

## The 2016 EU International Procurement Instrument's amendments to the 2012 buy European proposal: a retrospective assessment of its prospects

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# **The 2016 EU International Procurement Instrument's Amendments to the 2012 Buy European Proposal: A Retrospective Assessment of Its Prospects**

**Kamala Dawar<sup>1</sup>**

## **Abstract**

This paper assesses the European Commission's 2016 Amended Proposal for 'a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries.'<sup>2</sup> The proposed regulation aims to improve the conditions under which EU businesses can compete for public contracts abroad. It provides the EU with leverage through imposing a price penalty on any tender for an EU procurement which is originating in a country that does not offer the EU 'reciprocity' in access to its procurement markets.

After introducing the 2016 International Procurement Instrument (IPI) Amended Proposal, the paper examines the legal framework of the Amended Proposal with reference to its evolution from the European Commission's original 2012 proposed regulation. The analysis then turns to the concept of reciprocity, which serves as the justificatory basis of the Commission's proposal before assessing the 2016 Amended Proposal's compatibility with the EU's commitments under the WTO, including most notably the World Trade Organization's Government Procurement Agreement (WTO GPA), the General Agreement on Tariffs and Trade (GATT) and the Agreement on Subsidies and Countervailing Measures (ASCM). This assessment concludes by questioning the compatibility of this proposed regulation with the EU's obligations under the WTO as well as the objectives of the EU procurement rules, underpinned by Treaty principles.

## **Introduction**

The European Commission has noted that it has not exercised its power to regulate the access of foreign goods, services and companies into the EU's public procurement market, except in certain utilities sectors. And as a result, approximately €352 billion in value of EU public procurement is open to bidders from member countries of the WTO agreement on government procurement (GPA), while this market access is not matched by other countries. The estimated value of US procurement offered to foreign bidders is currently just €178 billion, €27 billion for Japan, and even less for China.<sup>3</sup>

In seeking to address this perceived imbalance, in 2012 the European Commission advanced its own version of a 'Buy national' proposal to regulate the access of third-country goods and

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<sup>1</sup> Lecturer in International Commercial Law, Sussex University, k.dawar@sussex.ac.uk.

<sup>2</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries. Henceforth referred to as "The 2016 IPI Amended Proposal."

<sup>3</sup> See [http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc\\_149242.pdf](http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149242.pdf) pp8-9.

services to the EU's internal market in public procurement.<sup>4</sup> The 2012's Proposal made its passage through the European Institutions until January 2016, when the Commission released an amended Proposal to address some of the concerns raised about the original proposal. The 2016 IPI Amended Proposal seeks to bring improvements to the initial initiative. It has finetuned this proposal to allow the EU to take proportionate and more targeted action – by providing leverage in negotiations – but without closing EU markets or adding any unreasonable burden for contracting authorities.<sup>5</sup>

After introducing the 2016 International Procurement Instrument (IPI) Amended Proposal, in Section 1, the paper then examines the legal framework of the Amended Proposal with reference to its evolution from the original 2012 proposed regulation in Section 2. In Section 3, the analysis turns to the concept of reciprocity, which is the basis of the Commission's proposal. Section 4 assesses the 2016 Amended Proposal's compatibility with the EU's commitments under the WTO, including most notably the World Trade Organization's Government Procurement Agreement (WTO GPA), the General Agreement on Tariffs and Trade (GATT) and the Agreement on Subsidies and Countervailing Measures (ASCM).

This analysis of the 2016 IPI Amended Proposal concludes, in Section 5, that the draft regulation is crafted along the lines of the US Buy America Act 2009, implemented under the American Recovery and Reinvestment Act during the fiscal recession in the US. Moreover, the evidence suggests that the Buy American Act did indeed offer leverage to open up procurement markets internationally. Nevertheless, this examination contends that the legal and policy framework of the 2016 draft regulation could still operate to undermine the principles and objectives of multilateralism under the GATT/WTO and the plurilateralism provided under the WTO GPA. It could further conflict with the overall purpose of the EU procurement rules which is to reflect the principle of value for money.<sup>6</sup> Value for money is to be achieved through competition, unless there are compelling reasons to the contrary. This analysis questions whether the EU's justification of this proposal in terms of achieving reciprocity is indeed compelling enough.

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<sup>4</sup> The official title is: “2012/060 (COD) Proposal for a Regulation Of The European Parliament And Of The Council On The Access Of Third-Country Goods And Services To The Union's Internal Market In Public Procurement And Procedures Supporting Negotiations On Access Of Union Goods And Services To The Public Procurement Markets Of Third Countries”. Adopted on March 21st 2012. Henceforth referred to as ‘The 2012 Proposal.’

<sup>5</sup> European Commission Takes Action to Open Up International Procurement Markets. Press release Public procurement. Brussels, 29 January 2015.

<sup>6</sup> Value for money is defined as the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought. See: for example the UK Crown Commercial Guide to the transposition of the Procurement Directives:  
[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/472985/A\\_Brief\\_Guide\\_to\\_the\\_EU\\_Public\\_Contract\\_Directive\\_2014\\_-\\_Oct\\_2015\\_\\_1\\_.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472985/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Oct_2015__1_.pdf)

## **Section 1: The 2016 IPI Amended Proposal: Amendments to the 2012 Initiative**

This section examines the background to the IPI proposal. It looks at the original 2012 proposal before the amendments put forward in the 2016 IPI Amended Proposal. The assessment then seeks to identify how well the concerns identified during its passage through the European Institutions have been addressed in the 2016 IPI Amended Proposal.

The EU has historically been active in seeking to expand the level playing field in world procurement markets. It has perceived these efforts to be in the face of an entrenched reluctance from many countries to allow for the participation of EU operators and products in their procurement tenders. The EU was a major advocate of public procurement liberalization under the GATT Procurement Codes, while the 1994 WTO GPA was itself based on key EU concepts surrounding the appropriate design and execution of procurement contracts. This was in part because at the time the EU had one of the most developed public procurement regulatory frameworks internationally. The Revised GPA further displays the influence of the EU in the design of the right to appeal clauses, the judicial review mechanism, and e-procurement, for these were all part of previous EU legislation. The WTO Revised GPA's newly adopted Works Programmes were also included at the request of the EU after it had successfully negotiated this with other parties' delegations. The Works Programme reflects the EU's policy priorities, such as sustainable procurement and SMEs in procurement.<sup>7</sup> As such, the EU has been very successful in promoting its public procurement agenda to the WTO through the GPA, as well as in its attempt to transfer EU practices in the globally lucrative market of public procurement.

