Reciprocity as Security: Reconsidering Third Country Access to European Critical Infrastructure Procurement

Nathan MEERSHOEK*

EU public procurement law provides different options for preventing geopolitically undesirable dependency on third country suppliers in critical infrastructure. Their effectiveness solely depends, however, on the willingness of national authorities to use those. Recently, the EU therefore adopted the International Procurement Instrument (IPI) Regulation, within the sphere of the Common Commercial Policy (CCP), to condition the access to public contracts for third country entities on reciprocity. This article explores the security dimension of this issue. After generally considering the role of sovereignty as a limit to international trade, the article specifies the security risks which may arise in a public procurement context and sets out the legal options for Member States to address those. The article then discusses how security intrinsically shapes CCP instruments and how the new regulation could indicate a shift in the EU's role, from facilitating legal options for Member States, towards the Commission itself restricting the market access for certain third countries. Although such bans ought to be based on a lack of reciprocity rather than security, in times of weaponized dependencies the security dimension is undeniable. When considering interdependence as a stabilizing force in international relations, reciprocity itself has in fact become a security objective.

Keywords: EU law, Public Procurement, National Security, Critical Infrastructure, Common Commercial Policy, International Procurement Instrument, Economic Interdependence, Sovereignty, World Trade Organization, Government Procurement Agreement

1 INTRODUCTION

While Russia's 2022 invasion of Ukraine showed Europe the bankruptcy of policies seeking for peace through trade with autocracies, the EU is still struggling in its relationship with China. In EU policy, China is now framed as both a close cooperation partner as well as a 'systemic rival' and 'economic competitor'.[1] At the same time, the US government is increasingly drawing EU Member States into its rivalry with China, by pushing for export restrictions on sensitive technology such

* Assistant Professor at Utrecht University Centre for Public Procurement (UUCePP) & Centre for Regulation and Enforcement in Europe (RENFORCE), Utrecht University School of Law. Email: n.a.meershoek@uu.nl.

1 *See* European Commission, *EU-China – A Strategic Outlook*, JOIN(2019)5 final, 1 (12 Mar. 2019).

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as the chipmaking machines of the Dutch company ASML. Although something of a shift towards a more realistic China policy is observable, there is still great divergence in trade approaches among the Member States with regards to China; depending on their relative economic interests rather than European geopolitical interests.

This divergence was for instance visible when German chancellor Scholz visited Chinese President Xi Jinping in November 2022 with a delegation of German businesses, despite French President Macron asking him to go together.[2] Around a week before, Germany had allowed the sale of stocks in the Hamburg port to the Chinese company COSCO Shipping.[3] These events are hardly surprising from a national-economic perspective when considering that in 2021 Germany was – by far – the EU's largest exporter to China and one out of only three EU Member States with a trade surplus.[4]

The focus of this contribution will be on public procurement, where the struggle is apparent as well. In recent years, the EU and its Member States have become increasingly concerned with security risks resulting from dependency on third country suppliers for goods and technologies used in critical infrastructure. In the Netherlands, for instance, different media outlets raised concerns about the procurement of Chinese surveillance drones by the Dutch National Police,[5] Chinese electricity cables by the Dutch electricity network provider[6] and the procurement of Chinese scanners by the Dutch border control in the Port of Rotterdam.[7] Public authorities sometimes tend to blame EU public procurement law for such outcomes, as the law generally aims to facilitate as wide as possible

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2 *Germany's Scholz Flies Out Under Fire to Meet Xi*, Politico (3 Nov. 2022), https://www.politico.eu/article/germany-olaf-scholz-criticism-embarks-china-trip-visit-xi-jinping/#:~:text=The%20chancellor%20visits%20Beijing%20but,over%20EU%20strategic%20priorities.&text=BERLIN%20%E2%80%94%20Two%20pillars%20of%20Germany%27s,security%20spending%20%E2%80%94%20collapsed%20this%20year (accessed 22 May 2023).

3 *German Go-Ahead for China's Cosco Stake in Hamburg Port Unleashes Protest*, Politico (26 Oct. 2022), https://www.reuters.com/markets/deals/german-cabinet-approves-investment-by-chinas-cosco-hamburg-port-terminal-sources-2022-10-26/ (accessed 22 May 2023).

4 With export value of 104,655 million euros in 2021, while the second place was covered by France with only 24,028 million euros. *See* Eurostat, *China-EU - International Trade in Goods Statistics*, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=China-EU_-_international_trade_in_goods_statistics (accessed 22 May 2023).

5 For this example *see* N. Meershoek et al., *Naar een betere bescherming van veiligheidsbelangen bij de aankopen van de Nationale Politie: Een eerste verkenning van enkele aanbestedingsrechtelijke vraagstukken*, Utrecht University Centre for Public Procurement & RENFORCE (2022).

6 *See Zorgen over Chinese kabels in Nederlands stroomnet*, Financieele Dagblad (3 Apr. 2022), https://fd.nl/bedrijfsleven/1435078/zorgen-over-chinese-kabels-in-nederlands-stroomnet (accessed 22 May 2023).

7 *See* e.g., *Douane gebruikt in buitenland bekritiseerde scanapparatuur uit China*, NRC (1 Feb. 2021), https://www.nrc.nl/nieuws/2021/02/01/douane-gebruikt-in-buitenland-bekritiseerde-scanapparatuur-uit-china-a4029991 (accessed 22 May 2023). *See also Meet the Huawei of airport security*, Politico (11 Feb. 2020), https://www.politico.eu/article/beijing-scanners-europe-nuctech/ (accessed 23 May 2023).

competition for public contracts based on the principles of non-discrimination and equal treatment.

