

Preliminary analysis of leaked proposed TISA Annex on Government Procurement

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Summary

This memorandum provides a preliminary¹ analysis of the leaked proposed Annex on Government Procurement (AGP) in the Trade In Services Agreement (TISA) currently being negotiated. A number of other TISA Parts and Annexes are relevant to this analysis including the core text and the leaked Financial Services Annex².

The proposed AGP has extreme liberalisation of government procurement (GP) by a wider range of governmental entities and for services contracts of all values compared to what is required for some countries at the World Trade Organization (WTO), under a United States (US), European Union (EU) or European Free Trade Association (EFTA)³ free trade agreement (FTA).

This extreme liberalisation of GP would undermine the deliberate government policies of a number of developed and developing TISA countries which try to promote their domestic services companies and hence local employment including for indigenous peoples etc through GP laws and policies. It is also likely to undermine widespread policies to support domestic micro, small and medium enterprises. The limited exceptions available for this proposed AGP would not save these and other programs in TISA countries from being severely undermined by this proposal if it is agreed to.

This proposed text goes beyond the WTO because the WTO does not have rules on GP that apply to all WTO Members.

- The WTO's Agreement on Government Procurement (GPA) is an optional agreement that some TISA countries have joined (see Table 1).⁴
- The WTO's services rules (GATS) stipulate negotiations on services GP,⁵ however they are still at very early stages with no convergence on the outcome⁶.
- The EU and USA tried to add GP (transparency only) to the WTO negotiations in 1996,⁷ however it was opposed by developing countries⁸ and was eventually rejected from the current Doha Round of WTO negotiations.⁹

Importance of government procurement

In most developing countries, the government is the main source of procurement for services, including construction and maintenance of infrastructure.¹⁰ In developing countries, public procurement (of goods and services) can account for as much as 20% of gross domestic product¹¹ or more than 25% in the case of Malaysia¹². Government purchasing therefore provides a major source of demand for domestic service suppliers and reserving that for domestic companies (or otherwise preferring them) can facilitate social and economic development,¹³ provide employment and business opportunities for marginalized or disadvantaged individuals and communities¹⁴ and act as a 'wealth

redistribution' tool¹⁵. Examples of these benefits of directing government purchasing at local suppliers (which could be undermined by the proposed TISA text, see below) include:

- the current Canadian government 'has directed that procurements involving munitions and shipbuilding be limited to companies in Canada.'¹⁶ The National Shipbuilding Procurement Strategy in Canada is a long-term plan that, according to the Ministers of National Defense, Fisheries and Oceans, and State, 'will create good jobs in high-tech industries across Canada'¹⁷
- In 1996, the Canadian government's 'procurement policy mandated that all contracts valued at more than \$5,000, which would benefit the Aboriginal population, would only be open to bidding for aboriginal suppliers as long as those suppliers could meet basic standards of contract management.'¹⁸ This has had a positive impact on indigenous businesses in Canada, 'As of 2000, Aboriginal businesses had increased their total annual contracting dollars from 76.5 million to 136.4 million, an increase of 78.3 percent.'¹⁹
- In Australia, upon winning a contract to supply equipment or service to the Defence Department, foreign contractors were obligated to provide defence offsets activities for Australian industry. A survey done by the Australian Department of Defence in 1991 indicates that offsets had induced local industry to upgrade technology and it was responsible for at least a 10% point increase in local industry involvement in defence projects.²⁰ 'Companies undertaking offsets activities indicated that this type of work had led to a proportionately higher level of benefits such as developing new capability, increasing overseas competitiveness and introducing new technology.'²¹

Since GP can be so large, opening it to foreign companies has also given rise to concerns about balance of payments problems.²²

For governments which want to save money by purchasing from the cheapest service supplier in the world, or which want a greater choice or different quality than is available from domestic companies, they can always voluntarily open up their government purchasing of services to companies from any country in the world. This unilateral liberalisation can be done immediately without having to join TISA with government procurement liberalisation provisions. If services GP is opened to foreign competition unilaterally, then in future if the government wishes to reserve it for local suppliers (for example for any of the reasons above), it can restrict it to local companies again. However, if services GP is opened to foreign companies via TISA, it cannot be closed again.

What GP is covered by the proposed TISA text?

