ARTICLES

Tvisha Shroff & Katrin Kuhlmann, *A Legal Perspective on Digital Trade: Keeping the Internet Neutral*

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NOTES AND COMMENTS

Wolfgang Alschner and Dmitriy Skougarevskiy, *Convergence and Divergence in the Investment Treaty Universe- Scoping the Potential for Multilateral Consolidation*
The Trans-Pacific Partnership ("TPP") would have been by far the world’s largest regional trade agreement. The TPP will still be of tremendous regional importance if it endures in some form following the recent withdrawal from it by the USA, and if the USA incorporates the procurement related concessions reached while negotiating the TPP into bilateral agreements. As a complex multi-theme agreement, the TPP also covers government procurement among many other issues. While the TPP on the whole may not bring about a Copernican revolution in terms of actual trade liberalisation and market access, the TPP procurement chapter may bring about a huge change in terms of opening the TPP parties’ government procurement markets to foreign competition.

Prior to the TPP, among the TPP parties, only the USA, Canada, Japan and Singapore have been long-standing parties to the WTO Government Procurement Agreement ("GPA") which New Zealand joined only in 2015 and Australia has been negotiating its accession. Apart from that, the scope of other public procurement liberalising international trade commitments has been very limited in the South-East Asia region and among TPP-signatories from South America, with only North American TPP-signatories having their public procurement markets previously integrated under the North American Free Trade Agreement ("NAFTA"). Public procurement relevant commitments within the Association of South-East Asian Nations ("ASEAN") have been very limited and unclear, whereas procurement rules agreed upon by members of the Asia-Pacific Economic Co-operation ("APEC") have been non-binding. Liberalisation of public procurement markets in the Trans-Pacific area did not gain momentum until (i) the
Procedural provisions imposed by the TPP procurement chapter virtually copy provisions of the GPA with minor modifications only, and this convergence implies that the determination of the TPP procurement chapter’s coverage in principle emulates solutions of the GPA model (with lists of covered procurers, goods, services and construction services as well as value-thresholds, along with averaged scope of country-specific commitments). Major deficiencies of the TPP procurement chapter’s coverage can be seen in some countries’ refusal to cover sub-central procurers (in the case of Malaysia, Mexico, New Zealand, United States and Vietnam) and utilities services (in the case of Canada, Mexico and Vietnam) as well as in extremely long transition periods (in some cases in excess of twenty years) for decreasing contract-value-thresholds of the TPP procurement chapter’s application to standard levels (in the case of Malaysia and Vietnam).

In terms of allowing non-commercial considerations in the public procurement process, the TPP procurement chapter green-lights the pursuit of sustainability-related goals to an even greater extent than the GPA. At the same time, country-specific derogations accommodate extensive traditional industrial/protectionist policies, for example by allowing significant set-asides from obligations under the TPP procurement chapter (in the case of Mexico and Vietnam).†

† This article draws upon, and is an expanded version of: Jędrzej Górski, Opening Government Procurement to International Competition in the Asia-Pacific Region: Impact of the Transpacific Partnership (CUHK CFRED Working Paper No. 16, Mar. 18, 2016).
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I. INTRODUCTION

The Trans-Pacific Partnership (“TPP”) was revealed on 5th October, 2015 and signed on 4th February, 2016.1 It would have been the world’s largest Regional Trade Agreement (“RTA”) within the meaning of Article XXIV:5 of the General Agreement on Trade and Tariffs (GATT).2,3 Yet the entire TPP project was

1New Zealand has been selected as the Trans-Pacific Partnership’s depositary. See Trans-Pacific Partnership art.30.7 [hereinafter TPP].The legally verified text was released on Jan. 26, 2016. See Text of the Trans-Pacific Partnership, NEW ZEALAND FOREIGN AFFAIRS AND TRADE, https://www.tpp.mfat.govt.nz/text (last visited Jan. 26, 2016).
3Under the GATT, an RTA is an agreement, the sense of which is ‘the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area’. See GATT47 art. XXIV: 5. See also Understanding on the
called into question when President Donald J. Trump instructed the United States Trade Representative on 23 January 2017 to permanently withdraw from the ratification process of this agreement, honouring his previous campaign promises.\(^4\)

However, the TPP will still be of tremendous regional importance if it endures in some form following the withdrawal from it by the USA, and if the USA incorporates the procurement related concessions reached while negotiating the TPP into bilateral agreements.\(^5\) A complex multi-theme agreement, the TPP also covers government procurement (in Chapter 15) among many other issues. While many claim that the TPP on the whole will not bring about a Copernican revolution in terms of actual trade liberalisation and market access,\(^6\) the TPP’s

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\(^4\) The presidential memorandum directed to the United States Trade Representative stated among other things that ‘It is the policy of my Administration to represent the American people and their financial well-being in all negotiations, particularly the American worker, and to create fair and economically beneficial trade deals that serve their interests. Additionally, in order to ensure these outcomes, it is the intention of my Administration to deal directly with individual countries on a one-on-one (or bilateral) basis in negotiating future trade deals. Trade with other nations is, and always will be, of paramount importance to my Administration and to me, as President of the United States.’ The White House, Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 FR 8497 (Jan. 25, 2017)

\(^5\) See note 4.

\(^6\) Such a view is commonly expressed during academic events devoted to the TPP and trade in South-East Asia, yet it is either shared in informal talks or rarely recorded. Such a view typically goes along with scholars’ strict focus on regulatory matters under the TPP. For example Byung-il Choi has been recorded to say that ‘(…)TPP is not about market access the way I understand, it is about regulatory coherence (…)’. See Byung-il Choi, Release of Implications of the Trans-Pacific Partnership for the World Trading System, PIIE (July 14, 2016), https://piie.com/file/10632/download?token=WzW6ZnR8 (last accessed on Dec.31, 2016). See also the discussion about Mercurio’s and Stiglitz’s views on the primarily regulatory function of the TPP in this introductory section and also see, e.g., Claude Barfield, The Trans-Pacific Partnership and America’s strategic role in Asia in THE TRANS-PACIFIC PARTNERSHIP AND THE PATH TO FREE TRADE IN THE ASIA-PACIFIC (Peter C.Y. Chow, ed., Edward Elgar Publishing, Inc., Cheltenham, UK 2016) at 37. Such communis opinio could hardly be verified with economic literature seeing that economic papers have rather been focused on a precise assessment of the TPP’s impact on specific sectors and countries. See e.g., Francis Tuan and Agapi Somwaru, Agriculture and TPP With or Without China: A Partial Equilibrium Analysis, in The Trans-Pacific Partnership and the Path to Free Trade in the Asia-Pacific (Peter C.Y. Chow, ed., Edward Elgar Publishing, Inc., Cheltenham, UK 2016); Lee-in Chen Chiu, Pharmaceuticals and herbal medicine in the Asia Pacific amidst TRIPS and the TPP, in The Trans-Pacific Partnership and the Path to Free Trade in the Asia-Pacific (Peter C.Y. Chow, ed., Edward Elgar Publishing Inc., Cheltenham, UK 2016) Rude, James and Henry An, Trans-Pacific Partnership: Implications for the Canadian
procurement chapter could still bring about a huge change in terms of opening the TPP parties’ public procurement markets to foreign competition.

The TPP originated from the Bush administration’s pending negotiations on the Trans-Pacific Strategic Economic Partnership (“TPSEP” or “P4”) at the turn of February and March 2008, and the notification to the Congress of the administration’s intent to join the P4 was given on September 22 of the same year. Subsequently, the newly instituted Obama administration (in January 2009) inherited those negotiations and continued working towards what evolved into the TPP “with the goal of shaping a regional agreement that will have broad-based membership and the high standards worthy of a 21st-century trade” - as stated by Barack Obama in Tokyo on 14th November, 2009. The attention of the American negotiators to high standards resulted in various regulatory matters being brought to the fore and being coalesced under the umbrella of the novel concept of ‘regulatory coherence’, eventually defined in the TPP chapter entirely devoted to this problem as the “use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of domestic policy objectives, and in

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Industrial Dairy Sector, 39(3) CANADIAN PUBLIC POLICY (2013) at 393; Koon Peng Ooi, Examining The Impact of ASEAN-China Free Trade Agreement on Indonesian Manufacturing Employment, CSAE Working Paper WPS/2016-15, June 2016. Nonetheless, some confirmation of the thesis that the TPP will only bring about modest liberalization can be seen in the claim that the TPP could serve the USA as a tool of preventing trade diversion in the region towards China (a result of the Chinese bilateral agreements concluded with countries of the region), i.e. to save the status quo. See e.g., Jeffrey H. Bergstrand, Should TPP Be Formed? On the Potential Economic, Governance, and Conflict-Reducing Impacts of the Trans-Pacific Partnership Agreement, 20(3) EAST ASIAN ECONOMIC REVIEW 279 (2016) at 295-296.

7. See Trans-Pacific Strategic Economic Partnership Agreement, ch.11 [signed July 18, 2005 (Chile, New Zealand and Singapore), August 2, 2005 (Brunei), in force May 28, 2006 (New Zealand and, Singapore), July 12, 2006 (Brunei), November 8, 2006 (Chile), 2592 U.N.T.S. 46151.


efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment.”

The concept of regulatory coherence first surfaced in a presentation by Barbara Weisel, the Assistant U.S. Trade Representative for South-East Asia and the Pacific at Peterson Institute, in October 2010. The US administration might from the very beginning have insisted (with regard to the regulatory coherence) that the “goal is not to interfere with the right of governments to regulate, but to expand internal regulatory coherence within each country and cooperation among TPP partner countries on existing and new regulatory issues.”

Thus it is an open secret that the TPP has been the US’ ‘child’, with the primary objectives being to (i) proliferate US-shaped standards in many fields of regulation (such as trade in energy, competition policy, intellectual property, investment etc.) in the Asia-Pacific region and (ii) in effect surpass the reluctance of the BRICS nations (Brazil, Russia, India, China and South Africa) to such standards with the ultimate goal of their adoption at the multilateral level through the World Trade Organization (“WTO”).

In early academic literature on the TPP, such views were expressed, for instance, by Mercurio, who noticed that even after the entry of Japan (in whose case, in contrast to the other parties negotiating the TPP, this agreement would indeed bring about significant market-access liberalisation, seeing its lack of pre-existing bilateral trade agreements with the other parties), the US’ main goal behind the TPP’s conclusion was ‘rulemaking’ in the wake of the WTO’s failure to address such regulatory matters in the course of the unfinished Doha Round. Likewise, in press comments addressed to wider audiences, Stiglitz and Hersh went further than that by stating, without beating about the bush, that (i) “You will hear much about the importance of the TPP for ‘free trade’. The reality is that this is an agreement to manage its members’ trade and investment relations — and to do so on behalf of each country’s most powerful business lobbies,” and (ii) “It should surprise no one that America’s international agreements

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10 See TPP, art. 25.2.1.
11 See note 9, footnote 25 at 8.
13 See Mercurio at 1560.
14 See notes 9 and 11.
produce managed rather than free trade. That is what happens when the policymaking process is closed to non-business stakeholders – not to mention the people’s elected representatives in Congress”\textsuperscript{16}.

Now, in the light of such strategic function of the TPP, many could not shake the feeling that the USA has for no good reason killed its most important geopolitical project in decades. Nonetheless, one could see, in this \textit{prima facie} unbelievable decision, a clear historical recurrence of what happened directly after the WW2 with the charter of the International Trade Organization (“ITO”)\textsuperscript{17} which was initially pushed through by the USA yet subsequently never entered into force mostly as a result of its non-ratification by the USA, due to protectionist sentiments in the Congress.\textsuperscript{18} Thus, if one believes that history is repeating itself, one can hope that at least a partial cure to the current situation (similar to the provisional application of the GATT for almost five decades until the establishment of the WTO\textsuperscript{19}) will be searched for soon. Unsurprisingly though, the initial announcement made on 21 November 2016 by newly elected president Trump on YouTube about the planned withdrawal from the TPP\textsuperscript{20} sparked a lot of
disappointment among other TPP signatories, especially Japan, as it is the TPP’s second largest economy. Before the results of the elections in the USA were revealed, Japan’s prime minister Shinzō Abe tried to exert some pressure on Trump’s possible future administration by saying that he will urge Trump ‘and others who have insisted on leaving the TPP to ratify the deal’ and that he "will seize every opportunity to urge the United States and other countries to complete domestic procedures promptly." 22 The day after Trump’s video was released, Abe said somewhat theatrically that the TPP would be meaningless without the participation of the USA. 23 Despite these statements, Japan along with Australia continued with their internal parliamentary ratification procedures, likely hoping for a last minute ratification of the TPP by the USA during Obama’s term, 24 but such possibility was very early ruled out by the republican majority leader of the Senate, Mitch McConnell. 25

In any case, since when Trump’s presidency appeared on the horizon, Abe insisted that ‘that doesn’t mean it’s over’ 26 whereas Mexico’s economy minister, Ildefonso Guajardo was the first one to officially propose back in November 2016 that the TPP signatories could consider amending TPP’s provisions in order to allow its entry into force even without the participation of the USA. 27 Even after the official

21 See, Japan’s upper house begins TPP deliberations as Abe promises to push Trump, INSIDE US TRADE DAILY REPORT, Nov 14, 2016.
22 See id.
23 See, Japan PM says TPP trade pact meaningless without U.S, TREND NEWS (English), Nov 22, 2016.
25 See, Japan PM admits bleak trade pact outlook before Trump talks, BBC MONITORING ASIA PACIFIC, Nov 14, 2016.
26 See id. Mitsuru & Taylor.
27 See note 25. As to its ratification, the TPP de facto requires a participation by the USA by providing that: ‘In the event that not all original signatories have notified the Depositary in writing of the completion of their applicable legal procedures within a period of two years of the date of signature of this Agreement, it shall enter into force 60 days after the expiry of this period if at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in
withdrawal by the USA in January 2017, similar voices in favour finalising the TPP in some other form could be heard, for example, from Australia’s ambassador to Philippines, Amanda Gorely, who emphasised that ‘Australia and other signatories, including Japan, New Zealand and other countries, are still talking about how we can progress the TPP in the absence of the USA.’

Clearly, TPP signatories have vested interest in the regional plurilateral trade liberalisation even without the USA on board. And what might have motivated their efforts to save the TPP is access to the Japanese market, such as for example Mexico, which reportedly agreed to further concession in terms of labour rights just in exchange for improved access to the Japanese market, after seeing that USA could not offer anything more in terms of market access. At the same, Japan also has some vested interests in deepening trade ties in the Transpacific area, such as for example with Canada, as this could allow Japan to diversify its supplies of hydrocarbons in the wake of the Fukushima disaster, increasing Japan’s demand for conventional sources of energy.

Meanwhile, perhaps to the great surprise of many, Trump’s policy of bilateral trade agreement might show some positive effects for the American economy. This, so far, can particularly be seen in the case of USA-Japan relation where Trump and Abe seem to have preliminarily agreed at the end of January 2017 to salvage most of the concessions reached the course of TPP negotiations on a bilateral basis, in exchange for Japan’s investment in the American infrastructure (high speed railway, modernisation of nuclear sector etc.) aiming at bringing at least 700,000 thousand jobs to the US. However, in such scenario, it is unclear whether and how the US trade policymakers could still regionally push for the regulatory coherence in line with the standards produced in the USA. It is true, that at least in medium term, countries of the region will be locked-in with concessions as to their regulatory autonomy made for the purposes of the TPP under the lead of the USA. Nonetheless, such status quo might not last forever, especially in light of China’s imminent efforts to divert TPP signatories from this agreement to concluding the so far rather sluggishly negotiated Regional Comprehensive Economic Partnership (“RCEP”) and to elevate China to the position of global trade rule-maker (currently still held by the USA), which can well be seen in President Xi Jinping’s

2013 have notified the Depositary in writing of the completion of their applicable legal procedures within this period’.  
28 See Recto Mercene, Australia is shaken by US decision to pull out of TPP, Ambassador Gorely says, BUSINESS MIRROR, Jan 29, 2017.  
30 Den Tandt, Michael, Moving Toward Bilateral Trade; Canada, Japan Should Consider TPP Alternatives, EDMONTON JOURNAL (May 25, 2016)N.1.  
speech from Davos in which he compared protectionism (impliedly the USA) to ‘locking oneself in a darkroom.’\textsuperscript{32}

In such a new reality where China has the opportunity to appropriate the central role in rulemaking from the USA in the course of negotiations on the modified version of the TPP, one could claim that Trump’s policy of bilateral trade agreements paradoxically could also largely save USA’s rulemaking position. Specifically, a network of high standard bilateral agreements would not only reinforce USA’s trade partners path-dependence upon previously accepted standards but also add new regulatory content more reflective of bilateral trade profiles and needs between the USA and specific countries of the region – which would \textit{in effectu} greatly undermine Chinese efforts to bring about its own vision of world trade order under a one-size-fits-all plurilateral approach.

Against all such uncertainties surrounding TPP’s future, the case of opening public procurement markets under the TPP is, especially in terms of standards and rulemaking, much more straightforward. The liberalisation of government procurement under the TPP is very different from commerce generally, i.e. commerce between mostly private actors because a strict harmonisation of the public procurement process between various jurisdictions as required by the Government Procurement Agreement (“GPA”), which is also followed by the procurement chapters of dozens of RTAs, along with the resulting heavy interference with domestic procurement laws going way beyond the concept of regulatory coherence,\textsuperscript{33} has now for almost four decades been a very basic instrument of international agreements aimed at liberalising public procurement markets. The TPP procurement chapter emulates the already existing model of liberalisation and, therefore, will not bring about anything novel to regulating these markets. Thus, in terms of standards of liberalisation it will altogether not matter whether the TPP is salvaged as a plurilateral agreement or a network of bilateral agreement. And, in the former case, it will not matter if the rulemaking process is hijacked by China or not because China has itself committed to in its WTO accession protocol and has negotiating its accession to the GPA.\textsuperscript{34} However, as further explained in this article in detail, in terms of actual access to government

\textsuperscript{32} See note 28.

\textsuperscript{33} The GPA and procurement chapters of RTAs interfere with national regulatory sovereignty not only with regard to protectionist measures like banning offsets (as further discussed in section 2) but also with regard to virtually every procedural aspect of the procurement process not leaving much regulatory space for domestic administrative laws (as further discussed 4).

\textsuperscript{34} See WTO Committee on Government Procurement, \textit{Report of the Committee on Government Procurement} (16 Nov. 2011) GPA/110, para. 6 at 1, 2.
procurement markets, the Asia-Pacific region—with some countries in South-East Asia keeping their public procurement markets entirely closed until recently—has been falling behind significantly in terms of the international liberalisation of public procurement compared with both Trans-Pacific general commerce in goods and Trans-Atlantic liberalisation of public procurement markets. Thus, even a gradual application of the existing model of liberalisation to the TPP parties’ public procurement markets will change the landscape of public procurement in the Asia-Pacific region beyond recognition.

This article first reviews the limited public procurement liberalising commitments previously existing in the region, including commitments made under/within the framework of (i) the GPA (in section A), (ii) the P4 (in section 0), (iii) other RTAs (in section 3), (iv) the Association of South-East Asian Nations (“ASEAN”) (in section 4), and (v) the Asia-Pacific Economic Co-operation (“APEC”) (in section 5). Next, against such background, this paper scrutinises new public procurement commitments under the TPP in terms of (i) procedural provisions (in section III), (ii) coverage (in section IV), and (iii) the scope of allowed pursuit of non-commercial considerations in the procurement process (in section V).