The regulation, however, provides different options for safeguarding national security interests – as well as European economic interests – within tendering procedures.[8] Based on these options, different types of third country bidders can be excluded or bidders can be screened on their reliability. The extent to which these *options* effectively prevent third country dependencies in European critical infrastructure is determined by the willingness of the Member States and/or their contracting authorities to use those; often meaning a willingness to pay for more expensive European products. Recently, the EU adopted the International Procurement Instrument (IPI) Regulation[9] within the sphere of the Common Commercial Policy (CCP) to condition the access to public contracts for third country entities on reciprocity; granting the European Commission the power to deny access to the European public procurement markets for certain (groups of) third country suppliers .

Most legal literature on EU trade policy naturally focuses on the economic logic of trade liberalization. In that context, it often emphasizes legal protection for foreign companies as a way to ensure the economic welfare gains of trade liberalization. I will instead address the trade issue through a security lens. Security exceptions are systematically included in international trade law for a reason. Rather than looking at these exceptions as a mere exception to the rule, I will thus address the security issue as a systemic component and prerequisite for trade liberalization in the context of public procurement.

For that purpose, I will first generally consider the role of sovereignty as a limit to international trade. Secondly, I will specify the security risks which may arise in a public procurement context. Thirdly, I will consider the legal options for Member States to prevent third country dependency within the EU's internal market-based public procurement regulation. Fourthly, I will discuss how security shapes CCP instruments such as visible in the recently adopted IPI Regulation. I

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[8] *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC Text With EEA Relevance*, OJ L 94, 65–242 (28 Mar. 2014), *Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC Text With EEA relevance*, OJ L 94, 243–374 (28 Mar. 2014), and *Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the Coordination of Procedures for the Award of Certain Works Contracts, Supply Contracts and Service Contracts by Contracting Authorities or Entities in the Fields of Defence and Security, and Amending Directives 2004/17/EC and 2004/18/EC (Text With EEA Relevance)*, OJ L 216, 76–136 (20 Aug. 2009).

[9] *Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the Access of Third-Country Economic Operators, Goods and Services to the Union's Public Procurement and Concession Markets and Procedures Supporting Negotiations on Access of Union Economic Operators, Goods and Services to the Public Procurement and Concession Markets of Third Countries (*International Procurement Instrument – IPI) (Text With EEA relevance), OJ L 173, 1–16 (30 Jun. 2022).

will conclude on the nature of the EU as a security actor through public procurement regulation by comparing the internal sphere with the external sphere.

2 SOVEREIGNTY AS A LIMIT TO INTERNATIONAL TRADE

Relying on foreign entities in public procurement, or trade in general, is not per definition problematic from a security perspective. European integration itself, which has been a source of peace and security for its Member States, was built on economic interdependence within a continent tormented by war. In recent years, however, economic globalization and – interdependence are increasingly framed as 'weaponized' or even at the roots of international conflict.[10] Whether it concerns Russia's weaponization of energy or the increasing constraints on the free trade in technology, the idea of economic interdependence as a source of global stability seems to have lost its momentum.

In reality, free trade has always been limited by concerns of national security; even within the European Union. Adam Smith already observed in his *The Wealth of Nations* that setting limits to trade liberalization is necessary for all sectors which are connected to a state's military power.[11] More recently, interdependence theorists Keohane and Nye acknowledged the positive effects of economic interdependence on peace to first depend on concurrence of geopolitical interests, for instance through military alliance.[12] The prospect of absolute welfare gains by opening up markets would otherwise be obstructed by the fear of relative losses of power.[13]

But also within a military alliance, the fear of relative losses disrupts cross-border market functioning, paving the way for protectionism or 'subsidy wars' as shown by the recently announced investments in sustainable industry by the US government and the European Commission.[14] Even European economic

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[10] *See* H. Farrell & A. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 Int'l Sec. 42 (2019), doi: 10.1162/isec_a_00351. On being the roots of conflict, *see* M. Leonard, *The Age of Unpeace: How Connectivity Causes Conflict* (Penguin Random House UK 2022).

[11] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book IV, Ch. I, part I (Oxford University Press 1976).

[12] R. Keohane & J. Nye, *Power and Interdependence* 21 (4th ed., Longman 2012). Military force is then considered irrelevant for resolving economic issues among members of an alliance.

[13] The underlying theoretical assumption (based on comparative advantage economics) is that states will generally all gain from international trade liberalization, but, as observed by Gilpin, the gains are usually not distributed equally. Following a realist stream of thought, states will then generally prefer relative gains over absolute gains; more so when the issue strongly connects to their military power. *See* R. Gilpin, *Global Political Economy: Understanding the International Economic Order* 77 (Princeton University Press 2001). Again, between 'security allies' economic interdependence can still be fruitful, *see* more recently: T. Gehrke, *EU Open Strategic Autonomy and the Trappings of Geoeconomics*, 27 Eur. For. Aff. Rev. Special issue 66–67 (2022), doi: 10.54648/EERR2022012.

[14] US Congress (117th), Public Law 117–169 (16 Aug. 2022) (Inflation Reduction Act). For the plans of the European Commission, *see* Communication from the Commission, *A Green Deal Industrial Plan for the Net-Zero Age*, COM(2023) 62 final (Brussels 1 Feb. 2023).

integration is by its very nature still constrained and shaped by geopolitical and military power structures.[15] Franco-German rapprochement after World War II was originally based on the shared external threat of the Soviet Union and the hegemony of the United States in the North Atlantic Treaty Organization (NATO). Ever since the collapse of the Soviet Union and the EU's expansion eastwards, the EU still seems to be searching for a common purpose beyond the market.[16]

Successful trade liberalization should thus be based on concurrence of security interests or at least some geopolitical stability. 'Successful' in that sense does not refer to (short-term) economic gains, but to the potential of trade liberalization to maintain peace and strengthen security.[17] In terms of international law, this means that transnational cooperation and trade liberalization still depend on the sovereign will of states. The components of sovereignty under international law, such as sovereign equality, independence and peaceful co-existence aim to stabilize the relations between states.[18] Neither security nor sovereignty requires something close to complete industrial autarky for states. Globalization systemically decreased the extent to which geography limits economic activity, while states are still geographically demarcated. Globalization did not, however, decrease the primacy of states as the most influential actors in the global economy, as they – depending on their power – shape and confine its regulatory frameworks.