The proposed text would open government purchasing of services²³ but **also goods** where they are a minor part of the contract.²⁴ (For ease of reference in this analysis, these combined goods and services contracts will also be called 'services').

The proposed text appears to cover:

- Purchasing by **all governmental agencies**.²⁵ This is very unusual because even in the WTO's GPA,²⁶ EFTA FTAs,²⁷ EU FTAs²⁸ and US FTAs²⁹ it is positive list liberalisation of GP, i.e. only the purchasing by those governmental entities listed is opened to competition from suppliers from other countries in the trade agreement. Negative list is a more extreme version of liberalisation than positive list. Negative list liberalisation would mean that purchasing by all government entities except those listed would be opened to competition from suppliers from other countries in the trade agreement. The proposed AGP text is even more extreme than negative list liberalisation and does not allow any exceptions for purchasing by any entities which meet the definition of governmental agencies.
- Services purchasing of **any amount**, even small contracts (provided it is via an open tendering procedure etc, see below). This is very unusual because even in the WTO's GPA,³⁰ EFTA FTAs,³¹ EU FTAs³² and US FTAs³³ there is a minimum threshold contract value so that contracts which are below this in value are not opened to foreign competition. This minimum threshold value helps to ensure that domestic micro, small and medium enterprises

(MSMEs) can still supply their governments because they do not have to compete with foreign suppliers for small contracts. A growing small business sector has great potential to reduce unemployment, increase average household incomes, reduce the poverty gap, and increase the tax base of the economy, which in turn provides the basis for further, sustainable long-term growth in the economy.³⁴ However the proposed AGP text does not allow TISA countries to reserve small contracts which are usually more accessible to MSMEs for domestic MSMEs or give other preferences to domestic MSMEs, see below.

- the purchasing of **services on a negative list basis** (since it specifies ‘pursuant to Article I-4 of the Agreement’³⁵ which is the national treatment provision³⁶ which is negative list³⁷) where there is a commercial presence of a services company from another TISA country. (Negative list means GP in all service sectors except those listed is opened to suppliers from other TISA countries). This goes beyond some existing trade agreements involving TISA countries such as the Peru-EFTA FTA where EFTA countries only opened GP of the services listed on a positive list basis.³⁸ (Positive list only opens the GP in the service sectors which are listed).

It is unclear whether the proposed text would open purchasing of services by all levels of government including municipal and other sub-national governments. In the WTO GPA both the revised and 1994 versions, it covers both national and sub-central government purchasing,³⁹ so there may be an attempt to do so in TISA as well.

It is also unclear whether the proposed text would open the purchasing by state owned enterprises. State owned enterprises can be significant purchasers for example 61% of Uruguay’s public invitations to tender in 2008 were by state owned enterprises,⁴⁰ (Uruguay is negotiating TISA). In the WTO’s GPA, purchasing by state owned enterprises is also opened,⁴¹ so there may be an attempt to do so in TISA as well.

Although the proposed text would only open GP of services where there is a prior publication of a procurement notice,⁴² depending on the country, this may be most of the time. For example for a subnational government in Australia, a basic requirement in the Victorian government’s purchasing is to publish procurement notices except in certain circumstances.⁴³ This may be exacerbated by another trade agreement which requires that GP covered by that other trade agreement always has a procurement notice published except in certain rare listed circumstances, as is the case in the Peru-U.S. free trade agreement,⁴⁴ (Peru is negotiating TISA).

The proposed text would only apply to services GP via open tendering (which is likely to be most GP especially of larger contracts). This may be exacerbated by another trade agreement which requires that GP (including of services) covered by that other trade agreement is always via open tendering except in certain listed circumstances, as is the case in the Peru-U.S. free trade agreement,⁴⁵ (Peru is negotiating TISA).

The proposed text would not apply to concessions to provide services to the public.⁴⁶

Since a definition of GP equivalent to the one in the WTO’s General Agreement on Trade in Services (GATS) will be used,⁴⁷ it can be expected to be something like GP means the ‘procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.’⁴⁸

What are the requirements for GP covered by the proposed AGP?