Yet with the EU these efforts are not seen to be effective enough. Many third countries remain reluctant to open their procurement markets to EU and/or international competition, or to open their markets further than what they have already done. And this has become more noticeable in the wake of the economic crisis. Indeed, the European Commission estimates that more than half of the world's procurement market is currently closed due to protectionist measures. Consequently, only €10 billion of EU exports (0.08% of EU GDP) reach foreign procurement markets, leaving an estimated €12 billion of unrealized EU exports because of such third-country restrictions.<sup>8</sup> These restrictions affect competitive EU sectors such as construction, public transport, medical devices, power generation and pharmaceuticals.

Perhaps frustrated or inspired by the conclusions of the market access negotiations in 2011 that were to be scheduled under the Revised WTO GPA and the limited offers being put forward by accession parties such as China, the European Commission floated a proposal, in March 2012, to regulate unilaterally the access of third-country goods and services to the EU's internal market in public procurement. The 2012 European Commission proposal was designed to encourage greater reciprocity on the part of trading partners, vis-à-vis access to the public procurement contracts. The 2012 Proposal put forward a draft regulation under which the European Commission could either autonomously or following an allegation from an EU Member State's contracting agent or other interested party, investigate any allegation into the specific tender to assess where there was a lack of substantial reciprocity or insufficient transparency to make such a judgment. If the country concerned was unwilling to provide satisfactory solutions to any substantiated allegation of a restrictive procurement measure within 15 months, the European Commission would have the mandate to disqualify those tenders made up for more than 50% of goods or services originating in the country concerned; and/or impose what it called "a mandatory price penalty"

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<sup>7</sup> The WTO Committee on Government Procurement, 2012, Annex 7.

<sup>8</sup> See [http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc\\_149242.pdf](http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149242.pdf) pp8-9

on those goods or services tendered which originate in the country concerned. A contracting agent could trigger also the regulation to exclude any qualifying procurement tender, as long as the value of ‘non-covered goods and services’ exceeded 50% of the total value of a tender valued at €5m or above.<sup>9</sup>

There were visible difficulties with the proposed ‘optional’ 2012 regulation.<sup>10</sup> For instance, its ad hoc implementation at both the Member State and Commission level meant that its application could be uneven, threatening to fragment the EU’s single market - contra Article 207 of the Treaty on the Functioning of the European Union (TFEU). This rule stipulates, among other things, that the EU’s common commercial policy shall be based on uniform principles. The 2012 proposal could have entailed that companies that place bids in markets where the contracting authorities or the European Commission are pro-actively seeking reciprocity would find less competition – or a more positive discrimination - for a contract because of the penalties imposed on the companies of non-reciprocating parties. In other words, the decision to exclude a non-reciprocating bid could entail excluding the best ‘value for money.’ It could also entail excluding those goods and services from EU firms that may supply to the excluded bid. Adding further to its uncertain consequences, unlike the ‘standing’ requirement under EU laws such as anti-dumping, disappointed EU bidding firms were also provided standing to initiate an investigation under the 2012 proposal.

There were other potentially problematic interpretative ambiguities identifiable in the 2012 Proposal. In those procurement tenders cases identified as originating in non-reciprocal markets, the EU would undertake consultations with the government concerned. If these consultations were unsuccessful, the European Commission was able to ‘temporarily’ disqualify the non-reciprocating country from the EU procurement market – without a clear definition of temporality in this context. The possibility to impose price penalties was similarly not defined, providing the European Commission with further discretion in their punitive application, and consequently less legal stability and uncertainty in their legality under the GATT/WTO. As discussed further below, the proposed regulation could potentially be challenged as a discriminatory measure under Article III National Treatment obligations, depending on whether the procurement in question could qualify for the derogation to Article III.4 National Treatment obligations, set out under Article III.8(a).<sup>11</sup> Further, the imposition of any price preference or offset could also potentially be challenged under the ASCM as a specific subsidy prohibited under Article 3.<sup>12</sup>

The 2012 Proposal met a mixed reaction at the Member State level and the Council was unable subsequently to take a formal position on its adoption. Some Member States were concerned about the very principle of closing down the EU market for goods and services originating in certain third countries. There were also fears about the risk of retaliation by the EU's trading partners, as well as the fact that the initiative could endanger the status of the EU as an adherent of open markets. Others signaled strong support due to the ‘unfair’ and detrimental nature of non-reciprocity. Somewhere in-between were those Member States who questioned whether an undue

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<sup>9</sup> Exclusive of value-added tax (VAT). Non-covered goods and services’ are defined as goods and services that originate either in countries which are not parties to the WTO GPA, or if party to the WTO GPA, the goods were excluded from the coverage by virtue of the schedules contained in the Annexes to the Agreement

<sup>10</sup> See Kamala Dawar. The Proposed ‘Buy European’ Procurement Regulation: An Analysis. Ch. 5: The 11<sup>th</sup> Global Trade Alert Report. CEPR. 2012.

<sup>11</sup> Arwel Davies. The GATT Article III.8(a) Procurement Derogation and Canada – Renewable Energy. *Journal of International Economic Law*, 2015,0,1-12.

<sup>12</sup> Luca Rubini, ‘Ain’t wastin’ time no more: Subsidies for Renewable Energy, the SCM Agreement, Policy Space and Law Reform’, 15 *Journal of International Economic Law*, (2012).

or disproportionate administrative burden would be imposed on both businesses and contracting agencies, as a consequence of the proposal.

