The Influence of the Proposed International Procurement Instrument on Reciprocity in the Opening of Procurement Markets

State aid & Public procurement in the European Union

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1. Introduction

A. The International Procurement Regime of the EU

'Public procurement' is the term used to describe the processes by which public authorities and the entities they control spend money for the purchase of goods, works or services on the market.[1] In this respect, governments have assumed a major role in the market economy – with their public purchase power amounting to approximately 10 to 25 per cent of national gross domestic product (GDP).[2] Moreover, in the European context, the public purchase of goods, works and services is estimated to account for roughly 16 per cent of GDP.[3] The significant impact on trade by public procurement also has an international dimension: the substantial share of worldwide trade flows affected by public procurement amounts to €1000 billion per year.[4] With these figures in mind, the importance, significance and impact of public procurement on the market economy is undeniable. However, public procurement entails more than simply the way in which and for what government money is spent. Being subject to detailed regulatory frameworks, the impact of public procurement goes beyond the numerical figures, thus finding its academic relevance in the legal landscape.

Essentially therefore, the choice has been made to analyse the legal instruments contributing to the development and liberalisation of international trade through public procurement. This paper acknowledges that the scope of public procurement can neither be conceptualised adequately nor precisely within the margins of this paper. Hence, the analysis is delimited in detail to the access to international procurement markets created through the conclusion of international agreements containing procurement clauses between the European Union, on the one hand, and third countries, on the other hand. Economic trends highlight the relevance of such delimitation: Competition for tender on the international procurement markets by European companies represents lucrative and resourceful business opportunities. In turn, opening the EU public procurement market to third countries ensures that the purchase of goods, works and services follows the leading dictum of 'best value for money' for the efficient use of public resources.[5] The benefits gained from opening

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[1] The definition of 'public procurement' follows the description of the term presented in Cambridge Advanced Learner's Dictionary, 4th edition, 2013.

[2] The estimates and percentages relating to public procurement are based on the information provided by the Commission Staff Working Paper (Impact Assessment), COM (2012) 124 final, 2012, pp. 7ff. Also: The Economist: Government consumption of the world, 2010, and the Commission DG Trade website on public procurement.

[3] DG Trade, http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/.

[4] *Ibid.*

[5] *Ibid.* In this context, it can be added that the reciprocal opening of procurement markets also contributes to the right against corrupt and fraudulent business practices, thereby contributing to an increased level of transparency and legal certainty in public procurement processes.

procurement markets are thus reciprocal in nature, as from a European perspective, it stimulates a competitive European industry and sustainable economic growth. In the international setting, public procurement enhances the well-functioning of the global economy as well as improves the level of certainty and predictability in matters of international trade.

In order to realise this goal, public procurement inevitably needs to be regulated by legislative frameworks entailing the rights and obligations for access to the EU public procurement market, in turn paired with an adequate level of reciprocity for European businesses to tender on the procurement market of third countries. The already existing agreements containing public procurement clauses vary in form and scope, as well as in respect to the level at which they are concluded.[6] Recently, the European Commission has brought forward a proposal for a new regulatory instrument, the Regulation on Access to International Public Procurement Markets,[7] currently under discussion in the European Parliament and the Council. The proposal for an international procurement instrument approves the traditional openness of the EU public procurement market and aims at improving the conditions for the access to international procurement markets on equivalent and reciprocal terms.[8]

B. Problem Statement

"Money is a great servant, but a bad master."
– Francis Bacon.[9]

As appreciated so far, the economic power of public procurement is considered a key driver of public policies. The numerical figures listed in the preceding part illustrate greatly how intensely public procurement impacts on the national, the European and the international level. The main reason for the Commission's proposal stems from the dichotomy in the levels of openness of international public procurement markets: While the Union's public procurement regime has

[6] The regulatory frameworks referred to range from agreements concluded at the plurilateral level governing the disciplines for awarding contracts on the international public procurement markets, to those taking effect at the regional or bilateral level, to on-going negotiations expected to result in considerable improvements in the mutual opening of procurement markets. In this respect, form does not matter as long as the instrument concluded represents a satisfactory tool to ensure further opportunities and greater fairness for international competition on the award of public procurement contracts.

[7] European Commission (2012), Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing rules on the access of third country goods and services to the European Union's internal market in public procurement and procedures supporting negotiations on access of European Union goods and services to the public procurement markets of third countries, SWD (2012) 57 final. Brussels: 21.3.2012.

[8] *See* Explanatory Memorandum to COM (2012) 57, p. 2.

[9] English lawyer and philosopher, 1561 – 1626.

traditionally been welcoming international tender, this effort is arguably not always paired with corresponding opportunities for EU businesses on the procurement markets of third countries. Admittedly, the Union acknowledges that the status of economic development of third countries may bar reciprocal access to public procurement in terms of rights and obligations. In light of diverging economic trading power, the Union indeed accepts greater concessions and deeper commitments when compared with developing countries, for example. Aside the economic coin, however, the limited openness of public procurement markets also results from the absence of any overarching, uniform international regime governing public procurement.[10]

The Union feels that it lacks negotiation leverage to foster the globalisation of procurement.[11] As a result of the Union widely committing on its procurement market, the current state of affairs satisfactorily suits third countries' strategic economic interests.[12] Current EU procurement practices amplify the perception that the EU procurement market is open beyond the level of the Government Procurement Agreement (GPA), leading third countries to simply question the need for negotiations on the further opening of procurement markets. The traditional openness of the EU procurement regime therefore strikes out any efforts felt by international businesses to tender an increased reciprocal basis.

Another problem intensifying the debate on international procurement markets stems from third countries' reliance on or possible adoption of protectionist measures relating to procurement contracts, thereby disadvantaging European companies. On the one hand, strong national agendas as well as domestic pressures may prevent the mutual opening of procurement markets.[13] On the other hand, the efforts of developing a competitive, technologically advanced industry by emerging economies may limit their willingness to consider reciprocal public procurement in the first place. The need for EU guidance on measures of public procurement in the international setting is therefore pressing.

In sum, the current problems associated with the opening of procurement markets defeat any prospect for an at least adequate level of reciprocity between commitment, on the one hand, and benefit, on the other. European companies are deprived of business opportunities in an international setting, reducing their leadership and preventing them from creating economies of scale.[14] Mainly for this reason, the Commission has presented its proposal on access to international procurement

[10] For example, the GATT 1994 and GATS both exclude public procurement from its scope (*see* Article III(8)(a) GATT 1994 and Article XIII GATS) and the WTO Agreement on Government Procurement (GPA) is currently only signed by 15 industrialised countries.
[11] European Commission 2012, p. 14.
[12] *Ibid.*
[13] DG Trade, http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/.
[14] European Commission 2012, p. 17.

markets. The aim of this paper is to provide an answer as to the extent to which the envisaged instrument may successfully increase the level of reciprocity in the opening of procurement markets, also for the sake of overcoming the current problems identified. In other words - taking Bacon's perspective in the quote presented above - the fluctuation of money resulting from efficient international public procurement has the potential of furthering international trade and the benefits associated therewith greatly. In the absence of at least adequate reciprocity in the opening of procurement markets, money will just remain a bad master, benefitting those with the most strategic economic interests and disadvantaging those with lesser economic power.

