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Public procurement in EU PTAs

Stephen Woolcock, LSE

Abstract

European Union trade and investment policy faces a dilemma with regard to comprehensive trade topics such as public procurement. On the one hand it is in the interests of the EU - has been the EU's aim - to include topics such as public procurement (one of the so-called Singapore issues) in trade agreements. This has been only partially successful at the multilateral and plurilateral levels, so the EU has used the vehicle of preferential trade agreements (PTAs) to extend the coverage of procurement rules. Even here there has been resistance including from some important potential PTA partners of the EU, for a number of political and industrial policy reasons. At a time when the stability of the whole rules-based trading system is in doubt, it is however, important for the EU to be able to conclude PTAs with systemically important trading partners, such as India, Brazil, China and others. So should the EU show some flexibility and accept less comprehensive agreements that exclude procurement, or should it continue to work for the inclusion of rules on procurement and risk delaying or not being able to conclude major PTAs? This chapter discusses why it is in the EU's interests to include procurement and why the PTA route is important. It then assesses how successful the EU has been in extending the coverage of procurement via PTAs before analyzing why this, like the efforts at a plurilateral level, have only been partially successful.

The wider context

With the stalling of multilateralism during the 2000s most of the developments in trade and investment agreements, and thus the extension of the rules-based order of trade have taken place through the vehicle of preferential trade and investment agreements (PTAs). The debate on the pros and cons of preferential versus plurilateral or multilateral approaches is now giving way to a concern about the stability of the rules-based trading system *per se*.[1] One source of instability is whether there is support for an extension of the multilateral trading system beyond the WTO rules as of about 2000 from China and other emerging

[1] By a rules-based order it is meant one that provides a framework of agreed rules that promotes predictability and stability in international trade and investment. This can be contrasted with a power-based order in which more powerful or larger economies shape the conditions of trade unilaterally (See Jackson, 1995).

markets. Another source of uncertainty is whether the apparent US shift towards a power-based approach to trade is a temporary phenomenon or something more structural. Then there is the general backlash against globalization and populist pressures.

In this environment it is in the interests of the EU to defend and ideally promote a stronger rules-based trading system. This is because the EU represents the most comprehensive application of a rules-based order. The EU has generally gone further in applying the norms and codes developed internationally, including in public procurement. [2] The EU has also gone further in the sense that EU rules are binding and subject to direct effect, thus introducing a form of "constitutionalisation" of international best practice in public procurement practice as expressed in OECD,[3] WTO[4] or UNCITRAL[5] codes and instruments. Deeper integration in the EU has gone hand-in-hand with the adoption of a comprehensive, rules-based order at the EU level. The EU is therefore understandably interested in rolling out comprehensive rules internationally. The comprehensive nature of EU provisions on transparency in public contracts means it is generally easier for non-EU suppliers to be aware of EU calls for

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[2] For example, voluntary codes of conduct or conventions such as those developed in the OECD have been implemented in EU law. This is the case for public procurement, in which the rules developed in the OECD have been applied by the EU in binding legislation. It is also true in the case of financial market regulations, where the EU has implemented international rules in EU Directives and Regulations. But it is also the case for policy areas such as labour standards, where ILO conventions have formed the basis of relevant EU provisions.

[3] See for example OECD Recommendation of the Council on Public Procurement (2015) http://www.oecd.org/gov/public-procurement/recommendation/OECD-Recommendation-on-Public-Procurement.pdf

[4] See WTO Revised Government Procurement Agreement (2014) (entry into force)
https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm

[5] UNCITRAL Model Law on Public Procurement (2014)
https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf

tender and how these will be awarded than it is for EU suppliers in many third countries. The nature of EU decision-making, based on a *de jure* qualified majority, but *de facto* on consensus also means that there is little prospect of the EU shifting to adopt a power-based trade policy, should this be the trend in trade policy in general and procurement markets in particular. [6]

The key question is therefore whether the EU can defend and ideally extend the rules-based order? In this context extending the scope of rules on procurement is one of the most challenging topics, and represents something of a litmus test for the ability of the EU and the international trading system as a whole to retain and build a rules-based order.

Why include public procurement?

Public procurement represents a major share of GDP in most countries. Although data is generally patchy, public procurement at the central and sub-central government levels as well as procurement by state-owned/para-statal enterprises accounts for in the order of 12% of GDP in developed economies.[7] It is probably the most important policy area, in terms of funding, in which governments retain discretionary powers. The EU supports the inclusion of public procurement in trade rules for a range of reasons, both normative and commercial.