The main **substantive** requirement is for TISA Country A to treat service suppliers from any other TISA country which have established a commercial presence by setting up, acquiring or maintaining a company etc (see definition of ‘juridical person’ in the leaked core text) in Country A the same as Country A’s own service suppliers when it is buying the relevant services. This means that for the services GP liberalised via TISA (see above), TISA countries can no longer:

- have set asides for local services suppliers. (A set aside is where only local companies can supply certain government contracts). For example:⁴⁹

- in Mexico, in 2011, government procurement registered on CompraNet was Mex\$293,939 million of which 48% was only available to Mexican nationals.⁵⁰ If this TISA proposal is agreed to, Mexico could no longer reserve all the services part of this GP for Mexican nationals. Even if all Mexico's free trade agreements with GP chapters liberalised GP in services, Mexico still has not opened GP in services to 11 other TISA countries.⁵¹
- for Paraguay, the WTO Secretariat noted that⁵² 'the amount of contracts awarded reaching US\$1,541 million in 2009. Of total government procurement over the period 2007-2009, 55 per cent was for goods and 44 per cent for services (including public works). . . Paraguay has used the government procurement regime as a tool for promoting domestic production and employment.' In 2009, 41.7% of amounts of contracts awarded were via national competitive bidding (only open to natural or legal persons domiciled in Paraguay), (compared to 38.1% under international competitive bidding).
- have price preferences. (A price preference is when a local company can still win the bid to supply a government even if its price is X% more expensive than the foreign company's).
 - In Uruguay: 'If the number of abridged procedures and direct procurement by all government bodies is included, the total amount of government procurement was over US\$2 billion in 2008 (excluding imported electricity, petroleum and related freight charges). . . Uruguay uses the government procurement system to protect and promote domestic industry. . . [eg] in government procurement a preference margin of 8 per cent shall be applied to the price of Uruguayan goods, services and public works, of equal quality or suitability compared to foreign goods, services or public works. . . MSMEs covered by this subprogramme are given a preference on the price of Uruguayan goods, services and public works, which ranges from 8 to 16 per cent for microenterprises and small enterprises and from 4 to 12 per cent for medium-sized enterprises.'⁵³ If this TISA proposal is agreed to, Uruguay could no longer continue to do this for the relevant services GP (see above).
 - Paraguay also uses price preferences for national services⁵⁴ but would not be able to continue to do so for the relevant services GP if this proposal is accepted.
 - In Peru, services are a significant proportion of GP and price preferences are still used:⁵⁵ Services was 26.6% of procurement and works was another 33.7% of procurement and GP was 28.9 billion nuevo sol in 2011. 'for procurement of works or services to be executed or supplied outside the provinces of Lima and Callao with contracts awarded according to the ADS and small contract (AMC) procedures, a preference of 10% is given on the amount of the technical and economic proposal of bidders domiciled in the province where the work is to be carried out or the service supplied, or in neighbouring provinces.'⁵⁶

It is unclear whether offsets are still allowed under this TISA proposal. (Direct offsets are when the foreign services company supplying the government has to use local inputs (eg local banks) related to the contract. Indirect offsets are when the foreign services company supplying the government has to buy some unrelated other local product/service eg bananas (eg if there is no local expertise for direct offsets). Offsets are important for local employment, balance of payments⁵⁷, technology transfer etc, see above.

There are also **procedural** requirements that specify the GP process for TISA countries in the proposed text.⁵⁸ Depending on their current GP process (which may already have to comply with procedural requirements in other trade agreements), the procedural proposals may be more burdensome for some TISA countries to implement than others.

Exceptions to proposed opening of services GP in TISA?

As noted above, the usual exceptions to opening services GP in trade agreements (exclusion of small procurement contracts via a minimum threshold value, exclusion of certain procuring entities etc) are not allowed in the proposed TISA GP text.

The core text seems to allow the usual GATS exceptions⁵⁹ to apply to this proposed GP Annex⁶⁰. However:

- These only cover health and the environment etc, not other policies which may be undermined by the proposed TISA GP rules such as local job creation or assistance to indigenous peoples etc.
- Even for the areas covered by the GATS exception and its equivalent for goods rules at the WTO,⁶¹ they have been very difficult for governments to use, succeeding only once in 40 attempts at the WTO according to one study.⁶²

There is no special and differential treatment (eg additional exceptions or flexibilities) or even transition periods for developing countries in the proposed TISA text. Whereas the EU's proposal to open services GP in the stalled GP negotiations under GATS at the WTO at least had a transition period for developing countries for up to 10 years for price preferences and offsets.⁶³

