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International Protection of Free Trade in Procurement Under NAFTA's Chapter 10 on Public Procurement: The Pathway from NAFTA to WTO Government Procurement Agreement to a Potential European-US Transatlantic Trade and Investment Partnership

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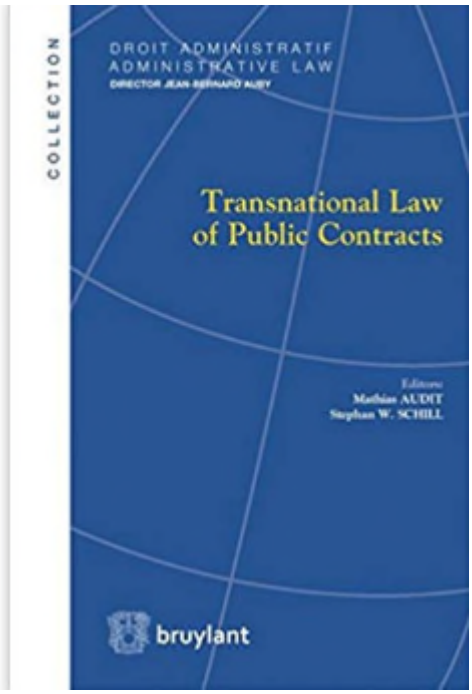

International Protection of Free Trade in Procurement under NAFTA's Chapter 10 on Public Procurement

The Pathway from NAFTA to the WTO Government Procurement Agreement to a Potential European-U.S. Transatlantic Trade & Investment Partnership

Christopher R. Yukins[*]

I. Introduction

The North American Free Trade Agreement (NAFTA), which entered into force on 1 January 1994, is an agreement between Mexico, Canada and the United States to ensure that covered goods and services fall under a comprehensive free trade agreement among the three countries. NAFTA included, in Chapter 10, provisions opening up many aspects of the parties' procurement markets.[1] As a practical matter, however, NAFTA's procurement-related provisions have largely been overshadowed by the World Trade Organization (WTO) Agreement on Government Procurement (GPA),[2] which includes the United States, Canada, and many other member parties, but not Mexico. Perhaps in part because Canada has a long history of integration with the U.S. industrial base for defense production,[3] with regard to

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[1] For a thorough discussion of the United States' implementation of NAFTA in the federal procurement system see L. EYESTER, *NAFTA and the Barriers to Federal Procurement Opportunities in the United States*, 31 Pub. Cont. L. J. 695 (2002).

[2] See generally S. ARROWSMITH/R. ANDERSON (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (2011). The newly revised GPA came into force on April 6, 2014. *See* http://www.wto.org/gpa.

[3] See, e.g., Defense Federal Acquisition Regulation Supplement 225.870-1, 48 Code of Federal Regulations § 225.870-1 ("[f]or production planning purposes, Canada is part of the [U.S.] defense industrial base"), *available at* http://farsite.hill.af.mil.

public procurement the United States' trading relationship with Canada under the GPA has played a more prominent role.[4]

The importance of the GPA in framing future procurement agreements is being borne out in current negotiations, between the European Union and the United States, on a comprehensive free trade agreement, known as the Transatlantic Trade & Investment Partnership (T-TIP). European negotiators have made it clear that their negotiations with the United States will be based on the GPA – in fact, that the T-TIP agreement may set a benchmark for future changes to the GPA, which is rapidly becoming the central agreement in international efforts to promote free trade in procurement. In the process, the procurement provisions of NAFTA are proving less important, as cooperation in trade and procurement regulation centers on the much more broadly adopted GPA. Whether through the T-TIP agreement (known as "TTIP" in Europe), or through the GPA, the international free trade agreements are likely to ease cross-border cooperation in framing procurement law.

Part II of this chapter reviews NAFTA's procurement-related provisions in detail, and discusses some of the protections built into that agreement. Part III describes the launch of the T-TIP negotiations between the European Union and the United States, and notes that those negotiations – based not on NAFTA, but on the GPA – demonstrate that the GPA has become an important instrument (more important than NAFTA) in framing free trade agreements in procurement. Part III describes how the T-TIP agreement might be used to open greater European access to public procurement markets in the United States, especially at the sub-central (state) level. Part III also discusses one option to open that access – to require states, when spending the billions of dollars of federal grants distributed every year, to afford European vendors the same "national treatment" they afford U.S. vendors – and describes some of the hurdles that face that approach. Finally, Part III discusses how the T-TIP agreement could be used to establish an ongoing mechanism -- specifically, an administrative structure to coordinate European and U.S. federal procurement regulations -- for the "transnationalization" of public procurement law.

II. Content and Application of NAFTA Chapter 10

Chapter 10 of NAFTA requires each NAFTA party (Mexico, Canada and the United States) to afford non-discriminatory, "national" treatment in the procurement of goods and services from suppliers from the other NAFTA countries. NAFTA also specifies certain procedural requirements for procurement, to ensure that procurements are carried out in a transparent, effective and fair manner.

The U.S. Department of Commerce noted that, for Canada and the United States, NAFTA's Chapter 10 "built on commitments already made in the U.S.-Canada Free Trade Agreement and the 1979 GATT Government Procurement Code."[5] In contrast, Chapter 10 was "Mexico's first commitment to eliminate discriminatory government procurement practices with respect to foreign goods, services and suppliers."[6]

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[4] For a discussion of the procurement-related elements of Canada's Free-Trade Agreement with the European Union, the Comprehensive Economic and Trade Agreement (CETA) see European Commission, *Facts and Figures of the EU-Canada Free Trade Deal*, EC MEMO/13/911 (18 October 2013), available at http://europa.eu/rapid/press-release_MEMO-13-911_en.htm (last visited 26 February 2014).

[5] U.S. Department of Commerce, International Trade Administration, Trade Compliance Center, *Chapter Ten (Government Procurement) of the North American Free Trade Agreement (NAFTA)*, available at http://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/NAFTA_chapter10_guide.asp (last visited 26 February 2014).

[6] Ibid.

