crosby*. In contrast, a clear separation of powers is, to some extent, a guarantee that the sub-central authorities would not come up some unexpected non-commercial considerations. However, the sequence of *Trojan* and *Crosby*, and their slightly different outcomes, also confirms that even federations with well-defined separation of powers always have some loopholes which emerge particularly when new public procurement-related international commitments suddenly encroach on territories previously reserved for sub-central governments. Clarifying the public procurement-specific allocation of powers is perfectly possible but the question remains if 'clarifying' always has to mean reallocating powers to central governments and depriving sub-central governments of their right to open or close local public procurement markets. The negative answer implies having to consider some forms of direct involvement in international trade negotiations by sub-central governments (see section 7.4).

7.4 Autonomy to negotiate

The third dimension of the public procurement-related autonomy of sub-central governments goes even further than the autonomy to freely and overtly discriminate against non-locals and lies in that sub-central governments might be directly involved in intergovernmental trade negotiations almost as if they were sovereign states. This wide scope of autonomy would embrace all regulatory matters being tools of indirect discrimination, all tools of direct discrimination, plus all external trade competences taken from central governments. In this scenario, central governments could not question, for instance, process-related technical requirements imposed by sub-central public procurers or secondary sanctions imposed by sub-central governments, [129] meaning that sub-central governments would be in full control

[128] See: Chairman of the WTO Dispute Settlement Body, 'United States - Measure Affecting Government Procurement. Constitution of the Panel Established at the Request of the European Communities and Japan' (11 January 1999) WT/DS88/4 WT/DS95/4.

[129] That wide scope of autonomy and standing in international negotiations would imply that sub-central governments would also take responsibility for their actions and have standing in disputes relating to the violation of international public procurement-related commitments which they have done individually. Split of responsibility of central and sub-central governments could be possible for example under the GPA as retaliatory measures imposed by one party adversely affected by

of the pursuit of local cross-border policies.[130] An official autonomy to negotiate is a very hypothetical scenario but it rarely happens that sub-central governments informally participate in international negotiations significantly affecting their outcomes. While no known cases of such participation have surfaced in the context of the pursuit of cross-border horizontal policies so far, some cases have shown how successfully sub-central governments can bring more liberalization by individually trading whilst keeping or waiving their traditional industrial policies toward third countries, hinting that this could also potentially be a solution for curbing cross-border horizontal policies.

7.4.1. Unofficial standing

Similarly to the autonomy to merely discriminate, the sub-central 'unofficial' autonomy to negotiate can originate from the historical arrangements made prior to the development of international instruments liberalizing public procurement markets. Unlike in the US, in some other countries, the gradual clarification of the separation of the public procurement-specific powers between central and sub-central authorities does not necessarily have to mean shifting all powers to central governments. Instead of justifying the upward shift of powers with a need to facilitate intergovernmental negotiations conducted by central governments, some portion of negotiating powers can remain with or be passed down to sub-sub-central level.

For instance, in the case of Canada, provinces and territories have always been heavily consulted by the central government with regard to international commitments on opening provincial public procurement markets.[131] That strong provincial regulatory autonomy originating from inter-provincial trade in Canada has been governed almost like trade between sovereign states. Section 121 of the Canadian Constitution[132] is the foundation of

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the violations of the GPA by the other party should anyway be confined to public procurement markets and not extend over other fields of commerce (see GPA12 article VII.14 'Balance of rights and obligation'). Thus, hypothetically, an adversely affected third country (or region of a third country) could restrict market access for persons/goods/services originating from the violating region, without interfering with general commerce regulated by central governments on both sides.

[130] Subject, however, to cross-border horizontal policies stemming from non-public procurement-specific legislation reserved for central governments affecting public procurement markets such as process-related technical standards in general commerce and trade sanctions in general commerce. In the hypothetical scenario of autonomy to negotiate, a central government could impose general-commerce sanctions similar to the Federal Burma Law but, unlike in *Crosby*, could not challenge public procurement-specific sanctions imposed by sub-central governments. See also: note 129.

[131] See: David Collins, 'Canada's Sub-central Government Entities and the Agreement on Government Procurement: Past and Present' in Robert D. Anderson and Sue Arrowsmith (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 175 at 182-183.

[132] See: The Constitution Acts 1867 to 1982 Consolidated as of 1 January 2013 ["*This consolidation contains the text of the Constitution Act, 1867 (formerly the British North America Act, 1867), together with amendments made to it since its enactment, and the text of the Constitution Act, 1982, as amended since its enactment. The Constitution Act, 1982 contains the Canadian Charter of Rights and Freedoms and other provisions, including the procedure for amending the Constitution of Canada. The Constitution Act, 1982 also contains a schedule of repeals of certain constitutional enactments and provides for the renaming of others. The British North America Act, 1949, for example, is renamed as the Newfoundland Act. The new names of these enactments are used in this consolidation, but their former names may be found in the schedule. The Constitution Act, 1982 was enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.). It is set out in this consolidation as a separate Act after the Constitution Act, 1867*"] ('Canadian Constitution').

the so-called 'Canada's Economic Union'[133] and represents a very 19th-century-ish approach to trade,[134] by (*i*) merely prohibiting imposing tariffs on goods in inter-provincial trade,[135] and (*ii*) leaving behind all NTBs such as free flow of labour, capital and services,[136] or public procurement. Provinces and territories from time to time renegotiate the shape of Canada's Economic Union by entering into interprovincial agreements like the Agreement on Internal Trade of 1994 ('AIT')[137] or the New West Partnerships of 2010,[138] which also regulate interprovincial liberalization of public procurement markets.

Public procurement-related obligations under Chapter Five of the AIT or article 14 of the New Western Partnership,[139]do not significantly differ from requirements imposed under the GPA.[140] The purpose of Chapter 5 of the AIT is to "*to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency*".[141] The AIT applies to procurement worth at least CA$25,000 in the case of goods, CA$100,000 in the case of services and construction but only to positively listed categories of goods, services, and construction works, and only to entities positively listed in the annexes to Chapter 5.[142] Apart from coverage, Chapter 5 of the AIT covers matters such as (*i*) the principle of reciprocal non-discrimination,[143] (*ii*) valuation of public contracts,[144]

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[133] The notion of Canada's Economic Union is an informal concept gathering legal/economic/factual arrangements such as (*i*) section 121 of the Canadian constitution of 1867 prohibiting internal barriers to trade in goods (see section 132 below), (*ii*) a single monetary authority and a single currency in place, (*iii*) nation-wide laws unifying areas such as safety of consumer products, banking, intellectual property, imports, competition, etc., (*iv*) standardization, (*v*) nation-wide income-support/benefit programmes which facilitate inter-provincial mobility of labour force, (*v*) a collection of provisions between provinces and the federal government pertaining to economic issues such as taxation/collection of taxes or regulating securities.

[134] See: Sujit Choudhry. 'Strengthening The Economic Union: the Chapter and the Agreement on Internal Trade' (2001-2003) 12(2) Const F 52 at 52.

[135] "*All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.*" See: Canadian Constitution, Section 12.

[136] See: note 134, ibid. See also: Business Council on National Issues, 'Canada's Economic Union. The Advantages. Questions and Answers. The cost of fragmentation.' (April 1992) at 2.

[137] See: Agreement on Internal Trade 1994 (entered into force on 1 July 1995, as amended). All provinces/territories are the AIT's signatories except for Nunavut which is an observer to the AIT.

[138] British Columbia, Alberta and Saskatchewan are bound by the so-called New Western Partnership which covers (*i*) the New West Trade Partnership Agreement 2010 (signed 30 April 2010, which came into effect on 1 July 2010 and has been fully implemented since 1 July 2013) ('NWTPA'), (*ii*) the New West Partnership Innovation Agreement 2010 (signed 30 April 2010, entering into force on 1 July 2010), (*iii*) New West Procurement Agreement 2010 (signed on 30 April 2010, entering into force on 1 July 2010), and (*iv*) New West Partnership Innovation Agreement 2010 (signed 30 April 2010, entering into force on 1 July 2010). The Western Partnership Arrangements extended the previous The Trade, Investment and Labour Mobility Agreement 2006 (signed 28 April 2006, entering into force on 1 April 2007) ('TILMA') binding upon Alberta and British Columbia. Other such agreements include, for instance the Trade and Cooperation Agreement 2009 (signed 11 September 2009, entering into force on 1 October 2009) between Ontario and Quebec. See also: Robin Hansen and Heather Heavin. 'What's "New" in the New West Partnership Trade Agreement? The NWPTA and the Agreement on Internal Trade Compared' (2010) 73(2) Sask L Rev 197 at 199-200.

[139] See: note 138. The difference between Chapter V of the AIT and the New West Procurement Agreement lies in that (*i*) its subjective coverage is extended to all public bodies and SIEs compared with the AIT covering such entities only if positively listed, (*ii*) its objective coverage is wider as it is determined by negative lists in contrast to the AIT whose objective coverage is determined by positive lists, and (*iii*) its thresholds are lower than the thresholds under the AIT. See: Craig Logie and Denis Chamberland. 'The New West Trade Partnership Agreement How the trade agreements define everyday procurement' (September/October 2011) 14(3) Summit (Canada's magazine on public sector purchasing) 18 at 18.

[140] See: note 131 at 183, 188.

[141] See: ibid. Article 501.

[142] See: ibid. article 502.

[143] See: ibid. Article 504.

and (*iii*) procedural provisions.[145] On top of that, provinces agree to internal liberalization but at the same time reserve their right to pursue various horizontal policies with measures such as (*i*) price preference for Canadian content[146] (*ii*) non-application of the rules provided for in Chapter 5 of the AIT if that is necessary for regional and economic development purposes,[147] and (*iii*) specific pre-existing horizontal programmes like the Industrial and Regional Benefits Policy of the Federal government,[148] Business Incentive Policy of Northwest Territories,[149] Business Incentive Policies and Community Contracting Policy of Yukon.[150]

As far as international liberalization is concerned, the provincial regulatory autonomy was not any weaker because, at least from the perspective of internal laws, Canada's federal government could not force provinces to comply even with binding international public procurement commitments[151] in contrast to the US where the federal government could discretionarily subject states to the GPA or similar commitments but has preferred to seek voluntary compliance (see section 7.3.1). Thanks to the strong autonomy and long-standing obstinacy in preserving reciprocity, provincial governments managed to trade the access to their public procurement in return for waiving local public procurement-related protectionist policies by the US. Namely, for many years, the Canadian provincial governments refused to accept significant commitments with regard to the liberalization of their local public procurements markets, like under the 'NAFTA'[152] or under the GPA94.[153] They claimed that any concession pertaining to Canadian sub-central entities offered to third countries would not give Canadian business reasonable reciprocal access to sub-central procurement in foreign markets mostly because of various long-standing buy American[154] policies of the US which obviously is the largest trading partner of Canada and potentially offers the most appealing public procurement-related opportunities for Canadian business.[155]

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[144] See: ibid. Article 505.

[145] See: ibid. Article 506.

[146] See: ibid. Article 504.4.a, Annex 502.3 C.8, Annex 502.4 J.1.

[147] See: ibid. Article 508.1.

[148] See: ibid. Annex 508.3.

[149] See: ibid.

[150] See: ibid.

[151] Canada's federal government has exclusive power to negotiate and to enter into international agreements (see: Canadian Constitution article 91 section 2). However, provincial legislature has the right to regulate (*i*) "*Local Works and Undertakings*" (see: Canadian Constitution article 92 section 10), (*ii*) "*Property and Civil Rights in the Province*" (see: ibid. article 92 section 13), and (*iii*) "*Matters of a merely local or private Nature in the Province*" (see: ibid. article 92 section 16). International treaties concluded by the federal government affecting these areas are not binding upon provinces without implementation by provincial legislature (see: note 131 at 182). See also: note 134 at 52-53).

[152] See: North American Free Trade Agreement(signed 17 December 1992, in force 1 January 1994) 32 I.L.M. 289 (1993) (chs. 1-9), 32 I.L.M. 605 (1993) (chs. 10-22), Chapter 10.

[153] See: note 39 at 939-940.

[154] See: Buy American Act 3 March 1933 41 U.S.C. §§ 10a–10).

[155] See: note 39 at 939-940.

Yet in 2001, the Canadian representative to the WTO Committee on Government Procurement claimed that *"[t]The discriminatory and restrictive nature of Small Business Set-Asides and Buy American stem from US procurement policies at the national level. They are applied by States and municipalities in their procurement when federal funding is provided, particularly in the transportation and highways sectors. Therefore, US federal government policies must be addressed to assure market access and non-discriminatory treatment for suppliers to US State and municipal governments*." [156] US-Canada disagreement on the mutual access to sub-central procurement and on the preference for small domestic business in those markets even escalated after the US Congress passed the ARRA in 2009[157] virtually eliminating Canadian business from competing for American sub-central procurement. [158] The risk of public procurement-related trade conflict [159] was eventually restrained by the US-Canada Government Procurement Agreement of 2010, under which Canadian business received temporary exemptions from local *buy American* policies,[160] and both parties committed to mutually improve market access (to sub-central procurement), and to accordingly amend their Annexe 2 to appendix 1 of the GPA. [161] According to Attwater, the key to reaching that agreement was convincing Canadian provincial governments that the opportunities generated for Canadian business in the US with the post-2008 stimulus packages were worth making mutual concessions between the countries.[162] It follows that extremely wide autonomy helped.[163]

7.4.2. Official standing scenario

Seeing that the indirect involvement of Canadian provinces in negotiations with the US was successful, why not consider firmly authorizing sub-central governments to directly and individually negotiate market access and the allowed scope of the incorporation of non-commercial considerations, as the driver of faster liberalization and for mutually waiving horizontal policies between sub-central governments? Such solution might, for instance,

[156] See: WTO Committee on Government Procurement, 'Review of National Implementing Legislation. Canada' (18 June 2001) GPA/51 at 4.

[157] See: American Recovery and Reinvestment Act 19 February 2009 Pub. L. No. 111-5, 123 Stat. 115, 516 (111th Congress). It, among others stipulates that "*[n]None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States*" (ARRA, Section 1605) and that "*[e]Except as otherwise provided (...), funds appropriated or otherwise available to the Department of Homeland Security may not be used for the procurement (…) if the item is not grown, reprocessed, reused, or produced in the United States*" (ARRA, Section 604).

[158] See: note 39 at 945.

[159] The ARRA caused an outcry by Canadian organizations such as the Federation of Canadian Municipalities which, at that time, was actively promoting retaliatory discriminating against American business competing for sub-central procurement in Canada. See: Philip G. Turi 'Begging The Neighbour: Understanding Canada's Limited Options in Resolving 'Buy America" (2010) 35(1) Can-US L J 237.

[160] See: Agreement Between the Government of the United States of America and the Government of Canada on Government Procurement (Signed 12 February 2010, in force 16 February 2010) 2010 TIAS No. 10,216.

[161] See: ibid. article 1. See also note 153 at 945-946.

[162] See: note 39 at 947.

[163] One could speculate that, without such strong sub-central public procurement-related regulatory autonomy in place, the Canadian federal government could, perhaps, turn a blind eye to US local protectionist policies and trade access to its provincial procurement markets with some other trade concessions as part of a larger negotiation package.

address the need for deeper liberalization between neighbouring regions of different countries or resolve tensions between central governments and sub-central governments particularly dissatisfied with a given country's common external trade policy, which for example was the case for many years with Canada and Quebec.[164] In the Canadian context, such solution was suggested by Collins, claiming that Canadian provinces cold have a sufficient 'infrastructure' and expertise, such as by having to negotiate the AIT, and could be independent players on the international plane.[165] Along similar lines, in the US context, Cooper generally commended the idea of seeking voluntary compliance by states with international public procurement-related commitments (see section 7.3.1) as better placing of the decision-making process[166] and also observed that it would be more efficient if states could individually reach reciprocal concessions with third countries.[167]

7.4.2.a Potential applicability

Canada might so far be unique with its exceptionally wide public procurement-related regulatory autonomy potentially facilitating individual negotiations by sub-central governments but granting autonomy to negotiate could also be hypothetically considered for a number of federal or just huge countries which, as at 2015, were still not subjected to significant international commitment on public procurement. Namely, one could reasonably predict that if countries like India,[168] Russia,[169] Brazil,[170] Indonesia[171] or Nigeria[172] make steps toward accession to the GPA, the tensions between their central and sub-central governments as to market access for third countries will be unavoidable,[173] likely leading to an intensified pursuit of local indirectly discriminatory horizontal policies aiming at counteracting the effects of the international commitments made by central governments.

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[164] See: note 131 at 189.

[165] See: ibid. at 187, 188.

[166] According to Cooper, the decision of local governors and/or state legislature to subject local public procurement markets to international commitments must be always based on strong local belief that such decision would benefit the local community in contrast to decisions made in federal congress which are detached from local conditions. See: Kenneth J. Cooper. 'To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level' (Winter 1993) 2(1) Minn J Global Trade 143-170 at 168-169.

[167] See: ibid.

[168] India has been the observer to the GPA since 10 February 2010. On India's procurement system, see generally: S. Chakravarthy and Kamala Dawar, 'India's Possible Accession to the Agreement on Government Procurement: What Are the Pros and Cons?' in Robert D. Anderson and Sue Arrowsmith (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 117.

[169] Russian Federation has been the observer to the GPA since 29 May 2013.

[170] As at October 2013 Brazil, had no observer status under the GPA. However, it is subjected to public procurement-related liberalization commitments within the Framework of Mercosur. See: Treaty establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (signed 26 March 1991, in force 29 November) 2140 UNTS 37341, Protocol on Public Procurement (*Protocolo de Contrataciones Públicas del Mercosur*) (15 December 2003) MERCOSUR/CMC/DEC. N 40/03.

[171] Indonesia has been the observer to the GPA since 31 October 2012.

[172] As at October 2013 Nigeria had no observer status under the GPA. On Nigeria's procurement system, see generally: Abiodun J. Osuntogun. 'Procurement law in Nigeria: challenges in attaining its objectives' (2012) (4) Pub Proc L Rev 139-152.

[173] In the case of huge countries, an effortless liberalization of local public procurement markets has so far happened only in Japan which - despite having very decentralized, uncoordinated and protectionist local procurement markets before the WTO Uruguay Round - was in a capacity to quickly assure GPA-compliance by sub-central procurers. See: Jean Heilman Grier. 'Japan's Implementation of the WTO Agreement on Government Procurement' (1996) 17(2) U Pa J Intl Econ L 605 at 623-624.

Such tensions could be all the more serious if at the initial stage of liberalization, central governments first shift the procurement backlog along with actual purchasing power to sub-central level - which is beyond the scope of initial international commitments likely covering mostly central agencies which can already be seen in the case of (*i*) China in the context of delinking indigenous innovation policies from public procurement[174] and (*ii*) the US in the context of channelling federal public funds to local agencies under the ARRA.[175]

7.4.2.b Feasibility

The possibility of engaging the sub-central governments in direct talks instead of forcing them to comply with commitments made at central level should never be ruled out given that better solutions to mitigate tensions between central and sub-central governments do not seem to be within arm's reach. However, depending on the country, this solution could be more a hindrance to than a driver for liberalization. Foremost, one should not presume that sub-central governments in emerging economies (*i*) would be as pragmatic in giving up their traditional protectionist policies as were Canadian provinces before agreeing the US-Canada Government Procurement Agreement of 2010 or the US states while determining the future coverage of the GPA94, and (*ii*) would not unexpectedly come up with exceptionally contentious local cross-border horizontal policies similar to the Burma Law or to Order-618.

The greatest concern about the feasibility of the sub-central autonomy to negotiate pertains to the ability to differentiate between goods and services originating from different regions of the same country. Namely, according to Cooper, without a two-fold system of rules of origin in country *x*, third country *y* could only offer better coverage toward all regions of country *x*, leaving very little incentive for any individual region of country *x* to individually liberalize its public procurement markets in exchange for general concessions offered by country *y*.[176] In turn Collins generally agreed that, it would be too much of a burden for public procurers of a third country *y* to apply a two-fold system of rules of origin differentiating between goods and services originating from different regions of country *x*.[177] But he also criticized Cooper for not noticing that (*i*) differentiating between regions of country *x* could easily be done based on subjective criteria (origin suppliers/contractors), rather than objective criteria (origin of goods/services), such as place of entrepreneurs' registration, and (*ii*) potential suppliers/contractors eager to sell to country *y* would be prone to reincorporate in regions of country *x* having public procurement market agreements with country *y*, which would be

[174] See: note 37, ibid.
[175] See: note 39, ibid.
[176] See: note 166 at 168169.
[177] See: note 131 at 188-189.

another incentive for regions in country *x* to seek wider reciprocal concessions with third countries.[178]

Figure 39. Two-fold systems of rules of origin.

negotiations between a sovereign state and a sub-central government	*versus*	*negotiations between a sub-central government and a sub-central government*

negotiating with:	sovereign state	sub-central government
sovereign state	one-fold rules of origin on both sides	two-fold rules of origin on one side
sub-central government	two-fold rules of origin on one side	two-fold rules of origin on two sides

The truth seems to lie in between, and the feasibility of the sub-central autonomy to negotiate should be assessed case by case. Foremost, the complexity of the problem lies in that in the case of two countries (*x*, *y*) negotiating public procurement-related concessions, only one (*x* or *y*) or both countries (*x* and *y*) might want to have their persons/goods/services differentiated by third countries (*x* by *y* and/or *y* by *x*) depending on from which region the persons/goods/services originate (see Figure 39), meaning that negotiations can be held between (*i*) central governments only, where no sub-central autonomy is involved and no two-fold rules of origin are necessary, (*ii*) central government on the one side and sub-central government on the other meaning that a two-fold system of rules of origin is necessary on one side, and (*iii*) sub-central governments only, where two-fold systems of rules of origin are necessary on both sides.

Next, the actual feasibility or non-feasibility of the sub-central autonomy to negotiate would much depend on the pre-existing internal features of involved countries and, generally speaking, the more pre-existing protectionism in local public procurement markets against non-local nationals the more feasible the autonomy to negotiate with third countries or with regions in third countries. From the perspective of country *x* wanting to have their persons/goods/services differentiated by third country *y*, the pre-existing inter-regional protectionism would imply that some form of regional rules of origin are already at the ready and could be recognized by country *y* or regions of country *y* (see Figure 39). In turn, from the perspective of country *y* wanting to allow its regions to individually differentiate between persons/goods/services of third countries x_1, x_2, x_3, etc. or regions of such countries, the pre-existing interregional public procurement-specific protectionism between regions of country *y* would imply that (*i*) public procurers subjected to sub-central governments of country *y* have the infrastructure and know-how necessary to treat differently goods/services which are already freely circulating in country *y*, and (*ii*) different treatment of such freely circulating

[178] See: ibid.

goods/services would not constitute an additional internal NTB to the internal market of country *y*.

This can best be exemplified by a similar real-life case when the then EC had been gradually forcing Member States to remove protectionist practices in public procurement markets against nationals of other Member States but, since the WTO Tokyo Round, has also allowed Member States to differentiate among nationals of various third countries (subject to liberalizing commitments made at the level of the then EC) as a part of its negotiations strategy and a means of improving its leverage in negotiations (see further next section 7.4.2.c). Namely, the EC's Commission in its capacity to negotiate and to enter into international trade agreements was then for the first time negotiating commitments on public procurement on behalf of its Members States (GPA79) whereas Member States had been previously reaching reciprocal concessions benefiting their businesses in bilateral talks with third countries.[179] In order preserve these concessions, the EC's Council passed a resolution stipulating that: "*Member States may continue to apply, in accordance with the provisions of the Treaty, existing commercial policy measures in respect of public supply contracts concerning certain products and categories of products originating in non-member countries*,"[180] meaning that (*i*) the international commitments to the liberalization of public procurement procurements were meant to be made by the central institutions of the then EC, and (*ii*) closing or opening public procurement markets not covered by international commitments was meant to be decided at the level of Member States, differentiating between goods/services originating from specific third countries. In the long term, this solution ended in fiasco for many reasons (see further next section 7.4.2.c), one of which could also be missing the point that the Member States had been previously focused on reaching public procurement-related bilateral concessions among each other. Given that public procurement markets were then being widely opened to goods from the entire EC anyway, bothering public procurers with tracking goods originating from third countries among all goods freely circulating in the internal markets might have not been worth the candle. According to Bovis, this solution only created a kind of intra-community NTB.[181]

7.4.2.c Sub-central leverage

In addition to technical questions, the feasibility of the sub-central autonomy to negotiate public procurement-related commitments and the allowed scope of horizontal policies also

[179] See: Christopher Bovis, *EU public procurement law* (Elgar European law, Edward Elgar, Cheltenham 2007) 488 at 36.

[180] Council Resolution of 21 December 1976 concerning access to Community public supply contracts for products originating in non-member countries OJ [1977] C 11, p 1–2 last para of the preamble and point 1. This language was repeated in the Council Resolution of 22 July 1980 concerning access to Community public supply contracts for products originating in third countries OJ [1980] C 211, p 2.

[181] See: note 179, ibid.

depends on whether sub-central governments could have sufficient leverage in international negotiations in case the leverage of central governments was fragmented and lost as a result of allowing sub-central governments to negotiate individually. The argument of lost purchasing power is not public procurement-specific and it is frequently used in discussions about possible disintegration of economic unions having common external trade policies. For instance, in the context of the possible breakup of the Canada Economic Union in the early 1990s,[182] the Business Council on National Issues[183] warned that better leverage in international organizations such as in the GATT/WTO, the IMF or in the OECD, had always been seen as one of the major advantages of Canada's Economic Union.[184] More recently, similar arguments were used in reports assessing costs of, for instance, Scotland's quitting the UK,[185] or the UK's quitting the EU.[186] At first glance, this argument seems to be all the more applicable to public procurement markets because of the particular importance of leverage in these markets stemming from the discussed binary nature of barriers to trade in public procurement markets (access or no access).[187] Namely, if one accepts that keeping public procurement markets closed toward foreigners (until reciprocal liberalizing concessions are reached with such third countries) is often the only way to get access to foreign public procurement markets for domestic businesses (see section 1.5.2), then the strong leverage concentrated in the hands of central governments seems to be the crucial tool to encourage third countries to offer concessions faster.[188]

However, the concentration of leverage in the hands of central governments as the facilitator of liberalization might be illusory because (*i*) the actual participation of sub-central governments in closing markets to subsequently reach reciprocal concessions with third countries is crucial for enhancing the entire country's leverage in trade negotiations whereas the indifference of sub-central governments would undermine such leverage, and (*ii*) one should not expect cooperation by sub-central governments when strongly centralized external public procurement trade policies do not reflect the needs of particular regions having diversified trade profiles with third countries and diversified expectations as to market access for 'their' enterprises in particular third countries. Obviously, central governments might try to control the entire leverage by forcing sub-central governments to

[182] See: note 133.

[183] Currently 'Canadian Council of Chief Executives.'

[184] See: note 136 at 4, 13, 17-18.

[185] See: UK Government, 'Scotland analysis: Devolution and the implications of Scottish independence' The Stationery Office Limited on behalf of the Controller of Her Majesty's Stationery Office (February 2013) ID 2539810 02/13, point 2.13 at 34, point 2.16 2nd *tiret* at 35.

[186] See: Centre for European Reform, 'The economic consequences of leaving the EU The final report of the CER commission on the UK and the EU single market' (June 2014) CER June 2014 ISBN 978 1 907617 12 6, point 1.5 at 34.

[187] See: Sue Arrowsmith, *Government procurement in the WTO* (Kluwer Law International, The Hague 2003) xxiii, 481 at 19; section 1.5.2.

[188] See: See: Simon Evenett, 'Multilateral Disciplines and Government Procurement' in Bernard M. Hoekman, Aaditya Mattoo and Philip English (eds), *Development, trade, and the WTO: a handbook* (World Bank, Washington 2002) 417 at 422.

generally close the door to foreigners rather than by seeking their voluntary cooperation. However, it is virtually impossible to unconditionally close markets without leaving any exceptions which can be discretionally applied by particular public procurers (see generally Chapter 8), still allowing particular public procurers to award particular contracts to foreigners of countries who have not offered reciprocal market access, thereby still allowing frustration of the entire country's leverage.

The importance of the voluntary cooperation by sub-central governments was reflected, for example, in the rationale of the mentioned EC Council resolution related to the WTO Tokyo Round stipulating that "*the Community must aim at achieving a satisfactory degree of reciprocity during the negotiations in which it is participating within the GATT and the OECD and must, under the most favourable conditions, use all suitable means of ensuring that this objective is attained (…)*,"[189] whereby 'all suitable means' meant relying on the support of Member States. Nonetheless, such policy could only make some sense in the course of transition to a full common external public procurement-related trade policy in the first years of the implementation of GPA79, and in the case of 'smaller' unions gathering less than ten Member States,[190] where the common policy could still more or less reflect the needs of Member States. It completely fell apart later, especially following the enlargement of the EU from 25 Member States in 2004, after which the Member States in principle kept their public procurement markets entirely open for foreigners, eroding the leverage of the entire EU (see further section 8.2.1.b), which demonstrates well that in specific circumstances sub-central governments acting individually could, indeed, have better aggregate leverage than a central government acting alone.

7.5 Conclusion

This chapter explored the possible relations between the pursuit of cross-border horizontal policies, various shades of local public procurement-specific regulatory autonomy and international liberalization of public procurement markets. The autonomy to merely regulate local public procurement markets normally stems from the size of countries and the 'distance' between central governments and sub-central procurers. The autonomy to discriminate and the 'unofficial' autonomy to negotiate are proven to mostly stem from the historical developments in the formation of federations. Problems with reaching new international public procurement-related concessions are proven to mostly stem from the combination of (*i*) the divergence of central and regional industrial policies, (*ii*) the

[189] "*[T]the Community must aim at achieving a satisfactory degree of reciprocity during the negotiations in which it is participating within the GATT and the OECD and must, under the most favourable conditions, use all suitable means of ensuring that this objective is attained (…).*" Council Resolution OJ [1977] C 11 (see note 180), p 1–2, last para. of the preamble and point 1. This language was repeated in Council Resolution OJ [1980] C 211 at 2 (see: ibid.).

[190] Germany, France, Italy, Belgium, Netherlands, Luxemburg, Ireland, Denmark and the UK until 1981.

allocation of actual purchasing power in the hands of sub-central governments, (*iii*) the likelihood of shifts of the procurement backlog between central and sub-central level, and (*iv*) the vague public procurement-specific separation of powers.

The autonomy to merely regulate local public procurement is wide enough to accommodate (*i*) traditional local protectionism hidden in procedural requirements equally indirectly discriminating against non-local nationals and foreigners, and (*ii*) the majority of cross-border horizontal policies such as those imposing social or green process-related standards in business operations conducted in third countries or specifying the details of regional indigenous innovation policies undermining IP rights linked to inventions originating in third countries.[191] By allowing the diversification of the scope and details of cross-border horizontal policies among regions (e.g. technical standards, lists of innovative products, etc.) it also generates additional burdens for foreign suppliers/contracts having to comply with a number of region-specific standards rather than to a one countrywide standard. The autonomy to openly discriminate against non-locals is at odds with external trade-related competences of central governments and only makes sub-central governments persevere in traditional local protectionism or encourages sub-central governments to come up with selective public procurement-related sanctions, often either frustrating ongoing negotiations or violating already made international commitments.

Curbing sub-central regulatory autonomy, being the most obvious solution to the uncontrolled pursuit of sub-central cross-border horizontal policies and tensions between central and sub-central governments, could easily be thwarted by informal practices and executive discretion of public procurers subjected to central governments. An alternative could be granting to sub-central government a right to individually negotiate the market access and scope of the pursuit of horizontal policies with third countries or regions of third countries, especially when (*i*) the interests of the central government and regions are irreconcilable, and (*ii*) individual regions would have better aggregate leverage in negotiations than the central government acting alone.

[191] As discussed in section 7.2, the decision to discriminate in the form of indigenous innovation policies was made at the central level, and sub-central governments only had to determine region-specific details.

Chapter 8. Executive discretion

This chapter is the second one of the three operationalizing the concept of cross-border horizontal policies as an impediment to further liberalization of public procurement markets, and focuses on the executive discretion of public procurers as to the actual pursuit of cross-border horizontal policies. The purpose of this chapter is to (*i*) present the correlations between various shades of executive discretion granted to public procurers and the diverging attitude of policymakers/lawmakers[1] and executive agencies toward the non-commercial considerations in the procurement process, as well as (*ii*) discuss in what ways an over-zeal or an idleness of executive agencies in incorporating non-commercial consideration might thwart the efforts of policymakers to liberalize public procurement markets in exchange for gaining reciprocal market access in third countries.

The focus of this chapter is mostly on the EU as the cases emerging in EU's Member States are numerous and well illustrate almost whole palette of problems related to public-procurement-specific executive discretion, which might trouble governmental policymakers and their public-procurement specific strategies toward third counties. An insight into the origin of cross-border horizontal policies in the EU will reveal that such policies can also be driven by grassroots initiatives of executive agencies and initially do not have be centrally steered. However, eventually, such policies are very likely to turn into written laws and – as show previous instances of the EU regime's influence on the GPA (see also sections 3.1 and 3.2) – even be recognised and regulated in the international instruments regulating liberalisation of public procurement markets.

This chapter starts by offering general remarks on (*i*) the spectrum of public procurement-related executive discretion, (*ii*) proposed concept of public procurement-specific 'regulated discretion,' and (*iii*) the adverse impact of a too wide scope of executive discretion for international trade negotiations (section 8.1). Then, it discusses the pursuit of cross-border horizontal policies stemming from the executive discretion regulated under 'facultative norms' (section 8.2) and under 'conditional mandatory norms' (section 8.3). This chapter concludes by looking at how the international liberalization of public procurement markets is also affected by the executive discretion in the traditional sense, hereinafter referred to as 'unregulated discretion' (section 8.4).

[1] A 'policymaker' in this chapter refers to an executive branch of government responsible for industrial (also with a green and social tint) and external trade policies while 'lawmakers' refers to a legislative branch of government responsible for national regulation of public procurement. For simplicity, the premise of the hypotheticals presented in this chapter is that lawmakers do not have different views on external public procurement-specific trade relations and do not want to undermine actions of policymakers (which is not always the case in real life where parliaments clash with executive branches of governments over trade policies).

8.1 General remarks

A given country's policymakers – which aim to achieve wider goals with purchasing power of their public agencies - always face the problem of public procurement-specific executive discretion entailing the uncoordinated pursuit of horizontal policies differing between specific public procurers or even between specific contracts granted by the same public procurer. The problem is largely inevitable, which recently could be seen, for instance, in the legislative works on the fifth generation of the EU's public procurement directives. The discussion on the 'obligations to buy high societal value products and services' meant that EU policymakers - in the spirit of the Europe 2020 Strategy for smart, sustainable and inclusive growth[2] (see section 3.2.6) - considered introducing of mandatory social and environmental non-commercial considerations into EU's public procurement system.[3] However, in the consultation process, the vast majority of stakeholders, including both suppliers/contracts and public procurers, strongly opposed to such idea by expressing the views - as summarized by the European Commission - that there was a "*fear of too much interference from the EU in the decisions of public purchasers, increased complexity of the legal framework, the risk of affecting contracting authorities' ability to adapt their purchasing decisions to their specific needs, risks of price increases and of disproportionate administrative costs for public purchasers and businesses, particularly SMEs*."[4] Accordingly the fifth generation Directive 2014/24 recognized that "*[i]In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement.*"[5] Simply put, the wide executive autonomy as to the integration of non-commercial considerations had to remain in place.[6]

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[2] See: European Commission, 'Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth' COM [2010] 2020; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ [2014] L 94, p. 65–242, preamble point 2; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ [2014] L 94, p. 243–374, preamble point 4; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ [2014] L 94, p. 1–64, preamble point 3.

[3] See: European Commission, Directorate Internal Market and Services, 'Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European procurement market. Synthesis of replies' (30 June 2011) <http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf> accessed 13 May 2014, point 4 at 15.

[4] See: ibid.

[5] See: Directive 2014/24, Preamble para. 95.

[6] However, a significant exception to the facultative nature of the integration of non-commercial considerations in the public procurement process by specific public procurers are the sector-specific mandatory non-commercial considerations which was also addressed in the general remarks on the optionality of the integration of non-commercial considerations in Directive 2014/24 in the way that: "*[t]The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council (16)) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council (17)). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.*". See: Directive 2014/24 preamble para. 95. See also: Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles, OJ [2009] L 120, p. 5-12; Regulation (EC) No 106/2008 of the

In the context of international trade − where the integration of non-commercial considerations can be more or less equated with discriminating against foreigners – public procurement-specific executive discretion is commonly seen as a tool of indirect discrimination, and it is juxtaposed against firmly discriminatory measures. This kind of approach to executive discretion could already be seen in the key survey on discriminatory policies in public procurement conducted by the OECD in the 1970s and handed over to the GATT Group on Non-Tariff Measures[7] on the eve of transferring the works on the OECD instrument on government procurement to the GATT Tokyo Round for further works.[8] That document stated that: (*i*) "*the system of preferences for domestic products has sometimes been placed on a statutory basis of a generally mandatory character*,"[9] and (*ii*) "*the preferential treatment applied in the field of government procurement to domestic products appears in many cases to be based on administrative discretion, practice and habit.*"[10]

However, while this has not attracted attention in the literature, lawmakers also 'regulate' public procurement-specific discretion by expressly giving public procurers an option to pursue or not to pursue specific discriminatory horizontal policies chosen by lawmakers. The pursuit of discriminatory horizontal policies at the executive level does not stem only from either mandatory norms (*ius cogens*) or unwritten rules, policies and of administrative practice and similar executive actions taken outside the law (*praeter legem)* or even against the law (*contra legem)*. Rather, there is a great spectrum of discrimination modalities in between 'preferences of a generally mandatory character' and 'administrative discretion, practice and habit,' including various types of facultative norms (*ius dispositivum)* allowing public procurers to discretionally pursue some policies (see section 8.2) or conditional mandatory norms ('*ius cogens conditional*') allowing public procurers to discretionally not pursue countrywide horizontal policies (see section 8.3). Unconditional mandatory policies

European Parliament and of the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment, OJ [2008] L 39 p. 1–7.

[7] See: OECD Secretariat, 'Government Purchasing in Europe, North America and Japan.' (Paris 1966) referred to in GATT, 'Multilateral Trade Negotiations, Group" Non-Tariff Measures", Government Procurement - Note by Secretariat, Aug. 5, 1975' GATT Secretariat (Geneva) MTN/NTM/W/16 point 5 at 2.

[8] After years of discussion, a 'crib sheet' resulting from the OECD's work was transmitted to the GATT Tokyo Round (1973-1979), whereby it was generally recognized in the GATT with regard to the OECD's output in 1976 that "*[m]Much of the text of this instrument has been drafted. However, there are a number of issues which have been explored in detail but on which agreement has not yet been possible. Even so, the discussions have helped to draw a fairly complete picture of the issues involved in producing such an instrument, and the links between them*" (see: GATT Secretariat 'Multilateral Trade Negotiations, Group on "Non-Tariff Measures", Work of the OECD on Government Purchasing, Note received from OECD, Oct. 18, 1976' GATT Secretariat (Geneva, 18 October1976) MTN/NTM/W/61 at 1). Activities of the Working Group I of the GATT Committee on Trade in Industrial Products [established in December 1969 in order to analyse possible actions in the area of government procurement and of certain other non-tariff barriers – see: GATT, 'Multilateral Trade Negotiations, Group "Non-Tariff Measures", Government Procurement - Note by Secretariat, Aug. 5, 1975' GATT Secretariat (Geneva) MTN/NTM/W/16 at 1] were suspended in 1975 because "*[n]Note was taken of the fact that the OECD was addressing itself to this matter and that a11 the suggested elements referred to above 'were covered by the guidelines under preparation in OECD. The Group was informed of the state of work in the OECD and of the main contents of the envisaged guidelines. In the circumstances it was not considered useful to elaborate further at that stage on the main headings in the Group; it was agreed that for the time being the best way to proceed would be for the Group to follow developments in OECD.*" (see: ibid at 2).

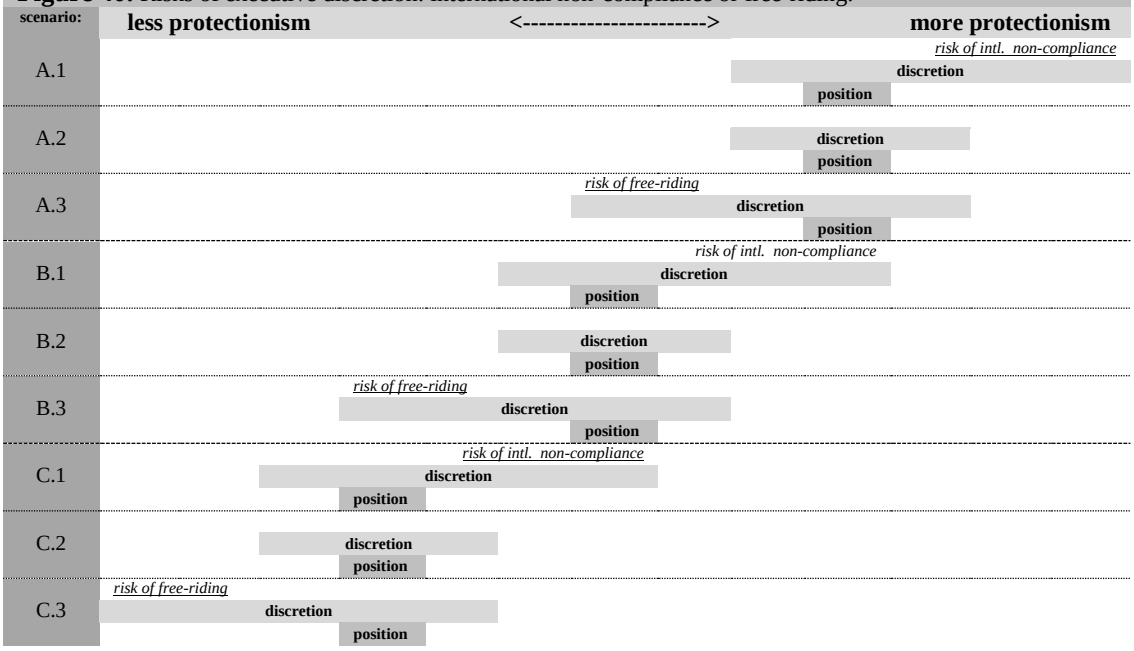
[9] See: ibid. point 14(c) at 6.

[10] See: ibid.

leaving no discretion to public procurers as well as 'all-in wrestling' by public procurers (unregulated discretion) are the marginal scenarios.

Contrary to another common belief, leaving more executive discretion does not always have to result in (*i*) more discrimination against foreigners, and (*ii*) a concealed support for countrywide policies by public procurers. It might well result in less protectionism whereas any inconsistencies between policymaking level and executive level are more likely to obstruct than help achieve goals of policymakers (see Figure 40). Therefore, what policymakers - planning, where need be, to augment or to curtail the pursuit of horizontal policies in order to achieve some policy goals – more generally need, is simply the allegiance by executive agencies.

Figure 40. Risks of executive discretion: international non-compliance or free-riding.



Specifically, on the one hand, policymakers of country *x* may want to curtail the pursuit of horizontal policies toward country *y* in order to assure compliance with international public procurement-related obligations, improve the negotiating climate, etc. (scenarios *C1*, *C2*, *C3*). However, some specific public procurers within country *x* might want more protectionism than expected by country *x*'s policymakers, and might employ more non-commercial considerations by exploiting facultative norms within regulated discretion or acting *praeter legem* or even *contra legem* within unregulated discretion (scenario *C.1*) – which would result in discrediting any international commitments made, or to be made, by country *x*, hindering further liberalization between country *x* and country *y*.

On the other hand, policymakers of country *x* may want to augment the pursuit of horizontal policies toward country *y* in order to improve country *x*'s leverage in international

negotiations and force country *y* to offer satisfactory reciprocal concessions (scenarios *A1*, *A2*, *A3*). However, some specific public procurers within country *x* might want less protectionism than expected by country *x*'s policymakers, and might employ less non-commercial considerations, especially by readily exploiting many loopholes left to them by lawmakers in mandatory conditional norms (see scenario *A.3*) – which would result resulting in (*i*) allowing persons of country *y* to free-ride on the liberal approach of particular public procurers of country *x*, (*ii*) discouraging country *y* from making reciprocal concessions toward country *x*, and (*iii*) undermining country *x*'s negotiating leverage toward country *y* hindering further reciprocal market liberalization.

The adverse effects of the executive defiance by some public procurers from countrywide public procurement-related trade policies on the efficiency of these policies also needs to be relativised to negotiating positions toward specific third countries. Suppose that country *x* has diversified public procurement-specific trade policies ranging from

(*i*) less protectionist policy toward country y_c (scenarios *C.1*, *C.2*, *C3*), through

(*ii*) moderate policy toward country y_b (scenarios *B.1*, *B.2*, *B3*), to

(*iii*) protectionist policy toward country y_a (scenarios *A.1*, *A.2*, *A3*).

As far as the risk of free-riding is concerned, suppose that (*i*) some public procurers of country *x* are generally less protectionist than country *x* (scenarios *A.3*, *B.3*, *C.3*), and (*ii*) country *x*'s policies toward countries y_c, y_b, y_a pretty much reflect current international commitments toward countries y_c, y_b, y_a (wide reciprocal liberalization with y_c, moderate with y_b and poor with y_a). In such case, a risk of free-riding on liberal executive policies would be

(*i*) minimal in the case of persons of country y_c (which anyway have secured market access to procurement offered in country *x*; see scenario *C.3*),

(*ii*) moderate in the case of persons of country y_b (which have moderate market access to procurement offered in country *x*; see scenario *B.3*), and

(*iii*) high in relations with persons of country y_a (which have theoretically limited market access to procurement offered in country *x*; see scenario *A.3*).

As far as the risk of the international non-compliance is concerned, suppose that in country *x* some other public procurers are generally more protectionist than country *x* (scenarios *A.1*, *B.1*, *C.1*), and the government has similarly diversified public procurement-related trade policies toward third countries y_c, y_b, y_a and these policies similarly reflect current international commitments. In such a case, the risk of country *x*'s non-compliance with

international public procurement-related international commitments toward countries y_c, y_b, y_a would be

(*i*) minimal toward country y_a (toward which commitments are limited anyway; see scenario *A.1.*),

(*ii*) moderate toward country y_b (toward which international commitments are moderate; see scenario *B.1*), and

(*iii*) high toward country y_c (toward which commitments are significant; see scenario *C.1*).

Actually, the same attitude to liberalization of a given public procurer of country *x* might have completely different effects, depending on third-country specific policies of country *x* (toward y_c, y_b, y_a). The same public procurer's attitude to liberalization might bring the risk of international non-compliance and the risk of free-riding at the same time in the case of

(*i*) moderate executive attitude to liberalization with a slight deviation toward liberalization -bringing the risk of international non-compliance in the case of very liberal country-*x*-wide policy toward y_c (scenario C.1) and the risk of free-riding in the case moderate country-*x*-wide policy toward country y_b (scenario B.3),

(*ii*) moderate executive attitude to liberalization - bringing the risk of international non-compliance in the case of very liberal country-*x*-wide policy toward y_c (scenario C.1) and the risk of free-riding in the case of protectionist country-*x*-wide policy toward country y_a (scenario A.3), and

(*iii*) moderate executive attitude to liberalization with a slight deviation toward liberalization - bringing the risk of international non-compliance in the case of moderate country-*x*-wide policy toward country y_b (scenario B.1) and the risk of free-riding in the case of protectionist country-*x*-wide policy toward country y_a (scenario A.3).

Moreover, depending on third-country specific policies of country *x*, even a minor executive divergence from country-*x*-wide *x* policies (scenarios *A.2*, *B.2*, *C.2*) might undermine country *x*'s negotiation strategies. If country *x*'s policy toward country y_c is very liberal, even a minor executive divergence toward more protectionism could bring some risk of international non-compliance but, in such case, an executive divergence toward more liberalism could not bring the risk of free-riding (scenario C.2). In turn, if country *x*'s policy is very protectionist toward country y_a, even a minor executive divergence toward more liberalism could bring some risk of free-riding but, in such case, an executive divergence toward more protectionism could not bring the risk of international non-compliance (scenario A.2).

In addition, even if public procurers insignificantly diverge from a pretty neutral country *x* policy toward country y_b, (scenario B.2), an inconsistent incorporation of non-commercial considerations among various public procurers or even between specific contracts granted by the same public procurer would always be some hindrance to the efficient achieving of goals of countrywide public procurement-specific trade/industrial strategies.

8.2 Regulated discretion and facultative provisions

Regulating public-procurement-specific executive discretion as to the integration of discriminatory non-commercial considerations with facultative norms means that lawmakers determine which horizontal policies can, but do not have to, be lawfully pursued by specific public procurers. On the one hand, by doing so, lawmakers send no clear message to third countries to what extent such policies would be actually pursued, and therefore force third countries to monitor the level of discrimination in public procurement markets also at the executive level in addition to monitoring legislation only, which is more difficult.[11] On the other hand, however, facultative provisions are still a better alternative to pre-existing unregulated executive discretion, habit or practice of individual public procurers (see further section 8.4). Lawmakers' firm recognition of (in place of a covert acquiescence to) the pursuit of specific horizontal policies by individual public procurers might tame un unbridled executive discretion in this regard and clarify the scope of allowed integration of specific non-commercial considerations at the national level.[12] It might also lead to the international recognition of specific horizontal policies, like in the case of environmental requirements integrated into the framework of GPA12 (see further section 8.2.2) – a case which also foretells future wider recognition of cross-border social and environmental policies in international instruments regulating public procurement markets (see further section 8.2.3).

