Emerging "New Issues" in Multilateral Trade Agreements

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Summary

- *The 10th WTO Ministerial Declaration 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 FTAs.*
- *The provisions around 'investments' in mega-FTAs have expanded in their coverage and scope. The definition of investments cover every kind of asset including shares, stocks, bonds, debentures, etc. Further, performance requirements, like export targets, domestic content requirements, etc. 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. The paper discusses the benefits and costs of joining 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 (SOEs) in their ambit. Many countries do not have SOEs but for those who have, it may become difficult to identify SOEs with commercial activity, as by the very definition these enterprises have in-built social objectives in their operations.*
- *Labour standards in trade agreements raises a pertinent question on whether trade agreements are appropriate tools and WTO an appropriate institution for ensuring labour rights in work place as violations are much higher in the non-tradeable sectors.*

Context

The 10th WTO Ministerial Meeting in Nairobi (MC10) has the potential of becoming a watershed for multilateral trade negotiations, which have made a very slow progress

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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 that "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.

In this context, it becomes important to identify and analyse these "new issues" which may enter the multilateral negotiations and assess their likely legal and economic implications for the developing countries as well as least developed countries (LDCs) and small states. The countries can accordingly decide what/whether they should support the entry of the "new issues" in the negotiations. This policy brief discusses some of the likely "new issues" which may have the possibility of being tabled for entering 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/challenges associated with them.

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, i.e., 'trade and investment', 'trade and competition policy', 'transparency in government procurement', and 'trade facilitation'- and were introduced to the WTO agenda. These came to be known as 'Singapore issues'. In 1997, WTO members were informed that WTO had begun a study on "new issues"[2] 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, 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 2004 July package, the fourth issue was delivered as trade facilitation agreement in Bali Ministerial Meeting in 2013.

Some of the "new issues" in 2016 may have their origins from the 'Singapore issues'. The investment issues; competition policy; and transparency in government procurement are some of the identified current "new issues". These issues are already in place in different trade agreements, especially in some of the Economic Partnership Agreements (EPAs); mega FTAs like Trans Pacific Partnership Agreement (TPPA); Regional Comprehensive Economic Partnership (RCEP); plurilateral

[2] https://www.wto.org/english/res_e/focus_e/focus20_e.pdf

agreements like Government Procurement Agreement (GPA); and regional agreements like ASEAN Comprehensive Investment Agreement (ACIA). However, bringing these issues into the multilateral negotiations may pose opportunities/ challenges which may differ from country to country. To the list of 'Singapore issues', some additional 'new issues' may be added, especially those which are now part of some of the mega FTAs including 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," namely trade and investment; transparency in government procurement; State-owned enterprises; and labour standards.

Trade and Investment[3]

One of the most contentious 'new issue' which may enter the multilateral negotiations is the 'trade and investment' issue. 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 as well as regionally. The 21st century trade agreements which give the most extensive coverage of investment issues include -2012 U.S. Model Bilateral Investment Treaty (US Model Treaty), ASEAN Comprehensive Investment Agreement, 2009 (ACIA), TPP and TTIP. There are three provisions around investment issues that need to be highlighted. These are:

Coverage of investment: For many countries which want to encourage foreign direct investments (FDI) inflows into their economies, investment agreements are a way of assuring a stable investment environment to attract the foreign firms. However, the definition of 'investment' can go much beyond FDI. The US Model Treaty, ACIA, TPP and 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; and
- 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.

[3] For detailed discussion on this issue see Opeyemi Abebe (2016), 'Emerging Disciplines on Investment in Trade Agreements,' Commonwealth Secretariat, Briefing Note (2).

An important implication of such an extensive coverage of investment would imply that the provisions for investment protection such as national treatment; most favoured nations 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 US Model Treaty and TPP.

Performance Requirements: Performance requirements (PRs) are mandatory conditions that investors need to perform, either as a precondition to entry into a country or to receive a specific incentive. This has been one of the FDI-development policy tool used by developed as well developing countries. Commonly used PRs have been export targets; transfer of technology; local content requirements; etc. However, model US Treaty as well as TPP has a long list of prohibited PRs which go beyond what is included in WTO TRIMs. Should investment issues be included in multilateral negotiations, there is a possibility that the list of prohibited PRs 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, transfer of technology/knowledge locally, etc.

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 of an arbitration tribunal outside the control of any government, who then decide on the specific aspects of the case. Investors directly take their case to this panel rather than the courts in the host country. With weaker legal and institutional frameworks, wide interpretations of investment treaty provisions this could open floodgates of litigations for developing countries and increase the complexity of policy making. Further 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 quite 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 restricts them in introducing new laws and regulations for seeking social objectives.

Countries which rely heavily on foreign investments and have strong legal & institutional frameworks as well as 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 of the 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 in fact result in increasing the vulnerability of the developing countries to international disputes and severely restrict their policy space in the area of investments, especially with respect to FDI.