The Office of the U.S. Trade Representative (USTR) prepared an explanatory Statement of Administrative Action for NAFTA, which was submitted to the U.S. Congress in compliance with section 1103 of the Omnibus Trade and Competitiveness Act of 1988, to accompany the implementing legislation for NAFTA.[7] The statement noted:

> NAFTA was not an endpoint; the agreement established a framework for further trilateral, regional and multilateral cooperation.[8]
>
> Although under NAFTA state, provincial and local governments in the three nations generally must conform to the same obligations as those applicable to the countries' federal governments, with regard to procurement, NAFTA Chapter 10, which covers procurement, imposes no obligations on state, provincial or local governments.[9]
>
> The USTR was to appoint a coordinator within his office to pursue further negotiations under NAFTA on state government procurement.[10]

The USTR Statement of Administrative Action also addressed NAFTA Chapter 10 (which relates to procurement) in more specific detail, as is discussed below.

A. Non-Discrimination and National Treatment

NAFTA's Chapter 10 generally required the three NAFTA countries to eliminate "buy national" restrictions on the majority of non-defense related purchases by their federal governments, on goods and services provided by firms in North America.[11] For the United States and Canada, as noted, NAFTA's Chapter 10 built on the measures to open procurement markets in the General Agreement on Trade and Tariffs (GATT) Agreement on Government Procurement and the prior Canada-United States Free Trade Agreement.[12] For Mexico, however, this was the first time that Mexico had eliminated discriminatory government procurement practices, and firms from outside North America – including European and Asian firms – would not benefit from Mexico's commitments under NAFTA's Chapter 10.[13] Article 1003 to the agreement sets forth the requirements regarding national treatment and non-discrimination. Article 1003(1) requires that, with respect to measures covered by Chapter 10, each party is to afford suppliers of another party "treatment no less favorable than the most favorable treatment that the Party accords to its own goods and suppliers," and to "goods and suppliers of another Party." Nor, under Article 1003(2), is any party to treat a locally established supplier less favorably than other suppliers based on foreign affiliation or ownership.

Article 1001 makes it clear that no party to NAFTA may structure a procurement in order to avoid the obligations of the agreement. Article 1001 also states that, while procurements covered by the agreement could include procurement by such methods as purchase, lease or

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7 Office of the U.S. Trade Representative, *The North American Free Trade Agreement Implementation Act: Statement of Administrative Action*, available at http://www.ustr.gov/webfm_send/2647 (last visited 26 February 2014).

8 Ibid. 3.

9 Ibid. 4. Annex 1001.1a-3 to NAFTA, State and Provincial Government Entities, notes that coverage "under this Annex will be the subject of consultations with state and provincial governments in accordance with Article 1024." The text of the NAFTA agreement can be found at www.nafta-sec-alena.org.

10 USTR Statement of Administrative Action (fn. 7) 10.

11 Ibid. 135.

12 Ibid. For a discussion of the differences between NAFTA and the prior GATT agreement see, e.g., C. MUGGENBERG, *The Government Procurement Chapter of NAFTA*, 1 U.S.-Mex. L. J. 295 (1993).

13 USTR Statement of Administrative Action (fn. 7) 135.

rental, covered procurements are not to include non-contractual agreements or any form of government assistance.

B. Offsets

Article 1006 establishes a blanket ban against offsets, requiring that each party ensure that its entities do not seek or impose offsets. The agreement defines offsets to mean

> conditions imposed or considered by an entity prior to or in the course of its procurement process that encourage local development or improve its Party's balance of payments accounts, by means of requirements of local content, licensing of technology, investment, counter-trade or similar requirements.

C. Covered Entities, Thresholds, Exceptions and Exclusions

Chapter 10 of NAFTA gives firms from each of the three countries access to the government agencies and government-controlled enterprises, including important Mexican "parastatal" entities, listed in Annex 1001 to the agreement. Under these provisions, the Mexican government is to provide U.S. and Canadian suppliers with expanding access to PEMEX (the state-owned petroleum company) and CFE (the Mexican government's electrical utilitity), though that access is subject to limited "set-asides" by PEMEX and CFE for Mexican suppliers.[14]

Under Chapter 10, the threshold for NAFTA coverage for purchases by covered entities in Canada and the United States is US$ 25,000 (this carried forward the threshold under the Canada-U.S. Free Trade Agreement). For other purchases by covered federal agencies in the three countries, the threshold is US$ 50,000 for goods and services, and US$ 6.5 million for construction services. Finally, for those enterprises owned by a signatory federal government, the thresholds for coverage are US$ 250,000 for goods and services, and US$ 8 million for purchases of construction services.[15] In determining whether these thresholds are met, the parties to NAFTA are to use the estimated value of procurements at the time of publication.[16]

Under Article 1018's exceptions, the parties generally reserved the right of any party to take "any action […] which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, [or to] "procurement indispensable for national security or for national defense purposes."

Article 1018 also states that, provided such measures are not applied in a matter that could constitute arbitrary or unjustifiable discrimination between parties or a disguised restriction on trade, nothing in Chapter 10 is to be construed to prevent any party from maintaining measures "(a) necessary to protect public morals, order or safety; (b) necessary to protect human, animal or plant life or health; (c) necessary to protect intellectual property; or (d) relating to goods or services of handicapped persons, of philanthropic institutions or of prison labor."

Under NAFTA's Chapter 10, the United States excluded certain types of procurement from coverage, including but not limited to the following:

> Set-asides on behalf of small and minority businesses.[17]

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14 Ibid. 135.
15 Ibid. 136.
16 NAFTA, Article 1002(2).
17 NAFTA, Annex 1001.2b, General Notes.

Procurement of transportation services that form a part of, or are incidental to, a procurement contract.[18]

Procurements by the U.S. Department of Defense of clothing and textiles covered by the "Berry Amendment," and procurements of certain specialty metals.[19]

Procurements by the U.S. Department of Agriculture of agricultural goods in furtherance of agricultural support programs or human feeding programs.[20]

Mexico and Canada similarly excluded certain types of procurements from coverage, as is set forth, for example, in Annex 1001.1b-1 to the agreement.