In normative terms rules on procurement can help ensure value for money and thus the best use of scares public funding. They can also counter corruption in the awarding of public contracts. The fact that there remains discretionary

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[6] This can also be illustrated by the case of public procurement. For some time there has been a debate on whether the EU should adopt an International Procurement Instrument that would in effect enable the EU to threaten to close its market if it does not get 'fair' access to other key markets, see Commission (2012). But it has, to date, not been possible to reach an agreement on the adoption of such an instrument.

[7] This is the OECD 34 average https://qdd.oecd.org/subject.aspx?Subject=GOV_PUBPRO_2016OECD.

power in the hands of government means that public contracts represent a major vehicle for and source of corruption, where there are inadequate forms of scrutiny and control. Corrupt practices can be found in countries at all levels of development, including within the EU, but the implications in terms of economic losses and the undermining of confidence and legitimacy of government is more pronounced in the less developed economies.[8] The adoption of rules on procurement, such as transparency requirements and rules of due process and contract award criteria are therefore seen as a means of making better use of limited public funds and thus contributing to sustainable development.

In commercial terms the fact that the EU regime for public procurement is more comprehensive than any other international agreement, and many national regimes, means that the EU market is more transparent and arguably more open than other markets.[9] Through its comprehensive application of rules on procurement the EU covers all levels of procurement with transparency and national treatment obligations.[10] This contrasts with the absence of any binding obligations on the procurement in emerging markets, which are not signatories to the WTO's Government Procurement Agreement (GPA) and often have extensive public and state-owned enterprise sectors. The state and state-owned enterprises in these markets can use the discretion they have to promote national champions and keep out EU suppliers. In other words the EU is seeking

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[8] While figures are by definition difficult to obtain on the waste caused by corrupt practices, surveys show that bribes are more common in public contracts than any other field and as much as 20% of the value of public contracts could be lost due to corruption. See UN Office on Drugs and Crime https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anticorruption_in_public_procurement_and_the_management_of_public_finances.pdf.

[9] There has been a debate on this topic in the context of the TTIP negotiations with the US and some literature that has sought to measure the relative degrees of openness of the EU market with others, see Woolcock and Grier, 2015.

[10] See annex 1 for a summary of the topics generally included in agreements on public procurement.

a 'level playing field' or reciprocity in procurement and thus some 15% of world markets.

Why preferential trade agreements?

One short answer to the question of why the EU seeks to include rules on public procurement in the PTAs it negotiates is that the multilateral and plurilateral alternatives have failed or are too slow. Government - or as here public – procurement was explicitly excluded from the scope of the GATT 1948. In 1963 work began in the OECD on the topic. In line with the normal development of trade rules (at least until the 2000s), the code developed in the OECD was then adopted in the – qualified MFN - GATT 1979 GPA 16 years later. The next major advance came in the revised plurilateral 1994 GPA another 15 years on. This was more extensive and included a more developed enforcement provision in the shape of the bid challenge procedures. The latter was first introduced in the Canada – US FTA in 1988. But the advances in the 1990s were in no small part due to developments in the EU and the move to establish comprehensive rules on procurement as part of the Single European Market (SEM). The latest revision of the GPA, which was agreed in 2011 as far as the rules were concerned and in 2014 in terms of commitments, took another 20 years. And by 2014 the number of countries and types of public procurement covered is still far from complete.

As suggested above international agreements on public procurement have two main elements; rules and coverage.[11] In terms of the rules (see annex 1 for a listing of the details), these have emerged from the work of the OECD and have both shaped and been shaped by the EU, which has these internationally agreed rules and incorporated them in binding EU legislation. The approach developed in the OECD also shaped the UNCITRAL model law on government procurement.

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[11] A distinction has been made between transparency and liberalization. This was more a means of facilitating international agreement, it being thought easier to agree on transparency than specific commitments. In practice the distinction is a less clear. In practice most impediments to competition in public contracts take the form of *de facto* - rather than specific *de jure* (i.e. price margins favouring local suppliers) - preferences. This means that transparency measures can have the effect of enhancing competition.

The UNCITRAL rules are very similar, but like all such UN codes voluntary. These norms are also applied, i.e. demanded, by doners such as the World Bank when they fund contracts. It could therefore be argued that there is a *de facto* international norm or best practice in public procurement, which has of course been developed by the OECD/developed economies.

In terms of the coverage of these rules, in other words, which countries agree to apply them and for which types of purchasing entity, there has been much less progress. Coverage has been negotiated within the GATT/WTO and more recently in PTAs, but there has been no agreement on a multilateral agreement and the plurilateral GPA has been signed only by OECD economies and a few others such as Hong Kong, and even some OECD economies such as Australia, are yet to sign.