8.2.1. Facultative norms and direct discrimination

Facultative norms rarely allow public procurers to directly discriminate against foreigners. They are very likely statutory and, therefore, easily identifiable. Facultative norms allowing direct discrimination can be mostly exemplified with traditional industrial policies whereas

[11] The actual scale of the practical application of the discriminatory horizontal policies is obviously much more relevant for third countries than the mere fact of writing such policies down as black-letter law. For instance, the then EC 'got tricked' into the prior moderate application of the small-business set-asides in the US when the then EC had first consented to the exclusion of procurement covered with the US's minority-and-small-business set-asides from the scope of GPA79 but, soon after GPA79 had entered into force, the then EC complained that "*since the enactment of the Agreement, US government agencies have markedly increased their use of small-business set-asides.*" See: Christopher McCrudden. 'International Economic Law and the Pursuit of Human Rights: A Framework For Discussion of The Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement' (1999) 2 J Intl Econ L 3 at 19.

[12] For example, in the course of the legislative work on the fifth generation of the EU's directives, almost all stakeholders – while they generally opposed the wider mandatory integration of non-commercial considerations to the procurement process (see: note 2) – they also "*believe[d] that the possibility of including environmental or social criteria in the award phase should be better spelt out in the Directives.*" See: ibid. point 4 at 15.

there is little overlap between such norms and the pursuit of cross-border horizontal policies. This is because directly discriminatory cross-border horizontal policies are mostly mandatory and, at best, can be waived by public procurers under narrow circumstances (see further section 8.3).[13]

8.2.1.a Examples

As far as traditional industrial policies are concerned, for instance, under third-generation Directive 93/38 regulating public procurement in the water, energy, transport and telecommunications sectors,[14] provided that "*[a]Any tender made for the award of a supply contract **may be rejected** where the proportion of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 802/68 of 27 June 1968 on the common definition of the concept of the origin of goods (16), exceeds 50% of the total value of the products constituting the tender.*"[15] In that case, the EU lawmaker (*i*) left it completely to the discretion of public procurers whether to apply overt directly discriminatory policies, or not, and (*ii*) risked free-riding by suppliers/contractors of third countries due to the potential reluctance of procurers from utility sectors to apply that protectionist measure.

The executive discretion to directly discriminate can also be confined to the right to determine the scope of discrimination. For instance, Italy was successfully sued by the then EC Commission to the ECJ in 1989[16] for the violation of the Treaties with legislation which had created obstacles to its internal market by requiring that "*written invitations to tender from the authority awarding contracts must stipulate that the successful tenderer is to entrust a minimum proportion of **between 15 and 30%** of the works to undertakings which have their registered offices in the region in which the works are to be carried out.*"[17] While at first glance that Italian law – the sense of which was to "*offset the disadvantages encountered by small and medium-sized undertakings as a result of the system of overall awards of contract provided for in that Law, by virtue of which various works are awarded under a single*

[13] Actually, directly discriminatory cross-border horizontal policies can be reduced to human-rights-driven trade sanctions on the side of green and social policies (see section 6.2.4.a) and to statutory indigenous innovation programmes on the side of firm industrial policies (see section 6.3.2.c). The very essence of such measures is to respectively (*i*) force all public procurers to follow countrywide sanctions or countrywide directly discriminatory industrial policies, and (*ii*) not allow individual public procurers to decide whether to comply with such programmes or not.

[14] See: Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ [1993] L 199, p 84–138.

[15] See: Directive 93/38, article 36(2).

[16] See: Case C-360/89, *Commission of the European Communities v Italian Republic* ECR [1992]I-03401.

[17] See: Law No 80/87 on 'Special provisions for accelerating the completion of public works)' ('*Norme straordinarie per l'accelerazione dell' esecuzione di opere pubbliche*'), article 2(1), cited in: Case C-360/89 para 2.

contract"[18] - was designed as mandatory, its actual effect on the free trade in its internal market could hugely depend on a particular public procurers applying that law. Specifically, the freedom of other Member States' suppliers/contractors to compete for public contracts in Italy would have been much more adversely affected if Italian public procurers had been closer to requiring 30 percent rather than 15 percent share of the local content (which was left to such procurers' complete discretion).

8.2.1.b Impact on liberalization

The detrimental impacts of facultative norms allowing direct discrimination on the international liberalization of public procurement markets lie in potential free-riding by suppliers/contractors of third countries. This problem could be well seen in the failure of the EU's longstanding policy on allowing Member States, since the WTO Tokyo Round, to discretionarily discriminate against foreigners of third countries in the case of procurement 'uncovered' with international commitments.[19,20] The rationale of that solution was to preserve concessions previously achieved by particular Member States on a reciprocal basis in relations with third countries[21] (see sections 7.4.2.b and 7.4.2.c). However, member States often left it to their executive agencies whether to close markets or not, perhaps not seeing any particular individual (Member-State-specific) gains from closing markets toward extra-communitarian (non-EU) foreigners.[22] For example in the UK, the subsequent Public Contract Regulations[23] only provided that "*a contracting authority shall not treat a person who is not a national of a relevant State* [that is a Member State or a third country covered

[18] See: Case C-360/89, para 13. The Italian government further explained that "*[t]The grouping in a single contract of services which, if separated, would be of interest only to regional undertakings, has the effect of excluding the latter from a number of contracts of lesser importance*" (see: ibid.).

[19] "*Member States may continue to apply, in accordance with the provisions of the Treaty, existing commercial policy measures in respect of public supply contracts concerning certain products and categories of products originating in non-member countries*". See: Council Resolution of 21 December 1976 concerning access to Community public supply contracts for products originating in non-member countries, OJ [1977] C 11, p 1–2, last para, of the preamble and point 1. This language was repeated in: Council Resolution of 22 July 1980 concerning access to Community public supply contracts for products originating in third countries, OJ [1980] C 211, p 2.

[20] The only exception was the EU-wide discriminatory measures targeting tenders of US origin which were in force between 1993 and 2006 {see: Council Regulation (EEC) No 1461/93 of 8 June 1993 concerning access to public contracts for tenderers from the United States of America, OJ [1993] L 146, p 1–23 repealed by the: Council Regulation (EC) No 352/2006 of 27 February 2006 repealing Regulation (EEC) No 1461/93 concerning access to public contracts for tenderers from the United States of America, OJ [2006] L59 p.7}. Offers for low-value projects filed by economic operators originating in the US had to be rejected (see: Regulation 1461/93 article 1). Such harmonized measures were a retaliatory measure responding to similar US instruments targeting EU business which had been passed to address price penalties imposed on non-EU business in the utilities sectors in Directive 93/38 (see: Proposal for a Council Regulation repealing Council Regulation (EEC) No 1461/93 concerning access to public contracts for tenderers from the United States of America, COM/2006/0060 final).

[21] "*[T]the Community must aim at achieving a satisfactory degree of reciprocity during the negotiations in which it is participating within the GATT and the OECD and must, under the most favourable conditions, use all suitable means of ensuring that this objective is attained (…)*". See: Council Resolution of 21 December 1976 concerning access to Community public supply contracts for products originating in non-member countries, OJ [1977] C 11, p 1–2, last para. of the preamble and point 1. This language was repeated in: Council Resolution of 22 July 1980 concerning access to Community public supply contracts for products originating in third countries, OJ [1980] C 211, p 2.

[22] See: Kenneth J. Cooper. 'To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level' (Winter 1993) 2(1) Minn J Global Trade 143-170 at 168-169 7.4.2.b.

[23] See: The Public Contracts Regulations 2006 No. 5 (made 9th January 2006, laid before Parliament 9th January 2006, came into force 31st January 2006); The Public Supply Contracts Regulations 1995 No. 201 (made 30th January 1996, laid before Parliament 31th January 1995, came into force 21st February 1995); The Public Supply Contracts Regulations 1991 (made 28th November 1991, laid before Parliament, 29th November 1991, came into force 21st December 1991).

with public procurement-international commitments[24]] *and established in a relevant State more favourably than one who is*"[25] implying *a contrario* that public procurers could, but did not have to, treat uncovered goods/services and/or suppliers/contractors less favourably. In other Member States like Italy,[26] Spain[27] or Germany,[28] public procurement-related national laws implementing directives have only even more vaguely provided that the rules set out under the directives should also be applied to foreigners covered by the GPA and to other public procurement-related international trade agreements, but remained tacit as to whether public procurers could discriminate against uncovered extra-communitarian foreigners or not.[29]

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[24] "*In these Regulations a relevant State is a member State or a State listed in column 1 of Schedule 4; the agreements with the European Union by which the provisions in relation to public procurement are extended to those States are specified in column 2 of that Schedule and the statutory provision designating them as European Treaties under section 1(3) of the European Communities Act 1972(a) is specified in column 3 of that Schedule*". See: note 23, Public Contract Regulations 2006, article 4.(4).

[25] See: note 23, Public Contract Regulations 2006, article 4.(2); ibid. Public Contract Regulations 1995 article 4.(2); ibid. Public Contract Regulations 1991 article 4.(2). Prior to the Public Contract Regulations 1991, public procurement subjected to the then EC's secondary legislation was merely regulated by fragmentary administrative circulars. See: Andrew Geddes, *Public and utility procurement: a practical guide to the U.K. regulations and associated Community rules* (2nd edn Sweet and Maxwell, London 1997) at 1.

[26] "*Art. 47. Operatori economici stabiliti in Stati diversi dall'Italia 1. Agli operatori economici stabiliti negli altri Stati aderenti all'Unione Europea, nonché a quelle stabilite nei Paesi firmatari dell'accordo sugli appalti pubblici che figura nell'allegato 4 dell'accordo che istituisce l'Organizzazione mondiale del commercio, o in Paesi che, in base ad altre norme di diritto internazionale, o in base ad accordi bilaterali siglati con l'Unione Europea o con l'Italia che consentano la partecipazione ad appalti pubblici a condizioni di reciprocità, la qualificazione é consentita alle medesime condizioni richieste alle imprese italiane. 2. Per gli operatori economici di cui al comma 1, la qualificazione di cui al presente codice non é condizione obbligatoria per la partecipazione alla gara. Essi si qualificano alla singola gara producendo documentazione conforme alle normative vigenti nei rispettivi Paesi, idonea a dimostrare il possesso di tutti i requisiti prescritti per la qualificazione e la partecipazione degli operatori economici italiani alle gare. é salvo il disposto dell'articolo 38, comma 5*'. See: Decreto Legislativo 12 APRILE 2006 N. 163 Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Code of public contracts related to works, services and supplies implementing Directives 2004/17/EC and 2004/18/EC) 2006 Official Journal (Gazeta Ufficiale) no. 231 of 2 October 2008 - Ordinary Supplement no. 227 (modified by legislative decree no. 52 of 11 November 2008 in force from 17 October 2008), article 47.

[27] "*Artículo 280. Obligaciones generales.* (...) *d) Respetar el principio de no discriminación por razón de nacionalidad, respecto de las empresas de Estados miembros de la Comunidad Europea o signatarios del Acuerdo sobre Contratación Pública de la Organización Mundial del Comercio, en los contratos de suministro consecuencia del de gestión de servicios públicos'.* See: Ley 30/2007, de 30 de octubre, de Contratos del Sector Público. (Law on Contracts in the Public Sector) 30/2007 Official Journal (Boletin Oficial Del Estado) Num. 276 of 16 November 2011 Sec. 1 p. 117729 (version consolidated by Legislative decree 3/2011 of 14 November) article 280.d).

[28] "*Anhang IV (...) Allgemeine Erläuterungen Die VOL/A in der vorliegenden Fassung berücksichtigt die Richtlinie 2004/18/EG des Europäischen Parlaments und des Rates vom 31. März 2004 über die Vrfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungs aufträge, die Richtlinie und die Verordnung (EG) Nr. 1564/2005 der Kommission zur Einführung von St andardformularen für die Veröffentlichung von Vergabebekanntmachungen auf dem Gebiet der öffentlichen Aufträge in der jeweils geltenden Fassung; sie trägt damit auch den Verpflichtungen nach dem Beschaffungsübereinkommen der Welthandelsorganisation WTO Rechnung*". See: Vergabe- und Vertragsordnung für Leistungen (*Contract Awards for Public Supplies and Services*) 20 November 2009 BAnz. Nr. 196a vom 29. December 2009 (entered into force 11 June 2010), part A, annex 4.II.

[29] Still, Member States have included in national laws (implementing secondary legislation) mandatory or dispositive norms mandating or allowing an indirect discrimination against non-EU/EEA elements and uncovered elements, such as an obligation to open a local branch and to appoint local proxies in order to have capacity to enter into a public contract in the case of Spain ["*Artículo 55. Empresas no comunitarias. (...) 2. Para celebrar contratos de obras será necesario, además, que estas empresas tengan abierta sucursal en España, con designación de apoderados o representantes para sus operaciones, y que estén inscritas en el Registro Mercantil*". - see: note 27, Ley 30/2007, article 55.2] or a discretionary right of public procurers to treat business not registered in the EU/EEA or in other covered countries (and not having a registered branch in the UK) as ineligible for being awarded public contracts in the case of the UK ["*(4) A contracting authority may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator* (…) *(j)* (…) *is not registered on the professional or trade register of the relevant State specified in Schedule 6 in which he is established under conditions laid down by that State.*" - see: Public Contracts Regulations 2006 2UK 2006 23.4.j].

Over three decades of the executive reluctance to individually pursue traditional industrial policies[30] have completely eroded the EU's leverage in the negotiations on reciprocal market liberalization with third countries. Eventually in 2012, the then commissioners Michel Barnier[31] and Karel De Gucht,[32] addressed this problem in public statements by (*i*) criticising "*repeated and serious discrimination against European suppliers in non-EU countries*",[33] and (*ii*) proposing vesting the Commission with a discretionary power to "*to restrict access to the EU market, if the country outside the EU does not engage in negotiations to address market access imbalances* (…) *for example by excluding tenders originating in a non-EU country or imposing a price penalty.*"[34] Also the European Commission emphasised in the Memorandum on the External Procurement Initiative by that "*some countries have introduced protectionist measures relating to procurement contracts which have hit EU companies*" (US, China, Brazil, Turkey, Russia and some states in Australia).[35] The discussion within the Commission produced the '*Proposal for a Regulation on the Access of Third-Country Goods and Services to The Union's Internal Market in Public Procurement and Procedures Supporting Negotiations on Access of Union Goods and Services to the Public Procurement Markets of Third Countries*'[36] which in theory would have had largely eliminated Member States' sub-central autonomy and public procurers' executive discretion to determine market access for extra-communitarian business.[37] The Commission would have had powers to (*i*) block foreign bids by either approving individual motions of public procurers,[38] or (*ii*) generally close the EU's public procurement markets access toward foreigners originating from countries which do not offer reciprocal market access.[39]

[30] In recent years, the concern of the public mostly pertained to the most expensive strategic infrastructural projects in new, mostly Eastern European Member States. The highlighted example of granting such contracts to contractors from third countries was entrusting the China Overseas Engineering Group Co. Ltd. ("COVEC") with the construction contract for the development of a highway in Poland worth about EUR300 million in 2009. See: Jędrzej Górski: 'Tightening the Common External Trade Policy in "Uncovered Procurement": A Populist Move or Well-thought-out Measure?' (2014) (2) Eur Proc & Priv Partn L Rev 104 at 105-106.

[31] Michel Barnier, the Internal Market and Services Commissioner made a statement that "*[t]The EU should no longer be naïve and should aim for fairness and reciprocity in world trade. Our initiative builds on Europe's belief that the opening up of public procurement generates benefits at global and European levels. We are open for business and we are ready to open up more, but only if companies can compete on an equal footing with their competitors. The Commission will remain vigilant in the defence of European interests and European companies and jobs.*" See: European Commission, 'Press Release: European Commission levels the playing field for European business in international procurement markets' (Brussels 21 March 2012) IP/12/268.

[32] Karel De Gucht, the Trade Commissioner claimed that "*I am a firm believer in making sure trade flows freely and government procurement must be an essential part of open trade markets worldwide. It's good for business, good for consumers and brings value for money for taxpayers. This proposal will increase the leverage of the European Union in international negotiations and with our partners to open up their procurement markets for European companies. I am confident that they will then get a fair opportunity at winning government contracts overseas and so generate jobs*". See: ibid.

[33] See: ibid.

[34] See: ibid.

[35] See: European Commission, 'External public procurement initiative - Frequently Asked Questions' (21 March 2012) MEMO/12/201 point 3 at 2.

[36] See: Proposal for a Regulation of the European Parliament and of the Council on the Access of Third-Country Goods and Services to The Union's Internal Market in Public Procurement and Procedures Supporting Negotiations on Access of Union Goods and Services to the Public Procurement Markets of Third Countries, COM(2012) 124 final, 2012/0060 (COD), 7-0084/12.

[37] See generally: note 30, Górski.

[38] See: note 36, COM(2012) 124, articles 5, 6.

[39] See: ibid. articles 5, 6.

Nonetheless, the works on bill lost momentum in November 2014,[40] and in December the new Commission decided to re-submit significantly revised bill,[41] still leaving this problem unresolved.

8.2.2. Facultative norms and indirect discrimination

Facultative norms allowing public procurers to discretionarily indirectly discriminate against foreigners are common. Indeed, public procurers, within their discretion, have been for instance commonly imposing environmental and social technical requirements (also including process-related requirements leading to cross-border regulatory interferences) thereby *de facto* disadvantaging foreign suppliers/contractors (see section and 6.2.1.b). The momentum of the development of such policies in the EU (being the cradle of this sort of policies – see also section 5.4) suggests that (*i*) facultative norms often only recognize the pre-existing impetus for the grassroots integration of non-commercial considerations by particular public procurers interfering with rather than supporting countrywide external trade policies, and (*ii*) regulating pre-existing discretion could be a gradual process also involving soft-law instruments and judicial decisions before facultative norms allowing incorporation of non-commercial considerations are adopted as hard laws.

Phase 1: Grassroots origins

In the case of the EU, first facultative norms only recognised that public procurers had been already individually incorporating green and social non-commercial considerations into procurement processes. Such norms could be seen in late 1990s in the combination of the (*i*) hard laws tacit as to the permissibility of the pursuance of some horizontal policies and rather encouraging public procurers to merely focus on value for money, accompanied with (*ii*) soft laws firmly encouraging public procurers to pay attention to various non-commercial mostly social and environmental considerations. Long before the adoption of similar facultative norms in the form of hard law in the fourth-generation directives in 2004 (see section 3.2.4), the Commission admitted in the green paper of 1996 that (*i*) "*purchasers, sometimes relying on national rules which are not compatible with Community law, use award criteria based on factors which are not provided for in the Directives and are therefore unacceptable. Cases where the award criteria are based fairly loosely on regional, social or environmental*

[40] See: <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/0060%28OLP%29> accessed 17 May 2015.

[41] "*Proposal to be amended in line with the priorities of the new Commission in order to simplify the procedures, shortening timelines of investigations and reducing the number of actors in implementation.*" See: European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2015 A New Start' (16 December 2014) COM/2014/0910 final, point 50 at 10.

considerations provide ample illustration of this problem,"[42] and (*ii*) "*Member States (and their public authorities) have, increasingly, started to integrate environmental considerations into their public procurement practices.*"[43]

However, instead of further stigmatizing such practices of public of procurers individually pursuing horizontal policies, the Commission also admitted that (*i*) "*[p]~~P~~ublic procurement rules can contribute to the achievement of social and environment policy objectives.*"[44] Also, in the environmental context, the Commission recognized that (*i*) "*[t]~~T~~he application of the public procurement directives d~~oes~~[id] indeed leave scope for public authorities to promote environmental protection,*"[45] (*ii*) "*[i]~~I~~t would undoubtedly be desirable in this connection to clarify the possibilities offered by the general provisions of existing legislation for taking environmental concerns into account and, at the same time, to define more precisely the limits to these possibilities.*"[46,47] And, in the social context, the Commission posed a question "*whether the possibilities offered by public procurement law for pursuing Community and national social-policy objectives in respect of the different groups concerned need[ed] to be clarified by means of an interpretative communication*."[48]

Phase 2: Use of soft-law

Following the green paper, in 1998, the Commission issued a communication stipulating that (*i*) "*[t]~~T~~he best value for money objective in public procurement d~~oes~~[id] not exclude taking environmental, social and consumer protection considerations into account. Nor does it require changing the present rules,*"[49] (*ii*) "*[i]~~I~~t [was]~~is~~, however, necessary to lay down clear guidelines to purchasers on how the environmental and social criteria can be taken into account in their contract award procedures, while complying with Community law, particularly as regards transparency and non-discrimination and the public procurement rules*,"[50] and (*iii*) "*[s]~~S~~uch guidelines are necessary if European suppliers are to be placed on an equal footing.*"[51] The Communications in principle repeated all preliminary claims of

[42] See: European Commission, 'Public Procurement in the European Union: Exploring the Way Forward. Green Paper' (Brussels 27 November 1996) COM (96) 583 final, point 3.1.3 at 11.

[43] See: ibid. point 5.46 at 40. The Commission also noticed that "*[t]~~T~~he Danish Government has recently adopted an 'Action plan for a sustainable environmental/'green' policy for public procurement'. Other Member States are also examining what steps can be taken to promote procurement of green products and services.*" See: ibid.

[44] See: ibid. point 5 at 29.

[45] See: ibid. point 5.47 at 40, 41.

[46] See: ibid.

[47] The Commission speculated that the environmental considerations could be integrated into: (*i*) exclusion criteria (see: ibid. point 5.48 at 41), (*ii*) technical specifications (see: ibid. point 5.49 at 41), (*iii*) selection criteria (see: ibid. point 5.50 at 41), (*iv*) award criteria (see: ibid. point 5.51 at 41), and (*v*) performance conditions (see: ibid. point 5.49 at 41).

[48] See: ibid. point 5.44 at 40.

[49] See: European Commission, 'Communication from the Commission on the Public Procurement in the European Union' (1998) COM(l998) 143 final, point 4.1 at 25.

[50] See: ibid.

[51] See: ibid.

the green paper[52] and assented to the integration of both green and social considerations into exclusion criteria as well as contact performance conditions,[53] and of only environmental considerations into technical specification as well as into selection and award criteria.[54]

From the perspective of the EU's external trade policy, the Commission found itself between Scylla and Charybdis at that time by simultaneously having to (*i*) secure the compliance with the new GPA94, in force since 1996, additionally covering lower-level governments in Member States, utilities sectors, and the provision of services and construction works,[55] and (*ii*) recognize grassroots individual practices of public procurers which then were not firmly allowed under the GPA. By stating that those practices did not place EU suppliers 'on an equal footing,'[56] the Commission indirectly admitted that such practices could be indirectly discriminatory toward suppliers from other Member States, also implying that such practices could be all the more discriminatory toward suppliers from third countries, and potentially violate provisions of GPA94.[57] As a solution - in the context of assenting to green and social consideration in internal market - the Commission's communication of 1998 also enigmatically stated that "*[i]In order to allow European firms to win procurement contracts outside the Union and the European Economic Area, the same objectives as followed for inside the Union need to be pursued vis a vis our trading partners*"[58] – which foretold that the Commission would take some steps to have such practices recognized and regulated also at the international level.

Phase 3: Intervention of judiciary

Meanwhile, in the internal market, the dichotomy of hard laws and soft laws soon resulted in disputes, the highlight being *Concordia* case in 2002.[59] Specifically, in *Concordia*, the City of Helsinki (procurer) called for tenders for the operation of the city's bus network.[60] The procurer additionally rewarded the use of vehicles emitting nitrogen below some very rigid levels (in the course of performing the public contract in question).[61] No party interested in

[52] See: note 47.

[53] See: note 49, point 4.3 at 27, ibid. point 4.4 at 28.

[54] See: ibid. point 4.3 at 27.

[55] See: note 42.

[56] See: note 49, point 4 at 25.

[57] Especially GPA12's Article VII section 1 (GPA94's Article VII point b.) providing that "*[a]A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement.*"

[58] See: note 49, point 4 at 25.

[59] See: Case C-513/99, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* ECR [2002] I-07213. See also: Case C-513/99, *Opinion of Mr Advocate General Mischo delivered on 13 December 2001 - Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* ECR [2002] I-07213.

[60] See: *Concordia* para. 20.

[61] "*22.As regards, first, the overall price asked, the most favourable tender would receive 86 points and the number of points of the other tenders would be calculated by using the following formula: Number of points = amount of the annual operating payment of the most favourable tender divided by the amount of the tender in question and multiplied by 86. 23. As regards,*

the outcome of *Concordia* (Finnish government included) denied that it was only the 'HKL' (a branch of the commercial enterprise owned by the city of Helsinki, adapting buses to run on the CNG[62]) that could meet these standards and gain additional points.[63] The major question was, however, whether such environmental horizontal policy contravened the then EU's legislation.[64]

The Finnish law implementing the EU secondary legislation provided that the assessment of overall economic advantage of a given tender can be based on "*the price, delivery period, completion date, costs of use, quality, life cycle costs, aesthetic or functional characteristics, technical merit, maintenance service, reliability of delivery, technical assistance and environmental questions*."[65] However, the then applicable directive (*i*) provided that the award of contracts by public purchasers should be based on "*(a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price*; or *(b) the lowest price only*,"[66] and (*ii*) did not make any, even very general or fragmentary, reference to environmental or social considerations.

Nonetheless, mentioned Communication of 1998 stipulated with regard to the award criteria in detail that "*environmental elements can serve to identify the most economically advantageous offer in cases where these elements imply an economic advantage for the purchasing entity, attributable to the product or service which is the object of the procurement*," [67] which was *nota bene* even referred to by the Finnish Supreme Administrative Court (*Korkein hallinto-oikeus*[68]) in its motion to the ECJ for the preliminary judgement initiating *Concordia* in 1999.[69] In line with the Communication, the ECJ stated that "*criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to constitute a*

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next, the quality of the vehicle fleet, a tenderer could receive a maximum of 10 additional points on the basis of a number of criteria. Thus points were awarded inter alia for the use of buses with nitrogen oxide emissions below 4 g/kWh (+2.5 points/bus) or below 2 g/kWh (+3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus)." See: ibid. paras. 22, 23.

[62] See: ibid. para. 19.

[63] See: ibid. paras. 71, 73, 75.

[64] See: ibid. paras. 35, 36.

[65] See: note 59, Opinion Advocate General, para. 9.

[66] See: Directive 93/38/EEC, Article 34(1). See also: Directive 92/50/EEC, Article 36(1).

[67] See: note 49, point 4.3 at 26-27.

[68] See: *Concordia*, para. 1.

[69] See: ibid. para. 34.

breach of the principle of equal treatment"[70] and found that the environmental requirements in question were permissible.

Phase 4: Integration intro hard-law

The fourth-generation Directive 2004/18[71] in the classical sector and 2004/17[72] in the utilities sector eventually expressly allowed public procurers to discretionarily employ green and social considerations and 'encouraged' promoting (*i*) incorporating eco-labels in the technical specification,[73] (*ii*) sheltered employment,[74] or (*iii*) environment and employment protection[75] (see also section 3.2.4). Those directives' preambles confirmed the significance of *Concordia*'s outcome with the opening statement that "*(…) [these]~~This~~ Directive[s] [were]~~is~~ based on Court of Justice case-law, in particular case-law on award criteria, which [had] clarifies~~d~~[d] the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area*."[76] However, the preambles also somewhat hid the grassroots origin of those developments by stating that (*i*) "*[u]~~U~~nder Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development,"*[77] (*ii*) *[these]~~This~~ Directive[s] therefore clarifies~~d~~[d] how the contracting authorities may contribute to the protection of the environment and the promotion of*

[70] See: ibid. para. 85.

[71] See Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ [2004] L 134, p 114–240.

[72] See: Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ [2004] L 134, p 1–113.

[73] "*6. Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by and any other eco-label, provided that:- those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract, - the requirements for the label are drawn up on the basis of scientific information, - the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and - they are accessible to all interested parties. Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.*" See: Directive 2004/18, article 23(6).

[74] See: Directive 2004/18, Preamble point 29, Article 19, Article 23 point 6, and Annex VII; Directive 2004/17 Preamble point 29, Articles 34 point 6, and Annex XXI.

[75] "*Obligations relating to taxes, environmental protection, employment protection provisions and working conditions 1. A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.*" See: Directive 2004/17, Article 27.

[76] See: Directive 2004/18, Preamble para 1; Directive 2004/17, Preamble para 1.

[77] See: Directive 2004/18/EC, Preamble para. 5. This language was also repeated in the fifth generation: *"Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts."* See: Directive 2014/24, Preamble point 91.

sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts."[78]

Phase 5: Internationalisation

Finally, also the first derestricted draft of the revision of the GPA revealed in 2006 eventually adopted without significant changes in 2012 (see further section 9.3.2) allowed public procurers to integrate environmental considerations into technical specifications.[79] And this cannot be seen as a coincidence because - according to derestricted documents of the WTO Committee on Government Procurement - the EU was the only GPA party which had proposed amendments (although their exact language is unknown) to the GPA's provisions related to technical specifications[80] (see: further section 9.1.3).

8.2.3. Template for legalizing cross-border horizontal policies

The momentum and sequence of events in the EU (from initial grassroots integration of non-commercial considerations by public procurers to the firm recognition of executive discretion to incorporate environmental considerations into technical specifications under GPA12) is a pattern which well explains how also the pursuit of discretionary green and social cross-border horizontal policies will likely be legitimised at the international level in the future.

Phase 1: Grassroots origins

The grassroots pursuit of green and social cross-border horizontal policies by particular public procurers has now for long been on the rise in the EU Member States (see also sections 5.4 and 6.2.1.b) and the European Commission has already regulated such pre-existing practice with soft-law facultative norms. The Commission's Communication on Sustainable Development of 2009[81] confirmed that public procurers in Member States had been already individually pursuing such policies. The communication recognized that "*[m]~~M~~any authorities [we]~~a~~re calling for tenders including sustainable objectives or "fair trade" in their procurement policies.*"[82] It defined 'fair trade' as among others "*seek~~s~~[ing] greater equity in international trade*"[83] and "*securing the rights of, marginalized producers*

[78] See: ibid.

[79] "*6. For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment*". See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Revision of the Agreement on Government Procurement as at 8 December 2006 - Prepared by the Secretariat' (11 December 2006) GPA/W/297 article X.6.

[80] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 21 February 2002' (2 May 2002) GPA/M/17, para. 65 at 11.

[81] See: European Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee. Contributing to Sustainable Development: The Role of Fair Trade and Non-governmental Trade-related Sustainability Assurance Schemes, COM(2009) 215 final.

[82] See: ibid. at 9.

[83] See: ibid. Annex I at 12.

and workers – especially in the South."[84] It also listed fair trade's goals as, among others, (*i*) 'a fair producer price, guaranteeing a fair wage,' [85] (*ii*) respecting ILO 'core conventions,'[86] (*iii*) respecting rights of women, children and 'traditional production methods,'[87] and (*iv*) "*capacity building and empowerment for producers, particularly small-scale and marginalised producers and workers in developing countries, their organisations as well as the respective communities.*" [88]

Phase 2: Use of soft-law

In addition, the Communication, for example, advised public procurers (*i*) not to "*require specific labels because this would limit the access to the contract of products which are not so certified but meet similar sustainable trade standards*," [89] and instead (*ii*) sketch technical specifications "*relate[ing] to the characteristics or performance of the products (e.g. glasses made out of recycled material)*"[90] – which meant that the Commission had nothing against discretionary interferences with regulatory environments of third countries by public procurers imposing process-related requirements. Similarly, the Commission's guide on 'Buying Social' of 2010[91] affirmed public procurers' right to (*i*) promote - presumably outside the EU - human rights,[92] (*ii*) fight child or forced labour,[93] and (*iii*) prefer buying 'ethical-trade-goods',[94] designating goods from third countries.[95] In the context of 'ethical-trade-goods', that guide also explained that "*the labour conditions of the workers involved in the production process of the supplies to be procured cannot be taken into account in the technical specifications, as they are not technical specifications within the meaning of the Procurement Directives. Under certain conditions, they may, however, be included in the contract performance clauses.*" [96]

[84] See: ibid.
[85] See: ibid. at 5.
[86] See: ibid.
[87] See: ibid.
[88] See: ibid.
[89] See: ibid. at 9.
[90] See: ibid.
[91] See generally: European Commission, 'Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement' Publications Office of the European Union, (October 2010).
[92] See: ibid. point 1.2 at 9.
[93] See: ibid. point 4 at 47.
[94] See: ibid. point 4 at 31.
[95] The guide defined 'ethical trade label/certification' as "*any non-governmental trade-related sustainability assurance scheme (for example, Fair Trade, Fairtrade, Max Havelaar, Utz, Rainforest Alliance, etc.). For further details on Fair Trade and other trade-related sustainability assurance schemes, see Commission Communication COM(2009) 215 final of 5 May 2009 'Contributing to sustainable development: The role of Fair Trade and nongovernmental trade-related sustainability assurance schemes.*" See: ibid. footnote 47 at 31.
[96] See: ibid. at 32.

Furthermore, the Commission's guide on 'Buying Green' of 2011[97] emphasized that the pursuit of environmental horizontal policies fell within the executive discretion of public procurers by stating that "*GPP is a voluntary instrument, which means that individual Member States and public authorities can determine the extent to which they implement it.*"[98] The 'green guide' clearly stated that public procurers were encouraged to continue with sustainable timber policies[99] and further clarified that (*i*) "*[y]~~Y~~ou may also specify the production processes or methods for a good, service or work*,"[100] and (*ii*) "*materials and production methods can explicitly be taken into account when defining technical specifications.*" [101] Among examples of how to identify a given public contract's environmental impacts, the green guide indicated (*i*) 'use of renewable raw materials in making the product,' (*ii*) 'packaging and transportation of the product,' or (*iii*) 'energy and water consumed, and waste generated in carrying out the service." [102]

Finally, the green guide also exposed the industrial dimension and discriminatory nature of such policies by stating that "*[y]~~Y~~ou can, for example, specify that electricity should be produced from renewable sources or that food be produced using organic methods, as these methods of production are widely available to economic operators across the EU,*"[103] despite reminding public procurers at the same time to comply with the GPA.[104]

Further phases: ?

Meanwhile, the fourth generation directives were much less pronounced in firmly assenting to interfering with the regulatory environments of third countries by individual public procurers (see section 3.2.4 and 8.2.2) than was the discussed soft law passed by the Commission. The Commission yet again found itself between Scylla and Charybdis by having to balance grassroots tendencies among public procurers and related international commitments. So far, the EU took a moderate stance on the problem. On the one hand, admittedly, the fifth-generation directives empowered public procurers to discretionally 'punish'[105] presumably foreign suppliers/contractors for non-compliance with internationally

[97] See generally: European Union, 'Buying green! A handbook on green public procurement ' (Belgium 2011) 2nd Edition.

[98] See: ibid. at 4.

[99] See: ibid.

[100] See: ibid. point 3.2.1 at 25.

[101] See: ibid. point 3.3 at 28.

[102] See: ibid. point 3.1.1 at 23. See also: note 91, point 5 at 33.

[103] See: note 97, point 3.3.2 at 29.

[104] See: note 99 at 5. Unsurprisingly, according to the guide, all policies/measures mentioned therein were fully compliant with the GPA. See: ibid.

[105] Specifically, in the case of non-compliance with such international standards, public procurers in Members States could (*i*) elect not to award a contract to potential suppliers/contractors offering the most advantageous but non-compliant tenders which would otherwise win (see: Directive 2014/24/EU, Article 56.1. *in fine*), (*ii*) preclude such potential suppliers/contracts at the initial stage of the procurement process [also Member states could mandate their public procurers to always preclude such non-compliant suppliers/contractors - see: ibid. Article 57.4.a., (*iii*) presume that abnormally low tenders result from such violations

accepted social and environmental international conventions (see sections 3.2.5 and 6.2.2.b). On the other hand, however, the EU had relinquished the Commission's idea of also allowing public procurers to similarly punish presumably foreign suppliers/contractors for not complying "*at least in an equivalent manner, with obligations established by Union legislation*"[106] (see ibid.).

Nevertheless, one should not rule out that it has been a stopgap-solution only and that the Commission would turn eye blind to public procurers imposing unilateral measures without any foothold in internationally recognised standards. Clearly though - in a few years from the adoption of the fifth-generation directive in 2015 - a discussion in the WTO Committee on Government Procurement at least on the right of public procurers to interfere with foreign regulatory matters with a foothold in internationally recognised standards would merely be a logical consequence of the long history of the cross-influences between the EU's public procurement and in the GPA (see further section 9.3.3 and 10.2.2). A dispute similar to *Concordia* recognizing and clarifying such right in the EU's internal market could only catalyse this process.

8.3 Conditional mandatory provisions

Regulating public procurement-specific executive discretion as to the integration of discriminatory non-commercial considerations with 'conditional mandatory norms' means (*i*) generally mandating public procurers to pursue certain discriminatory policies, and (*ii*) at the same, time allowing public procurers to waive such mandatory norms if serious commercial considerations arise (mostly a need to avoid very poor value for money while sourcing) - which brings a potential risk that suppliers/contractors of third countries would free-ride on the executive reluctance to apply countrywide horizontal policies and on resulting extensive use of such waivers.

8.3.1. Discretionary versus contingent discrimination

8.3.1.a Examples

For example, the industrial horizontal policy under the ARRA[107] in principle mandated using only US-made 'iron, steel, and manufactured goods' in the projects ('construction, alteration, maintenance or repair of a public building or public work') financed under that act[108] (see

(see: ibid. Article 69.2.d., or (*iv*) mandate suppliers/contactors to replace non-compliant sub-suppliers/subcontractors with complying ones (see: ibid. Article 57.4.a.).

[106] See: Proposal for a Directive on Public Procurement Repealing the Directive 2004/18, COM(2011) 896 final 2011/0438 (COD), Article 54 section 2. See also: Article 55.3.a. in the context of exclusion grounds and Article 69.1.d in the context of abnormally low tenders.

[107] See: American Recovery and Reinvestment Act, Feb. 19, 2009 Pub. L. No. 111-5, 123 Stat. 115, 516 (111th Congress).

[108] See; ARRA, section 1605.

section 1.3). However, by way of exception, the ARRA allowed public procurers to waive that provision in the case of (*i*) inconsistence with public policy,[109] (*ii*) non-availability of goods of US origin,[110] and (*iii*) unreasonable increase of the cost in the case of compliance.[111] Similarly, the third-generation Directive 93/38 (see section 8.2.1) – in addition to that it had allowed the rejection of tenders with foreign content in excess of 50 percent of their value[112] – in the case of such tenders, also generally mandated selecting tenders originating from the EU "*where two or more tenders are equivalent*,"[113] that is when "*the price difference ~~does~~*[did] *not exceed 3%*."[114] However, the mandatory norm could have been waived on the condition that the choice of domestic supplier "*would oblige the contracting entity to acquire material having technical characteristics different from those of existing material, resulting in incompatibility or technical difficulties in operation and maintenance or disproportionate costs*."[115]

8.3.1.b Design

Figure 41. Classification of conditions.

'**condition**' (*conditio*)
future uncertain event
'**causal condition**' (***conditio causal*)**
future uncertain event, the fulfilment of which depends on purely external factors
potestative condition (*conditio potestativa***)**
future uncertain event, the fulfilment of which depends on the will of a procuring agency (originally a party to a contract)
mixed condition (*conditio mixta*)
future uncertain event, the fulfilment of which partly depends on the fulfilment of purely external factors, and partly on the will of a procuring agency (originally a party to a contract)

The executive right of public procurers to waive mandatory countrywide policies can stem from a combination of discretionary factors (potestative conditions - see Figure 41) and contingent factors (causal conditions). However, it would never stem from purely contingent factors only.

Namely, in the cases similar to the ARRA or Directive 93/38, the executive discretion of public procurers is two-fold and always includes (*i*) the right to waive mandatory policy

[109] "*Inconsistent with public interest. The head of the Federal department or agency may determine that application of the restrictions of section 1605 of the Recovery Act would be inconsistent with the public interest.*" See: ibid. Section 2 CFR 176.80 (a)(3).
See: ibid. Section 2 CFR 176.80 (a)(3).
[110] "*Nonavailability. The head of the Federal department or agency may determine that the iron, steel or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of non-availability of the articles listed at 48 CFR 25.104(a) and the procedures at 48 CFR 25.103(b)(1) also apply if any of those articles are manufactured goods needed in the project.*" See: ibid. Section 2 CFR 176.80 (a)(1).
[111] "*Unreasonable cost. The head of the Federal department or agency may determine that the cost of domestic iron, steel, or relevant manufactured goods will increase the cost of the overall project by more than 25 percent in accordance with § 176.110.*" See: ibid. Section 2 CFR 176.80 (a)(2).
[112] See: Directive 93/38, Article 36.2.
[113] See: ibid. Article 36.3 first sentence.
[114] See: ibid. Article 36.3 *in fine*.
[115] See: ibid. Article 36.4.

when some conditions are met, and (*ii*) the assessment of the fulfilment of these conditions (see scenario 1 in Figure 42). Indeed, none of the conditions of waiving the mandatory 'buy-American' norms under the ARRA were purely causal. Rather, to various degrees, those were 'mixed conditions' in the sense that the assessment of their fulfilment fell within the executive discretion of public procurers. And executive discretion ranged from:

(*i*) almost full discretion in the case of non-consistence with public policy, through

(*ii*) moderate discretion in the case of non-availability where 'reasonably available commercial quantities of a satisfactory quality' might be pretty freely interpreted[116] to

(*iii*) an increase of cost defined as an increase by 25 percent where an 'increase' referred to an overall contract's value rather than to the mere cost of goods which could still be pretty freely calculated.[117]

Figure 42. Discretionary discrimination versus contingent discrimination .

<table>
<tr><th></th><th>Is the causal condition met?</th><th>Is the mixed condition met?</th><th>Is the potestative condition met?</th><th>Mandatory discriminatory policy waived?</th></tr>
<tr><td rowspan="2">Scenario 1</td><td rowspan="2">- perhaps ➔</td><td colspan="2">- yes ➔</td><td>- yes -</td></tr>
<tr><td colspan="2">- no ➔</td><td>- no -</td></tr>
<tr><td rowspan="2">Scenario 2</td><td rowspan="2">- perhaps ➔</td><td>- yes ➔</td><td rowspan="4">n.a.</td><td>- yes -</td></tr>
<tr><td>- no ➔</td><td>- no -</td></tr>
<tr><td rowspan="2">Scenario 3</td><td>- yes ➔</td><td rowspan="2"></td><td>- yes -</td></tr>
<tr><td>- no ➔</td><td>- no -</td></tr>
</table>

The element of the discretion (and the potential risk of free-riding) would not be eliminated even if some lawmaker wanted to design an ARRA-like law obliging rather than allowing public procurers to waive mandatory policies in some very narrow circumstances (see scenario 2 in Figure 42) because defining such circumstances would be very difficult. Any precise definition of the consistence with public policy is unattainable. Perhaps, one might imagine a much more precise definition of unavailability in domestic markets. However, public procurers more or less know what is available domestically and, in advance, can sketch characteristics of purchased products in a way that would allow them purchase desired foreign goods/services contrary to countrywide protectionist policies.[118]

Theoretically, only a mandatory waiver of the ban on sourcing from foreigners based on a very precisely defined increase in the cost of procurement could eliminate executive discretion (see scenario 3 in Figure 42). However, such solution still would not eliminate a

[116] See: note 110.

[117] See: note 111.

[118] In real life, similar problems could, for example, be seen in the long-term tensions between the US Congress and the US Department of Defence on the ongoing purchases of Russian-made military equipment by the Department of Defense, particularly for the purposes of the mission in Afghanistan. See generally: Nathan Hodge. 'World News: On Pentagon Wish List: Russian Copters --- U.S.'s Lifting of Sanctions on Exporter Eases Procurement of Aircraft for Allies' Wall Street Journal (8 Jul, 2010) A.9; 'Russia to deliver 30 helicopters to Afghanistan despite US sanctions - official' BBC Monitoring Former Soviet Union (31 Mar, 2014) n/a; 'Aviation; --Russian Helicopters has no problems with Western sanctions so far - general director' *Interfax: Russia & CIS Defense Industry Weekly* (2014).

kind of contingency of the discrimination. Specifically, such automatic waiver of mandatory discriminatory norm would work exactly as price preferences with all the consequences (see section 1.5.1). Depending on the cost advantage, that a foreign supplier has against the cheapest domestic supplier (which the public procurer does not know), the results of the application of the automatic waiver based on the increase in cost would be dramatically different. If a foreign supplier's cost advantage is higher than the margin of automatic waiver, commercial considerations (value for money) will prevail over any countrywide protectionist horizontal industrial policy. The foreign supplier will still win the contract but would be paid less in line with the lower bid it has submitted as a result of the margin of price-preference-like discriminative measure.[119] In turn, if a foreign bidder's cost advantage is lower than the margin of waiver, some domestic supplier would win the contract and the public procurer would pay more.[120] Therefore, in real life, no reasonable policymaker/lawmaker would introduce measures potentially leading to so unpredictable results without some 'safety-valves' (waivers) allowing individual public procurers to intervene where necessary.

8.3.1.c Impact on international liberalization

From the perspective of the international liberalization of public procurement markets, mandatory, but conditionally 'waivable' discriminatory policies themselves do not cause major problems because in principle they are accompanied with safe-clauses mandating compliance with international commitments. That was the case of the ARRA[121] (see section 1.3) and that was the case of Directive 93/38 stipulating that: "*[t]This Article shall apply to tenders comprising products originating in third countries with which the Community has not concluded, multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be*

[119] See: Simon Evenett, Bernard Hoekman, 'Procurement of Service and Multilateral Discipline' in Pierre Sauvé and Robert M. Stern (eds), *GATS 2000: new directions in services trade liberalization* (Center for Business and Government, Harvard University, Boston 2000) 143 at 155.

[120] See: ibid.

[121] "*This section shall be applied in a manner consistent with United States obligations under international agreements" that with a significant number of countries.*" See: ARRA section 604(k) and section 1605(d). That 'save' clauses were added to the bill at the very last moment by Republicans represented by John McCain strongly argued for just removing those completely ineffective provisions (both the buy national clause, and the 'save' clauses) so that the bill was more readable [see: John Linarelli, 'Global Procurement Law in Times of Crisis: New Buy American Policies And Options in the WTO Legal System' in Sue Arrowsmith and Robert D. Anderson (eds), The WTO regime on government procurement: challenge and reform (Cambridge University Press, Cambridge 2011) 773-802 at 781; Joshua Schwatrz I., 'Procurement in Times of Crisis: Lessons from US Government Procurement in three Episodes of "Crisis" in the Twenty-First Century' in Sue Arrowsmith and Robert D. Anderson (eds), The WTO regime on government procurement: challenge and reform (Cambridge University Press, Cambridge 2011) 803-829 at 827]. However, for political reasons, for Democrats it would have been too bitter a pill to swallow (see: ibid. Linarellli at 782-783). See also: WTO Director-General, 'Report to the TPRB from the Director-General on the Financial and Economic Crisis and Trade-Related Developments' (26 March 2009) Job(09)/30 (26 March 2009), box 5 a 17.

without prejudice to the obligations of the Community or its Member States in respect of third countries."[122]

In turn, the impact of free-riding stemming from the potential abuses of executive discretion in waiving mandatory policies depends on the initial goals of countrywide mandatory yet conditionally waivable policies. In the case of Directive 93/38 – the rationale of which was to encourage third countries to offer, on a reciprocal basis, better concessions on the utilities sector under the GPA94 in the course of ongoing talks on its coverage[123] - hypothetical executive 'abuses' of waivers leading to free-riding could have discouraged third countries from making better offers on coverage. In contrast, in the case of the ARRA - the sense of which really was to discriminate against foreigners – a wide use of waivers by individual public procurers could improve the negotiation climate with third countries and decrease the risk of retaliatory measures potentially imposed by third countries on US suppliers/contractors competing for public contracts outside of the US.

8.3.2. Conditional mandatory norms and cross-border policies

Conditional mandatory norms can also be built into the cross-border horizontal policies, mostly public procurement-related sanctions, which only further exposes the industrial dimension of such policies and flaws of sanctions as such. For example, the Burma Law in principle precluded businesses engaged in operations related to Burma from being granted public contracts in the state of Massachusetts in order to help bring about a general change in Burma with the purchasing power of Massachusetts' public procurers (see section 6.2.4.a). However, the ban was not absolute, as the Burma Law provided that "*[i]In any procurement that includes bidders or offerors who are on or meet the criteria of the restricted purchase list, the awarding authority may award the contract to a person who is on or who meets the criteria of the restricted purchase list only if there is no comparable low bid or offer by a person who is not on the restricted purchase list*"[124] whereby the comparable low bid or offer was defined as "*a responsive and responsible bid or offer which is no more than ten percent greater than the lowest bid or offer submitted for goods or a service.*"[125,126] It follows that

[122] See: Directive 93/38, Article 36.1.

[123] The actual rationale of Directive 93/38 must be searched for in the previous Directive 90/531 (Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sector, OJ [1990] L 297/1–48), which was superseded by Directive 93/38, providing for identical solutions as in Directive 93/38 (Directive 90/531, Article 29), and its preamble explained that "*[w]Whereas, within certain limits, preference should be given to an offer of Community origin where there are equivalent offers of third country origin; Whereas this Directive should not prejudice the position of the Community in any current or future international negotiations; Whereas, based on the results of such international negotiations, this Directive should be extendable to offers of third country origin, pursuant to a Council Decision.*"

[124] See: Act Regulating State Contracts with Companies Doing Business with or in Burma 1998 Mass. Acts 130 (codified at Mass. Gen. LawS Ann. ch. 7, §§ 22G-22M, section 22.H.d. See also: Jennifer Loeb-Cederwall. 'Trade Restrictions with Indonesia: Does Massachusetts Know the Code' (1998) 4 New Eng Intl & Comp L Ann 181 at 187.