D. Planning and Publication

Chapter 10 of NAFTA says relatively little about procurement planning, but instead focuses on transparency regarding rules, opportunities and awards. Article 1019 sets forth general requirements regarding publication of laws, regulations and decisions regarding covered government procurement. With regard to specific procurements, Article 1010 sets forth standard best practices regarding prior publication. Article 1010 establishes special requirements for those times when procuring entities solicit for a qualification process,[21] and when procuring entities use qualified supplier lists.[22] Where a procuring entity seeks to amend a solicitation before bids or proposals are due, the entity must give notice of the amendment to all, using the original form of publication – not just to those that have expressed interest in the procurement. And, notably, any "significant information given […]to a supplier with respect to a particular procurement shall be given simultaneously to all other interested suppliers, [sufficiently in advance] so as to provide all suppliers concerned adequate time to consider the information and to respond."[23]

This suggests a possible independent line of challenge, should one supplier, and not its competitors, gain special access to inside information with the procuring entity.

Article 1013 explains the procedural steps that must be met in publicizing a prospective tender. Article 1013(b) specifically states that a procurement entity must "reply promptly to any reasonable request for relevant information made by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract."

Article 1012 sets forth minimum times to allow, after solicitations are published, for the submission of tenders. For open tendering procedures, that minimum time is generally 40 days. Notably, Article 1012 also addresses the time after award, before delivery, and says that when a procuring entity establishes a delivery date, the entity must, "consistent with its own reasonable needs, take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated and the time realistically required for production, destocking and transport of goods from the points of supply."[24]

Paragraph (8) of Article 1010 includes a requirement that a procuring entity must "indicate in the notices referred to in this Article that the procurement is covered by this Chapter." At least in the U.S. federal system, this obligation is apparently not met. In U.S. practice, while

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18 Ibid.
19 NAFTA, Annex 1001.1b-1.
20 NAFTA, Annex 1001.1a-1, Schedule of the United States.
21 NAFTA, Art. 1010(5).
22 NAFTA, Art. 1010(6).
23 NAFTA, Art. 1010(7).
24 NAFTA, Art. 1012(4).

regulations require that federal solicitations conform to NAFTA,[25] there is typically no reference to NAFTA in the published notices themselves.[26]

E. Contractor Qualification

In furtherance of the non-discrimination requirements of Article 1003, contracting entities under NAFTA are not, in the qualification of suppliers, to discriminate between suppliers of other parties. While Article 1009 generally describes common best practices in vendor qualification, Article 1009 (2)(c) appears more probing. That provision requires that, in assessing vendor qualifications,

> "the financial, commercial and technical capacity of a supplier shall be judged both on the basis of that supplier's global business activity, including its activity in the territory of the Party of the supplier, and its activity, if any, in the territory of the Party of the procuring entity."

This provision appears to mandate qualification assessments that reach far beyond the qualifying state – a stark contrast to many contractor performance assessments, which tend to focus only on the contractor's local work.

F. Specifications and Requirements

Technical specifications were addressed by Article 1007, which required each party to ensure that its entities do not employ technical specifications "with the purpose or effect of creating unnecessary obstacles to trade." Under Article 1007, each party is to ensure that any technical specification prescribed by its procuring entities is, where appropriate, (a) specified in terms of performance criteria rather than design or descriptive characteristics, and (b) based on international standards, national technical regulations, recognized national standards, or building codes. Technical specifications are, moreover, not to refer to trade names "unless there is no sufficiently precise […] way of otherwise describing the procurement requirements," and provided that in such cases words such as "or equivalent" are included in the tender documentation, so that equivalent products may be offered.
Article 1007(4) calls for parties to ensure that its entities do not seek or accept advice in the preparation of a solicitation from a person that may have a commercial interest in that procurement. These "organizational conflicts of interest" are more broadly prohibited under U.S. federal procurement law.[27]

G. Tendering, Competitions and Awards

Under Article 1008, tendering procedures are to be non-discriminatory. Accordingly, each party is to ensure that its entities do not provide any suppliers with procurement information that would, in effect, preclude competition. Per Article 1008, procuring entities are supposed to afford any supplier equal access to information before the solicitation is issued.

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[25] Federal Acquisition Regulation (FAR) 5.203(h), 48 Code of Federal Regulations (C.F.R.) § 5.203(h); FAR 25.408, 48 C.F.R. § 25.408. The Federal Acquisition Regulation is updated regularly at www.acquisition.gov/far.

[26] While NAFTA Annex 1010.1 states that U.S. solicitations will be published in the Commerce Business Daily, in fact that publication was replaced by an online resource, Federal Business Opportunities, available at www.fbo.gov, some years ago. That website publishes all significant federal procurement opportunities; see FAR 5.201, 48 C.F.R. § 5.201.

[27] FAR Subpart 9.5, 48 C.F.R. Subpart 9.5.

Article 1011 describes "selective" tendering procedures. In the U.S. federal system, the procedural requirements here would, it seems, be most applicable to other than full and open competition, as contemplated by Part 6 of the Federal Acquisition Regulation.[28] Under those U.S. procedures, as with NAFTA Article 1011, procuring entities must seek the maximum practicable procurement.[29]

Although multilateral, contemporaneous competitive negotiations are very common in the U.S. federal procurement system – they are almost always used for complex weapon systems and information technology systems[30] – NAFTA provides relatively little guidance on the use of competitive negotiations in procurement. Article 1014 does state, though, that when negotiations are used, offerors' information must be held in confidence, and a procuring entity may not provide "to any person information intended to assist any supplier to bring its tender up to the level of any other tender." To reduce the risk of discrimination, Article 1014 requires that all vendors must be given notice of any modifications to the procuring entity's requirements during negotiations, so that all may submit final, amended tenders in conformance with the changed requirements.

The competition and award processes are governed by Article 1015, which allows for electronic submissions of tenders. Article 1015(4)(b) addresses abnormally low tenders, and says that if an "entity has received a tender that is abnormally lower in price than other tenders submitted, [then the entity] may inquire of the supplier to ensure that it can comply with the conditions of participation and is or will be capable of fulfilling the terms of the contract."

The Article does not, however, explain how that inquiry should be structured – which leaves open the possibility that a foreign, low-price offeror may face a very discriminatory, intrusive inquiry regarding its cost structure.