The EU preference for extending the coverage of the rules was to include public procurement in the WTO. This was reflected in the EU position at the first WTO Ministerial meeting in Singapore in 1996 and hence the inclusion of procurement as one of the 'Singapore issues'. In the subsequent debate in the WTO, developing countries opposed any 'liberalisation' so the discussions were limited to transparency. In these the EU also sought to be comprehensive. EU experience internally had been that this was necessary in order for transparency to be effectively achieved. [12] The EU, supported by the USA, also argued that all procurement should be covered by transparency requirements and that these should be subject to dispute settlement. [13] Developing country WTO members opposed detailed provisions, arguing that only covered procurement should be subject to transparency requirements and opposed the use of dispute settlement.

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[12] The EU sought to include for example, requirements to publish all laws and regulations, information on planned procurement, contact points, information on the type of contract award procedure followed for each call for tender, the contract award criteria, calls for tender as well as any de jure preferences or local content requirements (Arrowsmith, 1996; and WTO https://www.wto.org/english/tratop_e/gproc_e/gp_dda_e.htm).

[13] This is in line with the UNCITRAL approach, which is intended to apply to all procurement. The difference between UNCITRAL and the efforts in the WTO or in PTAs is that the adoption of UNCITRAL rules is voluntary.

The opposition of countries such as India, Malaysia and others was also to the whole idea of a comprehensive agenda for the WTO. In the end these accepted the normative case for transparency, but stated that they did not believe the case had been made to include rules in the WTO.[14]

The alternative of plurilateralism has also been promoted by the EU. In the text of the 2011 revised GPA rules there were provisions on special and differential treatment (see annex 1) that were added in order to encourage developing country signatories. But with little concrete results. In the negotiations on coverage the EU and other signatories sought extensions on coverage and the inclusion of China in particular. China agreed agreed to a rendezvous clause on the GPA on its accession to the WTO. Increases in the value of procurement covered by the GPA of some $18 billion were agreed by 2014, but there remain gaps in coverage of existing signatories, such as at the sub-central government level. And in the end China could not be persuaded to join.

Inevitably negotiations on rules and coverage of public procurement have been multi-level in nature. As well as pressing the case at the multilateral and plurilateral levels, the EU has also sought to include procurement in the PTAs it negotiates. This has been in part driven by competition, such as from the USA and other OECD countries that negotiate PTAs including procurement. But the US and others have domestic constraints on what they can offer, in particular offers on coverage of sub-federal level procurement. The EU desire to include comprehensive provisions in PTAs must therefore be seen as driven by factors other than or in addition to competition with other PTAs. These have been discussed above.

How successful?

The EU approach to negotiating procurement provisions in PTAs has varied according to the negotiating partner. Broadly speaking it is possible to

[14] It is possible however, to identify more interest and support from a range of non-OECD economies, at least in terms of the increased number of observers in the GPA and the desire expressed by some to move to accession.

differentiate between PTA partners that are signatories to the GPA, in other words developed market economy countries; middle or high income developing economies; smaller or less developed economies; and significant emerging market economies.

In terms of the first group of GPA signatories the EU has succeeded in enhancing the coverage beyond that in the 2014 GPA schedules in some cases, most significantly in the case of the CETA with Canada. For the middle income developing economies, the EU has succeeded in getting some of these partners to sign up to the GPA type rules on transparency and include some commitments on coverage. Examples here are the Columbia/Peru and Central American PTAs. There has however, been less progress with the more significant emerging market economies. Negotiations with Mercosur have been held up due to other issues, although the reports from the negotiating group meetings suggest progress has been made on the text of an agreement. Negotiations with India do not appear to be making much progress and, if agreed, are likely to cover only transparency. Finally, with regard to smaller or less developed economies, the EU has succeeded in concluding at an agreement with CARICOM with transparency rules. Table 1 provides a summary overview of the provisions in existing PTAs completed by the EU.

Table 1 Summary of procurement provisions in PTAs concluded by the EU

Preferential Trade Agreement	GPA signatory	Transparency provisions	Coverage	NT	No off-sets	Bid/challenge	Comment
CETA	yes	GPA rules	GPA plus type II and III	yes	yes	yes	Procurement key issue in CETA, precedent for other federal states
Japan	yes	GPA rules	GPA plus; Japan higher thresholds for type II and III works	yes	yes	yes	Special arrangements to facilitate transparency for EU bids in rail sector
Singapore	yes	GPA rules	GPA plus; e.g. Singapore adds utilities	yes	yes	yes	Adoption of up to date GPA rules
Korea	yes	GPA rules	GPA plus build transfer and operate contracts; Korea higher thresholds for type II and III	yes	yes	yes	Minimal additions to GPA due to timing