Yet over and above this dissonance at the Member State level, there was still a general perception that an imbalance currently exists between the openness of the EU procurement market and third country procurement markets. Moreover, that this should be addressed so that European companies can enjoy better access to procurement opportunities abroad. As a result, the EP Plenary endorsed the mandate for trilogue, together with a list of amendments to respond to some of the concerns both legislative organs of the EU have expressed and in October 2014, the new European Parliament confirmed the decision taken under previous legislative term and prepared for trilogue. The 2015 Commission Work Programme (CWP) then announced its intention to amend the 2012 proposal to bring it into line with the priorities of the new Commission: i) simplify the procedures ii) shortening timelines of investigation and iii) reducing the number of actors in the implementation".

## Section 2: The Evolution of the 2016 IPI Amended Proposal

The 2016 IPI Amended Proposal applies<sup>13</sup> to the procurement covered under the revised EU procurement directives covering: concessions contracts;<sup>14</sup> goods contracts;<sup>15</sup> and contracts for utilities.<sup>16</sup> It faithfully reiterates the text of the WTO GPA and the GATT Article III.8(a) derogation in stipulated that the regulation:

... shall only apply where the goods or services are procured for governmental purposes. It shall not apply where the goods are purchased with a view to commercial resale or with a view to use in the production of goods for commercial sale. *It shall not apply where the services are purchased with a view to commercial resale or with a view to use in the supply of services for commercial sale.*<sup>17</sup>

This deliberate textual compatibility with both the WTO GPA and GATT Article III.8(a) would hope to facilitate any interpretation in harmony with a similar assessment under the WTO Dispute Settlement Mechanism (See Section 3). Moreover, the 2016 IPI Amended Proposal Article 1 provision specifically provides that the regulation shall apply *only with regard* to restrictive and/or discriminatory procurement measures or practices implemented by a third country in respect of purchases of *non-covered goods and services*, and its application shall be *without prejudice to any international obligations of the Union*. That is, the procurement covered by any trade agreement signed with the EU will be exempt from the application of the regulation. An additional safeguard is offered pursuant to the exceptions set out under Article 12. Here, EU contracting authorities and contracting entities have the discretion to decide not to apply the price adjustment measure with respect to a procurement or a concession procedure if there are no EU Union and/or covered goods or services available which meet the requirements of the contracting authority or contracting entity, or if the application of the measure would lead to a *disproportionate increase in the price* or costs of the contract.

This IPI Proposal appears to have learned from the experience of the Buy America regulation in the US. The two provisions set out under Article 12 IPI play a similar role as the “saving clauses” set out in the ‘Buy America’ policy under of the American Recovery and Reinvestment Act (ARRA). Section 1605 of the ARRA sets out a general requirement to use only iron, steel and other manufactured goods produced in the US applies to both federal ARRA-funded public building and works projects, and all state and local ARRA grant-funded public buildings and works projects. However, it shall not apply in any case in which the head of the Federal department or agency involved finds, inter alia, that it would be inconsistent with the public interest, or there would be insufficient supplies and of a satisfactory quality, if their inclusion would increase the cost of the overall project by more than 25 per cent, or it is found to be

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<sup>13</sup> Article 1.2 The 2016 IPI Amended Proposal.

<sup>14</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014. p.1).

<sup>15</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

<sup>16</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors OJ L 94, 28.3.2014

<sup>17</sup> Article 1.3 The 2016 IPI Amended Proposal.

inconsistent with United States obligations under international agreements.<sup>18</sup>

While the 2016 IPI instrument maintains the original EU objective of encouraging greater reciprocity on the part of trading partners' vis-à-vis access to the public procurement contracts, the overall proposal has been both refined and ring-fenced. The 2016 IPI Amended Proposal now proposes to limit any possible restrictive measures to "price adjustment measures" and exclude the possibility of completely disqualifying the tender. Moreover, the proposed regulation centralizes decision-making, removing the ability for the Member State procurement agencies or interested parties to trigger the regulation directly. This 2016 IPI Amended Proposal also addresses the concerns raised by the Member States about undue administrative costs, for by centralizing decision-making to the Commission it swiftly minimizes any potential administrative burden on both Member States and contracting agencies. Nevertheless, Member States are required to indicate the procuring entities that will be implementing the price adjustment measure. The time frames accorded to the Commission for investigating the claim have been shortened, while transparency has been increased with the requirement that all findings from any investigations into barriers to tenders in third countries must be made public.

As with the 2012 Proposal, the new proposed price adjustment measure can be applied to bidders or products or services from that country following a Commission investigation determining that a third party country is applying barriers to EU participation in its procurement market. However, there is now to be a presumption that a negative price preference will be imposed to level out the playing field of that particular procurement market. This presumption will be upheld unless the bidder can prove that *less* than 50% of the total value of their tender is made up of 'non-covered' goods and services originating in this third country. The proposal also permits targeting territories at both the regional or local level, like states, regions or even municipalities.

Other exceptions are provided under the 2016 IPI Amended Proposal Article 4, where more than 50% of the total value of the tender is made up of goods and/or services originating in least-developed countries,<sup>19</sup> and in certain developing countries.<sup>20</sup> Article 5 sets out an exemption for tenders submitted by EU SMEs established with a direct and effect link with the economy of at least one Member State, as well as for developing countries bidders or products, as long as they are subject to GSP+ treatment.<sup>21</sup> The IPI proposal also includes various other transparency, monitoring and reporting requirement both for the successful tender and for the contracting agencies. This brings the proposal in line with wider EU policies.

The 2016 IPI Amended Proposal sends out warning signals to its bilateral trading partners, fellow GPA parties and acceding- and observer-status GPA parties alike, to incentivize them to expand on their EU government procurement market access commitments. This proposed regulation

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<sup>18</sup> Such agreements may include bilateral exchange of letters on government procurement, such as the EC and the US exchanged May 1995), by which the US granted no less favourable treatment than for out-of-state suppliers and for out-of-city suppliers for a number of states and cities. The US' amended Trade Agreements Act of 1979 also authorizes waivers to federal-level discriminatory procurement provisions for parties to international agreements that provide reciprocal access for US goods, services, and suppliers in their procurement. These waivers have been issued when the GPA has been expanded to cover additional WTO Members and when the United States has entered an international agreement that covers government procurement.

