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THE IMPACT OF THE TPP ON OPENING GOVERNMENT
PROCUREMENT TO INTERNATIONAL COMPETITION IN THE ASIA-
PACIFIC REGION

JEDRZEJ GORSKI*

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

*MJur (Warsaw), PhD (CUHK), Research Fellow, Centre for Financial Regulation and Economic Development, Faculty of Law, The Chinese University of Hong Kong. Postdoctoral Research Associate, UCL Australia.

conclusion of the Trans-Pacific Strategic Economic Partnership (“TSEP” or “P4”), being the TPP’s predecessor, and (ii) subsequent proliferation of bilateral trade agreements directly preceding the conclusion of the TPP.

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 depository. *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).

²*See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

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

Interpretation of art. XXIV of the GATT, Apr. 15, 1994, Marrakesh Agreement establishing the WTO, Annex 1A 33.

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")⁷ 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.⁸ 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, 2009.⁹ 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*

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.

⁸ See Press Release, USTR, Schwab Statement on launch of the U.S. Negotiations to join the Trans-Pacific Strategic Economic Partnership Agreement (Sept. 22, 2008), <https://ustr.gov/schwab-statement-launch-us-negotiations-join-trans-pacific-strategic-economic-partnership-agreement> (last accessed on Dec. 31, 2016); Hamanaka Shintaro, *TPP versus RCEP: Control of Membership and Agenda Setting*, 18(2) JOURNAL OF EAST ASIAN ECONOMIC INTEGRATION, 163 at 169 (2014); IAN F. FERGUSON, MARK A. MCMINIMY & BROCK R. WILLIAMS, CONG. RESEARCH SERV., R42694, THE TRANS-PACIFIC PARTNERSHIP NEGOTIATIONS AND ISSUES FOR CONGRESS 1 (Mar. 20, 2015).

⁹ See The White House, Office of the Press Secretary, Remarks by President Barack Obama at Suntory Hall (Nov.14,2009) <<https://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-suntory-hall>> (last accessed Dec. 31, 2016); FERGUSON, *supra* note 6 at 3; IAN F. FERGUSON & BRUCE VAUGHN, CONG. RESEARCH SERV., R40502, THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 1 (Dec. 12, 2011).

*efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment*¹⁰.

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.*”¹¹ 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,¹² 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”)¹³.

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.¹⁴ 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,*”¹⁵ and (ii) “*It should surprise no one that America’s international agreements*

¹⁰ See TPP, art. 25.2.1.

¹¹ See note 9, footnote 25 at 8.

¹² Bryan C. Mercurio, *The Trans-Pacific Partnership: Suddenly a Game Changer*, 37(11) WORLD ECON. 1558 at 1559-1560 (2014). See also Ian F. Fergusson, William H. Cooper, Remy Jurenas & Brock R. Williams, *The Trans-Pacific Partnership Negotiations and Issues for Congress*, 22 (2) CUR. POL. & ECON. SOUTH, SOUTH-EASTERN, & CENTRAL ASIA 209-286 at 6-7 (2013); F. Fergusson & Brock R. Williams, *The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress* (2016) available at <https://fas.org/sgp/crs/row/R44489.pdf> at 14.

¹³ See Mercurio at 1560.

¹⁴ See notes 9 and 11.

¹⁵ See Joseph E. Stiglitz & Adam S. Hersh, Commentary, *The Trans-Pacific Free-Trade Charade*, PROJECT SYNDICATE, Oct. 2, 2015, <http://www.project-syndicate.org/commentary/trans->

*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*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 *prima facie* unbelievable decision, a clear historical recurrence of what happened directly after the WW2 with the charter of the International Trade Organization (“ITO”)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.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 WTO¹⁹) 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 TPP²⁰ sparked a lot of

[pacific-partnership-charade-by-joseph-e--stiglitz-and-adam-s--hersh-2015-10](#) (last accessed on Feb.14, 2016).

¹⁶Stiglitz and Hersh exemplified their claim with examples from pharmaceutical industry affecting TPP’s provisions on IP protection, and tobacco industry affecting TPP’s provisions on the protection of foreign investors.

¹⁷ See Interim Commission for the International Trade Organization, *Final Act and Related Documents*, United Nations Conference on Trade and Employment held at Havana, Cuba from 21 Nov.1947 to 24 March, 1948 (never ratified), para.1 of Preamble at 5. See Press Release, European Office of the United Nations, *Advance Guidance on ITO Draft Charter*, UN Press Release No. 291.

¹⁸ See Nadeem Cheema & Muhammad Amir Munir, From *GATT to WTO: A Legal Analysis*, PLJ 232 at 2-4 (SSRN numbering, file available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1910357> accessed 3 April 2015) at 3; George Bronz, *An International Trade Organization: the Second Attempt* (1956), HARV. LAW. REV., 69(3) 440 at 476-477.

¹⁹ The GATT47 entered into force provisionally on 1 Jan. 1948. See Bronz at 18; footnote 8 at 1093; See also WTO Secretariat, *GATT Analytical Index – Guide to GATT Law and Practice* (3 edn., Cambridge University Press, Cambridge 2012) 2408 at 171-184. The general idea of GATT’s 47 provisional application was that ‘*Part II of this Agreement* [i.e. institutional provisions] *shall be suspended on the day on which the Havana Charter enters into force*’ See GATT47, article XXIV:2. Because the Havana Charter has never entered into force the post-WW2 multilateral trade order had to operate under the GATT47, along with its Part II, which was not suspended.

²⁰ A Message from President-Elect Donald J. Trump, TRANSITION 2017 (21 Nov. 2016), <https://www.youtube.com/watch?v=7xX_KaStfT8> accessed Dec. 31, 2016; Michael C. Benderand & Damian Paletta, *Donald Trump Calls for List of Day-One Executive Actions, Outlines First 100 Days*, WALL ST. J., Nov. 22, 2016,

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 deal²¹ 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

<https://www.wsj.com/articles/donald-trump-calls-for-list-of-day-one-executive-actions-outlines-first-100-days-1479775808>. In the video, Trump vows to order withdrawal from TPP trade deal, investigate immigration visa fraud and create a plan to counter cyberattacks.

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.

²⁴ Obe, Mitsuru & Rob Taylor, *Japan Makes Early Push in Asia to Ratify TPP Trade Deal*, WALL ST.J.(Online), Oct 14, 2016. So far, only Japan ratified the TPP on 9 December 2016. See Mitsuru Obe, *Japan Ratifies Trans-Pacific Partnership, Which Trump Has Promised to Leave*, WALL ST. J., Dec. 9, 2016, <https://www.wsj.com/articles/japan-ratifies-trans-pacific-partnership-which-trump-has-promised-to-leave-1481273551>.

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 US.*'²⁸ 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.²⁹ 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.³⁰

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.³¹ 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.

²⁹ *Reshape or shatter? NAFTA*, THE ECONOMIST (2017) 422(9027), 41.

³⁰ Den Tandt, Michael, *Moving Toward Bilateral Trade; Canada, Japan Should Consider TPP Alternatives*, EDMONTON JOURNAL (May 25, 2016)N.1.

³¹ *Fairway Friends: America and its Asian Allies*, THE ECONOMIST (2017) 422(9027), 46.

speech from Davos in which he compared protectionism (impliedly the USA) to '*locking oneself in a darkroom*.'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 *in effect* 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,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.³⁴ However, as further explained in this article in detail, in terms of actual access to government

³² See note 28.

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).

³⁴ See WTO Committee on Government Procurement, *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”).³⁵ 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 1997,³⁶ thereby significantly opening Mexican public procurement markets even without accession

³⁵ See North American Free Trade Agreement (signed Dec. 17, 1992, in force Jan. 1, 1994), ch.10, 32 I.L.M. 289, 605 (1993).

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 is 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 P4³⁷ 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 Agreement³⁹), 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].

³⁷ See note 7.

³⁸ *Id.* at 2.

³⁹ See Marrakesh Agreement Establishing the World Trade Organization (signed at Marrakesh on Apr. 15, 1994, in force Jan. 1, 1995) 1867 U.N.T.S. 154.

The GPA was first adopted in 1979 (“GPA79”) as the product of the GATT Tokyo Round,⁴⁰ and was subsequently revised a number of times (“GPA87”⁴¹, “GPA94”⁴², and “GPA12”).⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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 2013-2015⁴⁷ and upon ratification by a minimum required number of parties, the GPA12 came into force on 6th April, 2014.⁴⁸

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

⁴⁰ GATT Secretariat, *The Agreement on Government Procurement 1979* (signed in Tokyo on Apr.12, 1979, in force Jan. 1, 1981) LT/TR/PLURI/2.

⁴¹ Agreement on Government Procurement, Revised Text 1987(Protocol of Amendments done at Geneva on Feb.2, 1987, in force Feb. 14, 1988).

⁴² Government Procurement Agreement 1994 (signed at Marrakesh on Apr. 15, 1994, in force Jan. 1, 1996), WTO Agreement Annexure 4B 417.

⁴³ GATT Secretariat, *Agreement on Government Procurement 2012* (signed at Geneva on Mar. 30, 2012, in force Apr. 6, 2014) GPA/113(Apr. 2, 2012).

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.

⁴⁷ *Ministers Greet Progress on Ratification of Revised Agreement on Government Procurement* (WTO 2013 News Items) Dec. 4, 2013.

⁴⁸ *Revised WTO Agreement on Government Procurement Enters into Force* (WTO 2014 News Items) Apr. 7, 2014.

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 GPA⁹⁴, while New Zealand joined the club in October 2014⁵¹. 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

⁴⁹GATT Secretariat, *Agreement on Government Procurement Done at Geneva on April 12, 1979 - Notification of Acceptances* (Feb. 20, 1980) Let/1092.

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

⁵¹ *Montenegro and New Zealand to Join the WTO’s Agreement on Government Procurement* (WTO 2014 News Items) Oct. 29, 2014); WTO Committee on Government Procurement, *Committee on Government Procurement - Minutes of the formal meeting of October 29, 2014*, (GPA/M/57) Dec. 22, 2014.

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, accordance 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 (“*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 (a procurement method whereby all interested suppliers may submit a tender⁵⁶) shall be preferred, and
- (iii) Limited tendering (a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice⁵⁷) should be permitted only in

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,⁵⁸ such as “*the requirement (...)for a work of art,*”⁵⁹ when the protection of patents, copyrights or other exclusive rights is involved,⁶⁰ an absence of competition for technical reasons,⁶¹ additional deliveries by the original supplier of goods or services (that were not included in the initial procurement),⁶² extreme urgency,⁶³ purchases in commodity markets,⁶⁴ etc.

4. Procedural Provisions

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.⁶⁵ 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*”.⁶⁶
- (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*’.⁶⁷
- (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*

⁵⁸ See *id.* art.XIII.1.

⁵⁹ See *id.* art. XIII.1.b.i.