II. PRIOR PUBLIC PROCUREMENT COMMITMENTS IN THE REGION

The pre-TPP scope of public procurement liberalising international trade commitments has been very limited in South-East Asia/Asia and the Oceania region and among TPP-signatories from South America, with only North American TPP-signatories having their public procurement markets previously integrated under the North American Free Trade Agreement (“NAFTA”). The US, Canada, Japan and Singapore have also had longstanding (since the GATT Tokyo Round) public procurement liberalising commitments towards mostly Western-European countries from outside of the Asia-Pacific region under the GPA. They were joined in these commitments by Korea upon the creation of the WTO and by New Zealand in 2015 (see further section A). In addition, Mexico signed a public procurement liberalising RTA with the EU in 1997, thereby significantly opening Mexican public procurement markets even without accession

36 See Economic Partnership, Political Coordination and Cooperation Agreement, EU-MX (signed Dec. 8, 1997, in force Oct. 1, 2000), art.10, 2165 U.N.T.S. 37818. It also worth noting that the EU and Mexico have been in the process of renegotiating this agreement, including its procurement chapter, the proposal of which was drafted by the EU and was made public in December 2016. See European Commission, ‘EU Proposals for modernised trade agreement with Mexico now available online’ (24 February 2017) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1598>
to the GPA. In fact, large scale liberalisation of public procurement markets in the Trans-Pacific region did not gain momentum until (i) the conclusion of the P4\(^{37}\) in 2005 (see further section 0) and (ii) subsequent proliferation of bilateral RTAs (see further section 3), whereas public procurement relevant commitments within the ASEAN have been very limited and unclear (see further section 4) and procurement rules agreed upon by members of the APEC have been non-binding (see further section 5).

A. GPA

The GPA is the only agreement within the WTO framework which addresses the problem of the international liberalisation of public procurement markets and only partly cures the original sin of the General Agreement on Tariffs and Trade of 1947 (GATT 47)\(^{38}\) (integrated into the WTO Agreement\(^{39}\)), which determined the unique position of public procurement in the multilateral trading system by excluding this matter from its scope of application, stipulating that:

**GATT 47 Article III:8:** “The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.”[GATT 47 Article III pertains to the rule of ‘National Treatment on Internal Taxation and Regulation’ and covers an NT clause in section 1 and an MFN clause in section 4].

GATT 47 Article XVII:2: “The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties’ fair and equitable treatment.”[GATT 47 Article XVII pertains to ‘State Trading Enterprises’, meaning (i) a state enterprise, wherever located, established or maintained by a contracting party, or (ii) any enterprise to which a contracting party grants, formally or in effect, special privileges -- as defined in section 1 of GATT 47 article XVII].

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\(^{37}\) See note 7.

\(^{38}\) Id. at 2.

The GPA was first adopted in 1979 (“GPA79”) as the product of the GATT Tokyo Round, and was subsequently revised a number of times (“GPA87”, “GPA94”, and “GPA12”). The original GPA79 covered the international liberalisation of public procurement of only goods, and the GPA87 (technically, a protocol of amendments to the GPA79 rather than a new agreement) only added a ban on national discriminatory treatment of locally established but foreign-owned businesses, or in other words, matters of establishment. The new GPA94 was adopted along with the establishment of the WTO and, for the first time, also covered the international liberalisation of public purchases of services. It also regulated review procedures in order to allow individual bidders to enforce procedural provisions of the GPA by challenging public procurers’ decisions before national courts. 

Subsequently, the GPA12 (again, technically an amendment by protocol to the GPA94 rather than a completely new agreement) was provisionally amended in December 2011 and the amendments were conclusively approved in 2012. The ratification of changes by the GPA parties continued through 2013-2015 and upon ratification by a minimum required number of parties, the GPA12 came into force on 6th April, 2014.

1. Parties

Until recently, the importance of the GPA for Asia and the Oceania region was very limited. The original GPA79 covered only Japan and Singapore—the other original parties to the agreement being Austria, the then European Economic Community (including Belgium, Denmark, Germany, Ireland, France, Italy, Luxembourg, Netherlands and the United Kingdom), Finland, Norway, Sweden, Switzerland, the United Kingdom in respect of its overseas territories except for

44 See id. at 20, art. II: 2.
45 Compare GPA79 (as revised in 1987) specifying in art. I(1)(a) that: ‘(…) [T]his includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se’ with art .III of GPA94.
46 See GPA94, art. XX.
Bermuda, Montserrat, St. Kitts-Nevis, Military Bases in Cyprus and Virgin Islands etc., and the USA.\(^{49}\) Hong Kong (then at the discretion of the UK) joined the GPA in April 1986,\(^{50}\) Korea joined the GPA\(^ {94}\), while New Zealand joined the club in October 2014\(^ {51}\). GPA parties from the other side of the Pacific which have also subjected their public procurement markets to the TPP include only the USA and Canada.

The GPA is a plurilateral agreement meaning that it binds only the parties thereto rather than all WTO members. Technically, it means that it, along with the ‘The Agreement on Trade in Civil Aircraft’, is listed in Annex 4 of the WTO Agreement.\(^ {52}\) Under Article II.3 of the WTO Agreement, any agreement listed in Annex 4 “does not create either obligations or rights for Members that have not accepted them.” The general sense of Article II.3 is to exclude the application of the general WTO Most Favoured Nations clause (“MFN”) to all plurilateral agreements listed in Annex 4, and therefore to prevent WTO members not subjected to plurilateral agreements from demanding the same treatment as the parties to the plurilateral agreements based on the general WTO MFN clause.\(^ {53}\)

2. Basic Anti-Discriminatory Provisions

The GPA’s multi-fold approach to the liberalisation of public procurement markets towards international competition starts with a bunch of anti-discriminatory principles such as (i) the National Treatment clause (“NT”), (ii) the


\(^{50}\) GATT Committee on Government Procurement, Communication from the Delegation of Hong Kong, (May 26, 1986) GPR/32.


\(^{52}\) Historically, the list of plurilateral agreements also included the International Dairy Agreement and the International Bovine Meat Agreement which were scrapped at the end of 1997. There also exist other agreements which are not multilateral such as the Information Technology Agreement. However, they are not listed in Annex 4.B to the WTO Agreement implying that even WTO members which have not joined such agreements can benefit from concessions made by the parties to such agreements based on the GATT MFN clause.

\(^{53}\) Nonetheless, in contrast to The Agreement on Trade in Civil Aircrafts, the GPA has arguably been included in the Annex 4.B only for the sake of clarity because, according to quoted GATT 47 Article III.8, GATT MFN clause does to apply to government procurement anyway.
MFN clause, \((iii)\) the ban on discrimination against locally established businesses which are either foreign owned or import foreign goods or services, and \((iv)\) the ban on offsets, found in the below provisions:

**GPA12 Article IV: “GENERAL PRINCIPLES, Non-Discrimination 1.** With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to: (a) domestic goods, services and suppliers\[the NT clause\]; and,(b) goods, services and suppliers of any other Party\[the MFN clause\].2. With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not: (a) treat a **locally established** supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or (b) discriminate against a **locally established** supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party […] Offsets 6. With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, **impose or enforce any offset.**”

3. **GPA’s Basic Assumptions**

The shape of the GPA’s provisions is based on the premise that opening public procurement markets to international competition requires that:

\(i\) In the course of evaluating bidders, the evaluation in principle shall be made based on solely commercial factors related to the procurement \(\text{\textit{the most advantageous tender; or where price is the sole criterion, the lowest price}}^{54}\) whereby public procurers “shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement”\(^{55}\)

\(ii\) Open tendering \(\text{\textit{(a procurement method whereby all interested suppliers may submit a tender}}^{56}\) shall be preferred, and

\(iii\) Limited tendering \(\text{\textit{(a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice}}^{57}\) should be permitted only in

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\(^{54}\) See id. art. XV.5.

\(^{55}\) See id. art. VIII.

\(^{56}\) See id. art. I(m).

\(^{57}\) See id. art. I(h).
exceptional circumstances, such as “the requirement (…) for a work of art,” when the protection of patents, copyrights or other exclusive rights is involved, an absence of competition for technical reasons, additional deliveries by the original supplier of goods or services (that were not included in the initial procurement), extreme urgency, purchases in commodity markets, etc.


To this end, the GPA imposes plentiful and largely procedural provisions regarding GPA parties’ domestic public procurement systems, and regulates matters such as transparency, publicity, and integrity of the procurement process. These rules, among others, cover:

(i) Valuation of contracts, whereby procurers should “neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Agreement”.

(ii) Technological neutrality in the case of a procurement process employing electronic means (since the revision of 2012) meaning that the public procurers shall “ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software”.

(iii) Rules of origin, whereby a ‘Party shall not apply rules of origin to goods or services imported from or supplied from another Party that are different from the rules of origin the
Party applies at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Party’. 68

(iv) A bunch of transparency-related requirements such as the access to public procurement-related legislation, 69 notices on specific planned/intended procurement, 70 notices on generally planned procurement, 71 notices on contract awards, 72 maintenance of documentation 73 and many others.

(v) Technical specifications, defined as any “tendering requirement that:(i) lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or (ii) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service” 74 whereby, among others, public procures shall: (a) “set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics,” 75 and (b) “base the technical specification on international standards, where such exist; otherwise, on national technical regulations, recognized national standards or building codes.” 76

(vi) Timings for the procurement process, 77 and

(vii) Review procedures before domestic courts or quasi-courts whereby GPA parties “shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge: a breach of the Agreement; or where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party’s measures implementing this Agreement”. 78

5. Exceptions and Sustainability

Just like any other trade-related agreement, the GPA offers general exceptions and, to the extent that they would not “constitute a means of arbitrary or unjustifiable

68 See id. art.IV.5.
69 ‘Party shall: (…) promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clause mandated by law or regulation and incorporated by reference in notices or tender documentation and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public’.

70 See id. art.VII.1-3.
71 See id. art.VII.4-5.
72 See id. art.XVI.2.
73 See id. art.XVI.3.
74 See id. art.I.u.
75 See id. art.X.2.a.
76 See id. art. X.2.b.
77 See id. art.XI.
78 See id. art.XVIII.1.
discrimination between Parties\textsuperscript{79} – allows the parties to adopt measures necessary to protect, among others \((i)\) public morals, order or safety,\textsuperscript{80} \((ii)\) human, animal or plant life or health,\textsuperscript{81} and \((iii)\) intellectual property.\textsuperscript{82} Moreover, the amendment of 2012 also clearly states that: \((i)\) “\textit{for greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment}”,\textsuperscript{83} and \((ii)\) “\textit{the evaluation criteria set out in the notice of intended procurement or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery}”.\textsuperscript{84}

Furthermore, some vague provisions—such as an option to exclude bidders in the case of “\textit{final judgments in respect of serious crimes or other serious offences}”\textsuperscript{85} or in case of “\textit{professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier}”\textsuperscript{86}—can be applied by procuring authorities not only to assure better value for money in procurement projects but also to hide some non-commercial considerations unrelated to potential procurers’/contractors’ capacity to perform public contracts. Particularly with regard to foreign bidders, such provisions cannot be applied in a non-arbitrary manner,\textsuperscript{87} and might lead to protectionist

\textsuperscript{79} See id. art III.2.
\textsuperscript{80} See id. art III.2(a).
\textsuperscript{81} See id. art III.2(b).
\textsuperscript{82} See id. art III.2(c).
\textsuperscript{83} See id. art X.6.
\textsuperscript{84} See id. art X.9.
\textsuperscript{85} See id. art VIII.4(d).
\textsuperscript{86} See id. art VIII.4(e).
\textsuperscript{87} If bidders are to be precluded from competing for contracts based on some misconduct like excessive exploitation of workers in the course of their foreign business operations, it is unclear whether that should be assessed based on bidders’ standards or based on a procurer’s standards, and by which courts. Regardless of which standards are to be applied, procurers’ courts have no tools to assess what actually happens abroad. In turn, bidders’ courts do not apply norms from other jurisdictions (i.e. procurers’ jurisdictions). This leaves bidders’ courts declaring violations of bidders’ domestic standards or implemented international standards on the table as the only feasible criterion for the preclusion of prospective suppliers/contractors due to previous extraterritorial social or environmental misconduct. Suppose that bidders’ courts are reliable: still, according to Arrowsmith, the reliance by public procurers on such convictions is also unfeasible because of the possible abuses of discretion and because of the many administrative obstacles such as difficulties in obtaining evidence of foreign convictions. See Sue Arrowsmith, \textit{Horizontal Policies In Public Procurement: A Taxonomy}, J. P. PROCUREMENT, Summer 2010 at 149. See also \textit{SOCIAL AND ENVIRONMENTAL POLICIES IN EC PROCUREMENT LAW: NEW DIRECTIVES AND NEW
selective elimination of specific foreign bidders under the guise of procurers’ policies geared to improve environmental or labour standards in third countries.

6. Coverage

The framework of the GPA (i.e. the combination of anti-discriminatory rules, premises and procedural provisions mentioned above) only applies to ‘covered’ procurement, and what is covered is determined by:

(i) ‘Subjective coverage’ meaning that only some procuring bodies (subjects) are covered, where under the GPA’s structure, a country specific Appendix 1 lists for each party: (a) covered central-government entities (in Annex 1 to Appendix 1) (b) covered sub-central government entities (in Annex 2), and (c) all ‘other’ entities (in Annex 3).

(ii) ‘Objective coverage’ meaning that only some goods and services (objects) are covered, where, under the GPA’s structure, a country specific Appendix 1 lists for each party: (a) covered goods (listed in Annex 4) (b) covered services (in Annex 5), and (c) covered construction services (in Annex 6).

Country-specific Appendix 1 might also include some general notes (usually in Annex 7 to Appendix 1. Usually, negative lists (meaning that all goods are covered except as otherwise specified in a given party’s Annex 4) determine the coverage of goods whereas positive lists (meaning that items are not covered unless expressly listed in a given party’s Annex 5) in principle determine the coverage of services. Lists of services covered under the GPA are usually not unlike commitments of a country under the GATS. For example, Singapore’s Annex 4 even incorporates Singapore’s list of covered services under the GATS by a simple cross-reference (see Figure 1).

**Figure 1.** Selected restrictions/notes made by the GPA’s signatories to the GPA12’s.

<table>
<thead>
<tr>
<th>Annex:</th>
<th>Canada</th>
</tr>
</thead>
</table>
| 2      | ‘2 For provinces and territories listed in this Annex, this Agreement does not apply to preferences or restrictions associated with programs promoting the development of distressed areas.

3. This Agreement does not cover procurement that is intended to contribute to economic development within the provinces of Manitoba, Newfoundland and Labrador, New Brunswick, Prince Edward Island and Nova Scotia or the |
6. Nothing in this Agreement shall be construed to prevent any provincial or territorial entity from applying restrictions that **promote the general environmental quality** in that province or territory, as long as such restrictions are not disguised barriers to international trade.

**USA**

2. The state entities included in this Annex may apply preferences or restrictions associated with programmes promoting the **development of distressed areas or businesses owned by minorities, disabled veterans, or women.**

3. Nothing in this Annex shall be construed to prevent any state entity included in this Annex from applying restrictions that **promote the general environmental quality** in that state, as long as such restrictions are not disguised barriers to international trade.

**Singapore**

3. This Agreement does not apply to any measure adopted or maintained with respect to Aboriginal peoples. It does not affect existing aboriginal or treaty rights of any of the **Aboriginal peoples** of Canada under section 35 of the Constitution Act, 1982.

**Japan**

2. **In case Parties do not apply Article XVIII [domestic review procedures] to suppliers or service providers of Japan in contesting the award of contract by entities, Japan may not apply the Article to suppliers or service**
providers of the Parties in contesting the award of contracts by the same kind of entities.’

**USA**

‘1. This Agreement does not apply to any set aside on behalf of a small- or minority-owned business. A set-aside may include any form of preference, such as the exclusive right to provide a good or service, or any price preference.’

General notes to party-specific appendices may, for instance, restrict the right of a signatory to maintain preferential treatment for minorities, historically disadvantaged individuals or for small and medium enterprises (USA, Canada).

Moreover, specific notes attached to particular annexes often limit the GPA’s coverage in bilateral relations in a way that suppliers/contractors of a particular party are excluded from offering particular goods and services to particular procuring entities of the GPA party which makes such reservations. Specific notes attached to particular annexes also often require reciprocity, meaning that a particular class of products or services is covered in relation to the suppliers/contractors of a given party only on the condition precedent that at some point in the future, the party in question will cover the same class of goods or services towards a party which makes such reservation (see Figure 1).

**Figure 2.** Value thresholds in the GPA12 [SDR].

<table>
<thead>
<tr>
<th>Country:</th>
<th>objective coverage</th>
<th>Subjective coverage</th>
<th>Specific threshold-related restrictions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>central</td>
<td>sub-central</td>
</tr>
<tr>
<td>Armenia</td>
<td>Goods</td>
<td>130,000</td>
<td>200,000</td>
</tr>
<tr>
<td></td>
<td>Services</td>
<td>130,000</td>
<td>200,000</td>
</tr>
<tr>
<td></td>
<td>construction works</td>
<td>5,000,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td>Canada</td>
<td>Goods</td>
<td>130,000</td>
<td>355,000</td>
</tr>
<tr>
<td></td>
<td>1) Services</td>
<td>13 0,000</td>
<td>3) 355,000</td>
</tr>
<tr>
<td>EU</td>
<td>construction works</td>
<td>EU</td>
<td>services</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>0</td>
<td>5,000,000</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>5,000,000</td>
<td>200,000</td>
<td>200,000</td>
<td>400,000</td>
</tr>
</tbody>
</table>

1. The following shall not be considered procurement between Annex 1 and Annex 2 entities, when awarded by providers and service providers.

2. Annex 5:

Goods

<table>
<thead>
<tr>
<th>SDR and</th>
<th>200,000</th>
<th>355,000</th>
</tr>
</thead>
</table>

Notes (…)

1. The following shall not be considered procurement:
national treatment regime for the construction service providers of Iceland, Liechtenstein, Norway, the Netherlands on behalf of Aruba and Switzerland, provided their value equals or exceeds 5,000,000 SDR and for the construction service providers of Korea; provided their value equals or exceeds 15,000,000 SDR.

<table>
<thead>
<tr>
<th></th>
<th>Goods</th>
<th>Services</th>
<th>Construction works</th>
<th>Goods</th>
<th>Services</th>
<th>Construction works</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hong Kong SAR</td>
<td>130,000</td>
<td>N.A.</td>
<td></td>
<td>400,000</td>
<td>400,000</td>
<td>None</td>
</tr>
<tr>
<td>Iceland</td>
<td>130,000</td>
<td>200,000</td>
<td>5,000,000</td>
<td>400,000</td>
<td>400,000</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Israel</td>
<td>Japan</td>
<td>Liechtenstein</td>
<td>Montenegro</td>
<td></td>
<td></td>
</tr>
<tr>
<td>------------------</td>
<td>-------------------</td>
<td>----------------------</td>
<td>---------------</td>
<td>--------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>construction works</td>
<td>5,000,000</td>
<td>8,500,000*</td>
<td>5,000,000</td>
<td>5,000,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Goods</td>
<td>130,000</td>
<td>250,000</td>
<td>130,000</td>
<td>200,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Services</td>
<td>130,000</td>
<td>250,000</td>
<td>130,000</td>
<td>200,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Construction works</td>
<td>8,500,000*</td>
<td>8,500,000</td>
<td>5,000,000</td>
<td>5,000,000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Annex 1
* starting from the sixth year after entry into force of the GPA12
SDR 5,000,000.