<sup>19</sup> Listed in Annex IV to Regulation (EU) No 978/2012

<sup>20</sup> Considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system as defined in Annex VII to Regulation (EU) No 978/2012

<sup>21</sup> Article VI IPI.

suggests that if the EU does not like the terms of a third party's market coverage of procurement, it could seek to remedy this situation outside of the GPA Agreement. The 2016 IPI Amended Proposal provides some punitive economic incentives and thus legislative push to third parties who have not opened up their procurement under either an RTA with the EU or under the WTO GPA, as well as those GPA parties who have not opened up a particular procurement market to the EU under their Annexes to Appendix 1. Indeed, the IPI wishes to be implemented widely, for if a contracting authority or contracting entity intends not to apply a price adjustment measures, it must indicate this in the contract notice that it publishes<sup>22</sup> and notify the Commission within ten calendar days of publication.

Under the 2016 IPI Amended Proposal, if after an investigation determining that bidders or products or services from a third party country is applying barriers to EU participation in its procurement market the Commission and the third party country must undergo consultations for up to 15 months. Article 7 states that if after the initiation of consultations, it appears that the most appropriate means to end a restrictive and/or discriminatory procurement measure or practice is the conclusion of an international agreement, negotiations shall be carried out in accordance with Articles 207 and 218 of the Treaty on the Functioning of the European Union (TFEU). The Commission can terminate such consultations if the country concerned undertakes international commitments agreed with the Union either through accession to the WTO GPA or expanding its market access commitments to the EU under the WTO GPA, or otherwise through the conclusion of a bilateral agreement with the Union which includes market access commitments in the field of public procurement and/or concessions.

If this soft leverage does not result in the reciprocity the EU is seeking, Article 11.1 of the IPI proposal provides for the possibility to apply price adjustment measures to those contested tenders submitted by economic operators originating in the third country concerned or tenders offering goods and services originating in the third country concerned - if the value of those goods and services accounts for more than 50 per cent of the total value of the tender. However, this price adjustment measure shall apply only for the purpose of the evaluation and ranking of the price component of the tenders. It does not affect the price due to be paid under the contract, for this will subsequently be concluded with the successful tenderer. This suggests that despite all of the efforts at non-discrimination, transparency and accountability in procurement processes, a non-transparent price negotiation takes place with the winning tenderer that may conceivably result in the final cost of the tender being set at more than a losing bid from a disappointed competitor.

## **2.1 Following the Buy America Model under the ARRA**

The experience of the impact of the Buy America Act may have been instructive in the design of the Commission's 2016 IPI Amended Proposal. Under the Buy America Act, a so-called 'saving clause' was included under Section 1605, to ensure that any implementation of the Act must be compatible with its international commitments under the WTO GPA. Nevertheless, the Buy America regulation was still able to provide unprecedented market access leverage over other countries, most notably a fellow GPA party and NAFTA signatory – Canada.

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<sup>22</sup> Pursuant to Article 49 of Directive 2014/24/EU or Article 69 of Directive 2014/25/EU or in the concession notice pursuant to Article 31 of Directive 2014/23/EU.

The pressure imposed upon Canada as result of the ARRA meant that it was forced to respond to by rapidly negotiating the 2010 AGP with the US.<sup>23</sup> Under the 2010 AGP, Canada provided US companies with a greater degree of permanent access to procurement markets in all provinces and territories except Nunavut. In exchange, the United States simply extended its 1994 WTO GPA commitments on sub-national procurement, which cover 37 US states, to Canada. The US did not increase its market access commitments under the Schedules of the WTO 1994 GPA. The US had previously refused to exempt Canadian businesses from its small business set-asides and other exemptions, so Canada had retaliated by refusing to expand its WTO GPA commitments to include sub-national procurement in 1994.<sup>24</sup> Evidently, the leverage that the ARRA offered the US outside of the GPA was enough to motivate Canada to give US firms access to Canadian provincial and territorial government procurement. And this concession was without Canada making any progress on the issue of small business set-asides or other US exemptions at the WTO.<sup>25</sup> The ARRA had a significantly detrimental economic effect on Canadian businesses without violating the WTO GPA. It illustrates how to exert influence on market access liberalisation, even over GPA parties, while utilising the restrictive nature of both reciprocity principle and the most favoured nation obligation operating under the WTO GPA to avoid non-compliance with the agreement.

The European Commission's 2016 IPI Amended Proposal appears to follow this model. However, rather than putting forward the proposal forward accompanied by the same rhetorical of economic nationalism and domestic job protection, the Commission appears to be justifying the 2016 IPI Amended Proposal with the rhetoric of reciprocity.

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<sup>23</sup> Shirley-Ann George Senior Vice-President, Policy, Canadian Chamber of Commerce stated in Evidence, Meeting No. 4, March 18, 2010: “[G]iven the normal length of time required to negotiate international agreements, reaching an accord in six months is an impressive accomplishment. When you take into account that the agreement also required the provinces to sign on, reaching an agreement with that group in six months is, frankly, quite mind-boggling.”

<sup>24</sup> Canada's negotiators argued that those set-asides prevented Canadian businesses from enjoying the same degree of access to US federal procurement markets as the US had to Canadian federal procurement markets.

<sup>25</sup> Canada subsequently expanded its commitments under the Revised WTO GPA to reflect this outcome.

### Section 3. Reciprocity under the WTO GPA

Reciprocity, or the practice of lowering barriers to trade in return for similar concessions from another country, is the core principle behind this proposed scheme. Reciprocity in the context of government procurement concessions is the rule by which several parties manage to maintain a balance and symmetry of treatment by granting the same or equivalent rights and benefits to each other. Reciprocity under international procurement agreements is strictly *conditional* in that it is contingent on rewarding actions. And moreover, it ceases when such actions cease; for while the act of giving is voluntary, the act of the recipient is obligatory. That is, government procurement market liberalization has traditionally been conditional on an explicitly strict reciprocal exchange of rights and obligations. It should not be confused with open or unconditional reciprocity, which does not demand any direct response to an antecedent action. Open reciprocity and most-favoured nation treatment characterize the negotiations followed under the GATT, which has faced criticisms that such unconditional reciprocity and MFN actually encourages free-riders in permitting non-reciprocity on the part of some countries.