2. Methodology

This paper aims to assess the extent to which the adoption of a Regulation on access by third-country goods and services to the EU procurement markets will influence reciprocity in the EU's trade agenda in the field of procurement. The proposal proclaims a special regime for least developed countries (LDC) in Article 4, while it leaves developing countries and industrialised states largely subject to the general narrow definition of reciprocity. Based on the hypothesis that reciprocal opening of markets is crucial in both these fields, the authors have compiled a selection of EU international trade agreements (e.g. Preferential Trade Agreements (PTAs), Free Trade Agreements (FTAs) and Partnership and Cooperation Agreements (PCAs)), which contain procurement clauses.

The first part of the contribution (Chapter III) addresses the phenomenon of asymmetry in procurement chapters of international trade agreements. Asymmetry and reciprocity are two sides of the same coin. As asymmetry indicates a lack of (complete) reciprocity, it is crucial to examine its existence in international commitments. Part A outlines the origins of and reasons for asymmetry and sketches out the state of affairs in the EU's bilateral trade agreements. To assess the degree of asymmetry, the agreements will be compared with regard to their procurement provisions as well as the relevant annexes and schedules. This enables us to deduce reasoning behind the draft Regulation.

The second part (Chapter IV) will then assess the content of the Proposal. Special attention is paid to the definition and extent of reciprocity that the Proposal aims to adopt. This is done to subsequently address on-going trade negotiations in the field of government procurement in which reciprocity is at stake or a challenging subject; this shows a contentiousness of the issue. It will then be assessed in what way the Proposal might change bargaining power in the short term perspective as well as lead to an equilibrium in commitments in the long term. A comparison is made between

short and long term successes while a difference between developing and industrialised countries is made.

3. Asymmetry in International Trade Agreements

A. Asymmetry and Reciprocity as Two Sides of the Same Coin

Asymmetry is a phenomenon to be found in the multilateral framework of trade agreements, and is a result of political power bargaining.[15] It describes the set up and nature of clauses in bilateral trade agreements. It is moreover a logical consequence of the difficulties encountered by the members of the WTO: to reach consensus on disputed matters. On the one hand, this meant that more states resorted to multilateral agreements on a smaller scale in the past, but logically this also means that rules will be tailored towards the needs of the countries in question. It goes without saying that often times the objectives of the WTO were evaded in bilateral agreements, where developed countries are able to push for the application of certain rules and evade others.[16] Asymmetries in the clauses of trade agreements are therefore deeply connected to power asymmetries among the negotiating parties.[17] Asymmetries can be found for example in the negotiation phase, where the formal equality of the WTO members is in practice not the case.[18]

De Lombaerde distinguishes between cases of relative and absolute asymmetry, where absolute asymmetry, one where the threat of discontinuation is especially high, can be found in FTAs.[19] However, there is also another, more consciously influenced side to asymmetry, which is that accorded in order to help developing countries in obtaining economic growth.

Special & Differential treatment, Most Favoured Nation Treatment and Reciprocity

The key objectives of the WTO are among others "raising the standards of living, ensuring full employment and a large and steadily growing volume of real income."[20] This is recognized especially with a view to the "need for positive efforts designed to ensure that developing countries and especially the least developed among them, secure a share in growth". In the realisation of its

[15] De Lombaerde et. al 2013, p. 1.
[16] De Lombaerde et al 2013, p. 2.
[17] De Lombaerde et al 2013, p. 3.
[18] De Lombaerde et al 2013, p. 4-5.
[19] De Lombaerde et al 2013, p. 2-3.
[20] Preamble of the WTO Agreement.

key economic objectives, the needs of developing countries need therefore always be taken into consideration. The inclusion of asymmetrical provisions reflects this.

Therefore, besides the fact that there is arguably a democratic deficit to be observed in the WTO, another side to asymmetry in the international trade legal setting is the introduction of so-called special and differential treatment (S&D) policies. This is a different facet to the early-adopted "most favoured nation" (MFN) treatment approach, which sought to remedy trade discrimination imposed on smaller countries by the big industrial countries.[21] The MFN treatment is the WTO's version of the non-discrimination clause and a key concept of its law and policy established in the WTO agreement.[22] The S&D principle reflects the realisation that free trade is limited by different statuses of development among the WTO members. Under this principle, WTO instruments contain asymmetrical provisions, which accord developing countries special regimes including

- longer time periods for the implementation of certain rules;
- measures that increase trading opportunities for developing countries;
- provisions requiring the safeguarding of interests of developing countries; and
- special provisions relating to the LDC.[23]

It needs to be noted however that many S&D provisions are merely best endeavour clauses, and that much emphasis is put on the reciprocity principle.[24] This is much to the detriment of developing countries, whose economies are often times trade oriented.

Asymmetrical Provisions in the field of Procurement

The GPA's key principles reflect those of EU law and *vice versa*: transparency and non-discrimination (MFN treatment).[25] The revised GPA contains ten S&D provisions: these include flexibility provisions for the implementation of the provisions (Article V.3-7 and 9), providing technical assistance (Article V.8) and provisions relating to LDC members. The tenor of these provisions is to give developing countries more precise and enforceable transitory provisions.[26] In the initial negotiation phase, the EU advanced its own idea of transitional arrangements, which were

[21] De Lombaerde et al 2013, p. 7.
[22] Van den Bossche & Zdouc 2013, p. 315.
[23] Committee on Trade and Development 2013, p. 3.
[24] De Lombaerde et al 2013, p. 15.
[25] Bourgeois et al 2007, p. 98.
[26] Committee on Trade and Development 2013, p. 80.

comparably liberal provisions for developing countries, relating to *inter alia* liberal entry provisions. This approach was rejected and not included in the agreement.[27] While the GPA is "only" a plurilateral agreement among a very limited number of countries and virtually no developing countries[28], the EU has concluded international trade agreements including asymmetrical procurement clauses with non-members to the GPA. In principle, studies conducted by the Commission support the presumption that the inclusion of procurement clauses in FTAs has a positive impact for both parties.[29]