<table>
<thead>
<tr>
<th></th>
<th>Goods</th>
<th>Construction services</th>
<th>Architectural, engineering and other technical services</th>
<th>Other services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan</td>
<td>100,000</td>
<td>4,500,000</td>
<td>450,000</td>
<td>100,000</td>
</tr>
<tr>
<td></td>
<td>200,000</td>
<td>15,000,000</td>
<td>450,000</td>
<td>200,000</td>
</tr>
<tr>
<td></td>
<td>130,000</td>
<td>1,500,000</td>
<td>450,000</td>
<td>130,000</td>
</tr>
</tbody>
</table>

None

<table>
<thead>
<tr>
<th></th>
<th>Goods</th>
<th>Services</th>
<th>Construction Works</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liechtenstein</td>
<td>130,000</td>
<td>130,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td></td>
<td>200,000</td>
<td>200,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td></td>
<td>400,000</td>
<td>400,000</td>
<td>5,000,000</td>
</tr>
</tbody>
</table>

None

<table>
<thead>
<tr>
<th></th>
<th>Goods</th>
<th>Services</th>
<th>Construction Works</th>
</tr>
</thead>
<tbody>
<tr>
<td>Montenegro</td>
<td>130,000</td>
<td>130,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td></td>
<td>200,000</td>
<td>200,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td></td>
<td>400,000</td>
<td>400,000</td>
<td>5,000,000</td>
</tr>
</tbody>
</table>

Annex 1
* Works

88 The Japan’s Annex differentiates between a list of Group A and Group B entities and sets up a lower threshold of SDR 4,500,000 for Group B entities and Japan Post (included in the list A) and a higher threshold of SDR 15,000,000 for all other entities in included Group A. See: GPA, Japan, Annex 3.
<p>|                |                |                | concessions contracts, when awarded by Annex 1 and 2 entities, are included under the national treatment regime for the construction service providers of the EU, Iceland, Liechtenstein, Norway, the Netherlands on behalf of Aruba and Switzerland, provided their value equals or exceeds SDR 5,000,000 and for the construction service providers of Korea; provided their value equals or exceeds SDR 15,000,000 |</p>
<table>
<thead>
<tr>
<th></th>
<th>Goods</th>
<th>Services</th>
<th>Construction Works</th>
</tr>
</thead>
<tbody>
<tr>
<td>Netherlands with respect to Aruba</td>
<td>100,000</td>
<td>100,000</td>
<td>4,000,000</td>
</tr>
<tr>
<td>New Zealand</td>
<td>130,000</td>
<td>200,000</td>
<td>400,000</td>
</tr>
<tr>
<td>Norway</td>
<td>130,000</td>
<td>200,000</td>
<td>400,000</td>
</tr>
<tr>
<td>Singapore</td>
<td>130,000</td>
<td>N.A.</td>
<td>400,000</td>
</tr>
<tr>
<td>Taiwan</td>
<td>130,000</td>
<td>200,000</td>
<td>400,000</td>
</tr>
<tr>
<td>USA</td>
<td>130,000</td>
<td>355,000</td>
<td>USD250,000 or SDR400,000</td>
</tr>
</tbody>
</table>

89 The threshold of USD 250,000 has been set up for power authorities (List A entities) whereas the threshold of SDR 400,000 has been set up for port authorities (list B entities). See GPA12, USA Annex 3.
The next point about the GPA’s coverage is that Annexes no. 1, 2 and 3 to party-specific Appendices no.1 set contract value thresholds; the framework of the GPA applies only above these values (see Figure 2). Thresholds are nominated in the Special Drawing Rights (“SDR”),\(^\text{91}\) and are not the same for goods, services and construction works, as well as between parties in bilateral configurations. Analogous to how the reciprocity-related restrictions on the coverage of goods and services operate, general and specific notes may also set up bilateral thresholds, and their modification can also be conditional upon a future mutual lowering of thresholds with regard to specific goods, services or works (see Figure 2). Usually, for goods and services, thresholds are lower in the case of central entities (about \text{SDR} 130,000), medium for sub-central entities (about \text{SDR} 200,000) and higher in the case of ‘other’ entities (about \text{SDR} 400,000). For construction works, thresholds are in principle flat in the case of all covered entities (about \text{SDR} 5,000,000).

### B. RTAs

#### 1. General Remarks

After the establishment of the WTO and the expansion of public procurement liberalising commitments under the GPA, RTAs have gradually dealt with public procurement. Obviously, while some public procurement-relevant RTAs imposed actual liberalizing commitments, some only called for future negotiations on opening up public procurement markets and can hardly be classified as public procurement liberalizing (for example Japan-Thailand,\(^\text{92}\) EFTA-Korea,\(^\text{93}\) Thailand-

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\(^{90}\) See id.

\(^{91}\) The SDR is an international reserve asset, created by the IMF in 1969 to supplement its member countries’ official reserves. Its value is based on a basket of four key international currencies, and SDRs can be exchanged for freely usable currencies. See IMF (Washington), Special Drawing Rights, IMF Factsheet dated Sept.30, 2016.


New Zealand,94 Thailand-Australia95). In any case, a strong trend towards a proliferation of public procurement liberalising commitments in RTAs was noticed in some numerical analyses - the largest dataset being gathered by Anderson, Müller, Osei-Lah, Pardo de Leon and Pelletier, who looked at 139 RTAs concluded since 2000.96 In that sample, 87 RTAs more or less addressed public procurement while the remaining 52 RTAs did not at all. Among the 87 RTAs which did, 39 RTAs included detailed provisions, while the remaining 48 RTAs included few provisions, of a limited nature.97

In another study, Davies reported that among the 77 RTAs that entered into force between January 2000 and February 2007, 66 RTAs included express references to public procurement.98 Reports of the GATS Working Party on Procedures (in the context of trade in services) showed that among 34 Economic Integration Agreements (“EIAs”) notified to the WTO Secretariat up to August 2004, 25 EIAs included express references to public procurement (10 of which were entered into by the EU).99 Subsequently, out of 33 EIAs100 notified to the WTO in the period between 31st August, 2004 and 31st July, 2009 22 EIAs included such references.101

97 Calculated based on Table 1 at 568-576.
100 EIA is a GATS-specific term referring to an RTA. See GATS, art. V.
These are significantly higher ratios of public procurement-relevant RTAs to all RTAs than in the 1990s.\textsuperscript{102}

The GATS-related studies on EIAs and leading authors on international liberalisation of public procurement markets agree that public procurement-related provisions of RTAs are heavily influenced by the GPA’s framework. For example, Davies noted that “it is clear that the GPA has had and will very probably continue to have a dominant influence on the development of procurement disciplines in RTAs”,\textsuperscript{103} whereas Heydon and Woolcock noted that “the trend in procurement is therefore the progressive application of GPA framework to more and more countries, since the core entities include GPA equivalent provisions on procurement in most of the PTAs they conclude.”\textsuperscript{104}

Davies, in surveying 68 public procurement-relevant RTAs, found 28 incorporating the GPA’s provisions by reference.\textsuperscript{105} The reports of the Working Party on GATS Rules also offered examples of RTAs including such express references to the GPA (e.g. EFTA Convention,\textsuperscript{106} Japan-Singapore\textsuperscript{107} and US-Singapore\textsuperscript{108})\textsuperscript{109} and also identified RTAs which replicate many GPA provisions without express reference to the GPA (e.g. Chile-Japan,\textsuperscript{110} Korea-Singapore\textsuperscript{112} and Japan-

\textsuperscript{102} In order to capture the trend, I analysed the WTO’s RTA-IS data base, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (accessed Apr. 8, 2015). In Oct. 2012, I found that among all 244 RTAs in force, 89 RTAs included express references to public procurement (Oct. 17, 2012). This is a significantly lower ratio of expressly public procurement-related RTAs to all RTAs compared to ratios reflected in the above studies limited to the RTA’s concluded after 2000.

\textsuperscript{103} See note 98 at 276. See also Arwell Davies & Krista Naduakurenschefer, Government Procurement, in BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS (Simon Lester, Bryan Mercurio & Lorand Bartels, eds., Cambridge Univ. Press) at 319 (2nd ed. 2016).

\textsuperscript{104} See supra note 80, 274 at 76

\textsuperscript{105} See note 98 at 275.

\textsuperscript{106} See European Free Trade Association, art. 37(signed June 21, 2001 and entered into force on June 1, 2002).


\textsuperscript{109} See WTO Working Party on GATS Rules, Main Approaches to the Undertaking of Commitments on Government Procurement in Economic Integration Agreements, paras.4,5, S/WPGR/W/51 (Nov. 11, 2004).


\textsuperscript{111} See note 7.
GATS-related studies also noticed that there are RTAs which include hybrid references to both the GPA and to the NAFTA (EU-Mexico\textsuperscript{115} and EFTA-Mexico\textsuperscript{116}.). Davies identified only a few agreements (i.e. Korea-Singapore,\textsuperscript{117} New Zealand-Singapore,\textsuperscript{118} New Zealand-Thailand\textsuperscript{119} and US-Singapore\textsuperscript{120}) that did not precisely follow the GPA’s procedural framework.\textsuperscript{122}


\textsuperscript{114} See note 101, para.7, S/WPGR/W/49/Add.1.

\textsuperscript{115} See note 36.


\textsuperscript{117} Under which the obligations of the procurers from the EU and the EFTA are determined by references to their obligations under the GPA (\textsuperscript{116}art.61. 2) while the obligations of Mexican procurers are determined by references to their obligations under the NAFTA (\textsuperscript{115}art.29. 2).

\textsuperscript{118} See note 112.


\textsuperscript{121} See note 108.

\textsuperscript{122} See note 98 footnote 9 at 276. However, the WTO’s GATS-related documents emphasize the very high level of similarity across all EIAs, for instance, Krajewski in his studies on the liberalization of services in some multi-party RTAs (i) NAFTA, (ii) CAFTA-DR; \textsuperscript{111}See Dominican Republic-Central America-United States Free Trade Agreement (signed Aug. 5, 2004, in force Mar.1, 2006 (El Salvador, United States), Apr. 1, 2006 (Honduras, Nicaragua), July 1, 2006 (Guatemala), Mar. 1, 2007 (Dominican Republic), ch.9, \url{http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-FTA/final-text}, (accessed on Aug. 29, 2014); Mercosur (\textsuperscript{117}See Treaty establishing a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay 1991 U.N.T.S. Vol. 2140 Reg. No.37341); Andean Community (\textsuperscript{118}See Andean Subregional Integration Agreement (known since 1996 as the Andean Community of Nations or Comunidad Andina de Naciones) (signed at Bogota on May 26, 1969, in force Oct. 16, 1969, official codified text of the CAN signed June 25, 2003),
All this implies that the TPP signatories are utterly path-dependent upon the decisions previously made by some of them and by non-signatory countries as to the procedural model of the international liberalisation of government procurement markets because a given country cannot diversify procurement rules imposed on its particular procurement agencies with regard to specific different countries. Once procurement rules are set for a given agency toward foreign suppliers/contractors under at least one trade agreement, they cannot be different for any other country. If so, the TPP signatories will need to follow the same GPA-modelled rules regardless of whether they opt for bilateral agreement instead of the TPP, stick to the idea of limited TPP without the USA, regardless of whether China is able to influence negotiations on such limited TPP or not. Not only that, if the negotiations on the RCEP were eventually successful, and if RCEP were to include actual commitments on government procurement, such commitments would need to follow the GPA model of liberalisation too.

2. P4

The P4 originated from the efforts taken in the 1990s by New Zealand, Singapore and Chile to liberalise trade bilaterally (in different configurations among those countries). Chile and New Zealand—despite extensive negotiations in the early 1990s—failed to reach an agreement on the shape of a bilateral RTA. However, New Zealand and Singapore managed to reach such an agreement in 2000 (the ANZSCEP) which eventually encouraged Chile to sit back at the negotiation table after the APEC leaders’ meeting held in Bandar Seri Begawan, Brunei in...
In light of uncertain prospects for the conclusion of an even wider agreement (including USA and Australia), New Zealand, Singapore and Chile coalesced their efforts towards a trilateral deal following another APEC Leaders’ Meeting held in Los Cabos in 2002; they also attracted Brunei to join the talks in the process, eventually leading to the signing of the P4 in 2005.

In terms of public procurement, the P4 followed the ANZSCEP in that it set up a relatively low and flat value threshold at SDR 50,000 for goods and services except for Brunei, which meant to cover its public contracts only above SDR 250,000 on a reciprocal basis. In terms of subjective coverage, while the ANZSCEP covers all functionally defined central agencies (i.e. controlled by respective governments) without listing them and includes a best efforts clause

125 Those three parties took a decision to commence works on a technically new agreement although, as noted by Hamanaka, the New Zealand-Singapore RTA included an accession clause (art.79) which stipulated that ‘[T]his Agreement is open to accession or association, on terms to be agreed between the Parties, by any Member of the WTO, or by any other State or separate customs territory’ and potentially allowed an extension of that RTA over Chile or other countries. See note 123.

126 See note 123.

127 See New Zealand-Singapore RTA, art.47.1, P4, Annexure 11.C.

128 The P4 also, separately from services, covered construction works where the contract-value threshold was, however, set up at SDR 5,000,000. See P4, Annexure 11.C.


130 “Government procurement’ means procurement by government bodies, that is departments and other bodies, including statutory authorities, which are controlled by the Parties and excludes procurement by anybody corporate or other legal entity that has the power to contract, except where the Parties exercise their discretion to determine that this Part shall apply’. See New Zealand-Singapore RTA, art.48(e).
regarding the sub-central bodies\textsuperscript{131}, the P4 includes traditional lists of covered central entities\textsuperscript{132}. Only Chile has subjected its sub-central entities to the P4,\textsuperscript{133} whereas Brunei promised only upon its accession to the P4 that it would negotiate its public-procurement-related and services-related commitments within two years of the P4’s coming into force.\textsuperscript{134} In terms of objective coverage the ANZSCEP covers all goods\textsuperscript{135} but services only to the extent of the service-related chapter of that agreement\textsuperscript{136}. The P4 similarly covers all goods subject to country-specific and mostly security/weaponry-related reservations\textsuperscript{137} but ‘all services’ in the case of Chile\textsuperscript{138} and New Zealand\textsuperscript{139} (subject to minor reservations\textsuperscript{140}) with only Singapore

\textsuperscript{131}‘In the case of regional or local governments or authorities, and in the case of procurement of services by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities, the Parties shall use their best endeavours to encourage wider application of this Part, consistent with good commercial practice, to procurement by all such governments, authorities and bodies’. \textit{See id.}

\textsuperscript{132} \textit{See P4, Annex 11.A.}

\textsuperscript{133} \textit{See id.}

\textsuperscript{134} New Zealand Ministry of Foreign Affairs and Trade, \textit{Trans-Pacific Strategic Economic Partnership Agreement National Interest Analysis} (July 2005), https://www.mfat.govt.nz/assets/_securedfiles/FTAs-agreements-in-force/P4/transpacific-sepa-nia.pdf (accessed Feb. 20, 2016). As a result, Brunei was not benefiting from P4’s provisions related to government procurement and services until Brunei’s relevant commitments were agreed upon with other P4 parties. \textit{See id. note 22 at 20.} Subsequent publicly available documents do not show Brunei’s appendices which suggests that public procurement relevant provisions of the P4 have never entered into force with regard to Brunei but this needs investigation.

\textsuperscript{135} \textit{See New Zealand-Singapore RTA, art.47.1.}

\textsuperscript{136} \textit{See id.art.47.2.}

\textsuperscript{137} Although art.11.22.1 of the P4 (exceptions) stipulates – similar to the GPA or any other public Procurement-relevant trade agreement - that ‘[N]othing in this Chapter shall be construed to prevent any Party from taking any action or not disclosing any information 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 defence purposes’, for instance Singapore’ schedule for the sake of clarity excludes ‘contracts made by the Internal Security Department, Criminal Investigation Department, Security Branch and Central Narcotics Bureau of the Ministry of Home Affairs as well as procurement that have security considerations made by the Ministry’. \textit{See P4, Annex 11.A, Singapore, notes to Section B, point 1(b) at 24.}

\textsuperscript{138} \textit{See P4, Annex 11.A, Chile, section B.2.}

\textsuperscript{139} \textit{See id. Annex 11.A, New Zealand, section B.2.}

\textsuperscript{140} Chile excluded ‘all financial services’ (\textit{See note 138}) while New Zealand (i) procurement of research and development services (\textit{See note 139, section 2.B.a.}), (ii) any procurement in respect of contracts for construction, refurbishment or furnishing of chanceries abroad (\textit{See note 139, section 2.B.b.}), and (iii) procurement of public health, education and welfare services (\textit{See note 139, section 2.B.c.})
using a positive list of covered services\textsuperscript{141} and Brunei’s final coverage remaining unclear\textsuperscript{142}. In terms of procedural provisions, while the ANZSCEP was a rare example of a public procurement relevant RTA imposing actual liberalising commitments without copying the GPA’s framework, instead making a reference to the “APEC Non-Binding Principles on Government Procurement relating to transparency, value for money, open and effective competition, fair dealing, accountability, due process and non-discrimination”\textsuperscript{143} (see further: section 4) the P4 went with the flow and, although without express references, largely repeated the GPA’s provisions.\textsuperscript{144}

In terms of non-commercial considerations to be applied by the P4 parties’ public procurers, perhaps by far the largest agreed departure from the quest for the best value for money has been New Zealand’s wide exemption of measures adopted in the realisation of the provisions of the Treaty of Waitangi,\textsuperscript{145} which aimed at regulating relations between the British Empire (then extending its sovereignty over present New Zealand) and the indigenous Māori people, whereas subsequently public procurement as gradually become a tool of empowerment and the building of economic capacity of Māori people.\textsuperscript{146} Specifically, identical to the ANZSCEP\textsuperscript{147} and to the GPA’s New Zealand specific Annex no.7,\textsuperscript{148} New Zealand secured in general the following exceptions to the P4: “[p]rovided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods and services, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more

\textsuperscript{142} See note 134.
\textsuperscript{143} See New Zealand-Singapore RTA, Article 46.2 (a).
\textsuperscript{144} See note 114.
\textsuperscript{146} E.g., the Auckland Council Procurement Policy, http://www.aucklandcouncil.govt.nz/EN/planspoliciesprojects/councilpolicies/Document/aucklandcouncilprocurementpolicy.pdf (accessed Feb. 25, 2016) states, as its second principle that (i) “[T]he procurement process will support the council’s commitment to Māori including responsibilities under TeTiriti o Waitangi/The Treaty of Waitangi and its broader legal obligations as described in the council’s Māori Responsiveness Framework’ (See id. at 3) and (ii) “[T]he procurement process will enable the integration of the Māori Responsiveness Framework in decision-making, business plan and procurement plan development, and service delivery to realise and enhance Auckland Council’s commitment to Māori.’ (See id.). See also note 12, Fergusson & others at 237.
\textsuperscript{147} See New Zealand-Singapore RTA, art. 74.
\textsuperscript{148} However, as a matter of chronology, the P4 was only modelled after the ANZSCEP as it was not yet a party to the GPA at that time.
favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.’”

3. Other RTAs

For long, many of the bilateral RTAs concluded in the Asia-Pacific region did not cover government procurement. Some agreements did not even expressly call for future negotiations (Chile-Mexico, Peru-Thailand, Japan-Malaysia, Japan-Brunei, Japan-Indonesia, Japan–Vietnam, Malaysia-New Zealand, Chile-...
Malaysia, Chile-Vietnam, Mexico-Peru, Malaysia-Australia, Chile-Thailand). Given the ASEAN’s very specific and limited approach to public procurement (see further section 4 on limited liberalisation of public procurement among ASEAN members), the RTAs collectively concluded by the ASEAN also did not cover government procurement (the ASEAN-Australia-New Zealand Free Trade Agreement, signed November 13, 2010, in force April 1, 2012), art.10.2.3, http://www.sice.oas.org/Trade/MEX_PER_Integ_Agrmt/MEX_PER_Ind_s.asp (accessed Feb. 12, 2016).
Trade Agreement, 162 ASEAN-China, 163 ASEAN-India, 164 ASEAN-Japan,165 ASEAN-Korea166). 167


164 In this case, the framework agreement only called for strengthening economic relations in the field of public procurement. See Framework Agreement on Comprehensive Economic Cooperation between the Republic of India and the Association of South-East Asian Nations (signed Oct. 8, 2003, in force July 1, 2004), art.6.b.vii, http://commerce.nic.in/trade/international_ta_framework_asean.asp (accessed Mar. 3, 2016). In turn, the goods-specific agreement did not make references to public procurement.


166 In this case the framework agreement as well as goods-specific, services-specific and investment-specific agreements did not make references to public procurement. See respectively Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of South-East Asian Nations
Agreements which precisely mandated future public procurement-related negotiations included the Chile-Peru FTA, the Japan-Philippines EPA, and the New Zealand-Thailand CEPA, the last one additionally providing that the


167 On RTAs collectively concluded by ASEAN, See generally Jeffrey D. Wilson, Mega-Regional Trade Deals in the Asia-Pacific: Choosing Between the TPP and RCEP?, 45(2) JOURNAL OF CONTEMPORARY ASIA, 345 at 347 (2015).


169 Negotiations on Non-discrimination: In the event that a Party offers a non-Party any advantages of access to its government procurement market or any advantageous treatment concerning the measures regarding government procurement, the former Party shall consent to enter into negotiations with the other Party with a view to extending these advantages or advantageous treatment to the other Party. See Agreement between Japan and the Republic of the Philippines for an Economic Partnership (signed Sept. 8, 2006, in force Dec. 11, 2008), http://www.mofa.go.jp/policy/economy/fta/philippines.html (accessed Feb. 13, 2016).