Economic interdependence within the EU is institutionalized in an internal market with a far-reaching absence of borders and export restrictions. Only in exceptional cases can Member States exercise their sovereign right to limit the free flow of goods and services; based on the security exceptions in the EU Treaties.[19] Institutionalization of free trade on the global level is much more limited. Although the WTO currently has 159 Member States, its functioning is severely constrained by security politics, as its rules seek to approach trade in isolation of politics. The geopolitical rivalry between the US and China has led to the paralysing of the judicial settlement mechanism of the WTO; underpinning that the functioning of free trade regimes requires geopolitical stability first.[20]

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15 In the case of military procurement, *see* N. Meershoek, *The Constraints of Power Structures on EU Integration and Regulation of Military Procurement*, 6(1) Eur. Papers 831–868 (2021).

16 The war in Ukraine might have revived the EU's security purpose; while also revealing the on-going military dependency on the US.

17 Notwithstanding that economic gains can be instrumental for that purpose.

18 Also referred to as the 'fundamental rights of states', *see* for instance M. Shaw, *International Law* 211–216 (6th ed., Cambridge University Press 2011).

19 *See* Arts 36, 52, 62, 65, 346 & 347 TFEU.

20 *See* e.g., *Trump Cripples W.T.O. as Trade War Rages*, The New York Times (8 Dec. 2019), https://www.nytimes.com/2019/12/08/business/trump-trade-war-wto.html#:~:text=Trump%27s%20widening%20trade%20war%20has,hears%20appeals%20in%20trade%20disputes (accessed 22 May 2023).

Geopolitical power structures and national security should thus be understood as natural constraints on trade liberalization.

Like in the EU Treaties, these natural constraints are explicitly embedded within the WTO's legal frameworks. The General Agreement on Tariffs and Trade (GATT), as well as the Government Procurement Agreement (GPA) include security exceptions for all actions which one of the contracting parties 'considers necessary for its essential security interests', in particular those 'relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment' or 'taken in time of war or other emergency in international relations'.[21]

Historically, these security exceptions have been used to adopt general trade measures against certain countries.[22] The US, for instance, invoked the exception to justify its policy of economically isolating Nicaragua (1985) and the European Community for the adoption of economic sanctions against Yugoslavia (1991). In 1975, Sweden even invoked the security exception for the justification of global import quota on certain footwear (leather shoes, plastic shoes and rubber boots),[23] based on the argument that the decrease of domestic production as a result of increasing import had become a 'critical threat to the emergency planning of Sweden's economic defence as an integral part of its security policy'.[24]

In 2019, a WTO panel rejected the self-judging nature of the security exception in a dispute brought by Ukraine against Russia for generally denying the transit of goods through its territory. Russia argued that there was an 'emergency in international relations' which presented threats to its essential security interests and that both determining its essential security interests and determining which actions 'it considers necessary' are the sole discretion of the state.[25] Although the Panel concluded that it had 'inherent jurisdiction' on the issue, it acknowledged the existence of an 'emergency in international relations' based on 'an objective fact, subject to objective determination'.[26] The UN General

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21 GATT, Art. XXI (b) (ii).

22 R. P. Alford, *The Self-Judging WTO Security Exception*, 697 Utah L. Rev. 708–725 (2011). The discussion of the WTO cases is largely derived from the author's dissertation, *see* N. Meershoek, *Sovereignty and Interdependence in EU Military Procurement Regulation*, 105-106, Dissertation Utrecht University (2023).

23 *See* the notification of the Swedish government: GATT, *Introduction of a Global Import Quota System for Leather Shoes, Plastic Shoes and Rubber Boots*, L/4250 (17 Nov. 1975).

24 GATT, *Council of Representatives Report on Work Since the Thirtieth Session*, L/4254, 17–18 (25 Nov. 1975).

25 WTO, *Report of the Panel, Russia – Measures Concerning Traffic in Transit*, para. 7.27, WT/DS512/R (5 Apr. 2019).

26 *Ibid*., paras 7.53, 7.77 & 7.102.

Assembly, after all, had recognized it as involving armed conflict.[27] The exception is thus not entirely 'self-judging'.

Determination of what a state *in concreto* may consider necessary for its essential security interests is then, according to the Panel, only limited by the obligation to apply the exception 'in good faith' and not 'as a means to circumvent' the GATT obligations.[28] The Panel concluded that, since the existence of an emergency (and even an armed conflict) was evident ever since 2014, while the transit bans could not be considered 'so remote from, or unrelated to' it that a causal relation would be unlikely, Russia could itself determine the necessity of the measures.[29]

The factual circumstances under which the exceptions from Article XXI can be invoked are thus not completely self-judging and subject to a certain extent of judicial review. Determining which measures are actually necessary appears to remain close to a nearly absolute exercise of a sovereign right. In contrast to the approach of the EU Court of Justice to security exceptions,[30] *Traffic in Transit* (2019) seems to indicate that judicial review of Article XXI GATT does not include a proportionality test. It appears that WTO bodies, being parts of what is merely a trade organization, would lack the legitimacy to balance the security interests of its members with the obligations prescribed by trade law.

Adam Smith defined the security constraint on free trade broadly, as he used his argument in defence of the British Acts of Trade and Navigation (1651) which completely excluded all non-British ships from shipping goods to Britain. These days, such a broad and nationalistic demarcation is unthinkable. National security as a limit to trade liberalization should somehow be linked to the protection of what is considered 'critical infrastructure'.