			works				
Mexico revision of 2001 PTA not yet finalised	No, but signed GPA like NAFTA	GPA type but less comprehensive	Type I and some type III; type II under discussion; higher threshold for works	yes	Most likely	Most likely	Illustration of extended coverage in revised agreements
Columbia/ Peru/	no	Very similar to GPA rules (best endeavours on some aspects)	Coverage of Type I, II and III with GPA thresholds	yes	yes	yes	Fairly comprehensive with EU offering some asymmetric coverage benefiting Colombia and Peru
Central America	no	GPA type	Type I, II and III, higher thresholds for smaller countries	yes	yes	yes	Fairly comprehensive
Vietnam	no	Broadly in line with UNICTRAL	Type I with some type III; phased reduction of thresholds over 16 years	yes	yes	yes	Use of phased reduction of thresholds
Cariforum	no	Similar but less detailed than GPA	Type I	no	no	yes	Transparency only, commitments to be negotiated; EU offers asymmetric coverage
Euromed partners	no						Simple reference to the aim of mutual access to procurement markets; current EU proposed text for DCFTA draws on GPA
East African Community , EPA	no						Rendezvous clause to negotiate
Mercosur currently being negotiated	no	Agreement on a text	Work underway on schedules	probably	Sticking point	probably	Some progress on procurement, but held up on other issues
India	no	Slow progress					Procurement a problem topic

Source: texts of various agreements: http://ec.europa.eu/trade/policy/countries-and-regions/accessed 14 May 2018

Type I = central government; type II sub-central/provinces and states; type III para-statal companies/utilities. See also Woolcock, 2017.

Agreements with GPA signatories

Of the agreements with GPA signatories the procurement provisions in the CETA are the most significant in that they include for the first time comprehensive coverage of provincial and municipal purchasing as well as that of the Crown Companies, in other words the para-statal bodies or type III entities as they are known in WTO terminology. The inclusion of sub-federal procurement was seen

as a condition for the EU to conclude CETA. It may also serve as a precedent for negotiations with similar federal states, such as Australia. But much will depend on how much the EU's trading partner desires a PTA with the EU. Canada had been keen to negotiate for some time because of its desire to diversify from its dependence on the USA.

The agreements with Korea, Singapore and Japan were GPA plus in a number of respects. Less so in the case of Korea as this was completed in 2010. But the EU – Korea agreement did add build transfer and operate (BTO) contracts. The FTA with Japan raised some challenging questions concerning coverage. Although the Japanese commitments under the GPA include prefectures (47 in all), there was limited coverage of the municipal level procurement. As noted in the table Japan also has some higher thresholds for works (i.e. construction projects) at the sub-national level. The EU interests in Japan were also to enhance effective access. For example, while Japan conforms to the GPA rules it does not provide systematic English translations of information. Another controversial question was the technical specifications for contracts with Japan railways (the so-called Operational Safety Clause), which can be - and was - seen by EU suppliers of rail equipment as a technical barrier to access in the rail sector.[15] Japan railways were privatized and thus seen to be subject to normal market conditions and so removed from the list of public entities subject to the discipline of the GPA rules, whereas most EU rail operators remain in the public ownership or regulated sectors, which brings them under the EU regime for type III procurement.

The EU – Singapore FTA has added more coverage of utilities in Singapore, which has been reciprocated by the EU thus resulting in greater coverage.

[15] As annex 1 shows technical specifications can be seen as one means of providing a de facto preference for local suppliers. This is especially the case when equipment is supplied to a network provider or when technological change takes place fairly slowly. In these cases a local supplier can capture the market for some time and reduce competition.

High - and middle - income developing countries

For the high and middle income developing economies, such as Colombia and Peru and the relevant Central American economies, the EU PTAs have effectively extended the GPA type transparency provisions as well as included coverage commitments. [16] These are comprehensive agreements, but coverage as usual is determined by schedules and reciprocity. Thus given the smaller scale of the markets, the EU coverage commitments have tended to be less that GPA coverage. But the EU has offered some asymmetric (more) coverage. The agreement with Central American partners also includes a further element of differentiation in that the smaller, less developed Central American states have higher thresholds. Generally speaking most high value procurement will be carried out by central government so the coverage of sub-central government is relatively much less important for small states than is the case in large federal states. Smaller, developing economies also tend to be more open if only in the sense that they do not have the same supply capacity as bigger, more developed economies and so must import more goods and services.