170 The Working Group shall report to the CEP Joint Commission within 12 months of the entry into force of this Agreement with recommendations on the commencement of bilateral negotiations to expand the application of this Chapter. See New Zealand-Thailand
governments of Thailand and New Zealand shall “implement, to the extent possible: (a) the APEC Non-Binding Principles on Government Procurement (…) and (b) the APEC Transparency Standard for Government Procurement” 171 (section 5 further discusses APEC procurement-related activities). Among RTAs including actual public procurement liberalising commitments, some were concluded by countries anyway bound by the GPA, whereby parties merely affirmed their commitments under the GPA (Canada-Korea, 172 Korea-US, 173 Japan-Singapore, 174 USA-Singapore, 175 and Korea-Singapore 176 ), except for the discussed New-Zealand-Singapore FTA concluded long before New Zealand joined the GPA (see: section 0). As far as RTAs concluded by the GPA parties and non-parties (but which joined the TPP) are concerned, the USA, Canada and Japan have had such agreements with Chile, 177 Peru, 178 and Mexico (the US and Canada collectively through the


171 See id. art. 13.2.


176 See supra note 94, art. 16.1.


NAFTA). Additionally, the USA also had a public procurement liberalising RTA with Australia, but failed to conclude negotiations on the entire RTA with Malaysia in 2008 because of Malaysia’s hesitance to discontinue its preference schemes for the ethnic Malay population (Bumiputera) in its domestic public procurement system. In comparison, Singapore has concluded such RTAs only with Australia (“SAFTA”) and Peru.

Public procurement liberalising RTAs in the Asia-Pacific region concluded by nations other than the GPA parties have been rare. Before New Zealand joined the GPA, it had concluded such an agreement not only with Singapore but also with Australia (“ANZCERFTA”). Australia has had such an agreement with Chile, the latter emerging as the leader of liberalisation of public procurement among South-American nations not assembled in the MERCOSUR (“Mercado Común del Sur” or ‘Common Southern Market’), with Peru coming second. In fact, on the opposite side of the Pacific, South America has been split into countries gathered in MERCOSUR, established in 1991 under the Treaty of Asunción (Argentina, Brazil, Paraguay, Uruguay, joined by Venezuela 2012) and countries gathered in the much older Andean Pact currently known as the Andean


Community of Nations (‘ComunidadAndina de Naciones’ or “CAN”) established in 1969 under the Cartagena Agreement 187 (Bolivia, Columbia, Ecuador, Peru, formerly Chile and Venezuela). While internal liberalisation of public procurement has not been on the agenda of the Andean Community, MERCOSUR launched works of the public-procurement-dedicated working group in December 1997,188—which resulted in the adoption of the GPA-like Protocol on Government Procurement in 2003,189 subsequently amended in 2004.190 Finally, a decade later, and a year before the conclusion of negotiations on the TPP, three future TPP parties (Chile, Mexico, Peru), along with Colombia managed to reach an agreement on the Pacific Alliance (Alianza del Pacífico) 191 which also covered public procurement and, similar to MERCOSUR’s protocols on procurement, followed GPA’s model of liberalisation.

As far as the scope of commitments is concerned, RTAs going significantly further than the GPA model include the ANZSCEP (see section 0), the SAFTA and the ANZCERFTA. The SAFTA was unique in that it offered universal and threshold-free objective coverage of all goods, services and construction works192, but it confined its subjective coverage to Australia’s listed central agencies,193 with Singapore (as was its habit) liberalising procurement of only its central agencies in the lack of sub-central level of the government.194 Unlike the ANZSCEP, the SAFTA did not refer to the APEC non-binding procurement principles. However, it did not entirely copy the procedural framework of the GPA either, being instead much less detailed than the GPA, and generally laid down that “[e]ach Party shall ensure that the tendering procedures of its entities are consistent with the provisions of this Chapter, provide for mechanisms to eliminate conflict of interest between persons administering a tendering procedure and potential suppliers, achieve value for money outcomes and are conducted in a fair

For example, with regard to the timing of the procurement process, the public procurement-relevant chapter of the SAFTA only mandated that “[a]ny conditions for participation in open tendering procedures shall be published in adequate time to enable interested suppliers of the other Party to initiate and, to the extent that it is compatible with the efficient operation of the procurement process, complete the registration and/or qualification procedures”196 without specifying minimum day limits. Interestingly, the public procurement-relevant chapter of the SAFTA also included provisions absent in the GPA94 or GPA12, such as:

(i) The requirement that “[o]wnership of intellectual property specifically produced under a contract for the procurement of goods and services concluded between a person of one Party and the other Party or its entities shall be as determined by the contract”197 as well as “[t]he contract for the procurement of goods or services shall not affect intellectual property rights in material that existed prior to the date of the contract unless the contracting Parties expressly agree otherwise in the contract,”198 or

(ii) The requirement that “[t]he Parties shall take reasonable measures to ensure that governments at all levels do not provide any competitive advantage to any government-owned businesses in their business activities simply because they are government owned” found in the SAFTA’s competition chapter199 but also applicable mutatis mutandis to procurement chapter.200

The ANZCERFTA went even further than the ANZSCEP or the SAFTA given Australia’s and New Zealand’s traditionally strong historical and economic ties. While the ANZCERFTA’s purpose was to reciprocally open the procurement markets of both countries, many solutions were particularly focused on opening Australian procurement to New Zealand’s content, without affording New Zealand the same level of consideration. Although parties to the ANZCERFTA recognized that ‘“[I]n government purchasing the maintenance of preferences for domestic suppliers over suppliers from the other Member State is inconsistent with the objectives of this Agreement, and the Member States shall actively and on a reciprocal basis work towards the elimination of such preferences,”201 the express requirement of NT peculiarly

195 See id., ch.6, art. 6.2.
196 See id., ch.6, art.6.4.
197 See id., ch.6, art.9.2.
198 See id., ch.6, art.9.3.
199 See id., ch.12, art.4.
200 See id., ch.6, art.10.
encumbered Australia whereby only the Australian government had to “continue to treat any New Zealand content in offers received from Australian or New Zealand tenderers as equivalent to Australian content.” Still, both parties committed to accord the same “benefits of any relevant tariff preferences,” and not impose offsets on each other’s content.

Subsequently, as a part of the planned revision of the ANZCERFTA in 1988, the Australian government committed to support New Zealand’s efforts to also get access to procurement managed by Australia’s sub-central governments by joining Australia’s internal ‘National Preference Agreement’ (“NPA”) which had mutually opened procurement markets between Australian provinces. New Zealand signed the NPA in 1989 and both countries along with Australia’s sub-central government sealed the deal for the creation of the single public procurement market in 1991 by entering into Australia-New Zealand Government Procurement Agreement (“ANZGPA”) further revised in 1997 and in

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202 This implies that some forms of preferential treatment for New Zealand’s content existed in Australia’s procurement system even before conclusion of the ANZCERTA See id., art. 11.2.a(i).

203 See id., art. 11.2.a.ii, 11.2.b.i.

204 See id., art.11.2.a.iii, 11.2.b.ii.

205 ‘3. The Member States shall undertake a general review of the operation of this Agreement in 1988. Under the general review the Member States shall consider: (a) whether the Agreement is bringing benefits to Australia and New Zealand on a reasonably equitable basis having regard to factors such as the impact on trade in the Area of standards, economic policies and practices, co-operation between industries, and Government (including State Government) purchasing policies; (…)’. See id., art.22.3.a.


208 See id.

the ANZGPA has been threshold-free and, in terms of objective coverage, has applied to ‘[a]ll goods and services procured by the Parties’. In turn, in terms of subjective coverage, it has applied to ‘[p]rocurement undertaken by Government bodies that is Departments and other relevant public bodies including statutory authorities, which are controlled by the Parties to the Agreement and excludes procurement by any local authority, Government owned corporation, body corporate or other legal entity that has the power to contract, except where the Party exercises its discretion to determine that the Agreement will apply’. On top of that, the ANZ GPA included some reasonable exceptions to its application which can barely be found in typical public-procurement-related chapters of RTAs, such as the exemption of: (i) ‘procurement conducted by Government bodies that trade in substantial competition with the private sector and would be placed at a significant commercial disadvantage if they were required to fully comply with all provisions of the Agreement’ and (ii) joint ventures with the private sector.

Beyond the Australia-New Zealand-Singapore triangle, the scope of procurement-related commitments under the RTAs has not exceeded, as one could reasonably predict, what such RTAs’ parties would likely agree to under the GPA. Moreover, it can be generally seen with regard to the RTAs that, in the light of very sluggish expansion of the GPA, the USA along with its closest economic partners such as Canada and Japan became the driving force of the liberalisation of public procurement markets in the Asia-Pacific region through concluding bilateral agreements which include procurement chapters imposing actual liberalising commitments. Nonetheless, it can also be seen that the strategy has been pretty successful in Latin American countries, whereas in South-East Asian countries the results of such strategy have been very modest.

4. ASEAN

Five TPP members (Brunei, Chile, Malaysia, Singapore and Vietnam) are also members of the ASEAN. The ASEAN was established in 1967 in order ‘to accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a

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211 See note 209.

212 See ANZGPA, Introduction, para 2.

213 See id., Coverage, para 1.

214 See id., Annex1, point 1.

215 See ANZGPA, Annex 1, point 2.
prosperous and peaceful community of South-East Asian Nations.” 216 The ASEAN members’ efforts toward economic integration within that block since the very beginning included public procurement, since the declaration following the Second Meeting of the ASEAN Economic and Planning Ministers held in Kuala Lumpur in March 1976, stating that “[i]n regard to cooperation in Trade, ASEAN Economic Ministers emphasized their desire to strengthen intra ASEAN trade and agreed that the following measures should see as reference points for future studies on trade cooperation amongst ASEAN countries,” including government procurement217.

Consequently, the general purpose of the Agreement on ASEAN Preferential Trading Arrangements (“ASEAN-PTA”) adopted in 1977 218 was to regulate matters such as “long-term quantity contracts; purchase finance support at preferential interest rates; preference in procurement by Government entities; extension of tariff preferences; liberalization of non-tariff measures on preferential basis; and other measures.” 219 Specifically with regard to public procurement of goods, ASEAN members decided to prefer tenders from within the ASEAN and discriminate against non-ASEAN tenders by agreeing that:

(i) “[p]re-tender notices for international tenders in respect of procurement by Government entities should be sent to the Missions of the Contracting States in the relevant ASEAN capital” 220

(ii) “[s]ubject to such provisions as may be embodied in supplementary agreements on Government procurement and to the rules of origin to be subsequently decided, Contracting States shall accord each other a preferential margin of 2-1/2% which should not exceed US$40,000 worth of preference per tender in respect of international tenders for Government procurement of goods and auxiliary services from untied loans submitted by ASEAN countries vis-a-vis non-ASEAN countries” 221

219 See id., art. 3.
220 See id., art. 7.1.
221 See id., art. 7.2.
(iii) “[t]he preferential margin should be applied on the basis of the lowest evaluated and acceptable tender.”

Such provisions did not imply by any means that the ASEAN members should not discriminate against each other in the case of public procurement of goods. Rather, they only meant that in the case of contracts open to foreign competition (at the discretion of each ASEAN member), not only should ASEAN suppliers/goods not be discriminated against compared with third (non-ASEAN) countries but also that ASEAN suppliers/goods should get some favourable treatment compared with such third countries. Yet, in the course of the Tokyo Round, public procurement-relevant provisions of the ASEAN-PTA appeared to be problematic for non-ASEAN countries negotiating their accession to the GPA79 in terms of Singapore’s accession to the GPA. Such countries inquired into ASEAN members in May 1978 within the framework of the Working Party on the ASEAN-PTA: (i) whether “[t]he provisions on government procurement of Article 7 of the Chapter II of this Agreement could be incompatible with the principle of non-discrimination with respect to the government procurement vis-à-vis participating countries to the Agreement and non-participating countries,” and (ii) “[w]hat would be the view of participants to this Agreement on the compatibility between these provisions and the international code which is now being negotiated in the Sub-group on "Government Procurement" in the MTN?”

In response, the ASEAN members stated evasively that: (i) “[t]he ASEAN member countries of the General Agreement[i.e. GATT47] are aware of their obligations under the General Agreement,” (ii) “therefore the provisions of the General Agreement will be observed in carrying out their obligation under the preferential trading arrangements,” and (iii) “[t]he compatibility of ASEAN Government Procurement provisions as against the international code on government procurement does not arise at the moment as the code is still being negotiated.”

On being asked whether they could “assure contracting parties that the provisions of the subject Agreement will not impede elimination and/or reduction of nontariff measures on an MFN basis as a result of the Multilateral Trade Negotiations including, inter alia, conformity to a code on government procurement,” the ASEAN members replied that “[t]he Agreement did not affect in any manner the right of any participating states to reduce or eliminate nontariff

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222 See id., art. 7.3.
223 See note 238.
225 See id.
226 See id. at 6-7
227 See id.
228 See id.
229 See id., Question 2 at 2.
measures on a most-favoured-nation basis”230. That statement perhaps meant that one possible solution of how to resolve the conflict between public procurement-relevant obligations under the GPA79 and the ASEAN-PTA covering the same country would be that a country subjected to both agreements would have to offer 2.5% margin of preference to all GPA79 parties against all non-GPA (and non-ASEAN?) countries. However, even prima facie, such a solution would have been too difficult to implement because of its complexity.

Additionally, in December 1978 the representative of the ASEAN members in the context of the potential conflict of the GPA79 and the ASEAN-PTA further clarified that: (i) “in the view of the members of ASEAN The provisions of the General Agreement Did not cover government procurement,”231 (ii) “It would also be premature at this time to discuss the relevant provisions of the ASEAN Agreement in relation to an eventual code on government procurement as such a code was still under negotiation,”232 and (iii) “no ASEAN Preferences on government procurement additional to the 2.5 Per cent preference specified in the Agreement [ASEAN-PTA] had been established and that previous national legislation on this subject had in effect been superseded by the provisions of the Agreement.”233

The delegation of Singapore, being the only realistic candidate for joining the GPA79, was specifically asked in May 1978—(i) “Are there any preferences in government procurement for domestic concerns in each of the ASEAN countries?”234 and (ii) “If so, what are these domestic preferences and how will they relate to the ASEAN preferences?”235. In response, in line with the statements collectively made by all ASEAN members, Singapore’s delegation clarified that (i) “[P]references in government procurement are extended to domestic concerns in each of the ASEAN countries in the form of a certain per cent margin between the offered price of domestic concerns vis-a-vis non-domestic competitors within which government procurement will have to be awarded in favour of the domestic concern,”236 (ii) “[B]y the terms of Article 7 of the Agreement, the preferential margin to be accorded to the contracting States regarding government procurement concerns only bids submitted by ASEAN countries vis-a-vis non-ASEAN countries”237 and (iii) “Hence, domestic preferences on government procurement vis-a-vis nondomestic concerns whether they are ASEAN or non-ASEAN are not affected by the Agreement on ASEAN PTA.”238

230 See id.
232 See id.
233 See id.
234 See note 224, Question 18 at 6
235 See id.
236 See id.
237 See id.
238 See id.
Eventually, under the GPA79, Singapore simply secured a derogation from preferences stemming from the ASEAN-PTA instead of trying to apply more complicated solutions which would have combined ASEAN-PTA’s margin of preference with the GPA’s NT and MFN clauses (as initially collectively suggested by all ASEAN members). Subsequently, in the course of negotiations on the GPA87, Singapore made a reservation that “[T]he offer [was] conditional on the right of the Singapore Government to grant tenderers from the ASEAN countries a two and a half per cent or US $40,000 preferential margin in accordance with the provisions of the Agreement on ASEAN Preferential Trading Arrangements.” Moreover, “[T]he Representative of Singapore Stated that concerning Article V: new Paragraph 3, on information prior to notice of proposed purchase, it was the understanding of her delegation that Singapore would, under the Agreement on the ASEAN Preferential Trading Arrangement, continue to give prior notice to other ASEAN Countries before similar notices were published to non-ASEAN countries”.

Meanwhile, the ASEAN members took further steps to deepen inter-ASEAN economic integration, but with little effect on public procurement, by concluding in January 1992 (i) The Framework Agreements on Enhancing ASEAN Economic Cooperation, and (ii) the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (“CEPT-AFTA”). The general

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239 Although original Annexes to the GPA79 are not easy to find, the shape of Singapore’s derogations, can be inferred from other Singapore’s communications made in the GATT Committee on Government procurement such as that ‘Except for the preferential treatment of ASEAN Countries provided for in the ASEAN Preferential Trading Arrangements signed by the Foreign Ministers of the ASEAN Countries on 24 FEB 1977 and incorporated into Paragraph 357 of IM 3 by Finance Circulars 1/79 and 8/79 dated 19 JAN 79 and 6 JUL 79 respectively, there will be no discrimination in the evaluation of offers received from domestic and foreign suppliers’. See GATT Committee on Government Procurement, Implementation and Administration of the Agreement: Supplement, Legislation of Singapore, GPR/3/ADD.11/SUPPL.1, para. 3.23 at 9 (1982).

240 See note 230.


242 See id., para. 12 at 2.


The CEPT-AFTA did not make any express references to public procurement, neither covering nor excluding public procurement. Thus, one could claim that public procurement should be covered by CEPT-AFTA’s general NTB-related provisions.\(^{252}\) However, the common understanding was that public procurement was excluded.\(^{253}\) For example, the Hanoi Plan of Action of 1998 (i.e. 6 years after the adoption of the CEPT-AFTA) showed how little was achieved in the 1990s in terms of liberalisation of public procurement markets among the ASEAN members by still calling it as a part of ‘other facilitation activities’ for (i) the establishment of “a mechanism of information exchange and disclosure requirements to promote transparency of government procurement regimes by the year 2003 to facilitate participation of ASEAN nationals and companies”\(^{254}\) and to (ii) ‘encourage the liberalisation of government procurement’\(^{255}\).

\(^{245}\) See note 243, art.2.A.1.
\(^{246}\) See id., art. 2.A.2.
\(^{247}\) See id., art.2.A.3.
\(^{248}\) See CEPT-AFTA, art.2.4.
\(^{249}\) See note 218.
\(^{250}\) See CEPT-AFTA, art.5.A.1.
\(^{251}\) See CEPT-AFTA, art.5.A.2.
\(^{254}\) See Ha Noi Plan of Action (adopted by the Heads of State/Government at the 6 the ASEAN Summit in Hanoi, Vietnam on Dec. 15, 1998), art.2.1.4.a,
New agreements also kept in place the 2.5% margin of preference discriminating against non-ASEAN content because (i) the framework agreement allowed that “for products not covered by the CEPT Scheme, the ASEAN Preferential Trading Arrangements (PTA) or any other mechanism to be agreed upon, may be used”[256] and (ii) the CEPT-AFTA set forth that “all products under the PTA which are not transferred to the CEPT Scheme shall continue to enjoy the MOP existing as on 31st December 1992.”[257] Thus, Singapore had to maintain this derogation under the GPA94,[258] and even after GPA94 coming into force, Singapore’s representatives in the WTO had to emphasise that “Singapore believe[d] that this provision allows it[GPAs’s MFN clause] to extend preferential treatment to the other ASEAN countries as none of them are a party to the GPA.”[259]

Nonetheless, in retrospect, during a country trade policy review held in 2008 Singapore’s delegations assessed that “to date, this instrument [ASEAN margin of preference] has hardly been used but we still need to retain it as it is Singapore’s commitment to ASEAN.”[260]

Eventually, the ASEAN Trade in Goods Agreement (“ATIGA”) of 2009[261] superseded the ASEAN-PTA and the CEPT-AFTA, and ditched the external 2.5% margin of preference in a rather vague way. Specifically, the ATIGA did not expressly supersede the previous agreement but rather provided with regard to its ‘relation to other agreements’ that (i) “subject to paragraph 2 of this Article, all ASEAN economic agreements that exist before the entry into force of ATIGA shall continue to be valid,”[262] (ii) “Member States shall agree on the list of agreements to be superseded within six (6) years.”