3 SECURITY RISKS IN CRITICAL INFRASTRUCTURE PROCUREMENT

Although defining the concrete interests of their national security is the sole responsibility of the Member States,[31] a common EU definition of 'critical infrastructure' is embedded in the Critical Infrastructures Directive (2008).[32] According to Article 2(a), critical infrastructure is generally – and quite vaguely – understood as comprising that

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27 *Ibid*., paras 7.122–7.123.
28 *Ibid*., paras 7.132–7.133.
29 *Ibid*., para. 7.146.
30 *See* e.g., Case 72/83, *Campus Oil*, EU:C:1984:256, paras 37–51.
31 This was for instance confirmed by the Court in a public procurement context in Case C-187/16, *Commission v. Austria*, EU:C:2018:194, para. 75.
32 *Council Directive 2008/114/EC of 8 December 2008 on the Identification and Designation of European Critical Infrastructures and the Assessment of the Need to Improve Their Protection*, OJ L 345, 75–82 (23 Dec. 2008).

what is 'essential for the maintenance of vital societal functions, health, safety, security, economic or social well-being of people'. Such assets or systems include activities which are inherently performed by the government, such as the deployment of the police and the military, as well as activities which can be outsourced to public – or private companies, such as the supply of energy and drinking water.[33] In all scenarios, the state remains responsible for the protection and continuity of critical infrastructure, as the security of its citizens depends on it. There is a great variety of potential threats to the functioning of critical infrastructure, coming for instance from war, natural disasters, organized crime and terrorism. A non-negligible share of potential threats arises in the context of public procurement, as through procurement a – small or large – part of the responsibility for the construction or maintenance of a critical function of society can be transferred to a third party.

Much of public procurement in the context of critical infrastructure then brings along national security risks. The *Dutch National Coordinator for Counterterrorism and Security* has, for instance, distinguished three categories of risks in public procurement. Outsourcing to an unreliable (third country) economic operator can result in (1) the disturbance of the continuity of critical infrastructure, (2) leakage of confidential information such as state secrets and (3) a dependency on countries with different geopolitical interests.[34] The third category of risks has gained particular attention in EU politics ever since the Union's 2016 Security Strategy called for 'strategic autonomy'.[35] In the meantime, different EU policies have sought for more European self-sufficiency in certain industries, such as visible in the enactment of the European Defence Fund and the Commission's proposal for the European Chips Act.[36] Yet, the extent to which EU Member States appear willing to rely on particular third countries with different geopolitical interests still differs extensively throughout the Union, compromising any type of 'strategic autonomy' on the supranational level.[37] Europe's energy crisis, which resulted from a deliberately

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[33] *See* for instance the Dutch approach: *National Coordinator for Counterterrorism and Security (NCTV), Critical Infrastructure (Protection)*, https://english.nctv.nl/topics/critical-infrastructure-protection (accessed 22 May 2023).

[34] NCTV, *Factsheet Nationale veiligheid bij overnames en investeringen of inkoop en aanbesteding* (Den Haag 21 Jun. 2018).

[35] EU External Action Service, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy* (Jun. 2016).

[36] *Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 Establishing the European Defence Fund and Repealing Regulation (EU) 2018/1092*, OJ L 170, 149–177 (12 May 2021), and European Commission, *Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework of Measures for Strengthening Europe's Semiconductor Ecosystem (Chips Act)*, COM(2022)46 final (Brussels 8 Feb. 2022).

[37] The EU has so far been unable to impose bans on Chinese investments in Member State critical infrastructures through public procurement, *see* T. Poutala et al., *EU Strategic Autonomy and the Perceived Challenge of China: Can Critical Hubs Be De-weaponized?*, 27 Eur. For. Aff. Rev. Special issue 79–89 (2022), doi: 10.54648/EERR2022015.

created energy dependence on Russia, based on financial reasons, underlines the geopolitical naivety present in many EU Member States.[38]

4 PROTECTING NATIONAL SECURITY WITHIN THE INTERNAL MARKET-BASED PUBLIC PROCUREMENT REGULATION

As part of the economic interdependence rationale of European integration, the first public procurement directives were adopted in the 1970s to integrate this segment of the internal market by banning discriminatory practices.[39] As such, the logic of EU public procurement regulation is liberalization of the markets for public contracts by harmonization of laws and adherence to common legal principles in the procurement of the Member States.[40] These legal principles most importantly include the principles of non-discrimination, equal treatment, transparency and proportionality.[41]

Article 21 TEU requires the Union's external actions 'to be guided by the principles which have inspired its own creation' and more specifically to 'encourage the integration of all countries in the world economy'. To a far extent this appears to be accurate for the Union's actions in international public procurement liberalization. Together with countries like Canada, the United States and Japan it has been a party to the WTO's GPA since its establishment in 1994, aiming for 'greater liberalization and expansion' of international trade. Following the obligation for the EU to ensure consistency between its policies, such external actions should also be integrated in the approach to third countries within the internal market-based public procurement regulation. The GPA obligations therefore flow through into this regulation.

This section explores the possibilities under the internal market-based public procurement regulation to prevent third country dependencies to consider its potential contribution to protecting European critical infrastructures.

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[38] Such 'naivety' is apparent in the public procurement of many Member States as well, such as Romania, *see* I. Baciu, *The Exclusion of Third-Country Suppliers from EU Public Procurement Procedures: The Romanian Case*, 16 Eur. Procurement & Pub. Priv. P'ships L. Rev. 153 (2021), doi: 10.21552/epppl/2021/2/8. Following pressure by the Commission, Romania has amended its public procurement legislation in this respect (*see ibid.*, at 155–156).

[39] *Council Directive 71/305/EEC of 26 July 1971 Concerning the Co-ordination of Procedures for the Award of Public Works Contracts*, OJ L 185, 5–14 (16 Aug. 1971) on works, and *Council Directive 77/62/EEC of 21 December 1976 Coordinating Procedures for the Award of Public Supply Contracts*, OJ L 13, 1–14 (15 Jan. 1977) on goods.

[40] *See* e.g., W. Janssen, *EU Public Procurement Law & Self-Organisation – A Nexus of Tensions & Reconciliations* 30 (Eleven International Publishing 2018).

