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Emerging 'New Issues' in Multilateral Trade Agreements

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The *Trade Competitiveness Briefing Paper* series provides evaluative and strategic research on new and emerging trade issues of relevance to the Commonwealth member countries. The series focuses on the practicalities of addressing these new issues as well as long existing (but still very current) policy challenges in a time-bound, targeted and effective manner; taking into account both opportunities and challenges that emerge due to changes in global trade landscape. The views expressed here are those of the author(s) and do not necessarily represent those of the Commonwealth Secretariat.

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Abstract

Very slow progress has been made in multilateral trade negotiations since the initiation of the Doha Development Round in November 2001. Responding to this, the 10th Ministerial Meeting of the World Trade Organization in Nairobi has the potential of becoming a watershed moment by opening up the possibility of 'new issues' entering the multilateral negotiations. This policy brief discusses some of the likely 'new issues' which may be tabled for entering the negotiations, and assesses their likely legal and economic implications for developing and least developed countries (LDCs) and small states.

JEL Codes: F13, F15

Keywords: World Trade Organization (WTO), multilateral trade agreements, 10th WTO Ministerial

Contents

Abbreviations and acronyms

ACIA	ASEAN Comprehensive Investment Agreement
ASEAN	Association of Southeast Asian Nations
FDI	foreign direct investment
FTA	free trade agreement
GPA	government procurement agreement
ILO	International Labour Organization
ISDS	investor state dispute settlement
LDCs	least developed countries
MC10	10th Ministerial Declaration of the World Trade Organization in Nairobi
RCEP	Regional Comprehensive Economic Partnership
SMEs	small and medium enterprises
TPP	Trans-Pacific Partnership
TPPA	Trans-Pacific Partnership Agreement
TRIMs	Trade-Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
WTO	World Trade Organization

1. Summary[1]

- The 10th Ministerial Declaration of the World Trade Organization (WTO) provides a leeway for 'new issues' to enter the multilateral trade agreements, although all members need to agree to this.
- This policy brief initiates discussions on some of the identified emerging 'new issues' which have already appeared in some of the mega free trade agreements (FTAs).
- The provisions around investments in mega FTAs have expanded in their coverage and scope. The definition of investments covers every kind of asset including shares, stocks, bonds and debentures. Further, performance requirements, such as export targets and domestic content requirements, are being discouraged in the emerging trade agreements. Many of these provisions are being legally enforceable making investor–state dispute settlement (ISDS) mechanisms an emerging issue of contention.
- Provisions around transparency and competitive access to government procurement are emerging in some of the mega FTAs. This briefing paper discusses the benefits and costs of joining a government procurement agreement (GPA) and also highlights the issues around coverage of entities, thresholds and set asides.
- Very few trade agreements include commercial activities of state-owned enterprises in their ambit. Many countries do not have state-owned enterprises but those that have might find it difficult to identify state-owned enterprises with commercial activity, as these enterprises have in-built social objectives in their operations.
- It is debateable whether trade agreements are appropriate tools to address labour standards and whether the WTO is an appropriate institution to deal with labour rights in the workplace as violations are much higher in non-tradeable sectors than in tradeable sectors.

2. Context

The 10th Ministerial Meeting of the World Trade Organization (WTO) in Nairobi (MC10) has the potential of becoming a watershed for multilateral trade negotiations, which have made a very slow progress since the initiation of the Doha Development Round in November 2001. The Nairobi Ministerial Declaration notes that 'less progress has been made in Agriculture and other central components of the WTO's negotiating agenda, namely NAMA, Services, Rules and Development'. Further, the declaration points out, 'While we concur that officials should prioritize work where results have not yet been achieved, some wish to identify and discuss other issues for negotiation.' This brings to the forefront the possibility of 'new issues' entering the multilateral negotiations, although their entry has to be agreed by all members.

This policy brief discusses some of the likely 'new issues' which may be tabled for entering the negotiations, as it becomes important to identify and analyse them, and assess their likely legal and economic implications for developing and least developed countries (LDCs) and small states. Countries can then decide what or whether they should support the entry of the 'new issues' in the negotiations. Although detailed discussions on the provisions and implications around these issues is beyond the scope of this policy brief, some pertinent questions are raised, which may help countries to assess the potential opportunities and challenges associated with them.