From its inception, then, the plurilateral Government Procurement Code sought to address the free-rider problem and the lack of full reciprocity that the EU is currently concerned with. The WTO GPA's strict reciprocity principle and conditionality is formally set out in an appendix and forms an integral part of the Agreement.<sup>26</sup> The Annexes are negotiated along four basic parameters, consisting of: i) the value of procurement—covering only contracts estimated to exceed a certain value threshold; ii) the identity of the procuring entity—covering only those listed by each party in its annexes; iii) the type of goods or services procured—consisting of all goods, apart from some expressly excluded by each party, and only services listed by each party in its annexes; and iv) the origin of the goods or services—including only countries that are GPA parties. During the GPA negotiations, not only must the parties decide which services and goods and construction are covered by the obligations, but they must also negotiate which contracting authorities or entities will be included in Annex I-III and then, additionally, the value of the thresholds that will trigger the scope of application of the agreement in each case and category of procurement. Parties to the GPA also commonly qualify the scope of the coverage of their obligations within their Annexes to Appendix 1. The OECD has estimated that if reciprocity is not taken into consideration, that is, if the commitments are applied on an unconditional MFN basis among WTO GPA parties, the average level of commitments would be 16% higher than that with reciprocity. High impacts (more than 25 percentage points) are observed in space transport services and banking services, while there is relatively no impact in construction services.<sup>27</sup>

The key objective of the EU's IPI Proposal is for more market access reciprocity to improve the *unfair* conditions under which EU businesses competes for public contracts abroad. The EU has estimated that it is the most open of all procurement markets for the “de jure” openness of the EU procurement markets is 85%, while for the U.S. it is only at 32%.<sup>28</sup> However, the most available data rather suggests that the US and the EU achieved a balance in the value of market access concessions in government procurement. Messerlin has indicated that the openness of the EU and the U.S. towards third countries (non-EU and non-US) in public procurement is around both 4-

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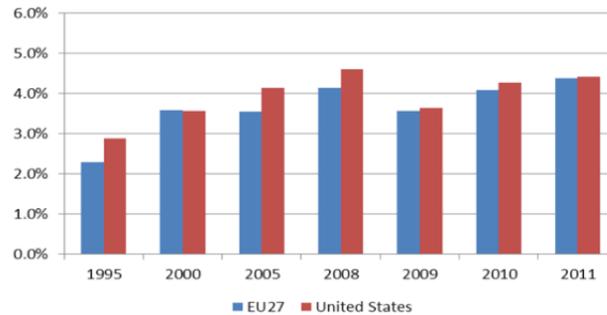
<sup>26</sup> The coverage of the Agreement is set out for each signatory party in Appendix I, which is divided into Annexes concerning the specific coverage of the obligations. The Annexes address: 1) central government entities covered by the Agreement; 2) covered sub-central government entities; 3) "other" covered entities (e.g. utilities); 4) goods; 5) services coverage; 6) coverage of construction services; and 7) General Notes.

<sup>27</sup> Asako Ueno. Multilateralising Regionalism on Government Procurement. OECD Trade Policy Paper No. 151. 2013.

<sup>28</sup> Quoted in: Patrick Messerlin. The Beauty of Public Procurement in TTIP. ECIPE Bulletin No. 1/2016.

5%, depending on the set of data. In fact, as Figure 1 indicates, the EU was less open than the U.S. until the late 2000s, and did not catch up with the U.S. until the 2008 financial crisis.<sup>29</sup>

Figure 1. The EU27 and US Penetration Ratios Selected Years<sup>30</sup>



Note: Penetration ratios are the shares of (extra-EU in the case of EU Member States) public imports in total demand for public goods and services.

Box 1 illustrates how the EU specifies in its General Notes that the GPA applies only to the services listed in their commitments, in respect of a given party, and only to the extent that this Party has given reciprocal access to the service concerned.<sup>31</sup> Similar Scheduled Notes accompany their other Annexes. Thus while the statements that accompany the 2016 and 2012 Proposals imply that the current market concessions situation is unfair an overview of the EU market access concessions set out under the Revised GPA refutes this and highlights the strict reciprocity already operating under the EU's WTO GPA schedules. That is, EU negotiators did negotiate symmetrical concessions under the WTO GPA schedules based on strict reciprocity and highly conditional MFN.

| <b>Box 1 EU Schedules Notes to Annex 3</b>  |
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| 6 The following <i>shall not</i> be considered as covered procurement:  |
| a. procurement by procuring entities operating in the fields of: <ul style="list-style-type: none"> <li>i production, transport or distribution of drinking water covered under this Annex;</li> <li>ii production, transport or distribution of electricity covered under this Annex;</li> <li>iii airport facilities covered under this Annex;</li> <li>iv maritime or inland port or other terminal facilities covered under this Annex; and</li> <li>v urban railway, tramway, trolley bus or bus services covered under this Annex in regard of supplies, services, suppliers and service providers <i>from Canada</i>;</li> </ul> |
| b. procurement by procuring entities operating in the field of production, transport or distribution of drinking water covered under this Annex in regard of suppliers and service providers <i>from the United States</i> ;  |

<sup>29</sup> Patrick Messerlin. The Beauty of Public Procurement in TTIP. ECIPE Bulletin No. 1/2016.