[125] See: the Burma Law, Section 22H.(d). See also: note 124, Loeb-Cederwall. 'Trade Restrictions with Indonesia: Does Massachusetts Know the Code' (1998) 4 New Eng Intl & Comp L Ann 181 at 187.

the Burma Law *in effectu* imposed selective price preferences, being a typical measure of traditional industrial policies on suppliers/contractors from the EU and Japan covered by secondary sanctions under that act. Despite all alleged atrocities happening in Burma, blacklisted suppliers/contractors could still overcome sanctions if (*i*) their offers were cheaper by 10 per cent than the cheapest bidder not covered by those sanctions (contingent condition), and (*ii*) a particular public procurer saw a commercial interest in dealing with principally blacklisted suppliers/contractors (potestastive condition and altogether a mixed condition).

From the perspective of intergovernmental trade relations, one could ask if building the conditional mandatory norms into the design of public procurement-related sanctions only adds insult to injury or rather pours oil on troubled waters. Very hypothetically, it might help if (*i*) the scope of possible waivers is wide, and (*ii*) third countries affected by sanctions have reasons to believe that sanctions in practice would be more frequently waived than applied. For example, in the case of sanctions employing price preferences, the scope of possible waivers would be determined by the margin of preference. One might only speculate whether the reaction of the EU and Japan to the Burma law would have been that firm and instant if the margin of price preference in the Burma Law had been set at, say, 3 per cent instead of 10 per cent. In such a case, much less domestic bids would have been be 'comparable' with bids submitted by suppliers/contractors covered by sanctions, so Massachusetts' public procurers could have waived sanctions more frequently. Perhaps, in such a case the EU and Japan would have preferred postponing submitting any formal claim and would have sought a more conciliatory solution.

8.4 Unregulated discretion

Lastly, the unregulated discretion, roughly defined as 'administrative discretion, practice and habit,'[127] is commonly seen as the major obstacle to liberalization of public procurement markets as, to quote Pomeranz, "*[t]The much more difficult task in eliminating discrimination against foreign suppliers* [than firmly discriminating overt provisions] *is discrimination effected either by the absence of procurement rules or by the invisible use of existing practices and procedures*."[128] However, there is no escape from unregulated discretion if the public procurers are about to be more efficient by behaving more like private economic operators, and the role of unregulated discretion as a tool of deliberate countrywide discriminatory horizontal policies shall not be overestimated. Rather, the

[126] See: note 124, Loeb-Cederwall at 187.

[127] See: note 8, point 14(c) at 6.

[128] See: Morton Pomeranz. 'Toward a New International Order in Government Procurement (1981-1982) 12(2) Pub Cont L J 129 at 144.

efforts aiming at removing obstacles to international liberalization of public procurement markets shall focus on curbing the illicit conduct of public officials and improving the 'professionalism' of public administration.

8.4.1. Need for discretion

As a general remark - while from the perspective of international trade a strict regulation of public procurement process has always been seen as a tool for eliminating discrimination against foreigners (see section 1.6) - from the internal perspective, an overregulation has been seen as a risk to the efficiency of procurement, which was so emphasised by Kelman:

> "*As a strategy of organisational design, rules have a cautious character. When we design organisations based on rules, we guard against a disaster, but at the cost of stiffing excellence. Excellence requires the ability to demonstrate distinctiveness, but rules imply uniformity. Government officials deprived of discretion that could produce misbehaviour are at the same time deprived of discretion that could call forth outstanding achievement. If an organisation's tasks are standard and its environment slow to change, this won't create particular problems, since creativity or innovativeness are unnecessary. When that's not the case, rule-bound organisations are accidents waiting to happen.*"[129]

Of course, some degree of regulation of public procurers' behaviour is unavoidable because public procurement is an 'action through political channels' and, to quote Friedman, "*[t]The characteristic feature of action through political channels is that it tends to require conformity. The great advantage of the market, on the other hand is that it permits wide diversity*."[130] However, even the most basic premises for regulating procurement processes now often do not stand the test of time, like the bias in favour of open tendering and against negotiated procedures (see section 2.3.3). Indeed, Tucker observed already in the late 1990s that because of the technological progress "*what had previously been a matter of comparing bids often now requires careful negotiations, either before or after the bidding process of both. If a bidding process is designed with not thought of negotiation, or when negotiation is considered likely to encourage corruption, the strains in the system will occur.*" Similarly, Schooner more generally claimed in the early 2010s that in the US there had always been a strong desire by different stakeholders in public markets to make the procurement process much more like in private markets (more 'commercial') as it would bring much more efficiency to the public sector and much more collaboration between public procurers and

[129] See: Steven Kelman, *Procurement and public management: the fear of discretion and the quality of government performance* (AEI Press, Washington 1990) at 28.

[130] See: Milton Friedman, *Capitalism and freedom* (University of Chicago Press, Chicago 1962) at 15.

suppliers/contract.[131] Therefore, clearly, policymakers/lawmakers seeking for better efficiency of their domestic public procurement systems have good (non-protectionist) reasons for opposing to further tightening the procurement process at the level of international instruments.

8.4.2. Concealed regulation *versus* unethical conduct

Nonetheless, policymakers have always been 'nosing around' the pursuit of concealed discriminatory horizontal policies in other countries (see further sections 9.2 and 9.3) and believed that curbing unregulated executive discretion would eliminate such concealed protectionism. However, the discrimination stemming from public procurers' unregulated practices embraces not only concealed countrywide policies but also unethical conduct of procurement officials, referred to by Arrowsmith as 'illegitimate practices,' including 'corruption, nepotism, or patronage.'[132] It can also embrace temporary problems with the enforcement of law, as illustrated by Atkinson describing China's central government's efforts to remove the effects of Order 618[133] (see section 7.1.3): "*[w]~~W~~hile government departments were told to remove regulatory documents related to indigenous innovation, its intent likely remains latent with many central and provincial government purchasing managers, who are likely to continue to tilt their purchasing to Chinese-owned companies*".[134] The elimination of such illegitimate practices or temporary problems clearly lies not only in the interest of third countries seeking better market access but also in the interest of domestic policymakers.

8.4.2.a The conviction of covert regulation

The assumption of the wide existence of concealed horizontal policies could be seen already in the first GATT documents mentioning public procurement revealing that the US yet in 1964 - when no binding commitments on the international liberalization of public procurement were in place - "*request[ed] participating governments* [in the GATT] *to publish all regulations and practices governing their procurement procedure*" in the course

[131] See: Steven L. Schooner, 'Commercial Purchasing and Comparative Public Procurement: Exposing the Chasm between the United States Government's Evolving Policy and Practice' (7 October, 2002) The George Washington Center for the Study of Globalization Occasional Paper Series at 23.

[132] Sue Arrowsmith, *Government procurement in the WTO* (Kluwer Law International, The Hague; Boston 2003) xxiii, 481 a 16. See also: Krista Nadakavukaren Schefer and Mintewab G. Woldesenbet, 'The Revised Agreement on Government Procurement and Corruption' (2013) 47(5) J World Trade 1129 at 1133.

[133] See: Order Regarding the Launch of National Indigenous Innovation Product Accreditation Work for 2009 30 October 2009 (promulgated by the Ministry of Science and Technology, the National Development and Reform Commission and the Ministry of Finance, effective 30 Oct., 2009). See also: Siyuan An and Brian Peck. 'China's Indigenous Innovation Policy in the Context of its WTO Obligations and Commitments' (2011) 42(2) Geo. J. Intl L 375 at 395; S. James Boumil III. 'China's Indigenous Innovation Policies under the TRIPS and GPA Agreements and Alternatives for Promoting Economic Growth' (2012) 12(2) Chicago J Intl L 755, footnote 45 at 763.

[134] See: Robert D. Atkinson, 'Enough is Enough: Confronting Chinese Innovation Mercantilism', The Information Technology and Innovation Foundation (Washington February 2012) at 25.

of works of the GATT Sub-Committee on Non-Tariff Barriers.[135] The US then claimed that (*i*) "*[p]Procedures which have the effect of giving officials substantial discretion in awarding contracts between domestic and foreign firms may result in de facto discrimination against foreign suppliers, even though such discrimination is not required by law or regulation*",[136] and (*ii*) "*[b]Because the nature of these potential barriers is the absence of publicly defined procedures and standards, it is impossible and will continue to be impossible to make precise judgments as to their actual effect*". Also, in 1977, in the Sub-Group Government Procurement of the WTO Tokyo Round, 'some delegations' claimed that many countries were "*applying a more subtle method of discrimination through such practices as lack of advance notice of purchases, onerous conditions for foreign suppliers seeking to qualify as bidders, refusal to entertain foreign supplier complaints or even respond to those complaints and the operation of procurement systems in a highly invisible fashion so that it was nearly impossible to determine what was going on in day-to-day operations*."[137]

The first years of the operation of the GPA79 showed that the introduction of 'publicly defined procedures and standards' did not eliminate the discriminatory practice of particular public procurers (see also section 9.2.2). Soon, the US General Accounting Office in the report titled 'The International Agreement on Government Procurement: an Assessment of its Commercial Value and U.S. Government Implementation' admitted that still (*i*) "*[t]There ~~are~~* [were] *difficulties in monitoring compliance even when adequate resources are devoted to the effort*,"[138] and (*ii*) "*[t]To more fully monitor compliance, the embassies need the active assistance of the in-country American business community*."[139] That report also noted with consternation that individual public procurers could simply blatantly ignore rules stemming from the GPA particularly stigmatizing Italy where "*[a]Although the Italian **government** ostensibly implemented the Agreement by administrative circular, Italian procurement officials often did not use its procedures. Host government agencies published virtually no*

[135] See: GATT, 'Sub-Committee on Non-Tariff Barriers - Procurement Procedures to Be Adopted by Participating Governments - Proposals by the United States Government' (15 July 1964) TN.64/NTB/30 a 2.

[136] See: ibid. at 1.

[137] See: GATT, Multilateral Trade Negotiations - Group "Non-Tariff Measures, 'Checklist of Points Summarizing Views on Specific Issues in the Area of Government Procurement. Note by the secretariat' GATT Secretariat (Geneva 22 April 1977) MTN/NTM/W/96 at 9.

[138] See: US General Accounting Office, 'Report to the U.S. Trade Representative and the Secretaries of Commerce and State: The International Agreement on Government Procurement: an Assessment of its Commercial Value and U.S. Government Implementation' (16 July 1984) GAO-NSIAD-84-117 digest at iii. In line with the observation of the US's administration, there has always been a belief in the literature that everybody else but the US should be blamed for covert discriminatory practices, as summarized by Yukins and Schooner who observed that "*one common form of trade barrier is those explicit measures to provide domestic industry with a competitive advantage over foreign competitors. Historically, the United States operated significant overt policies, generally embodied in legislation (…) whilst the policies of many of its major trading partners, including most European states, were more covert.*" See: Christopher R. Yukins and Steven L. Schooner. 'Incrementalism: Eroding the Impediments to a Global Public Procurement Market' (2007) 38(3) Geo. J. Intl L 529 at 536.

[139] See: note 138, GAO-NSIAD-84-117, Chapter 4 at 36.

announcements of covered procurements."[140] However, instead of looking at the problem of corruption, that report referred to the Italian case as "*[t]The most noted case of* ***systemic*** *noncompliance*," [141] and the US "*[e]Embassy officials* [still] *believe[d] that some* ***governments*** *may be violating the Agreement in ways they cannot detect*."[142]

8.4.2.b Fighting unethical behaviour

While the international community continued fighting executive discretion by tightening regulation, more general attempts to address the problem of corruption in international business transactions (also affecting public procurement) originated just from the US. The American Foreign Corrupt Practices Act of 1977 ('FCPA')[143] was passed as a response to the leakage to the public of the information on the 'facilitation payments' made by Lockheed Aircraft Corporation to foreign officials in a number of third countries in exchange for buying its products, and by over four hundred similar cases later revealed by American enterprises under the voluntary disclosure programme offered by the Securities and Exchange Commission.[144] Its official purpose was to penalize the corrupt practices of domestic enterprises in the future.[145] Subsequent works on internationalizing the FCPA gained momentum after the Clinton administration took office in 1993,[146] leading to the adoption of the FCPA-like OECD Convention[147] (see section 4.3) and a number of other corruption-focused and public procurement-related documents such as for instance (*i*) the Inter-American Convention Against Corruption of 1996,[148] (*ii*) the Convention on the protection of the European Communities' financial interests of 1995,[149] (*iii*) Convention on the fight against corruption involving officials of the European Communities or officials of

[140] See: ibid. See also: note 132, Nadakavukaren Schefer and Woldesenbet at 1133.

[141] See: note 138, GAO-NSIAD-84-117, Chapter 4 at 36.

[142] See: note 138, GAO-NSIAD-84-117, digest at iii; note 138, Yukins and Schooner at 536.

[143] See: The Foreign Corrupt Practices Act 1977 15 U.S.C. § 78dd-1, et seq. On the history of the FPCA and its correlation with history of the OECD Anti-bribery convention, see: Mark Pieth, 'Introduction' in Lucinda A. Low and Peter J. Cullen (eds), *The OECD convention on bribery: a commentary* (Cambridge University Press, Cambridge 2007) 608 at 8-10.

[144] See: ibid. Pieth, footnote 11 at 7. See also: note 132, Nadakavukaren Schefer and Woldesenbet at 1135.

[145] 'Domestic' meant linked to the US by, among others, (*i*) being organized under US laws, (*ii*) having their main place of business in the USA, or (*iii*) having securities publicly traded in the USA. For the details of the FCPA's application see: Stuart H. Deming, The Foreign Corrupt Practices Act and the new international norms (International practitioner's deskbook series, 2nd edn American Bar Association, Chicago 2010) 801at 7-12. Nonetheless, the covert rationale of the FCPA might have been to prevent private American business from any foreign business operations interfering with sometimes illicit deals (but driven by political or security concerns) made by military/intelligence agencies of the US government operating abroad. See: note 143, Pieth at 8.

[146] See: Kenneth W. Abbott. 'Rule-making in the WTO: lessons from the case of bribery and corruption' (2001) 4(2) J Intl Econ L 275 at 2-4.

[147] See: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted by the Negotiating Conference on 21 November 1997, signature 18 December 1997). See also: note 132, Nadakavukaren Schefer and Woldesenbet at 1335-1136.

[148] See: Inter-American Convention Against Corruption (signed 29 March 1996,in force 6 March 1997) OEA/Ser.K/XXXIV.1, CICOR/doc.14/96 rev. 2, 35 ILM 724. In article III it stipulated that: "*(…) the States Parties agree to consider the applicability of measures within their own institutional systems to create, maintain and strengthen: 5. Systems of government hiring and procurement of goods and services that assure the openness, equity and efficiency of such systems.*"

[149] See: Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (Signed at Brussels on 26 July 1995) OJ [1995] C 316, p. 49-57.

Member States of the European Union of 1997,[150] (*iv*) Council of Europe Criminal Law Convention on Corruption of 1999,[151] and eventually the UN Convention against Corruption ('UNCAC').[152] Thus, from then on, the problem of discriminatory illegitimate executive practices was embraced in two ways: with the procedural framework of international instruments regulating the liberalization of public procurement markets on the one hand and with international instruments generally targeting corruption on the other.

However, neither approach has been fully 'universalised.' As regards tightening regulation, according to the UNCITRAL Report to the UN General Council of 2003, "*in some countries, public procurement* [still] *was not a matter for legislation, but for internal directives of ministries and government agencies.*"[153] As regards fighting corruption, the FCPA and OECD Convention covered only the 'supply side' (suppliers/contractors) of the problem. There was no will among the major players (the EU, US, Japan, their governments and business) in the 1990s and ever thereafter to also cover the 'demand side' (like the solicitation of bribes by public procurers) with an international agreement, and to integrate such agreement within the framework of the WTO.[154] That failure is particularly unfortunate, especially in light of Arrowsmith's claim that - with the high standards and professionalism adhered to by public officials - many and internationally accepted principles of the regulation of public procurement processes could be abandoned.[155]

8.4.3. Concealed horizontal policies

Altogether, this is not to say that policymakers never unofficially channel the behaviour of their public procurers to achieve wider policy goals. The opposite must be true in the light of the *communis opinio* on this matter (see section 8.1).[156] However, the 'collusion' of executive agencies in advancing policymakers' goals has often coincided with the issues such as sub-central autonomy, or the dynamics of regulation.

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[150] See: Council Act of 26 May 1997 drawing up, on the basis of Article K.3 (2) (c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union 1997, OJ [1997] C 195.

[151] See: Criminal Law Convention on Corruption (signed at Strasbourg on 27 January 1999, in force 1 July 2002) 1999 ETS 173.

[152] See: United Nations Convention Against Corruption (signed 31 October 2003, in force 14 December 2005) UN Secretariat A/58/422 ('UNAC'). Article 9 of the UNCAC specifically pertains to public procurement and, among others, calls its parties to "*take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption*." (see: UNCAC, article 9.1). See: note 132, Nadakavukaren Schefer and Woldesenbet at 1139, 1152. The UNCAC was also mentioned in the preamble of the GPA 12. See also: ibid. at 1151.

[153] See: UN, 'Supplement No. 17 to the Report of the United Nations Commission on International Trade Law on its thirty-sixth session held 30 June-11 July 2003 (New York 2003) A/58/17, para. 230 at 52.

[154] See: note 146 at 283-285.

[155] See: Sue Arrowsmith, John Linarelli and Don Wallace, Regulating public procurement: national and international perspectives (Kluwer Law International, The Hague 2000) xxxii, 856 at 22-23.

[156] See also 'Figure 30 Framework of China's public-procurement specific 'indigenous innovation' program.' in section 6.2.3.b illustrating the details of the initial experimental indigenous innovation programs (first launched at the level of sub-central governments) which could not be tested without a good co-ordination with sub-central executive agencies. In fact, at the local level, a clear-cut line between a legislative and executive branch of government is often hard to draw.

As far as sub-central autonomy is concerned, for example, it was a common view that prior to the extension of the GPA's coverage over sub-central bodies under the GPA94, "*[i]~~I~~t ~~is~~ [had been] an "unwritten law" in Japan that local governments give priority to local firms when conducting procurements. Local governments routinely [had] give[n] preferential treatment to local firms by establishing qualifications for participation in a procurement that non-local firms cannot meet.*"[157] A hint that also a central government might have had its hand in those 'unwritten laws' lies in that, that - after the central government had nimbly subjected previously very decentralized local procurement markets to the requirements of the GPA[158] - other parties to the GPA did not indicate problems related to the non-compliance by Japanese sub-central governments.[159] And this suggests that central governments had a real capacity to influence the conduct of even local public procurers. If so, one could claim that, had the pre-GPA94 local protectionism gone against the will of the central government, the central government would have eliminated such policies even before the conclusion of the GPA94.

As far as dynamics of regulation is concerned, one could see an informal cooperation of policymakers and public procurers for instance in periods when the European Commission spotted the grassroots initiatives of public procurers and decided to integrate those initiative into EU-wide policies but had not yet come up with official legislative proposals leading to the subsequent regulation of particular green and social consideration in public-procurement-related directives (see sections 8.2.2, 8.2.3).

8.5 Conclusion

This chapter explored the relations between the pursuit of cross-border horizontal policies, various shades of public procurement-specific executive discretion and international liberalization of public procurement markets. This chapter challenged the view that an unregulated discretion of public procurers is a tool of protectionism used by policymakers equivalently with overtly protectionist and mandatory policies. This chapter rather showed that (*i*) the attitude of lawmakers/policymakers and individual public procurers as to the incorporation of non-commercial considerations often diverges, (*ii*) executive agencies might be much less protectionist than countrywide external trade policies, and (*iii*) executive practices discriminating against foreigners can often stem from unethical/illegal conduct of self-interested public officials rather than from following covert countrywide policies.

[157] See: Jean Heilman Grier. 'Japan's Implementation of the WTO Agreement on Government Procurement' (1996) 17(2) U Pa J Intl Econ L 605 at 639.

[158] See: ibid. at 623-624.

[159] The GPA parties usually do not restrain themselves from pointing out even minor violations of its provisions. See further: section 9.3.

This chapter also found that - given that executive discretion is an unavoidable and necessary element of the procurement process – on one the hand, lawmakers/policymakers increasingly have to (*i*) accept grassroots initiatives emerging from the executive level (such as integrating green and social requirements into procurement process, also including process-related requirements likely interfering with foreign regulatory matters), and (*ii*) as a result, risk non-compliance with international commitments. On the other hand, the lawmakers/policymakers also have to (*i*) agree that particular public procurers *de facto* have a final say on the application or non-application of ostensibly mandatory policies (such as restriction of market access for foreigners or selective public procurement-related trade sanctions), and (*ii*) as a result, risk losing the leverage in international negotiations or not achieving the goals of sanctions.

Chapter 9. Trade negotiations

This chapter is the last one of the three operationalising the concept of cross-border horizontal policies as an impediment to a further liberalisation of public procurement markets, and analyses trade negotiations related to public procurement, mostly within the plurilateral framework of the GATT/WTO Committee on Governments Procurement. Its purpose is to present the influence of intergovernmental controversies arising out of the pursuit of cross-border horizontal policies in the course of discussing new and monitoring existing commitments related to opening public procurement markets.

This chapter starts by offering general remarks on the specificity of reaching intergovernmental commitments in the field of public procurement, focusing on (*i*) the lack of private markets-like interactions between public procurers and suppliers/contractors which does not help the emergence of commonly accepted public procurement-specific legal order, (*ii*) difficulties with removing NTBs, and (*iii*) co-relations between negotiations on public procurement and other trade-related issues (section 9.1). This chapter then moves on to analysing (*i*) the pre-WTO public procurement-related negotiations, including the behind-the-scenes of the Tokyo Round, the operation of the GPA79, its revision of 1987, and the Uruguay Round leading to the adoption of the GPA94 (section 9.1.4), as well as (*ii*) the operation of the GPA94 and works leading to its revision in 2012 (section 9.3). In these two sections, this chapter illustrates how - out of the chaos of four decades of talks combining matters of compliance, changes to framework and coverage as well as of new accessions – a decision emerged to launch talks on regulating matters relevant to environmental and social cross-border horizontal policies such as various aspects of sustainable procurement and safety standards. In addition, this chapter also addresses the role of cross-border horizontal policies as an obstacle to the multilateralisation of the GPA and presents such policies as a factor (*i*) contributing to the ongoing bilateralisation of negotiations inside the GPA circle and with third countries negotiating accessions to the GPA, and (*ii*) further discouraging developing countries from liberalising their public procurement markets.

9.1 General Remarks

The cause of relatively little success of the negotiations aiming at liberalising public procurement markets compared with the developments in general commerce can be seen in the influence of the ‘non-private’ nature of public procurement markets and of the characteristics of trade barriers in these markets on public procurement-related trade negotiations. The absence of private business-to-business cross-border relations, otherwise supporting intergovernmental developments in the field of global commercial legal order, has meant that the public procurement-specific global legal order (mostly the framework of

the GPA) could not emerge spontaneously like in private markets.[1] Rather, the governments - apart from the scope of liberalisation - have had to also negotiate the shape of such order without an active involvement of all stakeholders in these markets (public agencies on the demand side, and private business on the supply side) virtually guaranteeing that such unnaturally created legal order would more bother than captivate stakeholders (also meaning that the GPA framework has been a burden for rather than a facilitator of liberalisation). In turn, the mostly non-tariff nature of barriers to trade in public procurement markets has meant that their liberalisation could not keep up with liberalisation of general commerce, which had mostly lain in the elimination of tariffs. However, these factors, to some extent, have been mitigated by the practice of tangling public procurement-related concession with larger negotiation packages and trading access to public procurement markets for concessions that are not related to public procurement.

9.1.1. Lack of micro-scale drivers

The emergence of the global/transnational trade-related legal order has been seen as a great success compared with developments in internationalising other fields of law[2] often falling within the emerging concept of global administrative law.[3] However, the global model of regulating public procurement itself falls within the concept of global administrative law (see section 1.6) and the top-down development of this model only ostensibly corresponds with the fruitful developments in private markets. Looking at public procurement markets through the prism of Druzin's recent 'structuralist account' of the emergence of global commercial legal order in the absence of central authority explains the crucial differences between legal orders in private and public procurement markets. According to Druzin's theory, "*commercial legal order has the ability - and, in fact, the tendency - to run ahead of the State and evolve, grow, and sustain itself quite robustly in a transregional context*,"[4] and what has allowed an emergence of global trade order is (*i*) reciprocity,[5] (*ii*) market requirements,[6] (*iii*) network effects,[7] plus (*iv*) also the interplay of macro-level factors (level of trade-related international agreements) and of micro-level factors (private contracting and

[1] See generally: Bryan H. Druzin. 'Anarchy, Order, and Trade: A Structuralist Account of Why a Global Commercial Legal Order is Emerging' (2014) 47(4) Vand J Transnat'l L 1049.

[2] For example, the harmonisation of family law, criminal law or tort low. See: ibid. at 1050, 1051: ibid. footnotes 1, 2 at 1051.

[3] Druzin noticed that that some development in the emergence of non-trade-related international legal order might be seen in the rising global administrative law movement (see: ibid. footnote 3 at 1051). This does not mean, however, that some fields of global administrative law cannot be trade-related. Indeed, the international regulation of public procurement was presented as an exemplification of global administrative law in section 1.6.

[4] See: note 1 at 1052. Actually 'public procurement' does not exist without a state subject to fully privatised enterprises operating in utilities sectors over which states/governments have no control, but such enterprises are still subjected to public procurement regimes because of special or exclusive rights created by states/governments which such enterprises enjoy.

[5] See: note 1 at 1051-1066.

[6] See: ibid. at 1067-1075.

[7] See: ibid. at 1076-1083.

private dispute resolution) seems .[8] Compared with private markets, in public procurement markets some of these factors are even stronger at the macro level but, at the micro level, some of these factors are completely absent.

9.1.1.a Lack of reciprocity

As far as reciprocity is concerned, this theory differentiates between (*i*) a 'positive reciprocity' meaning incentives to enter into mutual arrangements (a carrot),[9] and (*ii*) a 'negative reciprocity meaning' a punishment for breaching these arrangements (a stick).[10,11] In public procurement markets, at the macro level, both 'positive reciprocity' and 'negative reciprocity' factors seem to be an even stronger incentive to cooperate than in general commerce given the often binary nature of trade barriers in public procurement markets (access or no access). In the case of such trade barriers, negotiating governments, on the one hand, live in the hope of gaining access to markets which otherwise would be completely closed, so they negotiate (carrot).[12] On the other hand, once public procurement-related trade agreements are in force, the contracting governments also live in fear of losing market access completely as a punishment for non-compliance (a stick),[13] so they have an even stronger incentive to comply than in general commerce.

However, at the micro level, the relations between public procurers and suppliers of foreign goods or foreign contractors are nothing like the relations between merchants from different jurisdictions driven by self-interest.[14] There is no 'positive reciprocity' because public procurers who manage 'not-their-money' merely want to procure goods or services to discharge their administrative duties and/or pursue horizontal policies. At the micro level, there is no 'negative reciprocity' in public procurement markets either.[15] In the case of breaching arrangements (not only breaching the rigid black letter of public contracts but also

[8] See: ibid. at 1051. Druzin explained this interplay in the way that: "*[t]he basic structure of trade drives toward convergence - a fact that may be discerned as much on the macro-level of state actors as it is on the micro-level of private parties. For the structuralist account offered here, the distinction between private and state actors makes little conceptual difference. It does not matter the size of the trading entity; all that is required is that it act as a single, unified entity. When dealing with other states, national governments meet this definition.*" See: ibid. at 1053.

[9] See: ibid. at 1060.

[10] See: ibid.

[11] In a similar context, Benson refers to positive and negative 'incentives'. See: Bruce L. Benson, 'The Law Merchant's story: how romantic is it?' in Peer Zumbansen and Gralf-Peter Calliess (eds), *Law, Economics and Evolutionary Theory* (Edward Elgar Publishing, Cheltenham, 2011) 68 at 70.

[12] This is a theoretical model only because - as discussed in Chapter 7 and Chapter 8 - governments would cooperate if such incentive in practice was not undermined by the problem of executive discretion and sub-central autonomy.

[13] While prior to the GPA94 intergovernmental disputes arising out of commitments under the GPA79 were to be settled according to the GPA-specific procedural rules (see: the GPA79 article VII section 6.-13.), GPA94 subjected rules of dispute settlement to the rules of WTO Dispute Settlement Understanding (see: GPA94 article XXII).

[14] See: note 1 at 1060.

[15] According to Druzin, the negative reciprocity at the micro level is made up of elements such (*i*) ability to choose applicable law and arbitration (see: ibid. at 1057), and (*ii*) cost of lost reputation and the lost future commercial opportunities (see: ibid. at 1059).

best merchant practices), unlike in the case of private actors, public procurers do not risk future commercial opportunities as a result of lost reputation.[16]

9.1.1.b Lack of market forces

As far as markets forces are concerned, unlike in the case of merchant law,[17] the framework of public procurement liberalisation did not emerge from grassroots initiatives of private actors necessitated by practical needs of trade which are alike across different regions.[18] We do not know much, if anything, about the specificity of purchasing goods not for resale by medieval servants for their lords' courts/corteges, but one could imagine that such market actors and merchants did not share the same needs. Being on the demand side of transactions only, and being tied to lords' courts/corteges, such 'public procurers' of the past must have travelled much less along the trade routes in the quest for goods than private merchants involved in continuous trading/re-selling operations[19] so such public procurers did not contribute to the emergence of the so-called 'old merchant law'[20] that much.[21]

One could also imagine that the then public procurers, in the case of disputes with non-local suppliers emerging within their lords' jurisdictions, did not settle such disputes in private so-called 'Pie Powder courts' tolerated by the lords.[22] So they did not contribute to the developments in private arbitration within merchant law either. Moreover, by the very nature of public procurement, the then public procurers could not abandon their lords unlike

[16] See: ibid.

[17] Black's law dictionary defines 'Custom of merchants' as: "*[a]~~A~~ system of customs or rules relative to bills of exchange, partnership, and other mercantile matters, and which, under the name of the "lex mercatoria," or "law-merchant," has been engrafted into and made a part of, the common law*." See: Bryan A. Garner (ed), *Black's law dictionary* (available at Westlaw BLACKS, 9th edn St. Paul 2009). Blackstone, in Commentaries, defined merchant law as: "*[a]~~[A]~~ particular system of customs . . . called the custom of merchants, or lex mercatoria . . . is . . . allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions. . . . [A]s these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other*." See: William Blackstone, Commentaries *45, 273, as cited in: Leon E. Trakman. 'From the Medieval Law Merchant to E-Merchant Law' (2003) 53(3) Univ Toront L J 265 at 788. Benson defines 'Lex Mercatoria' as: "*a distinct, but not independent, system of polycentric customary law evolving spontaneously from the bottom up through the interactions of merchants in pursuit of the universal objective to enhance opportunities for voluntary trade*." See: note 11 at 73.

[18] To summarize Druzin's argument on market forces, the requirements of trade are similar all over the world, leading to the development of (*i*) similar institutions between merchants at the micro level (structure of private contracts, procedural aspects of private alternative dispute settlement), and (*ii*) similar design of trade-related international agreements concluded by various states. See: note 1 at 1068.

[19] The origin of merchant law lies in that merchants involved in cross-jurisdiction trade (unavoidable in fragmented medieval Europe) had to travel, so – along the trade routes – they craved for a uniform normative system facilitating their operations (see: ibid. at 1072) and related dispute resolution system (see: ibid. at 1070).

[20] According to Trakman, the difference in early and late (since 16th century) understanding of old merchant law lies in that, initially, merchant law was an autonomous institution and an independent legal system (see: note 17, Trakman at 783). However, along with the first attempts to institutionalize old merchant law at the level of national legislation, merchant law was increasingly seen as an autonomy of merchants acting within national legal systems to freely contract/co-operate among themselves (see: ibid. Trakman at 783, 784).

[21] That is not to say that public procurers of the past did not have their needs but one could make a claim that in the times of feudal fragmentations neither (*i*) particular then public procurers had sufficient purchasing power comparable with federal governments of the present to dictate the terms of business, nor (*ii*) limited interactions between public procurers of the past allowed developing parallel behaviour that could, by way of repetition, lead to the development of public procurement-specific region-wide *modi operandi* of dealing between agents/servants of lords and merchants furnishing needed goods.

[22] Also known as 'piepoudre*'* courts. Usually, they accompanied medieval fairs; the judges were chosen by groups of merchants, and there is no evidence that those courts were established at the lords' will. See: note 11 at 78. See also: Marlene Wethmar-Lemmer. 'The Development of the Modern Lex Mercatoria: A Historical Perspective' (2005) 11(2) Fundamina 83 at 188.

mobile private merchants who could pretty freely leave one jurisdiction for another, indirectly forcing lords to improve conditions of conducting cross-jurisdiction trade.[23]

When rising national states appropriated merchant law by institutionalising and codifying it throughout the 16th-19th centuries bringing so-called 'new merchant law,[24] this still corresponded with the previous 'polycentrism' of old merchant law in the sense that national legal systems reflected regional variations of it (variations of local customs).[25] The integration of merchant law into a vast array of international, almost universal instruments such as under the aegis of UNIDROIT,[26] or UNICIRAL (especially the UN Convention on Contracts for the International Sale of Goods,[27] 'CISG')[28] in the 20th century only followed market forces, which had forced the emergence of global-level merchant customs.[29] In contrast, the global model of regulating public procurement was meant to apply to disconnected national/local public procurement markets in which similar processes had not taken place, and this model's premises like the bias against negotiated procurement procedures and preference for lowest-price price award criteria (see section 2.3.3) only further limited public procurers' ability to communicate their needs through markets forces.

[23] See: note 11 at 70.

[24] Also by subjecting commercial disputes to the national courts and public judges. See: note 22, Wethmar-Lemmer at 190. To quote Trakman: "*[a]An institutionalized Law Merchant emerges when informal law becomes formal law, as when the decisions of merchant judges are formally consolidated into civil law commercial codes and judicial precedents into the common law*." See: note 17, Trakman at 783. See also: note 20.

[25] See: note 17, Benson at 73. Benson explained polycentrism in medieval old merchant law with the notion of 'jurisdictional hierarchy' stemming from some divergence of rules developed for the purpose of (*i*) 'intra-group' interactions, which might have varied between various groups, and (*ii*) the harmonised 'inter-groups' forced into being by the interactions between various groups (see: ibid. at 71). Similarly, Kadens referred to various overlapping 'layers' of old merchant law, including (*i*) Europe-wide layer embracing pretty universal norms like non-application of ordeals or duels as a proof of innocence to merchants (see: Emily Kadens. 'Order within Law, Variety within Custom: The Character of the Medieval Merchant Law' (2004) 5(1) Chicago J Intl L 39 at 56, 57), (*ii*) regional layer embracing some discrepancies between Northern and Southern Europe, for example, as to the detail of preferred forms of credit (see: ibid. at 57), (*iv*) layer of region-specific rules on the organisation and timing of fairs (see: ibid. at 58), and (*v*) guild-specific and good-specific customs (see ibid. at 59, 60). See also: note 1 at 1076, 1077, 1083.

[26] The International Institute for the Unification of Private Law was established within the framework of the League of Nations in order to "*to examine ways of harmonising and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law.*" See: International Institute for Unification Statute, (signed 1926, incorporating the amendment to Article 6(1) which entered into force on 26 March 1993) <http://www.unidroit.org/about-unidroit/institutional-documents/statute> accessed 28 December 2015, article 1, 1st sentence.

[27] See: United Nations Convention on Contracts for the International Sale of Goods (signed at Vienna 11 April 1980, in force 1 January 1988) 1489 UNTS 25567.

[28] See: note 1, footnote 4 at 1052; note 17, Trakman at 809.

[29] It is inevitable that, along with increasing volumes of global trade and related increasing interactions between merchants – while this does not fully remove polycentrism (see: note 25) – also the standardisation of rules of trade at the global level must increase (see: note 1 at 1077). Since the moment of the integration of the spontaneously created global layer of merchant law into intergovernmental instruments such as various model laws or conventions, according to Trakman, modern merchant law can be classified into (*i*) output of national law-makers institutionalising previous old merchant law, (*ii*) international instruments, and (*iii*) the remaining area of merchants' self-regulation not embraced by national lawmakers or international arrangements. See: note 17, Trakman at 812, 813.

9.1.1.c Lack of network effects

Figure 43 Direct and indirect network effects

Direct network effects

Among network effects, as first distinguished by Katz and Shapiro, there are direct network effects and indirect network effects whereby the former are "*generated through a direct physical effect of the number of purchasers on the quality of the product.*"[30] Examples of direct network effects start with phone - whereby consumer's utility form buying a phone "*depends on the number of other households or businesses that have joined the telephone network*"[31] – and also include particularly communications technologies such as "*Telex, data networks, and over-the-phone facsimilie equipment.*"[32]

According to Liebowitz and Margolis, direct network effects are likely to occur in 'literal' or 'actual' networks with some physical characteristics which require some capital investment and can be owned as "*pipelines, cables, transmitters, and so on.*"[33] However, direct network effect can also occur in 'metaphorical' or 'virtual' networks like in the case of language or same car-brand owners which can exchange their experiences about car repairs.[34] What best distinguishes direct network effects from indirect network effects (according to Liebowitz and Margolis and according to Druzin) is that direct network effects involve "*some **direct interaction** among network participants.*"[35]

Indirect network effects

In turn, indirect network effects occur when "*a complementary good (spare parts, servicing, software) becomes cheaper and more readily available the greater the extent of the (compatible) market*,"[36] like in the case of a person buying computer concerned about a number of other buyers for the reason that "*the amount and variety of software that will be supplied for use with a given computer will be an increasing function of the number of hardware units that have been sold.*"[37] Other examples include "*video games, video players and recorders, and phonograph equipment*,"[38] or "*post-purchase service for durable goods, such as automobiles.*"[39] According to Liebowitz and Margolis, indirect network effects likely occur in 'metaphorical networks' which are very unlikely to be owned[40] and **do not involve direct interaction** between network members.[41]

As far as network effects are concerned, just as with reciprocity, they exist in public procurement markets at the macro-level only, and do not exist at the micro level. Network effects (for the first time employed by Druzin to explain the emergence of the standardisation

[30] See: Michael L. Katz and Carl Shapiro, 'Network Externalities, Competition, and Compatibility' (1985) 75(3) Am Econ Rev 424 at 424. See also: Joseph Farrell and Garth Saloner, 'Standardization, Compatibility, and Innovation' (1985) 16(1) Rand J Econ 70 at 70; Masaaki Kotabe, Arvind Sahay and Preet S. Aulakh, 'Emerging Role of Technology Licensing in the Development of Global Product Strategy: Conceptual Framework and Research Propositions' (1996) 60(1) J Marketing 73 at 76-77.

[31] See: note 30, Katz and Shapiro at 424.

[32] See: note 30, ibid.

[33] See: Stan. J. Liebowitz and Stephen E. Margolis. 'Network Externality: An Uncommon Tragedy' (1994) 8(2) J of Econ Perspectives (1986-1998) 133 at 135-136. This implies, according to Lemley and McGowan that such 'actual' networks are virtually limited to telecommunications services. See: Mark A. Lemley and David McGowan, 'Legal Implications of Network Economic Effects' (1998) 86(3) Calif L Rev 479 at 489.

[34] See: note 33, Liebowitz and Margolis, footnote 5 at 136. See also: note 33, Lemley and McGowan at 489 and footnote 29 at 489. Virtual networks, like a network of same language speaker, in principle cannot be owned (see: note 33 Lemley and McGowan at 490), subject to some minor exceptions like franchise systems like restaurants, bars, retailers, service firms, country clubs, or private schools (see note: 33, Liebowitz and Margolis, footnote 5 at 143).

[35] See: Stan J. Liebowitz and Stephen E. Margolis, 'Should technology choice be a concern of antitrust policy?' (1996) 9(2) J L Tech 283 at 287; Bryan H. Druzin, 'Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities' (2009-2010) 18(1) Tul J Intl Comp L 131 at 150.

[36] See: note 30, Farrell and Saloner at 70-71. See also: note 30, Katz and Shapiro at 424; note 30 Kotabe, Sahay and Aulakh at 77.

[37] See: note 30, Katz and Shapiro at 424.

[38] See: note 30, ibid.

[39] See: note 33, Liebowitz and Margolis at 135. Note, however, that – while Liebowitz and Margolis treated the two as one category falling under the concept of indirect network externalities – Katz and Shapiro originally made a distinction between (*i*) indirect network effects based on 'hardware-software paradigm,' and (*ii*) 'positive consumption externalities' which "*arise for a durable good when the quality and availability of postpurchase service for the good depend on the experience and size of the service network, which may in turn vary with the number of units of the good that have been sold,*" and which Katz and Shapiro exemplified just with the relation of foreign car's sales in the US market with the initial small size of service network. See: note 30, Katz and Shapiro at 424. However, according to Lempley and McGowan, positive consumption externalities – called 'positivefFeedback effects' by Lempley and McGowan and exemplified with relation between sales and service network of exotic cars – do not require any "*technological compatibility, interoperability, or even contractual relationships are necessary to sustain this "network.*"" because simple economy of scale works here and these are not networks at all. See: note 33, Lemley and McGowan, at 494.

[40] See: note 33, Liebowitz and Margolis, at 136. Nevertheless, as mentioned some virtual networks (like same language users) might generate direct network effects (see note 34). Still, indirect network effects including both hardware-software paradigm and positive consumption externalities (see note 39) will occur only in networks without physical characteristics.

[41] See: note 35.

of commercial legal practices) in economics refer to the phenomenon (first noticed by Rohlfs[42]) that "*there are many products for which the utility that a user derives from consumption of the good increases with the number of other agents consuming the good,*"[43] implying, among others, that many hardware-software solutions such as mobile phones or tablets, text/graphic editors, data storage devices, etc. tend to use standardized platforms, eventually leading to the domination of one standard.[44] According to Druzin, it works the same with the commercial legal standards as (*i*) "*commercial parties selecting law can be likened to consumers selecting a product, and are thus equally susceptible to the effects of network externalities*,"[45] (*ii*) "*the number of consumers who recognize the same legal norms is analogous to the number of consumers who use a product*,"[46] and (*iii*) "*there is an implicit benefit in adopting the dominant practice in that it facilitates a merchant's ability to do business with a greater number of traders*."[47]

Commercial legal standards have a very strong tendency to spontaneously synchronise because (*i*) commercial law combines both direct and indirect network effects (see: Figure 43),[48] and (*ii*) according to Druzin, in the case of systems combining both direct and indirect networks effects "*direct network externalities ~~will~~ play the most important and forceful role in producing a network effect, while any indirect network externalities that may arise ~~will~~, in a sense, supplement this process*."[49] Direct network effects lie here in that commercial law, similar to phones, "*is a tool to assist specific interactions between different parties*"[50] and "*like a telephone or fax machine, its value is in its ability to facilitate these direct interactions*."[51] In turn, indirect effects may emerge within specific legal products/platforms (like specific legal standards, or entire jurisdictions along with their dispute settlement systems) which merchants choose one over another because of specific jurisdiction's expertise, competence or cost of lawyers etc.[52] By frequently dealing with specific complex cross-border commercial disputes, courts and lawyers from jurisdictions selected by

[42] See generally: Jeffrey Rohlfs, 'A Theory of Interdependent Demand for a Communications Service' (1974) 5(1) Bell J Econ Manag Scien 16.

[43] See: ibid. Katz and Shapiro at 424. See also: note 33, Liebowitz and Margolis at 133.

[44] See: note 1 at 1077, 1078. See also: Thomas Eisenmann, Geoffrey Parker and Marshall W. Van Alstyne. 'Strategies for Two-Sided Markets' (2006) 84(10) Harv Bus Rev 92 at 94; A. Srinivasan and N. Venkatraman. 'Indirect Network Effects and Platform Dominance in the Video Game Industry: A Network Perspective' (2010) 57(4) IEEE Trans Engg Manag 66 at 66.

[45] See: note 35, Druzin at 134.

[46] See: note 35, Druzin at 160.

[47] See: note 1 at 1079.

[48] While Lemley and McGowan claimed that (*i*) networks can be allocated on the continuum ranging from actual networks, through virtual networks to networks generating 'simple positive feedback phenomena,' and (*ii*) "*[t]~~T~~he greater the inherent value of the good relative to any value added by additional consumers, the less significant the network effect*" (see: note 33, Lemley and McGowan at 488), Druzin argues contrary to Lemley and MCGowan that one system can be allocated on two points of such continuum and generate both direct and indirect network effects like "*telephone, whose value will increase primarily from the ability to call more people, but also from any corresponding improvement in service (quality, speed, etc.) that may result from the increase in users*.". See: note 35, Druzin at 150-151.

[49] See: note 35, Druzin at 152-153.

[50] See: note 35, Druzin 160.

[51] See: ibid.

[52] See: ibid.

merchants would even more expertise or unique qualifications like for example London in the field of insurance and shipping,[53] which is not unlike making new software applications available for a given operating system. Such indirect network effects reinforce direct effects as an increasing expertise and reputation of a given jurisdiction, or of dispute settlement system, attracts even more merchants just like better quality of telephone-related service might attract even more telephone users than a mere possibility to communicate.[54]

However, in public procurement markets, at the micro-level typical mandatory norms, in principle, disallow free choice of law and forum in the case of public contracts,[55] so they preclude procurers from agreeing on choosing predominant platforms with their suppliers/contractors.[56,57] In turn, at the macro-level,[58] network effects explain the outcome of the talks on the framework of the future GPA in the OECD in the 1960s, given the close economic links between those countries needing such common platform,[59] and the subsequent tendency to converge all other platforms of conducting procurement process into one pretty uniform public procurement-specific legal order (GPA, GPA-modelled public procurement-related chapters of the RTAs, the EU's public procurement directives, UNCITRAL model laws, and conditions of loans/aid granted by multinational financing institutions).[60] Arguably, Western-European mostly Francophone countries with similar legal systems, during their talks in the OEEC/OECD in 1960s, could initially overcome so-called 'zero-output trap' and agree on the common platform of liberalisation without a certainty as to this platform's future number of users and utility because they altogether behaved more like multi-location organizations which first adopted fax machines for the purposes of internal commutations.[61] Then, the framework of the GPA has proved to

[53] See: ibid. at 158.

[54] See: ibid. at 152, 158.

[55] The right to choose forum is also seen by Linarelli as a factor facilitating a harmonisation of legal orders. Linarelli explained it in a way that the choice of law is the king of 'gap-fillers'. However, there are situations in which co-operating merchants do not share the jurisdiction but, at the same time, transaction costs related to the choice of law are too high. In such cases at least the choice of forum might play the gap-filler role. See: John Linarelli. 'The Economics of Private Law Harmonization' (2002) 96 Proceedings of the Annual Meeting (American Society of International Law) 339 at 340.

[56] Admittedly, in particular sectors, public procurers might follow prevailing platforms, such as model contractual clauses published by the *Fédération Internationale Des Ingénieurs-Conseils* ('FIDIC') in the case of constructions/infrastructural works, build-and-operate agreements or in the case of employing related consultants (see: Hök Stieglmeier. 'Relationship Between FIDIC Conditions and Public Procurement Law—Reliability of Tender Documents' (2009) 23(1) Intl Cons L R 23 at 23). However, in contrast to private markets, the FIDIC platform can only be used to the extent that it does not contravene mandatory rules governing public procurement (see: ibid. at 24).

[57] See: ibid. It is extremely unlikely that any national public procurement-related law would allow (*i*) choosing law other than domestic law or (*ii*) subjecting disputes arising out of public contracts purely private arbitration. Also, international commitments like the GPA or the GPA-modelled RTAs only require assuring that appeal/challenge procedures before state courts are available for suppliers/contractors. See: GPA94, article XX.

[58] According to Druzin, at the macro level "*state actors adopting the provisions that structure treaty arrangements. Given sufficient interaction, network effects will cause a general drift toward a single standard.*" See: note 1 at 1080.

[59] In turn, the lack of network effects, likely caused by the geographical situation, might explain the long-standing opposition to the GPA by Australia and New Zealand (see section 2.3.2). Indeed, network effects leading to the emergence of a local trade legal order do not lead to absolute convergence and do not remove a kind of polycentrism which remains in place, which Druzin explains with the concept of 'network insulation' (see: note 1 at 1081-1082).

[60] See: ibid.

[61] See: Michael L Katz and Carl Shapiro, 'Systems Competition and Network Effects' (1994) 8(2) J Econ Perspect 93 at 97.

produce direct network effects, by being like telecommunications grid or a common language and by thus allowing intergovernmental negotiations on the scope of liberalisation whereby each new GPA-framework-user has increased the utility of pre-existing users. And subsequently, with an increasing number of users, thanks to indirect network effects, this platform has gained new applications such as bilateral/regional intergovernmental liberalisation (conclusion RTAs modelled after the GPA),, borrowing from development banks or proving integrity of procurement systems (implementation of UNCITRAL model laws in consistency with GPA's framework).

9.1.1.d Impact on liberalisation

As far as international liberalisation of public procurement markets is concerned, the lack of discussed micro factors (positive and negative reciprocity, market forces and network effects) in these markets explains a huge disconnect between (*i*) a high level of the standardisation of public procurement-specific global legal order (framework of the GPA, RTAs, etc.), and (*ii*) the relatively limited scope of actually reached concessions (coverage of the GPA, RTAs, etc.). In private markets (general commerce), the liberalisation mostly within the framework of the WTO and the emergence of global commercial legal order gradually institutionalised within the framework of other institutions have been separate issues. In contrast, in public procurement markets, the changes to the legal order and to its application (GPA's, RTAs' coverage) have been intertwined and have come as one package.[62] The strong positive reciprocity at the macro level has driven negotiators toward an overregulated framework of the GPA without prior consensus among suppliers/contractors and public procurers at the micro level. The strong macro-level network effects have driven this framework's replication into other public procurement-related platforms.