3. The likely 'new issues' which may be tabled for multilateral trade negotiations

Many of the 'new issues' which are now being discussed by trade experts as likely candidates for the multilateral negotiations are not so new and discussions began in mid-1990s. At the Ministerial Conference in Singapore in December 1996, four new issues were identified and introduced to the WTO agenda: trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation. These came to be known as 'Singapore issues'. In 1997, WTO members were informed that the WTO had begun a study on 'new issues' (WTO Focus 1997). The working groups on the relationship between trade and investment and trade and competition policy held their first meetings in June 1997 and July 1997 respectively. On 21 July 1997, the Working Group on Transparency in Government Procurement completed its second session while the Council for Trade in Goods continued discussions on trade facilitation. While three of the four issues were dropped in the July 2004 package, the fourth issue was delivered as a trade facilitation agreement in the Bali Ministerial Meeting in 2013.

Some of the 'new issues' in 2016 may have their origins from the 'Singapore issues': investment issues, competition policy and transparency in government procurement. These issues are already in place in different trade agreements, especially in some of the economic partnership agreements, mega free trade agreements (FTAs) like the Trans-Pacific Partnership Agreement (TPPA), the Regional Comprehensive Economic Partnership (RCEP), plurilateral agreements like the Agreement on Government Procurement (GPA), and regional agreements like the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement (ACIA) in 2009. However, bringing these issues into the multilateral negotiations may pose opportunities and challenges, which may differ from country to country. To the list of 'Singapore issues', some additional 'new issues' may be added, especially those that are now part of some of the mega FTAs, including the Trans-Pacific Partnership (TPP). Taking a clue from the existing regional, plurilateral and mega FTAs, some of the likely 'new issues' which may be tabled for negotiations in addition to the 'Singapore issues' can be identified as labour standards, state-owned enterprises, environment and electronic commerce. This policy brief discusses four of the above listed 'new issues': trade and investment, transparency in government procurement, state-owned enterprises and labour standards.

4. Provisions for trade and investment

One of the most contentious 'new issues' which may enter the multilateral negotiations is trade and investment. While this was rejected as an issue to be included in multilateral negotiations in 2004, an investment chapter has appeared in many trade agreements and exclusive investment treaties have been signed bilaterally and regionally. The 21st century trade agreements which give the most extensive coverage of investment matters include the 2012 US Model Bilateral Investment Treaty (US Model Treaty), the ASEAN Comprehensive Investment Agreement, 2009 ACIA, the TPP and the Transatlantic Trade and Investment Partnership (TTIP). There are three provisions around investment issues that need to be highlighted: coverage of investment, performance requirements and set-asides.

4.1 Coverage of investment

For many countries that want to encourage foreign direct investment (FDI) inflows into their economies, investment agreements are a way of assuring a stable investment environment to attract foreign firms. However, the definition of 'investment' can go much beyond FDI. The US Model Treaty, the ACIA, the TPP and the TTIP all provide a broad asset-based definition of investment where 'investment' means every kind of asset owned or controlled by an investor, including but not limited to:

- movable and immovable property and other property rights such as mortgages, liens or pledges
- shares, stocks, bonds and debentures; intellectual property rights
- claims to money or to any contractual performance related to a business and having financial value
- rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts
- business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.

An important implication of such an extensive coverage of investment is that the provisions for investment protection such as national treatment, most favoured nation treatment, and minimum standards of treatment would apply to all the above kinds of investments, except for those listed in non-conforming measures in the annexes. These could also extend to both pre- and post-establishment phases like in the US Model Treaty and the TPP.

4.2 Performance requirements

Performance requirements are mandatory conditions that investors need to perform, either as a precondition to entry into a country or to receive a specific incentive. This FDI development policy tool has been used by developed as well developing countries. Commonly used performance requirements have been export targets, transfer of technology, local content requirements, and so on. However, the US Model Treaty and the TPP have a long list of prohibited performance requirements, which go beyond what is included in the WTO Trade-Related Investment Measures (TRIMs) Agreement. Should investment issues be included in multilateral negotiations, there is a possibility that the list of prohibited performance requirements may expand beyond those in the TRIMs. This would imply that countries will be prohibited from relating investments of any kind to any of the performance targets like exports, domestic content, linking volume and value of imports to exports, domestic sales, and transfer of technology and knowledge locally.