A revision of the GPA went hand in hand with the call for a multilateral agreement on transparency in government procurement, as declared in the 2001 Doha Ministerial Declaration. However, it was never included in the agenda due to the fear of developing countries of not being able to conduct negotiations on equal footing with the industrialized nations as well as to implement the new commitments.[30]

Despite the general assertion by De Lombaerde and his colleagues that asymmetrical negotiations not always to the advantage of the developing countries, the EU's bilateral trade policy has been sensitive to the promotion of development, and has made concessions within the principle of reciprocity.[31] The general approach is here to offer rules similar to those contained in the GPA, however with an asymmetric element in the phasing out of transitional provisions for developing countries.[32] The EU has been rewarded for their efforts to promote development, *inter alia* with a Nobel Prize, however there is a growing feeling of offering too much that is influencing the EU's attitude in international procurement.[33]

B. Asymmetrical Provisions in concluded International Trade Agreements

EU-Colombia/Peru Free Trade Agreement

The EU is South America's second most important trading partner.[34] The agreement was concluded in 2012 and is provisionally applied in Peru since 1 March 2013, and in Bolivia since 1 August 2013. The three pillars of the agreement are political dialogue, development and free trade, whereas

[27] Didier 1999, p. 392.
[28] DG Trade 2014, p. 1. See also Van den Bossche & Zdouc 2013, p. 510.
[29] Bourgeois et al. 2007, p. 97.
[30] Van den Bossche & Zdouc 2013, p. 511.
[31] De Lombaerde et. al 2013, p. 10.
[32] Woolcock 2012, p. 33-34.
[33] Khorana & Asthana 2014, p. 13.
[34] Stohwasser, 2013.

the latter is relevant for this paper.[35] The obligation to ensure effective and reciprocal opening of procurement markets is laid down in Article 3(f) of the FTA. Annex XII lists the procuring entities in Appendix 1.

Covered procurement includes procurement for governmental purposes of goods, services or any combination thereof with *respect to each party*, not procured for commercial resale, by *any* contractual means for which the value exceeds the threshold defined in the Annex (Article 173). Article 175 lays down the principle of non-discrimination, which applies equally to both parties. Asymmetrical provisions include most prominently Article 193(3) on cooperation. The EU party has the obligation to supply assistance to the Andean countries in opening their markets. A sub-committee on Government Procurement is established, which is an indication of a monitoring of the implementation.

The Annex reveals further asymmetries, for example with regard to construction services. Goods for research and development services are excluded from the provisions with respect to Colombia,[36] as well as food products, leather and textiles for some of the procuring entities.[37] In Colombia, construction services may depart from the principle of equal treatment and non-discrimination to the benefit of local personnel in rural areas.[38] Subsection 7 of the Annex lists a number of entities not covered by the rules of the FTA. Moreover, Peruvian energy goods are excluded from procurement (Subsection 3). A number of exceptions is made in subsection 7: most notably it does not apply to procurement from micro and small sized enterprises. This is also a rule to be found in the section on Colombia.[39]

To the contrary, the EU part of the Annex repeats definitions and policies from the EU's internal procurement regime by reference, while all goods are covered by the procurement title in the FTA.[40]

EU-Iraq Partnership and Cooperation Agreement[41]

This is an agreement of certain interest because Iraq is thus far not a member of the WTO. The EU-Iraq PCA was signed on 11 May 2012. Its trade provisions entered into force on 1 August 2012 and

[35] Fritz 2010.
[36] Free-Trade Agreement between the EU on the one hand and Colombia and Peru on the other hand,
[36]OJ L 354, 2012 ,p. 2424.
[37] Ibid., p. 2424.
[38] Ibid., p. 2425.
[39] Ibid., See p. 2588.
[40] Ibid., pp. 2440- 2578, on Goods see Subsection 4 of the Section on EU
[41] http://ec.europa.eu/trade/policy/countries-and-regions/countries/iraq/

have since been provisionally applied. The Agreement is MFN based and does not give Iraq preferential access to the EU market.[42] The MFN and non-discrimination clause are set out in Articles 10 and 11 of the Agreement. The general principles of government procurement are set out in Article 43 *et sec*. "Treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers" shall be awarded.

Asymmetrical treatment becomes obvious in the EU-Iraq PCA: annual review of the effective operation of this chapter is warranted for while the lists are not exhaustive yet; a cautious approach has been taken (Article 58). Article 59 expressly proclaims the asymmetrical nature of the regime and spells out transitional measures granted to Iraq. A re-negotiation of the Annex will take place 3 years after the entering into force of the agreement. The gradual implementation shall be monitored.

EU-Korea Free Trade Agreement

The FTA with South Korea[43], which entered into force in July 2011, expands the mutual commitments on public procurement, which the EU and Korea have already made within the GPA framework. Under the GPA, both the EU and South Korea agreed to adopt considerable rules on transparency and non-discrimination for public procurement for goods and services by central and sub-central government entities.[44] Chapter Nine on Government Procurement aims at opening up additional areas of the public procurement market which remain uncovered by the GPA, and in particular those that comprise crucial business opportunities in both states: in EU public work concessions and in Korean 'build-operate-transfer' (BOT) contracts, as set out in Article 9.2 of the FTA.[45] The FTA guarantees the access to BOT contracts above the threshold of SDR 15,000,000. The same threshold applies to the EU public work concessions.[46] As both parties commit themselves to the same thresholds and other obligations are the same, an asymmetric approach cannot be found for this FTA.

[42] http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf
[43] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L127, 2011.
[44] DG Trade, 2011.
[45] Article 9.2 of the EU-Korea FTA; European Commission, 2009.; ibid.
[46] Annex 9 of the EU-Korea FTA.

Central America Association Agreement (AA)[47]

The AA concluded between the EU and Central America, which was signed in June 2012 and has since been provisionally applied, comprises a trade pillar that also relates to public procurement. Title V of the agreement sets out all rules of mutual commitment between both parties. The whole title has a high degree of reciprocity, with one exception concerning the possibility for the Central American party to "adopt, develop, maintain or implement measures to promote opportunities or programs for procurement policies for the development of its minorities and its MSMEs including preferential rules" in Article 210 (6). Such a provision cannot be found in any of the general public procurement directives or other procurement instruments of the EU.[48]

A look into Annex XVI on Government Procurement reveals that the EU conducts a policy of graduation with the Central American party, allowing some trading partners a phased extension of coverage. As regards the central government entities' purchase of goods and services, the threshold of SDR 130,000 applies to all parties, including the EU. However, El Salvador, Guatemala, Honduras and Nicaragua are given the possibility to apply a threshold of SDR 260,000 for the first three years after the entry into force of the AA. The situation is similar concerning the construction services where a threshold of SDR 5,000,000 applies and the same countries are given a higher threshold for the first three years.[49] Similarly, a phased extension of coverage is applicable for the same countries in case of contracts by sub-central government entities.[50] The fact that the Union accepts greater obligations on its part, in particular for the first years of application of the Agreement, creates a situation of imbalance between the parties.