255 See id., art. 2.1.4 c.
256 See note 243, art.2.A.2.
257 See CEPT-AFTA, art. 2.6.
258 This 2.5% preference margin was an issue that arose during Singapore’s accession to the WTO-GPA. It was agreed at that time during Singapore’s accession that Singapore may maintain a 2.5% preference margin if the need arises’. See WTO Trade Policy Review Body, Trade Policy Review Singapore. Minutes of Meeting held 14 and 16 July 2008. Addendum, WT/TPR/M/202/Add.1 at 61(Sept. 15, 2008).
260 See note 258.
262 See ATIGA, art. 91.1.
months from the date of entry into force and such list shall be administratively annexed to this Agreement and serve as an integral part of this Agreement, and (iii) “in case of inconsistency between this Agreement and any ASEAN economic agreements that are not superseded under paragraph 2 of this Article, this Agreement shall prevail”. In turn, the list amendments to previous agreements amended article 2.A.2 of the mentioned 1992 framework agreements to read that, “The ASEAN Trade in Goods Agreement (ATIGA) shall be the Main Mechanism for the AFTA. For the products not covered by the ATIGA, any other agreed mechanism may be used”. Subsequently, during Singapore’s trade policy review conducted in 2012, the report by the WTO Secretariat stated that: “[a]t the time of Singapore’s previous Review, the authorities noted that tenders are awarded to the supplier that provides an overall best value for money that meets the specifications and requirements stipulated in the tender. Hence, both quality and price are taken into account. Moreover, all foreign and domestic suppliers are subject to the same procedures. Given that there is no distinction or discrimination between local and foreign suppliers, Singapore does not monitor the proportion of foreign-supplier-awarded contracts’, implying that the 2.5% margin was deemed expired.

Still, the ATIGA did not expressly cover public procurement but, similar to the CEPT-AFTA, merely mandated further elimination of NTBs. The ATIGA was much more precise than the CEPT-AFTA in that it required an initial identification of NTBs applied in ASEAN Members and, consequently, that “unless otherwise agreed by the AFTA Council, the identified NTBs shall be eliminated in three (3) tranches”. Nonetheless, the identified NTBs still did not include discriminatory measures in public procurement. Likewise, subsequent so-called ‘blueprints’ of

\[263\] See id., art. 91.2.

\[264\] See id., art.91.3.

\[265\] See note 256.


\[268\] See notes 251, 252.

\[269\] See CEPT-AFTA, art. 40.4.

\[270\] (A)s follows: (a) Brunei, Indonesia, Malaysia, Singapore and Thailand shall eliminate in three (3) tranches by 1 January of 2008, 2009 and 2010; 2009 (b) The Philippines shall eliminate in three (3) tranches by 1 Jan. of 2010, 2011 and 2012; (c) Cambodia, Lao PDR, Myanmar and Viet Nam shall eliminate in three (3) tranches by 1 January of 2013, 2014 and 2015 with flexibilities up to 2018’. See CEPT-AFTA, art. 42.2.

2007 ("AEC Blueprint 2008-2015") and 2015 ("AEC Blueprint 2016-2025") laying foundations of the formalised ASEAN Economic Community ("AEC") did not expressly address an inter-ASEAN liberalisation of public procurement markets. Thus, although the AEC was eventually formally launched at the 47th ASEAN Economic Ministers’ Meeting on 22nd August, 2015 held in Kuala Lumpur, the prospects for the actual liberalisation of public procurement markets between ASEAN members remain unclear.

5. APEC

Figure 3 Osaka Action Agenda and public procurement.

9. GOVERNMENT PROCUREMENT.

OBJECTIVE

APEC economies will:

a. develop a common understanding on government procurement policies and systems, as well as on each APEC economy’s government procurement practices; and

b. achieve liberalization of government procurement markets throughout the Asia-Pacific region in accordance with the principles and objectives of the Bogor Declaration, contributing in the process to the evolution of work on government procurement in other multilateral fora; and

c. increase the use of electronic means to conduct government procurement and in so doing seek to promote the uptake of ecommerce more broadly.

GUIDELINES


274 The initial idea was that ‘[A]n ASEAN single market and production base shall comprise five core elements: (i) free flow of goods, (ii) free flow of services, (iii) free flow of investment, (iv) freer flow of capital, and (v) free flow of skilled labour. In addition, the single market and production base also include two important components, namely, the priority integration sectors, and food, agriculture and forestry’. See AEC Blueprint 2008-2015, art. 9.
Each APEC economy will:

a. enhance the transparency of its government procurement regimes and its government procurement information;
b. establish, where possible, a government procurement information database and provide the information through a common entry point; and c. review on a voluntary basis and take appropriate steps to improve the consistency of its government procurement regime with the APEC Non-binding Principles on Government Procurement (transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination); and
c. provide for and promote government procurement through electronic means wherever possible.

COLLECTIVE ACTIONS

APEC economies will:

a. utilize questionnaire surveys to exchange information on existing government procurement regimes and on publication of government procurement information in APEC economies;
b. maintain contact points to facilitate on-going exchange of the above information;
c. hold workshops, seminars and training courses on government procurement procedures, laws, regulations, regional and plurilateral agreements, and the impact of technological development on government procurement;
d. encourage establishment of an APEC government procurement information database, including information on procurement opportunities and the provision of a common entry point (such as World Wide Web (www) Home Page on the Internet) for participation by members on a voluntary basis; and
e. continue to report voluntarily on the consistency of their procurement regimes with the APEC Non-binding Principles on Government Procurement and on the improvements to their regimes.”

All TPP members are also members of the APEC. The APEC was established as a largely informal forum of inter-governmental co-operation at the ministerial meeting held on 6th November, 1989 in Canberra with a general goal to promote economic integration in the Asia-Pacific region.


276 See generally, The history of APEC, 17(4) BUSINESS KOREA 54 (Apr 2000); M. Shanmugam, Milestones in APEC history, MALAYSIAN BUSINESS 14 (Sept. 1, 1998)
Figure 4 APEC non-binding principles: elements of transparency.

Elements of transparency

Sufficiency and relevance of information: to enable potential suppliers to make informed decisions. For example, potential suppliers must have access to information on the conditions for participation and the requirements of the intended procurement in order to decide whether to participate and to prepare a responsive offer. Timelines: to ensure that the information is valid and useful when available to the receiver.

- Availability to all interested parties: to ensure that the procurement process is fair to all participants and seen to be fair.
- Through a readily accessible medium at no or reasonable cost: to ensure that information is accessible in practice.
- Consistency: the objectives of maintaining a transparent procurement system can only be achieved if the system remains consistently transparent. This also includes making information up to date and informing relevant parties of changes and additional information promptly.”

Notwithstanding the above, the following information may be withheld: commercially sensitive information, and information the release of which would prejudice fair competition among suppliers, impede law enforcement, contrary to public interest or compromise security of the economy concerned. Where such information is withheld, the reason should be given on request.

Among a number of political declarations made by APEC leaders, the Osaka Action Agenda of 1995 first expressly addressed public procurement and identified a set of principles such as (i) transparency, (ii) value for money, (iii) open and effective competition. (iii) fair dealing, (iv) accountability and due process, and (v) non-discrimination, which APEC members abide by on a voluntary basis (see: Figure 3). Based on this agenda, the APEC Government Procurement Experts Group (“GPEP”) initiated its works on the details of the non-binding principles in 1995 and issued the first set of nominally transparency-related principles (endorsed by the meeting of the APEC Ministers held in Vancouver in November 1997).

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277 See note 281, WT/WGTGP/W/11, para.3 at 2 (1997).
278 See id., para 4.
279 See note 276.
280 See supra note 256.
281 See WTO Working Group on Transparency, APEC Non-binding Principles on Government Procurement: Transparency; Communication from Hong Kong, China, WT/WGTGP/W/11 at 1 (Dec. 19, 1997). See also APEC Government Procurement Experts Group, Summary Report -
which, in fact, went much beyond transparency and were written so that they did not collide with the provisions of GPA, 94.

As far as transparency is concerned, sufficiency and relevance of information, availability to all interested parties, accessibility in practice, and consistency were identified by the GPEP as the core elements of transparency (see: Figure 4). Transparency-related principles also provided that "the laws, regulations, judicial decisions, administrative rulings, policies (including any discriminatory or preferential treatment such as prohibitions against or set aside for certain categories of suppliers), procedures and practices (including the choice of procurement method) related to GP should be transparent" and that APEC members shall, among others (i) publish these rules and make them 'readily accessible' to everybody, (ii) determine the subjective coverage of these rules with positive or negative lists of procurers covered with these rules, (iii) publish all amendments to these rules without delay, and (iv) open public procurement contact points. 'Procurement opportunities’ had to be transparent and published “in a medium readily accessible to suppliers (e.g. official journals/gazettes, newspapers, specialized trade journals, Internet, and through embassies and consulates)”.

Specific/intended procurement notices had to include “the nature of the product or service to be procured, specifications, quantity, time-frame for delivery, closing times and dates, where to obtain tender documentation, where to submit bids and contact details from which further information can be obtained." Finally, the award of contracts had to be transparent, meaning that (i) the outcome of the tenders would be published along with value of the winning bid, and (ii) information on the reasons of specific award would be provided to unsuccessful bidders upon request.

As far as requirements going beyond transparency are concerned, the first set of principles called, among others, for (i) "Making open and competitive tendering the preferred method of tendering”, (ii) “Allowing adequate and reasonable time for interested suppliers to prepare and submit responsive bids”, and (iii) "Evaluating bids strictly according to previously


See note 281, WT/WGTGP/W/11, para. 5.

See id., para. 6, 1st, corresponding with the GPA94 art.XXIV.5.a.

See id., para. 6, 2nd, corresponding with the GPA94 note 1 to art. 1.1., 3rd.

See id., para. 6, 3rd, corresponding with the GPA94 art.XXIV.5.b.

See id., para. 7, corresponding with the GPA94 art.V.11.

See id., para. 8, 2nd, corresponding with the GPA94 art.IX.1.

See id., para. 8, 4th, corresponding with the GPA94 art.XVII.1.b.

See id., para. 10, 1st, corresponding with the GPA94 art.IX.6.

See id., para. 14.1, corresponding with the GPA94 art.XVIII.1.

See id., para. 14.2, corresponding with the GPA94 art.XVIII.2.c.

See id., para. 8, 2nd, corresponding with the GPA94 art.X.1.

See id., para. 8, 3rd, corresponding with the GPA94 art.XI.
published criteria\textsuperscript{294} which shall also include ‘any preferential arrangements’”,\textsuperscript{295} and(iv) “designating a body/person for the purpose of reviewing supplier complaints about procurement processes which are not able to be resolved through direct consultation with the procuring agency in the first instance”. The second set of principles cover the details of value for money and open and effective competition.\textsuperscript{296} Noteworthy value-for-money-related provisions for example generally advocate that government officials should (i) “Not over-specify or under-specify the attributes and performance required to accomplish their objectives as these actions may affect the quality of value for money achieved”\textsuperscript{297} and (ii) “Should, according to the needs of each procurement situation, choose the method (…) encouraging levels of competition among suppliers commensurate with the anticipated value for money benefits from that competition”,\textsuperscript{298} seeing that “[N]o single type of procurement fulfils all requirements”.

As to award criteria, value-for-money-related provisions clarified that, “evaluation of offers should be done in a whole-of-life context, so as to ensure that the best value is obtained for the procurement. Besides price and fitness for purpose, other factors that may be taken into account include performance, quality, reliability, delivery, inventory costs, running costs, warranties and after-sale support and disposal”\textsuperscript{300}. In turn, noteworthy open-competition-related provisions emphasised that (i) “Good market knowledge can help government officials to design and plan the procurement process, to identify possible new sources of supply as well as to conduct the procurement in the most effective manner”,\textsuperscript{301}(ii) “competition may be limited by factors such as existence of monopolies or cartels, limited number of qualified suppliers, urgency of requirements, need for compatibility with existing products and difficulty in persuading suppliers

\textsuperscript{294} See id., para. 11, corresponding with the GPA94 art.XII.2.h.
\textsuperscript{295} See id., para. 12, corresponding with the GPA94 art.XII.2.h.
\textsuperscript{297} See WTO Working Group on Transparency in Government Procurement, APEC Non-Binding Principles on Government Procurement - Communication from Hong Kong, China’, WT/WGTGP/W/24, para. 19 (Sept. 21, 1999); APEC Government Procurement Experts Group, Review of the APEC Non-Binding Principles (NBPs) on Government Procurement Submitted by Australia at Government Procurement Experts' Group Meeting held in Hoi An on 8-9 September 2006, 2006/SOM3/GPEG/005, Agenda Item no. 9, Annex 1, para. 1.1(Sept. 8, 2006).
\textsuperscript{298} See note 297, WT/WGTGP/W/24, para.22; note 297, 2006/SOM3/GPEG/005, Annex 1, para. 2.1.
\textsuperscript{299} See id., para. 23, note 297, 2006/SOM3/GPEG/005, Annex 1, para. 2.2.
\textsuperscript{300} See id., para. 28, note 297, 2006/SOM3/GPEG/005, Annex 1, para. 3.4.
\textsuperscript{301} See id., para. 41, note 297, 2006/SOM3/GPEG/005, Annex 2, para. 1.5.
to bid,” and therefore (iii) “Buyers should adjust their procurement method to achieve the best value for money in such limited competition situations.”

Until September of 1998, the GPEG agreed on the principles of fair dealing, which largely came down to the bias against flexible negotiations between public procurers and tenderers corresponding to the GPA’s bias against non-negotiated procedures (see: section 3). Fairness of the procurement process could specifically be achieved in the way, among others, that (i)”Contact between government officials and suppliers should be on a formal basis once the formal procurement process starts”, and (ii) “Any shortlisting process for negotiations should be conducted in a fair and equitable manner and any negotiations should be conducted in a structured and ethical manner.”

Next, till February of 1999, the GPEG finalised works on the set of principles on accountability and due process, whereby accountability-related provisions largely came down to proper record-keeping and proper internal auditing within public administration. In turn, due process-related provisions were advocated, in line with the GPA94, that “mechanisms should be put in place for handling complaints about procurement processes or alleged breaches of procurement laws, regulations, policies and procedures which cannot be resolved through direct consultation with the procuring agency in the first instance”, and that the review body handling such complaints should, among

302 See id., para. 43, note 297, 2006/SOM3/GPEG/005, Annex 2, para. 2.2., 1st sentence.
305 See note 297, WT/WGTGP/W/24, para.47, 1st sentence; note 297, 2006/SOM3/GPEG/005, Annex 4, para.1.2, 1st sentence.
306 See id., para. 43; note 297, para.47, 8th sentence; note 297, 2006/SOM3/GPEG/005, Annex 4, para.1.2, 2nd sentence.
309 See id., para. 43; note 297, para.64; note 297, 2006/SOM3/GPEG/005, Annex 3, para. 3.
310 See generally GPA94 art. XX.
311 See note 297, WT/WGTGP/W/24, para.66; note 297, 2006/SOM3/GPEG/005, Annex 3, para. 3.
others, be in a position to “provide[e] for correction of the breaches or compensation for the loss or damages caused, which may be limited to the costs of tender preparation or protest”\textsuperscript{312}.

**Figure 5 APEC non-binding principles: non-discrimination**

In practice, this [non-discrimination] can be achieved through the following: the same information on procurement opportunities should be available in a timely manner to all potential suppliers. For example, publishing tender information through the Internet allows it to be available instantaneously to all interested suppliers wherever they are.

- Criteria for qualification of suppliers, evaluation of bids, and award of contracts should be based solely on the ability to meet the procurement requirements such as technical competence, and value for money considerations in terms of relevant benefits and costs on a whole-of-life basis;
- Where open call for tender is not practical, selective invitation to tender should be based on non-discriminatory and objective criteria of ability to meet the procurement requirements, consistent with the open and effective competition principles and practices identified by the GPEG earlier;
- Tender specifications should not be prepared, adopted or applied with a view to, or with the effect of, creating bias for or against the goods, services or suppliers of any particular economy/economies; or unnecessary obstacles to trade. Where possible, tender specifications should be drawn up in terms of performance/functional/operational requirements using international or other relevant standards;
- Bids should be evaluated and contracts awarded strictly according to the published criteria;
- Post-tender negotiations, if allowed, should be notified in the tender notice and/or tender documentation. The buyer should conduct the negotiations in a structured and ethical manner and should not in the course of negotiations discriminate between goods, services or suppliers of different economies. Also, any opportunity to submit revised bids should be provided on a non-discriminatory basis;
- Any debriefing should be available to all participating suppliers, and review procedures to all participating suppliers and suppliers having an interest in the procurement concerned, on a non-discriminatory basis; and
- Suppliers should not be unjustifiably excluded from the procurement process.\textsuperscript{313}

\textsuperscript{312} See id., para. 43; note 297, para.67, 2\textsuperscript{nd}tiret; note 297, 2006/SOM3/GPEG/005, Annex 3, para. 4.2., 2\textsuperscript{nd}tiret, corresponding with the GPA94 art. XX.7.c.

\textsuperscript{313} See note 297, WT/WGTGP/W/24, para.72; note 297, 2006/SOM3/GPEG/005, Annex 5, para. 3.1.
Finally, in August of 1999, the GPEG completed discussions on the last set principles covering the problem of ‘non-discrimination’ and most directly addressed international liberalisation of public procurement markets. Non-discrimination-related provisions (see: Figure 5) advocated liberalisation of public procurement markets not only amongst APEC members but towards all foreigners by advising that “procurement laws, regulations, policies, administrative guidelines, procedures and practices should not be prepared, adopted or applied so as to afford protection/favour/preference to, or discrimination/bias against, the goods, services or suppliers of any particular economy/economies”. Seeing that “the use of discriminatory practices in government procurement undermines the competitive process and thus the ability of member governments to achieve the best possible value for money outcomes” suggested exceptions to the principle of non-discrimination were not unlike those under GPA94 and included measures necessary “for the protection of their essential security interests relating to the procurement of arms, ammunition or war materials; or to procurement indispensable for security or defence purposes”.

Eventually, all previously prepared sets of principles were endorsed by and by the APEC Ministerial Conference held in Auckland in September 1999. They have since been largely unchanged. The transparency-related principles were replaced by ‘Transparency Standards on Government Procurement’ completed by the GPEP in September 2004 and endorsed by the APEC Leaders’ Meeting held in

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316 See para. 43; note 297, para.70; note 297, 2006/SOM3/GPEG/005, Annex 5, 3rd para.
317 See id., para. 43; note 297, para.73; note 297, 2006/SOM3/GPEG/005, Annex 5, para 3.2, corresponding with the GPA94 art.XXIII.1.
319 See APEC Government Procurement Experts Group, Summary Report - 20th Government Procurement Experts’ Group Meeting held in Santiago on 26-27 September 2004, 2004/SOM3/GPEG/SUM, para. 3.1 (Sept. 27, 2004). Works on the ‘Transparency Standards on Government Procurement’ originated from the APEC Leaders’ meeting held in Los Cabos in November 2002, whereby (i) transparency standards had to be developed in fields where field-specific working groups previously had not developed such standards, or (ii) revised in fields where field-specific working groups previously had done it, like in the case of previously developed transparency-related public-procurement-specific non-binding principles. See APEC Secretariat, APEC Leaders Statement to Implement APEC Transparency Standards (Los Cabos, Mexico)2002/AMM/061, paras.7, 8 (Oct. 26-27, 2002).
Santiago in November 2004.\textsuperscript{320} However, transparency standards did not bring about material changes compared with the previous language of public procurement specific transparency-related non-binding principles.\textsuperscript{321} Likewise, the revision of November 2006\textsuperscript{322} did not significantly modify non-binding principles (along with transparency standards integrated thereunto), except that revision further aligned exceptions to the non-discrimination principle to the GPA94, by adding measures necessary “to protect human, animal or plant life or health or the environment is consistent with the principle of non-discrimination, provided such a measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between member economies where the same conditions prevail or a disguised restriction on trade between the member economies”\textsuperscript{323}.