<sup>30</sup> Reproduced from Patrick Messerlin, *ibid.*

<sup>31</sup> <https://e-gpa.wto.org/report/coverage>

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| c. procurement by procuring entities operating in the field of maritime or inland port or other terminal facilities covered under this Annex of dredging services or related to shipbuilding in regard of suppliers and service providers from the United States;  |
| d. procurement by procuring entities covered under this Annex of air traffic control equipment in regard of suppliers and service providers from the United States;  |
| e. procurement by procuring entities operating in the field of airport facilities covered under this Annex in regard of suppliers and service providers from the United States and Korea;  |
| f. procurement by procuring entities operating in the field of urban railway, tramway, trolleybus or bus services covered under this Annex in regard of suppliers and service providers from the United States;  |
| g. procurement by procuring entities operating in the field of urban railway covered under this Annex in regard of suppliers and service providers from Japan;   |
| h. procurement by procuring entities operating in the field of railways covered under this Annex in regard of goods, suppliers, services and service providers from Armenia; Canada; Japan; the United States; Hong Kong, China; Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; |
| i. procurement by procuring entities operating in the field of high-speed railways and high-speed railways infrastructure in regard of goods, suppliers, services and service providers from Korea;  |
| j. procurement by procuring entities covered under this Annex of good or service components of procurement which are not themselves covered procurement in regard of suppliers and service providers from the United States;   |
| k. procurement by procuring entities operating in the field of production, transport or distribution of electricity covered under this Annex in regard of suppliers and services providers from Japan;   |
| l. procurement by procuring entities operating in the field of production, transport and distribution of electricity covered under this Annex ... (electrical transformers, plugs, switches and insulated cables) in regard of suppliers from Korea;   |
| m. procurement by procuring entities operating in the field of production, transport and distribution of electricity covered under this Annex ... in regard of suppliers from Israel;  |
| n. procurement by procuring entities operating in the field of bus services covered under this Annex in regard of suppliers and service providers from Israel;   |
| <i>until such time, the EU has accepted that the Parties concerned provide satisfactory reciprocal access to EU goods, suppliers, services and service providers to their own procurement markets. [emphasis added]</i>  |

In sum, the 2016 IPI Amended Proposal has followed the model of the US Buy America Act under the ARRA and its success in opening previously closed markets in Canada, a fellow NAFTA and GPA party. The EU has done this without the rhetoric of buy national or economic nationalism. Nonetheless, the 2016 IPI Amended Proposal quietly seeks to open up procurement markets through negotiations, consultations or ultimately by threatening or actually imposing sanctions through price adjustment instruments. While this may not be actionable under the WTO GPA, given that it explicitly does not relate to ‘covered procurement’, it nevertheless works against the general principles of the multilateralism and non-discrimination under GATT/WTO.

#### 4. Challenging the IPI Proposal under the GATT

Government procurement rules can be characterized as an internal regulatory measure, and as such subject to the non-discrimination requirements that are the cornerstone of the GATT/WTO. It was however explicitly carved out from the subsequent GATT Article III national treatment obligations by virtue of GATT Article III:8(a), which states:

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

This text, as noted above, is mirrored in the EU 2016 IPI Amended Proposal definition of procurement. Nevertheless, there were different interpretations put forward under the Panel and Appellate Body reports of the same WTO dispute over *Canada–Feed-in Tariffs (FIT)* programme, when given the task of defining procurement for the purposes of the application of Article III.8(a). The *FIT* dispute emerged when Japan and the EU challenged the legality of the domestic content requirements set out in the *FIT* scheme established by the Canadian Province of Ontario.<sup>32</sup> The EU challenged this measure on the grounds that the GATT III.8 (a) derogation could not apply to the *FIT* programme because only those government departments *directly* using the procured goods or services are immune from Article III’s national treatment obligations.<sup>33</sup> The EU claimed that the meaning of procurement for governmental purposes as set out in Article III.8 (a) is narrow. It is restricted to acquisitions made to meet ‘the needs’ of government. To qualify as a government procurement, any purchase must pass a ‘needs’ test to ensure that it is indeed intended ‘for the direct benefit or use of the government’.<sup>34</sup> The EU challenge also proposed a broad reading of Article III.8 (a) when defining ‘not with a view to commercial resale or with a view to use in the production of goods for commercial sale’. The EU claimed that if the purchased product is sold or introduced into the market regardless of whether this is done for profit, it should be deemed to be ‘with a view to commercial resale’, and thus disqualified from the derogation. As such, this interpretation sought to exclude more types of government procurement that distort competition in open markets from the safe haven of the Article III.8(a) derogation.

Unlike the EU, however, the Panel Report submit that the derogation would not be available if the electricity was purchased ‘with a view to commercial resale’ because the resales were made in competition with licensed electricity retailers. And although profit was made by the Government of Ontario from resale of FIT Programme electricity to consumers, this was a necessary requirement for the procurement to be considered for commercial resale: ‘loss-making sales can be, and often are, a part of ordinary commercial activity.’<sup>35</sup> The Panel then assessed the challenged measures – the offset - and reasoned that as there could not be any procurement of electricity without meeting this domestic content requirement, the requirement could be said to

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<sup>32</sup> A *FIT* is an increasingly employed instrument for promoting investment in renewable energy typically through fixed pricing for the purchases of renewable energy power above the market price for electricity.

<sup>33</sup> *Canada–Renewable Energy*, Third Party Written Submission of the US, paras. 13 and 14

<sup>34</sup> *Canada–FIT*, First Written Submission by the EU, paras. 118 –30.

<sup>35</sup> Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation* WT/DS412/R adopted 24 May 2013. para 7.122 –7.151.

govern procurement for the purposes of the Article III.8(a) derogation. As Davies notes, here critically, the Panel opened up the possibility that there need not be any competitive relationship between the products discriminated against and the products procured for the derogation to apply.<sup>36</sup>

This controversial interpretation was revised on appeal. The Appellate Body instead based its reasoning on the ‘products purchased’ when determining whether the FIT offset requirement did indeed govern the procurement. The Appellate Body submit instead that the Article III.8(a) derogation only becomes relevant once it has been determined that there is discriminatory treatment of the foreign product that is covered by the obligations in Article III. And only then, did it determine that such discrimination was the consequence of any laws, regulations, or requirements governing the procurement by governmental agencies. In sum: a purchase that does not fulfil the requirements of being made ‘for governmental purposes’ will not be considered to fall within the derogation of Article III.8 (a). This condition is regardless of whether the procurement in question complies with the requirement of being made ‘not with a view to commercial resale’<sup>37</sup> because these are cumulative requirements.<sup>38</sup>

Having determined the nature of the measure being challenged, the *FIT* Appellate Body assessed whether the product of foreign origin was actually in a competitive or directly substitutable relationship with the product purchased. It undertook a like-product analysis to allow for some conclusions to be made as to whether Canada’s *FIT* programme was disrupting international competitors’ sales of renewable energy generating equipment, as claimed by the EU and Japan. The Appellate Body concluded that the product being procured was electricity, whereas the product discriminated against for reason of its origin was generation equipment, and that these two products are not in a competitive relationship. Therefore, the scheme was not covered by the Article III.8(a) derogation. Consequently, the *FIT* scheme fell under application of the GATT Article III.4 national treatment obligations and in favouring domestic over foreign products, the *FIT* scheme was found to be in violation of GATT Article III.4.