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[47] Agreement establishing an Association between Central America, on the one hand, and the EU and its Member States, on the other, OJ L 346, 2012.

[48] The current Directives and those in transposition were examined, as well as the Commission Staff Working Document on the European Code of Best Practice Facilitating Access by SMEs to Public Procurement Contracts of 2008.

[49] The threshold for contracts including construction services by central government entities is SDR 5,000,000 for all parties, with the exception of El Salvador, Guatemala, Honduras and Nicaragua, which are given a higher threshold of around SDR 6,000,000.

[50] As regards contracts on goods and services, the threshold is SDR 355,000 for all parties, with the exemption of El Salvador, Guatemala, Honduras and Nicaragua that can apply a higher threshold of around SDR 490,000. The thresholds for contracts on construction services are the same as for the central government authorities, as mentioned above.

CARIFORUM-EU Economic Partnership Agreement (EPA)

The EPA commits CARIFORUM countries[51] and the EU to rules on transparency in government procurement under its Chapter 3. This chapter spells out key principles and minimum transparency rules to encourage fair public procurement procedures, to improve the suppliers' awareness of opportunities for tendering, and to provide for more equal opportunities for companies from both sides.[52] These rules are however merely relevant for relatively large contracts tendered by *central* authorities, i.e. those above the thresholds mentioned in Annex VI.[53] Therefore, these rules do not affect a great number of public contracts of CARIFORUM states. The reason for this is the intention to "keep transparency requirements manageable and in line with the CARIFORUM countries' development constraints".[54]

National treatment by the contracting authorities that fall under the scope of the agreement is required in Article 167. However it is essentially determined by the Joint CARIFORUM-EU Council which procurement by which party is covered by national treatment according to paragraph 3 of the same Article. Even though a liberalisation as under the GPA framework does therefore not take place, the Article provides for "progressive liberalisation based on positive listing of types of procurement to be covered".[55] The EPA does moreover not comprise provisions on market access in public procurement.[56]

The procurement chapter of the EPA envisages a crucial transition period in Article 180 in order to give CARIFORUM states enough time for implementation. This means that more developed countries are given one or two years, whereas the less developed countries (i.e. Haiti, St. Kitts and Nevis, Saint Lucia Saint Vincent and the Grenadines) are given five years.[57] Such exceptions are not provided for the EU and therefore an asymmetric approach can be identified. Asymmetry can moreover be found in the scope of coverage. While CARIFORUM parties have merely central government entities listed in Annex VI, EU procurement entities covered are the same as in the GPA (i.e. Member State's central governments, sub-central governments and other

[51] CARIFORUM is the forum of the Caribbean Group of African, Caribbean and Pacific (ACP) countries, i.e. Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Suriname, Trinidad and Tobago and Guyana.
[52] DG Trade, 2008; European Commission, 2009.
[53] The rules apply, on the CARIFORUM side, to supplies and services above SDR 155,000, and works above SDR 6,500,000 SDR. On the side of the EU, they apply to supplies and services above SDR 130,000, and works above SDR 5,000,000.
[54] DG Trade 2008, p. 1.
[55] Woolcock 2008 [a], p. 5.
[56] DG Trade 2008.
[57] DG Trade 2008, p. 7.

entities).[58] By covering merely *central* government entities of the CARIFORUM states, the majority of public contracting in larger, and in particular federal, states is excluded.[59]

There is moreover a degree of asymmetry in the thresholds set out in Annex VI. The CARIFORUM parties have a higher threshold of SDR 155,000 for goods and services and SDR 6,000,000 for works contracts. The EU simply uses the GPA thresholds (SDR 130,000 and SDR 5,000,000 respectively). This is so to reduce compliance costs.[60]

EU-Mexico 'Global Agreement'

In 1997, the Economic Partnership, Political Coordination and Cooperation Agreement ('the Global Agreement')[61] between the EU and the United Mexican States was concluded. The Global Agreement establishes *inter alia* an FTA through the inclusion of comprehensive provisions on trade, which entered into force in 2000 in respect of trade in goods,[62] and 2001 in respect of trade in services.[63] The EU-Mexico FTA devotes a special section on government procurement (Title V of the Agreement), following the objective of "the gradual and mutual opening of agreed procurement markets on a reciprocal basis".[64]

The EU-Mexico Agreement is essentially a WTO-plus agreement[65] as, in addition to the Agreement's compatibility with WTO law,[66] it includes deep and comprehensive clauses on government procurement to an extent yet blocked at the WTO level.[67] In this respect, the coverage of procurement in the EU-Mexico FTA is considerable:[68] It contains provisions on national

[58] Woolcock 2008 [a], pp .5-6.
[59] Woolcock 2008 [a], p. 6.
[60] Woolcock, 2008 [b], p. 33.
[61] Council Decision of 28 September 2000 concerning the conclusion of the 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, OJ L 276/45, 2000.
[62] Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000 [Joint Declarations], OJ L 157/10.
[63] Decision No 2/2001 of the EC-Mexico Joint Council of 27 February 2001 implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement, OJ L 70/7.
[64] Article 10 EU – Mexico Agreement. The objective of mutual opening of procurement markets is, however, not included in the Preamble to the Agreement.
[65] De Lombaerde 2002, p. 109.
[66] *See* Busse, Huth & Koopman 2000, p. 7: In order to be consistent with WTO law, the Global Agreement creates the FTA in accordance with the provisions of Article XXIV of the GATT 1994 and Article V of the GATS.
[67] The EU-Mexico Agreement is consistent with the WTO GPA, but characterised as a WTO-plus obligation because Mexico is not a party to the plurilateral GPA.
[68] Both trade in goods and trade in services are subject to the rules on public procurement contained in the FTA, provided that the respective thresholds are met and that the procuring entity is captured by the list of central and non-central government bodies required to procure in accordance with the Agreement.

treatment,[69] bid challenge,[70] dispute settlement,[71] a ban on offsets,[72] cooperation and capacity building[73] and the creation of a special joint committee,[74] the EU-Mexico Joint Council.