[41] Article 18(1) of the PP Directive.

4.1 The EU's public procurement directives for the public sector and utilities

For regular public procurement procedures which fall within the scope of Directive 2014/24/EU (the 'PP Directive'), the contracting authorities should, in principle, provide access for economic operators established in states that are party to the GPA or with whom the EU has agreed so within a specific free trade agreement.[42] Contracting authorities should then treat those foreign economic operators equally, as if they were established in the Union. There is no obligation to provide access to public procurement procedures for economic operators which are established in countries with whom the EU has not agreed to reciprocally open up their public procurement markets. But there is also no rule prohibiting contracting authorities to provide access to such entities, unless there would be specific sanctions applicable. Member States thus have broad discretionary powers in strategically determining the access for third country bidders from outside the GPA or specific agreements within the context of the CCP.

To complicate things further, most issues with third country dependencies arise with economic operators which are established in the Union – and therefore have the right to equal treatment – but are under the effective control of a foreign entity and/or primarily supply goods which originate from outside the Union or GPA territory. There is arguably somewhat more control over – and trust in – entities falling under the jurisdiction of a Member State or GPA country. This does not, however, significantly take away the security risks, as procuring from such an entity might just as well lead to geopolitically unfeasible dependencies and/or unreliable tenderers with a view to national security. There is no general solution to this problem in the PP Directive. Contracting authorities are allowed to set specific sustainability and social conditions, or technical specifications which could be more difficult to fulfil for third country suppliers, but such conditions should still be related to the subject-matter of the contract.[43] Contracting authorities are therefore not generally allowed to require goods to have a specific origin.[44]

In Article 85 of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (the 'Utilities Directive'), there is a specific solution to the potential security problem. Contracting authorities falling within the scope of this Directive are allowed to reject any tender for a

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42 *Ibid*., Recital 17.

43 Such as eco-labels, *see ibid*., Recital 75, Arts 42(1), 43 and Art. 70. *See* under 'quality standards' in Communication from the Commission, *Guidance on the Participation of Third Country Bidders and Goods in the EU Procurement Market*, COM(2019)5494 final (Brussels 13 Aug. 2019). The Commission also sets out how to use the option to exclude 'abnormally low tenders' based on Art. 69 of the PP Directive for the same purpose.

44 *Ibid*., Art. 42(4).

supply contract 'where the proportion of the products originating in third countries […] exceeds 50% of the total value of the products constituting the tender' (paragraph 2). In the utilities sectors there is thus an extensive possibility to prevent third country dependencies, as far as there are no specific trade relationships with the respective third country embedded within the GPA or a specific free trade agreement. All still depends, however, on the willingness of national contracting authorities to use the provision.

4.2 Extra room for preventing third country reliance in the Defence Directive

Unlike for the public procurement procedures that fall within the scope of the regular and utilities directives, within the scope of Directive 2009/81/EC on public procurement in the fields of defence – and security ('the Defence Directive') there is no general obligation to allow access to third country bidders from GPA countries. The Directive simply proclaims that all contracts falling within its scope, whether relating to military equipment or security in general, are exempted from the application of the GPA based on Article III(1). The EU cannot, however, exempt specific contracts from the application of the GPA.[45] Only the contracting authorities of the Member States can decide for concrete procurement contracts as to whether exemption is '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 defence purposes'. The Defence Directive only stipulates that categorically exempting those contracts is allowed.

Excluding economic operators which are established in third countries – whether within the GPA or not – is thus possible based on the Defence Directive. Like for the other directives in the case of economic operators established in EU or GPA countries, in the context of the Defence Directive the question quickly arises as to what to do in case of bidders established within the EU who supply third country goods or are controlled by third country shareholders. For such cases, the Defence Directive has added to the regular exclusion grounds the possibility to exclude any economic operator who is considered 'on the basis of any means of evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of the Member State'.[46]

This ground for exclusion is significant, both for its broad material scope and the evidence it requires. The EU legislature left the involved security risks

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[45] Also mentioned in: L. Butler, *Transatlantic Defence Procurement: EU and US Defence Procurement Regulation in the Transatlantic Defence Market* 159 (Cambridge University Press 2017).

[46] Directive 2009/81/EC, *supra* n. 8, Art. 39(2)e.

completely open, as only the Member States can determine their interests of national security and subsequently set appropriate standards in their procurement procedures. The Defence Directive does indicate that these risks could 'derive from certain features of the products supplied by the candidate, or from the shareholding structure of the candidate'.[47] This results in an unprecedented wide margin of appreciation for contracting authorities, if they signal a significant risk. Even if a certain economic operator obtains the necessary security clearances for performance of the contract, certain individuals of the personnel of the company could endanger the reliability of the Member State's security. Although exclusion would still be subject to the principle of proportionality, effective judicial protection will quickly be compromised by the secrecy of the information. It will then be extraordinary complex for a court to adjudicate whether exclusion would be a disproportionate means in light of the signalled security risk.

Particularly in the case of foreign security clearances which are considered equivalent by the buying Member State, Article 22 of the Directive mentions that there still is 'the possibility to conduct and take into account further investigations of their own'. Depending on the sensitivity of the classified information which needs to be shared with the contract performer, contracting authorities can request their intelligence services to conduct extra investigations, on foreign EU-based – as well as domestic operators. The results of these investigations, which are protected data sources, can then provide evidence based on which an operator might be excluded. As opposed to the other exclusion grounds and the regular PP Directive, the contracting authority would not be obliged to disclose this evidence. This lack of transparency, as mentioned by Trybus, can lead to 'an impression of arbitrariness' and 'danger of abuse'.[48] Even in a review procedure, contracting authorities can only be required to motivate their decision in general and vague terms, as the real evidence consists of protected data sources.