⁶⁰ See *id.* art.XIII.1.b.ii.

⁶¹ See *id.* art.XIII.1.b.iii.

⁶² See *id.* art.XIII.1.c.

⁶³ See *id.* art.XIII.1.d.

⁶⁴ See *id.* art.XIII.1.e.

⁶⁵ ‘Conduct of Procurement procuring entity shall conduct covered procurement in a transparent and impartial manner that: a. is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering; b. avoids conflicts of interest; and c. prevents corrupt practices’. See *id.* art.IV.4.

⁶⁶ See *id.* art.II.6.

⁶⁷ See *id.* art.IV.3.a.

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 documentation⁷³ 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 procurers 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’. See *id.* art.VI.1a.

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*⁷⁹ – allows the parties to adopt measures necessary to protect, among others (i) public morals, order or safety,⁸⁰ (ii) human, animal or plant life or health,⁸¹ and (iii) intellectual property⁸². Moreover, the amendment of 2012 also clearly states that: (i) “[f]or 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”,⁸³ and (ii) “[t]he 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”.⁸⁴

Furthermore, some vague provisions—such as an option to exclude bidders in the case of “*final judgments in respect of serious crimes or other serious offences*”⁸⁵ or in case of “*professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier*”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,⁸⁷ and might lead to protectionist

⁷⁹ See *id.* art.III.2.

⁸⁰ See *id.* art.III.2(a).

⁸¹ See *id.* art.III.2(b).

⁸² See *id.* art. III.2(c).

⁸³ See *id.* art.X.6.

⁸⁴ See *id.* art.X.9.

⁸⁵ See *id.* art.VIII.4(d).

⁸⁶ See *id.* art.VIII.4(e).

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, *Horizontal Policies In Public Procurement: A Taxonomy*, J. P. PROCUREMENT, Summer 2010 at 149. See also 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.

Annex: Canada

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*

	<p><i>territories of Nunavut, Yukon or Northwest Territories.</i></p> <p>6. <i>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.'</i></p> <p>USA</p> <p><i>'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.</i></p> <p><i>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.'</i></p>
5	<p>Singapore</p> <p><i>'The services covered are subject to the limitations and conditions specified in the Government of Singapore's Schedule of the General Agreement on Trade in Services (GATS).'</i></p>
6	<p>Singapore</p> <p><i>'The construction services covered are subject to the limitations and conditions specified in the Government of Singapore's Schedule of the General Agreement on Trade in Services (GATS).'</i></p>
7	<p>Canada</p> <p><i>'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.'</i></p> <p>Japan</p> <p><i>'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</i></p>

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].

Country:	objective coverage	Subjective coverage			Specific threshold-related restrictions
		central	sub-central	Other	
Armenia	Goods	130,000	200,000	400,000	None
	Services	130,000	200,000	400,000	
	construction works	5,000,000	5,000,000	5,000,000	
Canada	Goods	130,000	355,000	355,000	None
	1) Services	2) 130,000	3) 355,000	4) 355,000	

		0			
	construction works	5,000,000	5,000,000	5,000,000	
EU	Goods	130,000	200,000	400,000	Annex 2 'Notes (...) 1. The following shall not be considered as covered procurement: (...) e. procurement between 200,000 SDR and 355,000 SDR by procuring entities covered under this Annex of goods and services for suppliers and service providers from Canada' Annex 5 Works concessions contracts, when awarded by Annex 1 and 2 entities, are included under the
	services	130,000	200,000	400,000	
	construction works	5,000,000	5,000,000	5,000,000	

					<i>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.</i>
Hong Kong SAR	Goods	130,000	N.A.	400,000	None
	Services	130,000		400,000	
	Construction works	5,000,000		5,000,000	
Iceland	Goods	130,000	200,000	400,000	None
	Services	130,000	200,000	400,000	

		0			
	construction works	5,000,000	5,000,000	5,000,000	
Israel	Goods	130,000	250,000	355,000	Annex 1 * starting from the sixth year after entry into force of the GPA12 SDR 5,000,000 .
	Services	130,000	250,000	355,000	
	Construction works	8,500,000*	8,500,000	8,500,000	
Japan	Goods	100,000	200,000	130,000	None
	Construction services	4,500,000	15,000,000	4,500,000 or 15,000,000 ⁸⁸	
	architectural, engineering and other technical services	450,000	1,500,000	450,000	
	Other services	100,000	200,000	130,000	
Liechtenstein	Goods	130,000	200,000	400,000	None
	Services	130,000	200,000	400,000	
	Construction Works	5,000,000	5,000,000	5,000,000	
Montenegro	goods	130,000	200,000	400,000	
	Services	130,000	200,000	400,000	
	Construction Works	5,000,000	5,000,000	5,000,000	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><i>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 15,000,00</i></p>
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					0.”
Netherlands with respect to Aruba	Goods	100,000	N.A.	N.A.	None
	Services	100,000			
	Construction Services	4,000,000			
New Zealand	Goods	130,000	200,000	400,000	None
	Services	130,000	200,000	400,000	
	Construction Works	5,000,000	5,000,000	5,000,000	
Norway	Goods	130,000	200,000	400,000	None
	Services	130,000	200,000	400,000	
	Construction Works	5,000,000	5,000,000	5,000,000	
Singapore	Goods	130,000	N.A.	400,000	None
	Services	130,000		400,000	
	Construction Works	5,000,000		5,000,000	
Taiwan	Goods	130,000	200,000	400,000	None
	Services	130,000	200,000	400,000	
	Construction Works	5,000,000	5,000,000	5,000,000	
USA	Goods	130,000	355,000	USD250,000 or SDR400,000 ⁸⁹	None
	Services	130,000	355,000	USD250,000	

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.

		0		0 or SDR400,00 0 ⁹⁰	
	Construction Works	5,000,0 00	5,000,000	5,000,000	

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"),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 SDR 130,000), medium for sub-central entities (about SDR 200,000) and higher in the case of 'other' entities (about SDR 400,000). For construction works, thresholds are in principle flat in the case of all covered entities (about 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 GPA⁹⁴, 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,⁹² EFTA-Korea,⁹³ Thailand-

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.

⁹² *See* Agreement between Japan and the Kingdom of Thailand for an Economic Partnership (signed Apr. 3, 2007, in force Nov. 1, 2007), ch.11, 2752 U.N.T.S. 48547.

⁹³ *See* Free Trade Agreement between the EFTA States and the Republic of Korea (signed Nov. 27, 2000, in force July 1, 2001), ch.6, <http://www.efta.int/free-trade/free-trade-agreements/korea> (accessed on Aug. 28, 2014).

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

⁹⁴ See New Zealand-Thailand Closer Economic Partnership Agreement (signed Apr. 19, 2005, in force July 1, 2005), ch.13, <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Thailand/Closer-Economic-Partnership-Agreement-text/index.php> (accessed on Aug. 28, 2014).

⁹⁵ See Thailand-Australia Free Trade Agreement (signed July 5, 2004, in force Jan. 1, 2005), ch.15, https://www.dfat.gov.au/fta/tafta/tafta_toc.html (accessed on Aug. 28, 2014).

⁹⁶ The authors analysed 139 RTAs notified since 2000 which remained in force as of May 25, 2010. See Robert D. Anderson, Anna Caroline Müller, Kodo Osei-Lah, Josefa Paro de Leon and Philippe Pelletier, *Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA? in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM* (Sue Arrowsmith & Robert D. Anderson, eds., Cambridge Univ. Press 2011) at 561-656.

⁹⁷ Calculated based on Table 1 at 568-576.

⁹⁸ See Arwell Davies, *Government Procurement*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* (Simon Nicholas Lester & Bryan Mercurio, eds., Cambridge Univ. Press 2009) at 174.

⁹⁹ See WTO Working Party on GATS Rules, *Government Procurement-Related Provisions in Economic Integration Agreements*, para.7, S/WPGR/W/49 (Aug. 31, 2004).

¹⁰⁰ EIA is a GATS-specific term referring to an RTA. See GATS, art. V.

¹⁰¹ See WTO Working Party on GATS Rules, *Government Procurement-Related Provisions in Economic Integration Agreements*, para.6, S/WPGR/W/49/Add.1 (Sept. 28, 2009).

These are significantly higher ratios of public procurement-relevant RTAs to all RTAs than in the 1990s.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*",¹⁰³ whereas Heydon and Woolcock noted that "*[t]he 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.*"¹⁰⁴ Davies, in surveying 68 public procurement-relevant RTAs, found 28 incorporating the GPA's provisions by reference.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,¹⁰⁶ Japan-Singapore¹⁰⁷ and US-Singapore¹⁰⁸)¹⁰⁹ and also identified RTAs which replicate many GPA provisions without express reference to the GPA (e.g. Chile-Japan,¹¹⁰ P4,¹¹¹ Korea-Singapore¹¹² and Japan-

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.

¹⁰³ See note 98 at 276. See also Arwell Davies & Krista Nadakavukarenschefer, *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).

¹⁰⁴ See *supra* note 80, 274 at 76

¹⁰⁵ See note 98 at 275.

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

¹⁰⁷ See Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership (signed Jan. 13, 2002, in force Nov. 30, 2002), ch.11, 2739 U.N.T.S. 48385.

¹⁰⁸ See The United States-Singapore Free Trade Agreement (signed May 6, 2003, in force Jan. 1, 2004), ch.13, <http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta> (accessed on Aug. 28, 2014).

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).

¹¹⁰ See Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership (signed Mar. 27, 2007, in force Sept. 3, 2007), ch.12, 2751 U.N.T.S. 48546.

¹¹¹ See note 7.

Mexico¹¹³).¹¹⁴ GATS-related studies also noticed that there are RTAs which include hybrid references to both the GPA and to the NAFTA (EU-Mexico¹¹⁵ and EFTA-Mexico¹¹⁶).¹¹⁷ Davies identified only a few agreements (i.e. Korea-Singapore,¹¹⁸ New Zealand-Singapore,¹¹⁹ New Zealand-Thailand¹²⁰ and US-Singapore¹²¹) that did not precisely follow the GPA's procedural framework.¹²²

¹¹² See Free Trade Agreement between the Government of the Republic of Korea and the Government of the Republic of Singapore (signed Aug. 4, 2005, in force Mar. 2, 2006), ch.16, http://www.fta.gov.sg/fta_ksfta.asp?hl=22 (accessed on Aug. 28, 2014).

¹¹³ See Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (signed Sept. 17, 2004, in force Apr. 1, 2005), ch.11, 2768 U.N.T.S. 48744.

¹¹⁴ See note 101, para.7, S/WPGR/W/49/Add.1.

¹¹⁵ See note 36.

¹¹⁶ See Free Trade Agreement between the EFTA States and the United Mexican States (signed on Nov. 27, 2000, in force July 1, 2001), ch.V, <http://www.efta.int/free-trade/free-trade-agreements/mexico> (accessed on Aug. 29, 2014).