The general premise underlying Title V of the Agreement entails that EU suppliers gain access to the Mexican market on public procurement under the same conditions as NAFTA members, while Mexico benefits from the opening of the EU procurement market on the basis of the national treatment principle, thus placing Mexico in the same procurement position as the EU partners under the WTO Agreement.[75] Subsequently, the process of tender for public procurement is subject to the articles provided by NAFTA as regards the participation of EU businesses, whereas the tender on the European procurement market is governed by the provisions of the WTO GPA regime.[76]

Judging from the language employed in the Global Agreement between the Union and Mexico, with a view to Title V on government procurement specifically, the trade relations between the parties appear to be relatively equal. Neither party reserves specific status under the Agreement, as its scope and coverage obliges the reciprocal opening of procurement markets on identical conditions. However, when placing the focus on the conceptualisation of the principle of national treatment, or the definition of entities required to procure in line with the Agreement, substantial differences are revealed. The prime source of public procurement remains 'internal' in nature, despite the 'external' application of the Agreement: While the Union defines procurement in relation the instruments on European procurement, Mexico is driven towards the NAFTA. Ultimately, this homeward trend negates any possibilities for uniquely conceptualising public procurement in the relation between the Union and Mexico specifically. Two consequences can be drawn from this observation. First and foremost, the effort of "gradual and mutual opening of agreed procurement markets on a reciprocal basis" is realised. However, in such manner, reciprocity has two sides to the same coin, which ultimately precludes any uniformity and equality in the opening of the respective procurement markets.

Asymmetry also relates to the thresholds ultimately requiring public entities covered by the Agreement to procure in accordance. While the Union defines the thresholds in line with those

[69] Article 5(d) EU-Mexico Agreement.
[70] Article 10(2)(e) EU-Mexico Agreement.
[71] Article 50 EU-Mexico Agreement.
[72] The ban on offsets is not explicitly mentioned in any Article, however, the prohibition is realised by means of application of the non-discrimination principle.
[73] Articles 13-42 EU-Mexico Agreement.
[74] Article 45 EU-Mexico Agreement.
[75] Busse, Huth & Koopman 2000, pp. 10-12.
[76] Reveles and Rocha 2007, p. 7.

enumerated as per the GPA,[77] Mexico refers back to the slightly lower thresholds as per NAFTA.[78] Even though the difference in thresholds remains small, it cannot be denied that in terms of financial commitment, the Union accepts greater obligations on its part than Mexico, thus creating a situation of imbalance.

EU-Chile Association Agreement

The Agreement establishing an Association between the EU and its Member States and the Republic of Chile was concluded in 2002.[79] The provisions contained in Part IV of the Agreement[80] set out the trade-related pillar of the Agreement, which inter alia devote special title to 'government procurement', operating under the objective of the effective and reciprocal opening of the government procurement markets of the Parties.[81]

The entities required to procure in accordance with the Agreement are set out in Annex XI for the Union, and Annex XII for Chile, respectively. Additionally, these Annexes define the thresholds in relation to which the public contract becomes international in dimension, obliging the entity to expand the tender for contract beyond the national borders.[82] Public procurement is guided by the principles of national treatment and non-discrimination on grounds of nationality,[83] as well as transparency.[84] Towards the end of the chapter devoted to government procurement, the parties are called upon to expand any benefit granted to any third party with regard to access to their

[77] SDR 130,000 for goods and services and SDR 5,000,000 for works contracts.

[78] (1) For federal government entities, US$50,000 (ca. 32,450 SDR) for contracts for goods, services or any combination thereof, and US$6.5 million (ca. 4,218,396 SDR) for contracts for construction services; (2) for government enterprises, US$250,000 (ca. 162,246 SDR) for contracts for goods, services or any combination thereof, and US$8.0 million (ca. 5,191,872 SDR) for contracts for construction services. Special rules determine the thresholds for state and provincial government entities (*see* Article 1001(1)(c)(iii) of NAFTA).

[79] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, OJ L 352/3, 2002.

[80] Part IV of the Agreement comprises Articles 55 to 196, grouped under the heading 'Trade and Trade Related Matters'.

[81] Article 136 Association Agreement EU – Chile.

[82] SDR 130,000 for goods and services and SDR 5,000,000 for works contracts: *Uniform* thresholds thus govern the Union's and Chile's coverage on Government Procurement.

[83] Article 139 Association Agreement EU – Chile.

[84] Article 142 Association Agreement EU – Chile. The principle of transparency includes, inter alia, that procuring entities are required to avail information to enable effective bid (Article 147 Association Agreement EU - Chile) and secondly, that after the tender procedure, any information on why a bid was unsuccessful has to be made available if so requested (Article 154 Association Agreement EU - Chile). In this manner, the Agreement between the Union and Chile exceeds the scope of transparency as demanded by the GPA, or by the terms of the Agreement between the Union and Mexico.

respective procurement markets beyond the scope of the Agreement between the Union and Chile to each other by means of negotiations on a reciprocal basis.[85]

The evidence of asymmetric clauses in the section devoted to public procurement in the EU-Chilean FTA is rather limited. Therefore, academic literature comparing the rate of success of concluded FTAs is keen to stress the deep and wide-ranging trade facilitation achieved on the basis of the commitments made by *both* the Union and Chile.[86] In terms of public procurement, the application of identical thresholds requiring public entities to procure in accordance with the FTA functions as an illustrative indication in this respect.

It remains to be evaluated, however, how Article 160 of the Agreement influences the trade relations between the Union and Chile. As both parties are required to extend any benefit related to public procurement granted to any third country on equal footing to the other party to the Agreement, public procurement effectively operates in a triangle of rights, between the Union, Chile and any third country. In such manner, the further liberalisation of public procurement may be influenced by strategic economic decisions, which could possible lead to negative results in case either the Union or Chile decides not to engage in deeper commitments with any third country, for the sake of preventing the extension of such benefit to the other trading partner to the Agreement. This dependency may ultimately lead to asymmetry as regards the bargaining powers of the parties.

However, the reader shall be remained that this line of argumentation proceeds hypothetical terms and any results would yet have to materialise in practice in order to make definite determinations in this regard and to judge asymmetry appropriately. Moreover, Article 160 of the Agreement is formulated in positive terms, meaning that only the benefits, not the obligations, are to be extended to the other trading partner under the Agreement. The language of the provision itself thus generally limits the negative impacts on asymmetry.

[85] Article 160 Association Agreement EU – Chile.

[86] Inter alia, M. J. Garcia; Trade in EU - Foreign Relations: The EU-Chile Free Trade Agreement. Bristol, Post-Graduate Conference on European Foreign Policy, 2004. Also: O. Fasan; Comparing EU Free Trade Agreements. London, 2004.