4.3 Investor-state dispute settlement

Investor-state dispute settlement (ISDS) is one of the most controversial provisions of investment treaties. ISDS allows an investor to directly sue the state for violation of any of the principles of an investment treaty. The process also involves setting up an arbitration tribunal outside the control of any government, which then decides on the specific aspects of the case. Investors take their case directly to this panel rather than to the courts in the host country. With weaker legal and institutional frameworks, and wide interpretations of investment treaty provisions, this could open floodgates of litigations for developing countries and increase the complexity of policy-making. Developing countries sometimes lack the data and skills to determine the quantitative impact of activities of transnational corporations on their local economy. Defending cases can therefore be extremely challenging.

ISDS is a novel creation of investment treaties and arguably one of the strongest tools for foreign investors to manage political risk. However, it may expose governments to huge claims from multinationals outside their judicial systems and in some cases may also restrict them from introducing new laws and regulations with social objectives.

Countries that rely heavily on foreign investment, have strong legal and institutional frameworks, and the capacity to fight legal disputes, but are struggling to improve their domestic investment regimes, can benefit from these tightened investment provisions. One of the challenges that most developing countries face is that, given their institutional frameworks and resources, these investment rules may be fairly difficult to implement. Mere adoption of rules without implementation can result in increasing the vulnerability of developing countries to international disputes and severely restrict their policy space for investments, especially for FDI.

For a detailed discussion on this issue see Abebe (2016).

5. Provisions for government procurement

Governments are one of the largest buyers in the domestic market and procure around 30–40 per cent of gross domestic product in developing countries. Government procurement has been traditionally used as a development policy tool both by the developed as well as developing countries, especially for encouraging development of small and medium enterprises (SMEs). Further, the incentives to supply to the government has been leveraged by many governments for channelizing domestic investments in a particular direction and boosting growth of identified industries. However, in many countries lack of transparency in government procurement has been identified as one the major causes of corruption.

In 1996, the plurilateral GPA was put in place in the WTO as an attempt to increase transparency in government procurement and to provide equal access to this large and growing market to domestic and foreign firms. Studies highlighted some of the benefits of acceding to the GPA:

- Competition resulting from the agreement can lead to better use of taxpayers' money as the goods and supplies can be sourced from more efficient producers at lower cost.
- The GPA may improve the market access available for domestic producers as they become eligible to export to other countries' government procurement market.
- The transparency requirements reduce uncertainty for potential bidders (domestic and foreign), which may encourage them to compete for government contracts and reduce prices paid by the state.
- Transparency requirements control 'corruption' and ensure accountability.

On the other hand, costs associated in acceding to the GPA are mainly threefold:

- The implementation cost of switching over from the existing procurement regime to one that complies with multilateral obligations would rise. This would include costs of putting into place a system for supplier registration, bid challenge procedures, disclosure of tender results, and so on. Finger and Schuler (2001) estimated that the implementation cost of some of the WTO agreements was around US$150 million for each country – more than a full year's development budget in many LDCs.
- Complying with obligations related to compiling and reporting statistics on government procurement could entail huge costs.
- This could result in an adverse impact on domestic industry if the reciprocal market access given is large. This may be more acutely felt by SMEs, which may not in a position to compete with big foreign producers.

Further, government procurement has been used as policy tool for:

- national security, especially defence-related procurement
- redistributive goals, e.g. in a slowdown of higher public procurement from domestic entities through local content requirements
- industrial and regional development to encourage procurement from backward regions
- promoting SMEs
- supporting state-owned enterprises.

Irrespective of the above associated costs, government procurement is increasingly featuring in trade agreements. Since 2000, out of the 24 EU FTAs, 13 have a separate public procurement provision. The major differences in the provisions around government procurement in different trade agreements come from coverage of entity (central government entity, sub-central government entity and other entities), coverage of goods and services, thresholds and set-asides. While construction has been excluded in many bilateral and regional government procurement agreements, some mega FTAs like the TPP include construction.

For detailed discussions on this issue see Bandele (2016).

5.1 Coverage of entity and thresholds

In most trade agreements only central government entities are included, however recent mega FTAs like the TPP include sub-central government entities as well. There can be vast differences in the share of central government entity in total public procurement across countries. For example, central level procurement ranges from 80 per cent in New Zealand to merely 8 per cent in Belgium. Sub-central public authorities represent 87 per cent of the public procurement expenditures in Germany and Canada and 86 per cent in Japan (Cernat and Kutlina-Dimitrova 2015). In the TPP, some members do not have sub-central government entities covered, including the USA; however, the final provision in Chapter 15 reinforces the possibility of holding further negotiations and requires the parties to commence negotiation with a view to achieving expanded coverage, including sub-central coverage, no later than three years after the date of entry into force of the agreement. Further, although the thresholds for central government procurement are higher for Brunei Darussalam, Malaysia and Vietnam in goods, services and construction services, these countries are required to equalise their thresholds to those of developed countries after their adjustment period (five years for Brunei Darussalam; eight to ten years for Malaysia in goods and services, respectively; and five to ten years for Vietnam).

