

Government Procurement Chapter

Additional Information About US-proposed Chapter on Anti-Corruption

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During the ninth round of the TTIP negotiations, the US proposed that the Parties include the article “Ensuring Integrity in Procurement Practices” in the chapter on government procurement. The article as proposed indicated that it was “{f}urther to [Article X.2 of the chapter on Anti-Corruption – Measures to Combat Corruption].” This paper provides information about the US-proposed chapter on anti-corruption.

The US-proposed chapter on anti-corruption starts by having each Party affirm its resolve to eliminate corruption in matters affecting international trade and investment, and recognizes the need to build integrity within both the public and private sectors. Each Party further recognizes the importance of regional and multilateral initiatives to eliminate corruption in matters affecting international trade and investment, and commits to work jointly on encouraging and supporting appropriate initiatives to combat such corruption. Finally, each Party affirms its obligations under the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* and the *United Nations Convention against Corruption*, and agrees to ratify or accede to the *United Nations Convention against Corruption*.

The chapter then defines the measures that each Party must take to combat corruption in matters affecting international trade and investment. For example, the chapter requires each Party to adopt or maintain measures to establish as a criminal offense under its law, when committed intentionally, by any person subject to its jurisdiction, the promise, offering, or giving to a domestic public official, directly or indirectly, of an undue advantage for the official or another person in order that the official act or refrain from acting in relation to the performance of official duties. It dictates a similar requirement with respect to foreign public officials, but adds that such a promise, offering, or giving would also be wrongful if meant to obtain or retain business or other undue advantage in relation to the conduct of international business. The chapter also requires each Party to adopt or maintain measures to establish as a criminal offense, by any person subject to its jurisdiction, the solicitation or acceptance by a domestic public official, directly or indirectly, of an undue advantage for the official or another person, in order that the official act or refrain from acting in relation to the performance of official duties. The aiding or abetting, or conspiracy in, the commission of any of these offenses would be a criminal offense as well. In relating back to the applicable measures, the chapter further requires that each Party:

- adopt or maintain effective, proportionate, and dissuasive criminal penalties and procedures to enforce criminal measures;
- disallow the tax deductibility of bribes and other illegal expenses incurred in connection with the commission of an offense;
- adopt or maintain measures enabling the identification, tracing, freezing, seizure, and confiscation in both criminal and civil proceedings of proceeds, including any property, derived from an offense, and property, equipment, or other instrumentalities used in or destined for use in such offenses; and
- adopt or maintain such measures as may be necessary regarding accounting and auditing standards, the maintenance of books, records and internal controls, and financial statement disclosures by issuers, to prohibit or prevent the following acts carried out for the purpose of committing any of the described offenses.

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Finally, the chapter requires each Party to adopt or maintain such measures as may be necessary regarding accounting and auditing standards, the maintenance of books, records and internal controls, and financial statement disclosures by issuers, to prohibit or prevent the following acts carried out for the purpose of committing any of the following offenses: the establishment of off-the-book accounts; the making of off-the-book or inadequately identified transactions; the recording of non-existent expenditure; the incorrect identification of liabilities; and the use of false documents.

The chapter similarly requires, in matters affecting international trade or investment, that each Party adopt or maintain such measures as may be necessary to establish as a criminal offense under its law, when committed intentionally, by any person subject to its jurisdiction, the embezzlement, misappropriation, or other diversion by a public official for the benefit of the public official, or for the benefit of another person, of any property, public or private funds or securities, or any other thing of value entrusted to the public official by virtue of the public official's position. In this regard, each Party is required to provide effective, proportionate, and dissuasive penalties and procedures to enforce the measures adopted or maintained.

The chapter thereafter focuses on protections that each Party must afford persons that report corruption offenses. Each Party shall adopt or maintain publicly available procedures for persons to report to its competent authorities, including anonymously, any incidents that may be considered to constitute a covered offense or act. Each Party also shall adopt or maintain appropriate measures to protect against any discriminatory or disciplinary treatment, any person who, in good faith and on reasonable grounds, reports to the competent authorities any suspected acts concerning a covered offense or act. Each Party should consider requiring external auditors of an issuer's financial statement to report any suspected acts to the competent authorities concerning a covered offense or act, and shall ensure that the external auditors making such reports reasonably and in good faith are protected from legal action.

The chapter further outlines steps that each Party should adopt to promote integrity among public officials. It indicates that to combat corruption in matters affecting international trade and investment, each Party shall endeavor to promote, among other things, integrity, honesty, and responsibility among its public officials. To this end, each Party shall adopt or maintain measures to:

- provide adequate procedures for the selection and training of public officials for positions considered especially vulnerable to corruption and the rotation, where appropriate, of such public officials to other positions;
- require senior and other appropriate public officials to make publicly available declarations to the appropriate authorities regarding, among other things, their outside activities, employment, investments, assets, and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as a public official; and
- facilitate and require reporting by public officials acts of corruption to competent authorities, when such acts come to their notice in the performance of their functions.

In addition, each Party shall adopt or maintain codes or standards of conduct for the correct, honorable, and proper performance of public functions and the avoidance of conflicts of interest by

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public officials. Each Party shall also adopt or maintain measures providing for disciplinary or other actions, where warranted, against public officials who violate these codes or standards. Each Party shall establish procedures through which a public official accused or convicted of a covered offense may be removed, suspended, or reassigned by the appropriate authority. Finally, without prejudice to judicial independence, each Party shall adopt or maintain measures to strengthen integrity and prevent opportunities for corruption of public officials that are members of its judiciary in matters affecting international trade and investment.

The chapter likewise recognizes the important role that the private sector and civil society play in combating corruption. It requires each Party to take appropriate measures to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption in matters affecting international trade and investment and to raise public awareness regarding the existence, causes, and gravity of and the threat posed by such corruption, including, for example, undertaking public information activities and education programs that contribute to non-tolerance of corruption; encouraging professional associations and other nongovernmental organizations to assist enterprises in developing codes, standards of conduct, and compliance programs, for preventing and detecting corruption, etc. Each Party should also encourage enterprises to develop and adopt adequate codes, standards of conduct, and compliance programs for preventing and detecting, at a minimum, offenses that violate covered measures. And each Party should encourage enterprises to establish monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards, in order to prevent and detect offenses or acts that violate covered measures.

Under the chapter, each Party commits to enhancing the effectiveness of law enforcement actions to combat a covered offense or act. The chapter underscores that a Party shall not fail to effectively enforce the laws or other measures adopted or maintained to comply with certain provisions through a sustained or recurring course of action or inaction, in a manner affecting international trade and investment. That said, each Party retains the right for its law enforcement, prosecutorial, and judicial authorities to exercise appropriate discretion with respect to the enforcement of the Party's measures adopted or maintained to combat such corruption. Each Party also retains the right to take bona fide decisions with regard to the allocation of resources.

Finally, in respect of consultation and dispute settlement, the Parties shall endeavor to make every effort through dialogue, exchange of information, and cooperation to address any matter that might affect the operation of the chapter. But no Party shall have recourse to the arbitration procedure set forth in the chapter on state-to-state dispute settlement for matters involving the effectiveness of the law enforcement actions taken to combat covered offenses or act. A Party may request of the committee established under the administrative provisions of the TTIP Agreement for supervision of the implementation and operation of the Agreement to meet and consider any matter under the anti-corruption chapter and publish a written report indicating the position of each Party and any relevant facts.