Article 1015 also bars any covered entity from requiring that a supplier, to win award, have previously won a contract from that procuring entity, or that the supplier have had previous work experience within that party's territory. In practice, however, award of mission-critical systems, such as information technology systems, often turns on demonstrated experience with the same or similar systems; these practices may, though, run afoul of Article 1015's anti-discrimination protections, should vendors from other NAFTA nations complain that these experience requirements are, in practice, protectionist.

Article 1015 further requires that procuring entities inform losing tenderers, upon request, of the basics of the award, and that the awarding entities give losing tenderers, again upon request, a debriefing on the bases for the award. Article 1015's requirements are, in fact, much weaker than the notice and debriefing requirements under the U.S. Federal Acquisition Regulation. Thus, for example, while Article 1015(7) calls for publication of the award within 72 days, the Federal Acquisition Regulation calls for immediate publication of awards over US$ 4 million.[31]

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[28] 48 C.F.R. Part 6.

[29] Compare NAFTA, Art. 1011(3) ("[t]o ensure optimum effective competition between the suppliers of the Parties under selective tendering procedures, an entity shall, for each procurement, invite tenders from the maximum number of domestic suppliers and suppliers of the other Parties, consistent with the efficient operation of the procurement system.") with FAR 6.301(d), 48 C.F.R. § 6.301(d) ("[w]hen not providing for full and open competition, the contracting officer shall solicit offers from as many potential sources as is practicable under the circumstances."). NAFTA, Article 1016, Limited Tendering Procedures, lists additional, highly restricted circumstances in which limited tendering may be used.

[30] See, e.g., FAR Part 15, 48 C.F.R. Part 15.

[31] See, e.g., FAR 5.303 ("[c]ontracting officers shall make information available on awards over US$ 4 million (unless another dollar amount is specified in agency acquisition regulations) in sufficient time for the agency concerned to announce it by 5 p.m. Washington, DC, time on the day of award.").

H. Bid Challenges and Other Remedies

NAFTA Chapter 10 includes, in Section C, Article 1017, extensive requirements regarding each nation's bid challenge (or "protest") system. The Statement of Administrative Action which was prepared by the Office of the U.S. Trade Representative described this bid challenge system:

> Articles 1008 to 1016 set out a series of rules designed to ensure that procurement practices in all three countries are fair, transparent and predictable. The basic rule, established by Article 1008, is that of non-discrimination in procurement procedures. The NAFTA also requires covered entities to follow procedures similar to those required under the GATT Code, with respect to qualification of suppliers, time limits, documentation, award of contracts and other aspects of the procurement process. The United States and Canada already adhere to these procedures. Mexico will be adopting them for the first time under the NAFTA. They will result in significant changes in the way Mexico conducts its procurements.
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> * * * *
>
> In order to promote fair and open procurement procedures, Article 1017 requires each government to maintain a "bid challenge" mechanism enabling individual suppliers to have the entire bidding process reviewed. Suppliers from other NAFTA countries will have the right to challenge both bid procedures and contract awards, and will be assured that an independent body in each country will review such challenges and recommend action to correct any discrepancies.[32]

This excerpt from the Statement of Administrative Action highlighted two important issues. First, that the United States' position was that NAFTA required procuring entities to follow procedures similar to those required under the GATT Code, and that the United States and Canada adhered to those requirements. Thus, as the Statement of Administrative Action emphasized elsewhere, NAFTA would require few, if any, regulatory changes for the United States.[33]

Second, the Statement of Administrative Action left open a question regarding the bid challenges contemplated by NAFTA: Would vendors be able to protest violations of NAFTA's anti-discrimination provisions, or would vendors simply protest violations of the regulations which reflected NAFTA's obligations – meaning, in effect, that NAFTA could not be directly enforced by vendors?[34] The USTR Statement of Administrative Action, and the text of Section C of NAFTA itself, suggested the latter – that vendors would challenge the implementing regulations, and that those challenges would merely highlight discrepancies between NAFTA's requirements and the regulatory scheme.[35] This question has not been squarely resolved in the two bid challenge forums in the U.S. federal system, the U.S. Court

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32 USTR Statement of Administrative Action (n 7) 137-38.

33 See, e.g., ibid. 1.

34 Cf. 19 U.S.C. § 3312c(c) ("[n]o person other than the United States […] shall have any cause of action or defense under […] the Agreement [NAFTA] or by virtue of Congressional approval thereof; or […] may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with the Agreement […]").

35 See, e.g., NAFTA, Art. 1017(1)(m) ("each Party should authorize its reviewing authority, following the conclusion of a bid challenge procedure, to make additional recommendations in writing to an entity respecting any facet of the entity's procurement process that is identified as problematic during the investigation of the challenge, including recommendations for changes in the procurement procedures of the entity to bring them into conformity with this Chapter […]").

of Federal Claims and the Government Accountability Office, or in the U.S. Court of Appeals for the Federal Circuit (which hears appeals from the U.S. Court of Federal Claims).[36] Guidance issued by the Public Works and Government Services Canada, a leading centralized procuring agency in the Canadian federal government, indicates, in contrast, that Canadian regulators have concluded that vendors may, in fact, bring direct challenges to Canadian government violations of NAFTA. The PWGSC Supply Manual states, in relevant part:

1.35.1. Canadian International Trade Tribunal

> a) The international trade agreements require that each party have an independent bid challenge authority. The Canadian International Trade Tribunal (CITT)[37] is the bid challenge authority for Canada for the North American Free Trade Agreement (NAFTA), World Trade Organization Agreement on Government Procurement (WTO-AGP) Canada-Chile Free Trade Agreement (CCFTA), Canada-Peru Free Trade Agreement (CPFTA) and Agreement on Internal Trade (AIT). A potential supplier may file a complaint concerning a procurement action to the CITT, on the grounds that any aspect of the procurement process relating to a requirement covered by these agreements is unfair or discriminatory.
>
> b) CITT is authorized to receive complaints pertaining to any aspect of the procurement process up to and including contract award, and also to conduct inquiries and make determinations. In dealing with a complaint, CITT must determine whether the government institution responsible for the procurement under review has complied with the requirements of the trade agreements and such other procedural requirements, as prescribed in the Canadian International Trade Tribunal Procurement Inquiry Regulations.[38]

The discussion above relates to direct challenges by vendors. There remains, however, the possibility of a formal dispute between the NAFTA parties. Under NAFTA Article 1022(5), where member nations perceive serious issues in other nations' implementation of NAFTA Chapter 10, the affected party may have recourse to the inter-party dispute settlement procedures under Chapter 20 of NAFTA.

