

E-COMMERCE AND FREE TRADE AGREEMENTS

Introduction:

No mandate to negotiate ecommerce rules at the WTO

Only examine various ecommerce issues.

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WTO Ministerial Conference in Buenos Aires - December 2017 (MC11)

- proposal to begin negotiations on e-commerce rules
- a number of proposals regarding e-commerce were made at the WTO in 2016.

Government procurement

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), Japanese, and US proposals.

Liberalisation of GP by banning set-asides

EU appears 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’.

a) pushes WTO Members to do more e procurements

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.

Opening GP to non-established companies would prevent WTO Members (including LDCs) from further ‘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 – and ultimately help the local economy.

Government always biggest buyer.

- **Policy tool**

Since no exceptions have been proposed in this paragraph, it appears that the EU intends 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), it does not cover all goods and services.

This is TPP+ !!

□ By all government ministries, whereas in FTAs eg the TPP, this is only for the **ministries** listed, ie positive list.

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 have.

□ At all levels of government? (eg national, provincial and local).

- FTAs often do not liberalise subnational GP.

Liberalisation of GP by failing to exempt it from general liberalisation

- Both Japan and the US appear to be proposing national treatment (NT) and most-favoured nation (MFN) treatment for at least digital products.
- The equivalent rules in GATT and GATS carefully exclude GP from NT 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, 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).

Restrictions on requiring offsets in GP

There are two types of offsets used in GP:

□ **Direct**: eg if the Philippine airforce wanted to buy a helicopter, but no PH company could make helicopters, the PH 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 PH companies.

Restrictions on requiring offsets in GP

□ **Indirect**: The PH airforce wanted to buy a submarine, but no PH company could make submarines or any parts for submarines. The PH government could buy the submarine from a French company, but specify that the French company also buys xEuros of fish from PH companies. This indirect offset still ensures some demand for some (unrelated) local products and still provides jobs and helps the trade balance.

Crossborder data flow requirements and prohibitions on requiring data to be stored locally.

A number of governments therefore have **security concerns** about sensitive data being held abroad.

- South Korea greatly restricts the cross-border transfer of mapping data.
- The USA requires all cloud computing service providers that work for the Department of Defense to store DOD data within the USA.
- 'data is the most valuable resource for a nation today. Dangerous to allow biometric data to be stored in a third country.

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).

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** or **sue** the construction company in domestic courts and if it wins, seize its assets as allowed by the domestic court etc).

Restrictions on local presence requirements

However the EU is 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’.

Tax justice issues:

A. Permanent establishment:

1. Restriction against requiring servers to be located in the country where the MNC does business allows the MNC to avoid having PE, thus avoiding taxes in the host country.
2. Same thing with regard to having local physical presence.

Trans-Pacific Partnership

B. Customs Duties

(Loss of revenues)

The chapter prohibits TPP members to impose customs duties on any digital products or services (Article 14.3).

- This will help such content products as e-book, software, music, video, games, etc., freely move in the region. (However, local industries will suffer.)

C. VAT or sales tax: foregone revenues

Final points:

1. Good for consumers?
2. Good for MSME's, especially of developing countries? Global value chains
3. Development agenda: industrial and agricultural policy, local manufacturers and service providers.
4. Tax issues: tariffs, income tax, VAT
5. A governance issue: Role of the parliament in trade regulation and taxation.

THANK YOU