

Some of the implications of ecommerce proposals for government procurement - MC11 briefing paper^a

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Introduction

There is currently no mandate to negotiate ecommerce rules at the World Trade Organization (WTO). At the WTO, the current mandate is merely to examine various ecommerce issues.¹ However, at the WTO Ministerial Conference in Buenos Aires from 10-13 December 2017 (MC11), there is a proposal to begin negotiations on ecommerce rules² and a number of proposals regarding ecommerce were made at the WTO in 2016.

These ecommerce proposals have a variety of implications and include stronger intellectual property protection (TRIPS+) and additional investment rules (TRIMS+), even though investment is a Singapore issue which cannot be negotiated in the current Doha Round at the WTO³. This analysis only looks at the implications of three of the 2016 ecommerce proposals for government procurement (GP).

Since the proposals made were brief, it is difficult to know exactly what the proponents intend, therefore this is merely a preliminary analysis of the European Union (EU) et al⁴, Japanese⁵ and US⁶ proposals.

Although the EU et al and US^b non-papers make it clear that they are willing to allow exceptions to some of their proposed rules, none of the proposals discussed in this analysis have exceptions for least developed countries (LDCs). Therefore as proposed, all of the rules in these three ecommerce proposals would immediately apply to all LDC WTO Members.

Furthermore although the recently signed Trans-Pacific Partnership (TPP) had the most extensive ecommerce rules of any trade agreement, even it had more exceptions than have been proposed in these three WTO proposals. This analysis does not cover all the exceptions in the TPP, however the TPP did have exceptions to the whole ecommerce chapter for government procurement and information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.⁷ Countries which signed the TPP before these three ecommerce proposals were made^c who also made these ecommerce proposals are Japan, USA, Canada, Chile and Singapore.

Of course at the WTO the Agreement on Government Procurement (GPA) is optional, so for WTO Members which have not joined it and have not liberalised their GP in another trade agreement, they can still currently do set-asides, price-preferences and offsets to direct their GP to their local manufacturers, farmers and service-suppliers (with all the benefits for industrialisation, jobs and trade balance that that involves, see paper attached).

Liberalisation of GP by banning set-asides

The EU et al appear to want WTO Members to allow electronic applications for GP (e-procurement/e-auctions) and then to allow ‘non-established companies to participate in such procedures’.⁸ This:

- a) pushes WTO Members to do more e-procurement and then
- b) open that e-procurement to companies from any other country in the world (including from non-WTO Members) who do not have a presence (eg Mode 3) in the WTO Member doing the procuring.

^a By Sanya Reid Smith, Legal Advisor, Third World Network, 10 December 2017.
^b The Japanese non-paper does not seem to allow any exceptions to any of its proposed rules.
^c So knew what exceptions were in the TPP’s ecommerce chapter for GP etc

Opening GP to non-established companies would prevent WTO Members (including LDCs) from ‘setting-aside’ certain GP contracts which only their local companies (whether they are farmers, manufacturers or service suppliers) can supply to ensure they have business. These set-asides can help create steady demand for domestic manufacturers and farmers etc, see for example how developed and developing countries have used this in the paper attached.

Since no exceptions have been proposed in this paragraph,^d it appears that the EU et al intend this to apply to all GP ie:

- Purchasing of all goods and services (whereas in free trade agreements (FTAs) eg the Trans-Pacific Partnership (TPP)^e, it does not cover all goods and services⁹. So this is TPP+
- By all government ministries (whereas in FTAs eg the TPP, this is only for the ministries listed, ie a positive list. So this is TPP+ because it is not even a negative list, it appears to be absolute opening of all ministries).
- With no minimum threshold value (ie even the \$10 contracts to buy pencils which could normally be reserved for local micro, small and medium enterprises under FTAs eg the TPP could no longer be set aside for local manufacturers/ farmers/service suppliers).
- With no exceptions for: certain types of GP (eg public-private partnerships), or GP for certain purposes (eg for rural development or poverty eradication) as FTAs like the TPP have¹⁰.
- At all levels of government? (eg national, provincial and local). FTAs often do not liberalise sub-national GP¹¹.