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[36] Guidance issued by the U.S. Department of Commerce (fn. 5) suggests that vendors could bring a direct challenge, in the U.S. forums, to U.S. agency violations of NAFTA: "[t]o promote fair and open procurement, each Party is required to maintain 'bid challenge' mechanism. Suppliers have the right to challenge both bidding procedures and contract awards, and are assured that an independent body in each NAFTA country will review such challenges and recommend action to correct any discrepancies. The NAFTA does not specify how the review should be conducted or what role interested parties should have. If the reviewing authority finds that there has been a violation under the NAFTA, it can issue a 'recommendation' that the procuring agency should re-evaluate the bids, allow suppliers to re-compete or even terminate contracts. According to Article 1017, the procuring agency 'shall normally follow the recommendations of the reviewing authority', but it is not required to do so." It is not clear, however, whether this guidance should be taken as an authoritative statement of U.S. government policy.

[37] The Canadian International Trade Tribunal "is the main quasi-judicial institution in Canada's trade remedy system and has authority to […] inquire into complaints by potential suppliers concerning procurement by the federal government that is covered by the North American Free Trade Agreement (NAFTA), the Agreement on Internal Trade (AIT), the WTO Agreement on Government Procurement (AGP), the Canada-Chile Free Trade Agreement (CCFTA), the Canada-Peru Free Trade Agreement (CPFTA) and the CCOFTA"; see Canadian Court of International Trade, *Annual Report for the Fiscal Year Ending 31 March 2012* Chapter II, available at http://www.citt-tcce.gc.ca/publicat/ar2m_e.asp#P635_20993 (last visited 26 February 2014).

[38] Public Works and Government Services Canada (PWGSC), *Supply Manual*, § 1.35.1, available at https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/1/35/1 (last visited 26 February 2014). Accord Canadian International Trade Tribunal, *Procurement Review Process: A Descriptive Guide* (2009) ("[t]he Tribunal's mandate authorizes it to receive complaints pertaining to any aspect of the procurement process, conduct inquiries and make determinations. Its jurisdiction covers complaints under NAFTA, the AIT, the AGP and the CCFTA. […]In dealing with a complaint, the Tribunal must determine whether the government institution responsible for the procurement under review has complied with the requirements of NAFTA, the AIT, the AGP or the CCFTA and such other procedural requirements, as prescribed in the Regulations"), available at http://www.citt.gc.ca/publicat/guide_e.asp#P18_3222 (last visited 26 February 2014).

III. A Competing Paradigm: The U.S.-European Transatlantic Trade & Investment Partnership (T-TIP)[39]

According to the Office of the U.S. Trade Representative, NAFTA created the world's largest free trade area, which now links 450 million people producing US$ 17 trillion worth of goods and services.[40] In 2013, however, European and U.S. policymakers launched formal talks on a United States-European free trade agreement, to cover a trading area with a bilateral trade volume of over US$ 900 billion annually.[41] With regard to procurement provisions, the U.S. and European negotiators are building the new agreement – the Transatlantic Trade & Investment Partnership (T-TIP) – upon the text of the WTO Government Procurement Agreement (which underwent a substantial reform finalized in 2012)[42] rather than upon NAFTA's Chapter 10. The revamped GPA reflects updated best practices, and touches on far more areas of important procurement policy; it was and is, therefore, a much more promising point of departure for the broader U.S.-EU Free Trade Agreement.

A. Potential Economic Benefits of a T-TIP Agreement

The T-TIP agreement presents potential economic gains for both the United States and the EU. In an independent study published in March 2013, the Center for Economic Policy Research (CEPR) found that an aggressive T-TIP agreement[43] could increase the GDP of the EU and United States by up to 0.5% and 0.4% respectively.[44] This could translate into gains of € 119 billion in the European Union and US$ 121 billion in the United States.[45] Because the

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39 The author gratefully acknowledges the assistance of R. Locke Bell, student at the George Washington University Law School, in preparing portions of this part of the paper; additional material from this part was presented by the author, in expanded form, at the Thomson Reuters Government Contracts Year in Review conference in February 2014, in Washington, D.C., in a paper entitled *The European Procurement Directives and the Transatlantica Trade & Investment Partnership (T-TIP): Advancing U.S. – European Trade and Cooperation in Procurement* (2014), to be made available on www.ssrn.com, and in an article co-authored with Hans-Joachim Priess, *Breaking the Impasse in the Transatlantic Trade and Investment Partnership (TTIP) Negotiations: Rethinking Priorities in Procurement*, 56 The Government Contractor ¶ 235 (Thomson Reuters July 23, 2014). .

40 Available at http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta (last visited 26 February 2014).

41 See, e.g., J. EWING, *Trade Deal Between U.S. and Europe May Come to the Forefront*, New York Times (25 November 2012); European Parliament Press Release: *Free Trade with US But Not at Any Price, Say MEPs* (23 October 2012) ("[w]e want to send a strong political signal in favour of opening negotiations with the United States in order to create a real transatlantic market with enormous opportunities for growth. Agreement is not going to be easy and there are very divergent interests between the US and Europe […]. [Members of the European Parliament] call in the non-binding resolution for negotiations to begin in the first half of 2013, pointing out that that the EU and US have the 'largest economic relationship in the world' with a trade volume of € 700 billion and bilateral investment valued at almost € 2.4 trillion in 2011. Gross domestic product (GDP) in the EU and US could be boosted by € 163 billion by 2018 if half the non-tariff barriers were removed, they stress").

42 See WTO, *Committee on Government Procurement*, Doc. GPA/113 (2 April 2012).

43 See Centre for Economic Policy Research, *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment* 34 (Final Project Report, March 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf (last visited 26 February 2014). In the model used by the Center, an aggressive T-TIP agreement would be one which eliminated all tariffs, 25 percent of non-tariff barriers to trade (NTBs) on goods and services, and 50 per cent of procurement-related NTBs. The less ambitious T-TIP analysis assumed that the agreement could eliminate 98 per cent of all tariffs, 10 percent of NTBs on goods and services, and 25 percent of procurement-related NTBs; this less-ambitious version of the T-TIP agreement would produce smaller overall economic benefits.