The agreement with Vietnam illustrates how the EU has been able to include GPA type rules and coverage of central government and start coverage of some state-owned entities in economies that have important state owned enterprise sectors. The Vietnam agreement provides a form of transitional arrangement or a form of special and differential treatment in that Vietnam starts with much higher thresholds (which reduces coverage and compliance costs) and only moves to GPA type thresholds over an extended transition period (of 16 years).

Smaller and less developed partners

Moving on to the EU PTAs with smaller or less developed economies there is the example of the CARIFORUM Economic Partnership Agreement (EPA). This provides for GPA type rules, but transparency only for the time being. There is an open-ended rendezvous clause on the negotiation of coverage commitments. In other words commitments to national treatment will only be made when the

[16] These countries have also negotiated FTAs with the US that include similar provisions.

Joint Council (of the EU and Cariforum) agree to the coverage of entities. Although there is not rapid progress on commitments, Cariforum provides an illustration of how procurement norms and practices are being defused as much by cognitive learning on the part of the developing parties as by more coercive commitments in PTAs. Most Cariforum states have - or are in the process of - introducing transparency provisions in national legislation. These all follow the UNCITRAL/GPA type rules and depending on the size and capacity of the states, Cariforum countries are making progress towards effective application of such international best practice. CARIFORUM shows how the pace of reform depends on the capacity of the administrations and on cognitive learning or buy-in from leading decision makers. CARIFORUM is also an example, of the use of PTAs by the EU to promote regional integration in the sense that there is explicit provision for a Caribbean preference in procurement.

For other ACP states the Economic Partnership Agreements include only a rendezvous clause to negotiate on the topic. For example, this is the case for the EPA with the East African Union (within a period of five years). In the case of other EPAs, such as the EU - SADC there is no timing given in the rendezvous clause. The EU – SADC EPA simply recognizes the importance of transparency in public contracts. Here opposition from South Africa was important and was based on the view that procurement rules would limit the scope for the use of procurement in promoting industrial development and the Black Empowerment programme. Here then is a case for the EU to make clear that procurement rules do not reduce the ability to pursue strategic procurement provided this is done in a transparent manner and is based on objective criteria.

The emerging markets

Finally when it comes to PTAs with significant or major emerging markets the EU has made less progress. The resumed negotiations currently underway between the EU and MERCOSUR appear to have made progress on some public procurement provisions, with the 2017 report on negotiations stating that a text (on rules/transparency) has been agreed. One sticking point referred to in the

negotiation reports is however, that of offsets. [17] There is no doubt work to be completed on draft schedules of coverage, but the negotiations in general have been held up by differences over other topics (agricultural liberalization). Negotiations with India have made less progress on procurement. In general the EU has made much less progress extending a rules-based system to the emerging markets, which because of the scale of their public procurement and the significant role played by state-owned enterprises, are likely to be important.

The challenges establishing (and defending) a rules-based order in procurement

This section discusses some of the challenges or difficulties in negotiation provisions on public procurement in trade agreements.

Resistance to rule-making

The first major challenge is in the general resistance to inclusion of public procurement in trade agreements that constitute any form of binding obligation or a restriction of discretionary powers for states and other entities. As noted above this is one of the few remaining areas in some economies in which government has significant discretionary power with which it can pursue industrial policy objectives, whether these are in the form of supporting national champions, infant industry promotion or development. The political economy argument is that countries cannot benefit from more competitive public procurement markets unless they have the supply capacity to do so. There is then a conventional infant industry argument favouring the development of local suppliers. The development case is less clear-cut. Given limited resources developing country governments can least carry the economic costs of inefficient allocation of public funds. Then there is also the risk of abuse of discretionary power that can lead to corruption and undermine governance, as has been all too often the case. International competition in public contracts also tends to come via indirect imports, in other words contracts are supplied by the local affiliate of

[17] See annex 1. These are when the award of a contract to a supplier is linked to conditions on certain work being completed in the country awarding the contract.

a foreign company. The local affiliate will then contribute to the national economy and employment. So greater transparency and predictability in the award of public contracts can provide an incentive for potential suppliers to invest in capacity and thus contribute to economic growth and employment.

An additional factor in this cost-benefit analysis are the compliance costs for purchasing entities. These are often used as an argument to resist the adoption of rules including transparency measures. They can be mitigated, which is the reason for the use of thresholds that focus the cost and effort on the larger contracts Annex 1), but there is still resistance to rules, especially when these are complex or necessitate a change from established procedures. Such resistance also comes from para-statal or state-owned enterprises that operate in competitive markets, but which are still subject to potential government influence and therefore potentially come under procurement rules.