Liberalisation of GP by failing to exempt it from general liberalisation

Both Japan¹² and the US¹³ appear to be proposing non-discriminatory (national treatment (NT) and most-favoured nation (MFN) treatment) for at least digital products. The equivalent rules in GATT¹⁴ and GATS¹⁵ carefully exclude GP from NT¹⁶ because if NT had to be provided, then countries could not set-aside GP contracts for their local suppliers or give their local suppliers price preferences^f etc.

If GP is not excluded from these proposals, then WTO Members would not be able to use set-asides or price-preferences when their governments buy digital products (eg digital textbooks/workbooks for students in public schools).

If there are no exceptions, then it appears to be absolute liberalisation of GP as in the EU et al proposal above (ie no restricting the GP liberalisation to only:

- A positive list of ministries that open their GP,
- contracts above a minimum (threshold) value,
- restricting the GP liberalisation only certain digital products
- the national level of government)

This would have the implications noted above.

The US also seems to want new services to be protected against future discrimination.¹⁷ It is not specified whether this means NT and/or MFN, but if it has the same meaning as it seems to in para 2.2 of their proposal, then this would be NT and MFN. This may be on a negative list basis¹⁸ (ie exceptions only if all other WTO Members agree to allow a specific sector to remain closed), although how this can be

^d Unlike other paragraphs of this proposal eg para 4B19 which says it is ‘subject to appropriate public policy exceptions’

^e Of course the TPP can no longer come into force now that US President Trump has withdrawn the USA’s signature, <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>, since the required 85% of GDP (Article 30.5, <http://www.tpp.mfat.govt.nz/text>) cannot be reached without the USA, <http://www.imf.org/external/pubs/ft/weo/2016/02/weodata/weoselgr.aspx>. There were no LDCs in the TPP, <http://dfat.gov.au/trade/agreements/tpp/Pages/trans-pacific-partnership-agreement-tpp.aspx>.

^f Eg that they will buy from local suppliers even if they are up to x% more expensive than foreign suppliers of the same product/service

done for new services which by definition are not yet known is unclear. NT for new services without a GP exception would have the same implications as above but for services.

Restrictions on requiring offsets in GP

There are two types of offsets used in GP:

- direct: eg if the Bangladesh airforce wanted to buy a helicopter, but no Bangladeshi companies could make helicopters, the Bangladeshi government could buy it from a US company but specify that x% of the helicopter parts (eg the steel and copper wires and rubber) must come from Bangladeshi companies.
- Indirect: eg if the Senegalese airforce wanted to buy a submarine, but no Senegalese companies could make submarines or any parts for submarines, the Senegalese government could buy the submarine from a French company, but specify that the French company also buys xEuros of tinned fish from Senegalese companies. This indirect offset still ensures some demand for some (unrelated) local products and still provides jobs and helps the trade balance.

The use of offsets in GP would be banned/restricted by a number of these ecommerce proposals:

- The EU et al¹⁹ appear to be proposing a ban on the use of **local content** requirements (ie offsets), subject to ‘appropriate public policy exceptions’. It is not clear if ‘appropriate public policy exceptions’ would mean that GP is excluded from this proposed ban on local content.
- A common offset is requiring technology transfer as part of the GP contract (especially for defence contracts), eg see paper attached. This is particularly important to make sure that the purchasing government can use, maintain, fix and upgrade etc the equipment (eg a helicopter) that it has bought. The USA’s ecommerce non-paper proposes a ban on **technology transfer** that is not limited to ecommerce and has no exceptions (including for GP).²⁰ If agreed to, this would mean that GP by any Ministry, even small contracts, for all goods and services and potentially for GP at all levels of government) could not require technology transfer.
- China successfully used requirements for investors to use Chinese WLAN standards (the chips for which are made by Chinese manufacturers) to indirectly require local content.²¹ This kind of offset would be prohibited if the ban on requiring companies to use **local technology** proposed by the US²² is accepted without a GP exception. (No exceptions (including for GP) are currently proposed to this rule by the US, so again it would apply to all GP by any Ministry, even small contracts, for all goods and services and potentially for GP at all levels of government).