¹¹⁷ Under which the obligations of the procurers from the EU and the EFTA are determined by references to their obligations under the GPA (*See* note 36 art.29. 2; note 116 art.61. 2) while the obligations of Mexican procurers are determined by references to their obligations under the NAFTA (*See id*).

¹¹⁸ See note 112.

¹¹⁹ See Agreement between New Zealand and Singapore on a Closer Economic Partnership (signed Nov. 14, 2000, in force Jan. 1, 2001), Part 8, 2203 U.N.T.S. 39105.

¹²⁰ See New Zealand-Thailand Closer Economic Partnership Agreement (signed Apr. 19, 2005, in force July 1, 2005), ch.13, <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Thailand/Closer-Economic-Partnership-Agreement-text/index.php> (accessed on Aug. 28, 2014).

¹²¹ See note 108.

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; *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, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>, (accessed on Aug. 29, 2014); Mercosur (*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 [*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.¹²³ However, New Zealand and Singapore managed to reach such an agreement in 2000 (the ANZSCEP)¹²⁴ which eventually encouraged Chile to sit back at the negotiation table after the APEC leaders' meeting held in Bandar Seri Begawan, Brunei in

http://www.comunidadandina.org/ingles/normativa/ande_trie1.htm, (accessed on Aug. 29, 2014) and Association of South-East Asian Nation [See Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (signed Jan. 28, 1992),

http://www.asean.org/images/2012/Economic/AFTA/Common_Effective_Preferential_Tariff_Agreement%20on%20the%20Common%20Effective%20Preferential%20Tariff%20Scheme%20for%20the%20ASEAN%20Free%20Trade%20Area.pdf, (accessed on Aug. 29, 2014); ASEAN Trade in Goods Agreement (signed at Cha-am on Feb. 26, 2009, in force May 17, 2010, <http://www.asean.org/images/2012/Economic/AFTA/Annexure/ASEAN%20Trade%20in%20Goods%20Agreement,%20Cha-am,%20Thailand,%2026%20February%202009.pdf>, (accessed on Aug. 29, 2009) were compared] concluded that 'there is no common approach to government procurement relating to trade in services in the RTAs studied'. See Markus Krajewski, *Services Liberalization in Regional Trade Agreements: Lessons for GATS 'Unfinished Business'?* in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM (Lorand Bartels & Federico Ortino, eds., Oxford Univ. Press 2006), 175 at 193.

¹²³ See footnote 6, 163 at 169.

¹²⁴ See Agreement between New Zealand and Singapore on a Closer Economic Partnership (signed Nov. 14, 2000, in force Jan. 1, 2001), 2203 U.N.T.S. 39105. See also note 123.

2000.¹²⁵ 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 2005.¹²⁶

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 services¹²⁷ which was way below the thresholds typically set up under the GPA (see section: 6),¹²⁸ except for Brunei, which meant to cover its public contracts only above SDR 250,000 on a reciprocal basis.¹²⁹ In terms of subjective coverage, while the ANZSCEP covers all functionally defined central agencies (i.e. controlled by respective governments) without listing them¹³⁰ 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.

¹²⁹ See New Zealand Ministry of Foreign Affairs and Trade, *The New Zealand-Singapore-Chile-Brunei Darussalam Trans-Pacific Strategic Economic Partnership* (Oct. 2006), https://www.mfat.govt.nz/assets/_securedfiles/FTAs-agreements-in-force/P4/trans-pacificbooklet.pdf, (accessed Feb. 20, 2016); footnote 11 at 36; Minister of Industry and Primary Resources of Brunei Darussalam, Pehin Abdul Rahman Taib, *Letter to Honourable Jim Sutton, Minister for Trade Negotiations of New Zealand*, KPSU/IRTD/P/18 (May 23, 2005), http://www.sice.oas.org/Trade/CHL_Asia_e/Other_Side_Letters/Minis_BRN_ini_e.pdf (accessed on Feb. 20, 2016); Office of Hon Jim, Minister of Agriculture, Minister for Biosecurity, Minister for Trade Negotiations, Associate minister for Rural Affairs, MP Aoraki, *Letter to His Royal Highness Prince Mobamed Bolkiab, Minister for Foreign Affairs of Brunei Darussalam* (May 31, 2005), http://www.sice.oas.org/Trade/CHL_Asia_e/Other_Side_Letters/Minis_BRN_res_e.pdf (accessed Feb. 20, 2016).

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 bodies¹³¹, the P4 includes traditional lists of covered central entities¹³². Only Chile has subjected its sub-central entities to the P4,¹³³ 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.¹³⁴ In terms of objective coverage the ANZSCEP covers all goods¹³⁵ but services only to the extent of the service-related chapter of that agreement¹³⁶. The P4 similarly covers all goods subject to country-specific and mostly security/weaponry-related reservations¹³⁷ but 'all services' in the case of Chile¹³⁸ and New Zealand¹³⁹ (subject to minor reservations¹⁴⁰) with only Singapore

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'. *See id.*

¹³² *See* P4, Annex 11.A.

¹³³ *See id.*

¹³⁴ New Zealand Ministry of Foreign Affairs and Trade, *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. *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.

¹³⁵ *See* New Zealand-Singapore RTA, art.47.1.

¹³⁶ *See id.* art.47.2.

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's 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'. *See* P4, Annex 11.A, Singapore, notes to Section B, point 1(b) at 24.

¹³⁸ *See* P4, Annex 11.A, Chile, section B.2.

¹³⁹ *See id.* Annex 11.A, New Zealand, section B.2.

¹⁴⁰ Chile excluded 'all financial services' (*See* note 138) while New Zealand (*i*) procurement of research and development services (*See* note 139, section 2.B.a.), (*ii*) any procurement in respect of contracts for construction, refurbishment or furnishing of chanceries abroad (*See* note 139, section 2.B.b.), and (*iii*) procurement of public health, education and welfare services (*See* note 139, section 2.B.c.)

using a positive list of covered services¹⁴¹ and Brunei's final coverage remaining unclear¹⁴². 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*"¹⁴³ (see further: section 4) the P4 went with the flow and, although without express references, largely repeated the GPA's provisions.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,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.¹⁴⁶ Specifically, identical to the ANZSCEP¹⁴⁷ and to the GPA's New Zealand specific Annex no.7,¹⁴⁸ 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

¹⁴¹ See P4, Annex 11.A, Singapore, section B2.

¹⁴² See note 134.

¹⁴³ See New Zealand-Singapore RTA, Article 46.2 (a).

¹⁴⁴ See note 114.

¹⁴⁵ See Treaty of Waitangi (*Tiriti o Waitangi*) (signed Feb. 6, 1840) <http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text> (accessed Feb. 20, 2016).

¹⁴⁶ E.g., the Auckland Council Procurement Policy, <http://www.aucklandcouncil.govt.nz/EN/planspoliciesprojects/councilpolicies/Documents/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 Te Tiriti 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.

¹⁴⁷ See New Zealand-Singapore RTA, art. 74.

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.”¹⁴⁹

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,¹⁵⁰ Peru-Thailand,¹⁵¹ Japan-Malaysia,¹⁵² Japan-Brunei,¹⁵³ Japan-Indonesia,¹⁵⁴ Japan-Vietnam,¹⁵⁵ Malaysia-New Zealand,¹⁵⁶ Chile-

¹⁴⁹ See P4, art.19.5.1. Other P4 parties also agreed that (i) ‘(...)the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement’, (See P4, art.19.5.2.), (ii) ‘Chapter 15 (Dispute Settlement) shall otherwise apply to this Article’, (See *id.*), and (iii) ‘[A]n arbitral tribunal established under Article 15.6 (establishment of an Arbitral Tribunal) may be requested by Brunei Darussalam, Chile or Singapore to determine only whether any measure (referred to in Paragraph 1) is inconsistent with their rights under this Agreement’, (See *id.*).

¹⁵⁰ This agreement did not include references to public procurement. Chile –Mexico Free Trade Agreement (*Tratado de Libre Comercio Chile-México*, signed Oct. 1, 1998, in force Aug. 1, 1999), <http://www.sice.oas.org/Trade/chmefta/indice.asp> (accessed Feb. 16, 2016).

¹⁵¹ This agreement did not make references to public procurement. See Framework Agreement on Closer Economic Partnership between the Government of the Republic of Peru and the Government of the Kingdom of Thailand (signed Oct. 17, 2003, ratified Jan. 27, 2005, protocol signed Nov. 19, 2005, additional protocol signed Nov. 16, 2006, second additional protocol Nov. 13, 2009, third additional protocol signed Nov. 18, 2010, in force Dec. 31, 2011), http://www.sice.oas.org/Trade/PER_THA_FTA/Index_e.asp (accessed Feb. 13, 2016).

¹⁵² This agreement expressly excluded public procurement from services-related and investment-related chapters. See Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership (signed Sept. 17, 2004, in force Apr. 1, 2005), art. 80.10, 94.3, <http://www.mofa.go.jp/policy/economy/fta/malaysia.html> (accessed Feb. 13, 2016).

¹⁵³ This agreement only provided that its parties shall endeavour to ‘(a) accord most-favoured-nation treatment to goods, services and suppliers of the other Party, (b) enhance transparency of the measures regarding government procurement, and (c) implement in a fair and effective manner the measures regarding government procurement’. See Agreement between Japan and Brunei Darussalam for an Economic Partnership (signed in June 2007; in force 2008), art.98, <http://www.mofa.go.jp/policy/economy/fta/indonesia.html> (accessed Feb. 11, 2016).

¹⁵⁴ This agreement only imposed mutual public procurement-relevant information exchange obligations in the way that ‘[E]ach Party shall, subject to its laws and regulations, respond in a timely manner to reasonable requests from the other Party for information on its laws and regulations, policies and practices on government procurement, as well as any reforms to its existing government procurement regimes’. See Agreement between Japan and the Republic of Indonesia for an Economic Partnership (signed Aug. 20, 2007, in force

Malaysia,¹⁵⁷ Chile-Vietnam,¹⁵⁸ Mexico-Peru,¹⁵⁹ Malaysia-Australia,¹⁶⁰ Chile-Thailand¹⁶¹). 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

July 1, 2008), art.124, <http://www.mofa.go.jp/policy/economy/fta/indonesia.html> (accessed Feb. 11, 2016).

¹⁵⁵ This Agreement only provided that its parties shall '(a) enhance transparency of the measures regarding government procurement, and (b) implement in a fair and effective manner the measures regarding government procurement'. See Agreement between Japan and the Socialist Republic of Vietnam for an Economic Partnership (signed Dec. 25, 2008, in force Oct.1, 2009), art.106, <http://www.mofa.go.jp/region/asia-paci/vietnam/epa0812/index.html> (accessed Feb. 13, 2016).

¹⁵⁶ This agreement expressly excluded public procurement from services-related and investment-related chapters. New Zealand-Malaysia Free Trade Agreement (signed October 26, 2009, in force August 1, 2010), art. 8.3.4(b), 10.3.4(b), <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/malaysia-fta/> (accessed February 12, 2016).