Provisions around Government Procurement (GP)[4]

Governments are one of the largest buyers in the domestic market and procure around 30-40% of GDP in developing countries. Government procurement has been traditionally used as a development policy tool both by the developed as well as the 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 GP has been identified as one the major causes of corruption.

In 1996, plurilateral GPA was put in place in the WTO as an attempt to increase transparency in GP as well as providing equal access to this large and growing market to both domestic as well as foreign firms. Some of the benefits of acceding to GPA as highlighted by the studies are: *firstly*, competition resulting from the agreement can lead to a better utilization of tax payer's money as the goods and supplies can be sourced from more efficient producers at lower costs; *secondly*, GPA may improve the market access available for domestic producers as they become eligible to export to other countries' government procurement market; *thirdly,* the transparency requirements reduce uncertainty for potential bidders (both domestic and foreign), which may encourage them to compete for government contracts and lowers prices paid by the state; *fourthly,* transparency requirements control "corruption" and ensure accountability.

On the other hand, costs associated in acceding to the GPA are mainly three fold. First, implementation cost of switching over from the existing procurement regime to a regime that is compliant 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 etc. Finger and Schuler (2001)[5] estimated that the implementation cost of some of the WTO agreements was around 150 million US dollars for each country. This would be more than a full year's development budget in many of the LDCs. Second, complying with obligations related to compiling and reporting statistics on government procurement could entail huge costs. Third, 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 in case of defence related procurement

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[4] For detailed discussions on this issue see Bandele, O., (2016) 'Emerging Disciplines on Government Procurement in Trade Agreements,' Commonwealth Secretariat, Briefing Note (6).

[5] Finger, J. Michael, and Philip Schuler. 2001. "Implementation of Uruguay Round Commitments." In Bernard Hoekman and Will Martin, eds., Developing Countries and the WTO: A Pro-active Agenda. Oxford: Blackwell Publishers.

- Redistributive goals- e.g., in A slowdown higher public procurement from domestic entities through local content requirements.
- Industrial and regional development-encourage procurement from backward regions
- Promote small and medium enterprises (SMEs).
- Support of state-owned enterprises.

Irrespective of the above associated costs, GP 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 GP 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 GPAs, some mega FTAs like TPP include construction.

Coverage of Entity and Thresholds: In most trade agreements only central government entities are included, however recent mega FTAs like TPP include sub-central government entities as well. It is important to note that 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% in New Zealand to merely 8% in Belgium. Sub-central public authorities represent 87% of the public procurement expenditures in Germany and Canada and 86% in Japan6. In TPP, some members do not have sub-central government entities covered, including USA, however the final provision in Chapter 15 reinforces the possibility to hold 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 threshold for central government procurement are higher for Malaysia, Viet Nam and Brunei Darussalam in goods, services and construction services, these countries are required to equalise their thresholds to that of developed countries after their adjustment period (which is 5 years in case of Brunei Darussalam; 8-10 years for Malaysia in goods and services respectively; and 5-10 years in case of Viet Nam).

It is interesting to note that very few developing countries are members of WTO GPA, most of the developed countries in TPP are already members of WTO GPA. For Canada, Japan and USA, while they get extended market access, TPP would not require significant changes to their procurement measures and practices as the two largely comply with the requirements of the TPP.

Set Asides: GPA includes a provision for set-asides, which permit procuring entities not to apply non-discriminatory provisions in government procurement. Set asides 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 do provide some space for fulfilling social objectives of the procurement, these have to be negotiated. In TPP, Australia, Canada and US

[6] See Cernat and Kutlina-Dimitrova (2015), International Public Procurement: From Scant Facts to Hard Data, RSCAS PP 2015/08

have kept some set asides. United States has chosen to exclude a number of industries including procurement of any agricultural good made in furtherance of an agricultural support program. Set-asides are also taken for SMEs by USA and Australia. It is to be noted that definition of SMEs differ and large firms in developing countries can at best compete with SMEs in the developed countries for the procurement contracts.

Multilateral commitments in GPA can be useful for countries which are already party to GPA bilaterally or regionally but can be extremely challenging for countries which are non-party to GPA. Further, countries which have a large number of SMEs and have been using GP 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 GPA more challenging for countries with limited negotiating capacity.

Provisions around State -Owned Enterprises[7]

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

It is important to note that 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 the countries is -state-owned enterprises (SOEs), the reason being that SOEs have been set up in many strategic industries to fulfil social objectives as well as to generate income for the governments. In many countries these industries/services include banking, insurance, telecom, transportation, infrastructure, oil and gas and utilities.

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

[7] For detailed discussion on this issue see Kirk Haywood (2016), ‘Emerging Disciplines on State owned Enterprises in Trade Agreements,’ Commonwealth Secretariat, Briefing Note (3).

