
8 Differentiation and soft power as a means of promoting a balanced rules-based trading system: The case of public procurement

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At a time when the United States is leading the trading system back towards a more power-based order the effective use of European Union (EU) soft power is important for both the EU and the international trade and investment order.

An open trading system is needed because of the economic benefits from cooperation in trade and investment. The alternative response to interdependence is economic nationalism with all its inherent dangers of conflict. Balance is needed between commercial interests and other legitimate policy objectives, for example sustainable development. History also suggests that the trading system also rests on an overall balance of benefits, something that for market access commitments is determined by reciprocity or in order to achieve differentiation, asymmetric reciprocity. This can be achieved through differentiation in commitments on tariff bindings or other market access commitments. But it is also necessary to work towards differentiation in terms of the application of trade rules.

The EU should continue to support a rules-based system

An open, balanced, rules-based system is necessary for the EU, because it is compatible with the EU's domestic acquis. The nature of EU trade and investment decision-making is also such that it does not have the option of pursuing a power-based approach. The EU has market power, albeit in relative decline, but more importantly there has never been and is unlikely to be a qualified majority, let alone a consensus, of EU Member

States in favour of power-based trade policy. Such a policy implies, for example, threatening market closure in order to redefine rules or renegotiate agreements. A rules-based system is also in the interests of other OECD economies and most developing countries that do not have the leverage or capacity to make such a policy credible.

The need for differentiation

The lesson from the Doha Development Agenda (DDA) and subsequent developments is that there needs to be differentiation in the rules between countries at different levels of development and with different circumstances. The trading system has changed and is no longer one in which the OECD economies can shape outcomes and provide the international public good of an open trading system. This was the case before the recent shift in US trade policy, but is even more so at a time when the US is not interested in shared leadership. The trading system has been evolving into a more heterogeneous, or multipolar system for some time, but the trade rules have not adjusted adequately.

One model for approaching the question of differentiation is the Trade Facilitation Agreement (TFA), which establishes rules for customs and border controls but links adoption of these to the capacity of members of the World Trade Organization (WTO) to implement them effectively. At a multilateral level the EU should promote such a practical, functional approach to differentiation and thus seek to avoid a confrontation that would result from an attempt to produce formal provisions on which country should be a declared or self-declared developing country.

Given the limited progress in multilateralism trade and investment policy is currently being shaped by preferential trade agreements (PTAs). So how should the EU use its soft power to promote the overall aim of an open, balanced, rules-based system in such agreements? Differentiation is again a crucial element here. De facto the EU does differentiate between PTA partners according to the level of their development. The agreement with Canada is more comprehensive than agreements with Columbia or the Caribbean Forum (Cariforum), the agreement with Singapore is more comprehensive than that with the Southern African Development Community (SADC), etc. There is also a differentiation between countries that come under the EU General System of Preferences regimes (GSP, GSP+ and Everything-but-Arms) and those African, Caribbean and Pacific (ACP) countries that have signed Economic Partnership Agreements (EPAs). But what does differentiation in rules look like in more detail and is it possible to develop and articulate a more coherent approach?

What constitutes a rules-based system?

It is first helpful to be clearer on what is meant by trade and investment rules. Four main elements can be identified:

- International voluntary norms, such as those developed in the World Customs Organisation and in the International Standards Organisation which are important for trade facilitation in international supply chains. There are also United Nations Commission on International Trade Law (UNCITRAL) and United Nations Conference on Trade and Development (UNCTAD) model laws or codes. The process by which these norms or standards are developed is influenced more by developed countries with more research capability knowhow and resources, but they are generally recognized as examples of international best practice and used as models by many countries. The EU is active in developing such standards and norms;
- Trade and investment agreements then form the next element of a rules-based system and these generally build on the international voluntary norms or standards and incorporate them in more binding obligations. With the lack of progress in the WTO this is now taking place predominantly in PTAs. In the case of the EU this means seeking comprehensive coverage;
- A third element of the rules-based system is the implementation and enforcement of such commitments and rules. Here there are arguably two elements, one soft law and one hard law. The soft law element consists of peer reviews and dialogue based on transparency. In the multilateral setting this is if the 'third leg' of the WTO, which has been criticized recently as becoming partially redundant because of a failure of WTO members to engage. In PTAs the soft law element finds expression in the many committees and working groups that are established for more or less every chapter of a given PTA. These have been criticized in academic circles as WTO-X, precisely because they constitute soft power. The EU PTAs include more elements of such soft power than other PTAs;
- Finally there is then the hard law element of implementation or enforcement, which involves the use of sanctions or retaliation, sanctioned by an agreement and only after conciliation and quasi-legal dispute settlement procedures have been completed.