Table 1

TISA Party ⁶⁴	In WTO's GPA? ⁶⁵
Australia	A
Canada	Y
Chile	O
Colombia	O
Costa Rica	O
EU	Y
Hong Kong	Y
Iceland	Y
Israel	Y
Japan	Y
Korea	Y
Liechtenstein	Y
Mexico	N
New Zealand	A
Norway	Y
Pakistan	O
Panama	O
Paraguay	N
Peru	N
Switzerland	Y
Taiwan	Y
Turkey	O

Uruguay	N
USA	Y

Y= yes

N= no

A= negotiating accession to the GPA

O= observer

Conclusion

The extreme liberalisation of government procurement proposed in this text goes beyond liberalisation under existing trade agreements with the resultant undermining of laws, programs and policies such as those outlined above. For:

- Countries which are already party to the WTO's GPA, if accepted, the proposed text here in TISA:
 - Opens purchasing by more government entities
 - Opens GP of smaller services contracts
 - Can open GP of more services
 - Opens the services GP above to more countries
- Countries which have already opened services GP via an EFTA, EU or US FTA, if accepted, the proposed text here in TISA:
 - Opens purchasing by more government entities
 - Opens GP of smaller services contracts
 - Can open GP of more services
 - Opens the services GP above to more countries
- Countries which have not opened services GP via an EFTA, EU or US FTA or the WTO's GPA, if accepted, the proposed text here in TISA would open their services GP in a more extreme way than even that required via an EFTA, EU or US FTA or the WTO's GPA. If these TISA countries which have so far decided not to lock open their services GP in a trade agreement and which opposed even rules requiring mere transparency in the GP process at the WTO, then agree to lock open their services GP in TISA, this would be a radical change of policy.

¹ For example this analysis does not compare the AGP to all existing trade agreements involving TISA countries which open services government procurement

² Which proposed liberalisation of purchasing of financial services by public entities in Article X.6, <https://wikileaks.org/tisa/financial/02-2015/>

³ Iceland, Liechtenstein, Norway, Switzerland, <http://www.efta.int/>, all of whom are in TISA, <http://www.seco.admin.ch/themen/00513/00586/04996/index.html?lang=en>

⁴ https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm

⁵ Article XIII.2 https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleXIII

⁶ https://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/serv_e.doc

⁷ <http://www.twn.my/title2/t&d/tnd33.pdf>

⁸ <http://www.twn.my/title2/t&d/tnd33.pdf>

⁹ WTO document WT/L/579 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx

¹⁰ Rogerson, Christian M. (2004). *Pro-Poor Local Economic Development in South Africa: The Application of Public Procurement*. Urban Forum. Vol. 15, No. 2 (180).

¹¹ Center of International Development at Harvard University. Global Trade Negotiations Homepage: <http://www.cid.harvard.edu/cidtrade/issues/govpro.html>