¹⁵⁷ This agreement did not include references to public procurement. Free Trade Agreement between the Republic of Chile and the Republic of Malaysia (signed Nov. 13, 2010, in force Apr. 18, 2012), http://www.sice.oas.org/Trade/CHL_MYS/Index_e.asp (accessed Feb. 11, 2016).

¹⁵⁸ This agreement did not include references to public procurement. See Chile-Vietnam Free Trade Agreement (*Tratado de Libre Comercio entre Chile y Vietnam*, signed Nov. 12, 2011, in force Feb. 4, 2014), http://www.sice.oas.org/Trade/CHL_VNM/CHL_VNM_s/Index_s.asp (accessed Feb. 12, 2016).

¹⁵⁹ This agreement only explicitly excluded public procurement from the services-related chapter. See Mexico-Peru Free Trade Agreement (*Acuerdo de Integración Comercial México-Perú*, signed April 6, 2011, in force Feb. 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).

¹⁶⁰ This agreement explicitly excluded public procurement. See Australia-Malaysia Free Trade Agreement Australia, Malaysia (signed May 22, 2012, in force Jan. 1, 2013), art.8.4.1.b, 12.14.4, <http://dfat.gov.au/trade/agreements/mafta/Pages/malaysia-australia-fta.aspx#documents> (accessed Feb. 11, 2016).

¹⁶¹ This agreement provided that '[T]he Parties shall endeavour to promote transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination in their government procurement procedures'. See Free Trade Agreement between Chile and Thailand (signed Oct. 4, 2013, in force Nov. 5, 2015), art.11.8.2, http://www.sice.oas.org/Trade/CHL_THA_Final/CHL_THA_Index_PDF_e.asp (accessed Feb. 13, 2016).

Trade Agreement, ¹⁶² ASEAN-China, ¹⁶³ ASEAN-India, ¹⁶⁴ ASEAN-Japan,¹⁶⁵ASEAN-Korea¹⁶⁶).¹⁶⁷

¹⁶² This agreement excluded public procurement in chapters related to trade in services (Chapter 8, Article 1.4.a.) and investment (Chapter 11, Article 1.2.a). *See* Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area ASEAN members, Australia, New Zealand (signed Feb. 27, 2009, in force Jan. 1, 2010, 1st protocol of amendments in force Oct. 1, 2015), ch.8, art.1.4a, <http://dfat.gov.au/trade/agreements/aanzfta/official-documents/Pages/agreement-establishing-the-asean-australia-new-zealand-free-trade-area-aanzfta.aspx> (accessed Nov. 11, 2016).

¹⁶³ 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 between the Association of South East Asian Nations and the People's Republic of China (signed Nov. 4, 2002, in force July 1, 2003), http://www.fta.gov.sg/acfta/framework_agreement_05112002.pdf (accessed Mar. 3, 2016); Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China (signed Nov. 29, 2004, in force Jan. 1, 2005), http://www.fta.gov.sg/acfta/agreement_on_trade_in_goods_china_21112004.pdf (accessed Mar.10, 2016); Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the People's Republic Of China (signed Jan. 14, 2007, in force July 1, 2007), http://www.fta.gov.sg/acfta/agreement_on_trade_in_goods_china_21112004.pdf (accessed Mar. 10, 2016); Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the People's Republic of China (signed Aug. 15, 2009, in force Feb. 15, 2010), http://www.fta.gov.sg/acfta/asean-china_inv_agreement%28certified_copy%29.pdf (accessed Mar. 10, 2016).

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.

¹⁶⁵ *See* Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations (signed Apr.14, 2008, in force Dec. 1, 2008, in force for Brunei Jan. 1, 2009, in force for Malaysia Feb. 1, 2009, in force for Thailand June 1, 2009, in force for Cambodia Dec.1, 2009), <http://www.mofa.go.jp/policy/economy/fta/asean/agreement.pdf> (accessed on Feb. 28, 2016).

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,¹⁶⁸ the Japan-Philippines EPA,¹⁶⁹ and the New Zealand-Thailand CEPA,¹⁷⁰ the last one additionally providing that the

and the Republic of Korea (signed Dec. 13, 2005, in force June 1, 2007), http://www.asean.org/storage/images/2012/Economic/AFTA/joint_statement/Framework%20Agreement%20on%20Comprehensive%20Economic%20Cooperation%20Among%20the%20Governments%20of%20the%20Member%20Countries%20of%20the%20Association%20of%20Southeast%20Asian%20Nations%20and%20the%20Republic%20of%20Korea.pdf (accessed Mar. 3, 2016); Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (signed Aug. 24, 2006, in force June 1, 2007), http://www.fta.gov.sg/akfta/agreement_on_trade_in_goods.pdf (accessed Mar. 10, 2016); Agreement on Trade in Services Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the ASEAN and the Republic of Korea (signed Nov. 21, 2007, in force May 1, 2009), http://www.fta.gov.sg/akfta/ak-ats%20-%20agreement%20_asean%20version_%20-%20final%20signed%2021%20nov%202007.pdf (accessed Mar. 10, 2016); Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation Among ASEAN Member Countries and the Republic of Korea (signed June 2, 2009, in force Sept. 1, 2009), <http://www.fta.gov.sg/akfta/ak%20investment%20agreement%20%28signed%29.pdf> (accessed Mar. 10, 2016).

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).

¹⁶⁸ ‘Artículo 20.5: Negociaciones Futuras Contrataciones Públicas 1. La Comisión Administradora estudiará y propondrá, en el curso del primer año de entrada en vigor del Acuerdo, los términos que regularán la negociación de las Partes, en materia de contrataciones públicas’. *See* Peru Free Trade Agreement (*Acuerdo de Libre Comercio Chile-Perú*, signed Aug. 22, 2006, in force Mar. 1, 2009), art. 20.5, http://www.sice.oas.org/Trade/CHL_PER_FTA/Index_s.asp (accessed Feb. 16, 2016).

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-Singapore¹⁷⁶), 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

Closer Economic Partnership Agreement (signed Apr. 19, 2005, in force July 1, 2005), art.13.5, <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Thailand/Closer-Economic-Partnership-Agreement-text/index.php> (accessed on Aug. 28, 2014).

¹⁷¹ See *id.* art. 13.2.

¹⁷² See Free Trade Agreement between Canada and the Republic of Korea (signed Sept. 24, 2014, in force Jan. 1, 2015), art.14.2.1, http://www.sice.oas.org/Trade/CAN_KOR/English/CAN_KOR_index_e.asp (accessed Feb. 12, 2016).

¹⁷³ See Free Trade Agreement between the United States of America and the Republic of Korea (signed June 30, 2007, in force Mar. 15, 2012), art. 17.1.1, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (accessed Feb. 11, 2016).

¹⁷⁴ See Agreement between Japan and the Republic of Singapore for a New Age Economic Partnership (signed Jan. 13, 2002, in force Nov. 30, 2002), art.101.1, 2739 U.N.T.S. 48385.

¹⁷⁵ See The United States-Singapore Free Trade Agreement (signed May 6, 2003, in force Jan. 1, 2004), art.13.1, <http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta> (accessed on Aug. 28, 2014).

¹⁷⁶ See *supra* note 94, art. 16.1.

¹⁷⁷ See United States-Chile Free Trade Agreement (signed June 6, 2003, in force Jan. 1, 2004), ch.9, <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> (accessed Aug. 28, 2014); Canada-Chile Free Trade Agreement (signed Dec. 5, 1996, in force July 5, 1997), ch. K(bis), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en> (accessed on Aug. 29, 2014); Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership (signed Mar. 27, 2007, in force Sept. 3, 2007), ch.12, 2751 U.N.T.S. 48546.

¹⁷⁸ See United States-Peru Trade Promotion Agreement (signed Dec. 4, 2006, in force Feb. 1, 2009), ch.9, <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> (accessed on Aug. 29, 2014); Free Trade Agreement Between Canada and the Republic of Peru (signed May 29, 2008, in force Aug. 1, 2009), ch.14, http://www.sice.oas.org/Trade/CAN_PER/CAN_PER_e/CAN_PER_index_e.asp (accessed Feb. 12, 2016); Agreement between Japan and the Republic of Peru for an Economic Partnership (signed May 31, 2011 in force Mar. 1, 2012), ch.10,

NAFTA)¹⁷⁹. Additionally, the USA also had a public procurement liberalising RTA with Australia,¹⁸⁰ 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.¹⁸¹ In comparison, Singapore has concluded such RTAs only with Australia ("SAFTA")¹⁸² and Peru¹⁸³.

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").¹⁸⁴ Australia has had such an agreement with Chile,¹⁸⁵ the latter emerging as the leader of liberalisation of public procurement among South-American nations not assembled in the MERCOSUR (*Mercado Comúndel 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 Asunción¹⁸⁶ (Argentina, Brazil, Paraguay, Uruguay, joined by Venezuela 2012) and countries gathered in the much older Andean Pact currently known as the Andean

http://www.sice.oas.org/Trade/PER_JPN/EPA_Texts/ENG/Index_PER_JPN_e.asp (accessed Feb. 12, 2016).

¹⁷⁹ Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (signed Sept. 17, 2004, in force Apr. 1, 2005), ch.11, 2768 U.N.T.S. 48744.

¹⁸⁰ See Australia–United States Free Trade Agreement (signed May 18, 2004, in force Jan. 1, 2005), ch.15, https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf (accessed Mar. 11, 2016).

¹⁸¹ See note 12, Fergusson & others, at 227, 237; Pasha L. Hsieh, *The Roadmap for a Prospective US-ASEAN FTA: Legal and Geopolitical Considerations*, 46 (2) JOURNAL OF WORLD TRADE, 367–395 at 374 (2012).

¹⁸² See Singapore–Australia Free Trade Agreement (signed Feb. 17, 2003, in force July 28, 2003) 2257 U.N.T.S. 40221.

¹⁸³ See Peru–Singapore Free Trade Agreement (signed May 29, 2008, in force Aug. 1, 2009), ch.9, http://www.sice.oas.org/TPD/PER_SGP/Final_Texts_PER_SGP_e/index_e.asp (accessed Feb. 11, 2016).

¹⁸⁴ See Australia–New Zealand Closer Economic Relations Trade Agreement (signed Mar. 28, 1980, in force Jan. 1, 1983) 1329 U.N.T.S. 22307.

¹⁸⁵ See Australia–Chile Free Trade Agreement (signed July 30, 2008, in force Mar. 6, 2009), ch.15, 2694 U.N.T.S. 47842.

¹⁸⁶ See Mercosur (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.

Community of Nations (*Comunidad Andina de Naciones*’ or “CAN”) established in 1969 under the Cartagena Agreement¹⁸⁷ (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 government¹⁹⁴. 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

¹⁸⁷ See Andean Community [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), http://www.comunidadandina.org/ingles/normativa/ande_trie1.htm (accessed on August 29, 201).