As a result, governments searching for a platform of liberalisation of public procurement markets with other countries have been left with extremely limited choice. Clearly, some governments can be dissatisfied with the dominant platform and can be reluctant to subject their procurement thereto. Also, some governments might fear that their previously uncovered executive agencies and local governments could be similarly dissatisfied with this platform and could not comply with it. Thus, some governments might believe - in the light of strong macro-level negative reciprocity - that it is better not to coerce potentially reluctant executive agencies or local governments than to impose an unwanted platform on them,

[62] Indeed, it was seen very clearly when the negotiations on the revisions to the GPA that were meant to be agreed on in 2006 were stalled as the negotiating parties did not want to accept changes to the framework without satisfactory changes to the coverage and *vice versa* (see further section 9.3.1).

which could bring the risk of disproportionate retaliatory actions by third countries in the case of likely sub-central or executive non-compliance.

9.1.1.e Lack of micro drivers and horizontal policies

The lack of prior global consensus as to the legitimacy and scope of incorporating non-commercial considerations gradually developed in individual contracting between business and foreign public procurers (micro factors) can also explain a standstill in standardizing the pursuit of cross-border horizontal policies within the existing uniform platform (the GPA and its derivatives). Absent cross-regional micro factors, the attitude to non-commercial considerations in public procurement markets is still strongly polycentric (the EU's focus on cross-border green/social considerations, Chinese focus on technology transfers, the US's preference for traditional discriminatory measures). However, the challenge of its standardisation has already become global as public procurers are expected to apply exactly the same standards, an incorporation of similar non-commercial considerations included, while dealing with suppliers/contractors from various centres.[63]

To some extent, the lack of micro factors impeding the liberalisation of public procurement markets can be cured by allowing public procurers to more follow micro-factors-driven developments in private markets (see section 6.2.1.d). However, the point is that also private attitude to the integration of non-commercial considerations in private procurement processes is, to some extent, characterised by polycentrism. For instance, the EU's public procurers firstly followed private CSR practices (see section 8.2.2) and subsequently fair trade considerations with a focus on impacting business operations in third countries (see section 8.2.3), whereas, at the same time, Chinese public procurers were reluctant to abandon formalised indigenous policies (see section 7.1.3) somewhat aligning to aggressive technology transfer-oriented policies of the SIE actually operating in private markets. Private procurers can cope with polycentrism of commercial legal order by confining their operations to specific regions or by diversifying purchasing strategies toward various public suppliers/contractors, but public procurers subjected to international liberalising commitments and principles of NT and MFN cannot (see proposed solution in section 10.2.2).

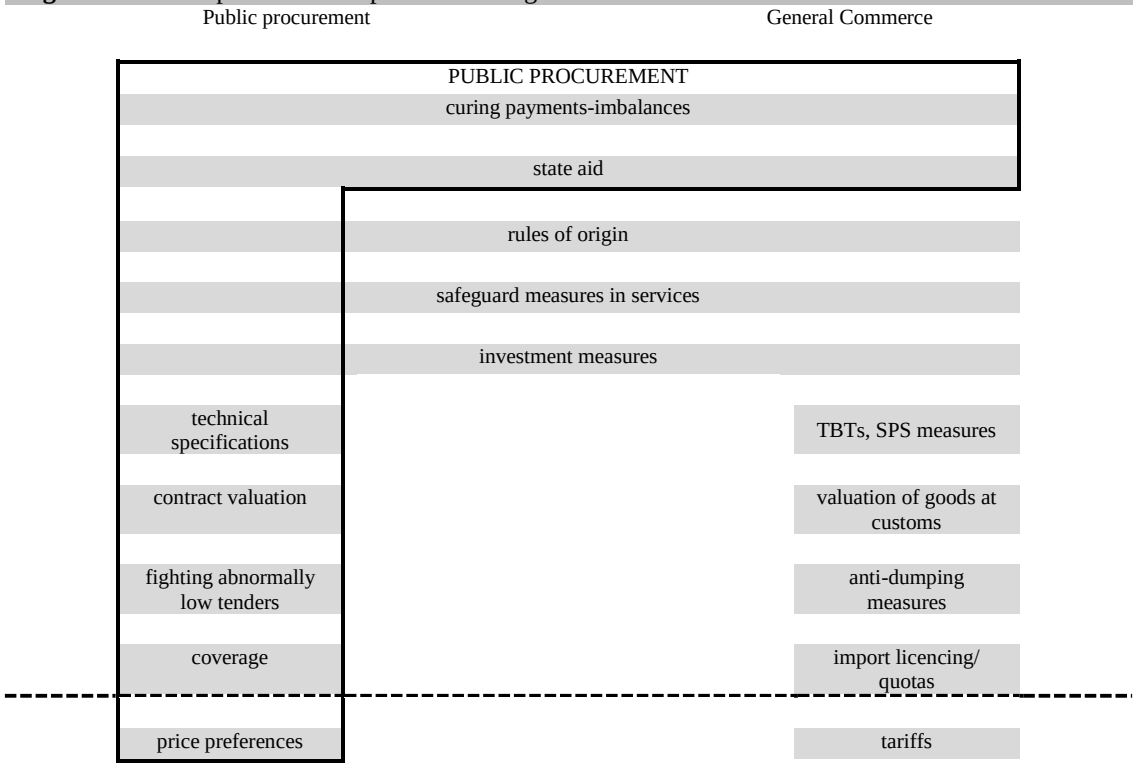
Altogether, any efforts of one centre to integrate its own attitude to cross-border horizontal policies into the universal platform must meet the resistance of other centres. Therefore the

[63] The idea of the GPA's universalism has clashed with polycentrism of public procurement legal orders since the very beginning. For instance, in the late 1960s, Baldwin looked very sceptically at the development in the works in the OECD related to the framework of the future international instrument on government procurement by (*i*) challenging – from the US perspective - the view taken by the OECD that 'public procurement is administratively inefficient' and (*ii*) suggesting first making some 'small-scale experiments' with tentatively universal solutions gradually emerging in the OECD. See: Robert E. Baldwin, *Nontariff distortions of international trade* (Brookings Institution, Washington 1970) 210 at 78.

green light for the incorporation of environmental criteria under the GPA's revision of 2012 surely pleased the EU's public procurers but, at the same time it must have added to problems of negotiations on accessions of emerging economies to the GPA,[64] and similar effects might be expected in the case of hypothetical recognition of cross-border policies under this agreement (see further section 9.4.2.b).

9.1.2. Elimination of NTBs

Figure 44. Public procurement-specific versus general NTBs.



In addition to the absence of micro factors, the second major difference of public procurement-specific negotiations compared to general commerce has lain in that the negotiating parties could not simply agree on the scope of liberalisation of public procurement markets (coverage) in contrast to tariffs which could be greatly reduced while the elimination of NTBs could be left to later or separate negotiations. On the contrary, public procurement on the whole has been seen as a self-standing NTB from the perspective of the entire multilateral trading system, especially in the context of employing public procurement to cure payment imbalances and as a form of state aid (see Figure 44).

The negotiations on the GPA's coverage, themselves, have resembled more of negotiations on the removal of import licensing/quotas than of tariffs. Because negotiations on the GPA have always been tangled with negotiations on the GPA's framework (see sections 9.1.1.d, 9.3.1.c), they have had to simultaneously encompass a number of NTBs built into this

[64] And also to problems of (*i*) developed economies' domestic bidders who rely on foreign inputs, as well as (*ii*) taxpayer concern groups.

framework and regulated differently than in general commerce. Such public-procurement-specific NTBs include technical specifications (opposed to TBTs, SPS measures), rules of public contracts' valuation (opposed to customs valuation) or rules of fighting abnormally low tenders (opposed to rules governing anti-dumping actions). At the same time, some public-procurement-relevant NTBs remained regulated largely like in general commerce including, for instance, rules origins or barriers to foreign investment or safeguard measures in services (relevant for foreign suppliers/contractors operating through local establishments). As a result, despite the plurilateral character of the GPA, liberalisation of public procurement markets through the elimination of NTBs has been also discussed in multilateral committees.

9.1.2.a Balance of payments

Before the adoption of the GPA79, public procurement seemed to be considered as one major problem rather than a group of separate NTBs. However, it was not clear which committee should discuss it. When the massive reduction of tariffs in the GATT Kennedy Round (1963-67) revealed the importance of the NTBs,[65] the US delegation – in its submission to the Sub-Committee on Non-Tariff Barriers – started to continually list public procurement among other self-standing NTBs.[66] Some other delegations followed such conceptual approach.[67] Nonetheless, at that time, public procurement was in practice primarily considered as a tool for curing balance of payments imbalances which in the Kennedy Round were discussed independently from other NTBs. Therefore, public procurement matters only formally belonged to the Sub-Committee on Non-Tariff Barriers.

[65] See: note 63, Baldwin at 2; Richard A. Horsch. 'Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Government Procurement', (1979-1980) 12(2) NYU J Intl L & Pol 315 at 315.

[66] "*Government procurement, sanitary regulations, State trading, border tax adjustments, dumping and restrictive import policies on coal.*" See: WTO, Sub-Committee on Non-Tariff Barriers, 'Non-Tariff Barriers - Submission by the Government of the United States' (12 November 2011) TN.64/NTB/5, para. 4 at 2. See also: GATT, 'Sub-Committee on Non-Tariff Barriers - Procurement Procedures to Be Adopted by Participating Governments - Proposals by the United States Government' (15 July 1964) TN.64/NTB/30, point (i) at 1.

[67] Also Canada proposed classifying public procurement as a self-standing NTB in the way that "*[a]A further classification might be that concerned with government procurement policies and State-trading practices. Administration regulations regarding tendering and other government procurement regulations which hamper participation by foreign suppliers might be part of this category, and also questions relating to the operation of trading monopolies.*" See: GATT, Sub-Committee on Non-Tariff Barriers, 'Trade Negotiations Committee - Sub-Committee on Non-Tariff Barriers - Non-Tariff Barriers - Submission by the Canadian Delegation' (24 January 1964) TN.64/NTB/11, para. 6 at 2. As of April 1964, the US, the UK, Canada and Sweden were interested in discussing public procurement as one of the NTBs. See: GATT, 'Trade Negotiations Committee - Stage Reached by the Sub-Committee on Non-Tariff Barriers - Note by the Secretariat' (30 April 1964) TN.64/22 at 2. The then EC was added to the list of those countries in May 1964 (see: GATT, 'Trade Negotiations Committee - Stage Reached by the Sub-Committee on Non-Tariff Barriers - Non-Tariff Barriers So Far Identified - Addendum' (4 May 1964) TN.64/22/Add.1 at 1), plus Denmark Switzerland and India in July 1964 (see: GATT, Sub-Committee on Non-Tariff Barriers, 'Membership of Groups - Note by the Executive Secretary' (15 July 1964) TN.64/NTB/31). The subsequent documents of various GATT bodies slightly differed but also listed government procurement as a self-standing NTB. For instance in October 1968, the GATT Secretariat grouped public procurement along with (*i*) 'government aids', (*ii*) 'state trading', (*iii*) 'government monopoly practices, including exclusive franchise to private or cooperative enterprises', (*iv*) 'screen time, local content, mixing requirements', and (*v*) 'export restraints; minimum price requirements' without naming this group (see: GATT Secretariat, 'Tentative Groups for Analysis of Non-Tariff Inventory - Secretariat Proposal' (17 October 1968) Spec(68)106), and one day later the Committee on Trade in Industrial Products listed public procurement along with (*i*) 'government aids', (*ii*) 'state trading', (*iii*) 'government monopoly practices, including exclusive franchises to private and co-operative enterprises' under the wider category of 'Government participation in trade' (see: GATT, Committee on Trade in Industrial Products 'Classification of Non-Tariff Trade Barriers - Working Group Proposal' (18 October 1968) Spec(68)110).

The UK's delegation and the executive secretariat of Sub-Committee on Non-Tariff Barriers proposed the establishment of a public procurement-specific working group.[68] However, it only met once in July 1964.[69] The UK's delegation merely managed to lambast the US for trying to cure its payment imbalances with restrictive public procurement through that short-lived group,[70] and Japan did the same via the Sub-Committee on Non-Tariff Barriers.[71]

After autumn 1964, the discourse on public procurement in that sub-committee was discontinued, which might be linked to the launch of works on the public procurement code in the OECD Trade Committee (see section 2.3.1). Subsequently, delegates continued to discuss public procurement-related issues in the Committee on Balance-of-Payments Restrictions. In that committee, for instance in 1975, Brazil was enquired about *"government instruction which required government procurement to be directed to countries with which Brazil Had a favourable balance of trade,"*[72] while during the 1970s India and Pakistan were both asked about received tied aid (see section 4.2.3) for projects channelled through public procurement[73] and about public purchases of commodities on the verge of state trading and public procurement.[74] Over time, the significance of government actions aiming at curing payment imbalances has greatly diminished in line with Baldwin's and Richardson's prediction made in 1972 that problem of payment imbalances was already then

[68] See: GATT, Sub-Committee on Non-Tariff Barriers, 'Note by the Secretariat on Meeting of 15 June 1964' (30 June 1964) TN.64/30 para. 12 at 3; GATT, Sub-Committee on Non-Tariff Barriers, 'Meetings of Groups - Note by the Executive Secretary' (2 July 1964) TN.64/NTB/22.

[69] See: GATT, 'General Agreement on Tariffs and Trade - Groups Examining Non-Tariff Barriers Have Held First Meetings' (22 July 1964) GATT/888.

[70] "*The United Kingdom note that the Working Party of the OECD Trade Committee, in its draft report on United States Legislation and Regulations, Applicable to United States Government Procurement, expressed the view that there should be progressive steps to relax the impact of the United States balance-of-payments programme on foreign suppliers as their balance-of-payments position improved. The United Kingdom are of the opinion therefore that preferences accorded by the United States for domestic products purchased by public authorities whether for use off-shore or in the United States should be phased out and that the first step should be the early withdrawal of the 50 per cent margin of preference. Other non-tariff restrictions discriminating against public purchases of foreign goods should also be abolished.*" See: GATT, 'Group on Government Procurement Policies - Preference for Domestic Products in Purchases by Public Authorities (United States "Buy-American" and Other Restrictions) - Note by the United Kingdom Delegation' (17 June 1964) Spec(64)139, para. 9 at 2.

[71] See: GATT, Sub-Committee on Non-Tariff Barriers, 'Regulations regarding Government Procurement (United States "Buy-American" Act and Other Preference for Domestic Products) - Note by the Japanese Delegation' (16 July 1964) TN.64/NTB/33 at 1

[72] See: Committee on Balance-of-Payments Restrictions, 'Report on the consultation under Article XVII:12(a) with Brazil and examination of import deposit scheme' (17 May 1976) BOP/R/88 at 13.

[73] See: Committee on Balance-of-Payments Restrictions, 'Report on the consultation under Article XVIII:12(b) with India' (8 November 1973) BOP/R/70, para. 6 at 3; Committee on Balance-of-Payments Restrictions, '1967 Consultation Under Article XVIII: 12(b) with Pakistan: Basic Document for the Consultation' (14 July 1967) BOP/70, para, 2.v.3 at 4.

[74] It is now unclear if those countries were involved in imports for the purposes of resale (which would have qualified as state trading) or not-for-resale (e.g. for handling commodities for free – which would have been a public procurement) or perhaps in some combinations of the two. The discussion was about 'government grain procurement' in the case of India [see: Committee on Balance-of-Payments Restrictions, 'Report on the consultation under Article XVIII:12(b) with India' (7 December 1978) BOP/R/104 at 2) and about 'monopoly procurement of Basmati paddy' in the case of Pakistan [see: Committee on Balance-of-Payments Restrictions, '1987 consultation under Article XVIII:12(B) with Pakistan: Statement submitted by Pakistan under Simplified Consultation Procedures' (6 October 1987) BOP/273, para. 20 at 15]. Also Ghana had to explain why "*some socially sensitive imports are, however, handled by a state procuring agent, the Ghana National Procurement Agency*". See: Committee on Balance-of-Payments Restrictions, '1983 Consultation with Ghana: Basic document for the Consultation' (16 November 1986) BOP/238 at 10.

close to elimination because all major currencies had already been floating, thereby largely eliminating payment imbalances.[75]

9.1.2.b TBTs

The commencement of the discussion on curbing the TBTs preceding the official launch of the GATT Tokyo Round[76] immediately revealed the need to draw a clear line between regulating 'technical regulations'[77] and 'standards'[78] for the purposes of general commerce and 'technical specifications' for the purposes of public procurement. Preserved GATT documents do not show delegations' exact arguments, but the subsequent drafts of the future GATT Tokyo Round TBT agreement[79] prove that the delegations, for long, were in the dark as to how to resolve that problem; to start with the expert paper of May 1971 suggesting that the future TBT agreement shall also cover public procurement. According to that paper, the agreement was meant to apply, among others to 'voluntary standards' and 'voluntary standards bodies' including "*public purchasing agencies, associations of insurance companies, companies which dominate the production or use of the product concerned in the local market, professional societies (...) which have no overt powers to issue mandatory standards but whose standards, in practice, have mandatory effect, for example (…) because of market domination.*"[80] In line with that, the first draft of July 1972 required parties to *"use their best efforts to ensure that any-voluntary standard for a product which is, or is*

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[75] See: Robert E. Baldwin and J. David Richardson, 'Government Purchasing Policies, Other NTB's, and the International Monetary Crisis' in Simon J. Evenett and Bernard M. Hoekman (eds), *The WTO and government procurement: Critical perspectives on the global trading system and the WTO* (Critical perspectives on the global trading system and the WTO, Edward Elgar, Cheltenham 2006) 235 at 235-23. However, the problem of fixed rates returned with a rapid emergence of economies whose governments still fix exchange rates (see for instance: Bryan Mercurio and Celine Sze Ning Leung. 'Is China a "Currency Manipulator"?: The Legitimacy of China's Exchange Regime Under the Current International Legal Framework' (2009) 43(3) Intl Law 1257) leading to the revival of the problem. For instance, in order to slightly improve trade imbalances, and political tensions about it, the Chinese government and its SIE reserved a contract backlog worth roughly USD15 billion to the US industries back in 2006 (see: Ping Wang, 'Accession to the Agreement on Government Procurement: the case of China' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 90 at 101-102; see also: section 1.5.2). Contemporarily, if payment imbalances occur, public procurement has become virtually the only tool for curing them because, meanwhile, the possibility of using other NTBs to this end has been significantly limited GATT, 'Balance-of-Payments: Declaration on Trade Measures 1979 (signed at Tokyo on 12 April 1979, in force 1 January 1980) GATT Secretariat (28 November1979) LT/TR/DEC/1; Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 (signed at Marrakesh on 15 April 1994, in force 1 January 1995) WTO Agreement Annex 1A 29.

[76] The first meeting within the framework of the GATT Tokyo Round was scheduled for 12-14 September 1973. See: GATT Secretariat, 'Ministerial Meeting - Tokyo, 12 - 14 September 1973 - Hotel Accommodation in Tokyo - Note by the Secretariat' (7 June 1973) MIN(73)INF/1 at 1.

[77] "*Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*" See: Agreement on Technical Barriers to Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A,1994 117 Annex I, para. 1.

[78] "*Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."* See: ibid. Annex I., para. 2.

[79] See: Agreement on Technical Barriers to Trade 1979 (signed at Tokyo on 12 April 1979, in force 1 January 1980) GATT Secretariat (1979) LT/TR/A/5 1.

[80] See: GATT, 'Working Group 3 on Standards, Expert Drafting Group on Standards - (Possible Elements for a Set of Principles on Standardization) - (Draft GATT Code of Conduct regarding Standards Which May Act as Technical Barriers to Trade)' (28 May 1971) Spec(71)45.

likely to be, the subject of substantial purchases by public bodies is such as to be suitable to serve as a basis for such purchases."[81]

The shift toward a firm exclusion of public procurement from that agreement can first be seen in the draft of March 1973 where the best-effort requirement disappeared[82] and the scope of the entire agreement was limited by the exclusion of "*standards which are prepared for use by a single enterprise, whether governmental, semi-governmental or non-governmental, either for its own production or purchasing purposes*" from the definition of standards,[83]very likely at the request of the US.[84] In September 1975 'standards' were replaced with 'technical specifications' in conformity with new 'ECE/ISO definitions'[85] at the request of the GATT Secretariat[86] and of 'Nordic Countries'.[87] Peculiarly, the definition of technical specifications in the draft of March 1978 did not include any exclusion of technical specifications tailored for single/individual procurement[88] but the versions of December 1978 already stipulated, as in the adopted text, that "*[p]Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Code but are addressed in the Code on government procurement*."[89]

Depending on the perspective, the complete exclusion of technical specifications from the application of subsequent GATT/WTO TBT agreements might be assessed as a grave error of negotiators acquiescing to discriminatory practices at the executive level or as a very well-balanced decision allowing a moderate liberalisation. On the one hand, one could claim that that decision has led to an untamed imposition of a discriminatory process and product-related requirement by public procurers requiring more than what is mandated under general

[81] See: GATT, 'Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade - Revised Draft for Consideration by Drafting Group' (21 July 1972) INT(72)72, para. 4.e at 11.

[82] See: GATT, 'Draft - Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade' (22 March1973).INT(73)28, para. 3 at 5-6.

[83] See: ibid. Annex 1 para.1 at 29.

[84] The indirect evidence lies in that later, in 1975 and 1976, the US was the only delegation defending this solution. See: Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Technical Barriers to Trade", 'Definitions - Note by the Secretariat' (25 September 1975) Spec(75)27, para. 2.3. at 2; Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Technical Barriers to Trade", 'Points before the Sub-Group - Note by the Secretariat' (10 March 1976) MTN/NTM/w/37 at 2.

[85] At the initial stage of the GATT Tokyo Round "*no generally accepted definitions for basic terns in standardization existed*" (see: GATT, Group "Non-Tariff Measures", 'The applicability of the ECE/ISO definitions for the proposed" standards code Note by the Secretariat' (17 September 1975) MTN/NTW/W/18, para. 1 at 1) and "*it was necessary for the purposes of the Code to choose some terns and to define then*". (See: ibid.). Meanwhile, "*widely accepted definitions have been arrived at by ECE* [United Nations Economic Commission for Europe] *in close co-operation with ISO*" (see: ibid. para. 2) and the "*ECE has already finally endorsed the definitions"* (see: ibid.).

[86] See: ibid. MTN/NTW/W/18, paras. 1, 2.

[87] See: Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Technical Barriers to Trade", 'Proposal by Nordic Delegation' (24 September 1975) MTN/NTM/W/19, para. 2.1.

[88] See: Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Technical Barriers to Trade", 'Draft Code of Conduct for Preventing Technical Barriers to Trade - Note by the Secretariat' (29 March 1978) MTN/NTM/W/150, annex 1 para. 1 at 31.

[89] Group "Non-Tariff Measures" - Sub-Group "Technical Barriers to Trade", 'Technical Barriers to Trade - Revision' (5 December 1978) MTN/NTM/W/192/Rev.1.

laws in force in their jurisdictions. On the other hand, however, one could claim that the application of subsequent GATT/WTO TBT agreements to the procurement covered by the GPA would not have been feasible because some procurers - especially in the case of high-value internationally contestable contracts - would frequently need to buy also non-off-the-shelf products. In addition, even if it had been feasible, it could have led to even more meagre coverage than was actually achieved. In such hypothetical case, the negotiating parties could have limited their coverage offers perceiving an integration of the rules stemming from TBT agreements into the GPA framework as (*i*) yet another unnecessary and burdensome element of the dominant platform of liberalisation (see section 9.1.1.d), or (*ii*) as a 'crafty' attempt of one centre to impose its bias against channelling horizontal policies through technical specifications on other centres not sharing this bias (see section 9.1.1.e *in fine*).

9.1.2.c Back to plurilateral committees

A focus on the new challenges to public procurement liberalisation, like the facilitation of the provision of services through local establishments after the establishment of the WTO and adoption of GATS,[90] brought back the liberalisation of public procurement markets to the agenda of multilateral committees dealing with specific NTBs. This was the case in the 1990s in the GATS Committee where the now stalled public procurement-related multilateral negotiations under the mandate of GATS Article XIII:2[91] (see: section 2.4.1) were conducted along with the talks on 'emergency safeguard measures'[92] believed to adversely affect local establishments and to be able to cause divestments.[93] Also more recently, after 2010, this tendency could be seen in the works of the Committee on Trade-Related Investment Measures and controversies related to the domestic content requirement imposed through national public procurement laws on purchases by private foreign investors operating in

[90] According to Evenett and Hoekman, this has actually become a priority for further liberalisation of public procurement markets. See: Simon J. Evenett and Bernard Hoekman, 'Procurement of Service and Multilateral Discipline' in Pierre Sauvé and Robert M. Stern (eds), *GATS 2000: new directions in services trade liberalization* (Center for Business and Government, Harvard University, Boston 2000) 143 at 144. They also observed that locally established foreign firms competing for public service contracts are often "*treated as "nationals" so that the effects of discrimination may be minimal minimal so long as FDI is the preferred mode of supply*. *However some government may differentiate between locally established firms on the basis of ownership*" (see: ibid. at 153).

[91] "*There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.*" See: GATS, Article XIII:2.

[92] "*There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.*" See: GATS, Article X.1.

[93] See: WTO Working Party on GATS Rules, 'Report of the Meeting Held on 18 October 1995 - Note by the Secretariat' (14 November 1995) S/WPGR/M/2, para. 9 at 2; WTO Working Party on GATS Rules, 'Report of the Meeting of 23 February 1996 - Note by the Secretariat' (19 March 1996) S/WPGR/M/4, para. 5 at 1; para. 6 at 2; WTO Working Party on GATS Rules, 'Report of the Meeting of 22 May 1997 - Note by the Secretariat' (30 June 1997) S/WPGR/M/11, para. 2 at 11; WTO Working Party on GATS Rules, 'Report of the Meeting of 23 July 1997 - Note by the Secretariat' (3 September 1997) S/WPGR/M/12, para.9 at 2; WTO Working Party on GATS Rules, 'Report of the Meeting of 1 October 1997 Working Party on GATS Rules, 'Report of the Meeting of 23 June 1998 - Note by the Secretariat' (31 July 1998) S/WPGR/M/17 - Note by the Secretariat' (19 November 1997) S/WPGR/M/13, para. 8 at 2.

utilities sectors[94] - which foretells that the talks on curbing public procurement-related NTBs might be increasingly conducted beyond the Committee on Government Procurement.

9.1.3. Public procurement as part of a package

The level of liberalisation achieved in public procurement markets despite the discussed obstacles can be explained by the fact that public procurement-specific concessions negotiated in plurilateral circles have always been tangled with concessions made in general commerce. Theoretically, to quote Lawrence, "*[t]The issues contained in clubs* [plurilateral agreements] *should also not overlap with issues that are already part of the WTO's single undertaking*."[95] The plurilateral nature of the GPA (see section 2.3.2) should mean that accession to the GPA is not mandatory, and that the WTO members should be able to freely discriminate against persons of each other in uncovered public procurement.[96] Also, the consequences of the non-compliance with the GPA should be fully insulated from the multilateral general-commerce system as *"any dispute arising under any Agreement* [GPA] *listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in Appendix 1 of the Dispute Settlement Understanding."*[97]

However, the practice has been different. In the course of the Tokyo Round, for instance, the Japanese delegation made a statement that: "*Japan is offering these new entities, even though partially, in order to maximize the overall MTN package despite the fact that Japan's negotiating partners are not offering or are making specific exclusions of public transportation and telecommunication sectors. In the present round of negotiations Japan does not expect reciprocity in its strict sense in order to achieve successful conclusion of the*

[94] See: WTO Committee on Trade-Related Investment Measures, 'Minutes of the Meeting Held on 1 October 2010 - Note by the Secretariat' (1 November 2010) G/TRIMS/M/30, para. 19 at 3; WTO Committee on Trade-Related Investment Measures, 'Minutes of the meeting held on 3 October 2011 - Note by the Secretariat' (10 November 2011) G/TRIMS/M/31, paras. 18, 19 at 3, para. 20 at 3, 4, para. 23 at 4, para. 30 at 5; WTO Committee on Trade-Related Investment Measures, 'Minutes of the special meeting held on 4 May 2012 - Note by the Secretariat' (14 June 2012) G/TRIMS/M/32, paras. 23-26 at 4, 5; WTO Committee on Trade-Related Investment Measures, 'Minutes of the special meeting held on 1 October 2012 - Note by the Secretariat' (22 November 2012) G/TRIMS/M/33, paras. 33-52 at 6-8; WTO Committee on Trade-Related Investment Measures, 'Minutes of the meeting held on 30 April 2013 - Note by the Secretariat' (19 June 2013) G/TRIMS/M/34 paras.29-41 at 5-7, paras 93-100 at 13; WTO Committee on Trade-Related Investment Measures, 'Minutes of the meeting held on 4 October 2013' (20 December 2012) G/TRIMS/M/35 paras..30-46 at 5-7, paras. 96-102 at 14-15, paras. 19-36 at 4, 7, paras. 67-79 at 9-12, WTO Committee on Trade-Related Investment Measures, 'Minutes of the meeting held on 20 June 2014' (5 September 2014) G/TRIMS/M/36, paras. 107-115 at 16-17.

[95] See: Robert Z. Lawrence. 'Rulemaking Amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection' (2006) 9(4) J Intl Econ L 823 at 826.

[96] See: James Boumil S. 'China's Indigenous Innovation Policies under the TRIPS and GPA Agreements and Alternatives for Promoting Economic Growth' (2011-2012) 12(2) Chi J Int'l L 755 at 775.

[97] See: GPA12 Article XX.3. See also: note 95 at 826.

Tokyo Round. However, Japan retains its right to raise the question of reciprocity, should the question arise in the major review after three years of implementation."[98]

Subsequently, according to Blank and Marceau, formally separate general and public procurement-specific negotiations in the WTO Uruguay Round were 'intrinsically linked'[99] and "*the US Trade Representative at that time, Carla Hills, was reported as saying that government procurement was one of the most important market access elements in the Uruguay Round*."[100] The convergence of appendixes to the GATS and of services-specific appendices to the GPA (see section 2.3.4) is perhaps the best proof that both negotiations, indeed, went in tandem.[101] After the Uruguay Round, the GPA membership has become *de facto* mandatory for new WTO members forced to accept an obligation to negotiate future accession to the GPA.[102] Even the premise of the insulation of public procurement-specific controversies from dispute resolution in general commerce has been somewhat challenged by mentioned recent developments in the Committee on Trade-Related Investment Measures (see section 9.1.2.c *in fine*).

In addition, links between reaching public procurement-specific and general concession must be even stronger in the case of negotiating RTAs, in the case of which (*i*) public procurement concessions can more easily be traded for other concessions than within a multilateral framework, (*ii*) negotiating parties do not need to argue about procedural solutions instead relying on the GPA's framework.

9.1.4. Interim conclusion

To summarise the general remarks − while the access to public procurement markets might be traded for other concessions within the multilateral system − public procurement-specific

[98] See: GATT, 'Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Government Procurement" - Statement by the Delegation of Japan' (10 April 1994) MTN/NTM/W/239 at 1.

[99] See: Annet Blank and Gabrielle Marceau. 'History of the government procurement negotiations since 1945' (1996) 4 Pub Proc L Rev 77 at 115.

[100] See: ibid.

[101] While linking public procurement-specific and general-commerce concessions has in principle driven liberalisation, it also was a deal-breaker for the Philippines which failed to accede to the GPA in the early 1980s (and ever thereafter) as its delegation demanded public-procurement-specific non-reciprocal concessions (the Philippines tabled offers with very poor subjective coverage) in exchange for concessions made elsewhere, by claiming that "*[s]Signatories - particularly Philippines' trading partners - would look at its interest as a part of the whole negotiation package in the context of the Tokyo Round and would view the Philippines' initial efforts favourably, considering that significant changes had taken place recently in the Philippine trade régime, including the liberalization of tariff and monetary policies, involving items of actual and particular interest to most developed countries.*" See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 8 - 9 July 1981' (29 July 1981) GPR/Spec/9 point A.4 at 2.

[102] As for 2011: "*[n]Nine other WTO Members are in the process of acceding to the Agreement: Albania, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman, Panama and Ukraine. A further four WTO Members have provisions regarding accession to the Agreement in their respective Protocols of Accession to the WTO: Croatia, the Former Yugoslav Republic of Macedonia, Mongolia and Saudi Arabia*." See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Report (2011) of the Committee on Government Procurement' (16 November 2011) GPA/110, para. 6 at 1, 2 (footnotes omitted). The obligation to negotiate accession to the GPA also covers, among others, Russia (see: WTO, Working Party on the Accession of the Russian Federation, 'Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization' (WT/ACC/RUS/70; WT/MIN(11)/2) 17 November 2012, paras. 1142-1143).

negotiations are largely autonomous because they bring very different challenges. In contrast to general commerce, public procurement-specific negotiations also embrace (*i*) regulating the global legal order governing individual contracting in cross-border transactions between public procurers and their foreign suppliers/contractors, which could not emerge spontaneously, as well as (*ii*) eliminating the NTBs stemming from the individual conduct of public procurers. The global harmonisation of issues like rules of public contracts conclusion, criteria of sourcing (what to buy and from whom, including CSR/PSR/fair trade considerations, demand for technology transfers), technical specification, etc., prompted by strong macro-level network effects (see section 9.1.1.c) comes as an integral part of liberalisation commitments. This tendency toward harmonisation is often at odds with the existing polycentrism of approaches to rules governing individual contracting, conduct of public administration, and executive discretion (see 9.1.1.d *section in fine*), and to non-commercial purchasing criteria (see section 9.1.1.e). As such, this tendency significantly undermines negotiations on coverage, which is confirmed in the following sections scrutinising documents from the GATT's/WTO's negotiations.

9.2 Non-commercial considerations in the GATT

En masse, the detailed chronological analysis of works in the Committee on Government Procurement shows a very slow trend toward a systematic recognition and regulation of the pursuit of cross-border horizontal policies under the GPA framework induced by a number of non-compliance cases, protracted processes of new accessions, and by developments in national procurement regimes of GPA parties undermining the original premises of the GPA framework. However, in the pre-WTO works, GPA parties were completely trapped in the bias against the incorporation of non-commercial considerations in the procurement process. In addition, after the conclusion of the Tokyo Round and the GPA79's entry into force, the discussions on the revision of the original agreement held in the GATT Committee on Government Procurement were overshadowed by (*i*) never-ending controversies related to the implementation of and compliance with the original agreement, as well as (*ii*) dynamic changes to the GPA's subjective coverage, mostly caused by the withdrawals of the 'other entities,' including ex-SIE, over which parties to the GPA had lost control. In the case of non-compliance caused by the pursuit of horizontal policies, the representatives usually avoided discussing other parties' legitimate needs and escaped working on more general solutions applicable to all GPA parties. The representatives rather preferred to (*i*) formalistically control the procedural compliance by one of another, and (*ii*) accept individual country-specific derogations allowing the pursuit of horizontal policies. All critical and humdrum problems were discussed at a time, leaving little space and time for serious discussion about the accuracy of solutions adopted in the original GPA79.

9.2.1. Tokyo Round

Subject to some fragmentary discussions on offsets and on related forced technology transfers (see further section 9.4.2.c), the attempts to legitimize horizontal policies were absent in the course of talks on the OECD's draft submitted to the GATT Tokyo Round. Negotiators were then predominantly focused on very basic things such as, for example, developing previously non-existent common public procurement-related terminology,[103] or on how to approach the problem of sub-central autonomy and of unregulated executive discretion.[104] While it was obvious for everybody that, at that time, the domestic public procurement sectors had been widely used to advance non-commercial goals,[105] the overall image of minutes/protocols from Tokyo shows a blind faith in curbing non-commercial considerations by (*i*) strictly harmonising the procurement process among future GPA parties, and (*ii*) reaching the widest possible coverage. The strong premise of many negotiating parties was that "*the aim of government purchasing should be to obtain the best value for public funds spent and not to pursue various socio-economic objectives, e.g. the protection of infant industries, etc. Exceptions and derogations taken together could undermine the whole purpose of negotiating rules of government procurement.*"[106]

9.2.2. Revision of 1987

As summarised in retrospect by the US delegation 1992 "*in the early years of the Code, its members had spent most of their time examining each other's implementation of the Code in detail*."[107] Blank and Marceau see the 1980s as a time of disappointment about the GPA79, observing that "*[p]Parties generally felt that the agreement that the agreement was not*

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[103] According to the GATT secretariat, matters like "*(i) Objectives and principles, (ii) Definitions, (iii) Procurement entities, (iv) Elimination of existing discrimination, (v) Exceptions (vi) Purchasing procedures, (vii) Publication of government procurement regulations, (viii) Reporting, review, complaint and confrontation procedures*" were mostly on the agenda. See: 'Multilateral Trade Negotiations, Group "Non-Tariff Measures", Government Procurement - Note by Secretariat,' GATT Secretariat (Geneva 5 August 1975) MTN/NTM/W/16, para. 2 at 1. See also: 'Multilateral Trade Negotiations, Group "Non-Tariff Measures", Government Procurement - Note by Secretariat,' GATT Secretariat (Geneva 1 December 1976) MTNN/NW/W/74, para. 4 at 2.

[104] "*Some delegations stated that with regard to the degree of government control, budgetary independence, etc., the position of procurement entities (centralized, decentralized, para-governmental, public companies, public utilities) could vary significantly between countries depending on number of factors such as differences in constitutional or administrative structures, administrative organization, etc. Some delegations believed that these differences posed difficult questions which would require careful examination having in mind the objective of an overall balance of commitments. 22. Among other points made were the following: - procurement entities included in any arrangement should cover as wide an area as possible; - an important task would be to find an equilibrium between obligations of central and federal governments.*" See: GATT, Multilateral Trade Negotiations - Group "Non-Tariff Measures, 'Checklist of Points Summarizing Views on Specific Issues in the Area on Government Procurement. Note by the secretariat' GATT Secretariat (Geneva 22 April 1977) MTN/NTM/W/96, paras. 21, 22 at 7.

[105] The GATT secretariat summarized the opinions of the negotiating parties on why they prefer local to foreign products concluding that they do so in order: *"(a) to save foreign exchange and generally safeguard their balance-of payments situations-,(b) to promote the economic development of certain areas; (c) to ease a situation of high and persistent unemployment, or as a measure to counter potential unemployment; (d) to promote the economic development of certain social groups and socially depressed or victimized groups of persons; (e) to attain certain strategic objectives such as independence from foreign sources of supply for certain essential goods of military importance, or for reasons of national security.*" See: 103, MTN/NTM/W/16, para. 13 at 6.

[106] See: note 104, para. 38 1st *tiret* at 13.

[107] See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 13 May 1992' (26 June 1992) GPR/M/46 para. 10 at 5.

implemented in a reciprocal fashion and that this created the credibility gap, which could perhaps be overcome by improving the text of the existing agreement."[108] Indeed, dozens of the minutes from the 1980s show that the discussions at the meetings of the Committee of government procurement mostly covered mutual accusations of the non-compliance of national public procurement-relevant laws with the procedural framework of the GPA, and that parties' representatives spent a lot of time explaining the complexities of their own domestic laws to their colleagues representing other countries.[109] The representative also had to deal with unexpected controversies stemming from the imprecise language of the original agreement such as whether (*i*) purchases of goods should also cover leasing of goods,[110] or (*ii*) if the value of contracts was meant to be net of after VAT, customs and other taxes.[111]

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[108] See: note 99 at 102. Also the US administration believed that: "*[a]Although the Agreement was an important policy step toward less restrictive trade, experience during the course of our review shows it to have far less commercial value than originally anticipated. Foreign signatory governments opened a smaller value of procurements to international competition than was projected. They had high proportions of procurements that were too small to be covered by the Agreement and made extensive use of noncompetitive procurement procedures, which the Agreement allows under certain circumstances. The commercial value of the Agreement was further limited by (1) cases of noncompliance with its requirements, (2) previous agreements and national practices that had already opened procurements covered by the Agreement to U.S. competition, and (3) the inability of U.S. firms to competitively sell overseas many of the products that foreign governments were buying.*" See: US General Accounting Office, 'Report to the U.S. Trade Representative and the Secretaries of Commerce and State: The International Agreement on Government Procurement: an Assessment of its Commercial Value and U.S. Government Implementation' (16 July 1984) GAO-NSIAD-84-117 at ii.

[109] See generally: GATT, 'Draft Report (1981) of the Committee on Government Procurement' (15 October 1981) Spec(81)46; GATT, 'Committee on Government Procurement - Draft Minutes of the Meeting Held on 13 - 15 October 1981' (13 November 1981) GPR/Spec/11; GATT, 'Committee on Government Procurement - Draft Minutes of Meeting Held on 25-26 May 1983' (30 June 1983) GPR/Spec/27.

[110] That was an all-against-one game whereby it was only the US which believed that the GPA79 covered leasing goods in the sense that the provision of goods should be construed widely enough to also include leasing. See GATT, 'Committee on Government Procurement - Draft Minutes of the Meeting Held on 15 January 1981' (6 February 1981) GPR/Spec/6 para. 52 at 21; GATT, 'Committee on Government Procurement - Minutes of the Meeting - Held on 15 January 1981' (11 March 1981) GPR/M/1, paras. 52 at 13-14. The US eventually gave up on that matter by stating that: "*[f]Furthermore, until the question of the applicability of the Agreement to Leasing is resolved, we believe it important that Parties affirm their intention not to change their procurement practices with respect to leasing in a manner that would have the effect of circumventing the Agreement. To this end, we recommend that the Parties promulgate a joint declaration stating their intention not to use leasing in a manner that would prejudice the objectives of the Agreement."* (see: GATT, 'Committee on Government Procurement: Leasing and the Agreement on Government procurement Statement by the United States. Statement by the United States' (1 April 1981) GPR/W/2 at 2; see also: GATT, 'Committee on Government Procurement - Draft Joint Declaration on Leasing - Communication from the Delegation of the United States' (25 June 1981) GPR/W/3). The leasing was eventually firmly included in the GPA as a part of its first revision (see: GATT, 'Committee on Government Procurement - Minutes of Meeting of 21 November 1986: Protocol Amending the Agreement on Government Procurement' (7 January 1987) GPR/M/24, Article I:1(a) at 13).

[111] According to the US, it "*was a very important one* [covering leasing] *in relation to the implementation and operation of the Agreement"* (see: note 110, GPR/Spec/6, para. 58 at 24) as "*[e]Essentially the question was whether Parties, when calculating a contract price for the purpose of determining whether it would fall above the threshold*" (see: ibid.), and including taxes *"seemed to be correct because it gave the price the consumer finally had to bear in the market place."* See: ibid. See also: note 110, paras 58-60 at 15; GATT, 'Committee on Government Procurement - Draft Minutes of the Meeting Held on 9 April 1981' (5 April 1981) GPR/Spec 8, paras. 68-77; GATT, 'Committee on Government Procurement - Minutes of the Meeting - Held on 9 April 1981' (5 June 1981) GPR/M/2, paras. 67-76; GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 8 - 9 July 1981' (29 July 1981) GPR/Spec/9, paras. 85-91). The USA asked for the consultation under VII 3 of the Agreement in August 1981 (see: GATT, 'Committee on Government Procurement - Request for Consultations under Article VII:3 of the Agreement' (3 August 1981) GPR/Spec/10). The US initiated the dispute in July 1982 (see: GATT, 'Committee on Government Procurement - Request for Initiation of Dispute Settlement Procedures under Article VII:6 of the Agreement' (2 July 1982) GPR/Spec/18). The composition of the panel was decided in March 1983 (see: GATT, 'Committee on Government Procurement - Article VII:7 Panel on Value-Added Tax and Threshold - Note by the Secretariat' (21 April 1983) GPR/W/29). The panel found in January 1984 that: "*[c]Considering these various aspects and arguments, the Panel found that the term contract value in Article I:1(b) should be interpreted to be the full cost to the entity, taking into account all the elements that would normally enter into the final price, and would therefore include any VAT payable, unless the entity was exempted from paying VAT. The Panel concluded, therefore, that the present EEC practice of excluding the VAT was not in conformity with this interpretation of the existing Agreement when the entity was not exempted from paying VAT*." (see: Dispute Settlement Body, 'Committee on Government Procurement - Panel on Value-Added Tax and Threshold - Report of the Panel' (17 January 1984) GPR/Spec/31, para. 28 at 9). Later on, in the course of negotiations on the first revision of GPA79, the then EC's delegation – given that the effective average rate of the VAT in the EC was 13 percent – proposed lowering thresholds by 6.5 percent as a 'fair compromise' (see: GATT, 'Committee on Government Procurement - Minutes of Meeting of 19 June 1985' (23

The representatives seemed to believe that to-the-letter compliance with procedures would be a cure for protectionism and did not go much into the essence of non-commercial considerations, with which particular countries' procedural non-compliance with the GPA might have been backed. By way of exception, for example in 1981 (the first year of the GPA's operation), the representatives merely complained about (*i*) the UK's one minor programme of help for 'development areas' which was meant to be discontinued soon,[112] and (*ii*) the US's implementation of the GPA79 in the form of an executive order only, whereby representatives of other countries were not sure whether it would be entirely clear for many US agencies that those agencies should not apply many 'buy-American' or other discriminatory provisions without further changes to the US's primarily legislation,[113] plus (*iii*) particularly Sweden complained about increased allocation of the US's procurement backlog under various schemes allowing set-asides favouring small and minority businesses (which the US had been allowed to continue to apply under its schedules to GPA79).[114] Apart from such minor cases, no objections to specific social, environmental or human rights-related policies were raised in the works of the committee in the first years.

GPA79's article IX.6.a mandated "*further negotiations, with a view to broadening and improving this Agreement*" *"[n]*~~*N*~~*ot later than the end of the third year from the entry into force of this Agreement and periodically thereafter*." Thus, in December 1982, the representatives started talking about expanding the subjective coverage (expanding lists of covered entities)[115] and also about covering services (expanding objective coverage).[116] The then chairman of the Committee, Anthony Dell from the UK summarised in retrospect (in October 1988) the GPA parties' attitude to negotiating the future revision of 1987 in a way that (*i*) the outcome of negotiations "*would normally result from individual Parties' own cost/benefit analyses, including in particular whether the additional procurement opportunities justify the additional costs of implementation - overall and on an entity-by-entity basis – and negotiations aiming at a balance of rights and obligations (overall and,*

August 1985) GPR/M/18 para. 53 at 9). It was done so during the revision of 1987 (see: GATT, 'Committee on Government Procurement - Meeting of 12 February 1987 - Note by the Chairman' (25 February 1987) L/6128 para. 7 at 1, 2).

[112] "*Up to 25 per cent of any tender was reserved for certain companies situated in development areas, on condition that all elements relevant for the award were equivalent to the most advantageous offer. The system was of little importance and would be further curtailed*." See: note 109, GPR/Spec/11, para. 33 at 8.

[113] See note 110, GPR/M/1, paras. 22-24 at 6; note 110, GPR/Spec/6, paras. 24, 25 at 9.

[114] See: note 109, GPR/Spec/11, para. 13 at 4. Ironically, at the same time, the US delegation was claiming that (*i*) there were "*efforts in various countries Parties to the Agreement to increase "Buy National" preferences for entities not covered by the Agreement*" (see: ibid. para. 77 at 15), (*ii*) "*many non-covered entities already excluded foreign participation through formal or informal preferences*" (see: ibid.), (*iii*) "*it was in the interest of all to minimize the incidence of "Buy National" restrictions*" (see: ibid.), and (*iv*) "*It was important not only to discourage the adoption of new "Buy National" measures but also to eliminate existing preferences because they created pressures for new restrictions*" (see: ibid.).

[115] See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 15 December 1982' (19 January 1983) GPR/Spec/21, paras. 17-25.

[116] See: ibid. 1 paras 26-33.

possibly, by sector)",[117] and (*ii*) "*[d]Delegations would have to take into account a wide variety of differing constitutional, administrative, political and legal situations and traditions, and differences in development, financial and trade needs.*"[118] In line with this, in May 1983 the Swiss delegation came up with the idea of the GPA's at least partial application to 'nationalized sectors' more or less overlapping with the notion of 'other bodies' in the language of the GPA and 'utilities' in the language of the EU's secondary legislation.[119] While negotiating future revisions, the representatives also started to quarrel about the excessive share of single tendering/direct sourcing in many countries,[120] and the US delegation was particularly stymied by other delegations for having introduced preferences for 'labour surplus areas.'[121]

In February 1984, integrating non-industrial non-commercial considerations (green, social) into the GPA framework was beyond the consideration of the committee to the extent that (*i*) "*while there seemed to be general recognition of the fact that certain environmental factors affected procurement of services, some delegations had felt that the proposed work went beyond procurement matters and the Committee's competence*"[122] as summarised by the US delegate while discussing the very wide context of ongoing services-related negotiations,[123] and (*ii*) were not addressed by any delegation in the first draft amendments to GPA79 gathered by the committee in October 1984.[124] Rather, a lot of attention was paid to matters such as a future expansion of the coverage to (*i*) insurance services,[125] (*ii*) architectural services and engineering consulting services,[126] and (*iii*) management services.[127] In the

[117] See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 7 October 1988' (25 January 1989) GPR/M/31, para. 2 at 1.

[118] See: ibid.

[119] See: GATT, 'Committee on Government Procurement - Question of Nationalized Enterprises - Note from the Delegation of Switzerland' (14 October 1983) GPR/W/41. Later on, in April 1984, Switzerland further clarified that 'nationalized enterprises' shall mean: "*1. Enterprises that are wholly State-owned. 2. Enterprises in which the State owns either a majority share of capital or a preponderant share in relation to the other co-owners. 3. Enterprises in which the State owns only, a limited share (minority or accessory holding) but in whose management it intervenes directly for other reasons (inter alia, statutory reasons).*" See: GATT, 'Committee on Government Procurement - Question of Nationalized Enterprises - Note from the Delegation of Switzerland - Addendum' (3 April 1984) GPR/W/41/Add.1.