Subsequently, works of the GPEG lost their momentum as APEC members gradually lost interest in participating in this forum. Apart from conducting voluntary reviews of APEC members’ procurement systems (assessed against non-binding principles), the GPEG managed to host a few seminars related to public procurement. Eventually, at the 29\textsuperscript{th} GPEG meeting held in March 2010, the chair of the APEC Committee on Trade and Investment noticed that: (i) “GPEG has not met the quorum requiring over fourteen members’ participation to the meeting in three consecutive meetings and the GPEG could be closed under the APEC rule”,\textsuperscript{324} and that (ii) “in such a circumstance, the group needs to review the benefit and objective of continuing its work”\textsuperscript{325}. After March 2010, the GPEG meetings were discontinued.

III. FRAMEWORK

The framework of the TPP, to a large extent, copies the framework of the GPA12, adding some new elements. In case the commitments made in the course of the

\textsuperscript{320} See note 297 at 1.

\textsuperscript{321} Changes were only technical/linguistic. Above references to original non-binding principles (WT/WGTGP/W/24) are juxtaposed with references to identical provisions after the revision of 2006 (2006/SOM3/GPEG/005). See notes 298-303, 305, 306, 308-317.


\textsuperscript{323} See note 297 2006/SOM3/GPEG/005, Annex 5, para 3.3, corresponding with the GPA94 art.XXIII.2.

\textsuperscript{324} See APEC Government Procurement Experts Group, Summary Record -29th Government Procurement Experts’ Group Meeting held in Singapore on 31 2009, 2010/SOM1/GPEG/002, para. 2 (Mar. 4, 2010).

\textsuperscript{325} See id.
negotiations on the TPP were to be split and incorporated into new or amended bilateral agreements, these minor improvements of the TPP procurement chapter over the GPA are a good indication of how procurement chapters of such bilateral agreements and their relations with other chapters of such agreements could look like. With regard to the scope of application, compared with the GPA12, the TPP procurement chapter extends the definition of government procurement by extending the definition of ‘contractual means’ to ‘build-operate-transfer contract and public works concession contract’ defined as ‘contractual arrangement[s] the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plants, buildings, facilities or other government-owned works and under which, as consideration for a supplier’s execution of a contractual arrangement, a procuring entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of those works for the duration of the contract’. The TPP procurement chapter also specifies that, in the case of procurement funded by international organisations or with development aid, it does not apply to such procurement if such international organisations or donors ‘restrict the participation of suppliers’, in contrast to the GPA which exempts procurement ‘under the particular procedure or condition of an international organization, or funded by international grants, loans or other assistance where the applicable procedure or condition would be inconsistent with this Agreement’ without further restrictions. Finally, the TPP clarifies that it does not apply to the ‘procurement of a good or service outside the territory of the Party of the procuring entity, for consumption outside the territory of that Party’ which is not expressly stated in the GPA12.

Other divergences from the GPA12 can be seen as minor or technical improvements. For instance, the TPP procurement chapter clearly states the preference for open tendering over limited tendering, whereas this basic premise of the international liberalisation of public procurement markets can only be a contrario inferred under the GPA12 (see section 3). The TPP procurement chapter also sets forth ‘for greater certainty, that a procuring entity may conduct market research in developing specifications for a particular procurement’. The scope of protected private trade secrets is also wider than under the GPA12, in the way that public procurement shall not ‘disclose [any] information that would prejudice legitimate commercial

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326 Under the GPA12, ‘contractual means’ include ‘purchase; lease; and rental or hire purchase, with or without an option to buy’. See GPA12, art.II.2.b.
327 See TPP, art.15.1,15.2.b.
328 See id., art.15.2.3.e.ii. See GPA12, art.II.3.e.iii.
329 See id., art.15.2.3.f.
330 See id., art.15.4.4.
331 See GPA12, art.XVII.1.
332 See TPP, art. 15.12.5.
interests of a particular supplier” whereas the GPA12 only protects ‘confidential’ information which might prejudice such interest. Specifically, under the TPP, the meaning of ‘confidential information’ must be different from ‘information’ because the TPP—along with the new provision on the protection of information potentially prejudicing commercial interests—still keeps the provision on the protection of ‘confidential information’ potentially prejudicing commercial interests identical to the relevant provision of the GPA12. Finally, in line with English also being a working language of the ASEAN and the APEC, the TPP procurement chapter suggests that “each Party shall endeavour to use English as the language for publishing the notice of intended procurement” which cannot be found in the GPA12.

Framework of the liberalization of public procurement markets under the TPP is almost entirely included in its public procurement-specific chapter. TPP chapters on cross-border trade in services, financial services, electronic commerce state-owned enterprises and designated monopolies include clauses expressly excluding their application to public procurement. The chapter on technical barriers to trade too “shall not apply to technical specifications prepared by a governmental entity for its production or consumption requirements” as “these specifications are covered by Chapter 15 (Government Procurement),” in line with the similar exemption of public-procurement-specific technical specifications from the WTO TBT Agreement.

| Figure 6: Procurement-relevant provisions in the TPP’s investment chapter |
| Exemption of some performance measures (Article 9.10.3.f.) |
| “Paragraphs 1(b), 1(c), 1(f), 1(g), 1(h), 1(i), 2(a) and 2(b) shall not apply to government procurement.” |

333 See id., at 15.17.2.
334 See GPA12, art.XVII.3.
335 See TPP, 15.17.3.
336 See TPP, art.15.7.5.
337 The GPA12 does not prefer any of the WTO languages (English, French and Spanish) one over the other. See GPA12, art.VII.3.
338 See TPP, art. 10.2.3.b.
339 See id., art. 11.2.4.
340 See id., art. 14.2.3.a.
341 See id., art. 17.2.7.
342 See id., art. 8.3.4, 1st sentence.
343 See id., art. 8.3.4, 2nd sentence.
344 See id., art. 9.10.3.f.
Exempted performance measures (Article 9.10.1 and 9.10.2.)

“1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking

(b) to achieve a given level or percentage of domestic content;
(c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
(f) to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory;
(g) to supply exclusively from the territory of the Party the goods that the investment produces or the services that it supplies to a specific regional market or to the world market;
(b) (i) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party; or (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a particular technology; or
(i) to adopt: (i) a given rate or amount of royalty under a licence contract; or (ii) a given duration of the term of a licence contract.”

“2. No Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, on compliance with any requirement
(a) to achieve a given level or percentage of domestic content;
(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory; (…)”

Moreover, the chapter on investment specifies that its provisions on NT and ‘senior management and boards of directors’ shall not apply to public procurement; additionally, the ban of ‘performance requirements’ under the investment chapter does not cover some such measures if channelled through

345 See id., art. 9.10.1.
346 And ‘[I]f a public entity providing health care services engages in government procurement for pharmaceutical products or medical devices, formulary development and management with respect to that activity by the national healthcare authority shall be considered an aspect of such government procurement’. See TPP, ch.26, Annexure 26 a, footnote 11 to art.3. 9.10.2.
347 See TPP, art.9.4.
348 See id., art.9.11.
349 See id., art.9.12.6
public procurement\textsuperscript{350} (see: Figure 6). In turn, an Annexure to the chapter on transparency and anti-corruption provides that the requirement of procedural fairness related to the reimbursement of pharmaceuticals under domestic healthcare schemes “shall not apply to government procurement of pharmaceutical products and medical devices (…)”.\textsuperscript{351}

Finally, from the institutional perspective, although the TPP’s public procurement-specific chapter establishes a dedicated committee on Government Procurement,\textsuperscript{352} the chapter on administrative and institutional provisions establishes a multi-task ‘Trans-Pacific Partnership Commission’ which among other shall “consider and adopt, subject to completion of any necessary legal procedures by each Party, a modification to this Agreement of (…) the lists of entities, covered goods and services, and thresholds contained in each Party’s Annex to Chapter 15 (Government Procurement)”\textsuperscript{353}.

\section*{IV. Coverage}

The similarity between the frameworks of the TPP procurement chapter and the GPA12 implies that the determination of coverage under the TPP procurement chapter emulates the GPA model with lists of covered procurers, content (goods, services and construction services) and value-thresholds along with averaged scope of country-specific commitments. Thus, the originally planned liberalising impact of the TPP procurement chapter on the Asia-Pacific region would have depended on country-specific limitations, bilateral arrangements and transitional provisions. Now, the eventual impact on the TPP negotiations on procurement markets will depend on how much of the made concessions particular TPP signatories would be prone to also make in the case of a potential limited TPP without the USA, or bilateral agreements, or even in the case of the RCEP. So far, it is safe to say that at least in USA’s case, its commitments related to coverage will likely be salvaged in the bilateral agreement given their rather limited nature. In the case of commitments between other TPP signatories, the eventual impact on the TPP negotiations will depend on two factors. Firstly, the already made concessions will be much more likely to stay untouched in place if an agreement on some form of limited TPP without the USA would be reached because splitting the TPP would likely involve reopening negotiations in many areas, including government procurement. Secondly, it would depend on what countries with previously partially or completely closed procurement markets (like Vietnam, Malaysia or

\textsuperscript{350} See id., art.9.10.3.f.
\textsuperscript{351} See TPP, annex 26-A, art. 3.
\textsuperscript{352} See id., art.15.23.
\textsuperscript{353} See id., art.27.2.c.iii.
Brunei) actually traded for access to such markets. If it was only general access to the US market that was traded, then such countries will likely be satisfied with bilateral agreements with US which incorporates the procurement-related concessions made under the TPP to such agreements, but they will not have the incentive to do the same towards other countries. If it was also market access to the Japanese market and markets of other developing economies of the region which was traded, then such countries would also continue to sustain the procurement-related commitments made by them under the TPP in the regional area as well, regardless of whether plurilaterally or bilaterally.

A. Subjective Coverage

Subjective coverage of the TPP procurement chapter is determined by positive lists of central, sub-central, and other entities. However, Brunei, Malaysia, Mexico, New Zealand, Singapore, the USA and Vietnam have not covered any sub-central procurers, and the USA’s coverage of other entities has been confined to five entities responsible for marketing hydro-electric power (i.e. Tennessee Valley Authority, Bonneville Power Administration, Western Area Power Administration, South-Eastern Power Administration, and South-Western Power Administration), an entity operating the Saint Lawrence Seaway, and the Rural Utilities Service. While in the case of small countries like Singapore and Brunei sub-central procurers simply do not exist because of the limited size of public administration, other mentioned countries failed to cover their sub-central entities despite the fact that some of them had covered their sub-central procurers in other agreements, like the US and New Zealand under the GPA12 (see: Figure 2). The same is with the USA’s coverage of other entities, which is wider under the GPA12– apart from the seven mentioned entities also covered under the TPP, it includes the Port Authority of New York and New Jersey, the Port of Baltimore, and the New York Power Authority.

Nonetheless, the TPP parties in principle have aligned their commitments with other agreements. For example, Japan (identically with the GPA12) has generally listed sub-central (prefectural) governments without specifying particular agencies. Further, Japan has laid down a restriction with regard to such governments that the TPP procurement chapter “shall not cover contracts which the entities award for the purpose of their daily profit-making activities which are exposed to competitive forces in

357 See GPA12, Appendix 1 for the US, Annex 3, list B.
358 See id., Appendix 1 for Japan, Annex 2.
markets” and in line with its GPA schedules has extended this restriction to ‘other entities’.

A minor exception to the use of positive lists in the determination of subjective coverage can be seen in Canada’s Annex of sub-central (provincial) entities. Negative lists have been used for Alberta, British Columbia, Northwest Territories, Nunavut, Prince Edward Island, and Saskatchewan. Without any exception, Newfoundland and Labrador have covered ‘all departments of the province’, whereas Manitoba has covered ‘all departments, boards, commissions and committees of the province.’ Nova Scotia and Quebec have made references to their internal laws functionally

359 See TPP, Annex 15.A, Japan, notes to Section B, point 3.
360 See GPA12, Appendix 1 for Japan, Annex 3.
361 See TPP, Annex 15.A, Japan, notes to Section C, point 1.
362 See id., Annex 15.A, Canada, section B.
363 Unless some sub-central procurer is negatively listed, TPP procurement chapter applies to ‘[A]ll Ministries and Agencies (All Government Departments and Provincial Agencies, Boards, Councils, Committees and Commissions) of the Province’. See id., Annex 15.A, Canada, Section B.
364 Unless some sub-central procurer is negatively listed, TPP procurement chapter applies to ‘[A]ll Ministries, Boards, Commissions, Agencies and Committees of the Province’. See id., Annex 15.A, Canada, Section B.
365 Unless some sub-central procurer is negatively listed, TPP procurement chapter applies to ‘[A]ll Departments and Agencies of the Territory’. See id., Annex 15.A, Canada, Section B.
366 Unless some sub-central procurer is negatively listed, TPP procurement chapter applies to ‘[A]ll Departments and Agencies of the Territory’. See id., Annex 15.A, Canada, Section B.
367 Unless some sub-central procurer is negatively listed, TPP procurement chapter applies to ‘[A]ll Departments of the Province’. See id., Annex 15.A, Canada, Section B.
368 Unless some sub-central procurer is negatively listed, TPP procurement chapter applies to ‘[A]ll Ministries of the Province’. See id., Annex 15.A, Canada, Section B.
369 In this case, TPP procurement chapter applies to ‘[A]ll Departments of the Province’. See id., Annex 15.A, Canada, Section B.
370 In this case, TPP procurement chapter applies to ‘[A]ll Departments, Boards, Commissions and Committees of the Province’. See id., Annex 15.A, Canada, Section B.
371 In this case, TPP procurement chapter applies to ‘[A]ll Departments and Offices of the Province established under the Public Service Act, except for the following entities and circumstances (...). See id., Annex 15.A, Canada, Section B.
372 In this case, TPP procurement chapter applies to ‘[A]ll departments of the Province and the governmental agencies set out in subparagraph (2) of the first paragraph of section 4 of the Act Respecting Contracting by Public Bodies’. See id., Annex 15.A, Canada, Section B.
defining public procurers, whereby Nova Scotia has additionally excluded and Quebec added some entities.\textsuperscript{373}

In principle, the TPP parties have covered virtually all possible central procurers except for such particularities as residences of the Monarch of Brunei (Nurul Iman’s Palace)\textsuperscript{374} and the Sultan of Malaysia (Istana Negara)\textsuperscript{375}. However, at the same time, the TPP parties have significantly limited procurer-specific objective coverage for some central agencies particularly pertaining to the listing of ministries of defence and other military-related procurers. This is the case with Australia (Department of Defence),\textsuperscript{376} Japan (Ministry of Defence),\textsuperscript{377} Malaysia (‘Ministry of Defence’),\textsuperscript{378} Mexico (Secretaría de la Defensa Nacional and the Secretaría de Marina),\textsuperscript{379} Singapore (Ministry of Defence),\textsuperscript{380} Vietnam (Ministry of National Defence and Ministry of Public Security)\textsuperscript{381} and the USA (Department of Defense).\textsuperscript{382}

TPP parties have also—in relation to specific procurers—excluded the procurement of some specific goods/services which are essential for the operation of such procurers. For example, the USA has excluded the procurement of “any oil purchase related to the Strategic Petroleum Reserve by department of energy”.\textsuperscript{383} Peru secured an exemption for petroleum products in the case of PETROPERU (Petróleos del Perú), including: “(a) Crude Petroleum (b) Gasoline (c) Propane (d) Diesel oil (e) Butane (f) Low sulfur medium distillation or Gasoil (g) Natural gas (h) Bio-diesel (i) Saturated acyclic hydrocarbons (j) Catalysts (k) Ethanol (l) Additives”.\textsuperscript{384} Japan secured exemptions, among others, for (i) procurement related to ‘operational safety of transportation’ in the case of the Japan Railway Construction, Transport and Technology Agency\textsuperscript{385} and Tokyo Metro Co. Ltd,\textsuperscript{386} (ii) procurement related to ‘geological and geophysical survey’ in the case of the Japan Oil, Gas and Metals National

\textsuperscript{373} Only Ontario and Yukon offered positive lists. See id., Annex 15.A, Canada, Section B.
\textsuperscript{374} See id., Annex 15.A, Brunei, Section G(a).
\textsuperscript{375} See id., Annex 15.A, Malaysia, Section G, point 1.a.
\textsuperscript{376} See id., Annex 15.A, Australia, Section A, point 2, item 25 and notes to Section A, point 4.a.
\textsuperscript{377} See id., Annex 15.A, Japan, Section A, item 25; Section D, point 2.
\textsuperscript{378} See id., Annex 15.A, Malaysia, Section A, item 3; notes to Section A, point 3.
\textsuperscript{379} See id., Annex 15.A, Mexico, Section A, item 3; Section A, item 12; Section D, \textit{in intio}.
\textsuperscript{380} See id., Annex 15.A, Singapore, Section A, item 24; Section A, note to item 24.
\textsuperscript{381} See id., Annex 15.A, Vietnam, Section A, item 21; Section A, item 20; notes to Section A, point 5; notes to Section A, point 6.
\textsuperscript{382} See id., Annex 15.A, US, Section A, item 17; notes to Section A, point 3.
\textsuperscript{384} See id., Annex 15.A, Peru, notes to Section C.
\textsuperscript{385} See id., Annex 15.A, Japan, notes to Section C, point 2.a.
\textsuperscript{386} See id., Annex 15.A, Japan, notes to Section C, point 2.b.
Corporation\textsuperscript{387} and (iii) “procurement of ships to be jointly owned with private companies” in the case of the Japan Railway Construction, Transport and Technology Agency\textsuperscript{388}. The bilateral or plurilateral arrangements among the TPP parties as to subjective coverage mostly affect sub-central and other entities, whereas at the central level such arrangements have marginal importance, like in the case of Australia covering “[i]n respect of the Department of Defence, a good or a service (…) with respect to Vietnam only to the extent that Vietnam has covered that good or service in its Schedule”.\textsuperscript{389} Specifically, Japan has restricted access to its sub-central procurers for Malaysia, Mexico, New Zealand, United States and Vietnam,\textsuperscript{390} and Australia has covered its sub-central procurers only in relation to Canada, Chile, Japan, Mexico and Peru but was “prepared to extend coverage of this Section to other Parties upon negotiation of mutually acceptable concessions”\textsuperscript{391}. In turn, Chile made a reservation that (i) “offer[ed] the entities listed under [that] Section [i.e. sub-central entities] only to those Parties that assume[d] equivalent commitments at the sub-central level”\textsuperscript{392} (which upon signing the TPP pertained to Brunei, Malaysia, New Zealand, the United States and Vietnam,\textsuperscript{393}) and (ii) “[i]n the case of the Parties that currently do not have entities at this level of government, Chile could extend the benefits of this Section to the Parties that make improvements to their respective coverage under Section A [i.e. central entities] or C [i.e. other entities]”\textsuperscript{394}. As far as other entities are concerned, Mexico expressly restricted market access to such entities for Brunei, Malaysia, New Zealand and Vietnam,\textsuperscript{395} whereas Mexican content and/or nationals were expressly excluded by New Zealand\textsuperscript{396} and Vietnam.\textsuperscript{397} As can be seen, the express restrictions are not always reciprocal yet no one should be surprised that some discrepancies between country specific annexes have emerged out of negotiations. Such discrepancies are normally corrected and counter restrictions are added for the sake of clarity in the course of subsequent exchange of notes on bilateral basis, during which parties to the TPP could also reciprocally improve subjective coverage, which, however, is now very unlikely in light of the TPP’s unclear status in its current form. In any case, a number of such outright bilateral restrictions along with divergences in the signed version of the

\textsuperscript{387} See id., Annex 15.A, Japan, notes to Section C, point 2.d.
\textsuperscript{388} See id., Annex 15.A, Japan, notes to Section C, point 2.e.
\textsuperscript{389} See id., Annex 15. A, Australia, notes to section A, point 4.e.
\textsuperscript{390} See id., Annex 15.A, Japan, notes to Section B, point 1.
\textsuperscript{391} See id., Annex 15.A, Australia, notes to Section A, point 4.a.
\textsuperscript{392} See id., Annex 15.A, Chile, notes to Section B.
\textsuperscript{393} See id., Annex 15.A, Chile, footnote 1 to notes to Section B.
\textsuperscript{394} See id., Annex 15.A, Chile, notes to Section B.
\textsuperscript{395} See id., Annex 15.A, Mexico, notes to Section C, point 2.
\textsuperscript{396} See id., Annex 15.A, New Zealand, notes to Section C, point 2.
\textsuperscript{397} See id., Annex 15.A, Vietnam, notes to Section C, point 5.
agreement indicates some irreconcilable differences in parties’ positions as to market access at the time of negotiations and hints that some bilateral agreements were sought until the very last moment of negotiations but were not reached.