¹⁸⁸ See Mercosur Common Market Group (*Grupo Mercado Común*) (*Creación del Grupo Ad Hoc Compras Gubernamentales*) (Montevideo, Dec. 13, 1997) MERCOSUR/GMC/RES N° 79/97.

¹⁸⁹ See Protocol on Public Procurement (*Protocolo de Contrataciones Públicas del Mercosur*) (Dec. 15, 2003), MERCOSUR/CMC/DEC. N 40/03.

¹⁹⁰ See Protocol on Public Procurement (*Protocolo de Contrataciones Públicas del Mercosur*) (Montevideo, Dec. 9, 2004), MERCOSUR/CMC/DEC. N° 27/04.

¹⁹¹ See Pacific Alliance (*Alianza del Pacífico*) (signed Feb. 10, 2014, in force July 20, 2015), ch.8, http://www.sice.oas.org/Trade/PAC_ALL/Index_PDF_s.asp (accessed Feb. 12, 2016).

¹⁹² See Singapore- Australia Free Trade Agreement, ch.8, art.3.1, footnote 1 to Article 1.

¹⁹³ See *id.*, ch.8, Annex 3.a.

¹⁹⁴ See *id.*, Annex 3.a.

and non-discriminatory manner”.¹⁹⁵ 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.

²⁰¹ See Australia-New Zealand Closer Economic Relations Trade Agreement, art.11.1, Jan 1, 1983, AUSTRALIAN TREATY SERIES 1983 No.2, <http://dfat.gov.au/trade/agreements/anzcerta/pages/australia-new-zealand-closer->

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.”²⁰² Still, both parties committed to accord the same “benefits of any relevant tariff preferences,”²⁰³ and not impose offsets on each other’s content.²⁰⁴

Subsequently, as a part of the planned revision of the ANZCERFTA in 1988,²⁰⁵ 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”) ²⁰⁶ which had mutually opened procurement markets between Australian provinces.²⁰⁷ New Zealand signed the NPA in 1989²⁰⁸ 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”) ²⁰⁹ further revised in 1997 ²¹⁰ and in

[economic-relations-trade-agreement.aspx](#) (last accessed on Feb. 10, 2017) [hereinafter ANZCERTA].

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.

²⁰⁶ *See* Agreed Minute on State Government Purchasing Preferences (signed at Christ Church on June 21, 1988), <http://dfat.gov.au/trade/agreements/anzcerta/Documents/301.pdf> (accessed Mar. 10, 2016).

²⁰⁷ *See* Department of Foreign Affairs and Trade of the Commonwealth of Australia, *Closer Economic Relations: Background Guide to the Australia New Zealand Economic Relationship* (Feb. 1997), pt.65, <http://dfat.gov.au/trade/agreements/anzcerta/Documents/ce.pdf> (accessed Mar. 2016). The National Preference Agreement was retitled in 1991 as the ‘Government Procurement Agreement.’ *See id.*

²⁰⁸ *See id.*

²⁰⁹ *See* Australia-New Zealand Government Procurement Agreement (Hereinafter ANZGPA) (adopted 1991, revised in 1997 and 2013), <https://www.business.govt.nz/procurement/for-suppliers/working-with-government/australia-new-zealand-government-procurement-agreement-1.47-mb-pdf> (accessed Mar. 10, 2016).

2013²¹¹.the ANZGPA has been threshold-free and, in terms of objective coverage, has applied to '[a]ll goods and services procured by the Parties'.²¹² 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'.²¹³ 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) "[p]rocurement 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"²¹⁴ and (ii) joint ventures with the private sector²¹⁵.

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 "[t]o 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

²¹⁰ See WTO Committee on Regional Trade Agreements, *Australia and New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) - Biennial Report on the Operation of the Agreement. Communication from the Parties* (May 19, 2006), G/L/777, WT/REG111/R/B/3, at 7.

²¹¹ See note 209.

²¹² See ANZGPA, Introduction, para 2.

²¹³ See *id.*, Coverage, para 1.

²¹⁴ See *id.*, Annex 1, 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 1977²¹⁸ 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 and

²¹⁶ See ASEAN Declaration (adopted by the Foreign Ministers at the 1st ASEAN Ministerial Meeting in Bangkok, Thailand on Aug. 8, 1967), <http://cil.nus.edu.sg/rp/pdf/1967%20ASEAN%20Declaration-pdf.pdf> (accessed March 3, 2016).

²¹⁷ ASEAN Secretariat, *Joint Press Statement of the 2nd ASEAN Economic Ministers Meeting* (issued in Kuala Lumpur, Malaysia on Mar. 9, 1976), <http://cil.nus.edu.sg/rp/pdf/1976%20Joint%20Press%20Statement%20on%20The%202nd%20ASEAN%20Economic%20Ministers%20Meeting-pdf.pdf> (accessed Feb. 29, 2016).

²¹⁸ See Agreement on ASEAN Preferential Trading Arrangements (signed Feb. 24, 1977, in force Aug. 25, 1977, superseded by the ATIGA).

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.”²²²

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.²²³ Yet, in the 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-a-vis participating countries to the Agreement and non-participating countries,”²²⁴ 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?”²²⁵.

In response, the ASEAN members stated evasively that:⁽ⁱ⁾ “[t]he ASEAN member countries of the General Agreement [i.e. GATT47] [we]’re aware of their obligations under the General Agreement,”²²⁶ ⁽ⁱⁱ⁾ “therefore the provisions of the General Agreement will be observed in carrying out their obligation under the preferential trading arrangements,”²²⁷ 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”²²⁸. 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,”²²⁹ the ASEAN members replied that “[t]he Agreement d[id] not affect in any manner the right of any participating states to reduce or eliminate nontariff

²²² See *id.*, art. 7.3.

²²³ See note 238.

²²⁴ See GATT Secretariat, *Agreement on ASEAN Preferential Trading Arrangements, Questions and Replies* (May 29, 1978) L/4668. Question 19 at 6.

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 ASEA-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) “[i]t 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.*

²³¹ See GATT, *Report of the Working Party on the Agreement on ASEAN Preferential Trading Arrangements* (Dec. 1, 1978) L/4735, para. 14 at 4.

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-PTA²³⁹ 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)²⁴⁰. 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”.²⁴¹ 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”.²⁴²

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,²⁴³ and (ii) the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (“CEPT-AFTA”)²⁴⁴. The general

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 “[E]xcept 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.

²⁴¹ See GATT Committee on Government Procurement, *Minutes of Meeting of 21 November 1986: Protocol Amending the Agreement on Government Procurement* (Jan. 7, 1987) GPR/M/24, ‘derogations’ at 23.

²⁴² See *id.*, para. 12 at 2.

²⁴³ Framework Agreements on Enhancing ASEAN Economic Cooperation (signed Jan. 28, 1992),

<http://cil.nus.edu.sg/rp/pdf/1992%20Framework%20Agreements%20on%20Enhancing%20ASEAN%20Economic%20Cooperation-pdf.pdf> (accessed Mar. 3, 2016).

²⁴⁴ See Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (signed Jan. 28, 1992, superseded by the ATIGA), [http://www.asean.org/images/2012/Economic/AFTA/Common Effective Preferential Tariff/Agreement%20on%20the%20Common%20Effective%20Preferential%20Tariff%2](http://www.asean.org/images/2012/Economic/AFTA/Common%20Effective%20Preferential%20Tariff/Agreement%20on%20the%20Common%20Effective%20Preferential%20Tariff%2)

purpose of the framework agreement was, among others, to (i) establish a free trade area within 15 years following that agreement,²⁴⁵ (ii) use the CEPT scheme as the main catalyst for achieving this goal,²⁴⁶ and (iii) in the long-term, to eliminate both tariffs and non-tariff barriers (“NTB”) to trade²⁴⁷. In turn the CEPT-AFTA predominantly continued the process of tariff reduction²⁴⁸ which had been initiated by the ASEAN-PTA²⁴⁹. The CEPT-AFTA also very generally took on the existing NTBs by providing that the ASEAN members shall (i) “Eliminate all quantitative restrictions in respect of products under the CEPT Scheme upon enjoyment of the concessions applicable to those products”,²⁵⁰ and (ii) “Eliminate other non-tariff barriers on a gradual basis within a period of 5 years after the enjoyment of concessions applicable to those products”²⁵¹.

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.

[OScheme%20for%20the%20ASEAN%20Free%20Trade%20Area.pdf](#) (accessed on Aug. 29, 2014) [hereinafter CEPT-AFTA].

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.

²⁵² Neither did the subsequent framework agreement on liberalisation of services. See ASEAN Framework Agreement on Services (signed Dec. 15, 1995, in force Dec. 30, 1998), <http://cil.nus.edu.sg/1995/1995-asean-framework-agreement-on-services-signed-on-15-december-1995-in-bangkok-thailand-by-the-economic-ministers> (accessed Mar. 3, 2016).

²⁵³ See Razeen Sally, *ASEAN FTAs: State of Play and Outlook for ASEAN’s Regional and Global Integration*, in *THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS* (Sanchita Basu Das & Ors., eds.), 324, Asian Development Bank, ISEAS Publishing, Singapore (2013).

²⁵⁴ See Ha Noi Plan of Action (adopted by the Heads of State/Government at the 6th 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 [GPA’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 2009²⁶¹ 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)

<http://cil.nus.edu.sg/rp/pdf/1998%20Ha%20Noi%20Plan%20of%20Action-pdf>.
(accessed Mar. 2, 2016).

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).

²⁵⁹ See WTO Committee on Government Procurement, *Committee on Government Procurement Original: English Application for Accession to the Agreement on Government Procurement of Singapore. Replies to the Questions on the Government Procurement, Régime of Singapore*, GPA/W/19, question 7 at 4 (June 14, 1996).

²⁶⁰ See note 258.

²⁶¹ See ASEAN Trade in Goods Agreement (signed Feb. 26, 2009, in force May 17, 2010), <http://www.asean.org/images/2012/Economic/AFTA/Annexure/ASEAN%20Trade%20in%20Goods%20Agreement,%20Cha-am,%20Thailand,%2026%20February%202009.pdf> (accessed on Aug. 29, 2009) [hereinafter ATIGA].

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”²⁶³, 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”²⁶⁴. In turn, the list amendments to previous agreements amended article 2.A.2 of the mentioned 1992 framework agreements²⁶⁵ 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”²⁶⁶. 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.²⁶⁷

Still, the ATIGA did not expressly cover public procurement but, similar to the CEPT-AFTA,²⁶⁸ 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 Members²⁶⁹ and, consequently, that “unless otherwise agreed by the AFTA Council, the identified NTBs shall be eliminated in three (3) tranches”²⁷⁰. Nonetheless, the identified NTBs still did not include discriminatory measures in public procurement.²⁷¹ Likewise, subsequent so-called ‘blueprints’ of

²⁶³ See *id.*, art. 91.2.