In addition to exclusion based on unreliability, it could be argued that contracting authorities in the fields of defence and security could also use the aforementioned provision in the Utilities Directive to exclude tenders where more than 50% of the value consists of goods originating in third countries, as it would not contradict the purpose of the Defence Directive – i.e., providing extra room to protect security – and the principle of non-discrimination as that does not apply to third countries in this context.[49] As the Directive generally allows for discrimination based on third country establishment, it will be even more difficult for such

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47 *Ibid*., Recital 65.

48 M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* 387 (Cambridge University Press 2014).

49 N. Meershoek, *Nationale veiligheid als natuurlijke begrenzing van EU aanbestedingsliberalisering*, Tijdschrift Aanbestedingsrecht & Staatssteun 24–36 (2021).

economic operators, as compared to foreign EU-based companies, to prove any wrongdoing of the contracting authority.

Within the internal domain, the Defence Directive has not proven to be effective at all, as it has failed to reach its primary objective of integrating the military procurement markets.[50] Member States still extensively use Article 346 TFEU to exclude the application of the Directive.[51] Based on its military security function, the strict demarcation of Common Foreign and Security Policy (CFSP) and TFEU competences as required by Article 40 TEU and the Court's centre of gravity method, I have previously argued that the Defence Directive has not been adopted under the correct legal basis in the EU Treaties. It should have primarily been regulated within the intergovernmental Common Security and Defence Policy (CSDP) instead of the internal market.[52] The EU could then still have a role as a 'security actor' in its military procurement regulation, which is only a particular segment of critical infrastructure procurement. Though the EU would have a greater potential to *effectively* regulate military procurement, its role as a security actor would then naturally be more limited than within the supranational instruments due to the inefficiencies which are inherent to a more intergovernmental approach.

It is rather unsurprising in this context that the Commission, in response to the tremendous military procurement challenges raised by the war in Ukraine, has recently been focusing on stimulating collaborative procurement rather than procurement liberalization.[53]

4.3 Security exceptions in the EU Treaties: Room for national policy?

As national security has remained the sole responsibility of the state, both EU law and international trade law – which are legal orders based on the legal authority of those states – are naturally constrained by it. In EU internal market law this constraint is primarily found in the exceptions based on public security or public

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50 For the definition of 'military equipment', *see* Case C-615/10, *Insinööritoimisto InsTiimi*, 07 Jan. 2012, ECLI:EU:C:2012:324, para. 40.

51 *See* European Parliament, *EU Defence Package: Defence Procurement and Intra-Community Transfers Directives European*, Implementation Assessment, European Parliamentary Research Service (Oct. 2020). Within the time period 2016–2018 only 11.71% of the contract value was awarded based on the Directive (at 86–98) and even for those contracts, 86% was still awarded to a bidder established in the country of the contracting authority between 2016–2020 (*see* at 97–98).

52 *See* N. Meershoek, *Why the EU Internal Market Is Not the Correct Legal Basis for Regulating Military-Strategic Procurement – On Functional Division of Competences*, 47 Eur. L. Rev. 353–375 (2022). *See also* Meershoek, *supra* n. 22, at 191-215.

53 *See* for instance: *Proposal for a Regulation on Establishing the European Defence Industry Reinforcement Through Common Procurement Act*, COM(2022) 349 final (Brussels 19 Jul. 2022).

policy of Articles 36, 52, and 62 TFEU, as well as the exception based on national security of Article 346 TFEU.

When it comes to security in terms of *security of supply*, this was already confirmed in the internal market context by the Court in *Campus Oil* (1984). The Court accepted in this case the measures of Ireland aimed to protect its domestic oil refinery against foreign competition for security-of-supply reasons, despite the existence of EU measures on this issue. The Court considered that petroleum was deemed of 'exceptional importance' as an energy source in modern economy and thereby even for the existence of a country.[54] More generally, the Court has defined the national security responsibility of Article 4(2) TEU to comprise 'the prevention and punishment of activities capable of seriously destabilizing the fundamental constitutional, political, economic or social structures of a country'.[55] It appears that national security and critical infrastructure are different conceptualizations of the same function under EU law.

The Court ruled in *Commission v. Austria* (2018) on the use of security of information as an exception to EU public procurement law. The judgment concerned both the exception in the specific public procurement Directive as well as Article 346(1)a TFEU which reads that 'no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security'. Similar exceptions are included in the current PP Directives.[56] The ruling concerned a public contract for the printing of all types of official documents such as passports. Under Austrian law, all federal printing contracts were exclusively awarded to the formerly state-owned company *Österreichische Staatsdruckerei GmbH* (ÖS) when secrecy or compliance with security rules was deemed necessary.[57] Austria argued that directly awarding these service contracts would protect its essential security interests and that the contracts therefore fall outside the scope of the EU Treaties and the PP Directives.[58]

Most crucial is to understand that it is for the Member States only to define their essential security interests based on Article 346(1)a TFEU.[59] It is then only for the Court (and EU law in general) to test whether a specific measure fits the way in which the Member State has defined its security interests and whether it does not go beyond what is necessary to meet the defined interests. The burden of proof for this is on the Member States. The Court clarified this by stating that it is for the

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54 Case 72/83, *Campus Oil*, *supra* n. 30, paras 34–35.
55 Case C-623/17, *Privacy International*, EU:C:2020:790, para. 74 and Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net*, EU:C:2020:791, para. 135.
56 *See* Art. 15(3) of the PP Directive and Art. 13a of *Directive 2009/81/EC, supra* n. 8.
57 Case C-187/16, *Commission v. Austria*, *supra* n. 31, paras 14–16.
58 *Ibid*., para. 37.
59 *Ibid*., para. 75.