In addition to the economic utility function of competitive public procurement, there is also often a significant political utility function at work. In the most democratic systems votes are still sought through the timely granting of a contract for an infrastructure project that helps create or preserve local employment. There are few votes to be gained from using local or national tax revenue to pay for contracts awarded to non-local or foreign suppliers. These considerations are present in discussions on buy national policies in all countries, including in leading OECD economies. In developing economies or in political systems in which there is less democratic accountability, high-level corruption in the distorting the procedures for the award of public contracts may be a significant means of retaining political patronage and thus power. Low-level corruption in terms of officials turning a blind eye to illegal practices or in the awarding of smaller contracts (which generally fall below the thresholds of all procurement rules) is often a means of augmenting low levels of pay for administrators.

Finally in terms of the sources of resistance there is the general backlash against globalization. The introduction of more competition in public contracts

represents can be seen, or presented, as the latest frontier in the fight against neo-liberal globalization. Introducing greater transparency or competition in certain services sectors or the utilities therefore faces considerable opposition.

Shaping normative views

A second, and related challenge in defending and extending a rules-based order in public procurement is the need to achieve a buy-in for such policies. Experience has shown that the adoption of new laws or agreements in procurement is not sufficient. Many countries have adopted reform legislation on procurement, but then failed to carry through with its implementation. The case of procurement has also shown that finding a broad consensus on the rules and getting such a buy-in takes time. As noted above the OECD started work in the field in the 1960s and there is still only very partial support. The OECD has, as in other areas of trade and investment rule-making, played an important role and continues to do so by seeking to improve the provision of information and promoting improvements, such as in the integrity in procurement initiative. But the OECD is no longer seen by key EU trading partners in the emerging markets as the legitimate source of rule-making.

The challenge for the EU is therefore to make the normative case for a rules-based order in public procurement. In this effort it is unlikely to get much coherent support from the United States. The US administration has had limited power to negotiate on procurement because most US public procurement is at the state or municipal level and the federal government has no competence. Although it can and does press for China and other emerging markets to sign up to GPA obligations. In the past the executive branch has made efforts to extend coverage to the states and cities for example, but Congress has pushed for Buy America provisions, as in 2008. The current US administration (in 2018) is more likely to extend Buy America or Buy American provisions than push the states or municipalities in the US to offer more coverage.

Conflating normative and commercial arguments

There is a strong case to be made for more transparency and competition in public procurement markets. This should not run counter to development aims and the use of public contracts to promote other legitimate public policy objectives, such as in the form of green procurement policies. The aim of the rules-based system is that contracts are awarded according to agreed criteria in an objective fashion and that transparency ensures public funds are not diverted to serve short term political or corrupt interests. Given such a framework it is still possible to use procurement to promote such legitimate public policy objectives.

In negotiating trade agreements on procurement however, this normative case for rules is conflated with commercial interests in gaining access to markets. One of the reasons developing countries opposed the inclusion of procurement in the WTO was that the debate on transparency was linked to the bargaining process of the WTO on liberalization in general and liberalization of procurement markets in particular. This is also a challenge for the EU in negotiating procurement provisions in PTAs. The case for transparency and best practice in procurement is often interpreted in the developing country partners of the EU as serving EU vested interests. Asymmetry in market size has effects here that go beyond relative bargaining power. Smaller, less developed economies than the EU have less supply capacity and generally fill more public contracts through foreign suppliers. The EU, due to its size has supply capacity to satisfy almost all demands and therefore a lower share of public contracts are satisfied by foreign suppliers, even if the EU market as a whole is large. The inclusion of detailed public procurement rules in comprehensive PTAs is therefore seen as serving the interests of the EU.

A general dilemma

This brings us back to the general dilemma facing the EU in its PTA strategy. On the assumption that little progress can be expected at the multilateral or plurilateral levels for the foreseeable future, it is in the interests of the EU to actively negotiate and conclude PTAs particularly with systemically important emerging market partners. But the pursuit of comprehensive PTAs makes this

less likely if these potential PTA partners resist a comprehensive agenda. The question is therefore whether the EU can find sufficient flexibility in its approach to enable progress in concluding PTAs. Public procurement is something of a litmus test in this respect, because it is one of the most sensitive and difficult topics to negotiate. In other words should the EU conclude PTAs without any provision on public procurement, if this is the only means of doing so? Alternatively what provisions can or should be included, and how should the EU go about trying to persuade its trading partners to include procurement?