The Appellate Body’s legal assessment was faithfully followed in a subsequent, similar WTO dispute involving India’s domestic content requirements relating to Solar Cells and Modules.<sup>39</sup> Yet unlike the later dispute, in Canada- *FIT*, the Appellate Body also assessed the legality of the same measure under the Agreement on Subsidies and Countervailing Measures. This move suggested that with or without the GATT Article III.8(a) derogation and, moreover, whether or not a WTO GPA party has excluded a specific procuring entity or market from its Appendix 1 Annexes, there is no safe haven from the application of the ASCM to those government procurement measures that relate to goods. That is, even if the 2016 IPI Amended Proposal is not in violation of the WTO GPA obligations, it is not necessarily freed from the obligations of either the GATT or the ASCM.

At face value it could be assumed that because the 2016 IPI Amended Proposal Article XX states that the application of regulation must be consistent with international obligations, the proposed regulation would be not likely to violate the ASCM. On the other hand, it is also difficult to conclude that a price adjustment instrument or local content requirement, prohibited under ASCM

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<sup>36</sup> Arwel Davies. *Op cit.* p4.

<sup>37</sup> Appellate Body Report, *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, paras. 5.59, 5.60, 5.61.

<sup>38</sup> *Ibid.* para. 5.69.

<sup>39</sup> *India — Certain Measures Relating to Solar Cells and Solar Modules* (WT/DS456/PR), 24 February 2016. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds456\\_e.htm#bkmk456r](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm#bkmk456r)

Article 3, would not be deemed to be a ‘benefit’ if it were specifically designed to have impact as a leverage mechanism. The Panel Report for the *Indonesia – Autos* dispute likened minimum required domestic content levels to domestic content requirements. The Panel opined that "by definition, [domestic content requirements] always favour the use of domestic products over imported products, and therefore affect trade".<sup>40</sup> Part II of the ASCM Agreement provides in Article 3 that Members shall neither grant nor maintain (non-agricultural) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. The proposed 2016 IPI Amended Proposal price adjustment mechanism confers a benefit of up to 50% to those tenders that do not originate from parties that are not offering strictly reciprocal access to their procurement markets. As such is not simply discriminatory, but it is an unfair practice potentially prohibited in offering a benefit through domestic content requirements.

#### 4.1 The IPI and Horizontal Policy Objectives: Small Medium Enterprise Promotion

In the legislative procedure leading to the adoption of the 2014 Procurement Directives, one of the main focuses of the EU was to improve the possibilities and conditions for participation of SMEs<sup>41</sup> in public procurement covered by the EU rules.<sup>42</sup> Approximately 20.8 million SMEs are registered in the EU. This represents 99.8% of all enterprises, and produces more than a half of European GDP. It is therefore of little surprise that SMEs are now the prime focus of European public policy and promoting their access to public procurement is an explicit objective of the 2014 Directive. This is stressed in Recital 2, ‘*Public procurement plays a key role in the Europe 2020 strategy ... For that purpose, the public procurement rules adopted pursuant to [the 2004 Directive] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs)*’. And, even in clearer terms, in Recital 78: ‘*Public procurement should be adapted to the needs of SMEs*’. Article 83(3) of the 2014 Directive provides for increased monitoring at the national level and for an obligation on Member States to transmit to the Commission every three years a monitoring report covering information on *inter alia* the level of SME participation (see also Recitals 124 and 134). Yet, despite the SME focus in the negotiations leading up to the 2014 Directive and the numerous references to SMEs in its Recitals, these Directives contains few rules that can substantively promote the participation of SMEs in EU level competitions for public contracts.

There are four main policy instruments for promoting the participation of SMEs in public procurements that are of relevance here. Firstly, it is possible to change procurement procedures to facilitate competition by SMEs. This avenue suggests increased transparency, and improved economic and administrative methods to facilitate smaller businesses.<sup>43</sup> The second option

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<sup>40</sup> Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R adopted 23 July 1998, ¶14.82.

<sup>41</sup> As defined under the Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

<sup>42</sup> This focus was initiated in the Commission’s *Europe 2020 A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, and was clearly visible in the *Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011) 15 final and was one of five main aims in the 2011 Proposal.

<sup>43</sup> See for example: SMEs' access to public procurement markets and aggregation of demand in the EU. 2015. PwC, ICF GHK and Ecorys; *The Access of SMEs to Public Procurement Contracts (2004)* prepared by EIM Business and Policy Research and KMU Forschung Austria for DG Enterprise and Industry.

<http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-studies/craft-publicprocurement.htm>;

involves providing direct subsidies to SMEs by the government. European SMEs benefit from EU funding through grants, loans or, guarantees. Subsidy support is available both directly (EU grants) and through programmes managed at national level. SMEs can also benefit from a series of non-financial assistance measures in the form of programmes and business support services.<sup>44</sup> Third, a common policy is to offer price preferences in procurement evaluations. Here, as discussed previously in relation to the 2016 IPI Amended Proposal, government will add a percentage onto the price of large business so as to provide SMEs competing in the procurement a greater chance of being successful in winning a contract award.<sup>45</sup> Finally, there is the policy instrument of providing set asides of specific procurements for SMEs. For example, in the US, the federal government establishes formal goals to ensure small businesses get a share of work in the federal market. Every federal government purchase valued from \$2,500 to \$100,000 is automatically set aside for SMEs, provided that there are at least two companies that can provide the product or service.<sup>46</sup> However, the 2014 Directive includes only one of these measures – changing procurement procedures to facilitate SME participation.<sup>47</sup>

Following the 2014 Procurement Directive, the IPI Proposal also notes that because of their size and limited capacity SMEs often face particular problems because of burdensome procedures. It too seeks to promote SME participation in the economy, in line with the general SME policy of the EU, and wider EU Trade Policy. Consequently, pursuant to the 2016 IPI Amended Proposal *Article 5*, those tenders submitted by SMEs established in the EU and engaged in substantive business operations,<sup>48</sup> shall be exempted from this Regulation. However, this exclusion is of questionable value in promoting SME participation in procurement markets either in the EU or abroad. From the outset, the high value threshold makes it unlikely that smaller companies would be concerned by the instrument. But more generally, given that the aim of the objective is to provide the EU with leverage to open up procurement markets in third countries or procurement markets not yet opened up under the WTO GPA, it is not clear how this regulation would have applied to SMEs, but for the Article 5 exclusion. The price adjustment mechanism might operate in their favour as for any other domestic bidder, if they are in a position to tender for a bid valued at above 500,000 euros, but that possibility does not require protecting or pronouncing in a specific SME rule.