[120] See generally: GATT, 'Committee on Government Procurement - Minutes of Meeting Held on 23 February 1983' (22 April 1983) GPR/M/Spec/3.

[121] "*4. The representatives of the European Economic Community raised a number of points resulting from an examination of Commerce Business Daily:(...) (iv) The labour surplus area preference appeared with monotonous frequency in tender publications. The United States had argued that this system was non-discriminatory vis-à-vis foreign suppliers but the footnotes in question stated that bidders located in LSA's would be given preferential treatment in the evaluation of bid prices. As nothing was said about the treatment of bidders from abroad, he concluded that the preference existed only for companies located in an LSA. He added that this system worked because awards very often went to such companies.*" See: GATT, 'Committee on Government Procurement - Draft Minutes of Meeting Held on 3 November 1983' (8 December 1983) GPR/Spec/30 para. 4 at 2.

[122] See: GATT, 'Committee on Government Procurement - Minutes of Meeting Held on 1 - 2 February 1984 - Draft' (9 March 1984) GPR/Spec/33, para. 61 at 10

[123] See: ibid.

[124] See: GATT, 'Committee on Government Procurement - Article IX:6(b) Negotiations - Consolidated List of Suggestions Made for Improvements of the Agreement - Note by the Secretariat - Revision' (8 October 1984) GPR/W/56/Rev.1.

[125] See generally: GATT, 'Committee on Government Procurement - Article IX:6(b) Negotiations - Study of Certain Types of Service Contracts - Insurance' (30 January 1985) GPR/W/66.

[126] See generally: GATT, 'Committee on Government Procurement - Article IX:6(b) Negotiations - Study of Certain Types of Service Contracts - Architectural and Consulting Engineering Services' (30 January 1985) GPR/W/67.

background, in the general ambit of *bellum omnium contra omnes* about the non-compliance, in November 1984, the US asked for consultations about Japan's practice of splitting public contracts in a way that they fell below the thresholds for the GPA's application,[128] whereas the highlight of 1985 were the long discussions on whether the purchases of computers along with related software/maintenance services should be classified as purchases of goods or of services.[129]

The agreement on the text of the 1987 revision was finally reached in January 1987,[130] eventually resolving the dispute over leasing agreements (lasting then for six years) by firmly covering such agreements with the GPA in line with the US's position.[131] The attempts to expand the GPA's coverage over services were, at that time, unsuccessful and this problem was left for another revision.[132]

It is surprising that the Committee's documents do not show any discussion on the various schemes advancing non-commercial goals in the parties' national procurement systems despite the fact that the outcome of the revision were not without significance for this matter. Specifically, on the one hand, GPA parties ostensibly continued to oppose the pursuit of non-commercial considerations and requirements which go beyond contract performance by agreeing to add the provision that "*any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question*."[133] On the other hand, however, they also agreed to the numerous derogations[134] from this principle including (*i*) Austria's, Finland's, Norway's, Sweden's and Switzerland's right to deviate, in exceptional cases, from basic GPA principles for 'policy reasons', [135] (*ii*) Canada's set-asides for small business,[136] (*iii*) the then EC's non-application

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[127] See generally: GATT, 'Committee on Government Procurement - Article IX:6(b) Negotiations - Study of Certain Types of Service Contracts - Management Consulting Services' (18 June 1985) GPR/W/70.

[128] See: GATT, 'Committee on Government Procurement - Request for Consultations under Article VII:4 of the Agreement' (8 November 1984) GPR/Spec/42.

[129] While delegations were negotiating extension of the GPA over services, they came to realize that in many instances the line between purchases of goods and services in the case of computers would not be clear-cut as: "*[a]As computers became more sophisticated, entities tended to turn to suppliers for assistance with the result that the service element would increasingly exceed 50 per cent of the price. Also, whilst operating software was previously considered part of the original contract, suppliers now more and more often succeeded in introducing elements or clauses (e.g. availability of alternative computer resources; availability of company staff), which from having been without value now had subjective values attributed to them. This, combined with the traditional maintenance and installation costs, would make the contract a service contract escaping the Agreement.*" See: GATT, 'Committee on Government Procurement - Working Party on Computer Procurement - Summary Note on Meeting Held 27 September 1985' (30 October 1985) GPR/Spec/48, para. 6.(iii) at 2.

[130] See generally: note 110, GPR/M/24, Annex II.

[131] See: GATT, 'Committee on Government Procurement - Minutes of Meeting of 21 November 1986: Protocol Amending the Agreement on Government Procurement' (7 January 1987) GPR/M/24 13 article I:1(a); GATT, 'Committee on Government Procurement - Minutes of Meeting of 21 November 1986' (7 January 1987) GPR/M/24 paras. 9, 20, 44, 45.

[132] See: GATT, note 110, GPR/M/24, Annex II.

[133] See: note 110, GPR/M/24, article V:2(b): at 15.

[134] Either newly accepted derogations or prolonged derogations allowed under the original GPA79. Full annexes and appendices to the original are not easily available for comparison. Certainly though, the US had originally reserved off-sets for small and minority business (see: note 114).

[135] "*When a specific procurement decision may impair important national policy objectives the (Austrian) (Finnish etc.) Government may consider it necessary in singular procurement cases to deviate from the principle of national treatment in the*

of the GPA to external aid programmes,[137] (*iv*) Germany's right to counteract the results of the country's previous division,[138] (*v*) Japan's right to keep pre-existing preferences for co-operatives,[139] (*vi*) Singapore's right to offer price preferences to bids originating from other ASEAN countries,[140] and (*vii*) the US's set-asides for small and minority business.[141] Those derogations must have been discussed directly between the parties, bypassing the Committee of Government Procurement.[142]

9.2.3. Uruguay Round

Bellum omnium contra omnes continued when negotiations on further changes to the GPA were launched already a month after the decision on the revision of January 1987,[143] following the Declaration of Punta del Este initiating the GATT Uruguay Round.[144] Before substantial talks on the revision started, in May 1987 the then EC - joined by other parties – complained about the US's so-called 'Mattingly amendment,' being another 'buy American' set of provisions in the defence sector.[145] At the same time, both the EU and the US raised objections to the decentralization of Japanese national railways which allegedly resulted in splitting up public contracts managed by that entity to fall below the GPA's thresholds.[146] Continuously lambasted by other delegations for various cases of non-compliance, the US's representative stated in March 1988 that the US would continue to pursue 'buy American'

Agreement. A decision to this effect will be taken at the (Austrian) (Finnish etc.) cabinet level." See: note 110, GPR/M/24, Annex IV at 22.

[136] See: note 110, GPR/M/24, Annex IV at 22.

[137] "*This Agreement shall not apply to procurement by entities falling under this Agreement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes.*" See: ibid. at 23.

[138] "*According to existing national obligations, the entities contained in this List shall, in conformity with special procedures, award contracts in certain regions which, as a consequence of the division of Germany, are confronted with economic disadvantages. The same applies to the awarding of contracts to remove the difficulties of certain groups caused by the last war.*" See: ibid.

[139] See: ibid.

[140] "*The offer is conditional on the right of the Singapore Government to grant tenderers from the ASEAN countries a two and a half per cent or US $40,000 preferential margin in accordance with the provisions of the Agreement on ASEAN Preferential Trading Arrangements.*" See: ibid.

[141] See: ibid.

[142] Many minutes of the meetings of the Committee of Government Procurement very fragmentarily refer to discussions in informal working groups and one might have an impression that the actual substantial discussions were held informally rather than in the committee.

[143] See generally: GATT, 'Committee on Government Procurement - Draft Minutes of Meeting of 12 February 1987' (11 March 1987) GPR/Spec/56.

[144] See: GATT, 'Multilateral Trade Negotiations - The Uruguay Round - Ministerial Declaration on the Uruguay Round' (20 September 1986) MIN.DEC.

[145] "*The representative of the EEC stated that his delegation had been very preoccupied by certain bills and clauses added to legislation before the United States Congress, dealing in particular with the procurement of machine tools by the DOD. As far as he understood, the so-called Mattingly amendment stated that the DOD might only procure machine tools falling under FSC 34, if manufactured in the United States or Canada. The Agreement, including Annex I, showed that this particular category was among the products which were generally covered by the Agreement subject to national security rules. His delegation interpreted this to imply that exceptions would occur on a case by case basis. The present exception transferred FSC 34 from the generally covered list to the list of non-covered products. The volume of annual trade was in the order of 10-20 million dollars. The amendment was therefore a quite significant change, and a clarification was needed as to how such a modification to the DOD rules could be compatible with the Agreement.*" See: GATT, 'Committee on Government Procurement - Minutes of Meeting of 12 February 1987' (9 April 1987) GPR/M/25, para. 84 at15. The then EC asked for consultations on that matter in July 1987 (see: GATT, 'Committee on Government Procurement - Request for Consultations under Article VII:4 - Communication from the European Economic Community' (8 July 1987) GPR/41).

[146] See: GATT, 'Committee on Government Procurement - Draft Minutes of Meeting Held on 20 May 1987' (1 July 1987) GPR/Spec/57, para. 35 at 10.

policies in order to cure the US's trade deficits until a consensus is reached on the expansion of the GPA over services.[147] In response, the EC's delegation was warning that such an approach will surely discourage, rather than encourage, other parties from reaching any further concessions.[148]

A year later, in March 1989, the Finnish delegation contested yet another 'brand-new' 'buy-American' contractual clause imposed by the US National Research Foundation (covered by the GPA) on its private contractors (responsible for research works in Antarctica), which required also private contractors to source domestically.[149] While the US and Finland settled unofficially (because also Finland was coincidently caught by the US in regard to sourcing its Arctic ice-breakers without competition[150]) the then EC also commenced complaining about procurement by the US National Research Foundation in June 1991,[151] leading to a dispute in *Sonar Mapping System.*[152] After the US had lost that case in April 1992,[153] its representative in the Committee of Government Procurement threatened that this fact *"might create complications for the negotiations on the extension of the coverage of the Code,"*[154] which could be rephrased in a way that other GPA parties should have acquiesced to the US's non-compliance with already made commitments in order to encourage the US to make even more commitments, with which the US might not comply anyway.

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[147] "*Over the past year, the United States Congress had become increasingly frustrated by the large United States trade deficits. Buy America provisions reflected this frustration. Part of the impetus for these provisions came from the lack of Code coverage for telecommunications, power generating and transmitting, and transportation equipment. The lack of services coverage in the Agreement was also leading to the first major Buy America restrictions on services procurement. Despite the best efforts of the United States Executive branch to oppose Buy America provisions, especially those that might affect United States Government obligations under the Agreement, the Congress had tended lately to pass such provisions with ease. More bills were possible. Despite good intentions, the United States Executive branch would find it increasingly difficult to manage the situation.*" See: GATT, 'Committee on Government Procurement - Draft Minutes of the Meeting Held on 18 March 1988' (26 April 1988) GPR/Spec/59 para.7 at 4.

[148] "*The Community had always warned against any possible extension of the Buy America Act or other restrictions by the Congress acting on its own initiative or on that of the Administration. It had repeatedly said that any such extension would have a negative impact on its ability and willingness to conclude negotiations referred to in Article IX:6 of the Agreement."* See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 18 March 1988' (6 June 1988) GPR/M/30 para. 5 at 3.

[149] See: GATT, 'Committee on Government Procurement - Acquisition or Lease of Antarctic Research Vessel with Ice-Breaking Capability by the United States National Science Foundation - Communication by Finland' (7 March 1989) GPR/W/91; GATT, 'Committee on Government Procurement - Statement by the Delegation of Finland at the Committee Meeting on 16 March 1989' (30 March 1989) GPR/W/92. The US delegation claimed that the National Science Foundation ('NSF') granted a service contract to Antarctic Services Inc. '*for the operation of research programmes in the Antarctic*' [see: GATT, 'Committee on Government Procurement - United States Response to the Government of Finland on the Question of a National Science Foundation Services Contract' (30 March 1989) GPR/W/93, para. 1 at 1] whereby the "*[t]The "contract concerned" is a sub-contract of a services contract awarded by NSF and therefore not covered by the Code*" (see: ibid. para. 2 at 2). Finland and the US settled it bilaterally and informally (see: GATT, 'Committee on Government Procurement - Draft Minutes of the Meeting Held on 14 April 1989' (26 April 1989) GPR/Spec/62, para. 3 at 2) apparently because also the US could accuse Finland of single-sourcing the purchase of a ship operating in the Arctic (see: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 16 March 1989' (18 May 1989) GPR/M/32, paras. 31, 32 at 7, 8).

[150] See: ibid.

[151] See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 23 April 1991' (6 June 1991) GPR/M/39, para. 29 at 5; GATT, 'Committee on Government Procurement - Communication from the Commission of the European Communities' (5 July 1991) GPR/W/107. The panel was established before the end of July 1991. See: GATT, 'Committee on Government Procurement - Meeting of 12 July 1991 - Note by the Chairman' (31 July 1991) L/6891, para. 6 at 1.

[152] See: Dispute Settlement Body, 'United States - Procurement of a Sonar Mapping System - Report of the Panel' (23 April 1992) GPR.DS1/R para. 5.1 and 5.2 at 21.

[153] See: ibid.

[154] See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 26 June 1992' (17 August 1992) GPR/M/47, para. 13 at 12.

Meanwhile, in January 1990, the US delegation asked for consultation about the procurement of electronic toll collection equipment related to the Oslo toll ring project,[155] because the US caught Norway culpable in overtly trying to 'build manufacturing capacity.'[156] This led to a dispute in *Trondheim Toll Ring Project* decided in favour of the US, simultaneously with *Sonar Mapping System*, in April 1992.[157] Among others, the US submitted that "*the Norwegian procurement of a toll ring system for Oslo confirmed that Norway's behaviour in the Trondheim case was part of a consistent Norwegian policy to use its government procurement system to support a national supplier of electronic toll systems so as to increase its ability to compete on the European and world markets*."[158] The US submission also referred to an instruction addressed by the Norwegian Ministry of Transport and Communications to the public procurer responsible for that contract which stated that: *"[a]As recognised, the Ministry of Transportation has for a long time stressed the political importance in connection with the choice of payment systems for the toll road .... The choice of [Micro Design] creates great possibilities for Norwegian high technology production within the EC area. The Ministry of Industry has estimated the international market potential in the area of 10-20 billion NOK over a five-year period*"[159] – which Norway could not deny.[160]

[155] See: GATT, 'Committee on Government Procurement - Communication from the United States' Delegation' (12 January 1990) GPR/W/103. After unsuccessful negotiations, the US asked for the establishment of the panel in 16 January 1990 [see: GATT, 'Committee on Government Procurement - Request for Initiation of Dispute Settlement Procedures under Article VII:6 of the Agreement - Communication from the United States with Respect to Norway's Procurement of Electronic Toll Collection Equipment' (16 January 1990) GPR/W/103/Add.1]. At some point, the US withdrew the claim [see: GATT, 'Committee on Government Procurement - The Oslo Toll Ring Project - Communication from the United States - Addendum' (7 May 1990) GPR/W/103/Add.3], but also asked for another round of consultations [see: GATT, 'Committee on Government Procurement - Communication from the United States' Delegation' (11 June 1991) GPR/W/106; GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 20 June 1991' (12 July 1991) GPR/M/40, paras. 2-23], and eventually for the establishment of the panel [see: GATT, 'Committee on Government Procurement - Communication from the United States' Delegation' (11 September 1991) GPR/W/108].

[156] According to the US delegation: "*[s]Several statements by high level political officials in the Ministry of Transportation and the Road Directorate* [of Norway] *indicated that the award decision had been made not on the merits of the offers but on political and export-potential considerations. The representative of the United States quoted, as examples, the State Secretary of the Ministry of Transportation as having said that the main concern had been to choose a supplier that would create new jobs and export opportunities, and that, since the State should pay a considerable part of the project, it could give direction about the choice of supplier.*" See: GATT, 'Committee on Government Procurement - Minutes of Meeting Held on 19 January 1990' (21 February 1990) GPR/M/35, para. 7 at 2.

[157] See: - Report of the Panel, *Norway - Procurement of Toll Collection Equipment for the City of Trondheim* (28 April 1992) GPR.DS2/R para. 5.1 and 5.2 at 24. The US claimed violation of GPA's 87's (*i*) article II pertaining non-discrimination and NT, and (*ii*) article V.16.(e) pertaining to the exclusion of 'prototypes' and 'first products ' from GPA's application (see ibid. para. 1.3).

[158] See: ibid. para. 3.12 at 10.

[159] See: ibid. para. 3.12 at 11.

[160] The Norwegian defence-line lay in the GPA's exclusion in the case of research and development contracts (see: ibid. para. 4.1 at 16) while the US rejected that argument by maintaining that "*Article V:16(e) was not applicable since, in its view, the objective of the contract was not research and development but the procurement of toll collection equipment*" (see: ibid. para. 4.1 at 16). The Panel agreed with the US by contending that "*[i]If most of the cost of producing a product that was being procured were to consist of payments for labour required to produce it, this would clearly not constitute a ground for claiming that that procurement was excluded from the coverage of the Agreement. The same reasoning must also apply if research and/or development were to constitute an input into the production of products being procured and were not itself the object of the procurement*" (see: ibid. para. 4.8 at 18).

Simultaneously, matters relevant to the liberalisation of services such as (*i*) the right of establishment, freer movement of labour (since 1988)'[161] and (*ii*) the future 'bid protests system'[162] and "*entities which are not central, regional or local government entities, but whose procurement policies are controlled by, dependent on, or influenced by, such governments*"[163] were discussed from 1990 in detail during informal meetings. The parties hoped to have a new agreement in force by January 1993.[164] The first merged draft was presented to the committee in December 1991.[165] Despite numerous existing derogations and pending disputes, that draft, again, did not include any discourse on the allowed scope of non-commercial considerations, apart from off-sets available for developing countries (see further section 9.4.2.c). The majority of the parties tabled formal coverage offers in August 1992,[166] and re-submitted revised offers in November 1993.[167] An agreement on the new GPA's framework was reached on 15 December 1993[168] but the negotiations on the new agreement's coverage were left unfinished because "*[a]Although the Agreement is considered a balanced package as it stands, participants intend[ed] to further expand the coverage of commitments prior to its signature in April next year and subsequently prior to its entry into force at the beginning of 1996.*"[169]

9.3 Non-commercial considerations in the WTO

Directly after the establishment of the WTO and GPA94's entry into force, the GPA parties generally seemed to continue to believe that strict compliance with formal rules would curb non-commercial considerations and still preferred to grant individual derogations instead of working on more general provisions applicable to the national public procurement systems of all parties. The merits of particular horizontal policies or the problem of cross-border regulatory interferences between the GPA parties were only occasionally raised in the

[161] See: GATT, 'Report (1988) of the Committee on Government Procurement' (28 October 1988) L/6420 at 9.

[162] See: GATT, 'Committee on Government Procurement - Meeting of 9 March 1990 - Note by the Chairman' (9 April 1990) L/6663 at 3.

[163] This could be linked to the fact that the then EC was then covering the utilities sector with its public procurement-related secondary legislation. See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 9 March 1990' (19 April 1990) GPR/M/36 para. 3 at 2.

[164] See: GATT, 'Committee on Government Procurement - Status of Work in the Negotiations Undertaken Pursuant to Article IX:6(B) of the Agreement on Government Procurement - Report by the Chairman on His Own Responsibility' (27 November 1990) GPR/Spec/63 at 3.

[165] See: GATT, 'Committee on Government Procurement - Working Paper for the Negotiations Undertaken Pursuant to Article IX:6(b) of the Agreement on Government Procurement - Series of Draft Articles' (9 December 1991) GPR/Spec/64. See also: GATT, 'Committee on Government Procurement - Draft Agreement on Government Procurement - Chairman's Paper on His Own Responsibility Without Prejudice to Negotiator's Positions' (20 December 1991) GPR/64.

[166] See: GPR/Spec/74; GPR/Spec/65; GPR/Spec/66; GPR/Spec/67; GPR/Spec/68; GPR/Spec/69; GPR/Spec/70; GPR/Spec/71; GPR/Spec/72; GPR/Spec/73; GATT, 'Report (1992) of the Committee on Government Procurement' (25 November 1992) L/7121, para. 11 at 2.

[167] See: ibid.

[168] See: GATT, '[Press Release] - New GATT Procurement Agreement Gives International Access to Hundreds of Billions of Dollars of Government Purchases' (15 December 1993) GATT/1603; GATT, 'Committee on Government Procurement - Decision Concluding the Negotiations, 15 December 1993' (17 December 1993) GPR/73.

[169] See: ibid. GATT/1603 at 2. Another set of offers was tabled by the majority of parties in January 1994 (see: GPR/74/Add.1; GPR/74/Add.2; GPR/74/Add.3; GPR/74/Add.4; GPR/74/Add.5; GPR/74/Add.6; GPR/74/Add.7; GPR/74/Add.8; GPR/74/Add.9; GPR/74/Add.10; GPR/74/Add.11; GPR/74/Add.12).

context of controversies related to the non-compliance with the GPA rather than in the context of necessary changes to its framework. The GPA parties generally kept to this approach until the GPA's revision in 2012. However, at the same time, they also agreed to negotiate, after the revision's entry into force, matters like phasing out individual derogations or regulating 'sustainable procurement' and 'safety standards', which could potentially result in the clarification of the GPA parties' stance on the scope of allowed cross-border horizontal policies.

9.3.1. Toward revision in 2006

9.3.1.a Interim Committee

The works in the interim Committee on Government Procurement[170] bridging the old and new agreements were overshadowed by new, mostly technical matters like the use of innovation technology in the procurement process,[171] or harmonisation of statistical reporting by the parties, particularly of the rules of origin of services.[172] Only the Canadian delegation constantly raised the problem of the US's pursuit of horizontal policies for instance by postulating *"circumscribing, limiting, or even eliminating set-aside exception in the Agreement"* in December 1995.[173] The Canadian representative also pointed out, for instance, that "*in 1979, the United States had obtained the right to have a set-aside by providing coverage of the National Aeronautics and Space Administration (NASA). It was, therefore, ironic that NASA had recently introduced a programme for the set-aside of all procurements up to $1 million (and possibly up to $5 million) for United States small businesses*."[174] Also in the context of new technical developments, the Canadian delegation saw tight links between technological advancement and the pursuit of horizontal policies, for instance in that the US had already started to use innovative electronic procurement methods to increase the scope of application of preferences for small and minority businesses.[175]

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[170] Established by the decision of the Informal Working Group on Negotiations on Government Procurement of 10 March 1994 in order to "*undertake all necessary tasks to prepare for the entry into force of the Agreement on Government Procurement to be done on that date in Marrakesh*." See: WTO Committee on Government Procurement, 'Report of the Interim Committee on Government Procurement to the Committee on Government Procurement to be Established under the New Agreement on Government Procurement' (16 January 1996) GPA/IC/9, Annex 1.

[171] See generally: WTO Committee on Government Procurement, 'Interim Committee on Government Procurement - Information Technology in Government Procurement - Possible Issues for Examination Identified as a Result of Consultations with Delegations. Communication from the Chairman' (19 April 1995) GPA/IC/W/18.

[172] See generally: WTO Committee on Government Procurement, 'Report of the Working Group on Statistical Reporting to the Interim Committee on Government Procurement' (9 January 1996) GPA/IC/8.

[173] See: WTO, 'Interim Committee on Government Procurement - Minutes of the Meeting Held on 7 December 1995' (8 February 1996) GPA/IC/M/6, para. 21 at 4.

[174] See: WTO Committee on Government Procurement, 'Interim Committee on Government Procurement - Minutes of the Meeting Held on 25 October 1995' (6 December 1995) GPA/IC/M/5 para. 11 at 3.

[175] "*Improvements in technology could be a very effective tool to enhance market access as well as to improve the efficiency of procurement procedures. However, in the absence of defining principles, these technology advances could erode rather than enhance access. For example, the new United States legislative initiatives (simplified acquisition procedures, NASA mid-range procurement project) were disturbing in that they clearly linked the introduction of pilot projects for electronic tendering with the stringent application of small and minority set-asides. The introduction of new computerized databases to identify suppliers further enhanced efforts to ensure that the set-aside was applied whenever possible. Access to foreign firms was further*

9.3.1.b WTO's committee first years

The first year of the operation of the new WTO Committee on Government Procurement passed tranquilly and, similar to the works of the interim committee, was marked by technicalities linked to the implementation of the new agreement.[176] However, it was the calm before the storm. The Massachusetts' Burma Law as the first major controversy about the pursuit of cross-border horizontal policies surfaced in the committee in February 1997, leading to the EU's statement that the Burma Law (*i*) "*constituted a breach of the rules of the Agreement on Government Procurement*,"[177] (*ii*) "*violated Article VIII(b) of the Agreement, given that it imposed conditions on a tendering company which were not essential to ensure the firm's capability to fulfil the contract*,"[178] (*iii*) "*infringed Article X of the Agreement because it imposed qualification criteria based on political rather than economic considerations*',"[179] and (*iv*) "*was in contradiction with Article XIII:4, to the extent that the statute provided for the award of contracts to be based on political, instead of economic, considerations.*"[180] The EU was joined by Japan in this assessment in November 1997 when the Japanese delegate also raised the problem that the Burma law had adversely affected at least 30 Japanese enterprises operating in the US.[181] During the committee's meeting in May 1997 - while the US representative did not try to defend Massachusetts' legislative action - the US representative retorted that *"that various Member States of the European Community had been encouraging State governments in the United States to enact this type of legislation, in particular, with respect to Indonesia"*[182] – suggesting that also the EU had problems with its sub-central governments eager to independently interfere with the regulatory environments of third countries. In February 1998, the Japanese delegate complained to the committee that the US federal government, in informal talks, had not been in a position to explain how the matter would be dealt with by the State of Massachusetts.[183]

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impeded by the application of preferential small business sub-contracting provisions for larger value contracts which would otherwise be fully subject to the obligations of international agreements." See: ibid.

[176] Its first meeting was held on 27 February 1996. See generally: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 27 February 1996' (18 April 1996) GPA/M/1; WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting held on 4 June 1996' (23 July 1996) GPA/M/2; WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting held on 20 September 1996' (25 October 1996) GPA/M/3; WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 5 December 1996' (7 January 1997) GPA/M/4.

[177] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 24 February 1997' (11 April 1997) GPA/M/5, para. 47 at 7.

[178] See: ibid.

[179] See: ibid.

[180] See: ibid.

[181] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 29 September 1997' (1 December 1997) GPA/M/7, para. 26 at 5.

[182] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 21 May 1997' (18 August 1997) GPA/M/6, para. 20 at 5.

[183] "*The representative of Japan said that Japan had held three rounds of consultations with the United States in 1997 concerning the legislation enacted by the Commonwealth of Massachusetts regulating state contracts with companies doing business with or in Myanmar (WT/DS95/1 and GPA/D3/1). His delegation had been informed that the Federal Government of the United States had had high-level contacts with the Government of Massachusetts but, because of the confidential nature of those contacts, no detailed explanation had been provided on such Federal activities or on any reasonable perspective towards*

Nonetheless, given that the matter was internally dealt with by the US courts (see section 7.3.2) the discussion on that matter was discontinued, except for the subsequent information on (*i*) the suspension of the works of the panel established in that case,[184] and (*ii*) the subsequent expiry of the panel's authority to investigate that matter.[185]

In the meantime, the Canadian delegation continuously complained about the scope of the US's set-asides for small and minority business (through 1996-2000).[186] In late 1997, the EU along with the US managed to reach a solution to a dispute with Japan pertaining to the interoperability of software in *Procurement of a Navigation Satellite* case.[187] In September 1998, the US believed to have caught South Korea red-handed pursuing industrial policies in the case of procurement managed by the Korea Airport Construction Authority.[188] The US's request for consultations stated, among others, that (*i*) the eligibility for becoming a primary contractor of that Korean entity was conditional upon sourcing from suppliers having manufacturing operations in South Korea,[189] and (*ii*) foreign contractors' participation was generally conditional upon 'domestic partnering' requirements meaning for example that "*[f]Foreign firms should participate in a bid with local firms (leading or prime company) as consortium members or subcontractors.*"[190] However, the US (joined at the consultation

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finding a solution to the matter under consultation. The issue of the inconsistency of the measures enacted with the provisions of the Agreement had remained unresolved. His delegation requested the United States delegation to provide explanations or information on this matter." See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 18 February 1998' (26 May 1998) GPA/M/8, para. 28 at 7.

[184] "*The Panel was constituted on 6 January 1999. In a communication to the Chairman of the DSB, dated 10 February 1999, the Chairman of the Panel stated that, in the context of a United States court ruling barring the implementation of the measure at issue, the European Communities and Japan had requested the Panel to suspend its work in accordance with Article 12.12 of the DSU and that the Panel had agreed to this request (WT/DS88/5 and WT/DS95/5).*" See: WTO Committee on Government Procurement, 'Report (1999) of the Committee on Government Procurement' (21 October 1999) GPA/30, para. 10 at 3.

[185] "*Since the Panel had not been requested to resume its work within 12 months, pursuant to Article 12.12 of the DSU, the authority for the establishment of the Panel lapsed as of 11 February 2000 (WT/DS88/6 and WT/DS95/6).*" See: WTO Committee on Government Procurement, 'Report (2000) of the Committee on Government Procurement' (2 November 2000) GPA/44, para. 10 at 3.

[186] See: WTO, 'Report (1997) of the Committee on Government Procurement' (29 October 1997) GPA/19, para. 5 at 19; WTO Committee on Government Procurement, 'Report (1998) of the Committee on Government Procurement' (30 October 1998) GPA/25 para. 6 at 2; note 184, GPA/30 para. 8 at 2; note 185, GPA/44, para. 8 at 3.

[187] On 26 March 1997, the EU filed a request for consultations, with regard to a procurement of 'a multi-functional satellite for the installation of a Global Navigation Satellite System' by the Japanese Ministry of Transportation, claiming that "*specifications refer explicitly to those of the US WAAS and that a more neutral formulation was requested allowing for extended interoperability"* (see: WTO Committee on Government Procurement, 'Japan - Procurement of a Navigation Satellite - Request for Consultations by the European Communities' (1 April 1997) GPA/D1/1; WT/DS73/1). The US joined consultations on 9 April 1997 (see: note 177, GPA/M/5). On 31 July 1997, the EU notified the Chairman of the Panel that a mutually agreed solution had been found (see: WTO Committee on Government Procurement, 'Japan - Procurement of a Navigation Satellite - Communication from the Chairman of the Panel' (8 August 1997) GPA/D1/2; WT/DS73/4). The solution consisted in (*i*) "*the establishment of cooperation between the European Tripartite Group (consisting of the European Commission, the European Space Agency and Euro control) on the one hand and the MOT on the other in the field of interoperability between MSAS and European Geostationary Navigation Overlay Service (EGNOS),*" and (*ii*) the requirement of interoperability in future procurement (see: WTO Committee on Government Procurement, 'Japan - Procurement of a Navigation Satellite - Notification of Mutually-Agreed Solution' (3 March 1998) WT/DS73/5; note 183, GPA/M/8 para. 27 at 8).

[188] The conflict first surfaced during the 9th meeting of the committee when the US claimed that attempts had been made to settle with Korea informally but no solution had been reached. See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 25 June 1998' (1 September 1998) GPA/M/9, para. 16 at 6.

[189] In violation of articles III(1), VIII and XVI of the GPA. See: WTO Committee on Government Procurement, 'Korea - Measures Affecting Government Procurement - Request for Consultations by the United States' (22 February 1999) GPA/D4/1; WT/DS163/1, 1st *tiret* at 1.

[190] See: ibid. 2st *tiret* at 1.

stage by the EU[191] and Japan[192]) lost that dispute in May 2000 on the ground that the Panel ruled that the Korean procurer in question was not covered by the GPA at all, and that was the last formally settled dispute related to the GPA.[193]

9.3.1.c 1999-2006

Like the GPA79, the GPA94 mandated further negotiations three years from its entry into force.[194] The parties held plurilateral or bilateral informal consultations outside the committee.[195] As far as discussions on non-commercial considerations are concerned, it is only known that neither the EU's proposed draft of the revised GPA94 submitted in July 1999[196] nor amendments proposed by the US in May 2000[197] made any references to social or environmental considerations. Rather, the discussion was focused on matters such as (*i*) covering 'build-operate-transfer contracts' and 'concessions for public works' in late 2001,[198] and (*ii*) amending provisions on tendering procedures, technical specifications, definitions, and statistical reporting in late 2002.[199] Subsequent versions of the EU's and US's drafts were circulating in the form of 'informal notes,' which have never been derestricted.[200] In July 2004, the parties scheduled a conclusion of the revised GPA94 for early 2006,[201] and in

[191] See: WTO Committee on Government Procurement, 'Korea - Measures Affecting Government Procurement - Request to Join Consultations - Communication from the European Communities' (8 March 1999) WT/DS163/2.

[192] See: WTO Committee on Government Procurement, 'Korea - Measures Affecting Government Procurement - Request to Join Consultations - Communication from Japan' (9 March 1999) WT/DS163/3.

[193] See: Dispute Settlement Body, 'Korea - Measures Affecting Government Procurement - Report of the Panel' (1 May 2000) WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, p. 3541, paras. 8.1, 8.2.

[194] See: GPA94 article XXIV:7.

[195] The first informal meetings were held on 9 December 1998 and 22 February 1999. See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 23 February 1999' (4 August 1999) GPA/M/11 para. 29 at 6.

[196] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Proposal for the Amendment of the Government Procurement Agreement (1994) - Submission by the European Community' (15 July 1999) GPA/W/87.

[197] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Review of the Agreement on Government Procurement - Streamlining the Provisions of Articles XIII and XVIII Relating to the Receipt and Opening of Tenders, the Awarding of Contracts, and the Disclosure of Information on Contract Awards - Submission by the United States' (24 May 2000) GPA/W/112; WTO Committee on Government Procurement, 'Committee on Government Procurement - Review of the Agreement on Government Procurement - Streamlining the Provisions of Articles VII, IX, X, XI, and XV Relating to the Definition and Use of Tendering Procedures, Invitations to Participate, and Time-periods for tendering- Submission by the United States' (24 May 2000) GPA/W/113.

[198] During the informal meeting held on 1 October 2001. See: WTO Committee on Government Procurement, 'Report (2001) of the Committee on Government Procurement' (11 October 2001) GPA/58, para. 24 at 5.

[199] See: WTO Committee on Government Procurement, 'Report (2002) of the Committee on Government Procurement' (6 November 2002) GPA/73 para. 37 at 7.

[200] See: note 198, para. 23 at 5.

[201] In July 2004, it was summarised by the committee that the purpose of the revision was to address (*i*) "*whether there should be further harmonization of thresholds*," (*ii*) "*whether there should be a uniform level of coverage of the entities covered by the Agreement*," (*iii*) "*whether Annex 1 should follow a positive or negative list approach*," (*iv*) "*whether there should be greater harmonization of the way entities are described, in particular whether Annexes 2 and 3 should be structured on the basis of categories of entities, for example as defined in the legislation of individual Parties or in terms of lists of individual entities*," (*v*) "*whether, in regard to services coverage in Annexes 4 and 5, further commonality of presentation is desirable and feasible, taking into account coverage and presentation under the GATS*," (*vi*) "*whether the General Notes in the Annexes can be simplified and made more easily understandable*," (*vii*) "*other issues that may be raised by delegations."* See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices - Decision of 16 July 2004' (19 July 2004) GPA/79.

August 2005 they hoped to reach agreement before the WTO Hong Kong Ministerial conference to be held in December 2005.[202]

While everybody else was negotiating coverage of the revised agreement, the Israeli delegation made a successful attempt to preserve its right to pursue its industrial policies which it had been allowed to do since its accession in 1983 based on its status of a developing country.[203] Namely, Israel wanted to maintain the level of exceptionally allowed off-sets at 30 percent of the contracts' value, which otherwise would have had to be reduced to 20 percent starting from January 2005.[204] The Israeli representative exposed this country's internal problem with industrial lobbies to the international domain by stating that (*i*) "*[i]n recent years, the Government of Israel had been facing severe criticism by the domestic industry concerning Israel's membership in the GPA. The domestic industry held that the GPA had failed to meet expectations in terms of its contribution to the Israeli economy*",[205] and (*ii*) "*[t]he industry claimed that, on the one hand, the GPA had not led to the expected results of increased gains for Israeli companies in foreign public tenders, and, on the other hand, the domestic industry had lost its advantages and share of the local government procurement market*."[206]

The Israeli delegate further explained that "*offset provisions still stood to serve as a vital instrument in promoting industrial co-operation between foreign companies and Israeli small and medium-sized enterprises*,"[207] (*ii*) *"Israeli companies had proved to be successful in acting as subcontractors in such tenders. Hence, a development-oriented instrument, such as offsets, was essential in creating the opportunities for industrial co-operation between foreign prime contractors and Israeli SMEs*,"[208] and (*iii*) "*[e]Experience had shown that industrial cooperation between foreign and Israeli enterprises had led in many cases to long term business relationships for the benefit of both sides involved*."[209] The request surprisingly met little resistance from other parties,[210] leading to a Committee's decision allowing an extension of the 30 percent threshold by one year,[211] and leaving it for later if a further

[202] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 21 July 2005' (30 August 2005) GPA/M/27, section B at 12.

[203] See: WTO Committee on Government Procurement, 'Minutes of the Meeting held on 17 November 2004' (8 December 2004) GPA/M/24, paras.65-80; WTO Committee on Government Procurement, 'Minutes of the Meeting Held on 16 December 2004' (18 January 2005) GPA/M/25, paras. 1-11.

[204] See: ibid. paras. 66, 67.

[205] See: ibid. para. 71 at 11.

[206] See: ibid.

[207] See: ibid. para. 73 at 11.

[208] See: ibid.

[209] See: ibid.

[210] See: ibid. paras. 81-89.

[211] See: WTO Committee on Government Procurement, 'Decision Pursuant to Article XXIV:6(a) on the Agreement on Government Procurement of 16 December 2004' (17 December 2004) GPA/83.

extension shall be granted or not.[212] However, later on, other parties were much more reluctant to accept unlimited extension of high-percentage off-sets.[213] For instance the US delegate claimed that the solution to Israeli concerns about the importance of public procurement-related off-sets for Israeli industry would have to eventually mean phasing out off-sets and finding other solutions.[214] Even so, the parties still agreed to a 28 percent off-set threshold for three more years starting from January 2006 (instead of 20 percent which otherwise would have been applicable).[215]

The first formal draft of GPA94's revision was circulated in December 2006.[216] The purposes of that revision were later optimistically categorised in retrospect by Pascal Lamy into a need to (*i*) update the agreement in line with developments in technology, (*ii*) curb still existing discriminatory measures, and (*iii*) the extend coverage of the agreement.[217] As far as non-commercial considerations are concerned - as mentioned many times in preceding chapters - the draft opened the way to legalising cross-border environmental policies by allowing environmental considerations to be included in technical specifications[218] and in evaluation criteria.[219] Derestricted documents show no discussion on this crucial matter at all. However, one might indirectly deduct that the idea came from the EU because it was the only party which had tabled proposals for the revised provisions related to technical specifications back in 2001.[220]

Nonetheless, the next formal meeting of the committee was called in December 2007 to only confirm that the coverage-related negotiations were stalled.[221] In December 2008, the committee's chairman Nicholas C. Niggli "*urged all delegations to redouble their efforts and to continue to work together in a spirit of compromise, remembering that the price of a continued impasse in the coverage negotiations was continued delay in the coming into force of the revised GPA text – something which, in turn, might have adverse implications for*

[212] See: note 202, para. 22 at 6.

[213] See: WTO Committee on Government Procurement, 'Minutes o the meeting held on 14 October 2005' (21 November 2005) GPA/M/28, paras. 16-24; WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 21 December 2005' (31 January 2006) GPA/M/29, paras. 7-12.

[214] See: note 213, GPA/M/28, para. 16.

[215] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Decision Pursuant to Article XXIV:6(a) of the Agreement on Government Procurement - Decision of 21 December 2005' (22 December 2005) GPA/86.

[216] See: WTO, 'Committee on Government Procurement - Minutes of the Meeting Held on 8 December 2006' (29 January 2007) GPA/M/31, para. 5 at 2.

[217] Pascal Lamy, 'Foreword' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) xxv at XXX.

[218] "*For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment.*" See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Revision of the Agreement on Government Procurement as at 8 December 2006 - Prepared by the Secretariat' (11 December 2006) GPA/W/297, Article X.6.

[219] "*The evaluation criteria set out in the notice or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics, and terms of delivery.*" See: ibid. Article X.9.

[220] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 21 February 2002' (2 May 2002) GPA/M/17, para. 65 at 11.

[221] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Formal Meeting of 13 December 2007' (23 January 2008) GPA/M/33, para. 34 at 6.

future accessions."[222] In February 2009, Mr. Niggli - by making a claim that "*[i]In the present time of great economic uncertainty, the Agreement on Government Procurement and its mechanisms seemed more relevant to the needs of the world economy than ever before. WTO Members were becoming more and more directly involved in economic activity, and this put the Agreement and the deliberations that took place in the Committee at the heart of the challenges facing the multilateral trading system*," - seemed to suggest that there was very little chance of reaching an agreement at that time.[223] The major obstacle to reaching an agreement seemed to lie on the 'all or nothing' approach, meaning that the new framework could not be agreed on without a parallel consensus on the expansion of coverage.[224] No single committee's document shows any party's attempt to think outside the box and propose adoption of necessary changes to the framework while leaving arduous negotiations on the expansion of coverage for later.

9.3.2. Revision of 2012

9.3.2.a Post-crisis stagnation

In the post-2008-crisis conditions, traditional industrial non-commercial considerations surfaced in the committee anew, after the US delegation had notified the adoption of the ARRA,[225] leading to the ceaseless exchange of notifications between (*i*) the EU expressing its serious concerns about ARRA on the one hand,[226] and (*ii*) the US's assurances that the ARRA was in full compliance with the GPA.[227] At the same time, the Japanese delegation notified the adoption of numerous environmentally-oriented and public procurement-related legislative measures, such as (*i*) measures aiming at achieving, for example, reduction of emissions thanks to environmental criteria applied in the purchases of electricity and vehicles,[228] or (*ii*) the "*Basic policy for the promotion of the procurement of eco-friendly*

[222] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Formal Meeting of 9 December 2008' (20 January 2009) GPA/M/35, para. 48 at 9.

[223] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Formal Meeting of 25 February 2009' (19 March 2009) GPA/M/36, para. 6 at 1.

[224] A similar solution was possible at the end of the GATT Uruguay Round. Perhaps the scale of remaining discrepancies between the parties as to coverage was much larger this time.

[225] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Notification of National Implementing Legislation - Communication from the United States Pursuant to Article XXIV:5(b) of the GPA' (24 April 2009) GPA/98.

[226] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Questions for the United States Regarding the Buy America(n) Provisions in the US Economic Stimulus Package - Communication from the European Communities' (24 March 2009) GPA/W/303; WTO Committee on Government Procurement, 'Committee on Government Procurement - Questions for the United States Regarding the Buy America(n) Provisions in the US Economic Stimulus Package - Communication from the European Communities' (3 July 2009) GPA/W/305; WTO Committee on Government Procurement, 'Committee on Government Procurement - Responses of the United States Regarding the "Buy American" Provisions in the US Economic Stimulus Package - Communication from the United States' (1 October 2009) GPA/W/307.

[227] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Responses of the United States to Questions of the European Communities With Respect to the buy American Provisions in the American Recovery and Reinvestment Act of 2009 - Communication from the United States' (27 April 2009) GPA/W/304; note 226, GPA/W/307.

[228] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Notification of National Legislation - Communication from Japan Pursuant to Article XXIV:5(b) of the Agreement on Government Procurement' (2 June 2009) GPA/99, para. 4 at 2.

goods and services" under the *"law concerning the promotion of the procurement of eco-friendly goods and services by the state and other entities*"[229] – which was not contested by the other parties probably because Japanese measures did not impose process-related requirements.[230]

9.3.2.b 2010-2012

The negotiations on the revision were resumed in 2010,[231] and were mostly coverage-focused, eventually leading to the expansion of commitments worth about USD80-100 billion each year.[232] The first attempts to eventually systematically approach horizontal policies instead of agreeing to individual derogations or acquiescing to non-compliance could be seen, for instance, in adding 'the treatment of small and medium-sized enterprises' to the negotiating agenda in December 2010.[233] A year later, in December 2011, the committee adopted a revised text,[234] this time leading to the adoption of the final decision in April 2012,[235] when particular parties' annexes specifying the vast majority of coverage-related matters were simply attached to the revised framework of the agreement accepted in December 2011.

With the lack of more general provisions, country-specific non-commercial considerations consented to by all the parties continued to be hidden in country-specific annexes and appendices including:

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[229] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Notification of National Implementing Legislation - Communication from Japan Pursuant to Article XXIV:5(b) of the GPA - Addendum' (23 July 2009) GPA/37/Add.6.

[230] At least, there is no evidence in the minutes/protocols of the committee which would show such objections. Moreover, even though electricity-related requirements are process located, given Japan's geographical situation, imports of electricity are out of the question anyway.

[231] "*During the present reporting period, Parties pursued their negotiations with renewed vigour and determination. Discussions related to the negotiations took place in a series of informal meetings held in the weeks beginning 8 February, 26 April, 12 July, 11 October and 6 December 2010.*" See: WTO Committee on Government Procurement, 'Report (2010) of the Committee on Government Procurement' (9 December 2010) GPA/106, para. 33 at 11.

[232] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Report (2012) of the Committee on Government Procurement' (6 December 2012) GPA/116, para. 7 at 2. As far as the changes to the framework are concerned the Committee summarised them as follows: "*• The extension of coverage by other Parties to the Agreement to, at a minimum, 400 additional procuring entities (including new coverage by a particular Party of all of its provincial and territorial governments); • New coverage by three major Parties of Build-Operate-Transfer arrangements (BOTs); • Additional coverage of services procurement by the majority of Parties, particularly with respect to telecommunications; • Additional coverage of construction services. As a result of these additions, all Parties will now cover construction services (CPC 51) in full; • The reduction of applicable thresholds by four of the Parties; and • The elimination by several Parties of miscellaneous restrictions on market access that were previously applied.*" See: ibid.

[233] See: WTO Committee on Government Procurement, 'Report (2010) of the Committee on Government Procurement' (9 December 2010) GPA/106, attachment, point 11 at 14. Under the GPA12 Article XXII.8.(a).(i), the matter was left for further negotiations.

[234] However, subject to legal review and final verification. See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Ministerial-level meeting of the Committee on Government Procurement (15 December 2011) - Decision on the outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement' (16 December 2011) GPA/112.

[235] See: note 234, GPA/112, para. 5; WTO, 'Committee on Government Procurement - Adoption of the results of the negotiations under article XXIV:7 of the Agreement on Government Procurement, following their verification and review, as required by the Ministerial Decision of 15 December 2011 (GPA/112), paragraph 5. Action taken by the Parties to the WTO Agreement on Government Procurement at a formal meeting of the Committee, at the level of Geneva heads of delegations.' (2 April 2012) GPA/113. See also: WTO Secretariat, 'Committee on Government Procurement - Ministerial-level meeting of the Committee on Government Procurement (3 December 2013, at Bali, Indonesia) - Declaration' (3 December 2013) GPA/122.