44 Ibid. 46, Table 16.

45 Ibid. 47, Table 17 (conversion rate of € 1= US$ 1.28).

two parties already enjoy very low tariff rates, any T-TIP agreement must focus on non-tariff barriers to trade (NTBs) in order to make a significant impact.[46] Under the model described in the macroeconomic study by the CEPR (and sponsored by the European Union), procurement reform alone could increase GDP up to € 12 billion in the European Union and up to US$ 8.6 billion in the United States.[47] In this procurement-only scenario, the primary growth in trade would be seen in goods such as chemicals and motor vehicle for the European Union, and in chemicals and fabricated metals for the United States.[48]

Procurement-related non-tariff barriers to trade pose major hindrances to trade in many fields; expert opinion and private sector surveys have shown procurement-related non-tariff barriers to be the leading NTBs affecting construction services, and the second-ranked NTBs affecting iron, steel and metal products.[49] Studies have suggested that the main procurement-related NTBs facing firms in transatlantic trade are provisions favoring local firms (such as export controls in the United States, and the various "Buy American" preferences), discrimination against foreign entities, and a lack of transparency.[50] Major barriers to European access to procurement opportunities in the United States are the Berry Amendment, the Buy American Act (which covers supplies generally), and the Buy America Act (which applies to certain transportation infrastructure purchases).[51] The Small Business Act's preferences for small businesses and small-business set-asides also pose an indirect impediment to European firms seeking to win U.S. contracts.[52] Restrictions on U.S. access to European procurement stem from a number of factors, including favoritism of EU firms, delays in the finalization of contracts, and documentation issuance and reciprocity requirements in architectural and construction services.[53] Due to the administrative nature of the EU barriers, in comparison to the legal restrictions to access in the United States, it is hoped that the U.S. barriers will be more "actionable", or addressable through a T-TIP agreement (this issue is addressed further below).[54] It is also expected that the European Union will realize a greater macroeconomic benefit, but after a slight downturn in the short run, the United States will begin to realize long-term macroeconomic gains as well.[55]

The European negotiators hope to overcome a deeply embedded set of domestic preferences in U.S. procurements – including, for example, the "Buy American" preference which was a prominent part of the American Recovery & Reinvestment Act of 2009. The U.S. government has been reluctant to abandon these measures, and has included extensive reservations to free trade obligations under the WTO Government Procurement Agreement (GPA) and bilateral free trade agreements.[56] The European Commission estimated that "only 32% (€ 178bn) of the U.S. procurement market is open to EU businesses under the commitments recently taken by

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46 Ibid. 7.

47 Ibid. Note this is with a 50 per cent reduction in procurement-related NTBs.

48 Ibid. 37, Tables 10 and 11.

49 Ecorys, *Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis*, 166, Table 20.3, available at http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf (last visited 26 February 2014).

50 Ibid. xxv.

51 Ibid. xxxiv. The provisions at 41 U.S.C. §§ 10(a)-(d) are known as the Buy American Act, and they apply to all purchases of goods over the micropurchase threshold. 49 U.S.C. § 5323 is known as the Buy America Act and applies to transit-related grants to states and local organizations.

52 Ibid. 186-87.

53 Ibid. 38, 187.

54 Ibid. 187; European Commission CEPR Report (fn. 43 27.

55 See Ecorys (fn. 49 Table 20.4.

56 European Commission, *Impact Assessment Report on the Future of EU-US Trade Relations* 13 (12 March 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf (last visited 26 February 2014).

the US in the framework of the GPA."[57] In finalizing their impact assessment, the European Commission recommended:

> Finally, in respect of public procurement, we should aim at improving EU firms' access to public procurement opportunities in the US, inter alia by setting the following operational objectives:
>
> 1) increasing the coverage of federal procurement (e.g. additional procuring entities and removing Buy America conditions attached to federal funding);
>
> 2) broadening the coverage of the US sub-federal level both by increasing the number of states, as well as the coverage of those currently offered by the GPA;
>
> 3) persuading the US to progressively eliminate trade barriers to cross-border procurement ("Buy America(n)" provisions, sectoral derogations, in particular on mass-transit and with respect to SMEs).[58]

B. Launch of the T-TIP Negotiations

In his State of the Union Address on 12 February 2013, President Barack Obama announced his administration's intent to enter into negotiations with the European Union (EU) to create the Transatlantic Trade and Investment Partnership.[59] A month later, the European Union called on each of its member states to prepare for negotiations on this "game-changing trade deal",[60] and shortly thereafter, on 20 March 2013, the White House sent a memorandum to the House of Representatives detailing plans to initiate T-TIP talks within 90 days.[61]

The decision to pursue a free trade agreement with the European Union came at the recommendation of the U.S.-EU High Level Working Group on Jobs and Growth launched by President Obama and EU leaders in November 2011.[62] In its final report of 11 February 2013, the High Level Working Group urged policymakers to "initiate as soon as possible the formal domestic procedures necessary to launch negotiations on a comprehensive trade and investment agreement."[63]

The Group suggested a flexible agreement "designed to evolve over time" and geared toward producing substantial improvement in the areas of market access, regulatory issues and non-tariff barriers to trade.[64] With regard to procurement, the HLWG "recommend[ed] that the goal of negotiations […] be to enhance business opportunities through substantially improved access to government procurement opportunities at all levels of government on the basis of national treatment."[65]

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57 Ibid.

58 Ibid. 23.

59 Address before a Joint Session of Congress on the State of the Union, Daily Comp. Press Doc. 90 (23 February 2013).

60 European Commission, *European Commission Fires Starting Gun for EU-US Trade Talks* (12 March 2013), available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=877 (last visited 14 February 2014).

61 Letter from Ambassador Demetrios Marantis, Acting United States Trade Representative, to the Honorable John Boehner, Speaker of the United States House of Representatives (20 March 2013), available at http://www.ustr.gov/sites/default/files/03202013%20TTIP%20Notification%20Letter.PDF (last visited 26 February 2014).