If buy-in is important for success in this field then the EU needs to concentrate on making the normative case for the use of 'international' best practice in procurement policies. This suggests a focus on transparency rather than pushing for market access as such. But the experience with procurement and the 70 years taken to get to where we are today suggests that this will be a slow process. For smaller developing countries the EU can and is focusing on transparency. But when it comes to the major emerging markets there is a commercial interest in ensuring reciprocal access. It is these pressures that have driven the demands for an International Procurement Instrument, which would enable parties in the EU to apply more of a threat of closure of the EU market. One of the difficulties with these proposals however, has been how to coordinate procurement decisions taken by entities in the Member States and the Commission as negotiator and thus ensure that the instrument can be used to enhance the EU's negotiating leverage rather than a means of protecting specific markets in the EU.

Conclusions on the way forward

The establishment of a predictable framework for competition in public procurement represents a high water mark for a rules-based international trading system. The codes and norms developed over the past 60 years or so after the explicit exclusion of public procurement from the GATT have been partially applied. To date it is the EU that has taken these codes and implemented them most comprehensively. The EU therefore promotes the comprehensive application of such rules in other economies. As in other areas of

trade and investment policy PTAs have become the default option for the EU in the pursuit of such an aim, following the failure of the EU efforts to promote multilateral agreement on the topic and the real but limited progress in the plurilateral GPA. In the PTAs it has negotiated the EU has been able to extend the coverage of what might be seen as 'international best practice' in public procurement markets, as defined in the OECD, UNCITRAL and other codes and guidelines.

The way ahead in promoting more comprehensive rules in procurement as in trade and investment in general requires the EU to differentiate between negotiating partners. In some cases it may be possible to use a coercive approach. This would be the case for example, when a more developed economy, with the capacity to adopt agreed international rules and procedures has held back from doing so for industrial policy or other reasons. In such a case coercion would take the form of a strong linkage between the conclusion of a PTA and the inclusion of comprehensive rules on public procurement. This approach appears to have worked in the case of CETA because Canada was very interested in negotiating an agreement with the EU. The EU was therefore able to make the inclusion of procurement a condition.

It has to be recognized however that rules ensuring the objective allocation and award of public contracts, and thus scope for international competition, requires a long term investment and commitment on the part of governments and purchasing entities (as well as suppliers). This requires buy-in by key political decision makers, who may well be tempted by the shorter term political utility of rather less objective contract award criteria. In such cases the EU will need to adopt a more modest and progressive policy and one based more on persuasion than coercion.

The EU effectively pursues a differentiated approach to the inclusion of procurement in PTAs as the discussion above clearly shows. For developed economies the approach is based on reciprocal coverage. For less developed PTA partners the focus is more on transparency and less on extensive coverage.

There remains however a danger of confusing more coercive reciprocity or market access objectives with the normative case that adopting objective rules will serve the long term interests of all stakeholders. The case against inclusion of rules on procurement in PTAs has been made that these simply serve the interests of the EU suppliers.

The EU therefore needs to continue to pursue a differentiated approach to the inclusion of rules on public procurement in its PTAs, including promoting capacity building in the field as it has also done. Combining the task of 'norm entrepreneur' and trade negotiator during the negotiation of a PTA is a very challenging task indeed. Making the case for objective rules in procurement will therefore probably be best done by other agencies. To date this has been the OECD and to a lesser degree UN agencies.

Bibliography

Annex 1 The scope of provisions on public procurement

Coverage Rules in international agreements generally cover procurement of supplies (goods), works (construction) and services. Coverage is defined by several elements: 1) thresholds (monetary values at and above which the agreement applies to procurement), which are designed to ensure that the most valuable contracts are open to competition and avoid the significant compliance costs of imposing international disciplines on smaller contracts; 2) the entities covered, as specified in three categories (central government, sub-central governments and other entities, such as utilities and SOEs); 3) negative list of goods, which means that the procurement of all goods is covered except those explicitly excluded; coverage of defence goods is generally based on a positive list; 4) services, including construction services, with coverage based on a positive list (only listed services are covered) or negative list (all services are covered except those listed); and 5) exclusions. [The coverage of the EU and US under the GPA is set out in Table 3.]
National treatment A cornerstone of public procurement agreements is non-discrimination. Parties must provide national treatment for all covered procurement. This requires parties to treat the goods, services, and suppliers of other parties no less favourably than domestic goods, services and suppliers. They may not apply domestic preferences and other discriminatory purchasing provisions for procurement covered by an

international agreement. National treatment obligations are the main means by which *de jure* preferences for specific categories of suppliers are tackled.

Transparency

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

Contract award procedures

In order to ensure flexibility, procurement rules in international agreements tend to provide for open, selective and limited tendering. Open tendering allows all interested suppliers to participate and may be based on price or most advantageous tenders. Selective tendering is used when the procuring entity invites only suppliers that meet certain qualification requirements to submit tenders. It requires competition and transparent procedures for the selection of qualified suppliers. Limited tendering is when the procuring entity invites specific suppliers to submit tenders. Agreements include more or less detailed rules on how invitations for tender are issued, what information is provided, and what time limits are set for bidding and for awarding contracts. Short time limits may put foreign bidders at a disadvantage, while long time limits may be detrimental to the work of the procuring entity.