(*i*) Canada's note with regard to sub-central procurers that "*[n]Nothing in this Agreement shall be construed to prevent any provincial or territorial entity from applying restrictions that promote the general environmental quality in that province or territory, as long as such restrictions are not disguised barriers to international trade*,"[236]

(*ii*) *Canada's* general note that "*[t]This Agreement does not apply to set asides for small and minority owned businesses*,"[237]

(*iii*) Canada's general note that "*[t]This Agreement does not apply to any measure adopted or maintained with respect to Aboriginal peoples*,"[238]

(*iv*) The US's note with regard to sub-central procurers that "*[n]Nothing in this Annex shall be construed to prevent any state entity included in this Annex from applying restrictions that promote the general environmental quality in that state, as long as such restrictions are not disguised barriers to international trade*,"[239]

(*v*) The US's note with regard to sub-central procurers that "*[t]The state entities included in this Annex may apply preferences or restrictions associated with programmes promoting the development of distressed areas or businesses owned by minorities, disabled veterans, or women*," [240]

(*vi*) The US's general note that "*[t]This Agreement does not apply to any set aside on behalf of a small- or minority-owned business. A set-aside may include any form of preference, such as the exclusive right to provide a good or service, or any price preference*,"[241]

(*vii*) The US's services-specific note that the agreement does not apply to research and development services,[242]

(*viii*) The US's services-specific note that the agreement does not apply to research and development services.[243]

9.3.3. Negotiations after the 2012 revision

While derestricted committee documents do not show how it came into being, the future working programmes were preliminarily accepted in December 2011 along with agreement

[236] See: note 235, GPA/113 at 54.
[237] See: ibid. at 62.
[238] See: ibid.
[239] See: ibid. at 427.
[240] See: ibid.
[241] See: ibid. at 433.
[242] See: ibid. at 431.
[243] See: ibid. at 406.

on the text of the 2012 revision. They completely reoriented the committee's previous attitude to discussing the legitimisation of the pursuit of horizontal policies and incorporation of non-commercial considerations into the procurement process. The GPA parties agreed to work on further curbing firm industrial horizontal policies among others by working toward abolishing individual derogations. They also agreed to take up the challenge of systematising the pursuit of environmental and social standards, opening the way for future legitimisation of cross-border horizontal policies. As far as firm industrial policies are concerned, the premise of the 'Work Programme for SMEs'[244] was that "*the Parties shall avoid introducing discriminatory measures that favour only domestic SMEs and shall discourage the introduction of such measures and policies by acceding Parties"* [245] and the goal of the Work Programme on Exclusions and Restrictions in Parties' Annexes [246] was *"reducing and eliminating exclusions and restrictions in future negotiations provided for in Article XXII:7 of the Agreement*."[247]

As far as green and social policies are concerned, the premise of the Work Programme on Sustainable Procurement[248] was that "*[t]The Committee shall identify measures and policies that it considers to be sustainable procurement practiced in a manner consistent with the principle of "best value for money" and with Parties' international trade obligations and prepare a report that lists the best practices of the measures and policies*"[249] and the premise of the Work Programme on Safety Standards in International Procurement[250] was that "*the Agreement does not prevent Parties from imposing or enforcing measures necessary to protect of public safety, provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustified discrimination or a disguised restriction on international trade*".[251] Nonetheless, those works had not been on the committee's agenda until the GPA's entry into force in April 2014 (at least 10 ratifications were required),[252] and the instruments were gradually gathered by the committee starting from mid-2013.[253]

When the revision of 2012 was awaiting its ratification and entry into force, the committee had to deal with new controversies. In July 2012, the EU protested against interfering with foreign regulatory environments with public procurement-specific trade sanctions by the US,

[244] See: note 234, GPA/112, Annex 5.
[245] See: ibid. Annex 5 para. 2.
[246] See: ibid. Annex 8.
[247] See: ibid. Annex 8 fourth para. of the preamble.
[248] See: ibid. Annex 7.
[249] See: ibid. Annex 7 para. 3.
[250] See: ibid. Annex 8.
[251] See: ibid. Annex 8 third para. of the preamble.
[252] See: WTO Committee on Government Procurement. 'Committee on Government Procurement - Minutes of the ministerial-level meeting of 12 March 2014' (14 May 2014) GPA/M/55, para. 2.1. at 1-2.
[253] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Report (2013) of the Committee on Government Procurement' (24 October 2013) GPA/121, para. 2.4. at 2.

which were reminiscent of the Massachusetts' Burma Law dispute.[254] This time, it was the state of Florida that imposed public procurement-related sanctions against foreign business engaged in Cuba and Syria.[255] While the EU delegate's understanding was that Florida's law in question had been at least temporarily blocked by US Federal courts,[256] the EU delegate (joined by the delegates of Canada,[257] Norway,[258] Switzerland[259] and Singapore[260]) still wanted confirmation that that law would be effectively suppressed by the US federal government, and the US representative promised so.[261] At the next meeting of the committee in July 2012, when the US representative was updating the parties on the developments before the US federal courts in that case,[262] the EU's delegate "*expressed concern about the issue of extraterritorial effect in some Parties' domestic laws that potentially affected the European Union's businesses and economic interests*."[263] After December 2012, minutes of the committee have not shown any further discussion on that matter[264] suggesting that the problem had been resolved. That controversy also again illustrated that in the case of internal tensions about sub-central autonomy between GPA parties and their local governments, other GPA parties could only play a waiting game (see section 7.3.2).

In addition, the expansion of coverage again caused new tensions between the US and Canada despite some temporary 'appeasement' after the conclusion of the discussed US-Canada Government Procurement Agreement[265] in 2010 (see section 7.4.1). The Canadian delegate accused the US of (*i*) significantly expanding (or planning to expand) the 'buy American' provision to new sectors (not only iron and steel but also buses, urban rail, cars,

[254] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the formal meeting of 18 July 2012' (20 August 2012) GPA/M/47 para. 26 at 5.

[255] "*32. On 1 May 2012, the Governor of the United States' state of Florida had signed legislation called "House Bill 959" which generally prohibits agencies from contracting with certain companies that have business operations in Syria and Cuba. The new legislation had been scheduled to enter into effect on 1 July 2012. However, on 4 June 2012, a United States subsidiary of a Brazilian conglomerate has filed a lawsuit against the state of Florida challenging the constitutionality of the legislation and seeking to enjoin the enforcement of the legislation. On 25 June 2012, the Federal District Court of Florida issued a preliminary injunction barring enforcement of the legislation. Under the United States' legal system, a preliminary injunction is an order issued by a court, either before or during a trial, to halt specified action in order to prevent an irreparable injury from occurring before the court had had the chance to decide the case on the merits. 33. In its decision, the District Court had stated that the preliminary injunction was warranted because there was a "substantial likelihood" that the court would find that the new legislation was unconstitutional as a violation of the United States Supremacy Clause, the Foreign Affairs Power, and the Foreign Commerce Clause of the United States' constitution. The state of Florida has until late July to appeal the injunction. However, the injunction remains in effect unless and until the court decides to modify it. It has no expiration date so that it would remain valid until there was further action by the court. As the court proceedings were at a very preliminary stage, the United States' government has not taken any position on the legislation, nor on the merits of the lawsuit. However, the legislation was not in effect, so that neither GPA Parties nor their suppliers were being harmed or denied the opportunity to participate in any Florida state procurement as a result of this legislation.*" See: ibid. paras. 32, 33 at 5.

[256] See: ibid. para. 27 at 4.

[257] See: ibid. para. 29 at 4.

[258] See: ibid. paras. 30 at 4, 5.

[259] See: ibid. para. 35 at 5.

[260] See: ibid. para. 36 at 5.

[261] See: ibid. para. 31 at 5.

[262] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the formal meeting of 31 October 2012' (19 November 2012) GPA/M/48 para. 23 at 3.

[263] See: ibid. para. 24 at 4.

[264] See: ibid. paras. 26-28 at 5.

[265] See: Agreement Between the Government of the United States of America and the Government of Canada on Government Procurement (Signed 12 February 2010, in force 16 February 2010) TIAS No. 10,216.

etc.) as a counter-measure against expanded coverage,[266] and (*ii*) blurring the US's compliance or non-compliance with the GPA by adding that requirements that such policies should "*be applied consistently with the United States' international trade obligations*" to all new 'buy American' laws, even to the laws not covered by the GPA at all.[267] Canada's delegation was joined in that statement by the delegations of Japan,[268] the EU,[269] Switzerland[270] and Hong Kong.[271]

Talks on new work programmes were eventually launched, firstly informally, in June 2014[272] and formally in the committee in November 2014.[273] As regards the Work Programme on Exclusions and Restrictions more or less overlapping with the goal of curbing traditional industrial policies, delegations had been expected to submit summaries of their country-specific restriction on coverage by the end of 2014.[274] As regards the Work Programme on SMEs, the template of the questionnaire addressed to the parties on the matter was meant to be agreed on by November 2014 and circulated later on.[275] As regards the Work Programme on Sustainability, the preparation of documents initiating the discussion in the committee was entrusted to Canada,[276] which the Canadian delegation did already in December 2014.[277] However, as of mid-2015 Canadian submission remained restricted. As regards the Work Programme on safety standards, in November 2014 "*no specific action had been requested/proposed regarding the Committee's Work Programme on safety standards in international procurement*"[278] and, as of mid-2015, no progress has been achieved in this respect according to unclassified documents.

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[266] Canada's delegation complained that (*i*) "*on 10 June 2014, the President of the United States had signed into law the Water Resources Reform and Development Act (WRRDA). This Act contained a programme that would provide financial assistance to large water infrastructure projects. The legislation imposed new Buy America restrictions on all iron and steel used in such projects. The WRRDA also imposed new and permanent Buy America restrictions on procurements funded by the Environmental Protection Agency's (EPA) Clean Water infrastructure fund – the Clean Water State Revolving Fund (CWSRF).*" [see: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the formal meeting of 25 June 2014' (4 September 2014) GPA/M/56, para. 2.3. at 2, 3], (*ii*) "*United States federal government had tabled in Congress a new law that sought to expand domestic content requirements attached to federal funding for urban transportation – the Generating Renewal, Opportunity, and Work with Accelerated Mobility, Efficiency and Rebuilding of Infrastructure and Communities throughout America Act – or the "GROW AMERICA ACT". Section 3006 provided for an increase in the Buy America domestic content provisions for so-called "rolling stock" – buses, urban rail cars – from the current 60 percent to 100 percent by 2019. If passed, this bill would force GPA suppliers to localize production in the United States in order to participate in these procurements.*" (see: ibid. para. 2.4. at 4), and (*iii*) a number of local/state-level legislative initiative after the likes of federal *buy American* measures (see: ibid. para. 2.5. at 4).

[267] See: ibid. para. 2.4. at 2 and para. 2.5. at 3.

[268] See: ibid. paras. 2.10.-2.12. at 4.

[269] See: ibid. paras. 2.13.-2.14. at 5.

[270] See: ibid. paras. 2.15.-2.16. at 5.

[271] See: ibid. para. 2.17. at 5.

[272] See: WTO Committee on Government Procurement. 'Committee on Government Procurement - Report (2014) of the Committee on Government Procurement' (24 September 2014) GPA/126, para. 2.8. at 3.

[273] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the formal meeting of 25 November 2014' (2 February 2015) GPA/M/58 para. 4.1. at 4.

[274] See: ibid. para. 4.2.b. at 4.

[275] See: ibid. para. 4.2.a. at 4.

[276] See: ibid. para. 4.2.c. at 4.

[277] See: Committee on Government Procurement - Work Programme on Sustainable Procurement - Communication from Canada (5 December 2014) GPA/WPS/SP/1.

[278] See: note 273, para. 4.3. at 5.

9.3.4. Practice versus theory

The detailed review of four decades of GATT/WTO public procurement-related negotiations substantially supports the theoretical foundation of this chapter explaining little success of attempts to liberalise public procurement markets (compared to general) commerce with the combination of (*i*) the non-private nature of public procurement markets and the lack of micro level drivers preventing a spontaneous emergence of acceptable global order of public contracting (see section 9.1.1), and (*ii*) the non-tariff nature of trade barriers in these markets (see section 9.1.2). Indeed, the works on the framework needing to arbitrarily regulate the global legal order of public contracting (including procedures of contracting, a number of public-procurement-specific NTBs, attitude to horizontal policies) have often overshadowed works on the coverage (determining the actual scope of liberalising commitments), especially after the fiasco of the planned 2006 revision where the negotiating parties could not agree on the scope of the application of that framework for another six years.

The preference for varying individual derogations for country-specific horizontal policies over more general framework's provisions could for long mask the disconnect between (*i*) the harmonised framework coalesced by strong macro-level drivers (reciprocity and network effects) and (*ii*) the reality in which the order of public contracting, non-commercial considerations included, has remained strongly polycentric. For long, where the derogations did not suffice, the disputes about the non-compliance with the GPA's procedural rules interfering with individual contracting have also masked the incorporation of non-commercial considerations. Thus, the problems of the pursuit of cross-border horizontal policies and interferences in other GPA parties' regulatory environments have rarely surfaced in the context of non-compliance (Burma Law, similar measures adopted in Florida in 2012, planned EU Member States' action against Indonesia in 1997). However, since the individual-derogations-method met its dead end, such problems have been on the agenda of future works on the framework (most likely thanks to the EU's negotiating position dictated by the developments in its internal market).

Work programmes scheduled after the 2012 revision's entry into force foreshadow some incipient consensus on such problems among the current major centres deciding the shape of the GPA system. However, firmly allowing process-related requirements (potentially resulting from work programmes on sustainable procurement and on safety standards) as well stymying industrial policies including innovation mercantilism (potentially resulting from work programmes on SMEs and on individual derogation) well illustrates an inclination of the dominant regional centre's to impose its over other centres (see sections 9.1.1.d and

9.1.1.e) and might only further petrify emerging/developing countries' reluctance to join the GPA because they are not a participants of this consensus (see further section 9.4.2).

9.4 Obstacles to multilateralisation

The very little success of negotiations aiming at multilateralising public-procurement-related commitments (i.e. also embracing emerging/developing countries with the dominant platform) has been commonly explained in the literature with the incapacity of the GPA's model of liberalisation to (*i*) accommodate the wider industrial/social policy-goals of developing/emerging countries,[279] and (*ii*) offer to such countries satisfactory market access.[280] Many still see the key to the multilateralisation in offering special and differential treatment to developing countries.[281] However, this problem must also be seen through the prism of the combination of (*i*) the ongoing bilateralisation of negotiations dictated by the diversity of bilateral trade profiles between negotiating countries, and (*ii*) the reluctance of the 'rich club' to dispel the vagueness of the GPA's model as to the allowed scope of cross-border horizontal policies pursued by more affluent counties. Indeed, even the existing plurilateral format of negotiations has been largely disintegrated by the bilateral nature of the actual commitments made by the GPA parties toward each other and with third countries (see also sections 2.3.2 and 4.1). The *de facto* bilateralisation of formally plurilateral negotiations has already caused a number of controversies raised by the GPA parties ignored in such bilateral arrangements. And the possibility of bilateral deals on the allowed scope of the pursuit of cross-border horizontal policies, especially between affluent GPA parties and emerging economies only adds to the list of obstacles to multilateralisation.

9.4.1. Bilateralism within plurilateralism

The increasing trend toward bilateralisation of public procurement-related trade negotiations equally pertains to relations among GPA parties only, parties and non-parties, and among non-parties. In particular, formal agreements between GPA parties and third countries are

[279] See for instance: Vinod Rege. 'Transparency in government procedures: Issues of concern and interest to developing countries' (2001) 35(4) J World Trade 489 at 490, 491. In the context of South-East Asia, Hsu defined such wider policy goals as "*developmental needs (for SMEs, domestic suppliers and craftspeople).*" See: Locknie Hsu. 'Government Procurement: A View from Asia' (2006) 1(2) Asian J WTO & Intl Health L & Pol'y 379 at 395. Also Linarelli generally observed that: "*[t]The weakness of the GPA to accommodate SME and HDI policies likely offers clues as to why the GPA has had such trouble becoming multilateral. If ever there will be a need for revisions in future GOA, these areas might prove to be productive places to focus.*" See: John Linarelli, 'The limited case for permitting SME procurement preferences in the Agreement on Government Procurement' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO regime on government procurement: challenge and reform* (Cambridge University Press, Cambridge 2011) 444-458 at 445. In turn, Corvaglia and Maschner observed that "*[o]One of the most controversial regulatory challenges faced by the WTO Procurement Agreement is, in fact, represented by the difficulties in striking a balance between the legitimate promotion of industrial, environmental and social policies at the procurement national level, with the principles of non-discrimination embedded in the GPA.*" See: Maria Anna Corvaglia and Laura Maschner, 'The Complementarity of Soft and Hard Law in Public Procurement: Between Harmonization and Resilience' (2013) NCCR Trade Working Paper no 2013/10 at 9.

[280] See: Roberto Giraldo. 'A Critic to the Objectives of the Global Public Procurement Initiatives in the Context of the WTO' (2005) (5) International Law: Revista Colombiana de Derecho Internacional 217 at 232.

[281] See: ibid.

seen as a challenge to multilateralisation because strong economies might prefer to use their leverage more efficiently in individual talks with emerging economies without having to care about the GPA's MFN clause, like in the case of the US individually dealing with South-East Asian countries.[282] However, this similarly works within the plurilateral framework where the GPA parties enter into numerous more or less formalized and overt agreements pertaining to various aspects of coverage, non-commercial considerations and even procedural details. Some GPA parties for a long time unsuccessfully battled for the preservation of the plurilateral character of negotiations and of conformity with the GPA's MFN principle as well as against bilateral arrangements on the pursuit of horizontal policies. Nonetheless, in the course of negotiations on the planned revision of 2006, after many years of the practice to the contrary, it was clear that "*[n]Negotiations on the extension of coverage of each Party's Appendix I as well as on the elimination of discriminatory measures and practices in such Appendices will be largely pursued bilaterally*" [283] and only "*subject to monitoring by the Committee as a whole.*"[284]

9.4.1.a Pre-Uruguay negotiations and bilateralism

Actually, the idea of the MFN clause's practical application was de facto ridiculed in the GATT committee already in 1981 when the US delegation made a claim that (*i*) various 'buy American' laws could be waived for "*non-signatories provided they undertook in a bilateral agreement the full procedural and substantive obligations of the Agreement*",[285] and (*ii*) "*[i]If a country which in the context of its procurement system substantially complied with the Code obligations indicated interest in entering into a bilateral agreement, the United States Government had authority to consider such an agreement so as to designate that country beneficiary under United States law, thereby extending to it all the benefits of the new legislation and regulations pertaining to the GATT Agreement*." [286,287] In the same

[282] See: note 279, Hsu. at 395. However, exceptionally, as Davies and Nadakavukaren Schefer noticed, also the opposite direction is possible in the sense that bilateral agreements concluded between GPA-parties and GPA-non-parties might - instead of undermining plurilateral GPA system – coalesce it. For instance, under the Japan-Mexico EPA's public-procurement-relevant chapter "*[i]In the event that after the entry into force of this Agreement a Party offers a non-Party specified in paragraph 3 below additional advantages of access to its government procurement market beyond what the other Party has been provided with under this Chapter, the former Party shall consent to enter into negotiations with the other Party with a view to extending these advantages to the other Party on a reciprocal basis*." (see: Japan-Mexico EPA, Article 130.2) whereby 'non-Party' was defined as "*in the case of Japan, a Party to the Agreement on Government Procurement in Annex 4 to the WTO Agreement, as may be amended, (hereinafter referred to as "the GPA") or a party to an existing Economic Partnership Agreement with Japan and in the case of Mexico, a party to the North American Free Trade Agreement, as may be amended, (hereinafter referred to as "the NAFTA") or the European Communities.*" (see: ibid. Article 130.3). See: Arwel Davies and Krista Nadakavukaren Schefer, 'Government Procurement' in Bartels, Lorand, Simon Nicholas Lester and Bryan Mercurio (eds), *Bilateral and regional trade agreements :commentary and analysis* (2nd edn Cambridge University Press, Cambridge 2016) at 309.

[283] See: note 201, GPA/79 at 2.

[284] See: ibid.

[285] See: note 110, GPR/Spec/6, para. 24 at 9.

[286] See: ibid.

[287] Technically, the US delegation was correct in the sense that the GPA's MFN clause covers only concessions granted to any 'any other Party' [see: GPA79, article II.1.(b)]. However, this only proves that the GPA's MFN ignoring commitments made toward non-parties makes littles sense (the less parties GPA had in the past, the less sense the GPA's MFN clause made because the pool of non-parties used to be larger). In addition, the US statement could also be interpreted in a way that non-parties to

period, the US delegation also blocked, for a month, entry into force of Greece's protocol of accessions (following Greece's accession to the then EC, now EU, the members of which are collectively subjected to the GPA) with regard to the US, apparently in order to win some concessions from Greece on a bilateral basis.[288] Later that year, the cases of non-compliance commenced to be dealt with bilaterally, which for the first time could be seen in that the Austrian representative - enquired by the US representative as to why "*only 3.9 per cent of all Austrian purchases were Code-covered*"[289]and by the delegate of the then EC and Sweden on related calculation methodology[290] - stated that "*[h]~~H~~e would revert to the more specific questions at the next meeting or bilaterally*."[291] In the second half of 1981, also potential accessions of new members appeared to be discussed bilaterally, when the Philippines' representative claimed a few times that the Philippines was engaged in bilateral negotiations with 'some developed countries'[292] of an 'exploratory' nature.[293] The GATT secretariat complained in June 1984 that "*[l]~~L~~ittle concrete information exist~~s~~[ed] in the secretariat with respect to bilateral consultations. The offers made in the Tokyo Round [we]~~a~~re known but subsequent consultations ha~~ve~~[d] not been officially documented by way of formal offers to the Director General under the adopted procedure's*."[294]

The fragmentation of talks on the expansion of coverage, compliance, and even potential accessions of non-parties only reflected the diverging trade profiles and interests in reciprocal access to specific foreign procurement markets between particular countries. This somewhat facetiously surfaced in the committee when the Israeli delegation grassed Japan up to the committee in April 1989 for organising a public procurement-related seminar in Israel,

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the GPA could hope for better concessions from the US (better coverage or waivers of industrial policies) than GPA parties. This is because - in the case of dealing with the GPA parties - the US would have to extend any bilateral arrangements over all other GPA parties unless all parties agreed to individual derogation (which might discourage US from reaching reciprocal concessions with GPA parties compared with non-parties).

[288] "*I have been instructed by my authorities to confirm to you that the United States does not consider itself bound to apply the provisions of the Agreement on Government Procurement to Greece by virtue of the acceptance by the European Communities of Greece as a member State in the European Communities. Should it be considered that the Agreement on Government Procurement otherwise would apply as between the United States and Greece, I am also instructed to inform you that, until such time as I inform you to the contrary, the United States, pursuant to Article IX:9 of the Agreement, does not consent to such application between the United States and the European Communities with respect to Greece.*" See: GATT, 'Committee on Government Procurement] - Agreement on Government Procurement - Communication from the Delegation of the United States (12 January 1981) GPR/1 at 1. "*I have been instructed by my authorities to inform you that, in light of the decision of the Committee on Government Procurement on 15 January 1981 regarding the application of the Agreement on Government Procurement between each Party to the Agreement and Greece, my letter to you of 30 December 19801/concerning United States action under Article IX:9 of the Agreement against the European Communities with respect to Greece ceased to have effect as of 15 January 1981.*" See: GATT, 'Committee on Government Procurement - Agreement on Government Procurement - Communication from the Delegation of the United States' (3 February 1981) GPR/6 at 1.

[289] See: GATT, 'Committee on Government Procurement - Draft Minutes of Meeting Held on 23 February 1983' (18 March 1983) GPR/Spec/23, para. 14 at 7.

[290] See: ibid. paras. 15-16 at 7.

[291] See: ibid. para. 17 at 7.

[292] See: GATT, 'Committee on Government Procurement - Draft Minutes of Meeting Held on 25-26 May 1983' (30 June 1983) GPR/Spec/27, para. 3 at 1; GATT, 'Committee on Government Procurement - Draft Minutes of the Meeting Held on 13 - 15 October 1981' (13 November 1981) GPR/Spec/11, para. 4 at 1. See also: note 101.

[293] See: ibid. GPR/Spec/11, para. 4 at 1.

[294] See: GATT, '[Committee on Government Procurement] - Agreement on Government Procurement - Article IX:6(b) Negotiations - Special and Differential Treatment for Developing Countries - Note by the Secretariat' (28 June 1984) GPR/W/56/Add.2, para. 12 at 3.

the official purpose of which "*had been to familiarize the Israeli export community with the characteristics and opportunities of Japanese procurement*"[295] as "*an important activity of technical assistance under the provisions of Article III* [Special and Differential Treatment for Developing Countries] *of the Agreement*".[296] In addition to rising bilateralism, also prioritising regionalism by some parties could be seen, for instance in the Singaporean representative's statement on the new requirements on the elimination of discriminatory pre-procurement communications with suppliers of selected countries to be integrated into the text of the GPA's 1987 revision.[297] The Singaporean representative communicated that "*Singapore would, under the Agreement on the ASEAN Preferential Trading Arrangement, continue to give prior notice to other ASEAN countries before similar notices were published to non-ASEAN countries.*"[298]

9.4.1.b Uruguay negotiations and bilateralism

In the course of works in the Uruguay Round, GPA parties kept some appearances of plurilateralism. However, committee documents reveal that, at the decisive stage of negotiations, bilateral informal talks covered not only coverage but also 'textual proposals' designating changes to the GPA's framework.[299] The trend toward more formalised bilateral agreements on the coverage between GPA parties had been initiated when the US and the then EC had "*decided to make certain reciprocal commitments to open their respective procurement markets as a downpayment towards an expanded Code*."[300] The US, among others, traded waiving numerous 'buy American' provisions encumbering 'US federal entities in the electric power sector'[301] for the expanded coverage of the EC's commitments

[295] See: GATT, 'Committee on Government Procurement - Draft Minutes of the Meeting Held on 16 March 1989' (25 April 1989) GPR/Spec/61, para. 62 at 14.

[296] See: ibid.

[297] "*Entities shall not provide to any potential supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition*." See: GPA79, article V.3.

[298] See: note 110, GPR/M/24, para. 12 at 2.

[299] "*From now on, the negotiations proceed on the basis of concrete offers and requests from participants and concrete textual proposals for any changes in the Agreement that might be needed. In the course of the week, a number of bilateral and plurilateral discussions have taken place outside meetings of the Informal Working Group. It is necessary that bilateral work be intensified in the weeks to come. The Group has set aside the weeks of October 22 and November 12 for further meetings.*" See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 5 October 1990' (28 November 1990) GPR/M/38, para. 7 at 2. See also: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 27 March 1992' (30 April 1992) GPR/M/45, para. 2 at 3.

[300] See: GATT, 'Committee on Government Procurement - Memorandum of Understanding between the United States of America and the European Economic Community on Government Procurement' (8 June 1993) United States 07/06/1993 GPR/W/126, preamble *in fine*. "*This Agreement shall terminate on the earlier of 30 May 1995 or the entry into force of an expanded Code; provided, however, that either Party may terminate this Agreement on 50 May 1994 by notice given to the other Party, at least 30 days prior to that date.*" See: ibid. Article 7.3.

[301] See: ibid. Article 3.2, Annex 4 at 49.

over similar public procurers [302] subjected to the second-generation utilities Directive 90/531/EEC[303] (see section 3.2.2).

The EU and the US, in April 1994, reached a final bilateral agreement on the coverage to be later integrated into GPA94.[304] The EU's delegation made an attempt to also gain market access to Canadian provincial procurement by converting the EU-US deal into trilateral agreement also covering Canada. However, EU's delegation was perhaps missing the point that the Canadian provincial governments would never allow any international liberalisation of their local public procurement markets toward any third country unless the US waived "*small business set-aside*s*, Buy America provisions and local preference exceptions*"[305] policies toward small Canadian business (see section 7.4.1).[306] Canada refused to join the previously reached EU-US agreement[307] and - although "*[o]~~O~~ther countries withheld Annex 2 and 3 coverage from Canada*" [308] - "*Canada could have made a similar carve-out for specific countries with which it had particular difficulties but it did not*."[309] In the light of no progress being made, the EU's representative heavily criticised Canada for not subjecting provincial governments to GPA94, stating that the *"explanation given by the Canadian delegation (…) really only referred to the United States,"*[310] and Canada's problems "*were exclusively part of the bilateral relationship between Canada and the United States and that the entire plurilateral framework was being held hostage by problems in a bilateral relationship*" [311] which "*went against the entire philosophy behind the Agreement on*

[302] See: ibid. Article 3.1, Annex 2 at 47.

[303] See: Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations, and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors, OJ [1992] L 76, p 14–20.

[304] See: note 173, GPA/IC/M/6, para. 21 at 4. See also: WTO Committee on Government Procurement, 'Interim Committee on Government Procurement - Minutes of the Meeting Held on 4 April 1995' (24 May 1995) GPA/IC/M/3, para. 6 at 2.

[305] See: note 174, GPA/IC/M/5, para. 11 a 3.

[306] In the exchange between the Canadian and US representative on this matter, the Canadian delegate claimed among other things that: (*i*) "*[a]A range of entities which provinces would be prepared to offer within the context of achieving a balanced agreement had been identified*" (see; ibid. para. 12 at 3), (*ii*) "*the Canadian provinces were ready to specify in their offers the coverage of goods as well as a range of services, and construction services*" (see: ibid.), (*iii*) "*a constant priority throughout these negotiations had been the extension of market access to the steel and transportation sectors*" (see: ibid. para. 12 at 4), and (*iv*) "*Canada was prepared to table an offer at the sub-central level if, and only if, members were prepared (1) to include sectors of priority interest to Canadian suppliers, for example, in the steel and transportation areas; and (2) to agree to circumscribe the use of small business and other set-asides in a manner that, while not precluding their use, would provide an acceptable security of access to suppliers from all members of the Interim Committee. It was Canada's position that, in providing increased and secure market access to its trading partners, it was not unreasonable to expect the same degree of reciprocal market access in return. In the context of the present offers, this circumstance simply did not exist.*" (see: ibid.). In response, the US representative claimed that: (*i*) the US "*had already tabled its offer on sub-central entities, over a year ago*" (see: ibid. para. 13 at 4), (*ii*) "*[i]It might not have been completely satisfactory from the Canadian perspective but it had allowed his authorities to reach agreement on sub-central procurement with a number of other Signatories to this Agreement*" (see: ibid.), and (*iii*) "*[w]With respect to the specific complaint on the set-asides and recent developments, it was his country's position that no changes in potential market access for foreign suppliers with respect to these programmes had occurred*" (see: ibid.).

[307] See: note 304.

[308] See: ibid.

[309] See: ibid.

[310] See: note 174, GPA/IC/M/5, para. 14 at 4-5.

[311] See: ibid.

Government Procurement."[312] One could claim however, that the plurilateral framework of negotiations was, in that case, rather undermined by the lack of solidarity of other GPA parties and their reluctance to hear Canada's lone voice in the wilderness about the need to more generally discuss the elimination of all country-specific derogations from the agreement (constantly then expressed by that country's representative in the interim committee - see section 9.3.1.a).

9.4.1.c Post-Uruguay negotiations and bilateralism

Upon the establishment of the WTO and adoption of the GPA94, many believed that the multilateralisation of the GPA was feasible and somewhere on the horizon.[313] However, the practice of the GATT/WTO Committee on Government Procurement rather led to a further 'depluriteralisation' of negotiations. That tendency was catalysed by controversies about procurement of telecommunications equipment.[314] In 1995, the US and Japan were caught red-handed agreeing on Japanese "*measures and operational guidelines included a provision on the submission of procurement information as early as possible before the notice of invitation to tender and on solicitation of information or comments from potential suppliers*."[315] Those measures benefited US suppliers only and were adopted between March and October 1994 in addition to 'The bilateral agreement between Japan and the United States on public procurement of telecommunication and medical technology products and services' expanding Japan's subjective coverage over bodies which Japan, admittedly, soon added to its GPA appendices in compliance with the MFN principle.[316]

However, while the Japanese representative oddly claimed that also the "*operational guidelines were applied on an m.f.n basis,*"[317] the representative of the then EC, joined by the representative of Canada,[318] noted that (*i*) "*he was aware that the commitments were offered on an m.f.n basis and were basically folded into the framework of the Agreement on*

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[312] See: ibid.

[313] Bernard M. Hoekman and M. M. Kostecki, *The political economy of the world trading system: from GATT to WTO* (Oxford University Press, Oxford 1995) 301 at 124.

[314] "*I* [Chairman] *and the secretariat have consulted with all signatories individually during the last two days. These consultations have been useful in providing a better understanding of participants' positions and thoughts. Substantive differences on the main issues nevertheless remain. Several delegations referred to the need to make progress in parallel bilateral or plurilateral consultations, in particular on resolving procurement regarding telecommunications. The need for a balanced, reciprocal agreement was also emphasised by many. Various suggestions were made for future work.*" See: GATT, 'Committee on Government Procurement - Minutes of the Meeting Held on 12 July 1991' (2 September 1991) GPR/M/41, para. 2 at 1.

[315] See: GATT, 'Committee on Government Procurement - Minutes of the Meeting on 4 April 1995' (30 May 1995) GPR/M/54 para. 21 at 4.

[316] "*The entity coverage was 113 entities for telecommunications and 52 entities and their hospitals for medical technologies. In both cases, central government entities and entities established on the basis of specific laws were included. He hoped soon to be in a position to circulate to delegations full information on the bilateral agreement.*" See: ibid.

[317] See: ibid.

[318] See: ibid. para. 23.

Government Procurement" [319] and (*ii*) if "*these commitments were really part of the Agreement on Government Procurement, one would expect that monitoring would also take part in the context of the plurilateral basis of the Agreement*."[320] In turn, the representative of the US (being the beneficiary of those operational guidelines) downplayed the EC's accusations by stating even more dimly that (*i*) "*his delegation intended to be as transparent as possible with respect to its obligations under the bilateral agreement*", and (*ii*) that the GPA "*did not preclude any Party from concluding separate bilateral or regional agreements on procurements covered by the Agreement on Government Procurement*" [321] – again showing the US's ambiguous attitude to the meaning of the GPA's MFN principle.[322]

Minutes also mention that in April 1997 "*[t]The representative of Switzerland said that Switzerland and the United States had recently concluded a bilateral agreement which would enable Switzerland to have access to public procurement by thirty-seven States in the United States and the United States to have access to procurement at the cantonal level in Switzerland. Furthermore, Switzerland and the United States would open their procurement markets in the areas of electricity, ports and airports*".[323] Finally, minutes also illustrate that already during the second meeting where the Burma Law was on the agenda, the EU's representative reservedly stated that the EU *"was closely monitoring the action taken by the Government of the United States to address its concerns and, in this respect, the European Community had made informal bilateral contracts with the United States,"*[324] instead of more generally discussing the inadmissibility of public procurement-related sanctions with representatives of all GPA parties.

After 1997, minutes of the Committee of Government Procurement have not shown subsequent controversies about bilateral agreements/arrangements. However, this might be explained by the fact that the bilateral concessions on the access to public procurement

[319] See: ibid. para. 22.

[320] See: ibid. The representative of the then EC further noted that "*[h]His delegation was somewhat surprised that the two parties to the bilateral agreement had decided on a separate, bilateral, monitoring exercise. His delegation was not stating that such a monitoring exercise was against Code obligations, either the present or the new one. Yet his delegation hoped that the monitoring exercise would take place in such a manner as to preclude creating biases in the manner in which the bilateral agreement would be implemented in favour of any country. His delegation had hoped that the monitoring exercise would have been open to any Party which had an interest in seeing that the advantages, which were indeed applicable on an m.f.n basis, were offered on a non-discriminatory basis to any Party to the Agreement on Government Procurement or anyone who wished to take part in those markets in Japan. It would have helped if the bilateral agreement would not have provided for a bilateral monitoring exercise. Although not constituting a legal infringement, it gave the impression that an agreement had been worked out on a bilateral basis to serve the interests of the two parties to it and that therefore there was a reason why monitoring should take place on a bilateral basis as well.*" See: ibid.

[321] See: ibid. para. 22. See also: GATT, 'Committee on Government Procurement - Communication from Japan - Measures by the Government of Japan Relating to its Public Sector Procurement of Telecommunications Products and Services and of Medical Technology Products and Services' (8 June 1995) GPR/Spec/78 at 2.

[322] See: note 285.

[323] See: note 177, GPA/M/5, para. 12 at 3.

[324] See: note 182, GPA/M/6 para. 19 a 5.

markets became in the meantime a virtually mandatory element of all new RTAs (see section 0) so bilateral agreements inevitably ceased to give rise to controversies in the committee.

9.4.1.d Bilateralism and cross-border horizontal policies

The bilateralisation of negotiations on the liberalisation of public procurement markets can also be tangled up with two-party arrangements determining the scope of allowed pursuit of cross-border horizontal policies as it is already now inherently tangled up with determining the scope of horizontal firmly economic, and sometimes social policies.[325]

The diversity of bilateral trade profiles implies that the expectations of a given country about curbing industrial policies must vary with regard to specific third countries. Likewise, the concessions - that a given country equally offers to all third countries - might be crucial for some of them but meaningless for the others. On the one hand, the inability to reach a bilateral agreement meeting the mutual needs of two countries can undermine multilateralisation in the case of both (*i*) prospective accessions (like in the case of the Philippines since 1980) and (*ii*) potential expansion of commitments among GPA parties (like in the case of Canada throughout the 1990s and 2000s). On the other hand, the opportunity to reach such bilateral agreements - without having to extend resulting commitments over other countries based on the MFN clause – can push two mostly interested countries out of the plurilateral and potentially multilateral negotiation table (like in the case of the US's public procurement trade strategy toward South-East Asia).

Exactly the same mechanism actually or potentially applies to the pursuit of cross-border horizontal policies. This is all the more true given that the selectiveness and arbitrary application of cross-border horizontal policies is not only a source of bilateral conflicts (see section 6.3) but also might be a key to responding to bilateral interests behind third counties' backs. Namely, governments can bilaterally, or in small regional circles, reach more or less formal agreements not only on the scope of coverage of liberalising commitments but also on process-related standards (technical, environmental, social) or even on the scope of technology transfers. Actually, nothing prevents governments from making bilateral deals ignoring the needs of third countries and undermining efforts to multilateralise public procurement commitments also in the way that two governments, in various configurations, trade market access, easing process-related requirements, curbing innovation-mercantilism of

[325] Indeed, the bilateral talks on the expansion of the coverage (i.e. on market access) are nothing more than deals on curbing traditional protectionist industrial policies.(regardless of whether the expansion of coverage also means bilaterally waiving firm policies like preferences for small and minority business like in the case of the US or simply means opening previously closed markets to foreign competition like mostly in the case of other countries).

the SIE, or other non-public-procurement-specific trade concessions as a part of larger negotiation packages (see also section 9.1.3).

As far as the inability to resolve bilateral controversies blocking multilateralisation in concerned countries is concerned, one could imagine a country *x* affronted by country's *y* cross-border horizontal policy similar to the Australian Illegal Logging Prohibition Act of 2012[326] (see section 6.2.3.a). This policy is particularly affecting country *x*. At the same time, country *x* is also considering an accession to a plurilateral public procurement-relevant agreement, to which country *y* is a party (whereby other parties are not harmed by country *y*'s timber-related policies). The history of Canada's battle to curb the US's traditional industrial policies (by which Canada was particularly harmed) suggests that - without third countries' solidarity forcing an *erga omnes* withdrawal of country *y*'s timber-related policy - country *x* would not be interested in entering into such plurilateral agreement at all.

As far as the opportunity to reach bilateral agreements behind third countries' backs is concerned, one could imagine country *x* and *y* both with formally unilaterally open public procurement markets, and both in practice protecting their markets with indirectly discriminatory measures. In this scenario, emerging country *x* is pursuing aggressive selective innovation-mercantilist policies. At the same time, country *x* is also considering an accession to a plurilateral public procurement-relevant agreement. In turn, country *y* particularly affronted by country *x*'s innovation mercantilism is a party to mentioned plurilateral agreement. At the same time, country *y* is pursuing aggressive green and social cross-border horizontal policies particularly affronting country *x*. Especially if country *x* and *y* are key trade partners, they might agree to mutually waive these policies, in such case (*i*) likely decreasing their interest in country *x*'s accession to the plurilateral agreement, and (*ii*) keeping country's *x* and country's *y* cross-border horizontal policies in place toward third countries.

Bilateral (third country-specific) waivers are feasible in the case of both green/social standards and forced technology transfers (see further sections 10.2.2 *in fine*). As far as green and social standards are concerned, the developments in general commerce show a trend toward the bilateralisation of commitments related to TBTs,[327] where countries

[326] See: Illegal Logging Prohibition Act 2012, No. 166 of 2012 - C2012A00166.

[327] While roughly two thirds of the preferential trade agreements concluded between 1948-2011 include provisions related to TBTs, this does inform whether such provisions are enforceable or not, and if they really impose higher bilateral standards related to curbing TBTs or merely repeat obligations recognised at the multilateral level such as under such the TBT Agreement. See: Boris Rigod. 'TBT-Plus Rules in Preferential Trade Agreements' (2013) 40(3) Leg Iss Econ Integ 247 at 248; Tristan Kohl, 'I Just Read 296 Trade Agreements' UNU-CRIS Working Papers (2013) W-2013/9 table 4 at 27. See also: Henrik Horn, Petros C. Mavroidis and André Sapir. 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33(11) World Econ 1565 at 1575.

reciprocally dilute or enhance commitments stemming from the WTO TBT Agreement.[328] Nothing prevents making similar public procurement-specific arrangements given that countries have already been able to bilaterally or regionally agree on such details of procurement process such as on early notifications of key trade partners ahead of other countries (which was the case of Japan toward the US and of Singapore toward other ASEAN members). As far as technology transfers are concerned, for instance, the US and China - while discussing the controversies stemming from the discussed Order 618 (see section 6.2.3.b) – were able to agree in December 2010 that they shall "*not adopt or maintain measures that make the location of the development or ownership of intellectual property a direct or indirect condition for eligibility for government procurement preferences for products and services.*"[329,330]

9.4.2. Developing countries

Apart from bilateral problems between specific 'developed-developing' pairs of countries, a more general reluctance of the developing countries to accede to the GPA seems to stem from the proactive policies of the 'rich club' acquiesced to by current features of the GPA system (with a passive posture of developing countries) rather than from the GPA's system blocking a proactive attitude to public-procurement-related industrial policies of developing countries (with a passive posture of developed countries).[331]

In fact, since the very beginning of the Tokyo Round, it was clear for the negotiating parties that "*the use of the government procurement as an instrument of government policy is common to both the developed and the developing countries.*"[332] This perception obviously

[328] See: Lee Ti Ting, 'Technical Barriers to Trade Provisions in Regional Trade Agreements' (SIEL), (Rochester, Rochester 20 June 2012) Society of International Economic Law Working Paper No. 2012/12 at 2. For example, Rigod, in the specific context of the EU-Korea FTA without analysing a wider sample of agreements, proposed a term 'TBT-plus' provisions designating provisions "*going beyond the body of rules contained in the WTO TBT Agreement*" (see: note 327, Rigod at 249). In the EU-Korea FTA, Rigod exemplified sectors covered by TBT-plus provisions with: (*i*) consumer electronics (see: ibid. at 260-261), (*ii*) automotive products (see: ibid. at 261-262), (*iii*) pharmaceuticals (see: ibid. at 262), and (*iv*) chemicals (see: ibid. at 263).

[329] See: US Trade Representative, 'Fact Sheet' (15 December 2010) 21st U.S.-China Joint Commission on Commerce and Trade, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2010/21st-us-china-joint-commission-commerce-and-trade> accessed 13 June 2015. See also: note 96 at 766. At the same time, China and the US also agreed that they shall "*continue to discuss whether this principle applies to other government measures*" (see: ibid.) despite the fact that China's protocol of accession to the WTO anyway stipulated that: "*China shall ensure that the distribution of import licences, quotas, tariff-rate quotas, or any other means of approval for importation, the right of importation or investment by national and sub-national authorities, is not conditioned on: whether competing domestic suppliers of such products exist; or performance requirements of any kind, such as local content, offsets, the transfer of technology, export performance or the conduct of research and development in China.*" See: WTO Secretariat, 'Accession of the People's Republic Of China, Decision of 10 November 2001' (23 November 2001) WT/L/432, para. 7.3.

[330] Also, by way of a more distant analogy, one could point out in the context of compulsory licensing that developing countries have happened to enter into bilateral agreed trading waiving compulsory licensing of pharmaceuticals originating from specific third countries for some other trade concessions offered by such third countries. See: Mary Hess Eliason. 'Regulatory Marketing Approval for Pharmaceuticals as a Non-Tariff Barrier to Trade: Analysis under the WTO's Agreement on Technical Barriers to Trade' (2006-2007) 8(2) San Diego Intl L J 559 at 263.

[331] See: note 279.

[332] See: GATT, 'Multilateral Trade Negotiations, Group "Non-Tariff Measures", Government Procurement - Note by Secretariat,' GATT Secretariat (Geneva 5 August 1975) MTN/NTM/W/16, para. 14.e) at 7.

has not changed after the Uruguay Round.[333] However, over the decades, developing countries have generally continued to advance their industrial goals by simply blocking market access and expecting asymmetrical treatment by the developed countries. At the same time, the industrial policies of the developed countries have evolved, and special and differential treatment for developing countries seems to have lost its appeal (if it had ever had any). Developed countries have been even unilaterally and unconditionally opening their markets toward least developed countries. Nevertheless, they have still been able to (*i*) secure reciprocal market access with the *de facto* tied aid (see section 4.2.3) and public procurement requirements imposed by the MDBs (see section 4.2.2), and (*ii*) protect their procurement markets with green and social requirements more and more encroaching upon developing countries' regulatory autonomy. Simultaneously, only the largest and, at the most promising emerging economies have matured from blocking market access and sought developed countries' consent to pro-active innovation mercantilism and technology transfers as a form of special and differential treatment. However, such requests in principle have been always denied.

9.4.2.a Special and differential treatment

Figure 45. Special and differential treatment developing/least developed countries.

	GPA79	GPA87[334]	GPA94	GPA12[335]
non-reciprocal subjective coverage	yes [article II.3, article II.4]		[article V.3]	yes [article V.3.c.]
non-reciprocal objective coverage	yes [article II.4]		[article V.3]	yes [article V.3.c]
non-reciprocal thresholds	no			yes [article V.3.d]
domestic requirement	yes [note to article V.14.h]		yes [article XVI.2 and note 7 to this article]	yes [article V.3.b along with article I.l]
price preferences	no			yes [article V.3.a]
off-sets	yes [note to article V.14.h]		yes [article XVI.2]	yes [article V.3.b]
technology transfers	yes [note to article V.14.h]		'licensing of technology' article XVI.2 and note 7 to this article]	yes [article V.3.b along with article I.l
derogations from MFN clause	yes [article II.5]		yes [article V.3]	yes [article V.2]

Initially, the quarrels between developed and developing countries mostly came down to the problem of coverage and equivalence of offered market access. During the Round Tokyo, the superficially neoliberal vision of worldwide liberalisation of public procurement markets and the belief of some delegations in achieving "*[t]The Balance of rights and obligations*"[336] as well as "*global reciprocity in the field of government procurement as between developed countries*"[337] was not shared by developing countries which did not succumb to ideas such as that (*i*)"*[i]If all, countries were willing to open their procurement systems, the trade of developing countries could also be expected to benefit as government procurement, on the*

[333] See: note 279, Corvaglia and Maschner at 11.

[334] Please note that all references to article GPA79 V.14.h, in the case of GPA87 refer to article V.15.h instead.

[335] Under GPA12, the special and differential treatment is in principle merely available to least developed countries, and to other developing countries only "*to the extent that this special and differential treatment meets its development needs*." See: GPA12, articles V.1.(a), V.1.(b).

[336] See: note 104, MTN/NTM/W/96, para. 10 at 3.

[337] See: ibid.

basis of the best value per tax unit expended in this area, was in the interest of all countries, including those with scarce financial resources,"[338] or (*ii*) "*opportunities for increased access to markets of developed countries as well as of other developing countries and an increased share of developed countries' imports relating to government procurement was also an important objective.*"[339]

On the contrary, the representatives of the developing countries generally alleged that "*the problems faced by developing countries as exporters, stemmed from their lack of knowledge about the opportunities that existed in the area of international procurement, and from the operation of and competition from large multinational corporations*," [340] and those disadvantages "*were exacerbated in respect of developing countries through their lack of the necessary human:, financial and economic resources.*" [341] Hence, negotiators soon understood that developing countries would need to be offered some forms of preferential treatment,[342] and the case for the inclusion of such provisions into the text of GPA79 was officially explained with developing countries' need to (*i*) "*safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development,*"[343] (*ii*) "*promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy,*" [344] (*iii*) "*support industrial units so long as they are wholly or substantially dependent on government procurement,*" [345] and (*iv*) "*encourage their economic development through regional or global arrangements among developing countries presented to the CONTRACTING PARTIES to the GATT and not disapproved by them.*"[346]

The forms of special and differential treatment mostly confined to the asymmetrical coverage incorporated into the GPA (see Figure 45) could never attract developing countries.

[338] See: ibid. para. 14 at 5.

[339] See: ibid. para. 10 at 3.

[340] See: ibid. para. 17 at 6.

[341] See: ibid. As far country-specific objections are concerned, for instance, the Nigerian delegation claimed that (*i*) "*Developing countries however, would need their government's patronage to stabilize demands for their industrial goods at least for a minimum period of ten years after which the young industries could be exposed to international competition.*" (see: GATT, 'Communication from by delegation of Nigeria' (5 December 1977) MTN/NTM/W/128, para.1 at 1) and (*ii*) "*The establishment of rigid judicial panels should be avoided so as to encourage continuous patronage by governments*" (see: ibid. para. 7 at 2).

[342] Some negotiators generally expressed the view that (*i*) "*opportunities resulting from increased access to markets of developed countries on the basis of non-discrimination alone might not be sufficient to enable developing country suppliers to take advantage of trade possibilities in the area of government procurement*" (see: note 104, MTN/NTM/W/96, para. 8 at 3) and (*ii*) "*provision should be made in any arrangement: - for extending more favourable treatment in the markets of developed countries to bidders and products from developing countries; - for developing countries to provide in their own markets more favourable treatment for their domestic suppliers, and suppliers from other developing countries so as to facilitate the expansion of their mutual trade*" (see: ibid. para. 15 at 5).

[343] See: GPA79, Article III.1.a.

[344] See: GPA79, Article III.1.b.

[345] See: GPA79, Article III.1.c.

[346] See: GPA79, Article III.1.d.

Foremost, based on Article III.11 of the GPA79,[347] some parties unilaterally liberalised their public procurement markets toward least developed countries,[348] killing least countries' incentives to reciprocally open their markets. Moreover, least developed countries, being highly dependent on development aid, anyway have had to liberalise their markets toward developed countries under the requirement imposed by the MDBs despite all their objections as, to quote Baldwin: "*in the choice between no aid and aid provided in inefficient manner, the later should be given sympathetic consideration.*"[349] Despite the strong trend toward formally untying multilateral and to some extent bilateral aid (see section 4.3), development aid is still believed to be tied informally by the donors.[350] As a result, also the mostly developed countries have had little interest in the liberalisation of public procurement markets of least developed countries under the GPA. For some mostly developed GPA parties, such move could be even detrimental given that diplomatic assistance for own businesses in expansion to developing markets (also by helping them to get local governmental contracts in such markets) is regarded as the norm.[351] Therefore, subjecting such markets to the GPA and bringing there mandatory international competition would be an obstacle to continuing with such policies.[352]

For the developing countries, asymmetrically or even unilaterally offered market access has been illusory. In the Tokyo Round, their representatives explained in the way that (*i*) "*since developing countries could often be interested in tenders of low value, the application of the lowest value threshold, which was administratively feasible, would not only be more in accord with their supply potential, but also preserve for them the benefits of transparency,*

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[347] "*Having regard to paragraph 6 of the Tokyo Declaration, special treatment shall be granted to the least-developed country Parties and to the suppliers in those countries with respect to products originating in those countries, in the context of any general or specific measures in favour of the developing country Parties. The Parties may also grant the benefits of this Agreement to suppliers in the least-developed countries which are not Parties, with respect to products originating in those countries.*" See: GPA79, Article III.11.