Restrictions on other GP requirements

Source code

Governments may need access to or transfer of the source code in a number of GP situations including:

- Procurement of critical infrastructure eg a nuclear power station to make sure it cannot be hacked (as some already have been²³)
- Procurement of military technology or other sensitive products because a number of governments have been concerned that several U.S.-based technology companies like Cisco and Apple may have installed so-called back doors into their products based on leaks by whistleblower Edward Snowden that exposed U.S. espionage activities.²⁴ Therefore some governments ‘are asking Western tech companies to allow them to review source code for security products such as firewalls, anti-virus applications and software containing encryption before permitting the products to be imported and sold in the country.’²⁵
- When buying software to suggest the sentencing etc of criminals to make sure there is no racial etc bias²⁶
- To make sure they can buy upgrades for the software and parts etc from any supplier – ie the cheapest (not just the original manufacturer)

However these three ecommerce proposals restrict government access to source code to varying degrees:

- The Japanese proposal²⁷ prevents disclosure of source code. It is unclear if this includes disclosure to the government, or just to private sector competitors. There are no exceptions, including for GP.
- The EU et al proposal²⁸ refers to both ‘transfer’ (presumably from one private company to a competitor) and to ‘access’ (which presumably includes by the government). However it only proposes ‘refraining’ from requiring transfer/access to source code. No exceptions (including for GP) have been proposed to this rule in the EU et al’s communication.
- The US proposal²⁹ seems concerned about regulators passing source code to a state-owned enterprise, but then bans any kind of requirement to share source code (presumably including with regulators/the purchasing government), which is then subject to an exceptions for authorities to be able to access source code to protect health/safety/other legitimate regulatory goals. Whether a purchasing government’s desire to do things like buy software upgrades from cheaper competitors is a ‘legitimate regulatory goal’ presumably would be clarified in any negotiations.

Depending on which (if any) of these proposals is agreed to, the ability of the purchasing government to access the source code in the equipment/service etc that they are buying (for example for the purposes above) could be severely restricted.

Cross-border data flows and restrictions on local server requirements

Snowden’s leaked documents have shown that the U.S. government’s National Security Agency (NSA) has among other activities sent an agent to a technology company’s headquarters where they installed U.S. government software on to the company server and downloaded data from there for several weeks.^g This would be facilitated if the data is stored in the United States because of cross-border data flow requirements and prohibitions on requiring data to be stored locally are agreed to in any new WTO ecommerce rules. A number of governments therefore have security concerns about sensitive data being held abroad. For example:

- South Korea greatly restricts the cross-border transfer of mapping data³⁰
- The USA requires all cloud computing service providers that work for the Department of Defense (DOD) to store DOD data within the USA.³¹
- ‘data is the most valuable resource for a nation today. It’s as valuable as the natural resources that India is blessed with. For instance, would it be okay for Aadhaar’s biometric data to be stored in a third country in an era where wars will no longer be fought with weapons but using tools of cyber warfare?’^h

Some governments (at national or provincial level) require information being held/processed on their behalf to be kept in their own country (eg so their own strong privacy laws apply to it).³²

All three ecommerce proposals require cross-border data flows, but only Japan’s³³ has no exception to this proposed rule. The EU et al³⁴ and US³⁵ are willing to have exceptions for ‘appropriate public policies’ and ‘reasonable safeguards like protection of consumer data’ respectively. Whether these would be sufficient to address the concerns of all WTO Members remains to be seen.