Member States to show that a derogation is necessary in order to protect its security interests and that these could not have been protected within a competitive tendering procedure as provided by the secondary legislation.[60]

Austria failed to prove that its essential security interests could not have been protected within a more open procurement procedure in which the bids of more economic operators would have been considered. According to AG Kokott, it could be allowed to derogate from EU law 'simply' because a Member State wishes to not disclose security-related information to foreign economic operators or economic operators controlled by foreign nationals, especially when it concerns economic operators from third countries.[61] Likewise, AG Kokott emphasizes that 'A Member State can also legitimately ensure that it does not become dependent on non-member countries or on undertakings from non-member countries for its supplies of sensitive goods'.[62] In the present case, the ÖS was privatized by Austria without any restrictions on foreign ownership. Therefore, it could not convincingly be argued by Austria that the protection of security-related information justified the categorical refusal to open the contract up to other economic operators.[63]

4.4 Interim conclusion

Considering that even within the Union there are certain processes within the critical infrastructure of the Member States for which only domestic entities are deemed reliable, constraints on the access of third country operators in European public procurement should be even greater. Contracting authorities therefore have flexibility under EU public procurement law and its exceptions to protect their national security.

Within the internal market-based public procurement regulation there are thus legal *options* to exclude third country influences in critical infrastructure, especially in the context of the Utilities Directive and the Defence Directive. There are, however, no *obligations* to protect critical infrastructures from third country influences. Consequently, Member States sometimes tend to choose cheap over secure. In a context of 'weaponized interdependence', this indicates a stronger role for the EU as a security actor in its external trade relations to reach a certain level of industrial and technological strategic autonomy.

The next section explores the security dimension that it creates in the Union's CCP. I will discuss the recently adopted IPI Regulation as an example of the CCP's securitization.

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60 *Ibid*., paras 78–79.
61 Opinion of AG Kokott in Case C-187/16, *Commission v. Austria*, EU:C:2017:578, para. 70.
62 *Ibid*.
63 *Ibid*., para. 71.

5 SECURITY WITHIN THE UNION'S CCP IN THE FIELD OF PUBLIC PROCUREMENT

There are serious security limitations to the CCP's liberalization objective as envisioned by the aforementioned Article 21(1) TEU.

With regards to exports, for instance, this limit is visible in three different layers. First, the export of military equipment is excluded from the application of the CCP based on Article 346 TFEU. Instead it has been softly regulated within the context of the CSDP by a Common Position of the Council.[64] Although Member States should take into account the national security of each other as well as that of friendly and allied countries,[65] in reality there is little convergence in military export policies. In the month before Russia's 2022 invasion of Ukraine, Germany was, for instance, still blocking arms exports to Ukraine.[66] Secondly, despite a common system for the export of dual-use goods, Member States are allowed to restrict intra-Union transfers to safeguard public policy and public security based on Article 36 TFEU[67] and to limit the export of dual-use items which are not listed in Annex I to the Regulation for reasons of public security.[68] Thirdly, exports in general can be limited for security reasons, as envisioned by the security exceptions within the general export regulation.[69] Following the Court's judgment in *Aimé Richardt*, this concerns both internal – and external security.[70] In *Leifer* and *Werner* the Court considered that it is difficult (and too artificial) to draw a hard distinction between security and foreign policy, as the former necessary depends on the latter. In a globalized world, it would be dysfunctional to consider the security of a state in isolation and to neglect the overall security of the international community. Therefore, the Court concluded that 'the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State'.[71]

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64 *Council Common Position 2008/944/CFSP of 8 December 2008 Defining Common Rules Governing Control of Exports of Military Technology and Equipment*, OJ L 335, 99–103 (13 Dec. 2008).

65 *Ibid*., Art. 2.

66 *Germany Blocks Estonia from Transferring Weapons to Ukraine*, The Baltic Times (23 Jan. 2022), https://www.baltictimes.com/germany_blocks_estonia_from_transferring_weapons_to_ukraine/ (accessed 23 May 2023).

67 Dual-use items are goods and technology which can be used for both civil and military purposes. *See Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 Setting Up a Union Regime for the Control of Exports, Brokering, Technical Assistance, Transit and Transfer of Dual-Use Items (Recast), PE/54/2020/REV/2*, OJ L 206, 1–461, recital 28 (11 Jun. 2021).

68 *Ibid*., Art. 9.

69 *Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on Common Rules for Exports (Codification)*, OJ L 83, 34–40 (27 Mar. 2015).

70 Case C-367/89, *Aimé Richardt*, EU:C:1991:376, para. 22.

71 Case C-70/94, *Fritz Werner Industrie Ausrüstungen GmbH*, EU:C:1995:328, paras 25–27.

The cases discussed previously show that exports may lead to security risks for the Union and the Member States. Although limited by the national security of the Member States, as described above, the CCP also possesses a security dimension as it provides the groundwork for how the Member States should deal with these security risks.[72] Deviating from the Union's common approach is then the exception to the rule. More generally, by possessing the exclusive competence to shape the external trade relations of the Member States, the Union determines the general level of economic interdependence with third countries.

A more specific example of the CCP's security dimension is the 2019 Regulation on the screening of Foreign Direct Investment (FDI).[73] This regulation aims to provide a Union level framework for the screening of FDI by the Member States.[74] Given the exclusive security responsibility of the Member States, the regulation does not affect their discretion to adopt a screening mechanism in the first place nor individual decisions 'to decide whether or not to screen a particular foreign direct investment'.[75] Its novelty lies in the list of factors which the Member States may take into consideration to determine whether a foreign direct investment is likely to affect security or public order, the cooperation mechanisms between the Commission and the Member States to discuss the impact on security and public order and the option for the Commission to 'issue an opinion' on investments likely to affect projects or programmes of Union interest.[76] The Regulation shows that the CCP inherently has a security dimension. The Member States, however, remain in charge as to whether actually taking restrictive measures.

Not being explicitly framed as a security instrument, the recently enacted IPI Regulation potentially grants a much greater role to the Commission. The Regulation aims to achieve reciprocity in the access to public procurement markets in countries that are not participating in the WTO's GPA.[77] Although China is not specifically mentioned in the Regulation, the Commission called on the European Parliament and the Council to adopt its amended proposal in its 2019 *EU-China Strategic Outlook*. In the *Strategic Outlook*, the Commission

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[72] In a more general sense, the CCP is a vehicle for the pursuit different types of foreign policy objectives, *see* for instance: J. Larik, *Much More Than Trade: The Common Commercial Policy in a Global Context*, in *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World*, 23–34 (M. Evans & P. Koutrakos eds, Bloomsbury Publishing 2011).