[348] For instance, already in 1981 the Canadian delegation informed others in the GATT Committee that it "*has[d] extended on a unilateral basis the benefits of the Agreement to a number of least-developed countries. The Government of Canada will be communicating directly with the Governments concerned. These are: Bangladesh, Benin, Bhutan, Botswana, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Ethiopia, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Malawi, Maldives, Mali, Nepal, Niger, Rwanda, Western Samoa, Somalia, Sudan, Uganda, United Republic of Tanzania, Upper Volta, Yemen Arab Republic and Yemen Democratic Republic. (Letter of 17 September 1981.)*." See: GATT, 'Committee on Government Procurement - First Annual Review of the Implementation and Operation of the Agreement - Background Document by the Secretariat - Revision' (10 December 1981) GPR/W/9/Rev.1, part I at 25. In turn, in October 1999 "*The representative of the United States said that his country already extended the benefits under the existing coverage of the Agreement to least developed countries. The representative of Canada said that, while her country extended the benefits of the GPA to least developed countries, any action in this respect should continue to be taken through initiatives by individual Parties. On this latter point, the representative of the European Community said that, the present provisions of Article V:12.*" See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 5 October 1999' (31 January 2000) GPA/M/12, para. 8 at 3.

[349] Note 63, at 8. See also: Victor Mosoti. 'The WTO Agreement on Government Procurement: a Necessary Evil in the Legal Strategy for Development in the Poor World?' (2004) 25(2) U Pa J Intl Econ L 593 at 634.

[350] See: note 279, Rege at 496.

[351] See: ibid. at 500.

[352] Even though the GPA, after its revision of 2012, has eventually clearly allowed tying aid (see section **4.2.3**; GPA12 article II.3.(e).(i)) the very essence of many such arrangements consists in their informality/secrecy. Because tying aid is stymied, a hypothetical least developed country subjected to the GPA and 'quiet' donors might prefer to informally favour suppliers/contractors of 'quiet' donors over suppliers/contractors of other GPA parties without revealing such arrangements to other GPA parties.

which the imposition of a high value would deny them,"[353] and (*ii*) *"if it were not possible to have a low value threshold of general application, developing countries would need differential treatment to the extent that the value threshold applicable to them should be lower in comparison to that applicable to developed countries."*[354] Nonetheless, mostly developed countries, particularly the US, despite reserving small-value or local contracts for supporting domestic SMEs or advancing social goals, could still offer a multiple of the value of developing countries' entire public procurement markets.[355] And - because reciprocity in public procurement markets has always been measured by the cumulative value of liberalised contracts – the calls by developing countries for a different approach to special and differential treatment have remained unanswered.[356]

Against this background, the incapacity of the GPA's system to integrate horizontal policies of developing countries addressing their legitimate development needs shall not be overestimated as real obstacle to the liberalisation their public procurement markets.[357] For example, social non-commercial considerations in South Africa and Malaysia commonly seen as irreconcilable with the spirit of the GPA[358] have been designed to cure past social injustice rather than to help the economies of those countries.[359] Elsewhere, the reluctance of developing countries to liberalise their public procurement markets has been most likely caused by domestic groups of interest and public sector seeking protection from international competition (see sections 1.2 and 1.3). Quite often, governments of developing countries have been simply reluctant to cut off the public money flowing to their crucial SIEs[360] or lose complete discretion over procurement related to the major infrastructural projects. For instance, in the case of Jordan's unfinished negotiations on its GPA accession, the greatest

[353] See: note 104, MTN/NTM/W/96 at 9.

[354] See: ibid.

[355] See: note 279, Linarelli at 446, 455; note 279, Rege at 496, 511.

[356] If reciprocity is measured this way, then in relations between a developed and developing country – with similar subjective and objective coverage as well as identical threshold – one could still see seemingly favourable treatment of developed and developing countries. While criticising such approach in the public procurement context, Linarelli referred to Kapstein's general commerce-related remarks on reciprocity having to meet the needs of developing/least developed countries, that is needs to (*i*) be 'mutually advantageous or fair,' (*ii*) 'recognize the relative bargaining powers of countries', and (*iii*) "*be sensitive to the requirements of the 'least advantaged' states: those lacking the human, natural, or financial resources necessary for carving out their place in the division of labor. Justice as fairness demands that their needs be met*." See: note 279, Linarelli at 457; Ethan B. Kapstein, *Economic justice in an unfair world: toward a level playing field* (Princeton University Press, Princeton. 2006) 253 at 60.

[357] It is a widespread view that developing countries are not attracted by the GPA's system because of such countries' inability to implement, under this system, development measures such as supporting their growing/developing domestic industries with public procurement. See: note 279, Corvaglia and Maschner at 11; Arie Reich. 'The New Text of the Agreement on Government Procurement: An Analysis and Assessment' (2009) 12(4) J Intl Econ Law 989 at 993; See: note 279, Hsu. at 395.

[358] With regard to South Africa, see: Phoebe Bolton. 'Government Procurement as a Policy Tool in South Africa' (2006) 6(3) Pub Proc L Rev 193-217 at 195. With regard to Malaysia, see generally: Christopher McCrudden and Stuart G. Gross. 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study' (2006) 17(1) Eur J Intl Law 151.

[359] See: note 279, Linarelli at 445, 455.

[360] For instance, with regard to Egypt, Zohny made a claim in 2003 that: "*the Egyptian Government is buying time for the Egyptian state owned enterprises and private corporations which constitute legal monopolies, such as the Osman Ahmed Osman Conglomerate, which is investing in almost every sector of the economy, including manufacturing, agriculture, services (insurance, health care), tourism, fishing and retail*." See: Ahmed Y. Zohny. 'Egypt's Procurement Regime and Building an Export Oriented Economy' 18(2003) Arab L Q 169 at 176.

problems pertained to bringing international competition into contracts offered by various authorities within the 'Aqaba Special Economic Zone'[361] or into other major Jordanian infrastructural projects.[362] Similarly, Panama refused to cover the 'Panama Canal Authority,' which had been so much sought by the US,[363] and eventually dropped its application to join the GPA in August 2013.[364,365]

Also the very limited private pro-liberalisation forces (i.e. private pressure on governments to seek for reciprocal access to foreign markets at the expense of domestic liberalisation - see section 1.4) have determined the slow pace of liberalisation in developing countries. For example, when Israel joined GPA79 in 1983, its representative in the first meeting after Israel's accession noted that the non-parties to the GPA would not internally press on liberalisation unless they could explain "*its possible value to the local business community*",[366] and (*ii*) "*[u]Uncertainty in this regard might contribute to explain why only his country* [Israel] *had acceded to the Agreement since it came into force.*"[367] While the Israeli strategy of off-sets has been successful at bridging domestic liberalisation by creating export capacity for local business (see section 9.3.1.c), other governments only moaned that their industries would not gain anything by gaining access to international markets. For instance, in 1982, India's representative complained that *"[i]It was also significant that India's offer had been made despite the fact that the extent of advantage to Indian exporters could be expected to become clearer only in the process of implementation.*"[368] In 2005, along similar lines, Jordan's representative explained in the WTO committee that the prerequisite of liberalisation was "*to convince the private sector and the associations that the accession to the Agreement on Government Procurement would not affect their work negatively*"[369] whereas internally the advantages of potential international expansion of

[361] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 14 March 2005' (13 April 2005) GPA/M/26, para. 19.d at 4.

[362] Haithan A. Haloush. 'Jordan Accession to the World Trade Organization: An Ideal Case Study for Other Arab Countries' (2009) 5(1) 5 Original L Rev 22 at 42.

[363] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Minutes of the Meeting Held on 29 September 2000' (3 January 2001) GPA/M/14, para. 19 at 5. The Panama's representative claimed that (*i*) "*it would not be possible to include PCA in its offer*" (see ibid.), (*ii*) the current regulation secured that the "*operation of the Canal would proceed in a smooth, efficient, profitable and secure manner*" (see ibid.), (*iii*) subjecting the Panama Channel Authority to the GPA would "*be a violation of the autonomous nature of this body and a limitation to its freedom of taking purchasing decisions*" (see ibid.), and (*iv*) "*the procedures administered by the PCA were the same as those that had been previously used by the United States*" (see ibid.).

[364] See: 253 GPA/121, para. 3.20 at 7.

[365] In almost 40 years of negotiations, the only major infrastructural project which propelled the liberalisation of public procurement markets was the reopening of the oil refinery in Aruba, leading to Aruba's accession to GPA94. Specifically, "*Aruba was very interested in export markets for its refined oil products. Government contracts were of course an interesting segment on that market especially in the region. Certain governments required that in order for companies to qualify for government contracts, the country of origin of the exporter had to be a Party to the Agreement on Government Procurement*." See: GATT. 'Committee on Government Procurement - Minutes of the Meeting Held on 29 March 1993' (GPR/M/49) 25 May 1993 para. 9 at 4.

[366] See: GATT, 'Committee on Government Procurement - Draft Minutes of Meeting Held on 2 November 1983' (1 December 1983) GPR/Spec/29 at 2.

[367] See: ibid.

[368] See: note 110, GPR/Spec/6 at 3.

[369] See: note 213, GPA/M/28 at 5.

Jordan's industries were assessed as 'marginal' because of their extremely limited experience of competing in international public procurement markets.[370]

Altogether, in this light, the high hopes for an accelerating multilateralisation-process linked to the new options as to the special and differential treatment introduced by the GPA revision of 2012 (see Figure 45) [371] are wishful thinking. The green light for non-reciprocal thresholds[372] or price preferences[373] potentially being imposed by least developed countries (and "*any other developing country, where and to the extent that this special and differential treatment meets its development needs*"[374]) cannot meet least developed countries' needs simply because such solutions cannot assure that potential exporters from such countries would get a real market access to public contracts offered by procurers of the current GPA parties.[375]

9.4.2.b Green and social standards

In the game of keeping emerging economies in check, pretty banally, environmental and social cross-border horizontal policies pursued by the mostly developed GPA parties merely substitute all previous concerns of developing countries about gaining real reciprocal market access. This is especially the case of vibrant emerging economies which have already overcome problems such as (*i*) poor international competitiveness of their domestic business previously killing pro-liberalisation forces, and (*ii*) small overall size of their public procurement previously killing their bargaining power in talks on coverage.[376]

In general commerce, the comparative advantage of emerging economies has been challenged by the attempts to internationalise high mandatory standards on the one hand (see section 6.2.2) and unilaterally impose standards on the other (see also section 6.2.1.d). Since early 1990s, unilaterally imposed process-related environmental requirements have hit

[370] See: Haithan A. Haloush. 'Jordan Accession to the World Trade Organization: An Ideal Case Study for Other Arab Countries' (2009) 5(1) 5 Original L Rev 22 at 42.

[371] See: note 357.

[372] See: GPA12, Article V.1(b).

[373] See: GPA12, Article V.3(d).

[374] See: GPA12, Article V.3(a); note 335.

[375] Nevertheless, one could pin some hopes on the potential outcomes of the Work Programme for SMEs (see: note 234, Annex 5) and the Work Programme on Exclusions and Restrictions in Parties' Annexes (see: note 234, Annex 8). Potentially, these programmes could lead to improving developing countries' suppliers'/contractors' access to lower-value-contracts by eliminating a need to negotiate country-specific conditions of special and differential treatment such as non-reciprocal threshold (see also further section 10.2.1).

[376] In the case of China, the boot is on the other foot, and rather developed countries have no leverage in negotiations as, to quote Shea, China "*is neither attracted by reciprocal access to much smaller procurement markets, nor deterred by the limited repercussions it faces if it does not join.*" See: U.S. House of Representatives, 'The Impact of International Technology Transfer on American Research and Development: Testimony of the Honorable Dennis C. Shea before the Committee on Science, Space, and Technology Subcommittee on Investigations and Oversight United States House of Representatives' (5 December 2012) HHRG-112-SY2 at 6.

vibrant export-oriented industries driving growth in emerging economies,[377] and also eco-labelling schemes proved to have had negative consequences on exports from developing countries.[378] Unsurprisingly, in trade negotiations, developing countries have usually presented international harmonisation of environmental labour and even democratic standards as a challenge to their own growth and have strongly opposed such standards[379] as well as have demanded more influence over setting/designing such standards.[380]

Developing countries have rejected ideas such that (*i*) developed countries' interest in social/environmental matters in other jurisdictions was merely a consequence of globalisation and the demise of protectionism,[381] or (*ii*) "*both trade and the promotion of human rights can serve the same purpose-namely bettering the well-being of individuals.*"[382] Instead, they have become distrustful of such rhetoric as they felt that the outcomes of the Uruguay Round only benefited the most developed counties.[383] The higher or just different standards have been commonly seen as unnecessary and arbitrary NTBs.[384] Harmonised labour standards have been likely to, to quote Vangrasstek 'become hijacked' by various domestic lobbies in developed countries fearing less expensive imports.[385] Likewise, all 'democratic' considerations incorporated into various trade agreements have been seen by developing countries as developed countries' policy tool allowing the latter, to quote Hafner-Burton "*to boost their own political influence, to solve trade or security problems or to*

[377] According to the complex study by the OECD on the impact of environmental requirement on market access "*[d]Ðuring the early 1990s, developing countries, particularly those with fast-growing manufacturing sectors and export-led agriculture, encountered barriers to exports due to new environmental requirements, particularly maximum residue limits (MRLs) for chemicals, and restrictions on how primary products were produced or harvested. Many of these new requirements seemed to target the sectors of greatest importance to developing countries: textiles, leather, fish and horticultural products,*" See: OECD. *Environmental requirements and market access* (OECD Publishing, Paris 2005) 287 at 11. In addition, for instance in Indian context, Debroy noticed that developing countries have reacted negatively to TBTs and SPS measures because they had little influence on determining such standards and have were not ready for such, in fact, protectionist standards. See: Bibek Debroy, 'The SPS and TBT Agreements: Implications for Indian Policy' Indian Council for Research on International Economic Relations, New Delhi, India (June 2005) Working Paper no. 163 at i.

[378] See: Arnab K. Basu, Nancy H. Chau and Ulrike Grote. 'On export rivalry and the greening of agriculture? The role of eco-labels' (2004) 31(2-3) Agric Econ 135 at 147.

[379] See: Beverly May Carl, *Trade and the developing world in the 21st century* (Transnational Publishers, Ardsley. 2001) 550 at 498; Emilie Hafner-Burton, *Forced to be good: why trade agreements boost human rights* (Cornell University Press, Ithaca 2009) 220 at 167.

[380] See: note 377, Debroy at I; Richard Bonsi, A. L. Hammett and Bob Smith. 'Eco-labels and International Trade: Problems and Solutions' (2008) 42(3) J World Trade 407 at 421.

[381] Destler presented this phenomenon in such a way while discussing US trade policy toward East Asia. See: I. M. (Mac) Destler, 'American Trade Politics in the Midst of the Doha Round' in Akira Kotera, IchiroÌ Araki and Tsuyoshi Kawase (eds), *The future of the multilateral trading system: East Asian perspectives* (Rieti ; Cameron May, London 2008) 157 at 168, 169.

[382] A fragment of a speech by the then Canadian Foreign Minister Mr. Axworthy held during 'Consultations with Non-governmental Organizations in Preparation for the 52nd Session of the U.N. Commission on Human Rights' on 13 February 1996, cited in: Craig Forcese. 'Globalizing Decency: Responsible Engagement in an Era of Economic Integration' (2002) 5(1) Yale Hum Rts & Dev L J 1 at 9.

[383] See: Zillur Rahman and S. K. Bhattacharyya. 'Doha: an Environmental Threat and Opportunity' (Oct 2002-Mar 2003) 2(2) J Servi Research 111 at 120.

[384] See: Matthew J. Marks and Harold B. Malmgren. 'Negotiating Nontariff Distortions to Trade,' (1975) 7(2) Law & Pol'y Intl Bus 327 at 328.

[385] See: Craig VanGrasstek, 'Labor Right' in Miguel Rodriguez Mendoza, Patrick Low and Barbara Kotschwar (eds), *Trade rules in the making: challenges in regional and multilateral negotiations* (Brookings Institution Press, Washington 1999) 546 at 493.

accumulate resources."[386] On the whole, such measures have been considered as a as 'bad diplomacy'[387] or even 'politics of repression.'[388]

All such concerns of developing countries all the more apply to negotiating concessions on the liberalisation of public procurement markets with regard to which - from the very beginning of GPA-related negotiations - many developing countries shared a fear that quality requirements and process-related requirements could be used against their industries, for example by indicating that "*developed countries should not utilize regulations relating to transportation, insurance storage, etc. so as to adversely affect developing country interests and opportunities in the field of government procurement.*"[389] Indeed, trade flows in public procurement markets are in the first place anyway affected by general-commerce unilateral measures with interfering with regulatory environments. In addition, public-procurement-specific measures allow for even more cross-border regulatory repression by the most developed GPA parties in the lack of clear regulation and relevant case law (see section 6.1.2). Moreover, one should not predict that work programmes scheduled after GPA's 12's entry into force (see section 9.3.3) will soon cure this problem. On the contrary, the goals of the Work Programme on Sustainable Procurement[390] and Work Programme on Safety Standards in International Procurement[391] (see section 9.3.3) clearly foreshadow some form of legitimisation of green and social cross-border horizontal policies (likely guided by similar developments in the EU - see section 8.2.3), only further dissuading governments of emerging economies to plurilaterally, and potentially multilaterally, open their procurement markets.

9.4.2.c Technology transfers

Figure 46. Provisions on compulsory licensing/technology transfers.

	Principle	Exception for developing countries
OECD Draft	"*In no case shall the award of a contract he made on the condition that the supplier licence the technology involved to another firm, provide offset procurement opportunities, or on any other condition similarly inconsistent with the principle of non-discriminatory procurement.*"[392]	No
GPA79/GPA87[393]	*"Entities should normally refrain from awarding contracts on the condition that the supplier provide offset procurement opportunities or similar conditions. In the limited number of cases where such requisites are part of a contract, Parties concerned shall limit the offset to a*	*Having regard to the general policy considerations of developing countries in relation to government procurement, it is noted that under the provisions of paragraph 14 (h) of Article V, developing countries may require incorporation of domestic*

[386] See: note 177, Hafner-Burton at 165. See also: ibid. at 5.

[387] See: ibid. at 22.

[388] See: ibid. at 4.

[389] See: GATT, Multilateral Trade Negotiations - Group "Non-Tariff Measures, 'Checklist of Points Summarizing Views on Specific Issues in the Area of Government Procurement. Note by the secretariat' GATT Secretariat (Geneva 22 April 1977) MTN/NTM/W/96 at 12.

[390] See: note 234, Annex 7.

[391] See: note 234, Annex 9.

[392] See: GATT/OECD, 'Multilateral Trade Negotiations, Group "Non-Tariff Measures," 'Draft OECD Instrument n Government Purchasing, Policies, Procedures and Practices Note Received from the OECD secretariat' (Geneva 28 January 1977) GATT Secretariat MTN/NTM/W/81, para. 32, version A at 13. According to version B: "*Except in the case of international collaborative projects, the award of contracts shall not he made on the condition that the supplier licence the technology involved to another firm or provide offset procurement opportunities, or on any similar conditions, if these conditions are inconsistent with the principle of non-discrimination*." (see: ibid.).

[393] Please note that all references to article GPA79 V.14.h, in the case of GPA87 refer to article V.15.h instead.

	reasonable proportion within the contract value and shall not favour suppliers from one Party over suppliers from any other Party. Licensing of technology should not normally be used as a condition of award but instances where it is required should be as infrequent as possible and suppliers from on Party shall not be favoured over suppliers from any other Party.[article V.14.(h)] *In the limited number of cases where offset procurement opportunities or similar conditions are required, these requirements shall be included in the notice of proposed procurement and tender documentation"* [last sentence added by the GPA87]	*content, offset procurement, or transfer of technology as criteria for award of contracts. It is noted that suppliers from one Party shall not be favoured over suppliers from any other Party.* [note to article V.14.(h)]
GPA94	*"Entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets".* [article XVI.1]	*"Nevertheless, having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement.(…)"* [article XVI.2]
GPA12	Offsets 6. With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset. GPA12 article IV.6	*Based on its development needs, and with the agreement of the Parties, a developing country may adopt or maintain one or more of the following transitional measures, during a transition period and in accordance with a schedule, set out in its relevant annexes to Appendix I, and applied in a manner that does not discriminate among the other Parties: (…) an offset, provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of intended procurement.* [article V.3.(b)]

Public-procurement-specific innovation mercantilism (i.e. technology transfers in exchange for public contracts – see section 6.2.3.b) has being the only kind of horizontal policies which could meet actual development needs of developing countries. However, while the GPA system has covertly acquiesced to the pursuit of environmental/social horizontal policies in line with evolving needs of its founders, it has also been incapable of accommodating technology transfers in the form sought by some emerging economies. Admittedly, innovation mercantilism can be accused of undermining the enforcement of internationally harmonised systems of IP protection.[394] However, it is also true that emerging economies have had some point in perceiving stronger IP rights similarly negatively to various excessive technical/environmental/social standards,[395] especially given that the most developed countries had also been using industrial policies to boost their economies before innovation mercantilism became stymied within the WTO system.[396]

While many currently warn about innovation mercantilism in China as a new phenomenon, also alerting that China might be followed by other large emerging economies,[397] this problem has always been addressed in the negotiations in the GATT/WTO Committee on Government Procurement in the background of talks on off-sets, licencing, etc. Derestricted documents from recent years show that candidates for the GPA membership have been asked

[394] See sections: 6.2.3.c, 6.2.3.d; Robert D. Atkinson, 'Enough is Enough: Confronting Chinese Innovation Mercantilism' The Information Technology and Innovation Foundation (Washington February 2012 at 14.

[395] See: note 377, Debroy, note at 14.

[396] See: Rainer Kattel and Veiko Lember. 'Public Procurement as an Industrial Policy Tool: an Option for Developing Countries?' (2010) 10(3) J Pub Proc 368 at 378.

[397] Atkinson pointed out India, Brazil and China's followers. See: note 394, Atkinson at 17.

about mandatory technology transfers, and small economies like Bulgaria,[398] Jordan[399] or the Kyrgyz Republic[400] all denied and were not further inquired on that matter.[401]

Historically, the founders of the GPA system yet at the OEEC/OECD-stage of works (see section 2.3.1) were all against allowing conditioning the award of public contracts upon technology transfers.[402] In the Tokyo Round, only India's delegation officially protested against such solution, by proposing that the "*developing countries parties to this agreement ~~may~~ [should be able to] accord preference to bids from foreign suppliers whose offer contemplated greater domestic content or whose offer facilitates the transfer of technology*".[403] Developed countries eventually softened their position consenting to offsets, technology transfers and domestic-content requirements on condition "*that suppliers from one Party shall not be favoured over suppliers from any other Part*" (see Figure 46). Nonetheless, as mentioned, India had serious concurrent reasons mostly related to coverage and market access for not joining the GPA,[404] and eventually those provisions only attracted Israel. Subsequently, in the course of negotiations on the GPA's 1987 framework, for

[398] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Checklist of Issues for Provision of Information Relating to Accession to the Agreement on Government Procurement - Replies by Bulgaria' (2 May 2001) GPA/W/136, para. 15 at 10.

[399] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Checklist of Issues for Provision of Information Relating to Accession to the Agreement on Government Procurement - Replies by Jordan' (5 December 2000) GPA/W/124, para.15 at 15.

[400] See: WTO Committee on Government Procurement, 'Committee on Government Procurement - Checklist of Issues for Provision of Information Relating to Accession to the Agreement on Government Procurement - Communication from the Kyrgyz Republic' (10 June 2002) GPA/W/197, para. 15 at 5.

[401] This might prove that such countries either decided themselves not to try to run before they could walk understanding their insufficient purchasing power to force technology transfers, or they tried but their attempts were ignorable.

[402] During the GATT works, among developed countries, only Japan proposed that conditioning the award of contracts upon licensing/transferring technology could be allowed in the case of 'international collaborative projects' (see: GATT, 'Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Government Procurement" - Draft Integrated Text for Negotiation on Government Procurement - Communication from Japan' (20 April 1978) MTN/NTM/W/152, para. 12. at 6) which was a follow up to 'Version B' of the OECD Draft's provisions pertaining to technology transfers (see note 392).

[403] This is the language of the first India's proposal of the modification of GPA79's draft, Part V, paragraph 14(h). See: GATT, 'Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Government Procurement" - Communication from the Delegation of India' (11 January 1979) MTN/NTM/W/216 at 1. Later, as a result of clerical/technical/structural works on GPA79, the Indian proposal was changed to read as follows: "*Provided that nothing in this Agreement shall restrict in any way the right of entities in developing countries parties to this Agreement to seek supplies of goods, subject to transfer of technology on specified terms; provided further that such entities may accord preference to bids from foreign suppliers whose offers contemplate greater domestic content or whose offer facilitates the transfer of technology*." See: GATT, 'Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Government Procurement" - Communication from the Delegation of India - Revision' (23 February 1979) MTN/NTM/W/216/Rev.1 at 1. In addition, India's delegation generally proposed a very wide special and differential treatment to read as follows: "*New paragraph 3 to be added: "Notwithstanding the provisions of paragraph 1, developing signatory countries may accord preferential treatment to their domestic products and suppliers1 with a view, inter alia, to: (a) safeguarding their external financial position and ensuring a level of reserves adequate for the implementation of their programmes of economic development; (b) promoting the establishment, revitalization and development of domestic industries in accordance with the objectives and priorities of national development; (c) protecting industries, including industrial units and ancillary industries wholly or substantially dependent on government procurement; (d) promoting development of industries, trade and economic co-operation among developing countries participating in preferential arrangements for economic co operation at the inter-regional, regional or sub-regional levels."* See: GATT, 'Multilateral Trade Negotiations - Group "Non-Tariff Measures" - Sub-Group "Government Procurement" - Draft Integrated Text for Negotiation on Government Procurement - Communication from India' (8 May 1978) MTN/NTM/W/153.

[404] See: note 368.

unknown reasons, Finland, Sweden and Norway made attempts to wipe out these provisions but they did not succeed.[405]

The last major to change to this regime was made in GPA94 when the general green light for technology transfers was restricted to individually negotiated and precisely determined derogations which had to be included in countries' specific appendices (see Figure 46). That development might be seen as a backward move in the sense that the applicable systematic solutions on technology transfers equally available for emerging economies were abandoned for *de facto* bilateral informal talks between interested developed and developing countries (likely conducted beyond the WTO Committee on Government Procurement in violation of the MFN principle, and likely leading to unreported agreements similar to the one between the US and China of 2010 - see section 9.4.1.d).[406]

9.5 Conclusion

This chapter examined the GATT's/WTO's public procurement-related negotiations in a quest for evidence of the influence of cross-border horizontal policies on the liberalisation process from three angles. Firstly, this chapter compared public procurement-specific negotiations with governmental negotiations and private grassroots trends in general-commerce. It found that still strongly polycentric attitudes to non-commercial considerations in public procurement markets worldwide lag behind the tendency to increasingly harmonise various aspects of public procurement-specific legal order through the GPA's framework, which largely explains many countries' aversion to subject more procurement to this framework.

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[405] "*Item 22 Offset Procurement and Technology Transfer (elaboration on current own proposal): Article V:14(h) should be replaced with the following: "Entities shall not award contracts on the condition that the supplier provide offset procurement opportunities or license technology, or similar conditions." 2 The note regarding Article V:14(h) should be eliminated*." See: GATT, 'Committee on Government Procurement - Article IX:6(b) Negotiations - Consolidated List of Suggestions Made for Improvements of the Agreement - Addendum' (19 April 1985) GPR/W/56/Rev.3/Add.1, item. 22 at 2. The reaction to that proposal was that "*[f]Four Parties supported the proposal. The drafter explained that the purpose was to close a potentially important loophole before it became a more serious problem, whereby countries could require more offsets and technology transfers on a limited basis. Three Parties added that offsets risked to spread into the civil sector. Two Parties indicated that an outright prohibition could not be accepted, one of these noted that its entities had not used the provision and that it was not a loophole in the Agreement. The drafter gave some examples of offsets or technology licensing in civil procurement. One Party asked what the situation would be if the supplier proposed offsets; the drafter replied that if such a proposal was not commercially viable, it might be enquired into by suppliers not getting the award. Another Party held that offsets would only be used if considered economically viable by the entity. Two Parties were particularly concerned with the proposal to delete the Note to Article V:14(h); one Party argued that considerations about offsets/technology licensing/local content requirements applied generally, above the area of government procurement, and that to amend the Agreement on this point could change the perception of it at political level. The drafter did not rule out elements of special and differential treatment for developing countries, but considered that the objectives of Article 111:1 were sufficient for their purposes; the problem as such was general and was not limited to developing country Parties.*" See: GATT, 'Committee on Government Procurement - Article IX:6(b) Negotiations - Consolidated List of Suggestions Made for Improvements of the Agreement - Note by the Secretariat - Fourth Revision' (12 July 1985) GPR/W/56/Rev.4, para. 16 at 20.

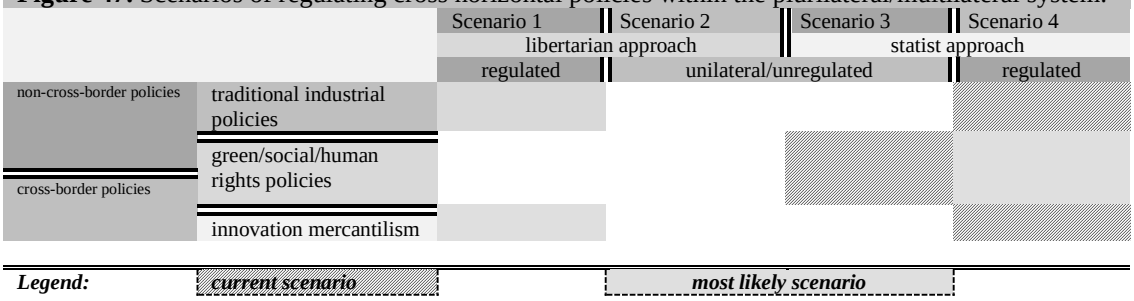
[406] This is all the more the true after the adoption of the mentioned Work Programme on Exclusions and Restrictions in Parties' Annexes, suggesting that - when negotiating - the current GPA parties might be also more averse to new derogations for developing countries.

Secondly, this chapter reviewed the works of the GATT/WTO on public procurement and found out that parties' representatives, for long, had not overtly discussed the problem of cross-border regulatory interferences except for the most blatant cases of secondary sanctions. Instead, the representatives were going after procedural non-compliance of other parties and were consenting to country-specific derogations for traditional industrial policies which - unlike social and environmental requirements, from time to time imposed by individual public procurers - could not be impliedly acquiesced to. Nevertheless, the GPA parties decided to eventually regulate these matters in the close future, likely leading to the express legitimisation of green and social cross-border horizontal policies and to a further stigmatisation of innovation mercantilism.

Thirdly, this chapter looked at the obstacles to a further expansion of coverage and multilateralisation of the GPA system. It found that the pursuit of cross-border horizontal policies is tangled up with (*i*) a trend toward bilateralisation of public procurement-specific negotiations, especially between developed and developing countries, and (*ii*) emerging/developing countries' aversion to accept public procurement-related international commitments. The diversity of bilateral trade profiles and the selectiveness of cross-border horizontal policies proves to actually or potentially undermine current plurilateralism and possible future multilateralism by contributing to either (*i*) long bilateral controversies also undermining liberalisation with third countries, or (*ii*) the conclusion of more or less overt bilateral agreements between most interested countries thereby eroding their need for multi-party negotiations. In turn, the developing countries' general aversion to open their public procurements markets proves to stem from mentioned conflict between the polycentrism of approach to cross-border horizontal policies and strong harmonisation tendencies, whereby emerging/developing countries perceive harmonisation requirements (coming in one package with liberalisation requirements under the GPA framework) as yet another form of regulatory repression.

IV. CONCLUSION

Figure 47. Scenarios of regulating cross horizontal policies within the plurilateral/multilateral system.



The developments in the GPA12 and the negotiation agenda scheduled after this GPA revision's entry into force, together with the trends in the EU's internal market, call for drawing some hypothetical scenarios of where the future works on the legal status of cross-border horizontal policies within the GPA system - which would likely also spread into RTAs or procurement guidelines imposed by the MDBs – might be heading to. The current situation analysed in previous chapters can be summarised in a way that – while the GPA system still keeps the pursuit of both traditional and innovation-oriented firmly industrial policies in check – it is at the same time more and more indulgent to green/social/human-rights-related considerations (see Figure 47). On the one hand, the acquiescence to green/social requirements and increasingly stepping into regulatory sovereignty of third countries meets the needs of public procurers of the most affluent EU member states. However, it disappoints those developing countries which still lack the industrial capacity to comply with such requirements not to mention that a potential compliance would undermine comparative advantage of such countries. On the other hand, current individual derogations for traditional industrial policies meet the expectations of current GPA parties like the US, Canada and of their sub-central governments. Nevertheless, at the same time, individual derogations cannot actually or potentially accommodate innovation mercantilism of the largest emerging economies like China and India.

The most likely scenario of further taming industrial policies in any form by curbing individual derogations, along with the simultaneous gradual legitimisation of green/social considerations, does not bode well for (*i*) the chances of the multilateralisation of the GPA, and (*ii*) the *en masse* liberalisation of public procurement markets between the block of GPA's parties guided by the most developed economies and the block of emerging and least developed economies. The multilateral liberalisation of public procurement markets seems to be much more achievable in alternative scenarios, in which excessive often process-related green/social requirements and aggressive innovation mercantilism challenging IP rights are approached evenly regardless whether that would be a denial or an acceptance. In the **unilateral libertarian scenario**, policymakers would voluntarily/unilaterally give up

pursuing all cross-border horizontal policies (see Scenario 2 in Figure 47). In the **reciprocal libertarian scenario**, policy-makers would do the same seeking, however, reciprocal market-access-concessions through multilateral co-operation (see Scenario 1 in Figure 47). In the **unilateral statist scenario**,[1] policy makers would moderately pursue cross-border horizontal policies on the brink of rules vaguely delineated by public-procurement-related trade agreements which is reminiscent of the current situation with green/social policies (see Scenario 3 in Figure 47). Finally, in the **reciprocal statist scenario**, governments might try to more precisely determine which commercial considerations shall be allowed and which cannot be tolerated (see Scenario 4 in Figure 47).

Arguably, such alternative scenarios might only happen if some major factors toppled the current system which is based on the GPA framework and coalesced by decades of 'path dependence.'[2] However, the *status quo* is that, along with the evolution on the GPA platform, an increasing number of governments have become locked-in with this platform just like industries and their consumers at some point have become locked-in with specific railway gauges,[3] vehicle propulsion,[4] nuclear reactors,[5] video recorders[6] or keyboard layouts.[7] The same is with private merchants locked-in with particular commercial legal standards, jurisdictions and dispute resolution fora, the repetitive selection of which might in the long term even affect such merchants' business strategies.[8] The adoption of the GPA platform by governments, of jurisdictions by merchants, or of technical solutions by producers and consumers, all also involve some investments and imply transactions costs of

[1] "*The English word statism and its equivalents in other languages denote an idea of the supremacy of the state and the corresponding principles, ideologies, policies, institutions, and even specific instances of state intervention in personal, social, or economic matters.*" See: Mikhail Ilyin, 'Statism' in Bertrand Badie, Dirk Berg-Schlosser and Leonardo Morlino (eds), *International Encyclopedia of Political Science* (SAGE Reference, Thousand Oaks 2011) 2512.

[2] "*A path-dependent sequence of economic changes is one of which important influences upon the eventual outcome can be exerted by temporally remote events, including happen- ings dominated by chance elements rather than systematic forces.*" See: Paul A. David, 'Clio and the Economics of QWERTY' (1985) 75(2) Am Econ Rev 332 at 332. "*The claim for path dependence is that a minor or fleeting advantage or a seemingly inconsequential lead for some technology, product, or standard can have important and irreversible influences on the ultimate market allocation of resources, even in a world characterized by voluntary decisions and individually maximizing behavior*." See: Liebowitz, Stan. J. and Stephen E. Margolis, 'Path Dependence, Lock-in, and History' (1995) 11(1) J L Econ Organ 205 at 205.

[3] See: Bryan H. Druzin, 'Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities' (2009-2010) 18(1) Tul J Intl Comp L 131 at 170-171; Stan J. Liebowitz, and Stephen E. Margolis, 'The Troubled Path of the Lock-in Movement' (2013) 9(1) J Compet L Econ 125 at 135, 136. See also generally: Douglas J. Puffert, 'Path Dependence in Spatial Networks: The Standardization of Railway Track Gauge' (2002) 39(3) Explor Econ His 282.

[4] That is the domination combustion engines over electric engines. See: W. Brian Arthur 'Competing Technologies, Increasing Returns, and Lock-In by Historical Events' (1989) 99(394) Econ J 116 at 126; note 3 Liebowitz and Margolis at 135, 136. See also generally: David A. Kirsch, 'The Electric Car and the Burden of History: Studies in Automotive Systems Rivalry in America, 1890-1996' (1997) 26(2) Bus Econ His 304.

[5] That is the domination of light-water reactors in the US. See: note 4, Arthur at 99, 126; note 3 Liebowitz and Margolis at 135. See also generally: Robin Cowan, 'Nuclear Power Reactors: A Study in Technological Lock-in' (1990) 50(3) J Econ His 541.

[6] See: note 3, Druzin at 146, note 3 Liebowitz and Margolis at 135, 136; Stan J. Liebowitz and Stephen E. Margolis, 'Should technology choice be a concern of antitrust policy?' (1996) 9(2) J L Tech 283 at 291; Stan. J. Liebowitz, and Stephen E. Margolis, 'Path Dependence, Lock-in, and History' (1995) 11(1) J L Econ Organ 205 at 208, 209.

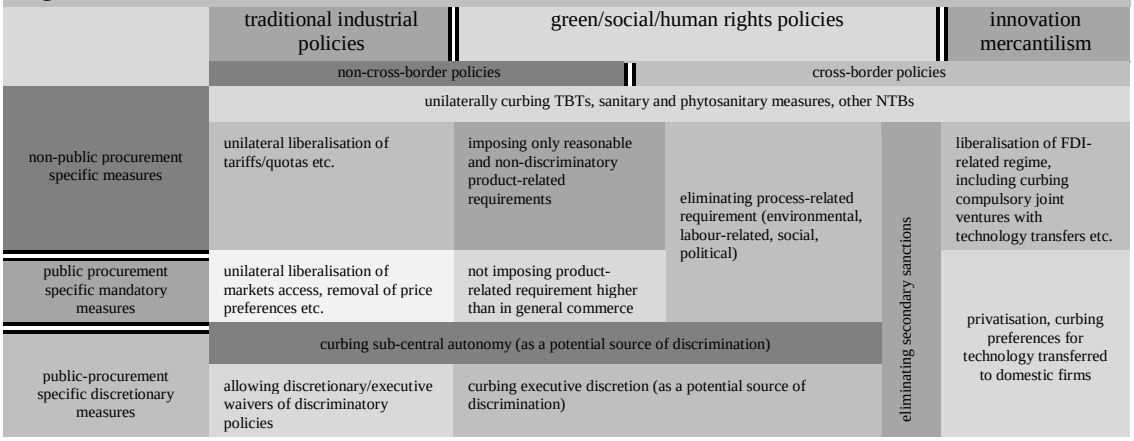
[7] See: note 3 Liebowitz and Margolis at 135, 136; note 6 Liebowitz and S Margolis at 213-214. See also generally: Liebowitz, S. J. and Stephen E. Margolis, 'Policy and Path Dependence: From QWERTY to Windows 95' (1995) 18(33) Regulation.

[8] See: note 3, Druzin at 163. See also section 9.1.1 on the comparision of GPA platform and order of private commercial contracting.

switching to different platforms, just like in the case of studying another foreign language.[9] The alternative platform of liberalisation of public procurement markets are suppressed or become forgotten with an increasing number of GPA parties and of RTA's repeating GPA's framework just like are keyboards other than QWERTY seeing that "*[n]~~N~~o one learns to use the Dvorak keyboard because there are so few Dvorak typewriters, and there are so few Dvorak typewriters because no one learns to use the Dvorak keyboard.*"[10] Still, despite having to bear switching cost, some electronic-devices-users could choose to use Dvorak keyboards, some merchants could choose exotic jurisdictions to rule their contracts, or some pen pals could choose to communicate in Esperanto. However, governments and public procurement bound by a number of instruments standardised liberalising commitments along with NT and MFN clauses could not, implying that in the case of public procurement markets, the lock-in with one platform is even stronger than in other examples of path dependence (see proposed solution in section 10.2.2).

10.1 Unilateral libertarian scenario

Figure 48. Neo-liberal scenario.



A purist unilateral libertarian scenario would be an embodiment of the premises set forth in Chapter 1, according to which policymakers should not misspend taxpayers' money or exploit meagre peoples' nationalist sentiments. Instead, policymakers would resist domestic lobbies such as uncompetitive domestic industries or trade unions.[11] In this scenario, the problem of cross-border horizontal policies stemming from general legal requirements would be chiefly limited because the size of the government, along with its purchasing needs, would be shrunk. And all SIEs particularly active in the field of innovation mercantilism would be privatised, or their ties with government would be cut in other ways. The policymakers guiding such limited governments would only expect from public procurement

[9] See: note 3, Druzin at 163, 164.
[10] See: note 7, Liebowitz and Margolis at 35.
[11] See: sections 1.3, 1.4.

to bring about the best value for money. They would leave achieving economic and societal goals for private enterprise and individuals, and they would not try to advance non-commercial goals domestically. So, all the more, they would not make it across the borders.

With regard to horizontal policies stemming from general legal requirements,[12] policymakers would carry out a general trade policy of openness with no tariffs, quotas, and very limited other NTBs - by doing so also facilitating trade in public procurement markets. In the spirit of general non-interventionism in foreign regulatory matters, policymakers would confine standards imposed in general commerce to non-discriminatory product-related requirements, and would not impose process-related requirements interring with foreign standards of environmental protection, labour-rights, non-discrimination of individuals, [13] or with enforcement of foreign laws. [14] To this end, policymakers would give up (*i*) pursuing exterritorial unilateral measures of governments, [15] (*ii*) trying to internationalise/harmonise higher standards through the conclusion of international agreements,[16] and (*iii*) dictating political change in third countries with trade sanctions/embargos. [17] Also, policymakers would be open to FDIs by abandoning (*i*) governmental controls/licensing of FDIs, and (*ii*) forced joint-ventures with along with forced technology transfers within such joint-ventures to local partners[18] - by doing so also facilitating selling especially services/systems/solutions to governments through local establishments rather than directly across the borders.

With regard to policies stemming from public-procurement-specific measures, there would not be any such measures because policymakers would not impose on foreign suppliers/contractors measures which are more discriminatory than in general commerce. At the level of contractual clauses,[19] particular public procurers would share the libertarian attitude of policymakers and would not generate additional obstacles to trade within their discretion while designing individual green or social requirements. In addition, public procurers would generally prefer off-the-shelf solutions. However - if procurement of bespoke solution including a 'pre-commercial procurement'[20] was unavoidable – public

[12] See section 5.5.1.

[13] See section 6.2.1.

[14] See section 6.2.3.

[15] See section 6.2.1.d.

[16] See section 6.2.2.

[17] See section 6.2.4.

[18] See section 6.2.3.d.

[19] Or at the level of local procurement, where the line between executive and law-making branch of government is often vague. See: section 8.4.3.

[20] The 'pre-commercial procurement' is as EU-specific concept often defined "*a process by which public authorities in Europe can steer the development of new technologically innovative solutions that can address their specific needs.*" See: Charles Edquist and Jon Mikel Zabala-Iturriagagoitia. 'Pre-commercial procurement: a demand or supply policy instrument in relation to innovation?' (2015) 45(2) R&D Manag 147 at 154.

procurers would only demand non-exclusive licences to the procured innovation,[21] without (*i*) claiming so-called 'march-in rights,'[22] or (*ii*) imposing other protectionist conditions of innovation's commercialisation.[23] Finally, the policymakers would not target providers of prevailing proprietary systems (especially of software) by mandating public procurers to purchase open-source solutions only,[24] instead leaving it to the discretion public procures to decide what best serves the purpose of particular public contracts (proprietary *versus* open-source systems).

Under such conditions, both the block of mostly developed current GPA parties and the block of emerging and least developed economies would not be dissuaded from opening their public procurement markets, one toward another. The mostly developed countries could not be accused anymore, as summarised by Charnovitz in the general-commerce context, of (*i*) "*attempts to impose domestic environmental or labour standards on other countries through trade measures*,"[25] (*ii*) an eco-imperialism,[26] or (*iii*) a "*green variant of the nineteenth-century's white-man's burden.*"[27] In turn, policymakers of emerging economies would not have to listen anymore to rants such as that "*[w]~~W~~estern nations like the United States, the Commonwealth nations, and much of Europe believe in the rule of law and the principles of free trade. Innovation mercantilists do not. For them the ends justify the means, even if they violate the values of market-based free trade and respect for the rule of law and private property rights (including respect for intellectual property).*"[28]

This scenario is purely hypothetical. Its realisation is even less likely than already overly optimistic visions of unilateral liberalisation of general commerce because a particular

[21] That was more or less the default principle of the 'Bayh-Dole Act' of 1980 [see: Bayh-Dole Act 1980 Pub. L. No. 96-51794 Stat. 3015-28 (codified as amended at 35 U.S.C. §§ 200-11, 301-07 (1994)]. See further: section 10.2.3.

[22] In the Bayh-Dole Act, the march-in rights meant that "*the Federal agency under whose funding agreement the subject invention was made shall have the right, (…) to require the contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the contractor, assignee, or exclusive licensee refuses such request, to grant such a license itself, if the Federal agency determines that such— (1) action is necessary because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use (…).*" See: Bayh-Dole Act, section 203.(a).1. See also: Richard N. Kuyath. 'Barriers to Federal Procurement: Patent Rights' (2000-2001) 36(1) Proc L 1 at 12.

[23] For instance, the Bayh-Dole Act mandates that "*[n]~~N~~otwithstanding any other provision of this chapter, no small business firm or nonprofit organization which receives title to any subject invention and no assignee of any such small business firm or nonprofit organization shall grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States (…*)." See: Bayh-Dole Act, section 204. See also: note 22, Kuyath at 14-15.

[24] See: section 6.2.3.b.

[25] A quote from the interview Arthur Dunkel, the then director of the GATT. See: 'Dunkel Warns on Protectionism' *The Financial Times* (Monday, 24 May 1993) 6. See also: Steve Charnovitz. 'Free Trade, Fair Trade, Green Trade: Defogging the Debate' (1994) 27(3) Cornell Intl L J 459 at 492.

[26] See: ibid. Charnovitz at 482.

[27] A reference made by Deepak Lal to the Rudyard Kipling's poem 'The White Man's Burden.' See: Deepak Lal. 'Trade blocs and multilateral free trade' (1993) 31(3) J Com Mar St 349; note 25, Charnovitz at 482.

[28] See: Robert D. Atkinson, 'Hearing on "The Impact of International Technology Transfer on American Research and Development" Before the House Science Committee Subcommittee on Investigations and Oversight U.S. House of Representatives' (5 December 5 2012) at 9.

policymaker's decision to open public procurement markets unilaterally would need to based not only on a belief that an overt or covert industrial policies are not efficient but also on the premise that its trading partners would behave alike, and also abandon cross-border horizontal policies. On the one hand, a reasonable policymaker must be aware of (*i*) detrimental welfare-effects for meagre people of keeping public procurement markets closed,[29] (*ii*) unpredictability of the use of price preferences, (*iii*) ambiguous sense of supports for SMEs[30] and of positive actions,[31] as well as (*iv*) incapability of scrutinizing compliance with any requirements across the borders.[32] On the other hand, however, the binary nature of trade barriers in these markets (access or no access)[33] dictates that a reasonable policymaker would also maintain some level of protectionism to compel reciprocal concessions. Moreover, a sophisticated policymaker would try to generate a fuss in foreign or international regulatory environments to cover up such protectionism, instead of causing hassles in its own regulatory background.[34] Euphemistically speaking, Friedman's claim on the unilateral liberalisation of trade that "*[h]~~H~~e moves fastest who moves alone*"[35] only partially applies here.

10.2 Reciprocal libertarian scenario

The reciprocal libertarian scenario presumes that a very few governments would unilaterally liberalise their public procurement markets. In this scenario, governments would need to agree on how to tune current GPA-tangled model of liberalisation (GPA's framework and its derivatives) in a way that (*i*) each party's commitments would go in tandem with the real access to the markets of other parties, and (*ii*) the reciprocity would not be impaired with any 'tricks.'[36] In this scenario, all individual derogations, special and differential treatment for

[29] See: section 1.2.

[30] See for instance: Kristin Hallberg, 'A market-oriented strategy for small and medium scale enterprises' (April 2000) IFC Discussion Papers IFD40 at 5; Thorsten Beck, Asli Demirguc-Kunt and Ross Levine. 'SMEs, Growth, and Poverty: Cross-Country Evidence' (2005) 10(3) J Econ Growth 199 at 224.