62 Ibid.

63 High Level Working Group on Jobs and Growth, *Final Report* (11 February 2013), available at http://www.ustr.gov/sites/default/files/02132013%20FINAL%20HLWG%20REPORT.pdf (last visited 26 February 2014).

64 Ibid. 2.

65 Ibid. 3.

Throughout their report, the members of the High Level Working Group urged that the T-TIP negotiations be focused on increased transparency, regulatory harmonization and open access.[66]

Canada and Mexico have reportedly shown interest in joining the T-TIP,[67] and there are reports that the United States has suggested that Turkey be included in the agreement.[68]

The EU-U.S. agreement may be shaped by a prior trade agreement between Canada and the European Union, the Comprehensive Economic & Trade Agreement (CETA), the key elements of which were announced in October 2013.[69] The CETA agreement would (among other things) substantially open procurement markets, by opening all Canadian sub-central (including provincial and municipal) levels of government procurement to European vendors. Furthermore, Canada would, under the agreement, create a single electronic procurement website that would combine information on opportunities at all levels of government, to make it easier for European firms to compete.[70] European officials and others have noted that the Canadian agreement may serve as a template for the T-TIP agreement.

C. Importance of Procurement to the T-TIP Negotiations

As the T-TIP negotiations have unfolded, it has become clear that procurement is politically very important for the European negotiating team. The European Union would like to be able to point to negotiating success in procurement, to mollify European stakeholders who fear that a T-TIP agreement could grant U.S. exporters much broader access to other sectors in Europe, such as agriculture.

In addressing procurement, the European Union's key goal is gaining better access to "sub-central" markets in the United States, especially state procurement markets.[71] While integration of the European procurement markets under the EU directives and the WTO Agreement on Government Procurement (GPA) has, in effect, given U.S. exporters generally free access to sub-central procurement markets in the European Union, only 37 of the U.S.

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66 Ibid.

67 G. MOODY, *Mexico Will Ask to Join US-EU Transatlantic Trade Agreement*, Techdirt (blog) (14 March 2013), available at https://www.techdirt.com/articles/20130313/10181122311/mexico-will-ask-to-join-us-eu-transatlantic-trade-agreement.shtml; D. GABRIEL, *Economic Integration: Towards a North America-EU Transatlantic Free Trade Zone*, Global Research (26 March 2013), available at http://www.globalresearch.ca/economic-integration-towards-a-north-america-eu-transatlantic-free-trade-zone/5328543 (last visited 26 February 2014); J. Vey, R. EMMOTT & I. Melander, *France Threatens to Delay Quick Start of EU-U.S. Trade Talks*, Reuters (25 March 2013); Z. LAIDI, *French Commentary Warns Transatlantic Trade Agreement Likely to Be to Europe's Detriment*, World News Connection (19 March 2013).

68 G. MOODY, *Now US Wants Transatlantic Free Trade Agreement with European Union to Include Turkey: Who's Next?*, Techdirt (19 March 2013).

69 See European Commission, *Trade: Canada* (19 November 2013), available at http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/ (last visited 26 February 2014); see, e.g., Government of Canada, *Agreement Overview: The Canada-European Union Comprehensive Economic and Trade Agreement* 3 (2013), available at http://www.actionplan.gc.ca/en/page/ceta-aecg/agreement-overview (last visited 26 February 2014).

70 See European Commission, *Trade: News Archive: Facts and Figures of the EU-Canada Free Trade Deal* (18 October 2013), available at trade.ec.europa.eu/doclib/press/index.cfm?id=974 (last visited 26 February 2014).

71 See, e.g., European Commission, Directorate-General for Trade, Note for the Attention of the Trade Policy Committee of the Council of the European Union re: Transatlantic Trade and Investment Partnership (TTIP), Doc. 238/13 (21 June 2012), Attachment: EU-US FTA Negotiations, Non Paper on Public Procurement 2 (20 June 2012), available at http://www.iatp.org/files/TPC-TTIP-non-Papers-for-1st-Round-Negotiatons-June20-2013.pdf (last visited 26 February 2014).

states have agreed to open their markets under the GPA (typically only partially),[72] and almost no U.S. cities or other local governments have joined the free trade agreement.[73]
The U.S. government has long argued that principles of federalism bar the federal government from compelling the states to open their procurement markets under an international agreement, such as the GPA.[74] Rather than challenging that position, some in the European procurement community have suggested that Europeans could instead gain access to state procurement markets indirectly, through the federal government's grantmaking authority, as the federal government makes hundreds of billions of dollars of grants to state and local governments every year.[75] These Europeans argue that the United States could use grants to liberalize state procurement markets, by requiring that state grantees afford "national treatment" to vendors from Europe.

D. Federal Guidance on Grants and Its Impact on T-TIP Negotiations

In the T-TIP negotiations, were the United States to accede to European demands that state grantees not discriminate against European vendors, the U.S. commitment might ultimately be included in grants guidance – though, as is discussed below, the grants guidance might need to be amended to bar federal, state and local procurement preferences.
The U.S. government's grants guidance was recently overhauled. On 26 December 2013, the U.S. Office of Management & Budget (OMB), a part of the Executive Office of the President, issued final guidance combining the various circulars and guidance which had long governed federal grants to states, local governments and other grantees.[76] The U.S. government makes grants of hundreds of billions of dollars to state and local governments; in fiscal year 2010, for example, those grants totaled over US$ 500 billion.[77]
Before the revised grants guidance was issued, for over 20 years, the common rule which governed federal grants had generally barred grantees from discriminating based on state or local procurement preferences.[78] Although the common rule was changed in the last days of 2013, when OMB published the revamped guidance,[79] the revised guidance again set limited

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72 See, e.g., WTO, Doc. No. GPA/113 417-26 (2012) (text of revised GPA, awaiting ratification, lists states that have agreed to join GPA), available at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited 26 February 2014). As noted (fn. 2), the revised GPA took effect on April 6, 2014.

73 Ibid. 428 (handful of U.S. local authorities included in GPA).

74 See generally A., *Note & Comment: Federalism and International Trade: The Intersection of the World Trade Organization's Government Procurement [Agreement] and State "Buy Local" Legislation*, 4 B.Y.U. Int'l. & Mgt. Rev. 179 (2008).