[73] *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union*, OJ L 79I, 1–14 (21 Mar. 2019).

[74] *Ibid*., recital 5.

[75] *Ibid*., Arts 1(3) and 3(1).

[76] *Ibid*., Arts 4 and 6–8.

[77] *Regulation (EU) 2022/1031, supra* n. 9, recital 20 and Art. 1(1) (30 Jun. 2022).

emphasized the importance of public procurement as one of the policy domains which the EU should use to reach a more balanced economic relationship with China.[78]

Whereas the FDI Regulation merely provides guidance to the Member States in screening foreign involvement in the European economy, the IPI Regulation creates the possibility for the Commission to prohibit the contracting authorities in the Member States to procure from foreign economic operators from those countries for which it has adopted an IPI measure and with regards to the sectors to which that measure is applicable.

To achieve this objective, the Commission can start an investigation – on its own initiative or upon a substantiated complaint of an interested party or a Member State – into the allegedly restrictive measures of a third country which result in 'a serious and recurrent impairment of access of Union economic operators, goods or services to the public procurement or concession markets of that third country'.[79] Subsequently, the Commission will invite the third country for consultations with the purpose of eliminating the restrictive measures or practices.[80] If these consultations do not lead to any changes in the existence of the practice, the Commission can ultimately adopt an IPI measure if it considers this to be in the interest of the Union. Such an IPI measure restricts the access of economic operators, goods and services from that third country to public procurement procedures in the EU Member States by requiring contracting authorities to impose a score adjustment on economic operators from that third country or completely excluding those economic operators.[81]

The reciprocity rationale behind the IPI Regulation is clear. The assumption underlying the regulation is that while the EU's public procurement markets are generally open to bidders from third countries, European companies do not have equal access to foreign public procurement markets.[82] From a legal perspective, the EU public procurement markets are not necessarily as open as the Commission presents them to be. As discussed before, there is a variety of options to exclude third country bidders or products. The openness of the European procurement market, at the moment, depends on the procurement policies of the Member States and their contracting authorities rather than EU law or policy. However, when comparing EU public procurement law on third countries with the rules in other countries, it is

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78 European Commission, *EU-China – A Strategic Outlook*, Joint Communication JOIN(2019) 5 final, 7 (12 Mar. 2019).

79 *Ibid*., Arts 2(1)I and 5(1).

80 *Ibid*., Art. 5(2).

81 *Ibid*., Arts 6(1) and 6(6).

82 According to the Commission, whereas the EU public procurement market with a value of 2,4 trillion euros is open to bidders from all around the world, more than half of the 8 trillion euros worldwide public procurement market is closed off to European companies, *see* Commission, *supra* n. 43, at 6.

clear where the assumption comes from. Article 10 of the *Government Procurement Law of China*, for instance, requires Chinese authorities to only procure domestic goods, works and services, except when these are not available in China or 'cannot be acquired on reasonable commercial terms'.[83]

The IPI Regulation could thus have an enormous impact on the access for certain third countries to the public procurement markets of the EU Member States. Considering the security dimension of economic interdependence, it potentially also increases the role of the Commission as a security actor through the CCP. Interdependence implies some level of balance and symmetry in dependency.[84] When it comes to public procurement, it is clear that such balance can only be based on the reciprocity that the IPI Regulation seeks to achieve.

6 CONCLUSION: RECIPROCITY AS SECURITY

International trade liberalization and European economic integration are generally constrained by diverging national security interests; generally embodied by the different types of security exceptions of their legal regimes. It has therefore been difficult for the Union to be an influential security actor through its supranational internal market- and trade competences with regards to public procurement. So far, public procurement regulation has been silent on whom not to trade with based on considerations of European security. The Union has only been able to create and coordinate legal instruments which provide the Member States legal options to limit the market access of third country entities (e.g., FDI Regulation, Public Procurement Directives etc.). In contrast, the Union has been influential in deciding who the Member States should provide access to by signing the GPA and other free trade agreements, although the Member States can still derogate based on their collective or individual security interests.

The IPI Regulation is different in that regard and could indicate a shift in the Union's trade policy, as it gives the Commission the power to completely ban third countries outside the GPA from the public procurement procedures of the Member States. Although this should be based on a lack of reciprocity rather than *European security*, in times of weaponized dependencies the security dimension is undeniable. When considering *inter*dependence as a stabilizing force in international relations, reciprocity itself has in fact become a security objective as it preserves symmetry in

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[83] *See* The Government Procurement Law of the People's Republic of China (Order of the President No.68) 2002, Art. 10. *See also* P. Wang, *China's Evolving Legal Framework on Public Procurement*, Pub. Procurement L. Rev. 312 (2004).

[84] Otherwise it loses its stabilizing function, *see* Farrell & Newman, *supra* n. 10, at 42–79.

dependencies.[85] An increased emphasis on security within the EU's trade policy naturally results – at least to a certain extent – in a *unilateral turn*. It remains to be seen whether the IPI Regulation can play a role of significance, as that will depend on the Commission's political willingness to go against the powerful third countries (China?) and how effective it can be in case of unwilling Member States.

The outbreak of the 2022 war in Ukraine showed Europe the toxicity of economic dependence on an expansionist autocratic state. Yet, Member States are still welcoming Chinese companies, products and investments into their critical infrastructures. If the Commission would succeed in either achieving more reciprocity with non-GPA countries in access to public procurement markets or unilaterally banning the unwilling completely, it would be a first step towards a more realistic trade policy.

[85] As it is framed as an economic instrument, most will consider the IPI Regulation to primarily concern economic interests, *see* Gehrke, *supra* n. 13, at 70.