²⁶⁴ See *id.*, art.91.3.

²⁶⁵ See note 256.

²⁶⁶ See Protocol to Amend Certain ASEAN Economic Agreements Related to Trade in Goods (Mar. 8, 2013), <http://agreement.asean.org/media/download/20140506100628.pdf> (accessed Mar. 3, 2016).

²⁶⁷ See WTO Trade Policy Review Body, *Trade Policy Review. Report by the Secretariat. Singapore*, 33, para.30 WT/TPR/S/267 (June 5, 2012).

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.

²⁷¹ Only in the case of Vietnam’s list, item no. 8479 covered ‘automatic license’ in relation to ‘machines and mechanical appliances’ and ‘government procurement and monetary security’ by ‘state bank.’ See ASEAN Secretariat, *Non-Tariff Measures Database* (Oct. 3, 2012), http://www.asean.org/?static_post=non-tariff-measures-database (accessed Mar. 3, 2015).

2007 (“AEC Blueprint 2008-2015”)²⁷² and 2015 (“AEC Blueprint 2016-2025”)²⁷³ laying foundations of the formalised ASEAN Economic Community (“AEC”)²⁷⁴ 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

²⁷² See ASEAN Economic Community Blueprint (adopted on Nov. 20, 2007 in Singapore by the Heads of State/Government), <http://cil.nus.edu.sg/rp/pdf/2007%20ASEAN%20Economic%20Community%20Blueprint-pdf.pdf> (accessed Mar. 3, 2016).

²⁷³ See ASEAN Economic Community Blue Print 2025 (adopted by the ASEAN Leaders on Nov. 22, 2015), <http://www.asean.org/storage/2012/05/AECBP-2025r-FINAL.pdf> (accessed Mar. 3, 2016).

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.”²⁷⁵*

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

²⁷⁵ See Implementation of the Bogor Declaration (adopted Nov. 19, 1995), http://www.apec.org/~media/Files/Groups/IP/02_esc_oaaupdate.pdf (accessed Mar. 3, 2016).

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.*²⁷⁷

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.²⁷⁸

Among a number of political declarations made by APEC leaders,²⁷⁹ the Osaka Action Agenda of 1995²⁸⁰ 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 1997²⁸¹)

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*”,²⁸² and that APEC members shall, among others (i) publish these rules and make them ‘readily accessible’ to everybody,²⁸³ (ii) determine the subjective coverage of these rules with positive or negative lists of procurers covered with these rules,²⁸⁴ (iii) publish all amendments to these rules without delay,²⁸⁵ and (iv) open public procurement contact points²⁸⁶. ‘Procurement opportunities’ had to be transparent²⁸⁷ and published “*in a medium readily accessible to suppliers (e.g. official journals/gazettes, newspapers, specialized trade journals, Internet, and through embassies and consulates)*”²⁸⁸. 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*”²⁸⁹. 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,²⁹⁰ and (ii) information on the reasons of specific award would be provided to unsuccessful bidders upon request²⁹¹.

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*”,²⁹² (ii) “*Allowing adequate and reasonable time for interested suppliers to prepare and submit responsive bids*”,²⁹³ and (iii) “*Evaluating bids strictly according to previously*

6th Government Procurement Experts' Group Meeting held in St. John's on 22-23 August 1997, 1997/GPEG2/SUM, para. 6 at 2 (Aug. 22, 1997).

²⁸² See note 281, WT/WGTGP/W/11, para. 5.

²⁸³ See *id.*, para. 6, 1st *tiret.*, corresponding with the GPA94 art.XXIV.5.a.

²⁸⁴ See *id.*, para. 6, 2nd *tiret.*, corresponding with the GPA94 note 1 to art. 1.1., 3rd *tiret.*

²⁸⁵ See *id.*, para. 6, 3rd *tiret.*, corresponding with the GPA94 art.XXIV.5.b.

²⁸⁶ See *id.*, para. 7, corresponding with the GPA94 art.V.11.

²⁸⁷ See *id.*, para. 8, 2nd *tiret.*, corresponding with the GPA94 art.IX.1.

²⁸⁸ See *id.*, para. 8, 4th *tiret.*, corresponding with the GPA94 art.XVII.1.b.

²⁸⁹ See *id.*, para. 10, 1st *tiret.*, corresponding with the GPA94 art.IX.6.

²⁹⁰ See *id.*, para. 14.1, corresponding with the GPA94 art.XVIII.1.

²⁹¹ See *id.*, para. 14.2, corresponding with the GPA94 art.XVIII.2.c.

²⁹² See *id.*, para. 8, 2nd *tiret.*, corresponding with the GPA94 art.X.1.

²⁹³ See *id.*, para. 8, 3rd *tiret.*, corresponding with the GPA94 art.XI.

*published criteria*²⁹⁴ which shall also include ‘any preferential arrangements’²⁹⁵ and (ii) “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.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”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”²⁹⁸ seeing that “[N]o single type of procurement fulfils all requirements”.²⁹⁹

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”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”,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

²⁹⁴ See *id.*, para. 11, corresponding with the GPA94 art.XII.2.h.

²⁹⁵ See *id.*, para. 12, corresponding with the GPA94 art.XII.2.h.

²⁹⁶ See APEC Government Procurement Experts Group, *Summary Report - 7th Government Procurement Experts' Group Meeting held in Penang on 23-24 February 1998*, 1998/GPEG1/SUM, para. 8 (Feb.23, 1998).

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).

²⁹⁸ See note 297, WT/WGTGP/W/24, para.22; note 297, 2006/SOM3/GPEG/005, Annex 1, para. 2.1.

²⁹⁹ See *id.*, para. 23, note 297, 2006/SOM3/GPEG/005, Annex 1, para. 2.2.

³⁰⁰ See *id.*, para. 28, note 297, 2006/SOM3/GPEG/005, Annex 1, para. 3.4.

³⁰¹ See *id.*, para. 41, note 297, 2006/SOM3/GPEG/005, Annex 2, para. 1.5.

to bid”³⁰², and therefore (iii) “Buyers should adjust their procurement method to achieve the best value for money in such limited competition situations”³⁰³.

Until September of 1998, the GPEG agreed on the principles of fair dealing,³⁰⁴ 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”,³⁰⁵ 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”³⁰⁶.

Next, till February of 1999, the GPEG finalised works on the set of principles on accountability and due process,³⁰⁷ whereby accountability-related provisions largely came down to proper record-keeping³⁰⁸ and proper internal auditing within public administration³⁰⁹. In turn, due process-related provisions were advocated, in line with the GPA94,³¹⁰ 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”³¹¹, 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.

³⁰³ See *id.*, para. 43, note 297, 2006/SOM3/GPEG/005, *ibid.* Annex 2, para. 2.2., 2nd sentence.

³⁰⁴ See APEC Government Procurement Experts Group, *Summary Report - 8th Government Procurement Experts' Group Meeting 1998 held in Kuantan, Malaysia on 8 September 1998*, 1998/GPEG2/SUM, para. 8 (Sept. 8, 1998).

³⁰⁵ See note 297, WT/WGTGP/W/24, para.47, 1st *tiret*; note 297, 2006/SOM3/GPEG/005, Annex 4, para.1.2, 1st *tiret*.

³⁰⁶ See *id.*, para. 43; note 297, para.47, 8th *tiret*; note 297, 2006/SOM3/GPEG/005, Annex 4, para.1.2, 2nd *tiret*.

³⁰⁷ See APEC Government Procurement Experts Group, *Summary Report - 9th Government Procurement Experts' Group Meeting held in Wellington on 4 February 1999*, 1999/GPEG1/SUM, para 5 (Feb. 4, 1999). See also WTO Working Group on Transparency, *APEC Non-binding Principles on Government Procurement: Accountability and Due Process*, WT/WGTGP/W/22 (Apr.7, 1999).

³⁰⁸ See note 297, WT/WGTGP/W/24, para.61; note 297, 2006/SOM3/GPEG/005, Annex 3, para. 2.

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 “*provid[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*”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.*³¹³

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

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’³¹⁴ 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, 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*”.³¹⁵ 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*”³¹⁶, 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*”³¹⁷.

Eventually, all previously prepared sets of principles were endorsed by and by the APEC Ministerial Conference held in Auckland in September 1999.³¹⁸ They have since been largely unchanged. The transparency-related principles were replaced by ‘Transparency Standards on Government Procurement’ completed by the GPEP in September 2004³¹⁹ and endorsed by the APEC Leaders’ Meeting held in

³¹⁴ See APEC Government Procurement Experts Group, *Summary Report - 10th Government Procurement Experts’ Group Meeting held in Rotorua on 8 August 1999*, 1999/GPEG2/SUM, para.5(Aug. 8, 1999); note 297, WT/WGTGP/W/24 at 1.

³¹⁵ See note 297, WT/WGTGP/W/24, para.70; note 297, 2006/SOM3/GPEG/005, Annex 5, para. 1.

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.

³¹⁸ See APEC Secretariat, *Eleventh APEC Ministerial Meeting (Auckland, New Zealand 9 - 10 September 1999) Joint Statement*, http://www.apec.org/~media/Files/MinisterialStatements/Annual/1999/99_amm_jms.pdf (accessed on Mar. 3, 2016).

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 2004.³²⁰ However, transparency standards did not bring about material changes compared with the previous language of public procurement specific transparency-related non-binding principles.³²¹ Likewise, the revision of November 2006³²² 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*”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 29th 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*”,³²⁴ and that (ii) “*in such a circumstance, the group needs to review the benefit and objective of continuing its work*”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

³²⁰ See note 297 at 1.

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.

³²² See APEC Government Procurement Experts Group, *Summary of Discussion - 24th Government Procurement Experts’ Group Meeting held in Hoi An on 8-9 November 2006*, 2007/SOM1/GPEG/002, para. 6 (2006).

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

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).

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’³²⁶ 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*”³²⁷. 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 restrictions³²⁸. 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*”³²⁹ 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 tendering³³⁰, whereas this basic premise of the international liberalisation of public procurement markets can only be *a contrario* inferred under the GPA12³³¹ (see section 3). The TPP procurement chapter also sets forth “*[f]or greater certainty, [that] a procuring entity may conduct market research in developing specifications for a particular procurement*”.³³² 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*

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”³³³ whereas the GPA12 only protects ‘confidential’ information which might prejudice such interest³³⁴. 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 GPA12³³⁵. 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*”³³⁶ which cannot be found in the GPA12³³⁷.

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,³³⁸ financial services,³³⁹ electronic commerce³⁴⁰ state-owned enterprises and designated monopolies³⁴¹ 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*”³⁴² as “[*t*]hese specifications are covered by Chapter 15 (Government Procurement),”³⁴³ 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.”*³⁴⁴

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.