[31] This particularly pertains to social policies which employ preferences for disadvantages individuals, minorities, positive actions etc. See for instance: Milton Friedman, Capitalism and freedom (University of Chicago Press, Chicago 1962) 202 at 108-118; David Sacks and Peter Thiel. 'The Case Against Affirmative Action (Features: Who Gets In?) *Stanford Magazine* (September/October 1996) Features Who Gets In? <https://alumni.stanford.edu/get/page/magazine/section/?section_id=35763> accessed 1 April 2014; Francine D. Blau and Anne E. Winkler. 'does affirmative action work?' (2005) 14(3) Regional Review - Federal Reserve Bank of Boston 38; Roland G. Fryer Jr and Glenn C. Loury. 'Affirmative Action and Its Mythology' (2005) 19(3) J Econ Perspectives 147; Richard H. Sander. 'A Systemic Analysis of Affirmative Action in American Law Schools' (2004) 57(2) Stan L Rev 367 at 478-483.

[32] See: section 1.5.3.a.

[33] See: section 6.3.2.a.

[34] In the sense that cross-border horizontal policies interfering with foreign regulatory environments might perfectly match domestic regulatory environments therefore not generating additional compliance costs for domestic business.

[35] See: note 31, Friedman at 73.

[36] This description perhaps best characterizes the combination of US public procurement trade policy (covered in depth especially in sections 7.2 and 7.3) seen from the perspective of the works in the GATT/WTO Committee on Government procurement. In addition, for instance Charnovitz offered general-commerce-related examples of similar practices of Clinton Administration such as:(*i*) threatening Japanese government with introduction trade sanctions for not letting Motorola a wider access to Japanese Market, (*ii*) conclusion of international agreement limiting a global production of aluminium in the light of emerging production capacity in Russia, (*iii*) imposing informal quotas on Canadian wheat in order to gain a political support in the Senate for the conclusion of the NAFTA. See: note 25, Charnovitz at 473, 474.

developing countries as well as a space for any cross-border regulatory interferences would be eliminated. As a result, negotiators would be able to table their list of entities (subjective coverage) and goods/services/works (objective coverage) to a more satisfactory framework (for everybody) without having to insists on bilateral or *erga omnes* country-specific exceptions, derogations, varying third-country-specific thresholds etc.

10.2.1. Traditional industrial policies

Figure 49. Fair reciprocity (one product/service model).

	developed country			
		developing		developing
	huge		small	
number of agencies	50	50	5	5
expenditure per agency and product/service	50	5	50	5
total expenditure per product/service	2500	250	250	25

In terms of traditional industrial policies, preventing tricks would foremost mean that especially the US could not continue with its double-standard-policy of forcing global liberalisation of public procurement in third countries while keeping protectionists measures at home thanks to US' individual derogations.[37] Contrary to the current conviction reflected in GPA parties' individual derogations,[38] a fair reciprocity would have to be more seen as an equivalence of types of covered entities and of covered contracts relative to the size of negotiating countries rather than as an equivalence of cumulative value of liberalised public procurement. Say, by covering the same product/service all across its public sector (procuring agencies), a huge developed country might cover 100 time as much (in terms of value) as a small least developed country, or 10 times as much as either small highly developed country or a large least developed country (see Figure 49). And this should still be considered reciprocal because only such understanding of reciprocity would bring a level-playing-field in terms of market access.[39]

[37] Linda Weiss and Elizabeth Thurbon. 'The Business of Buying American: Public Procurement as Trade Strategy in the USA' (2006) 13(5) Rev of Int'l Polit Econ 701 at 705, 710.

[38] See: section 2.3.4.

[39] Had such understanding been accepted already in the Tokyo Round, this might have (i) for example prevented discussed never-ending US-Canada disputes on market access and derogations (see sections 7.2 and 7.3), as well as (*ii*) been a proper response to interest of business originating from emerging countries in low-value procurement rather than in the largest and most lucrative contracts going beyond the capacity of such business. While developing countries have claimed that only lower non-reciprocal value-thresholds would assure fairly reciprocal market access between the block of developed and of developing countries (see: 'Multilateral Trade Negotiations, Group "Non-Tariff Measures", Government Procurement - Note by Secretariat,' GATT Secretariat (Geneva 5 August 1975) MTN/NTM/W/16 at 9), section 9.4.2.a has proved that the problem with 'unfairly reciprocal' market access has lain in exclusions of some above-thresholds contacts from coverage of mostly developed countries rather than from a lack of access to below-threshold procurement in mostly developed countries by suppliers/contractors from emerging economies.

10.2.2. Green and social policies

In terms of environmental/social/human-right-policies, preventing tricks would foremost mean banning measures with cross-border regulatory interferences. This could be largely achieved by aligning public-procurement-specific provisions to the rules of general commerce. The parties to the GPA or public-procurement-relevant RTAs could just expressly affirm - for instance in the form of explanatory memorandum/declaration - that article 12 of the Rio Declaration,[40] article 4 of the 1996 Singapore Ministerial Declaration, [41] and the outcomes of the disputes pertaining to the relevant provisions of the GATT and TBT Agreement such as *Tuna/Dolphin II* [42] *US-Shrimp* [43] and *US – Shrimp (Article 21.5 Malaysia)*[44] shall be applied *mutatis mutandis* to the interpretation of relevant provisions of the GPA and analogical provisions of the RTAs. That would mean that public-procurement-specific laws, technical specifications and other contractual obligations imposed by public procurers - like in general commerce - theoretically could still incorporate process-related requirements.[45] However, they could not discriminate against physically identical '**like product**,' [46] implying that in practice a margin for the legitimate use of process-related requirement would be very narrow.[47]

Alternative solutions could be much more precise than a ban on discrimination based on the concept of 'like products,' yet more complicated. And they would still deviate from already pretty well-defined rules governing general commerce. For instance, parties to the GPA or public-procurement-relevant RTAs could agree to include in such agreements a ban of '**public procurement-specific measures leading cross-border regulatory interferences**.' Such solution would require, however, determining what 'cross-border regulatory interferences' are, which – as Chapter 6 proved – would be very complex. A stricter and seemingly simpler solution would be to just ban all '**public-procurement-specific measures imposing process-related requirement**.' However, such solution might be seen as excessively interfering with national public procurement systems in two ways. Firstly, why shouldn't national policymakers be free to impose some process-related requirement (particularly safety or labour standards encumbering works or services physically performed in the country of public procurer) which have purely domestic regulatory effects? Secondly, why shouldn't national policymakers be free to inversely discriminate against business

[40] See: section 6.2.1.a.
[41] See: section 6.2.1.c.
[42] See: ibid.
[43] See: ibid.
[44] See: ibid.
[45] See: ibid.
[46] See: ibid.
[47] See: ibid.

operations subjected to their domestic regulatory environments without causing any regulatory externalities? As an illustration, why shouldn't a public procurer be free to precisely determine a construction site's accommodation/sanitary conditions unregulated in its general domestic laws or to preclude potential contractors for previous domestic-only violations of labour rights while not enquiring whether similar violations have happened abroad? Therefore, one could argue that 'public-procurement-specific measures imposing process-related requirement without cross-border regulatory interferences' should enjoy an exemption, which implies that 'cross-border regulatory interferences' would need to be defined anyway.

Regardless of how the ban of the pursuit of green/social cross-border policies was designed, the major dilemma of reciprocal libertarian scenario would be to take a proper approach to internationally recognized human-rights/social/environmental standards. With regard to trade sanctions, parties to the GPA/RTAs could for instance agree that they could merely impose primary sanctions, and only following a decision of the UN Security Council, just like under World Bank's general guidelines.[48] Apart from that, however, the basic premise of reciprocal libertarian scenario should be that no business operations subjected to a sovereign regulatory environment of given country shall be under external regulatory pressures backed by international standards that this country is not voluntarily subscribed to.

However, if parties to some international agreements setting up green/social standards wanted to employ public procurement in order to mutually enforce compliance, why shouldn't they be free to so agree, so long as it does not affect third countries? In other words, why shouldn't a few countries be free to collectively inversely discriminate against their own business compared with business of third countries? The difficulty with allowing such reverse discrimination would lie in that that public-procurement measures assuring enforcement of international standards would need to differentiate between countries which are subjected to such different standards and countries which are not. Say, in a hypothetical world made out of three countries *x*, *y* and *z*, country *x* and a country *y* have concluded a bilateral agreement on the liberalisation of public procurement markets and a separate agreement among others (*i*) outlawing the employment of workers under the age of 18, and (*ii*) calling for paying fair wages. Country *x* enforces compliance with labour-related agreement by a country *y* by (*i*) precluding suppliers of country *y* for previous proved cases of the use of underage labour, (*ii*) banning underage labour in technical specifications, contractual clauses and requiring labels/certifications confirming compliance, and (*iii*) rewarding paying fair wages in the evaluation/award criteria. At the same time *x*, *y* and *z* are

[48] See: section 4.2.2.a.

negotiating an extension of the public-procurement-agreement over country *z*. However, country *z* is standing firm on not allowing any external interferences with its working age of 16 and level of wages, and - unlike country *y*, - has enough leverage to resist country's *x* industrial policies aiming at depriving it (country *z*) of its labour-related comparative advantage. Country *x* is prone to give in on that matter as it wants to get access to country's *z* public procurement markets but still wants to keep cross-border regulatory measures targeting country *y* in place.

This could only be achieved by (*i*) removing all references to cross-border regulatory measures from instruments generally addressed to all potential suppliers (award criteria, technical specifications along with template-public-contracts), and (*ii*) only applying such measures to individually known suppliers, differentiating between suppliers originating from country *y* and country *z*. Specifically, public procurers of country *x* could exclude only suppliers of *y* country for the previous use of workforce under the age of 18, or add additional contractual clauses encumbering a supplier of country *y* once it is awarded a given public contract. Public procurers of country *x* could also indicate in technical specification generally addressed to all potential suppliers, that underage-labour-related-requirements and the obligation to provide relevant labels only apply to business operations subjected to the *x-y* labour-related agreement. Even award criteria could be designed in a way that only suppliers subjected to *x-y* labour-related would be penalised for not paying fair wages while suppliers of country *z* would not lose any points for keeping wages low. While technically challenging, allowing only consented cross-border regulatory interferences would likely attract liberalisation of public procurement markets by those countries which (*i*) oppose to external interferences with their internal regulatory matters (like country *z*), and (*ii*) do not fully embrace a libertarian attitude in the regional context or toward specific third countries (like a country *x* toward country *y*).[49]

10.2.3. Innovation mercantilism

Figure 50. Exemption of R&D from the GPA

EU's stance "*Pre-commercial R&D for supplies and prototypes are excluded from the competition obligation but not from the non-discrimination obligation. R&D services are completely excluded from the WTO GPA.*"[50]

- procurement of R&D

GPA12, article XIII "*3. (...) (b) this Agreement **does not apply** to: (...) (b) non-contractual agreements or any form of*

[49] In the context of the entire WTO system, Lawrence proposed a very similar system of clubs and 'clubs-of-clubs' whereby smaller circles could plurilaterally deal with matters like environment, labour standards, investment, competition, also in regional context only. See generally: Robert Z. Lawrence. 'Rulemaking Amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection' (2006) 9(4) J Intl Econ L 823 at 831. The proposed solution is also similar to the Linarelli's idea of 'variable geometry' of multilateral trade order within the WTO replacing the idea of WTO's 'single undertaking,' See: John Linarelli. 'Redesigning Global Trade Institutions' (2011) 18(1) Sw J Intl L 75 at 78-80. See also: Thomas Cottier. 'From Progressive Liberalization to Progressive Regulation in WTO Law' (2006) 9(4) J Intl Econ L 779 at 792-793.

[50] See: European Commission, 'Pre-commercial Procurement of Innovation. A Missing Link in the European Innovation Cycle' (March 2006), footnote 19 at 7.

*assistance that a Party provides, including cooperative agreements, **grants**, loans, equity infusions, guarantees and fiscal incentives;*"

- procurement of prototyping

GPA12, article XIII "*1. (...) a procuring entity may use **limited tendering** and may choose not to apply Articles VII through IX, X (paragraphs 7 through 11), XI, XII, XIV and XV only under any of the following circumstances: (...) (f) where a procuring entity procures a prototype or a **first good or service** that is developed at its request in the course of, and for, a particular contract for **research, experiment, study or original development**. Original development of a first good or service may include **limited production** or supply in order to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production or supply to establish commercial viability or to recover research and development costs;*"[51]

Exemption of R&D from the GPA from EU's firth generation directives[52]

- procurement of R&D

2014/24,[53] article 14 "*Research and development services. This Directive shall only apply to public service contracts for **research and development services** limited tendering means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice provided that both of the following conditions are fulfilled: (a) the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and (b) the service provided is wholly remunerated by the contracting authority.*"

- procurement of prototyping

2014/24, article 32 "*3. The **negotiated procedure without prior publication** may be used for public supply contracts: (a) where the products involved are manufactured purely for the purpose of **research, experimentation, study** or development; however, contracts awarded pursuant to this point **shall not include quantity production** to establish commercial viability or to recover research and development costs;*"

In terms of innovation mercantilism, preventing tricks would mean standing firm on prohibiting any cross-border horizontal policies which target specific foreign businesses and undermine IP rights originating in third countries by aggressive contractual clauses or by poor domestic enforcement of the global regime of the protection of IP.[54] At the first glance, that could be largely achieved by a strong stance of the international community on not consenting to any derogations from the ban of off-sets even in the case of least developed countries. Such solution, however, would be a tip of an iceberg only because the concept of innovation mercantilism pursued by some emerging economies merely covers internationally contentious cross-border transfers (from foreign originators) of already generated innovation. At the same time, core innovation-oriented industrial policies pursued by some mostly developed countries, consist in generating innovation through public procurement of R&D,[55] and enjoy a wide exemption from the GPA regime (see Figure 50). Therefore, levelling the playing field and efficient taming innovation mercantilism in a manner acceptable for all stakeholders in the GPA system would also need to go in tandem with revisiting rules applicable to purchases of R&D.[56]

[51] See: GPA12, Article 1.h.

[52] See: section 3.2.4.

[53] See: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ [2014] L 94, p. 65–242.

[54] See section 6.2.3.b.

[55] See: note 50 at 8-10.

[56] That is by no means to say that the right governments/public procurers to reserve R&D works and related public funds exclusively to domestic research institutions/contractors should be removed. However, the language of the exemption could much clearer. It should reflect that governments not-necessarily acquire innovation by allocating grants and retaining some IP

10.2.3.a Conditions of R&D's commercialisation

Figure 51. The Bayh-Dole Act and protectionist conditions of the commercialisation of publicly funded R&D.

The Bayh-Dole Act originally passed in the US in 1980,[57] generally addressing the problem of the IP right to the inventions originating from the government-sponsored research, [58] among others requires that:

Section 204 "*no small business firm or non-profit organization which receives title to any subject invention and no assignee of any such small business firm or non-profit organization shall grant to any person the exclusive right to use or sell any subject invention in the United States* ***unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States****. However, in individual cases, the requirement for such an agreement may be waived by the Federal agency under whose funding agreement the invention was made upon a showing by the small business firm, non-profit organization, or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible*."[59]

Indeed, from the perspective of the WTO system, the exemption of public procurement from the GATT47/GATS along with the exemption of R&D from the GPA creates a regulatory vacuum and gives governments a wide leeway to incorporate protectionist measures into conditions of financing R&D services, especially with regard to subsequent commercialisation of generated innovation like US under the Bayh-Dole Act (see: Figure 51). Such or similar 'side measures' related to the commercialisation of R&D in private markets are clearly protectionist but - unlike discriminatory measures in post-R&D sales to governments or forced transfers of existing innovation - are not banned under the GPA. [60]

Figure 52. Commercialisation of R&D in public procurement markets versus in private markets.
Scenario:: **IP TRANSFER TO** **COMMERCIALISATION** .....

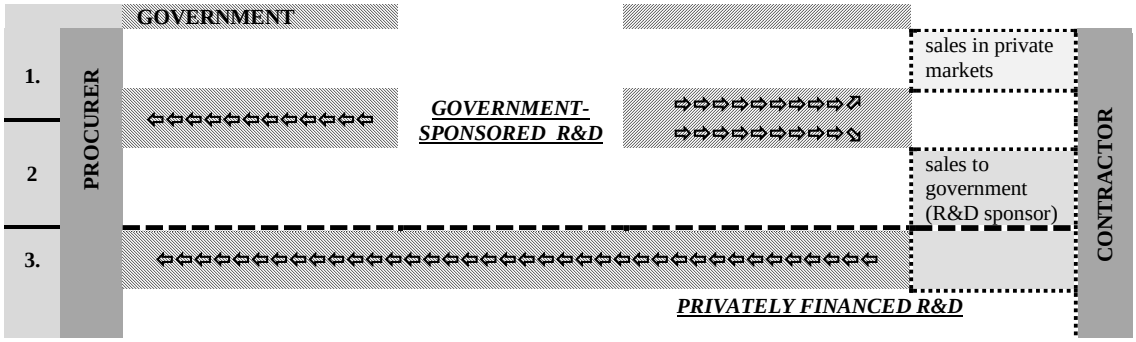
right to the generated invention. Especially in the US, research is formally procured both through 'grants' and 'contracts' which might explain why – in spite of the consensus that the GPA does not apply to the GPA - the US includes, in its appendices to the GPA, notes precluding application of the GPA to the procurement of R&D. See: also: note 22, Kuyath at 17; Diane M. Sidebottom. 'Intellectual Property in Federal Government Contracts: The Past, the Present, and one Possible Future' (2003) 33(1) Pub Contr L J 63 at 72; Diane M. Sidebottom. 'Updating the Bayh-Dole Act: Keeping the Federal Government on the Cutting Edge' (2000-2001) 30(2) Pub Cont L J 225 at 231.

[57] See: note 21.

[58] See generally: note 22, Kuyath; note 56, Sidebottom (2003); note 56, Sidebottom (2000-2001).

[59] See: note 21, section 204, (Added Pub. L. 96–517, § 6(a), Dec. 12, 1980, 94 Stat. 3023.

[60] Such measures draw upon R&D exemption, to which they are in fact loosely related, so the GPA's NT clause and the ban on off-sets (both applicable to covered procurement only) do not apply to such measures. Admittedly, specific types of R&D can be covered by country-specific appendices (see: GPA12, article II.2). Still, in the case of so-covered R&D, a *mutatis mutandis* application of the GPA's provisions on the ban on off-sets to side-measures regulating the conditions of R&D's commercialisation would be very controversial. Moreover, the possibility of the application of some of the provisions of other WTO's agreements (GATT47, TRIPS, TRIMS) to financing R&D is even more vague than in the case of forced technology transfers (especially TRIPS) (see sections 2.3.2 and 6.1.2.d). One could ask if the GATT exemption of public procurement also applies to financing R&D an it actually literally does not because governmental financing of research in exchange for 'nothing' does not fall within the concept of 'the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale' under GATT47 article III:8. However, this is not so obvious when, for instance, a financing institution (a public procurer) reserves some, even limited IP rights (e.g. a non-exclusive licence) for governmental purposes (regardless of the whether such IP-related requirements are imposed through non-contractual grants or public contracts - see also note 56). Nonetheless, even if one agrees that some R&D grants are not covered by the GATT's 47's exemption of public procurement, one can still hardly find any provision in other WTO's agreements applicable to R&D grants/contracts. Perhaps – only by way of analogy as the TRIMs Agreement applies to trade in goods only (see: TRIMS, Article 1) – TRIMS' provision stipulating that "*1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require: (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production (…)*" (see: Agreement on Trade-Related Investment Measures TRIMS (signed at Marrakesh on 15 April 1994, in force 1 January 1995) WTO Agreement Annex 1A 139, Annex, point 1) would be closest to the problem of discriminatory measures in the commercialisation of government-funded R&D in private markets. See: TRIMS, Annex, illustrative list.



In essence, levelling the playing field for various countries would have to mean that various policymakers should be similarly constrained in terms of equivalent protectionist measures, regardless of whether a given country's core pro-innovation policy comes down to (*i*) forcing transfer of already existing innovation financed by private foreign business (scenario 3 in Figure 52), (*ii*) reserving post-R&D sales for originators/domestic business (scenario 1 in Figure 52), or (*iii*) preferring domestic business in the post-R&D commercialisation of generated innovation in private markets (scenario 2 in Figure 52). To this end, under current GPA's framework, negotiators could simply agree to expressly cover more R&D services[61] and additionally clarify in the form of explanatory memorandum/declaration that protectionist requirements as to covered-R&D-commercialisation in private markets fall within the concept of 'conditions or undertakings that encourages local development' (offsets) under the GPA.[62] An alternative solution would be to keep R&D services largely uncovered and only outlaw protectionist conditions of R&D commercialisation. However – given that the GPA could not regulate 'side-matters' related to uncovered procurement - such objective could only be achieved by regulating such matters more generally in one the WTO's multilateral agreement, likely in the GATS, or in a separate multilateral declaration.[63]

10.2.3.b Conditions of IP transfers

Figure 53. The Bayh-Dole Act and IP rights.

[61] See: note 60

[62] See: GPA12, Article I.(l). See also: note 60.

[63] The language of such provision could draw upon TRIMS provisions. See: note 60.

Bayh-Dole Act stipulated that, in principle (*i*) "*[e]ach no-profit organization or small business firm may (…)* ***elect to retain title*** *to any subject invention*,"[64] and (*ii*) if the contractor so elects, the financing agency "*shall have a* ***nonexclusive, non-transferrable, irrevocable, paid-up license*** *to practice or have practiced for or on behalf of the United States any subject invention throughout the world.*"[65]

Agencies could only claim wider IP rights "***in exceptional circumstances*** *when it is determined by the agency that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of this chapter*,"[66] also having to justify the case for claiming more right and to go through a strict approval process.[67]

Preventing tricks about innovation mercantilism would also mean defining the allocation of IP rights between public procurers and their contractors much more precisely than by merely outlawing 'encouragement of local development' trough 'licencing of technology' as a part of the ban on offsets.[68] The point of departure would be the observation that (*i*) public agencies in principle do not need patents,[69] (*ii*) originators potentially deprived of the their IP right lack incentives to do research in co-operation with governments,[70] and (*iii*) private sector will manage IP commercialisation more efficiently.[71] Some ideas of how to allocate the IP rights in public procurement markets could for instance be drawn from mentioned

[64] See: Bayh-Dole Act, section 202.(a).

[65] See: ibid. section 202.(c).4..

[66] See: ibid. section 202.(a).

[67] See: ibid. note 56, Sidebottom (2003) at 69; note 56, Sidebottom (200-2001) at 229.

[68] See: GPA12, article I.(l).

[69] For decades after the WW2 and prior to the adoption of the Bayh-Dole, this was debated in the US, where the debate specifically pertained to whether the results if the government-funded R&D should always be placed in the public domain, or if IP rights should be in principle vested in originators [see: Rebecca S. Eisenberg. 'Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research' (1996) 82(8, Symposium on Regulating Medical Innovation) Va Law Rev 1663 at 1671-1675]. Kennedy's memorandum on Government Patent Policy of 1963 stipulated that the federal government should only retain patents "*a) Where (1) -i principal purpose of the contract is to create, develop or improve products, processes, or methods which are intended for commercial use (or which are otherwise intended to be made available for use) by the general public at home or abroad, or which will be required for such use by governmental regulations; or (2) a principal purpose of the contract is for exploration into fields which directly concern the public health or public welfare; or ' (3) the contract is in a field of science or technology in which there has been little significant experience outside of work funded by the government, or where the government has been the principal developer of the field, and the acquisition of exclusive rights at the time of contracting might confer on the contractor a preferred or dominant position; or (4) the services of the contractor are (i) for the operation of a government-owned research or production facility; or (ii) for coordinating and directing the work of others*." See: The President, 'Government Patent Policy, Memorandum for the Heads of Executive Departments and Agencies, Statement of Government Policy' (12 October 1963) 28 Fed. Reg. 10,943- 10,946; see also: ibid. Eisenberg at 1077-1079. In turn, the Harbridge House Report of 1968 stipulated that . "*[s]~~S~~ignificantly, the evidence does not indicate that either title or nonexclusive licensing is uniformly the best way to promote utilization. There are areas of technology where title is required for utilization; areas where title would inhibit it; and a large area-inventions with no commercial application-where neither title nor license will promote utilization.*" See: Harbridge House Inc., *Government patent policy study: final report. Prepared for the FCST Committee on Government Patent Policy* (Washington: Federal Council for Science and Technology, Committee on Government Patent Policy; for sale by the Supt. of Docs., U.S. Govt. Print. Off, 1968) at 4, also cited in: ibid. Eisenberg at 1681. A subsequent Nixon's memorandum on Government Patent Policy of 1971 provided for more possibilities of vesting IP right into originators by adding to the Kennedy's memorandum that: "*[g]~~G~~reater rights may also be acquired by the contractor after the invention has been identified where the-head of the department or agency determines that the acquisition of such greater rights is consistent with the intent of this Section 1 (a) and is either a necessary incentive-to call forth private risk capital and expense to bring the invention to the point of practical application or that the Government's contribution to the invention is small compared to that of the contractor. Where an identified invention made in the course of or under the contract is not a primary object of the contract, greater rights may also be acquired by the contractor under the criteria of Section 1 (c).*" See: The President, 'Government Patent Policy, Memorandum for the Heads of Executive Departments and Agencies, Statement of Government Policy' (23 August 1971) 36 Fed. Reg. 16,887- 16,891; see also: ibid. Eisenberg at 1684 1689].

[70] See: ibid. Eisenberg at 1697; note 22, Kuyath at 12; See: also: note 56, Sidebottom (2003) at 67; note 56, Sidebottom (2000-2001) at 226-227.

[71] For instance, Eisenberg noticed that governments agencies might be lacking expertise in assessing commercial viability of possessed patents (see: ibid. Eisenberg at 1697) an that, in no obvious way, vesting commercialisation in non-originators would be more efficient (see: ibid. at 1697-1690).

Bayh-Dole Act (see Figure 53)[72] and be incorporated into GPA/RTAs to also apply to covered purchases of both R&D and already existing innovation privately financed by foreign business. In short, whether while dealing with potential originators (procurement of R&D) or holders of already existing IP right, public procurers should in principle claim only 'nonexclusive, non-transferrable, irrevocable, paid-up licenses.'

10.2.4. Application of the scenario to SIE

The greatest challenge to the feasibility of the reciprocal libertarian scenario would the application of its core elements to the SIEs because 'realistically libertarian' governments would not cut all their ties with existing SIEs and would keep stake in some commercial entities for strategic/security reason. Realistically libertarian governments would not press on the pursuit of cross-border horizontal policies by the remaining SIEs. However, as discussed, the incorporation of non-commercial considerations by commercial entities (including the SIEs) might be a part of their business strategies not dictated by governmental influences at all.[73] As a result, sceptical governments of third countries would continue to press on covering such entities with the GPA or GPA-like instruments of international liberalisation which are simply unfit for commercial entities.

Indeed, the conflict between the commercial nature of sourcing by the SIEs and inflexibility of public procurement regime is irreconcilable. In terms of environmental and social policies, the application of the ban on cross-border regulatory interferences (see section 10.2.2) to the SIEs would prevent such entities from incorporating CSR/PSR/fair trade considerations into their sourcing practices, potentially jeopardising their individual clients who might even boycott such companies.[74] In turn, in terms of innovation mercantilism, regulating the allocation of IP between a procuring commercial entity subjected to public procurement rules and its suppliers would undermine commercial entity's elementary freedom of contracting.

In fact, getting back to basics of the GATT's 47's and GPA's definition of public procurement ('not with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale') hints that in the GPA was not designed to apply to a procurement by any commercial entity at all.[75] Even purchases of

[72] However without differentiating between domestic and foreign business unlike under the Bayh-Dole Act which discriminated against foreign originators by stipulating that the funding agreement might not assign patents to the originators if "*the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government.*" See: Bayh-Dole Act, section 202.(a).

[73] See: section 6.2.3.d.

[74] See ibid. However, such risk perhaps would not be high given that SIE normally operate in fields like infrastructure and public utilities and, therefore their positions in the markets is often monopolistic and not leave a lot of space for free consumer choices.

[75] See section 2.2.

non-tradable fixed assets or capital investment (purchases stationery, software for computers, construction works related to production facilities etc.) are in some sense 'for use' in the production or supply of goods or services for commercial sale or resale.[76] Therefore, the only solution is that the negotiators should seek to regulate purchases by the SIE beyond the GPA system and public-procurement-specific international instruments, and simply trade SIE-related concessions for public-related concessions as a part of larger negotiation packages.[77]

10.3 Unilateral statist scenario

In the unilateral statist scenario, governments would formally reciprocally open their public procurement markets but they would also use their purchasing power to unilaterally achieve their horizontal goals, yet within reason. Negotiators would agree to keep a *status quo* in terms of a vague approach to environmental and social policies and, at the same time would also partly close their eyes to public-procurement-specific innovation mercantilism. The outcomes of this scenario would be mostly uncertain and chaotic but just this scenario has been largely carried out so far despite all its flaws. In the lack of case-law, one could speculate that – in a system similar to current GPA framework - at least the most intrusive and contentious cross-border horizontal policies could be successfully challenged by affected third countries. Still, like now, ambiguous controversies would be resolved on case-by-case basis, often out court, and their outcomes would be dictated by the law of the jungle.

Vibrant and large emerging economies pursuing innovation mercantilism through their SIE would accept such rules of the game. However, they would only subject public procurement managed by their public authorities to the GPA system without covering their SIEs. As a result, the most intrusive and contentious form of innovation mercantilism pursued by public authorities could still be challenged based on the ban offsets (see section 10.2.3.a.) but SIEs' business strategies targeting IP possessed by specific foreign enterprises would need to be borne by the mostly developed countries leading in innovation. The innovation leaders would accept such offer simply because a half loaf would be better than none in the sense that their industries would generally get a significantly improved market access to procurement managed by emerging economies' public authorities (which currently is largely unsecured with any international agreements). At the same time, innovation leaders' most innovative industries would continue selling to emerging economies' SIEs as usual, that is

[76] The literal interpretation of the GPA article 2.a.ii (repeating the language of the GATT's 47's exclusion of public procurement from the GATT47) suggests that GPA12 should apply to procurement listed in appendices only on condition that such procurement is 'not with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale.' However, such interpretation would imply that all the commitments made by the GPA parties with regard to covered commercial entities were *in effectu* be meaningless.

[77] See: section 9.1.3.

without public procurement rules encroaching upon freedom of contracts in business-to-business relations.[78] The accusatory rhetoric about daylight robberies of IP committed by the SIEs present in current Western public debate would be abandoned. Instead, the view would prevail that (*i*) voluntary transactions must be benefitting both parties, and (*ii*) that IP owners would not enter into such agreements without having previously calculated all involved risks.[79] In the background, the smallest or least developed countries would only be pawns of the game, forced to open their public procurement markets in one way or another, whether that be (*i*) the requirements imposed on candidates for the EU membership,[80] (*ii*) financing conditions imposed by the MDBs on their creditors,[81] or (*iii*) bilateral RTAs concluded by pairs of Davids and Goliaths.

10.4 Regulated statist scenario

Regulated statist scenario would be based on a global consensus of all stakeholders as to uniform maximum environmental/social standards[82] and a maximum scope of allowed innovation mercantilism in otherwise widely opened public procurement markets.[83] Negotiators would need to choose from many overlapping more or less esteemed environmental or social 'international' standards designed by a number of intergovernmental or non-governmental organisations.[84] Little could be drawn in this regard from the developments in general commerce where - despite the views that these days sovereignty has already become purely formal[85] - the idea of the global unification of standards has met a strong resistance primarily just for the reason that unification/harmonisation would excessively interfere with countries' sovereignty and national policymakers' right to set up

[78] This does not mean however that the problems with enforcement of private contracts by public authorities/courts referred to in sections 6.2.1.b and 6.2.1.d shall not be address. Even so, this is a wider non-public-procurement-specific problem to solve.

[79] Similar views have been expressed in the context of general-commerce in private markets and different levels of IP protection among most developed and emerging economies. For instance Reichman observed that "*technology exporters need access to emerging Asian and Latin American markets as much as these countries need FDI, licensing, and up to date high-tech goods.*" See: Jerome H. Reichman. 'Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow' (2009-2010) 46(4) Hous L Rev 1115 at 1180. Reichman also pointed out some hypocrisy of the US IP-related trade policy promoting stronger IP right in third countries despite the fact that the US, before 1980s, used to have one of the least strict and most competitive patent/copy right regimes in the world, which catalysed rather than hindered economic growth. See: ibid. at 1117).

[80] See: section 3.5.

[81] See: section 0.

[82] According to Mccrudden, in the context of public procurement markets and unification of social/labour standards, the incorporation of the social issues to the WTO framework (just like they are incorporated within framework of the EU) would better assure the compliance with such standards than under ILO's conventions the enforcement of which is largely based on 'persuasion and diplomatic pressure.' See: Christopher McCrudden, *Buying social justice :equality, government procurement, and legal change* (Oxford University Press, Oxford 2007) 680 at 587-588. See also: Anne Davies and Christopher McCrudden. 'A Perspective on Trade and Labour Right' (2000) 3(1) J Intl Econ L 43 at 57.

[83] Such consensus could not be regional or bilateral for the reason that this could only further hinder a multilateral liberalisation of public procurement markets [see: Robert E. Baldwin, *Nontariff distortions of international trade* (Brookings Institution, Washington 1970) 210 at 4; section 9.1.2.b] unless regional or bilateral agreements on higher standards were designed in manner not affecting third countries as already proposed under reciprocal libertarian scenario. See section 10.2.2.

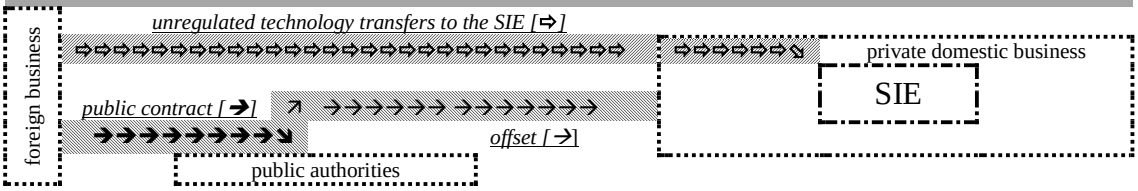
[84] See: Michael Ming Du. 'Reducing Product Standards Heterogeneity through International Standards in the WTO: How Far across the River?' (2010) 44(2) J World Trade 298.

[85] See: Thomas Cottier, 'Sovereign Equality and Graduation in International Economic Law' in Marise Cremona, Peter Hilpold, Nikos Lavranos, Stefan Staiger Schneider and others (ed), *Reflections on the constitutionalization of international economic law : liber amicorum for Ernst-Ulrich Petersmann* (Martinus Nijhoff Publishers, Leiden 2014) 215 at 225.

their own standards.[86] Nonetheless, while a complex unification of social/environmental standards by the WTO is nowhere close on the horizon,[87] an agreement on public-procurement-specific uniform standards could still be attainable. This is because such agreement would likely be less contentious that in general commerce as such agreement would (*i*) only affect trade in public procurement markets compared with all commerce, (*ii*) only determine maximum standards that particular public procurers - within their executive discretion - could but would not have apply on top of mandatory general-commerce standards (TBTs, SPS measures, etc.).[88]

Accordingly, negotiators would incorporate precise maximum social and environmental standards into the GPA's framework. Instead of designing original standards in which bodies like the WTO Committee on Government procurement do not have any expertise, the negotiators would rather agree to incorporate, by reference, precise internationally (but not universally) recognised standards, similar to the EU which unilaterally singled out a list of core international standards that can also be imposed on business operations conducted in third which have not ratified agreements recognising such standards.[89] In smaller circles, some groups of countries could agree on lower or even higher maximum standards but, again, only on condition that such arrangements would not affect business operations conducted in third countries. However, such objective – as already explained – could only be achieved if public procurers applied different standards to individually known suppliers/contractors, differentiating between suppliers originating from countries participating and not participating in such small-circle-arrangements (see section 10.2.2).

Figure 54. Technology transfers to public authorities *versus* to SIE



[86] See: Michael Ming Du. 'Reducing Product Standards Heterogeneity through International Standards in the WTO: How Far across the River?' (2010) 44(2) J World Trade 295 at 296; Lori M. Wallach. 'Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards' (2001-2002) 50(4) U Kan L Rev 823 at 823–866. In addition , the unification of standards has been believed to undermine efficient allocation of resources In the sense that unification of standards would interfere with voluntary exchanges creating welfare for both parties to an exchange under theory of comparative advantage. See: James Thuo Gathii. 'Re-characterizing the Social in the Constitutionalization of the WTO: a Preliminary Analysis' (2001) 7 Widener L Symp J 137 at 141. Jeffrey L. Dunoff. 'The death of the trade regime' (1999) 10(4) Eur J Intl L 733 at 745-747.

[87] Even though the WTO documents did not move that organisation away from environmental matters like in the case of labour issues under article 4 of the Singapore Declaration [but rather affirmed at the creation of the WTO that its works shall be aiming at 'making international trade and environmental policies mutually supportive' – see: WTO, 'Decision on Trade and Environment' (15 April 1994) LT/UR/D-6/], still the WTO itself does not see itself as an 'environmental protection agency' and WTO's members recognise that the WTO "*does not aspire to become one. Its competence in the field of trade and environment is limited to trade policies and to the trade-related aspects of environmental policies which have a significant effect on trade. In addressing the link between trade and environment, WTO Members do not operate on the assumption that the WTO itself has the answer to environmental problems. However, they believe that trade and environmental policies can complement each other.*" See: WTO, Trade and Environmental Division, *Trade and Environment at the WTO* (WTO, Geneva 2004) 76 at 6.

[88] And as discussed in Chapter 8, non-mandatory standards, largely, would not be applied in practice.

[89] See: section 10.2.2.

The vibrant and large emerging economies would accept a unification of maximum standards (allowing the mostly developed countries to pursue environmental/social cross-border horizontal policies against the comparative advantage of emerging economies) on condition that technology transfers were similarly regulated, yet not banned. In the case of purchases by public authorities (which in principle do not need patents, as discussed in section 10.2.3.b), instead of trying to *in abstracto* inflexibly allocate IP right, negotiators could agree on the uniform level of offsets forcing foreign suppliers/contractors to outsource some portion of awarded contracts to local sub-suppliers/subcontractors (see Figure 54). In subsequent negotiations, foreign suppliers/contractors and domestic sub-suppliers/subcontractors would *in concreto* determine the details of the IP allocation in accordance with their individual needs.[90] Similar to social and environmental standards, in smaller circles some countries could also agree on lower or higher levels of offset, also in exchange for lower or higher environmental/social standards - again, so long as their public procurers could differentiate between contractors/suppliers from countries subscribed and not subscribed to such small-circle-arrangements. In the case of purchases by the SIE, just like in the unilateral statist scenario, procurement by such enterprises would remain uncovered by public procurement regime.[91]

10.5 Conclusion

Altogether, the common denominator of all scenarios would be the quest of fairness for all current or potential stakeholders in the plurilateral and potentially multilateral system of the regulation and liberalisation of public procurement markets. A fair reciprocity (as defined in section 10.2.1) would be a more bitter pill to swallow for the mostly developed countries. While emerging and least developed economies should only be expected to eventually cover their public authorities, the mostly developed countries should make wider concessions. In all scenarios, the mostly developed countries would need to cease pressing on subjecting the purchases by emerging economies' SIE to public procurement regime. In the libertarian scenarios, the mostly developed countries would also need to give up all their protectionist policies accompanying purchases of R&D and all social and environmental cross-border

[90] However, the bargaining power as to the terms and conditions of such contracts, the transfers of IP included, would largely depend on the level of offsets. The higher the level of offset, the lesser the bargaining power of the foreign supplier/contractor in negotiations with local sub-supplier/sub-contractor. This claim is based on the pretty simple observation that, without an offset-requirement in place, a foreign enterprise would not have enter into any deal with local/domestic enterprises at all. Probably, in the case of low offset-threshold and huge competition in a given domestic industry (even between huge enterprises), the offset-requirement would not change much, if anything, in term of IP allocation. However, in the case of a high offset-threshold and scarcity of the local/domestic sub-suppliers/subcontractors with sufficient expertise, small local business could still effectively target innovation possessed by a specific foreign businesses.

[91] However, again, a bird in the hand (procurement by public authorities) is worth two in the bush (procurement by public authorities and SIE - see section 10.3 in fine).

horizontal policies in exchange for (*i*) securing access to emerging economies' procurement managed by public authorities, and (*ii*) emerging economies' commitment that their public sectors/administration would not be engaged in innovation mercantilism. In turn, in statist scenarios, the mostly developed countries would continue with green/environmental cross-border horizontal policies at the price of allowing emerging economies' public authorities to be actively involved in public-procurement specific innovation mercantilism. In any case, the burden of levelling the playing field would always be on the mostly developed current GPA parties rather than on the countries in the waiting room to the GPA.

Among all four scenarios, the realisation of the pure reciprocal libertarian scenario would be ideal because the pursuit of cross-border-horizontal policies would be largely eliminated and governments would keep one another in check. Nonetheless, a real-life-feasible reciprocal libertarian scenario would need to be softened by numerous third-party-neutral regional/bilateral agreements reflecting diverging bilateral trade profiles and the existing polycentrism of approaches to non-commercial considerations in public procurement. Still, the default position of such scenario would be clearly anti-protectionist and, under such scenario, cross-border regulatory interferences – unlike in the case of unilateral measures – would be consented to by governments of affected suppliers/contractors.

CONCLUDING REMARKS

This study sought to gather comprehensive information on cross-border regulatory interferences channelled through public procurement markets and evaluate this phenomenon as a genuine obstacle to a wider opening of public purchases to free trade.

At the high level of generality, problems of the liberalisation of public procurement markets proved to be not unlike in the case of general commerce. Protectionist policies have long been primarily driven by groups of interest related to internationally non-competitive industries taking advantage of nationalistic sentiments of the public as well as of political myopia. Public procurement markets have simply been yet another obvious tool of protectionism seeing that government purchases have always been widely employed by public procurers to achieve wider largely domestic policy-goals, but could also be easily hijacked by such groups of interest seeking protection from foreign competition to advance such groups' hidden or openly protectionist agenda. Nevertheless, public procurement markets - with largely binary nature of trade barriers (access or no access) and limited pool of crucial foreign public agencies/SIEs, to which key domestic enterprises could offer good/services – also proved to differ from private markets with countless actors able to surpass less categorical general-commerce trade barriers in countless business-to business transactions. Thus, the specificity of public procurement markets has also left some space for justified governmental action whereby an adoption of protectionist measures is merely a necessary step toward forcing the reciprocal opening of public procurement markets.

Similarly, at the high level of generality, the problem of cross-border regulatory interferences channelled through public procurement markets – conceptualised in this study as cross-border horizontal policies adversely affecting foreign (exterritorial) business interests by interfering in/distorting the foreign (international) regulatory environments, and often specifically targeting foreign business operators – has proved to reflect recent more sophisticated general commerce industrial policies, the *modus operandi* of which is to undermine foreign comparative advantage by interfering with foreign (extraterritorial) regulatory matters. Depending on countries' levels of income, existing social and environmental standards, technological advancement and position in the current multilateral trading system organised under auspices of the WTO, such policies have obviously diverged, with mostly developed countries targeting vibrant emerging economies' cost-advantage by promoting social and environmental agenda through international agreements or very controversial unilateral measures on the one hand, and vibrant emerging economies targeting mostly developed countries' innovation-advantage by forcing technology transfers mostly through regulation of FDIs. Public purchases have simply become yet another very

convenient channel of cross-border regulatory interferences with individually imposed unilateral social or environmental standards being much less conspicuous than generally applicable requirements, and technology transfers individually forced in the course of procurement by state agencies/SIE being much less conspicuous than generally applicable restrictions on FDIs.

However, this study found that nature of public procurement (including the lack of spontaneously emerged order of public contracting, the existence of public-procurement-specific sub-central autonomy and the need for wide executive discretion in hands of procuring agencies) brings completely different challenges to the removal of cross-border regulatory interferences as an obstacle to further liberalisation public procurement markets than in the case of general commerce where at least the adoption of unilateral standards has been significantly restricted by WTO obligations and case law, as well as technology-transfer-related restrictions on FDI are being gradually removed. Specifically, in the examination of the phenomenon of cross-border horizontal policies taming further liberalisation of public procurement markets, this study has come across a number of paradoxes determining the slow pace of this liberalisation, and found that a broader pursuit of cross-border horizontal policies can only exacerbate these paradoxes.

Paradox 1: *Framework of the GPA is the primary tool and the major obstacle to liberalisation at the same time.*

These paradoxes start with that the parties to the GPA have chosen a strict harmonisation of public procurement process encroaching upon national procurement systems (a global-administrative-law model) as the primary tool of liberalisation whereas the excessive harmonisation ignoring existing polycentrism of approaches to public procurement can be largely blamed for the reluctance of negotiating parties to conclude the GPA or subject more goods/services/procurers to GPA's framework. The polycentrism of approaches as to the pursuit of cross-border horizontal policies is yet another feature the domestic or regional public procurement systems that the globally harmonised model cannot embrace.

Paradox 2: *EU's public-procurement-relevant secondary legislation is de facto superior to formally superior international agreement.*

This is all the more true given the anomaly that the developments in the EU have dictated similar developments in the GPA while, in theory, the EU along with its member states should follow the development in the GPA agreed among all its parties. The shift from the initial axiom of non-incorporation of non-commercial considerations in the procurement

process toward advancing environmental and social agenda by the EU's procuring agencies (both domestically and extraterritorially) had to be also addressed in the GPA. And it was during GPA's revision of 2012 which foretells a fierce debate among current and potential parties to the GPA, especially those not sharing the EU's position. At the same time, the final outcomes of the already ongoing - especially in the context of China's uncertain accession to the GPA - battle about the extent of legitimate technology transfers to public procurers and SIEs of the large emerging economies (opposed to by the EU and the US) is neither less interesting, nor less crucial for the chances of further liberalisation of public procurement markets.

Paradox 3: *Liberalisation has been poor despite mostly binary nature of public-procurement-specific trade barriers theoretically driving liberalisation.*

These paradoxes continue with that the mostly binary nature of trade barriers in these markets could hint that negotiating parties, encouraged by their internationally competitive industries, shall strive for getting such industries a secured access to public procurement markets in third countries through reciprocal liberalisation. Nevertheless – in contrast to traditional protectionist measures such as bans on sourcing from foreigners or prohibitive price penalties - cross-border horizontal policies merely targeting cost-advantage or innovation-advantage of foreign economic operators/originators are not likely to entirely block market access. This means that negotiating parties lack similarly strong incentives to reciprocally open markets as in the case of traditional public-procurement-specific protectionist measures. Even if excessive green and social cross-border requirement or predatory conditions of technology transfers impacted foreigners similarly to prohibitive duties and drove them completely out of a given public procurement markets, a *de facto* lack of market access would be concealed and would not call for immediate actions by governments of affected economic operators/originators.

Paradox 4: *Libertarian attitude of procuring executive agencies might be an obstacle to liberalisation of procurement markets.*

The incentive to seek reciprocal concessions with other countries is also paradoxically undermined by the *in effectu* libertarian attitude of other countries' executive agencies toward foreigners (compared with more protectionist approach of their central-government-policymakers). This is because private business free-riding on foreign executive agencies' libertarian attitude is pressing less on its original governments to secure an access to foreign procurement markets by reaching formal reciprocal concessions. Indeed, very little can be done in terms compelling executive agencies to pursue often unwanted, troubling and costly

horizontal policies (involving additional efforts such as designing contract-specific social or environmental requirements and subsequently having to control compliance), or in terms of preventing executive agencies from sourcing abroad pursuant to their legitimate needs, in order to prevent free-riding. In the case of cross-border horizontal policies, the risk of free-riding is even greater because interfering with foreign regulatory environments for public procurers is obviously even costlier and more burdensome than interfering with purely domestic matters.

Paradox 5: *More negotiating parties are better for multilateralisation.*

Next, this study found that the obstacles to multilateralisation of the GPA system stemming from public-procurement-specific sub-central autonomy might paradoxically be solved by allowing sub-central governments to independently negotiate liberalisation of regional/local public procurement markets. *Prima facie*, more negotiating parties sitting at a negotiation table, intuitively primarily focused only on regional liberalisation, could lead to even further bilateralisation and fragmentation of the currently *de facto* declining plurilaterism. Still, however, the direct involvement of sub-central governments better understanding the needs of sub-central/local public procurers could minimise the risk of either (*i*) potential free-riding by foreign business on the libertarian attitude of sub-central public procurers, or (*ii*) potential international non-compliance by such procurers. And, as a result, sub-central governments negotiating independently from central governments would have better aggregate leverage in negotiations with third countries compared with central governments negotiating alone.

Otherwise, central-governments would continue to make unreliable commitments pertaining to sub-central public procurement markets toward third countries, and the pursuit of cross-border-horizontal policies would only further undermine the reliability of such commitments. Cross-border horizontal policies designed by central governments would continue to be largely ignored by sub-central governments and sub-central public procurers leading to even greater free-riding by foreign business. In turn, cross-border horizontal policies designed and applied by co-operating sub-central governments and sub-central public procurers would likely continue to devastate central governments' external public-procurement-related trade policies.

Paradox 6: *Third-party neutral bilateralism helps multilateralisation.*

Finally, this study also found that the process of the ongoing bilateralisation of public-procurement-related negotiations paradoxically might be remedied to by giving negotiating parties a green light to bilaterally (or regionally) negotiate the scope of the allowed third-

country-neutral pursuit of horizontal policies. Specifically, with the wide multilateral agreement on the liberalisation of public procurement markets as the default rule in place, particular negotiating parties (also independently their sub-central governments) could enter into third-country-neutral regional/bilateral agreements reflecting their diverging bilateral trade profiles and existing polycentrism of approaches to non-commercial considerations in public procurement. Under third-country-neutral agreements, negotiating parties could also bilaterally/regionally mutually cancel the most contentious cross-border horizontal policies targeting specific countries, their specific industries, geographical areas or individual business operators. Otherwise, the largely bilateral controversies about cross-border-horizontal policies would continue to cripple the liberalisation process way beyond such bilateral/regional public-procurement-related trade relations.

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