Technical specifications

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

Exemptions or exclusions

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

Enforcement and compliance

Experience has shown that without effective compliance, rules on public procurement will have little effect. Given the thousands of contracts are awarded every day, central compliance monitoring is impracticable. Rules therefore provide bidders who believe they have not been fairly treated with an opportunity to seek an independent review of a contract award decision. Penalties in the case of non-compliance may involve project cancellation, requirements to retender or financial

penalties (limited to the costs of bids or exemplary damages). Rules requiring information on contracts awarded and reasons why bids failed can also facilitate compliance.

Annex 2 Detailed comparison of procurement provisions in selected EU PTAs with international best practice

	GPA partners	*UNCRITRAL*	*EU - CARIFORUM 2007*	*EU - Colombia/Peru 2010*
Coverage	Cat I Central govt. Supplies and works – ve List. Service + ve list Thresholds supplies and services 130k SDR, works 5m SDR Cat II sub national govt 'voluntary' upon first sub-national level no local govt. Thresholds supplies and services 200k SDR and works 5m SDR Cat III Other entities e.g. Utilities thresholds; supplies and services 400k SDR and works 5m SDR	Intended to cover all procurement no provision for schedules purchasing entities can decide to restrict to domestic suppliers if size of contract is small	central government only for CARIFORUM, central, sub central and public enterprise for the EU (but not key utilities) (Annex 6) goods, services and works covered thresholds; as per GPA 1994 for the EU and For CARIFORUM 150k for goods and services and 6..5 mill SDR for works	Central government; goods, works and services through + ve listing; [with 200k threshold] sub-central government as in GPA for thresholds [threshold slightly lower than GPA, $50k for goods and services, $6.5m for works, $250k and $8m respectively for public enterprises;] [private companies not covered even regulated utilities;]
National treatment commitmen	national treatment and MFN for signatories	participation without regard nationality, but procuring entity can exclude foreign suppliers if grounds given	Joint Committee *may* decide entities and procurement to l covered (Art 167 (3)) NT for EU suppliers established in region; encouragement for the provision of national treatment within CARIFORUM	national treatment and non-discrimination for covered entities; NT for established suppliers of EU; no offsets;
Transp-arency	information to be provided on national procurement laws and rules; contracts to be advertised to facilitate international competition;	information on laws and rules to be provided invitations to tender to be published detailed records of contract awards to be kept	provision of information sufficient to enable effective bids no requirement on statistics	laws to be published; best endeavours for planned procurement; best endeavours for central information on contracts; post award transparency; detailed information on tenders and decisions to facilitate private actions reviews; information on why bids were not successful

Contract award procedures	option of open, restricted or single tendering;	open, restricted or single tendering is possible	open, restricted or limited tendering;	open, restricted and single tendering; detailed procedures vary slightly from GPA;
Contract award criteria	lowest price or most economically advantageous bid	price but also contribution development and balance of payments position can are mentioned	lowest price or most advantageous bid based on previously determined criteria	[lowest-priced or most advantageous bid based on previously deter. criteria
Technical specifications	use of international standards encouraged; performance standards preferred to design standards	encourages use of standardized products; design standards to be avoided	no mention	Performance standards rather than descriptive standards;] [encourages use of international standards, but exceptions always possible]
Exceptions	national security public interest override (Art XXIII)	security can decide not to award a contract	security	security
Bid challenge	bid challenge introduced in GATT for the first time; independent review interim remedies, but no contract suspension national interest waiver on contract suspension	scope for review by administrative or judicial body choice of remedies	bid challenge (Art 179) independent review with administrative or judicial body; effective, rapid interim measures procuring entities to retain records to facilitate reviews	bid challenge provisions; independent review body [rapid interim measures including suspension and termination of contract] [national interest waiver on contract suspension]
Technical cooperation And special and differential treatment	DCs can negotiate exclusions from national treatment to support balance payments problems; to support the establishment or development of domestic industries; or for regional preferential agreements (Art V 1-7) non-binding technical assistance including help for DC bidders (Art V 8-10) DCs may negotiate offsets (which are otherwise banned under Art XV) such as local content at time of accession (Art XVI)	non-binding so developing countries can select which provisions they wish to follow	exchange of experience; EU support for capacity building;	[non-binding provisions on technical cooperation];

The texts of the various agreements are available on the WTO, UNCITRAL, EU and US Government websites.