75 See, e.g., European Commission (fn. 71 3.

76 78 Fed. Reg. 78, 590 (26 December 2013). The consolidated guidance is referred to informally as the "Super Circular" or the "Omni Circular."

77 U.S. Census Bureau, available at http://www.census.gov/compendia/statab/2012/tables/12s0431.pdf (last visited 26 February 2014).

78 See, e.g., 53 Fed. Reg. 8034, 8097 (1988) (text of common grants management rule: "[g]rantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference."); ibid. 8039 ("[t]he application of unreasonably restrictive qualifications and any percentage factors that give bidding advantages to in-State or local firms are barriers to open and free competition which are not in the public interest. Section __.36(c)(2) [the non-discrimination requirement of the grants common rule] was included in the proposed regulation to foster competition, fairness, and economy in the award of contracts");. see generally D. J. CANTELME, *Federal Grant Programs to State and Local Governments*, 25 Pub. Cont. L.J. 335 (1996).

79 78 Fed. Reg. 78, 590 (26 December 2013), available at http://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30465.pdf (last visited 26 February 2014).

procurement standards;[80] as before, section 200.319 of the new guidance (the procurement standard which bars state and local procurement preferences) does not apply to states.[81]
But even if the revamped grants guidance did bar state grantees from discriminating based on state preferences, a simple commitment not to discriminate might not be enough. Experience has shown that free trade agreements in procurement must also address non-tariff barriers to trade; in other words, it is not enough to treat foreign vendors without discrimination, if there are other procurement rules or processes (non-tariff barriers to trade) which in practice impede those foreign vendors. To address this second layer of trade barriers, the Europeans may insist that the U.S. government also require state (and presumably other) grantees to follow certain minimum procedural standards in procurement.
Notably, there is precedent for requiring federal grantees to follow certain procurement minimum standards, when the grantees procure using federal funds. OMB Circular A-110,[82] recently incorporated into the revamped grants guidance, previously required that universities and other non-profit grantees use procurement systems which met certain minimum standards, and historically OMB Circular A-102 (which applied to state and local government grantees) also imposed minimum requirements for procurement.[83]
As recently revised, however, the OMB grants guidance does not impose general procurement requirements on state grantees – the revised guidance, unlike past OMB guidance, does not describe in detail how grantees' procurement processes should be shaped. Per the discussion above, while the revised grants guidance issued on 26 December 2013 does include certain narrow procurement requirements, apparently for the most part those standards do not apply to state grantees.[84] Thus, if the procurement standards under federal grants are to apply to the states – if the United States is to address European concerns about trade barriers by imposing uniform procurement standards on state grantees when they procure using federal dollars – the revised grants guidance will have to be rewritten to extend the procurement standards (including, presumably, the bar against state and local preferences discussed above) to state grantees.

E. T-TIP Agreement: Long-Term Regulatory Cooperation in Procurement?

The discussion above focused on how the United States might accommodate Europeans' demand that European exporters be given the same access to sub-central procurement markets which U.S. exporters enjoy in Europe. A separate issue, however, is whether the United States and the European Union might erect a long-term structure for coordinating procurement rules, to facilitate transatlantic trade in the procurement markets.
While those involved have argued for using the T-TIP agreement to establish a long-term mechanism for cooperating on laws and regulations that may raise non-tariff barriers to trade,[85] procurement regulation has generally not been part of that discussion. The European

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80 78 Fed. Reg. 78, 631-334 (§§ 200.317-326).

81 See ibid. 631 (§ 200.317) ("[w]hen procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with § 200.322 Procurement of recovered materials and ensure that every purchase order or other contract includes any clauses required by section § 200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§ 200.318 General procurement standards through 200.326 Contract provisions").

82 Available at http://www.whitehouse.gov/omb/circulars_a110 (last visited 26 February 2014).

83 See, e.g., 42 Fed. Reg. 45, 889-91 (12 September 1977) (Attachment O to Circular A-102, Procurement Standards).

84 See § 200.317, 78 Fed. Reg. 78, 631.

85 Available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf (last visited 26 February 2014).

negotiators have instead indicated that the T-TIP agreement would be used to frame future cooperation in other spheres of regulation, aside from procurement.[86] Procurement need not, however, be left behind. Coordination on procurement matters would be relatively easy, and with better cooperation between the two procurement regimes, both bodies of regulation (U.S. and European) could be improved and harmonized, thus reducing transaction costs for market participants and materially enhancing competition on both sides of the Atlantic.

The benefits of using the T-TIP agreement to foster regulatory cooperation in procurement could carry far beyond the European Union and the United States, moreover. Because the two systems stand as the most advanced procurement regimes, a process which identified best practices between the two systems would be a powerful tool for shaping procurement laws in *other* nations. Regulatory cooperation under T-TIP could, in other words, do far more than strengthen procurement markets between Europe and the United States -- it could help forge a flexible, harmonized body of procurement law that could help shape the law in other jurisdictions, creating a truly "transnational" body of procurement law.

IV. Conclusion

While NAFTA was intended to create a free trade area between Canada, United States and Mexico, in fact the procurement-related provisions under NAFTA Chapter 10 were relatively limited. The T-TIP agreement between the United States and European, currently under negotiation, may well prove a much stronger instrument in opening procurement markets, especially sub-central markets in the United States. This is in part because the T-TIP agreement will likely build on the WTO Agreement on Government Procurement (GPA), which is emerging as the center point for international free trade agreements in procurement. There are, however, significant obstacles that must be overcome if the European Union and the United States are to make those gains in opening their respective procurement markets. At the same time, it is also possible that the T-TIP agreement will address a different class of barriers to trade – barriers based on regulatory disjunctures between the U.S. and European procurement regimes – by creating durable channels for cooperation, between Brussels and Washington, in harmonization of procurement rules. By fostering transnational cooperation, the T-TIP agreement would take a step beyond the GPA, and indeed two steps beyond NAFTA: more than just opening markets, and more than just eliminating procurement rules that impede international competition, T-TIP could open the door to a far more harmonized set of procurement rules internationally.

[86] See, e.g., European Commission, *EU-US Transatlantic Trade & Investment Partnership: Trade Cross-Cutting Disciplines and Institutional Provisions – Initial EU Position Paper* (2013), available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf (last visited 26 February 2014).