Very few developing countries are members of the WTO GPA, but most developed countries in the TPP are already members of the WTO GPA. While Canada, Japan and the USA get extended market access, the TPP would not require significant changes to their procurement measures and practices as the two largely comply with the requirements of the TPP.

5.2 Set-asides

The GPA includes a provision for set-asides, which permit procuring entities not to apply non-discriminatory provisions in government procurement. Set-aside provisions can be applied on the basis of either the total value of procurement to which non-discrimination rules will not apply or as a percentage of total value of procurement. While set-asides provide some space for fulfilling social objectives of the procurement, these have to be negotiated. In the TPP, Australia, Canada and the USA have kept some set-asides. The USA has chosen to exclude a number of industries including procurement of any agricultural good made in furtherance of an agricultural support programme. Set-asides are also taken for SMEs by Australia and the USA. The definition of SMEs differs and large firms in developing countries can at best compete with SMEs in developed countries for procurement contracts.

Multilateral commitments in the GPA can be useful for countries which are already party to the GPA bilaterally or regionally, but can be extremely challenging for countries that are non-party to the GPA. Further, countries that have a large number of SMEs and have been using government procurement as a tool for creating demand for their products may find themselves negotiating away their policy space. All members have to agree to the set-asides as well as entities and thresholds to be included; this could make government procurement agreements more challenging for countries with limited negotiating capacity.

6. Provisions for state-owned enterprises

Competition policy has been closely linked to trade and investment. In order to deter businesses from limiting free and fair competition, and to discourage the formation of monopolies through cartels, mergers and so on, a working group on trade and competition policy was set up in the WTO under the Singapore Ministerial Conference in 1996. However, the July 2004 package decided that trade and competition policy would not form part of the Doha Development Agenda.

Many countries have some form of competition policy in place in their national laws and regulations. But one of the areas which has been obviated from competition laws in most of countries is state-owned enterprises, as state-owned enterprises have been set up in many strategic industries to fulfil social objectives and to generate income for the governments. In many countries these industries and services include banking, insurance, telecoms, transportation, infrastructure, oil and gas, and utilities.

Almost all FTAs have kept state-owned enterprises out of their ambit, except for a few such as the TPP. While early discussions in the TPP focused on strengthening the chapter on competition, the final text included a separate agreement on state-owned enterprises and designated monopolies (Chapter 17), with country-specific annexes detailing their exceptions to state-owned enterprise commitments. Proponents of the TPP argue that provisions on state-owned enterprises are a modest first step towards disciplining unfair advantages that state-owned enterprises have over foreign firms, and this will promote 'competitive neutrality'. However, a criticism levied against including state-owned enterprises in the ambit of competition regulations is that in many countries state-owned enterprises are set up in strategic areas with long gestation periods, which make it difficult for domestic firms to operate and for these state-owned enterprises to fulfil key social objectives.

In the TPP, provisions around state-owned enterprises apply to large commercially focused state-owned enterprises, which are profit-oriented with direct government ownership of more than 50 per cent of share capital, ownership interests that result in control of more than 50 per cent of voting rights, or where members can appoint the majority of members of the management body. This implies that all state-owned enterprises which are engaged in 'commercial activities' have to operate on non-discriminatory commercial principles and should not harm competitors. If they do, 'injury' can be claimed, making these provisions enforceable. The TPP also includes transparency rules: members have to identify state-owned enterprises and their specific programmes of assistance clearly whenever requested by any TPP member. The threshold level set for state-owned enterprises is SDR200 million, to be adjusted every three years. Non-conforming measures have to be listed; for example, Vietnam has listed all current and future activities of the Ministry of Defence as non-conforming measures.