Interim Conclusion

The analysis of the concluded international trade agreements reveals that there is yet no absolute reciprocity, but relative reciprocity. This conclusion stems from the fact that several exceptions are included in the agreements, for example:

1. the application of different thresholds requiring the public entities to procure in accordance with the provisions of the agreement (EU-Central America, CARIFORUM EU, EU-Mexico).
2. transitory provisions allowing a phased extension of coverage as regards matters of public procurement to the benefit of the third country trading partners (CARIFORUM-EU, EU-Iraq). The international trade agreements themselves usually provide for the establishment of a sub-committee entrusted with the task of re-negotiating and monitoring the implementation of the agreements (EU-Korea, EU-Mexico, EU-Colombia/Peru, EU-Chile), in particular their provisions on phased extension of coverage (CARIFORUM-EU, EU-Iraq).
3. the practice of rule export, whereby the EU predominantly commits itself to its procurement regime under EU law, while the trading partners is not ready to adhere to the same set of rules (EU-Mexico, CARIFORUM-EU, EU-Colombia/Peru).
4. the obligation for the EU to assist the trade partners in the opening of their procurement markets, which indicates a soft law power assigned to the Union (EU-Colombia/Peru). This could lead to a *de facto* more open market than that agreement within the terms of the agreement (*de jure*).

One of the possible means to remedy the illustrated lack of reciprocity and bargaining power is the proposed Regulation on the access of third-country goods and services to the EU public procurement market, as analysed in the following chapter.

4. Analysis: Proposal for a Regulation on the Access of Third-Country Goods and Services to the EU Public Procurement Market

A. The Outline of the Proposal

On 21 March 2012, the European Commission brought forward a proposal for a Regulation on the access of third-country goods and services to the EU's market in public procurement.[87] The central principle behind the proposed act is reciprocity, i.e. both trading partners take on similar levels of obligations.[88] With the main objective of ameliorating the conditions under which EU companies are able to compete for public contracts in third countries, the draft Regulation addresses the restricting procurement practices by a large number of trading partners of the EU. The treatment of and applicable rules to tenderers, goods and services from third countries, which have a bilateral agreement with the Union in the government procurement field, or where such an agreement is absent, are made clear. Further objectives are to reinforce the Union's position in negotiations relating to the access of EU businesses to public procurement markets of third countries and to increase its leverage to secure improved symmetry.[89]

Tenders concerning foreign goods and services on the EU's market are not regulated under a general framework under the two current principal public procurement directives[90] — neither under the new EU public procurement directives, which entered into force in April 2014 and are to be transposed into national legislation in the following two years.[91] The only explicit rules relating to bids including foreign goods and services are found in Articles 58 and 59 of Directive 2004/17/EC, as well as in Articles 85 and 86 of the new Directive 2014/25/EU. These provisions are however too narrow in scope as they are restricted to procurement by utilities. According to the Commission in its Explanatory Memorandum to the draft Regulation, these Articles cannot "make a substantial

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[87] European Commission (2012) 'Proposal for a Regulation on the European Parliament and 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 21.3.2012.

[88] Dawar 2012, p. 89.

[89] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade, Growth and World Affairs Trade Policy as a core component of the EU's 2020 strategy, COM(2010) 612 final, Brussels 09.11.2010

[90] 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 L 134, 30/04/2004, p. 114–240; 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 L 134, 30.04.2004, p. 1-113

[91] 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 Text with EEA relevance, OJ L 94, 28/03/2014, p. 65–242

impact on negotiations on market access".[92] These provisions will be repealed by the envisaged Regulation, as provided in Article 20.

The subject matter and scope of application is set out in Article 1 of the draft Regulation. Accordingly, it will apply to contracts covered by Directive 2004/17/EC, Directive 2004/18/EC, and a Directive on the award of concession contracts, which is now Directive 2014/23/EC.[93] Article 2 sets out the relevant definitions, which are essentially carried over from the existing EU procurement legislation.[94] The definition of the terms 'covered' and 'non-covered goods and services' is significant for the application of the Regulation. 'Covered goods and services' are those originating in a country with which the Union has international commitments in the public procurement area. In contrast, 'non-covered goods and services' are those originating in a country with which the Union has not concluded an international agreement in the public procurement field, or those where such international agreements exist, but which are not covered by the applicable schedules annexed to these agreements.

Article 4 is relevant for the third countries with which the EU has market access commitments, as it provides for the equal treatment of goods or services provided by those countries to goods and services originating within the EU. Under the second paragraph of Article 4, goods and services from *LDCs* are exempted from any potential control. According to Woolcock, "this is in line with the EU's policy that offers asymmetric access to the EU procurement market for least developed countries".[95] Remarkably, this Article does not clarify the treatment of goods and services originating in *developing countries*.

Articles 5 and 6 are the core of the draft Regulation, setting out how the EU will treat bids from countries which do not provide for adequate reciprocal access to EU suppliers. According to Article 5, individual contracting entities may request the Commission to use restrictive measures for tenders including non-covered goods and services under the mechanisms provided for in the Regulation. Article 6 spells out the conditions under which the Commission may approve an exclusion of tenders from tendering procedures. It sets out a threshold of EUR 5 million for tenders where the value of non-covered goods and services exceeds 50% of the total value of goods in services "in order to reduce the costs of compliance and to target only the most economically important tenders".[96] Unfortunately, Article 6 does not clarify how to manage situations where

[92] Explanatory Memorandum to COM (2012) 124 final.
[93] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance, OJ L 94, 28/03/2014, p. 1–64
[94] Woolcock 2012, p. 32.
[95] Woolcock 2012, p. 33.
[96] Woolcock 2012, p. 34.

public contracts are split to come below the thresholds in order to avoid being caught by the Regulation.

Pursuant to Article 6 (3), the Commission is given two months to adopt a decision on whether to exclude the tender, once the latter is notified to the Commission. In justified cases, this period may be extended by two months. The criteria for the exclusion of a bid are laid down in Article 6 (4). The Commission shall accept exclusion in the following cases: (i) where an agreement between the EU and the third country excludes the purchasing at issue by market access reservations; and (ii) where the third country does not provide "substantial reciprocity" in market opening between the Union and this third country. According to the same paragraph, "a lack of substantial reciprocity is presumed where restrictive procurement measures result in serious and recurring discrimination of Union economic operators, goods and services". For the Commission to determine whether such a lack exists, it has to investigate whether the third country's procurement law guarantees transparency in accordance with international standards and prevents discrimination against EU goods, services and tenderers. It also needs to consider the degree to which there are discriminatory practices (Article 6 (5)).

Articles 8 and 9 lay down the procedures and powers for the Commission to start an "external procurement investigation". Article 8 specifies the conditions under which the Commission can initiate an investigation into restrictive procurement practices by third countries, either on its own initiative or at the request of interested parties or the EU Member States. Such an investigation is carried out under the criteria of Article 6, as discussed above (Article 8 (2)). Investigations shall be conducted within nine month, with the possibility of extension to one year. Article 9 establishes a consultation mechanism with third countries for cases where the investigation confirms that the third country pursues a restrictive procurement practice. In case the third country is a party to the GPA or has other international commitments with the EU which cover public procurement, the Commission has to make use of the mechanisms for consultation and dispute settlement procedures provided by that agreement (Article 9 (2)).