What does it look like in practice?

With regard to rules included in EU PTAs one of the most controversial policy areas has been public procurement. In terms of the first element above, public procurement norms or regulatory standards have been developed through many years of dialogue in the OECD. These norms have also been adopted in the UNCTAD, in the shape of the Model Law on Public Procurement and have shaped and been shaped by standards developed by the donor agencies, such as the World Bank.

These norms and standards have then been adopted in trade agreements. There remains no multilateral agreement in the WTO, but a plurilateral agreement in the shape of the Government Procurement Agreement (GPA). Developing countries did not sign up to the GPA, in large part because there was no differentiation in the rules. Only when Art V was added in the 2012 revision that came into force in 2016, was there any differential treatment. Developing country members of the GATT/WTO also saw the inclusion of procurement almost exclusively as part of market access bargaining by the OECD members. Art V still makes the differentiation subject to the negotiation of an “appropriate balance of opportunities”. Various means of achieving differentiation are available under the agreement in addition to asymmetric commitments on coverage, but the provision on technical cooperation is still soft and it all depends on the application of the agreement.

There are normative and commercial reasons for including procurement in trade agreements. Procurement accounts for a large share of GDP (an average of 12% in OECD economies and much more in developing). In developing economies, it accounts for a major share of public expenditure. It is therefore important that public contracts are allocated according to clear, objective criteria that promote the balanced goal of sustainable development. Without rules or a regulatory framework governing the allocation of public contracts, there is a danger that discretionary power will be used to promote short-term political goals, i.e. the award of contracts for projects that help incumbents get re-elected or retain power. In many instances the allocation of public contracts is also a major source of corruption.

The EU’s commercial interest is due to the fact that it has comprehensively adopted international best practice, as expressed in the various codes and models, in binding EU law. There is therefore pressure to get its major trading partners and competitors to do the same.

So, how has the EU differentiated in the PTAs it has negotiated? Table 1 summarizes the position for public procurement chapters in selected EU PTAs. It illustrates that the EU has been applying a de facto policy of differentiation. The EU has also

been providing capacity building and other support for developing countries that are constrained by limited capacity. But this differentiation has been more the result of flexibility in negotiations than an articulated policy. There is also a tendency in the EU policy discourse to focus on market access rather than promoting suitable rules to help improve the practice of awarding public contracts.

Soft power as the way forward

By way of conclusion it can be argued that the use of hard power has had limited success in extending the rules-based trading system to include public procurement. Efforts to include it in the WTO were resisted because of the perception that it was part of a market access bargaining process that inevitably favoured the developed economies because the limited supply capacity and relatively high costs of compliance in many developing economies. There has also been opposition on the grounds that preferential procurement was seen as a development instrument and therefore part of the 'policy space' that needed to be retained. But there have been other sources of opposition to the adoption of rules in this policy area. Political motivations have been important when political decision makers have blocked greater transparency or more objective contract award criteria because they wish to retain discretionary power in the sense that governments, whether central or local, are reluctant to have disciplines over contracts. All too often a new road, hospital or school is seen as a means of gaining votes. Another source of opposition has been that national administrations simply do not have the resources to implement detailed rules on transparency and contract award procedures.

For the effective adoption of objective rules in government procurement soft power is therefore needed. Dialogue and persuasion are needed to bring about a genuine change in the culture surrounding public contracts that favours objective criteria and thus the best use of resources in promoting sustainable development. Without this the adoption of legislative reforms will mean little. Soft power in the shape of capacity building is also necessary to help with the creation of a professional cadre of procurement officials needed to implement reforms.

About the author

Stephen Woolcock is Lecturer in International Political Economy at the LSE. He also heads the LSE's International Trade Policy Unit. His previous posts included Senior Research Fellow at the Royal Institute of International Affairs (Chatham House) (1988-94) and Deputy Director for international affairs and the Confederation of British Industry (1985-1988). He has worked as consultant and advisor to a number of international organisations including the EU and national governments.