Although the high threshold levels, exemptions and definition of state-owned enterprises (which limits it to commercial activity) provide sufficient flexibility to members of TPP to continue with some of their key activities of state-owned enterprises, the ball has been set rolling and may gather speed. There may be doubts about whether the functions of state-owned enterprises in some countries are clear-cut enough for the provisions to apply. In many countries, especially developing and LDCs, a state-owned enterprise has a hybrid of commercial and social or public good functions, e.g., in sectors like railways and postal services. It may become extremely difficult for countries in such areas to demarcate whether a state-owned enterprise is undertaking commercial activity or not. Some railway lines may be operating commercially while others may be serving social objectives. These provisions may also limit the government's ability to experiment with development policy tools. For example, it may become extremely difficult for governments to restore the functions of the state-owned enterprises if the market model fails to provide necessary public utilities of good quality at accessible prices.

While many countries, especially in Africa, may not currently have many state-owned enterprises engaged in commercial activities, decisions to commit to disciplining these activities to enhance competition need to be taken carefully as state-owned enterprises are powerful development instruments in the hands of governments.

For detailed discussion on this issue see Haywood (2016).

7. Provisions for labour standards

Labour standards in international trade are becoming increasingly contentious. This issue was brought up in the WTO but the 1996 Singapore Ministerial Conference recognised the International Labour Organization (ILO) as the competent body to negotiate labour standards and it was suggested that the WTO Secretariat would work together with the ILO on technical issues for 'coherence' in global economic policy-making. Currently, none of the WTO councils and committees works on labour standards.

Labour standards cover a wide range of areas, including child labour, forced labour, trade unions and strikes, minimum wages, working conditions and working hours. While all WTO members agree on the internationally recognised 'core' labour standards – no forced labour, no child labour and no discrimination at work (including gender discrimination) – there is a raging debate on other issues. In general, it is perceived that while advanced countries emphasise the importance of there being greater international coherence in labour policies and consider that trade provides a powerful tool for improving workplace conditions, developing countries consider any further steps in this direction as enhancing protectionism and depleting the comparative advantages of developing countries, which have low wage labour.

While the USA and EU have included some provisions of labour standards in their bilateral and regional FTAs, this has occurred with varying degrees of enforcement. The majority of US FTAs cover the ILO core labour standards and some FTAs include cash standards on minimum wages, hours, and occupational health and safety. While these are enforceable in the partner countries' national laws, the ILO core standards are enforceable in very few US FTAs. In contrast, the EU offers additional market access to countries enforcing the ILO core principles (Bakhshi and Kerr 2010).

The first mega-FTA engaging developing and developed countries to include labour standards is the TPP. Under Chapter 19, TPP members agree to maintain laws and practices governing minimum wages, hours of work, and occupational safety and health. More importantly, these members also agree to discourage imports of goods produced by forced labour or child labour, or that contain inputs produced by forced labour or child labour imported from another country, regardless of whether the source country is a TPP member or not. Further, commitments in the chapter are enforceable and subject to dispute settlement.

There is no doubt that small states, LDCs and developing countries want to improve their labour standards, but it is not clear whether doing it through trade policy is the most appropriate and effective method, especially as most labour violations take place in non-tradeable sectors and the unorganised sector. While a rising number of US FTAs now include enforceable labour rights, the impact of these on the existing labour standards of partner countries (especially developing countries) is yet to be established. Ongoing research suggests that ratification is endogenous – countries that already have high standards tend to ratify conventions because the cost is low (Salem and Rozental 2012). There is an urgent need for developing countries to improve their labour standards in tradeable and non-tradeable sectors but to what extent an FTA can be the policy tool to achieve this goal remains doubtful.

For detailed discussion on this issue see Aryada (2016).

8. Conclusion

With the widening of the coverage and scope of 21st century trade agreements, many new provisions are being introduced and existing provisions are being tightened in order to provide a level playing field to domestic and foreign enterprises in areas that impact on international trade. Provisions around investments, government procurement, state-owned enterprises and labour standards are few such provisions, among others, which may be considered for multilateral negotiations. The implications of including these provisions may differ widely not only between developed and developing countries, but also among developing countries. Interests and concerns around these provisions largely depend on existing laws and regulations as well as practices and institutions in developing countries. While provisions for state-owned enterprises may be extremely important for some developing countries, in others state-owned enterprises may not exist. Similarly, while multilateral negotiations on investments may be favoured by some small states which lack negotiating capacity in this area, and therefore may prefer multilateral negotiations, it may be highly contentious for others. Bringing 'new issues' into the ambit of multilateral negotiations may further slowdown the pace of multilateral negotiations, making the conclusion of the Doha Development Agenda a distant reality.

Note

1 The author is grateful for the comments received from the participants of the workshop 'Building Capacity on Emerging New Issues in Multilateral Trade Negotiations' held in Colombo and Nairobi.

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