B. Objective Coverage

Objective coverage of the TPP procurement chapter has been determined, in principle, with negative lists of goods, services and construction services with exceptions affecting mostly services, with Canada,\(^{398}\) Japan,\(^{399}\) Malaysia,\(^{400}\) Singapore\(^{401}\) and Vietnam\(^{402}\) all having positive lists of covered services. Singapore has also used positive lists for construction services,\(^{403}\) and Canada even for the procurement of goods in the case of selected procurers, including “Department of National Defence, the Royal Canadian Mounted Police, the Department of Fisheries and Oceans for the Canadian Coast Guard, and provincial police forces”\(^{404}\). Exclusions from objective coverage are very diverse among the TPP parties especially in the case of goods. For example, Australia has excluded blood and blood-related products,\(^{405}\) and at the central level,\(^{406}\) and in New South Wales,\(^{407}\) has excluded purchases of motor vehicles. Vietnam has excluded petroleum oils,\(^{408}\) and Malaysia has excluded electrical energy and natural water,\(^{409}\) envelopes\(^{410}\) and procurement of Microsoft products and services under a ‘Master Licensing Agreement’\(^{411}\). Rice has been excluded by both Malaysia\(^{412}\) and Vietnam\(^{413}\).

In terms of services, TPP parties have largely excluded research and development of services related to healthcare, education, training, arts, or welfare like in the case of Malaysia excluding “People’s Housing Programme(Program Perumahan Rakyat)”\(^{414}\).

\(^{398}\) See id., Annex 15.A, Canada, Section E
\(^{399}\) See id., Annex 15.A, Japan, Section E.
\(^{400}\) See id., Annex 15.A, Malaysia, Section E.
\(^{401}\) See id., Annex 15.A, Singapore, Section E.
\(^{402}\) See id., Annex 15.A, Vietnam, Section E.
\(^{403}\) See id., Annex 15.A, Singapore, Section F.
\(^{404}\) See id., Annex 15.A, Canada, Section D, point 2.
\(^{405}\) See id., Annex 15.A, Australia, Section D, point 2.
\(^{406}\) See id., Annex 15.A, Australia, notes to Section A, point 2.
\(^{407}\) See id., Annex 15.A, Australia, Section B, New South Wales, Note, point 1.
\(^{408}\) See id., Annex 15.A, Vietnam, Section D.
\(^{409}\) See id., Annex 15.A, Malaysia, notes to Section D, point 1.
\(^{410}\) See id., Annex 15.A, Malaysia, Section G, point 4.b
\(^{411}\) See id., Annex 15.A, Malaysia, Section G, point 4.e.
\(^{412}\) See id., Annex 15.A, Malaysia, Section D.
\(^{413}\) See id., Annex 15.A, Vietnam, Section D.
Utilities have generally been excluded by Canada, Mexico and Vietnam, plus some postal services have been excluded by Japan and Malaysia. Malaysia has also excluded internal sea cabotage. In terms of construction services, dredging has been excluded by Malaysia and Vietnam. In addition, Malaysia refused to open the market for construction services that are carried out to maintain or improve the existing slope (hillslope surfacing) conditions through periodic maintenance; or to reconstruct or improve existing slopes or construct new slopes due to natural disaster, flood, landslide ground subsidence and other emergency and unforeseen circumstances. Vietnam refused to open the market for construction in remote, mountainous and extremely difficult areas as stipulated in Vietnam’s regulations and on islands located beyond Vietnam’s territorial sea as well as for construction of ministerial level headquarters. Finally, some reservations made as to objective coverage interfere or overlap with the TPP procurement chapter’s framework. For example, Mexico and Vietnam have in effect partially or completely excluded ‘build-operate-transfer contract and public works concession contract’.

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415 See id., Annex 15.A, Canada, Section F, point 2.a.
416 Including telecommunication, transmission, water and energy services. See id., Annex 15.A, Mexico, Section G, point 7.
418 Japan excluded ‘courier services with respect to letters.’ See id., Annex 15.A, Japan, notes to Section F, point 2.
419 Malaysia ‘restricted right to discriminate’ in the case of postal services. See id., Annex 15.A, Malaysia, Section G, point 4.a.
423 See id., Annex 15.A, Malaysia, notes to Section F, point 2.
426 See id., Annex 15.A, Chile, Section F, point 2.
427 Malaysia excluded ‘any Public Private Partnership (PPP) contractual arrangements including build-operate-transfer (BOT) and public work concessions’. See id., Annex 15.A, Malaysia, Section G, point 1.c.
428 Mexico excluded ‘the operation of government facilities under concessions’. See id., Annex 15.A, Mexico, Section G, point 1.c.
from the definition of public procurement significantly limiting their coverage of services and/or construction services.

It is apparent that such diversity of coverage restrictions between the parties must simply reflect TPP parties’ local conditions, including geographical and geological conditions, various models of state participation in, and regulation of, utility providers or diverging attitudes to the development of public infrastructure in cooperation with private enterprises. Some could at the first glance find the scope of coverage restrictions rather disappointing. However, significant carve-outs have in principle been made by parties which previously had the most restricted access to procurement markets. Thus their overall scope of commitments should arguably be perceived as a success of liberalisation rather than a failure. Particularly in the case of countries with no pre-existing procurement-related commitments, one can hardly assess whether the scope of such countries’ commitments under the TPP is extensive in the lack of pre-existing procurement-liberalising RTAs concluded by such countries to measure against.

C. Thresholds

<table>
<thead>
<tr>
<th>Country</th>
<th>Objective Coverage</th>
<th>Subjective Coverage</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Central</td>
<td>sub-central</td>
<td>Other</td>
</tr>
<tr>
<td>Australia</td>
<td>Goods</td>
<td>130,000</td>
<td>355,000</td>
<td>400,000</td>
</tr>
<tr>
<td></td>
<td>Services</td>
<td>130,000</td>
<td>355,000</td>
<td>400,000</td>
</tr>
<tr>
<td></td>
<td>construction services</td>
<td>5,000,000</td>
<td>5,000,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td>Brunei</td>
<td>Goods</td>
<td>130,000</td>
<td>n.a.</td>
<td>130,000</td>
</tr>
</tbody>
</table>

See notes 327.

Depending on how (in a specific case) given build-operate-transfer contract or public works concession contract can be classified.

However, only ‘[F]rom the beginning of the fifth year following entry into force of this Agreement for Brunei Darussalam and thereafter’. Before: (i) SDR 250,000 ‘[F]rom the beginning of the first year to the end of the second year following entry into force of this Agreement for Brunei Darussalam’ and (ii) SDR 190,000 ‘[F]rom the beginning of the third year to the end of the fourth year following entry into force of this Agreement for Brunei Darussalam’. See TPP, Annex 15.A, Brunei, Section B.

However, only ‘[F]rom the beginning of the fifth year following entry into force of this Agreement for Brunei Darussalam and thereafter’. Before: (i) SDR 500,000 ‘[F]rom the beginning of the first year to the end of the second year following entry into force of this Agreement for Brunei Darussalam’, and (ii) SDR 315,000 ‘[F]rom the beginning of the
### Figure 7: Thresholds under the TPP procurement chapter [SDR].

<table>
<thead>
<tr>
<th></th>
<th>Canada</th>
<th>Chile</th>
<th>Japan</th>
<th>Malaysia</th>
</tr>
</thead>
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<tr>
<td>Services</td>
<td>130,000[^434]</td>
<td>95,000</td>
<td>100,000</td>
<td>130,000[^436]</td>
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<td>service</td>
<td>n.a</td>
<td>220,000</td>
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<td>Goods</td>
<td>130,000</td>
<td>95,000</td>
<td>450,000</td>
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<tr>
<td>Services</td>
<td>130,000</td>
<td>95,000</td>
<td>4,500,000–</td>
<td>150,000</td>
</tr>
<tr>
<td>construction</td>
<td>5,000,000</td>
<td>5,000,000</td>
<td>4,500,000–</td>
<td></td>
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<tr>
<td>service</td>
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<td>and other</td>
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<td>services</td>
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<td>Other services</td>
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</table>

[^434]: See note 432.

[^435]: See note 433.

[^436]: However, only ‘[F]rom the beginning of the eighth year following entry into force of this Agreement for Malaysia and thereafter’. Before: (i) SDR 1,500,000 ‘[F]rom the beginning of the first year to the end of the fourth year following entry into force of this Agreement for Malaysia’, and (ii) SDR 800,000 ‘From the beginning of the fifth year to the end of the seventh year following entry into force of this Agreement for Malaysia’. See id., Annex 15.A, Malaysia, Section B.

[^437]: However, only ‘[F]rom the beginning of the eighth year following entry into force of this Agreement for Malaysia and thereafter’. Before: (i) SDR 2,000,000 ‘[F]rom the beginning of the first year to the end of the fourth year following entry into force of this Agreement for Malaysia’, and (ii) SDR 1,000,000 ‘[F]rom the beginning of the fifth year to the end of the seventh year following entry into force of this Agreement for Malaysia’. See id., Annex 15.A, Malaysia, Section C.
### Figure 7: Thresholds under the TPP procurement chapter [SDR].

<table>
<thead>
<tr>
<th></th>
<th>services</th>
<th>130,000&lt;sup&gt;438&lt;/sup&gt;</th>
<th>150,000&lt;sup&gt;439&lt;/sup&gt;</th>
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<tr>
<td></td>
<td>construction</td>
<td>14,000,000&lt;sup&gt;440&lt;/sup&gt;</td>
<td>14,000,000&lt;sup&gt;441&lt;/sup&gt;</td>
</tr>
<tr>
<td>Mexico</td>
<td>goods</td>
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<td>USD 397,535</td>
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<tr>
<td></td>
<td>Services</td>
<td>USD 79,507</td>
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<td></td>
<td>construction</td>
<td>USD 10,335,931</td>
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<tr>
<td>New</td>
<td>goods</td>
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<td>400,000</td>
</tr>
</tbody>
</table>

<sup>438</sup> However, only ‘[F]rom the beginning of the 10<sup>th</sup> year following entry into force of this Agreement for Malaysia and thereafter’. Before: (i) SDR 2,000,000 ‘[F]rom the beginning of the first year to the end of the fourth year following entry into force of this Agreement for Malaysia’,(ii) SDR 1,000,000 ‘[F]rom the beginning of the fifth year to the end of the seventh year following entry into force of this Agreement for Malaysia’, and (iii) SDR 500,000 ‘[F]rom the beginning of the eighth year to the end of the ninth year following entry into force of this Agreement for Malaysia’. See id., Annex 15.A, Malaysia, Section B.

<sup>439</sup> However, only ‘[F]rom the beginning of the 10<sup>th</sup> year following entry into force of this Agreement for Malaysia and thereafter’. Before: (i) SDR 2,000,000 ‘[F]rom the beginning of the first year to the end of the fourth year following entry into force of this Agreement for Malaysia’, (ii) SDR 1,000,000 ‘[F]rom the beginning of the fifth year to the end of the seventh year following entry into force of this Agreement for Malaysia’, and (iii) SDR 500,000 ‘[F]rom the beginning of the eighth year to the end of the ninth year following entry into force of this Agreement for Malaysia’. See TPP, Annex 15.A, Malaysia, Section C.

<sup>440</sup> However, only ‘[F]rom the beginning of the 21<sup>st</sup> year following entry into force of this Agreement for Malaysia and thereafter’. Before: (i) SDR 63,000,000 ‘[F]rom the beginning of the first year to the end of the fifth year following entry into force of this Agreement for Malaysia’, (ii) SDR 50,000,000 ‘[F]rom the beginning of the sixth year to the end of the 10<sup>th</sup> year following entry into force of this Agreement for Malaysia’, (iii) SDR 40,000,000 ‘[F]rom the beginning of the 11<sup>th</sup> year to the end of the 15<sup>th</sup> year following entry into force of this Agreement for Malaysia’, and (iv) SDR 30,000,000 ‘[F]rom the beginning of the 16<sup>th</sup> year to the end of the 20<sup>th</sup> year following entry into force of this Agreement for Malaysia’. See id., Annex 15.A, Malaysia, Section C.

<sup>441</sup> However, only ‘[F]rom the beginning of the 21<sup>st</sup> year following entry into force of this Agreement for Malaysia and thereafter’. Before: (i) SDR 63,000,000 ‘[F]rom the beginning of the first year to the end of the fifth year following entry into force of this Agreement for Malaysia’, (ii) SDR 50,000,000 ‘[F]rom the beginning of the sixth year to the end of the 10<sup>th</sup> year following entry into force of this Agreement for Malaysia’, (iii) SDR 40,000,000 ‘[F]rom the beginning of the 11<sup>th</sup> year to the end of the 15<sup>th</sup> year following entry into force of this Agreement for Malaysia’, (iv) SDR 30,000,000 ‘[F]rom the beginning of the 16<sup>th</sup> year to the end of the 20<sup>th</sup> year following entry into force of this Agreement for Malaysia’. See id., Annex 15.A, Malaysia, Section C.
Figure 7: Thresholds under the TPP procurement chapter [SDR].

<table>
<thead>
<tr>
<th></th>
<th>services</th>
<th>130,000</th>
<th>400,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Peru</td>
<td>construction service</td>
<td>5,000,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td></td>
<td>goods</td>
<td>95,000</td>
<td>200,000</td>
</tr>
<tr>
<td></td>
<td>services</td>
<td>95,000</td>
<td>200,000</td>
</tr>
<tr>
<td></td>
<td>construction service</td>
<td>5,000,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td>Singapore</td>
<td>goods</td>
<td>130,000</td>
<td>NA</td>
</tr>
<tr>
<td></td>
<td>services</td>
<td>130,000</td>
<td>NA</td>
</tr>
<tr>
<td></td>
<td>construction service</td>
<td>5,000,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td>United States</td>
<td>130,000</td>
<td>355,000</td>
<td>NA</td>
</tr>
<tr>
<td></td>
<td>130,000</td>
<td>355,000</td>
<td>NA</td>
</tr>
<tr>
<td></td>
<td>5,000,000</td>
<td>5,000,000</td>
<td>5,000,000</td>
</tr>
<tr>
<td>Vietnam</td>
<td>goods</td>
<td>130,000</td>
<td>NA</td>
</tr>
</tbody>
</table>

442 However, only ‘[F]rom the beginning of the 26th year following entry into force of this Agreement for Vietnam’. Before: (i) SDR 2,000,000 ‘[F]rom the date of entry into force of this Agreement for Vietnam to the end of the fifth year following the date of entry into force of this Agreement for Vietnam’. (ii) SDR 1,500,000 ‘[F]rom the beginning of the sixth year to the end of the 10th year following entry into force of this Agreement for Vietnam’. (iii) SDR 1,000,000 ‘[F]rom the beginning of the 11th year to the end of the 15th year following the entry into force of this Agreement for Vietnam’. (iv) SDR 260,000 ‘[F]rom the beginning of the 16th year to the end of the 20th year following the entry into force of this Agreement for Vietnam’, and (v) SDR 190,000 ‘[F]rom the beginning of the 21st year to the end of the 25th year following the entry into force of this Agreement for Vietnam’. See id., Annex 15.A, Vietnam, Section A.

443 However, only ‘[F]he beginning of the 26th year following entry into force of this Agreement for Vietnam’. Before: (i) SDR 2,000,000 ‘[F]he date of entry into force of this Agreement for Vietnam to the end of the fifth year following the date of entry into force of this Agreement for Vietnam’. (ii) SDR 1,500,000 ‘[F]rom the beginning of the sixth year to the end of the 10th year following entry into force of this Agreement for Vietnam’. (iii) SDR 1,000,000 ‘[F]rom the beginning of the 11th year to the end of the 15th year following the entry into force of this Agreement for Vietnam’. (iv) SDR 260,000 ‘[F]rom the beginning of the 16th year to the end of the 20th year following the entry into force of this Agreement for Vietnam’, and (v) SDR 190,000 ‘[F]rom the beginning of the 21st year to the end of the 25th year following the entry into force of this Agreement for Vietnam’. See id., Annex 15.A, Vietnam, Section A.
The thresholds under the TPP procurement chapter generally do not deviate from ‘standard’ thresholds under the GPA12 (compare: Figure 7 with Figure 2). The GPA-like level of detail of the procedural framework of the TPP procurement chapter implies that such complex procedural provisions cannot be applied to low-value-procurement. Thus, the thresholds are slightly lower only for Chile and Peru and start at SDR 95,000 for the procurement of goods and services at the central level against the most common SDR 130,000 threshold applicable in this case, which is in line with commitments made by these countries towards the USA in RTAs. Likewise, Japan’s higher thresholds for some construction services are compensated for with lower thresholds for goods and services in line with Japan’s schedules to the GPA12.

The target thresholds are in principle not higher than standard GPA thresholds. However, Brunei, Malaysia and Vietnam secured unusual transitional periods within which exorbitantly high initial thresholds will have to be gradually decreased over a very long time. Among the three black sheep, Brunei’s transitional periods are the shortest (4 years for both goods and services and for both central and other entities) and do not cover construction services.\textsuperscript{448} Malaysia is in the middle with eight and ten years needed to go down to standard thresholds in the case of goods and services\textsuperscript{449} respectively, and with a staggering twenty-one years necessary to go

\begin{tabular}{|l|l|l|}
\hline
services & 130,000\textsuperscript{444} & 2,000,000\textsuperscript{445} \\
construction service & 8,500,000\textsuperscript{446} & 15,000,000\textsuperscript{447} \\
\hline
\end{tabular}

\textsuperscript{444} See note 442.  
\textsuperscript{445} See note 444.  
\textsuperscript{446} However, only ‘[F]rom the beginning of the sixth year following entry into force of this Agreement for Vietnam’. Before: SDR 3,000,000 ‘[F]rom the date of entry into force of this Agreement for Vietnam to the end of the fifth year following entry into force of this Agreement for Vietnam’. See id., Annex 15.A, Vietnam, Section C.  
\textsuperscript{447} However, only ‘[F]rom the beginning of the 21st year following entry into force of this Agreement for Vietnam’. Before: (i) SDR 65,200,000 ‘[F]rom the date of entry into force of this Agreement for Vietnam to the end of the fifth year following entry into force of this Agreement for Vietnam’. (ii) SDR 55,000,000 ‘[F]rom the beginning of the sixth year to the end of the 10th year following entry into force of this Agreement for Vietnam’. (iii) SDR 40,000,000 ‘[F]rom the beginning of the 11th year to the end of the 15th year following entry into force of this Agreement for Vietnam’. (iv) SDR 25,000,000 ‘[F]rom the beginning of the 20th year following entry into force of this Agreement for Vietnam’. See id., Annex 15.A, Vietnam, Section C.  
\textsuperscript{448} See notes 432, 433, 434, 435.  
\textsuperscript{449} See notes 436, 437, 438, 439.
from SDR 63,000,000 to SDR 14,000,000 for construction services in the case of both central and other entities. Finally, there is Vietnam which secured (i) for goods and services: (a) Twenty-six years for going down from SDR 2,000,000 to SDR 130,000 in the case of central entities,450 and (b) six years for going down from SDR 3,000,000 to SDR 2,000,000 for goods and services in the case of other entities,451 as well as (ii) for construction services: (a) sixteen years for going down from SDR 65,200,000 to SRD 8,500,000 in the case of Central entities452 and for going down from SDR 65,200,000 to SRD 15,000,000 in the case of other entities453.

V. NON-COMMERCIAL CONSIDERATIONS

The TPP generally sets the trends for the high-standard trade agreements (widely addressing, for example, sustainability issues like labour rights and environmental protection). Regardless of whether the TPP in its current form is salvaged or not, it is likely that the USA will imminently use the same patterns in its planned bilateral agreements, likely affecting new or modified trade agreements in the Asia-Pacific region or elsewhere. The overview of the TPP procurement chapter in the context of the entire agreement and of party specific derogations reveals that TPP parties have left a lot of room for the pursuit of non-commercial considerations by public procurers. The TPP procurement chapter’s framework prima facie lives up to the premise of the limitation of non-commercial considerations in the procurement process as the best way to internationally liberalise markets. However, it also gives a green light for the pursuit of sustainability-related goals to an even greater extent than under the GPA12 (see: section 5). At the same time, transitional provisions accommodate extensive traditional industrial/protectionist policies in the case of countries which had very limited public procurement liberalising commitments prior to signing the TPP.