The 2016 IPI Amended Proposal Article 5 SME provision appears to be another act of lip service that has emerged in EU policies aiming to promote SMEs in recent years.<sup>49</sup> The EU is legally

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<sup>44</sup> Small businesses and start-ups were the major beneficiaries from the Competitiveness and Innovation framework programme (CIP) 2007 and 2013. More than EUR 1.1 billion of EU funding was directed to loan and risk capital investment to help 350,000 SMEs start up, grow and innovate. A further EUR 2.6 billion will fund actions to help SMEs bring innovative ideas to market, to apply ICT and renewable energy technologies, and benefit more fully from the internal market.

<sup>45</sup>For instance, in April 2012, the Cabinet of the Government of India approved the Public Procurement Bill, which recognizes SME preference schemes, among others, that set an annual goal of procuring a minimum of 20% of goods and services from micro entities and SMEs in India. See SMEs, Public Procurement and Inclusive Growth. Asian Development Bank.

<http://www.adb.org/sites/default/files/publication/30070/sme-development.pdf>

<sup>46</sup> Available at: <http://www.gsa.gov/portal/category/108231>

<sup>47</sup> See Dawar, K and Skalova, M. The Evolution of EU Public Procurement Rules and its Interface with the WTO: SME promotion and policy space. In: Sanchez Graells & Skovgaard Ølykke (eds) Reformation or Deformation of EU Procurement Directives. Edward Elgar. Forthcoming 2016.

<sup>48</sup> This entails have a direct and effective link with the economy of at least one Member State.

<sup>49</sup> E.g. Implementing the Community Lisbon Programme – Modern SME policy for Growth and Employment, 10.11.2005, COM(2005) 551 final; Small and medium-sized enterprises – Key for delivering

constrained by the WTO GPA with regard to promoting or protecting SMEs in those government procurement markets covered by the agreement. For while the WTO provides *ex ante* options for the parties to negotiate to promote their SMEs and various parties have inscribed such possibilities in their Annexes, it is significant for the legality of EU SME promotion in procurement markets, that the EU has not. From the very outset of the negotiations to the 1994 WTO GPA, the EU did not seek to negotiate carve out protections from the GPA's obligations for SMEs and it did not aim to negotiate concessions that matched the SME objectives of other parties. This is because the internal EU (then, the European Community) procurement directives were promulgated to liberalize the internal market among its Member States. The rationale underlying the Procurement Directives, and therefore the principles embodied in the Directives, are historically based on trade liberalization.<sup>50</sup> Moreover, not only did the EU did not fully exercise its potential to exclude SME's from the scope of the access to the EU's public procurement market, EU negotiators rather sought to explicitly discriminate against and penalise the United States (US), Korea and Japan for their promotion of SMEs under their respective GPA Appendix 1 Annexes. The EU's Notes to Annex 1 stipulate that:

The provisions of Article XVIII requiring Domestic Review Procedures *shall not* apply to suppliers and service providers of Japan, Korea and the US in contesting the award of contracts to a supplier or service provider of Parties other than those mentioned, *which are small or medium sized enterprises under the relevant provisions of EU law, until such time as the EU accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority businesses* (emphasis added).<sup>51</sup>

This historical stance has placed more recent EU efforts to promote SMEs in procurement markets in potential non-compliance with their international obligations under the WTO GPA. This legal constraint may explain why oftentimes SME promotion in international procurement markets has not resulted in a more comprehensive framework, such as in the US.

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more growth and jobs. - A mid-term review of Modern SME policy, 4.10.2007, COM(2007) 592 final; and "Think Small First" A "Small Business Act" for Europe, 25.6.2008, COM(2008) 394 final.

<sup>50</sup> For discussion, see S. Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2012) 14 *Cambridge Yearbook of European Legal Studies* 1-47.

<sup>51</sup> <https://e-gpa.wto.org/report/coverage>

## **Section 5. Conclusions**

The analysis undertaken in this paper suggests that while formally in compliance with the WTO GPA, the 2016 proposed IPI is potentially non compliant with GATT National Treatment obligations depending on the defined nature of the procurement in question, and the price adjustment mechanism may be seen as a domestic content requirement, prohibited under the WTO ASCM. This paper further submits that even though the 2016 IPI Amended Proposal is formally in compliance with the WTO GPA, it does not support the objectives of either the GATT/WTO or the WTO GPA – which are to open up markets to international competition under equal commercial conditions. It is also questionable whether the 2016 IPI Amended Proposal supports the stated aims of the EU - to promote value for money in public procurement along with the welfare of EU citizens, consumers and taxpayers.

The reasonable proposition that EU businesses must become more competitive internationally should not be used to undermine value for money in government spending, or the indisputable benefits of multilateralism, non-discrimination and negotiating under the tutelage of the WTO. There is growing consensus that ensuring non-discriminatory, transparent and fair public procurement is the best way for citizens and tax-payers obtain the best public goods and services available, and at the best value for money. To achieve this aim, more competition is needed in procurement markets rather than less. Moreover, the principle of reciprocity should not be used to justify the unilateral imposition of a punitive measure in procurement markets, and ensure a ‘matching’ of opportunities in third party markets. The 2016 IPI Amended Proposal, like its predecessor the 2012 draft regulation, could potentially function to provoke the creation of other ‘buy national’ policies, or indeed unilateral retaliation by third countries facing such penalties.