³³⁷The 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;

(h) (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.”³⁴⁵

“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; (...)³⁴⁶

Moreover, the chapter on investment specifies that its provisions on NT³⁴⁷ and ‘senior management and boards of directors’³⁴⁸ shall not apply to public procurement³⁴⁹; 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 procurement³⁵⁰ (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 (...)*”.³⁵¹

Finally, from the institutional perspective, although the TPP’s public procurement-specific chapter establishes a dedicated committee on Government Procurement,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)*”³⁵³.

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

³⁵⁰ See *id.*, art.9.10.3.f.

³⁵¹ See TPP, annex 26-A, art. 3.

³⁵² See *id.*, art.15.23.

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),³⁵⁴an entity operating the Saint Lawrence Seaway,³⁵⁵and the Rural Utilities Service³⁵⁶. 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.³⁵⁷

Nonetheless, the TPP parties in principle have aligned their commitments with other agreements. For example, Japan (identically with the GPA12³⁵⁸) 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*

³⁵⁴ See *id.*, Annex 15.A, US, section C, points 2.1-2.5.

³⁵⁵ See *id.*, Annex 15.A, US, section C, point 2.6.

³⁵⁶ See *id.*, Annex 15.A, US, section C, point 2.

³⁵⁷ See GPA12, Appendix 1 for the US, Annex 3, list B.

³⁵⁸ See *id.*, Appendix 1 for Japan, Annex 2.

*markets*³⁵⁹ and in line with its GPA schedules³⁶⁰ has extended this restriction to ‘other entities’³⁶¹.

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.³⁶² Negative lists have been used for Alberta,³⁶³ British Columbia,³⁶⁴ Northwest Territories,³⁶⁵ Nunavut,³⁶⁶ Prince Edward Island,³⁶⁷ and Saskatchewan.³⁶⁸ Without any exception, Newfoundland and Labrador have covered ‘all departments of the province’,³⁶⁹ whereas Manitoba³⁷⁰ has covered ‘all departments, boards, commissions and committees of the province.’ Nova Scotia³⁷¹ and Quebec³⁷² 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.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)³⁷⁴ and the Sultan of Malaysia (Istana Negara)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),³⁷⁶ Japan (Ministry of Defence),³⁷⁷ Malaysia ('Ministry of Defence')³⁷⁸ Mexico (*Secretaría de la Defensa Nacional and the Secretaría de Marina*),³⁷⁹ Singapore (Ministry of Defence),³⁸⁰ Vietnam (Ministry of National Defence and Ministry of Public Security)³⁸¹ and the USA (Department of Defense).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*”.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”.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 Agency³⁸⁵ and Tokyo Metro Co. Ltd,³⁸⁶ (ii) procurement related to ‘geological and geophysical survey’ in the case of the Japan Oil, Gas and Metals National

³⁷³ Only Ontario and Yukon offered positive lists. *See id.*, Annex 15.A, Canada, Section B.

³⁷⁴ *See id.*, Annex 15.A, Brunei, Section G(a).

³⁷⁵ *See id.*, Annex 15.A, Malaysia, Section G, point 1.a.

³⁷⁶ *See id.*, Annex 15.A, Australia, Section A, point 2, item 25 and notes to Section A, point 4.a.

³⁷⁷ *See id.*, Annex 15.A, Japan, Section A, item 25; Section D, point 2.

³⁷⁸ *See id.*, Annex 15.A, Malaysia, Section A, item 3; notes to Section A, point 3.

³⁷⁹ *See id.*, Annex 15.A, Mexico, Section A, item 3; Section A, item 12; Section D, *in intio*.

³⁸⁰ *See id.*, Annex 15.A, Singapore, Section A, item 24; Section A, note to item 24.

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.

³⁸² *See id.*, Annex 15.A, US, Section A, item 17; notes to Section A, point 3.

³⁸³ *See id.*, Annex 15.A, US, notes to Section A, point 4.b.

³⁸⁴ *See id.*, Annex 15.A, Peru, notes to Section C.

³⁸⁵ *See id.*, Annex 15.A, Japan, notes to Section C, point 2.a.

³⁸⁶ *See id.*, Annex 15.A, Japan, notes to Section C, point 2.b.

Corporation³⁸⁷ and (iii) “*procurement of ships to be jointly owned with private companies*” in the case of the Japan Railway Construction, Transport and Technology Agency³⁸⁸. 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”.³⁸⁹ Specifically, Japan has restricted access to its sub-central procurers for Malaysia, Mexico, New Zealand, United States and Vietnam,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”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”³⁹² (which upon signing the TPP pertained to Brunei, Malaysia, New Zealand, the United States and Vietnam,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]”³⁹⁴.

As far as other entities are concerned, Mexico expressly restricted market access to such entities for Brunei, Malaysia, New Zealand and Vietnam,³⁹⁵ whereas Mexican content and/or nationals were expressly excluded by New Zealand³⁹⁶ and Vietnam.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

³⁸⁷ See *id.*, Annex 15.A, Japan, notes to Section C, point 2.d.

³⁸⁸ See *id.*, Annex 15.A, Japan, notes to Section C, point 2.e.

³⁸⁹ See *id.*, Annex 15.A, Australia, notes to section A, point 4.e.

³⁹⁰ See *id.*, Annex 15.A, Japan, notes to Section B, point 1.

³⁹¹ See *id.*, Annex 15.A, Australia, notes to Section A, point 4.a.

³⁹² See *id.*, Annex 15.A, Chile, notes to Section B.

³⁹³ See *id.*, Annex 15.A, Chile, footnote 1 to notes to Section B.

³⁹⁴ See *id.*, Annex 15.A, Chile, notes to Section B.

³⁹⁵ See *id.*, Annex 15.A, Mexico, notes to Section C, point 2.

³⁹⁶ See *id.*, Annex 15.A, New Zealand, notes to Section C, point 2.

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 Singapore⁴⁰¹ and Vietnam⁴⁰² 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 envelopes⁴¹⁰ and procurement of Microsoft products and services under a ‘Master Licensing Agreement’⁴¹¹. Rice has been excluded by both Malaysia⁴¹² and Vietnam⁴¹³.

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.

⁴¹⁴ See *id.*, Annex 15.A, Malaysia, notes to Section A, point 9.

Utilities have generally been excluded by Canada,⁴¹⁵ Mexico⁴¹⁶ and Vietnam,⁴¹⁷ plus some postal services have been excluded by Japan⁴¹⁸ and Malaysia⁴¹⁹. Malaysia has also excluded internal sea cabotage.⁴²⁰ In terms of construction services, dredging has been excluded by Malaysia,⁴²¹ and Vietnam⁴²². In addition (i) Malaysia refused to open the market for “*construction services that is carried out to maintain or improve the existing slope (hillside 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*”,⁴²³ (ii) 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*”⁴²⁴ as well as for “*construction of ministerial level headquarters*”,⁴²⁵ and (iii) Chile refused to open the market for construction services to be performed at Easter Island (*Isla de Pascua*)⁴²⁶. Finally, some reservations made as to objective coverage interfere or overlap with the TPP procurement chapter’s framework. For example, Malaysia,⁴²⁷ Mexico,⁴²⁸ and Vietnam⁴²⁹ have *in effect* partially or completely excluded ‘build-operate-transfer contract and public works concession contract’

⁴¹⁵ See *id.*, Annex 15.A, Canada, Section F, point 2.a.

⁴¹⁶ [I]ncluding telecommunication, transmission, water and energy services’. See *id.*, Annex 15.A, Mexico, Section G, point 7.

⁴¹⁷ See *id.*, Annex 15.A, Vietnam, notes to Section E, point 1.a.

⁴¹⁸ Japan excluded ‘courier services with respect to letters’. See *id.*, Annex 15.A, Japan, notes to Section E, 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.

⁴²⁰ See *id.*, Annex 15.A, Malaysia, notes to Section E, point 1.

⁴²¹ See *id.*, Annex 15.A, Malaysia, notes to Section F, point 1.

⁴²² See *id.*, Annex 15.A, Vietnam, notes to Section F, point 1.

⁴²³ See *id.*, Annex 15.A, Malaysia, notes to Section F, point 2.

⁴²⁴ See *id.*, Annex 15.A, Vietnam, notes to Section F, point 2.

⁴²⁵ See *id.*, Annex 15.A, Vietnam, notes to Section F, point 3.

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.

⁴²⁹ Vietnam excluded ‘build-operate-transfer contract and public works concession contract’. See *id.*, Annex 15.A, Vietnam, Section G, point 1.a.

from the definition of public procurement⁴³⁰ significantly limiting their coverage of services and/or construction services⁴³¹.

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 co-operation 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

Figure 7: Thresholds under the TPP procurement chapter [SDR].

Country:	Objective Coverage	Subjective Coverage		
		Central	sub-central	Other
Australia	Goods	130,000	355,000	400.000
	Services	130,000	355,000	400.000
	construction services	5,000,000	5,000,000	5,000,000
Brunei	Goods	130,000 ⁴³²	n.a.	130,000 ⁴³³

⁴³⁰ See notes 327.

⁴³¹ Depending on how (in a specific case) given build-operate-transfer contract or public works concession contract can be classified.

⁴³² 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.

⁴³³ 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].

	Services	130,000 ⁴³⁴	n.a	130,000 ⁴³⁵
	construction service	5,000,000	n.a	5,000,000
Canada	Goods	130,000	350,000	350,000
	Services	130,000	355,000	355,000
	construction service	5,000,000	5,000,000	5,000,000
Chile	goods	95,000	220,000	220,000
	Services	95,000	220,000	220,000
	construction service	5,000,000	5,000,000	5,000,000
Japan	goods	100,000	200,000	130,000
	construction services	4,500,000	4,500,000-15,000,000	4,500,000–15,000,000
	architectural, engineering and other technical services	450,000	1,500,000	450,000
	other services	100,000	200,000	130,000
Malaysia	goods	130,000 ⁴³⁶	NA	150,000 ⁴³⁷

third year to the end of the fourth year following entry into force of this Agreement for Brunei Darussalam'. *See id.*, Annex 15.A, Brunei, Section G.

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].

	services	130,000 ⁴³⁸		150,000 ⁴³⁹
	construction service	14,000,000 ⁴⁴⁰		14,000,000 ⁴⁴¹
Mexico	goods	USD 79,507	NA	USD 397,535
	Services	USD 79,507		USD 397,535
	construction service	USD 10,335,931		USD 12,721,740
New	goods	130,000	NA	400.000

⁴³⁸ However, only '[F]rom the beginning of the 10th year following entry into force of this Agreement for Malaysia and thereafter'. Before: (i) SDR 2,000,000 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.

⁴³⁹ However, only '[F]rom the beginning of the 10th 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.

⁴⁴⁰ However, only '[F]rom the beginning of the 21st 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 10th year following entry into force of this Agreement for Malaysia', (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 Malaysia', and (iv) SDR 30,000,000 '[F]rom the beginning of the 16th year to the end of the 20th year following entry into force of this Agreement for Malaysia'. *See id.*, Annex 15.A, Malaysia, Section B.