When the investigation shows that restrictive measures in a third country exist and where the consultations failed, the Commission can adopt an implementing act concerning restrictive measures according to Article 10. The access to non-covered goods and services can then be temporarily limited by either excluding certain tenders or by imposing a price penalty on those goods and services which originate in the third country at issue. Article 11 provides for the withdrawal or suspension of restrictive measures. Article 13 regulates exceptions which provide the contracting authorities with the possibility to still purchase goods and services from a third country that is subject to restrictive measures under the Regulation. This allows the authorities to be more

flexible in order to meet their needs. Finally in case of infringement of the Regulation, a contract can be declared ineffective under Article 16.

Whether or not such a hard law approach is desirable, will be assessed firstly on its short-term prospects (in view of on-going trade negotiations and bargaining power) and subsequently on its long-term effects (i.e. persuasive effect and retaliation, and the narrow definition of reciprocity). On the basis of this analysis, conclusions on the success of such an instrument contributing to the reciprocal opening of public procurement markets will be drawn. The reader of this paper shall be reminded, however, that within the margins of this paper, it is not possible to fully assess the impact of the proposed Regulation. Therefore, special reliance is placed on secondary sources, in particular the impact assessment compiled by the European Commission.

B. The On-going Trade Negotiations

On-going trade negotiations include *inter alia* those between the Union and Georgia, Ukraine, Moldova, Malaysia and Morocco. However, these are not discussed further in detail in this section due to (i) either the lack of information, (ii) or only limited success of reaching agreement on matters of public procurement, (iii) or the fact that those negotiations are ultimately pursued for the purpose of accession to the Union. Those negotiations of interest and relevance for this paper will be briefly discussed in the following.

EU-Singapore Free Trade Agreement

Negotiations between the EU and Singapore on the FTA started in March 2010 and were concluded in December 2012. Both are parties to the GPA and have hence already entered into considerable commitments on public procurement.[97] Chapter Ten on Public Procurement aims at extending the coverage of procurement entities and at improving the commitments. The EU, for example, commits itself to more central government entities and entities of the utilities sectors. Moreover, it includes more categories of services contracts in comparison to the commitments in the GPA.[98] Also Singapore covers more procuring entities under the FTA as well as expands the categories of services contracts.[99]

[97] DG Trade 2013.
[98] DG Trade 2013.
[99] DG Trade 2013.

Asymmetry can be found again in the threshold applicable to both Parties. As regards goods and services contracts by central government entities according to Annex 10-A, Singapore has to apply a threshold of SDR 50,000 whereas the EU commits itself to a threshold of SDR 130,000. Remarkably, this time it is the EU that has a lower coverage compared to the third country. However, this is balanced by the commitments for contracts by sub-central entities. Annex 10-B is not applicable to Singapore as it does not have any sub-central governments. The EU commits itself to a threshold of SDR 200,000 for goods and services contracts.

Furthermore, there is asymmetry in the scope of coverage for construction services and work concessions found in Annex 10-F. While the EU commits itself to the whole division 51 of the Central Product Classification on construction work, Singapore's commitments cover merely a few areas of construction work.[100]

EU – MERCOSUR Framework Cooperation Agreement

At present day, the Union and MERCOSUR[101] have not yet completely succeeded in the establishment of a bi-regional free trade area. Their trading relations are conducted in the context of the EU – MERCOSUR Framework Cooperation Agreement,[102] signed in 1995 and in force since July 1997. A comprehensive FTA, consisting of three pillars (political dialogue, trade and economic issues, and cooperation) is to be negotiated. In May 2010, these trade negotiations were officially launched at the EU-MERCOSUR Summit in Madrid.

The trade agreement is envisaged to include a chapter devoted to public procurement to ensure the reciprocal opening of markets between the Union and MERCOSUR.[103] As the trading relations between the Union and MERCOSUR are highly influenced by the importance attached to trade agricultural products by the MERCOSUR countries, their refusal to accept the EU's Common Agricultural Policy and the strive for liberalisation of trade in agricultural products has so far blocked any successful negotiations on the overall inclusion of government procurement within a prospective trade agreement.[104] It has been unofficially proclaimed, however, during the Seventh

[100] Singapore commits itself to general construction work for buildings (512), general construction work for civil engineering (513), installation and assembly work (514, 516), building completion and finishing work (517) and others (511, 515, 518).

[101] MERCOSUR was established in 1991, and comprises Argentina, Brasil, Paraguay (suspended since June 2012), Uruguay and Venezuela.

[102] Council Decision 1999/279/EC of 22 March 1999 concerning the conclusion on behalf of the European Community of the Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part, OJ L 112/65, 1999.

[103] European Commission 2006, p. 23.

[104] Ibid., p. 24.

EU-Brazilian Summit in February 2014, that a trade agreement between the Union and MERCOSUR is close to being completed.[105]

EU-India Free Trade Agreement[106]

Contentious issues in the FTA include the insertion of a national treatment clause and non-discrimination principles. The EU party is heavily pushing for this in negotiations.[107] Reciprocal opening is being demanded on central, sub-central and local level and includes goods, services and utilities.[108] India has a strong development policy connected to procurement issues. Preference is often given to local businesses, with domestic content quotas for areas such as telecommunications and the information technology.[109]

India, on the other hand, is focusing its procurement policy on services, where it wants to advance into the European market. This is problematic with regard to lack of a data adequacy agreement, which prevents flow of sensitive information to India. Also, the EU's visa policy has been problematic for India's services market because it will prevent a spread of Indian services in the EU market. Those are the two most vital concerns right now. On top of that, India would incur high costs out of a necessity for reform in the current domestic procurement system. Khorana and Asthana therefore assert that due to problems in the reciprocity and mutual gains, the negotiation of a procurement chapter may be premature.

Transparency is the second big issue at stake in the FTA negotiations, especially with regard to a high level of corruption in India.[110] Procurement is especially vulnerable to corruption, making a demand for transparency in the FTA rather hard to achieve over night.[111] India is currently trying to remedy this by the signing of the UN Anti-corruption Convention (UNAC) and new laws that are to be passed soon.[112] This shows a degree of willingness on the side of India; however, transparency concerns still point in the direction of irreconcilable differences in the area of procurement at the moment.[113] This does not make agreement impossible in the long run however.[114]

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[105] http://www.sice.oas.org/TPD/MER_EU/MER_EU_e.asp.