Similarly, all three ecommerce proposals restrict the governments from being able to require local servers are used to store this sensitive data to varying degrees. Japan³⁶ and the USA³⁷ have no exceptions to this (including for GP). The EU et al³⁸ appear to be willing to allow ‘appropriate public policy exceptions’ to this proposed rule. Whether ‘appropriate public policy exceptions’ includes all the exceptions that WTO Members would need (including for GP) remains to be seen.

^g <http://www.nytimes.com/2013/06/08/technology/tech-companies-bristling-concede-to-government-surveillance-efforts.html?pagewanted=all>

^h <http://www.firstpost.com/business/sponsored-indian-cloud-data-centres-will-make-or-break-digital-india-2475598.html>

Restrictions on local presence requirements

In order to supply the government (especially for long term projects such as constructing a highway/hospital/dam), the purchasing government may require the supplier to be locally incorporated and have assets (eg a guarantee bond) held locally (eg by a bank in the country). This is because if something goes wrong, eg the construction company does not complete the project, the government has some recourse (eg it can keep the guarantee bond/sue the construction company in domestic courts and if it wins, seize its assets as allowed by the domestic court etc).

However the EU et al³⁹ are proposing a ban on requiring the company to have a local presence (eg to be incorporated locally or have a branch etc locally?) and this is only subject to ‘appropriate public policy exceptions’. Therefore any concerns WTO Members have about the implications of this (including for effective GP) would need to be covered by these ‘appropriate public policy exceptions’.

¹ WT/L/274 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

² WT/MIN(17)/15 from https://www.wto.org/english/thewto_e/minist_e/mc11_e/documents_e.htm

³ WT/L/579 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx

⁴ JOB/GC/97/Rev.3. These WTO documents are available from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

⁵ JOB/GC/100

⁶ JOB/GC/94

⁷ Article 14.2.3, <http://www.tpp.mfat.govt.nz/text>

⁸ Para 4A13

⁹ Eg see Malaysian GP annex at <http://www.tpp.mfat.govt.nz/text>.

¹⁰ Eg see Malaysian GP annex at <http://www.tpp.mfat.govt.nz/text>.

¹¹ Eg see Malaysian GP annex at <http://www.tpp.mfat.govt.nz/text>.

¹² 4Bpara 3

¹³ Para 2.2

¹⁴ Article III

¹⁵ Article XVII

¹⁶ Article III.8a) GATT and Article XIII.1 in GATS

¹⁷ Para 2.12

¹⁸ Since the second sentence of para 2.13 says this is subject to specific negotiated exceptions.

¹⁹ Para 4B20

²⁰ Para 2.6

²¹ See for example https://wikileaks.org/tisa/analysis/Analysis-of-20151001_New-provisions/Analysis-of-20151001_New-provisions.pdf

²² Para 2.8

²³ Eg <http://www.reuters.com/article/us-nuclear-cyber-idUSKCN12A10C>

²⁴ <http://fortune.com/2016/09/19/microsoft-china-transparency-center-beijing/>

²⁵ <https://www.reuters.com/article/us-usa-russia-tech-insight/under-pressure-western-tech-firms-bow-to-russian-demands-to-share-cyber-secrets-idUSKBN19E0XB>

²⁶ As has occurred in the USA for example

²⁷ Para 4C2

²⁸ Para 4B21

²⁹ Para 2.7

³⁰ <https://www.itic.org/public-policy/SnapshotofDataLocalizationMeasures1-19-2017.pdf>

³¹ <https://www.itic.org/public-policy/SnapshotofDataLocalizationMeasures1-19-2017.pdf>

³² Eg two of Canada’s provinces, <https://www.itic.org/public-policy/SnapshotofDataLocalizationMeasures1-19-2017.pdf>

³³ Para 4B1

³⁴ Para 4B19

³⁵ Para 2.3

³⁶ Para 4C1

³⁷ Para 2.5

³⁸ Para 4B20

³⁹ Para 4B20