In TPP, provisions around SOEs apply with respect to large commercially focused SOEs which are profit-oriented with direct government ownership of more than 50% of share capital; ownership interests that result in control of over more than 50% of voting rights or where members have ability to appoint majority of members of the management body. This implies that all SOEs which are engaged in 'commercial activities' have to operate on non-discriminatory commercial principles and should not harm competitors and if it does, 'injury' can be claimed making these provisions enforceable. TPP also includes transparency rules which means that members have to clearly identify SOEs and their specific programs of assistance whenever requested by any TPP member. The threshold level set for SOEs are 200 million SDR, to be adjusted every three years. Non-conforming measures (NCMs) have to be listed, for example, Viet Nam has listed all current and future activities of Ministry of Defence as NCMs.

Although the high threshold levels, exemptions and definition of SOEs which limits it to commercial activity, provide sufficient flexibilities to the members of TPP to continue with some of their key activities of SOEs, it should be noted that -the ball has been set rolling and may gather speed. There also arises some doubts on whether the functions of SOEs in some countries are clear-cut enough for the provisions to apply. In many countries, especially developing countries and LDCs, a SOE 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 an SOE is undertaking commercial activity or not. Some railway lines may be operating on commercial basis while others may be serving social objectives. These provisions may also limit the Government's ability to experiment with respect to development policy tools e.g., it may become extremely difficult for the governments to restore the functions of the SOEs, if market model fails in providing necessary public utilities of good quality at accessible prices.

While many countries, especially in Africa, may not currently have many SOEs engaged in commercial activities, the decision on taking commitments on disciplining these activities for enhancing competition needs to be carefully taken as SOEs are powerful development instruments in the hands of the governments.

Labour Standards[8]

Labour standards in international trade is increasingly becoming a contentious issue. This issue was brought up in the WTO but at the 1996 Singapore Ministerial Conference, a decision was taken where International Labour Organization (ILO) was recognised as the competent body to negotiate labour standards and it was suggested that WTO Secretariat will work together with ILO on technical issues for "coherence" in global economic policy-making. Currently, none of the WTO Councils and Committees work on labour standards (LS).

[8] For detailed discussion on this issue see Estella Aryada (2016), 'Emerging Disciplines on Labour in Trade Agreement' Commonwealth Secretariat, Briefing Note (4).

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

While US and EU have been including some provisions of labour standards in their bilateral and regional FTAs, these have been included with varying degrees of enforcement. The majority of US FTAs cover the ILO core labour standards and in addition some of these FTAs include cash standards on minimum wages; hours; and occupational health and safety. While these are enforceable in the partner countries’ national laws, in very few of the US FTAs, the ILO core standards are enforceable. The EU on the other hand offers additional market access to countries enforcing the ILO core principles[9].

The first mega-FTA engaging developing and developed countries to include labour standards is 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 that are produced by forced labour or child labour or that contains inputs used 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 on their labour standards, however, the question that arises is whether trade policy is the most “appropriate” and “effective” policy tool to do so, especially given the fact that most labour violations take place in the non-tradeable sectors as well as in the unorganised sector. While a rising number of US FTAs are now including enforceable labour rights, the impact of these on partner countries’ existing labour standards (especially developing countries) is yet to be established. Ongoing research in fact suggests that ratification is endogenous—that is, countries that already have high standards tend to ratify conventions because the cost is low (Salem and Rozental, 2012[10]). There is an urgent need for the developing countries to improve their labour standards both in tradeable as well as non-tradeable sectors but to what extent a FTA can be the policy tool for achieving this goal remains doubtful.

[9] Bakhshi, Samira, and William A. Kerr. “Labour Standards as a Justification for Trade Barriers: Consumer Concerns, Protectionism, and the Evidence.” The Estey Centre Journal of International Law and Trade Policy 11, no.1 (2010).

[10] Labor Standards and Trade: A Review of Recent Empirical Evidence, USITC, Journal of International Commerce and Economic, August 2012.

Conclusions

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 which 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. It is important to note that the implications of including these provisions may widely differ not only between developed and developing countries, but also among developing countries. Interests and concerns around these provisions largely depend on the existing laws and regulations as well as practices and institutions in developing countries. While provisions around SOEs may be extremely important for some developing countries, in others SOEs may not exist. Similarly, while multilateral negotiations on investments may be in 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” in the ambit of multilateral negotiations may further slow-down the pace of multilateral negotiations, making the conclusion of DDA a distant reality.

The Trade Competitiveness Section

The Trade Competitiveness Section provides technical assistance to Commonwealth member countries in four areas, namely market access; export development; export of services; and trade facilitation, in order to exploit opportunities offered by international trade. The Section works with government ministries, agencies, regulators and their stakeholders to provide assistance to develop their trade competitiveness. Areas of recent intervention include national trade policy formulation, export strategies, aid for trade strategies, competitiveness implications of trade agreements, trade facilitation and gendering trade policy.

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