[106] A text of the EU–India Agreement could not be obtained during the writing process of this paper. We rely therefore on secondary sources.

[107] Khorana & Asthana 2014, p. 7

[108] *Ibid.*

[109] *Ibid.*

[110] According to Transparency International's Corruption Perception Index 2013, India is placed on rank 94 out of 174 countries (with an Index of 36 (0 being very corrupt, 100 being very clean) http://cpi.transparency.org/cpi2013/results/

[111] Khorana & Asthana 2014, p. 9.

[112] Khorana & Asthana 2014, . 11: United Nations Convention Against Corruption, adopted via Resolution 57/169 on 31 October 2003.

[113] Gasiorek et al 2007, p. 8.

[114] Gasiorek et al 2007, p. 4.

EU-Canada Comprehensive Economic and Trade Agreement (CETA)

The EU and Canada have agreed on the CETA on 18th October 2013.[115] The Agreement ensures the opening of procurement markets at federal and sub-federal level of the Canadian state. This is exceptional because never before seen. There will be a single electronic procurement website to enable EU businesses to enter the Canadian procurement market.[116] A CETA draft from 2011, Round VI of negotiations could be found online.[117]

Interim Conclusion: The Desirability of the Proposed Hard Law Instrument in Relation to the Bargaining Powers as Displayed in the On-going Trade Negotiations

The Regulation proposes a narrow definition of reciprocity, thereby a meaning more akin to absolute reciprocity rather than that of relative reciprocity showcased in the concluded international trade agreements.[118] Even though intended to be a market opening measure, the Regulation might be considered to follow a "value claiming approach" rather than the prior "value creating approach" in trade policy, i.e. an approach where the EU claims are put above the mutual gains from opening markets.[119] So far the EU has not emphasised its own interest, but has made clear that it is in the interest of the third countries to strengthen their public procurement rules.[120]

The instrument is created to provide for leverage in bargaining, which will result in more reciprocal market opening in the end. Such a Regulation would strengthen the power of the Commission, which is the negotiator of such agreements on the Union's behalf. For instance, the fact that the Union commits 85 per cent of its procurement indicates that already a lowering of this percentage might increase the bargaining power of the Union - based on the fact that no other country has committed to this extent under the GPA.[121] In turn, this would particularly strengthen the bargaining power as regards industrialised trading partners, e.g. Canada, because the vast majority of GPA parties are industrialised countries. Especially in the area of 'non-covered goods', the adoption of the Regulation could lead to harmonisation in the annexes to the GPA. This result mainly stems from the pressure placed on the Union's trading partners to extend the scope of commitments in the annexes and schedules, which would in any case fall within the margins of the Regulation.

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[115] http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/

[116] http://trade.ec.europa.eu/doclib/press/index.cfm?id=974

[117] https://wiki.laquadrature.net/images/6/69/CETA_draft_jan_2011.pdf procurement to be found at p. 228.

[118] Woolcock 2012, p. 39.

[119] Woolcock 2012, p. 39.

[120] Woolcock 2012, p. 39.

[121] DG Internal Policies 2013, p. 3.

As regards developing countries, "an aggressive use of the Regulation is likely to undermine the EU's ability to persuade developing countries of the case for including procurement in bilateral trade agreements".[122] In the past, developing countries have rejected the signature of the GPA because they considered it as mainly "serving the offensive interests of the developed OECD economies".[123] The adoption of the Regulation would therefore represent the same outcome, however via a different legal route.

In light of the foregoing, it can be concluded that a short-term effect of the Regulation can be suspected especially with regard to industrialised nations. However, this cannot serve as the prime argument for the adoption of such an instrument since opening of public procurement markets is particularly targeted in the Union's relations with developing countries.

C. Long-term Success

In view of a sustainable and strong trade policy, the EU's approach should be driven towards the long-term success of public procurement policies. For developing countries, there is much more at stake than for industrialised countries when committing in the public procurement field. As a matter of fact, the economic power of public procurement remains a key driver of public policies, which is particularly important for developing countries in which public procurement constitutes 10-20 per cent of GDP, and hence is an essential development tool.[124] In the long-term, these developing countries can steer the development of their economies through public procurement towards the global market. A hard law instrument does probably not contribute to further *de facto* opening of the markets of developing countries due to possible retaliation, lack of leverage, of incentives and of development policy.[125]

On the basis of these considerations, the EU should consider embracing more thoroughly the soft law initiatives already taken in order to enhance development and cooperation.[126] Such soft law measures are advantageous in respect of more successful political dialogue, the mitigation of political opposition, and a reduced risk of retaliation, hence creating a situation that more acceptable

[122] Woolcock 2012, p. 40.
[123] Woolcock 2012, p. 40.
[124] Aid 2008, p. 55.
[125] DG Internal Policies 2013, p. 4 *et sec*.
[126] Jiang 2009, p. 288.

for development countries.[127] Once a certain level of development and cooperation is reached, hard law initiatives could be reconsidered.[128]

Referring back to the dichotomy between *de jure* and *de facto* market openness, the reader shall be reminded of the fact that in certain developing countries (e.g. China, Japan, Korea) the public procurement markets are even open to an extent beyond their *de jure* commitments.[129] Judging this relationship, it is advisable to engage in GPA revision with a view to provide a more accessible annex which reflects as well *de facto* commitments. This would reduce the perception that the EU is giving significantly more than it receives.

5. Conclusion

This paper has addressed the problem of asymmetry in international commitments with regard to public procurement markets among the EU's trading partners. While a certain lack of reciprocity can indeed be identified in already concluded international trade agreements, it is questionable which form a suitable policy tool to remedy this should take.

The initiative put forward by the Commission envisages the adoption of a Regulation with the central element of instituting a narrow definition of reciprocity. The possible short- and long-term effects of such an instrument have been outlined by reference to on-going negotiations in the procurement field. The results of this analysis can be identified along the dichotomies of developing versus industrialised countries, the use of hard versus soft law and *de jure* versus *de facto* market openness. The EU could increase its bargaining power, in particular with regard to industrialised trading partners, in the short run. In the long-term however, this could potentially result in no contribution to the *de facto* opening because of potential retaliation, lack of leverage, of incentives and the decline of development policy in the third countries.

To summarise, the proposed Regulation cannot, within the ambit of this paper, be identified as very promising at the moment. A revision of the GPA and the strengthening of soft law tools could serve as a stepping stone towards a possible tightening of hard law policy making in the future.

[127] Jiang 2009, p. 288.; DG Internal Policies 2013, pp. 3, 8.
[128] Jiang 2009, p.220.
[129] DG Internal Policies 2013, p. 3.

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