- ¹² In 2003, McCrudden, Christopher and Stuart G. Gross. *WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study*. The European Journal of International Law. Vol. 17, no.1. (2006): 162.
- ¹³ Rogerson, Christian M. (2004). *Pro-Poor Local Economic Development in South Africa: The Application of Public Procurement*. Urban Forum. Vol. 15, No. 2 (180-181).
- ¹⁴ Rogerson, Christian M. (2004). *Pro-Poor Local Economic Development in South Africa: The Application of Public Procurement*. Urban Forum. Vol. 15, No. 2 (188).
- ¹⁵ Bolton, Phoebe. "Government Procurement as a Policy Tool in South Africa." *Journal of Public Procurement*. Vol. 6:3 (2006): 195.
- ¹⁶ Williams, Alan. The Williams Group. "Defence Procurement, Industrial Development & Regional Benefits." *FrontLine Defence* (Jan/Feb 2007): 29.
- ¹⁷ Government of Canada, Public Works & Government Services, "Government of Canada announces National Shipbuilding Procurement Strategy." *Canada News Centre* (June 3, 2010): <http://news.gc.ca/web/article-eng.do?m=/index&nid=537299>.
- ¹⁸ La Noue, George R. Policies to Ensure Group Equality in Public Contracting in Four Countries. *The International Journal of Diversity in Organisations, Communities and Nations*, Vol. 8, No. 6 (2009).
- ¹⁹ La Noue, George R. *Policies to Ensure Group Equality in Public Contracting in Four Countries*. The International Journal of Diversity in Organisations, Communities and Nations, Vol. 8, No. 6 (2009): 88.
- ²⁰ Joson, S.S.. "Defense Offsets and Industrial Protection." *Indian Journal of Quantitative Economics* 11 no. 1 (1996): 40.
- ²¹ Joson, S.S.. "Defense Offsets and Industrial Protection." *Indian Journal of Quantitative Economics* 11 no. 1 (1996): 39-40.
- ²² See for example <http://www.cid.harvard.edu/cidtrade/issues/govpro.html>.
- ²³ An example of services likely to be covered are those covered in the World Trade Organization, https://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc, https://www.wto.org/english/tratop_e/serv_e/serv_e.htm.
- ²⁴ Footnote 2 of the proposed text
- ²⁵ Assuming the term 'governmental agencies' is still used when an equivalent definition to the one in the World Trade Organization's General Agreement on Trade in Services is incorporated, see below
- ²⁶ https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm
- ²⁷ Eg the Peru-EFTA FTA, <http://www.efta.int/free-trade/free-trade-agreements/peru>
- ²⁸ Eg the Peru-EU FTA, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2012:354:TOC>
- ²⁹ E.g. the Peru- USFTA, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>
- ³⁰ https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm
- ³¹ Eg the Peru-EFTA FTA, <http://www.efta.int/free-trade/free-trade-agreements/peru>
- ³² Eg the Peru-EU FTA, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2012:354:TOC>
- ³³ E.g. the Peru- USFTA, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>
- ³⁴ Mkhize, Z. L. (2004). "MEC for Finance and Economic Development." Paper presented at Supply Chain Management Conference: Transforming Government Procurement System, November 22-23, Durban, South Africa.
- ³⁵ Paragraph 2
- ³⁶ See core text also released today
- ³⁷ <http://www.seco.admin.ch/themen/00513/00586/04996/index.html?lang=en>
- ³⁸ <http://www.efta.int/free-trade/free-trade-agreements/peru>
- ³⁹ https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm
- ⁴⁰ WTO document WT/TPR/S/263/Rev.1 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.
- ⁴¹ https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm
- ⁴² Paragraph 1 of the proposed text
- ⁴³ <http://www.procurement.vic.gov.au/Buyers/Policies-Guides-and-Tools/Complexity-and-Capability-Assessment-Policy>, www.vgpb.vic.gov.au
- ⁴⁴ Article 9.4.1, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file52_12926.pdf
- ⁴⁵ Article 9.2.3, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file52_12926.pdf
- ⁴⁶ Footnote 2 of the proposed text
- ⁴⁷ Footnote 1 of the proposed text
- ⁴⁸ Article XIII, https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleXIII
- ⁴⁹ From TISA countries which have not joined and are not in the process of joining (or observing) the WTO's GPA, see Table 1. All of these countries have laws/programs which would be undermined if this proposal is accepted in TISA.

The definition of ‘GP’ used by the WTO Secretariat in their reports cited here may not be the same as that in TISA.

⁵⁰ This is presumably goods and services. WTO document WT/TPR/S/279/Rev.1 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

⁵¹ This is presumably goods and services. WTO document WT/TPR/S/279/Rev.1 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

⁵² WTO document WT/TPR/S/245/Rev.1 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

⁵³ WTO document WT/TPR/S/263/Rev.1 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

⁵⁴ WTO document WT/TPR/S/245/Rev.1 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

⁵⁵ WTO document WT/TPR/S/289/Rev.1 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

⁵⁶ WTO document WT/TPR/S/289/Rev.1 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

⁵⁷ https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf

⁵⁸ See for example the proposed Appendix to the TISA Annex on GP.

⁵⁹ Article XIV GATS, https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleXIV

⁶⁰ Article I-9

⁶¹ Article XX of the General Agreement on Tariffs and Trade (GATT), https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX

⁶² <https://www.citizen.org/documents/general-exception.pdf>

⁶³ WTO document S/WPGR/W/54 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx

⁶⁴ <http://www.seco.admin.ch/themen/00513/00586/04996/index.html?lang=en>

⁶⁵ https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm. WTO GPA Parties have already opened their services GP to 13 other economies (counting the EU as one and the Netherlands as including Aruba) under the GPA of which 12 are already negotiating TISA (only Armenia and Singapore are GPA Parties which are not in TISA).