⁴⁴¹ However, only '[F]rom the beginning of the 21st 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 10th year following entry into force of this Agreement for Malaysia', (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 Malaysia' (iv) SDR 30,000,000 '[F]rom the beginning of the 16th year to the end of the 20th 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].

	services	130,000		400,000
	construction service	5,000,000		5,000,000
Peru	goods	95,000	200,000	160,000
	services	95,000	200,000	160,000
	construction service	5,000,000	5,000,000	5,000,000
Singapore	goods	130,000	NA	130,000
	services	130,000		130,000
	construction service	5,000,000		5,000,000
United States	130,000	355,000	NA	USD 250,000
	130,000	355,000		USD 250,000
	5,000,000	5,000,000		5,000,000
Vietnam	goods	130,000 ⁴⁴²	NA	2,000,000 ⁴⁴³

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]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.

Figure 7: Thresholds under the TPP procurement chapter [SDR].

	services	130,000 ⁴⁴⁴		2,000,000 ⁴⁴⁵
	construction service	8,500,000 ⁴⁴⁶		15,000,000 ⁴⁴⁷

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.⁴⁴⁸ Malaysia is in the middle with eight and ten years needed to go down to standard thresholds in the case of goods and services⁴⁴⁹ respectively, and with a staggering twenty-one years necessary to go

⁴⁴⁴ See note 442.

⁴⁴⁵ See note 444.

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.

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 Viet Nam’. (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 16th year to the end of the 20th year following entry into force of this Agreement for Vietnam’. See *id.*, Annex 15.A, Vietnam, Section C.

⁴⁴⁸ See notes 432, 433, 434, 435.

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 SDR 8,500,000 in the case of Central entities⁴⁵² and for going down from SDR 65,200,000 to SDR 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.⁴⁵⁴ The TPP parties allowed for ‘measures that provide preferential treatment for SMEs’ as a result of “*recognis[ing] the important contribution that SMEs can make to economic growth and employment and the importance of facilitating the participation of SMEs in government procurement*”.⁴⁵⁵ However, such measures have to be fully transparent.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 “*provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of intended procurement*”,⁴⁵⁷ (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*”,⁴⁵⁸ “*provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of intended procurement*”,⁴⁵⁹ (iii) phased-in additions of specific entities or sectors intended procurement,⁴⁶⁰ and (iv) thresholds that are higher than its permanent threshold⁴⁶¹.

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 countries⁴⁶² and to other developing countries only “*where and to the extent that this special and differential treatment meets its development needs*”⁴⁶³. 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*”⁴⁶⁴ which made it possible for Malaysia and Vietnam to secure discussed transitional periods in excess of two decades (see: section C). In contrast, the GPA12 limits transitional periods for emerging

⁴⁵⁴ See GPA12, art. XXII.8.a.i.

⁴⁵⁵ See TPP, art.15.21.1.

⁴⁵⁶ See *id.*, art.15.21.2.

⁴⁵⁷ See *id.*, art.15.5.1.a. See also GPA12, Article V.3.a.

⁴⁵⁸ 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.I.

⁴⁵⁹ See TPP, art.15.5.1.b. See also GPA12, art.V.3.b.

⁴⁶⁰ See TPP, art.15.5.1.c. See also GPA12, art.V.3.c.

⁴⁶¹ See TPP, art.15.5.1.d. See also GPA12, art.V.3.d.

⁴⁶² See GPA12, art.V.1.a.

⁴⁶³ See *id.*, art. V.1.b.

⁴⁶⁴ See TPP, art.15.5.2.

economies (developing but not least developed countries) to three years⁴⁶⁵ and for least developed countries to five years⁴⁶⁶.

At the level of individual derogations, some TPP parties repeated exemptions of preferences for their SMEs, including Australia (“*any form of preference to benefit small and medium enterprises*”),⁴⁶⁷ New Zealand (“*any programme, preference, set-aside or any other measure that benefits SMEs*”),⁴⁶⁸ Peru (“*Chapter 15 (Government Procurement) shall not apply to procurement programmes on behalf of micro and small sized enterprises*”),⁴⁶⁹ and Vietnam (“*any procurement involving any form of preference to benefit small and medium enterprises*”).⁴⁷⁰ Some TPP parties have also reserved their right to continue regional development programmes. Malaysia exempted “*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*”.⁴⁷¹ Canada exempted “*preferences or restrictions associated with programmes promoting the development of distressed areas*”⁴⁷² in relation to all sub-central governments and “*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*”.⁴⁷³

In the pursuance of combined national security policies (allowed under general exceptions to the TPP procurement chapter and to entire agreement⁴⁷⁴) and industrial policies (only allowed with individual derogations), Australia, for the sake of clarity, made a reservation that TPP’s general security exception⁴⁷⁵ would allow it, in the procurement context, “*to maintain the Australian industry capability programme and its successor programmes and policies*”⁴⁷⁶. Similarly, Mexico restricted that in its case the security exception “*shall cover procurements made in support of safeguarding nuclear materials or technology*.”⁴⁷⁷

⁴⁶⁵ See GPA12, art.V.4.b.

⁴⁶⁶ See *id.*, art.V.4.a.

⁴⁶⁷ See TPP, Annex 15.A, Australia, Section G, point 3.c.

⁴⁶⁸ See *id.*, Annex 15.A, Peru, Section G, point 1.

⁴⁶⁹ See *id.*, Annex 15.A, New Zealand, Section G, point 1.c.

⁴⁷⁰ See *id.*, Annex 15.A, Vietnam, Section G, point 1.d.

⁴⁷¹ See *id.*, Annex 15.A, Malaysia, Section G, point 1.b.

⁴⁷² See *id.*, Annex 15.A, Canada, notes to Section B, point 2.

⁴⁷³ See *id.*, Annex 15.A, Canada, notes to Section B, point 3.

⁴⁷⁴ See *id.*, art 15.3.a and 29.2.b.

⁴⁷⁵ See *id.*, art.29.2

⁴⁷⁶ See *id.*, Annex 15.A, Australia, Section A, notes to section a point 4 d.

⁴⁷⁷ See *id.*, Annex 15.A, Mexico, Section G, point 12.

Significant set-asides⁴⁷⁸ 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.⁴⁷⁹

In the case of Mexico, transitional set-asides cover Pemex (*Petróleos Mexicanos*) and CFE (*Comisión Federal de Electricidad*), and allow it to exempt up to fifty per cent of procurement by such entities.⁴⁸⁰ They have to be gradually phased-out within the period of ten years.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 1,340,000,000⁴⁸² annually to go up to USD 2,230,000,000 after ten years.^{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 “*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*”)⁴⁸⁵ of (i) forty per cent, for labour-intensive projects,⁴⁸⁶ and (ii) twenty five per cent for capital-intensive projects⁴⁸⁷.

B. *Social and environmental policies*

As far as sustainability is concerned, the TPP procurement chapter largely emulates GPA12’s solutions pertaining to the inclusion of environmental standards in the

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

⁴⁷⁹ See TPP, Annex 15.A, Vietnam notes to Section D, point 1.

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 Pacífico (Additional Protocol to the Pacific Alliance Agreement)”. See *id.*, Annex 15.A, Mexico, footnote 1 to Section G.

⁴⁸¹ See *id.*, Annex 15.A, Mexico, Section G, points 1 and 2.

⁴⁸² See *id.*, Annex 15.A, Mexico, Section G, point 10.a.i.

⁴⁸³ See *id.*, Annex 15.A, Mexico, Section G, point 10.a.ii.

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

⁴⁸⁵ See *id.*, Annex 15.A, Mexico, Section G, point 13.b.

⁴⁸⁶ See *id.*, Annex 15.A, Mexico, Section G, point 13.a.i.

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 “[f]or 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.

Figure 8: Exclusion criteria in the TPP and GPA 12

TPP	GPA12
<p><i>‘If there is supporting material, a Party, including its procuring entities, may exclude a supplier on grounds such as:</i></p> <ul style="list-style-type: none"> <i>(a) Bankruptcy or insolvency;</i> <i>(b) False declarations;</i> <i>(c) Significant or persistent deficiencies in the performance of any substantive requirement or obligation under a prior contract or contracts; or</i> <i>(d) Failure to pay taxes’.</i>⁴⁹² 	<p><i>‘Where there is supporting evidence, a Party, including its procuring entities, may exclude a supplier on grounds such as:</i></p> <ul style="list-style-type: none"> <i>(a) Bankruptcy;</i> <i>(b) False declarations;</i> <i>(c) Significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;</i> <i>(d) Final judgments in respect of serious crimes or other serious offences;</i> <i>(e) Professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or</i> <i>(f) Failure to pay taxes’.</i>⁴⁹³

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 revision⁴⁹⁴ (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 occupation⁵⁰⁰. 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*

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*⁵⁰².

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 Waitangi⁵⁰³ (see: section 0) in general exceptions to the entire agreement rather than in its public procurement specific schedule of commitments.⁵⁰⁴ Similarly (but in schedules to the procurement chapter) Australia excluded measures for health and welfare⁵⁰⁵ as well as economic and social advancement⁵⁰⁶ of indigenous peoples. Canada excluded “*measure[s] adopted or maintained with respect to Aboriginal peoples*”⁵⁰⁷ 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*”⁵⁰⁸. 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 (...) includ[ing] any form of preference, such as the exclusive right to provide a good or service, or any price preference*”⁵⁰⁹.

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.⁵¹⁰ 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

⁵⁰² See TPP, footnote 1 to Article 15.8.5. See *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’.

⁵⁰³ See note 145.

⁵⁰⁴ See TPP, art. 29.6.

⁵⁰⁵ See *id.*, Annex 15.A, Australia, notes to Section G, point 1.c.

⁵⁰⁶ See *id.*, Annex 15.A, Australia, notes to Section G, point 1.d.

⁵⁰⁷ See *id.*, Annex 15.A, Canada, Section G, point 1.c.

⁵⁰⁸ See *id.*

⁵⁰⁹ See *id.*, Annex 15.A, US, Section G, point 1.

⁵¹⁰ See *id.*, Annex 15.A, Malaysia, Section G, point 2.a.

category, depending on the contract value, the margin of price ranges from 2.5 per cent to 7 per cent.⁵¹¹ For the second category, the margin of price ranges from 1.25 per cent to 3 per cent.⁵¹² For the third category, the margin of price ranges from 3 per cent to 10 per cent.⁵¹³

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,⁵¹⁴ which he subsequently did living up to his promises.⁵¹⁵ 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.⁵¹⁶ 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,⁵¹⁷ 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, 2016,⁵¹⁸ 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

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.*

⁵¹⁷ See Claude Barfield, *The Case for a Rump TPP*, THE NATIONAL INTEREST, Nov. 30, 2016, <http://nationalinterest.org/feature/the-case-rump-tpp-18560>.

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.