A. Industrial policies

The TPP procurement chapter, at the level of its generally applicable framework (rather than at the level of party-specific annexes) is slightly more flexible for the pursuit of overtly industrial policies than the GPA12. First the TPP procurement chapter goes ahead of the GPA12 by clarifying the TPP’s stance on the preferential treatment of small and medium enterprises (“SME”), whereas the treatment of

450 See notes 442, 444.
451 See notes 443, 445.
452 See note 446.
453 See note 447.
SMEs under the GPA12 was included only in the agenda of future works.\textsuperscript{454} The TPP parties allowed for ‘measures that provide preferential treatment for SMEs’ as a result of “recognising the important contribution that SMEs can make to economic growth and employment and the importance of facilitating the participation of SMEs in government procurement”.\textsuperscript{455} However, such measures have to be fully transparent.\textsuperscript{456}

Secondly, potential special and differential treatment provisions along with transitional measures are not unlike those available under the GPA, and include: (i) price preference program\textsuperscript{457} provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of intended procurement’,\textsuperscript{458} (ii) an offset defined as “any condition or undertaking that requires the use of domestic content, a domestic supplier, the licensing of technology, technology transfer, investment, counter-trade or similar action to encourage local development or to improve a Party’s balance of payments accounts”,\textsuperscript{459} provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of intended procurement”,\textsuperscript{460} (iii) phased-in additions of specific entities or sectors intended procurement,\textsuperscript{461} and (iv) thresholds that are higher than its permanent threshold\textsuperscript{462}.

However, the TPP procurement chapter allows such measures for all developing countries without differentiating between emerging economies and least developed countries, whereas under the GPA12 such measures are available only for least developed countries\textsuperscript{463} and to other developing countries only “where and to the extent that this special and differential treatment meets its development needs”.\textsuperscript{464} Moreover, in terms of transitional periods for such special measures, the TPP procurement chapter only vaguely specifies that “[t]he implementation period shall be only the period necessary to implement the obligation”\textsuperscript{465} which made it possible for Malaysia and Vietnam to secure discussed transitional periods in excess of two decades (see: sectionC). In contrast, the GPA12 limits transitional periods for emerging

\textsuperscript{454} See GPA12, art. XXII.8.a.i.
\textsuperscript{455} See TPP, art.15.21.1.
\textsuperscript{456} See id., art.15.21.2.
\textsuperscript{457} See TPP, art.15.1. For comparison, under the GPA12, offset ‘means any condition or undertaking that encourages local development or improves a Party’s balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement’.GPA12, art.I.l.
\textsuperscript{458} See TPP, art.15.5.1.b. See also GPA12, art.V.3.b.
\textsuperscript{459} See TPP, art.15.5.1.c. See also GPA12, art.V.3.c.
\textsuperscript{460} See TPP, art.15.5.1.d. See also GPA12, art.V.3.d.
\textsuperscript{461} See GPA12, art.V.1.a.
\textsuperscript{462} See id., art. V.1.b.
\textsuperscript{463} See TPP, art.15.5.2.
economies (developing but not least developed countries) to three years\textsuperscript{465} and for least developed countries to five years\textsuperscript{466}.

At the level of individual derogations, some TPP parties repeated exemptions of preferences for their SMEs, including Australia (“\textit{any form of preference to benefit small and medium enterprises}”),\textsuperscript{467} New Zealand (“\textit{any programme, preference, set-aside or any other measure that benefits SMEs}”),\textsuperscript{468} Peru (“\textit{Chapter 15 (Government Procurement) shall not apply to procurement programmes on behalf of micro and small sized enterprises}”),\textsuperscript{469} and Vietnam (“\textit{any procurement involving any form of preference to benefit small and medium enterprises}”).\textsuperscript{470}

Some TPP parties have also reserved their right to continue regional development programmes. Malaysia exempted “\textit{any procurement in relation to rural development programmes in rural areas with less than 10,000 residents and poverty eradication programmes for households earning below Malaysia’s Poverty Line Income}”.\textsuperscript{471} Canada exempted “\textit{preferences or restrictions associated with programmes promoting the development of distressed areas}”\textsuperscript{472} in relation to all sub-central governments and “\textit{procurement that is intended to contribute to economic development within the provinces of Manitoba, Newfoundland and Labrador, New Brunswick, Prince Edward Island and Nova Scotia or the territories of Nunavut, Yukon or Northwest Territories}.”\textsuperscript{473}

In the pursuance of combined national security policies (allowed under general exceptions to the TPP procurement chapter and to entire agreement\textsuperscript{474}) and industrial policies (only allowed with individual derogations), Australia, for the sake of clarity, made a reservation that TPP’s general security exception\textsuperscript{475} would allow it, in the procurement context, “\textit{to maintain the Australian industry capability programme and its successor programmes and policies}.”\textsuperscript{476} Similarly, Mexico restricted that in its case the security exception “\textit{shall cover procurements made in support of safeguarding nuclear materials or technology}.”\textsuperscript{477}

\textsuperscript{465}See GPA12, art.V.4.b.
\textsuperscript{466}See id., art.V.4.a.
\textsuperscript{467}See TPP, Annex 15.A, Australia, Section G, point 3.c.
\textsuperscript{468}See id., Annex 15.A, Peru, Section G, point 1.
\textsuperscript{469}See id., Annex 15.A, New Zealand, Section G, point 1.c.
\textsuperscript{470}See id., Annex 15.A, Vietnam, Section G, point 1.d.
\textsuperscript{471}See id., Annex 15.A, Malaysia, Section G, point 1.b.
\textsuperscript{472}See id., Annex 15.A, Canada, notes to Section B, point 2.
\textsuperscript{473}See id., Annex 15.A, Canada, notes to Section B, point 3.
\textsuperscript{474}See id., art 15.3.a and 29.2.b.
\textsuperscript{475}See id., art.29.2.
\textsuperscript{476}See id., Annex 15.A, Australia, Section A, notes to section a point 4 d.
\textsuperscript{477}See id., Annex 15.A, Mexico, Section G, point 12.
Significant set-asides\textsuperscript{478} from the obligations under the TPP procurement chapter have been secured by Vietnam and Mexico. In the case of Vietnam, set-asides cover purchases of pharmaceuticals and have been set up at up to one hundred per cent of the cumulative value of such procurement within first three years, to go down to fifty per cent starting in the sixteenth year of the operation of the agreement.\textsuperscript{479}

In the case of Mexico, transitional set-asides cover Pemex (\textit{Petróleos Mexicanos}) and CFE (\textit{Comisión Federal de Electricidad}), and allow it to exempt up to fifty per cent of procurement by such entities.\textsuperscript{480} They have to be gradually phased-out within the period of ten years.\textsuperscript{481} In turn, permanent set-asides cover procurement by all other entities within the first ten years plus Pemex and CFE after the end of the ten year period and have been capped at USD 1,340,000,000\textsuperscript{482} annually to go up to USD 2,230,000,000 after ten years.\textsuperscript{483,484} In addition to this, Mexico has also permanently secured its right to maintain local content requirements for ‘turnkey or major integrated project’ (defined as “\textit{a construction, supply or installation project undertaken by a person pursuant to a right granted by an entity with respect to which: (i) the prime contractor is vested with the authority to select the general contractors or subcontractors; (ii) neither the Government of Mexico nor its entities fund the project; (iii) the person bears the risks associated with non-performance; and (iv) the facility will be operated by an entity or through a procurement contract of that entity}”) \textsuperscript{485} of (\textit{i}) forty per cent, for labour-intensive projects,\textsuperscript{486} and (\textit{ii}) twenty five per cent for capital-intensive projects\textsuperscript{487}.

\textbf{B. Social and environmental policies}

As far as sustainability is concerned, the TPP procurement chapter largely emulates GPA\textsuperscript{12}’s solutions pertaining to the inclusion of environmental standards in the

\textsuperscript{478}In this context, a partial exemption from obligations over certain cumulative value of procurement.

\textsuperscript{479}See TPP, Annex 15.A, Vietnam notes to Section D, point 1.

\textsuperscript{480}However, “[T]ransitional provisions in this Section shall not apply to Canada, Japan and the United States. With respect to Chile and Peru, Mexico shall apply the equivalent provisions set out in Annex 8.2, Section G General Note and Derogations (Chapter 8) of the Protocolo Adicional al Acuerdo Marco de la Alianza del Pacifico (Additional Protocol to the Pacific Alliance Agreement)’. See id., Annex 15.A, Mexico, footnote 1 to Section G.

\textsuperscript{481}See id., Annex 15.A, Mexico, Section G, points 1 and 2.

\textsuperscript{482}See id., Annex 15.A, Mexico, Section G, point 10.a.i.

\textsuperscript{483}See id., Annex 15.A, Mexico, Section G, point 10.a.ii.

\textsuperscript{484}For further details and exceptions see: ibid. Annex 15.A, Mexico, Section G, points 10.b-10.d.

\textsuperscript{485}See id., Annex 15.A, Mexico, Section G, point 13.b.

\textsuperscript{486}See id., Annex 15.A, Mexico, Section G, point 13.a.i.

\textsuperscript{487}See id., Annex 15.A, Mexico, Section G, point 13.a.ii.
procurement process, but allows procurers much more than under the GPA in terms of inclusion of the labour standards and the protection of minority-related social rights both at the level of the general framework and at the level of country-specific derogations. As to environmental concerns, identically with the GPA12 (see: section 5), the TPP procurement chapter gives the greenlight for the inclusion of environmental considerations into technical specifications by stipulating that “for greater certainty, this Article [i.e. technical specifications] is not intended to preclude a procuring entity from preparing, adopting or applying technical specifications to promote the conservation of natural resources or the protection of the environment”488. Unlike the GPA12, it does not repeat such clarifications with regard to evaluation criteria,489 but instead clarifies that measures ‘necessary to protect human, animal or plant life or health’490 that can also include environmental measures491.

<table>
<thead>
<tr>
<th>Figure 8: Exclusion criteria in the TPP and GPA 12</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>TPP</strong></td>
</tr>
<tr>
<td>‘If there is supporting material, a Party, including its procuring entities, may exclude a supplier on grounds such as:’</td>
</tr>
<tr>
<td>(a) Bankruptcy or insolvency;</td>
</tr>
<tr>
<td>(b) False declarations;</td>
</tr>
<tr>
<td>(c) Significant or persistent deficiencies in the performance of any substantive requirement or obligation under a prior contract or contracts; or</td>
</tr>
<tr>
<td>(d) Failure to pay taxes’.492</td>
</tr>
<tr>
<td>(e) Professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or</td>
</tr>
<tr>
<td>(f) Failure to pay taxes’.493</td>
</tr>
</tbody>
</table>

488 See id., art.15.12.6. See also GPA12, art.X.6.  
489 See GPA12, art.X.9, cited in note 84.  
490 See TPP, art.15.3.1.b. See also GPA12, art.III.2.b.  
491 See TPP, art.15.3.2.  
492 See id., art.15.8.4.  
493 See GPA12 VIII.4.
As to labour-rights-related concerns, the TPP procurement chapter brings about original solutions which might also stimulate future developments in the GPA, in light of inclusion of the treatment of sustainable procurement in the GPA Negotiations Agenda after its 2012 revision\(^{494}\) (which might eventually clarify GPA’s stance on the pursuit of social rights across the borders towards finding a common ground in widely accepted international standards and on the curb of unilateral imposition of such standards by public procurers). Specifically, TPP parties slightly modified the list of reasons for the legitimate exclusion of bidders compared with the GPA12 (see: Figure 8) and additionally agreed that this list “is not intended to preclude a procuring entity from promoting compliance with laws in the territory in which the good is produced or the service is performed relating to labour rights as recognised by the Parties and set forth in Article 19.3 (Labour Rights), provided that such measures (...) are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade between the Parties”\(^{495}\).

In turn, under the TPP labour chapter (to which the TPP procurement chapter refers) TPP parties affirm the importance of the *International Labour Organization Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998*,\(^{496}\) and commit to adopt and maintain national laws in the realisation of this Convention’s provisions, including securing the freedom of association and the effective recognition of the right to collective bargaining,\(^{497}\) as well as the elimination of (i) forced or compulsory labour,\(^{498}\) (ii) child labour,\(^{499}\) and (iii) discrimination in respect of employment and occupation\(^{500}\). The TPP labour chapter and the TPP procurement chapter are somewhat contradictory as under the labour chapter it has been laid down that “nothing in this Chapter shall be construed to empower a Party’s authorities to undertake labour law enforcement activities in the territory of another Party”\(^{501}\). However, the right of public procurers of one TPP party to exclude bidders of the other TPP party because of labour-rights violations cannot be assessed other than through indirect ‘cross-border’ enforcement. In any case, this discrepancy seems to be solved by the provision stipulating that excluding nationals of other TPP party because of labour-rights violations “should not be

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\(^{494}\) See id., art.XXII.8.a.iii.
\(^{495}\) See TPP, art.15.8.5.
\(^{496}\) See id., art.19.2.1.
\(^{497}\) See id., art.19.3.1.a.
\(^{498}\) See id., art.19.3.1.b.
\(^{499}\) See id., art.19.3.1.c.
\(^{500}\) See id., art.19.3.1.d.
\(^{501}\) See id., art.19.5.3.
construed as evidence that another Party has breached the obligations under Chapter 19 (Labour) with respect to labour.\footnote{See TPP, footnote 1 to Article 15.8.5. See \textit{id.}, footnote 4 to art. 19.3 ‘To establish a violation of an obligation under Article 19.3.1 (Labour Rights) or Article 19.3.2, a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation or practice in a manner affecting trade or investment between the Parties’.}

At the level of individual derogations, some TPP parties secured their rights to continue policies aimed at the protection of minorities or indigenous people. New Zealand even managed to include exemptions for the measures stemming from the abovementioned Treaty of Waitangi\footnote{See note 145.} (see: section 0) in general exceptions to the entire agreement rather than in its public procurement specific schedule of commitments.\footnote{See TPP, art. 29.6.} Similarly (but in schedules to the procurement chapter) Australia excluded measures for health and welfare\footnote{See \textit{id.}, Annex 15.A, Australia, notes to Section G, point 1.c.} as well as economic and social advancement\footnote{See \textit{id.}, Annex 15.A, Australia, notes to Section G, point 1.d.} of indigenous peoples. Canada excluded “measure[s] adopted or maintained with respect to Aboriginal peoples”\footnote{See \textit{id.}, Annex 15.A, Canada, Section G, point 1.c.} and “set asides for aboriginal businesses; existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada protected by section 35 of the Constitution Act, 1982”\footnote{See \textit{id.}.} The USA, like in any other public-procurement-relevant trade agreement, has specified that “any set-aside on behalf of a small- or minority-owned business (…) including any form of preference, such as the exclusive right to provide a good or service, or any price preference”\footnote{See \textit{id.}, Annex 15.A, US, Section G, point 1.}

Special derogations for Malaysia were most controversial and, as mentioned earlier, had previously been a deal-breaker in the course of the bilateral negotiations on the potential US-Malaysia RTA. However, in the case of the TPP, other parties accepted Malaysia’s right to adopt or maintain permanent set-asides and permanent price preferences favourably treating Bumiputera people. Set-asides cover construction services and have been set up at thirty percent of all Malaysia’s construction services covered under the TPP.\footnote{See \textit{id.}, Annex 15.A, Malaysia, Section G, point 2.a.} In turn, price preferences differentiate between Bumiputera people supplying goods or service who originate from TPP parties (first category) and those who do not (second category), as well as Bumiputera people supplying manufacturing goods (third category). Price preferences only apply to contracts worth more than SDR 15,000,000. For the first
category, depending on the contract value, the margin of price ranges from 2.5 per cent to 7 per cent. For the second category, the margin of price ranges from 1.25 per cent to 3 per cent. For the third category, the margin of price ranges from 3 per cent to 10 per cent.

VI. CONCLUSION

The entire TPP has found itself for a the time being at a crossroads after the outcome of the presidential elections in the USA had become known and after president-elect Donald J. Trump had announced that the USA would withdraw from the TPP once he assume the office, which he subsequently did living up to his promises. However, as the largest geopolitical project of the USA in decades, it will likely re-emerge in some other form to start with, as announced by Trump, like a number of bilateral agreement to be concluded between the USA and other TPP parties instead. The real unknown in the first quarter of 2017 seems to be whether other TPP signatories will want to enter into a sort of ‘rump TPP,’ as already nicknamed by Claude Barfield, without the US or will want to go on with a network of bilaterals or regionals like the P4 and Pacific Alliance. The ratification of TPP by Japan, as the natural leader of the TPP project in the absence of the USA, on 9th December, 2016, after Trump’s statement, suggests that the former might still be the case. Particularly for government procurement, what goes around might still come around for two reasons. Firstly, as discussed in section IV countries with the most restricted access to procurement markets, including Brunei, Malaysia Vietnam would not have significantly improved such access any time soon because of transitional periods, meaning that rearranging the TPP into a network of separate agreements will not necessarily delay procurement liberalisation in the case of these countries. Secondly, as discussed in section I and section 1, potential renegotiation of the TPP will not involve discussions about procurement-related regulatory issues and standards (i.e. about the previously discussed well established global model of the government procurement liberalisation offered by the GPA) in contrast to other chapters of the TPP, which makes a potential agreement on government procurement in the reworked TPP or bilateral agreements that much easier. Moreover, even in case all other attempts to

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511 See id., Annex 15.A, Malaysia, Section G, point 2.b.i.
512 See id., Annex 15.A, Malaysia, Section G, point 2. b.ii.
513 See id., Annex 15.A, Malaysia, Section G, point 2. b.iii.
514 See note xenon.
515 See note 4.
516 See id.
518 See note 25, Mitsuru.
save the TPP in whatever form fail, procurement-related commitments already made by the TPP signatories in the course of negotiations on the TPP might still serve a breeding ground for GPA expansion in the region under which WTO members can liberalise their procurement markets without having to discuss other trade issues.

For the time being, careful examination of the procurement chapter of the TPP as signed reveals that TPP’s implementation would have undoubtedly contributed to taming protectionism in public procurement markets in the Asia-Pacific region. Nonetheless, section II of the TPP shows that the likely significant liberalisation would have largely resulted from pre-existing conditions, i.e. from very narrow initial procurement-related trade obligations. As illustrated earlier, before the TPP (among the TPP parties) merely USA, Canada, Japan and Singapore have been bound to the provisions of the GPA and the extent of further procurement-liberalising obligations has been very limited. This includes NAFTA, which showed limited and vague procurement-related provisions binding upon ASEAN members and soft-law procurement principles released by the APEC.

Therefore, section IV and section V have unsurprisingly revealed that the room for deeper liberalization would still remain colossal, and such liberalization could be achieved through the improvement of coverage as well as through the eradication of country-specific derogations along with transitional periods. Particularly Malaysia, Mexico, New Zealand, United States and Vietnam could agree on subjecting their sub-central agencies to TPP procurement rules. In turn, Canada, Mexico, Vietnam could hypothetically offer market access to their utilities services. Moreover, Malaysia and Vietnam would need to be somehow persuaded to shorten their extraordinarily long transition periods while Vietnam and Mexico could somehow be encouraged to back down over their extensive set-asides from the obligations under the TPP procurement chapter.

Finally, section III and section B showed that the sustainability-related provisions and procurement procedures of the TPP procurement chapter do not exactly mirror the framework of the GPA. However, they would not have by any means undermined the existing model of liberalisation and regulation of procurement markets either. Nonetheless, some lesser alterations of the existing model offered by the TPP, in particular those pertaining to international labour standards, could have some influence on prospective amendments of the GPA and, therefore, on the architecture of the entire procurement model, even beyond the Asia-Pacific region.
Altogether, the adoption of the TPP procurement chapter in its current form would have been only a subtle evolution in terms of procurement-related regulatory issues as any major revolution in this regard would require making major changes to the framework of the GPA first. However, in a long term perspective, the adoption of the TPP procurement chapter could have led to revolution in terms of the coverage of actual liberalising commitments, and now it remains to be seen what portions of these forward-looking commitments awaiting the expiry of the transitional period can be salvaged.