Analytical Note
SC/TDP/AN/MC10/5
December 2015
Original: English

WTO's MC10:
The Call for 'New Issues' at the WTO and Implications for Developing Countries

Narratives concerning enhancing the participation of developing countries in 'Global Value Chains' (GVCs) and supporting micro, small and medium enterprises have featured prominently in the WTO and other international organizations. These have intensified in the run up towards the Ministerial Conference in Nairobi. These discourses on GVCs and MSMEs have often been linked to making the case to 'reinvigorate the WTO' and to address new trade-related issues. The scope of the term 'new issues' is not clear. It could include the remaining three Singapore Issues (i.e. investment, competition, and transparency in government procurement') and also a non-exhaustive list of other issues.

Experts considering the challenges associated with discussing the Singapore issues at the WTO pointed out that these are 'non-trade' issues that do not belong to the WTO. If these issues are brought into the WTO, and WTO principles are applied to them, developing countries will be at a great disadvantage and would lose a great deal of their economic sovereignty, and their ability to make national policies of their own regarding economic, financial, social and political issues. The exercise undertaken in the dedicated working groups (between 1997 and 2003) showed that there are very wide gaps in the approaches among WTO Members on these issues, in addition to disagreement and lack of clarity in regard to the substance, implications and rationale of prospective multilateral rules in these areas.

This note provides a brief on the challenges associated with discussing investment, competition, transparency in government procurement, and an expanded mandate on e-commerce at the WTO.

December 2015
Geneva, Switzerland

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BACKGROUND POINTS

Global Value Chains and Fostering Participation of MSMEs; A Framing Narrative for 'New Issues'

– Narratives concerning enhancing the participation of developing countries in 'Global Value Chains' (GVCs) and supporting micro, small and medium enterprises have featured prominently in the WTO and other international organizations like the OECD and the World Bank, intensifying in the run up towards the Ministerial Conference in Nairobi. These ideas are clearly intended to influence the direction of the negotiations at the WTO.

– These discourses on GVCs and MSMEs have often been linked to making the case to 'reinvigorate the WTO' and to address new trade-related issues considered by some as necessary in order to keep the WTO relevant given the evolution of the global economy. An indirect link between the discourse on GVCs and that on MSMEs was reflected in a communication by few WTO Members entitled "Fostering the Participation of Micro, Small, and Medium Enterprises in Regional and Global Markets"[1], which called on "the General Council [to] consider the most appropriate arrangement to facilitate the exchange of information and experiences among Members regarding the opportunities and challenges of MSMEs…[taking] due account … of the relevant work of other international organizations, including the ITC, UNCTAD, and the World Bank…".

– A closer look at the work by the World Bank and other international organizations in the field reveals an extensive agenda highly focused on liberalization and non-trade 'behind the borders' regulatory elements. A paper by the OECD and the World Bank, entitled "Inclusive Global Value Chains: Policy options in trade and complementary areas for GVC integration by small and medium enterprises and Low-income Developing Countries"[2], laid out the view of the organizations on the factors that could enable better integration in GVCs and strengthen the participation of small and medium sized enterprises in these chains. When presenting this paper to the G20, the Secretary General of the OECD pointed out that "the OECD and the World Bank have put together a comprehensive action plan and defined priority policy actions that can be taken by G20 countries, either individually or collectively", adding that "open trade and investment policies should be at the center of the policy choices: in particular, priority actions must be taken to implement and ratify the WTO Trade Facilitation Agreement, alongside investment in hard and soft infrastructure that would allow goods and services to flow more easily across borders"[3].

[1] Communication from Brunei Darussalam, Lao PDR, Malaysia, and the Philippines (WT/GC/W/708), 19 November 2015.
[2] See: Report available at World Bank website http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/12/11/090224b083c499d8/2_0/Rendered/PDF/Inclusive0glob0developing0countries.pdf
[3] Istanbul G20 Trade Ministers Meeting: Presentation of the OECD-WBG inclusive global value chains report, Remarks by Angel Gurría, Secretary-General, OECD (6 October 2015, Istanbul, Turkey)

- The paper focuses on the need to address essential tariff barriers arguing that trade costs get multiplied when goods traverse multiple borders, rules related to foreign direct investment, convergence between dominant private and public standards, 'reforming'- both nationally and in coordination with other countries- business service sectors in key network industries such as logistics, supply chain management, ICT-related services, e-commerce, and professional services, enhancing 'rigorous' intellectual property legislation to protect innovative assets, and bringing competition principles to the international level of policy. Several of these areas, including investment rules, broad mandates on e-commerce in goods and services, competition rules, and the broader concepts of GVCs and MSMEs have been mentioned by few delegations of WTO Member countries as 'new issues' for the inclusion in the future work of the organization[4].

- Abhijit Das points out that "*using the recommendations of the study as the basis for initiating negotiations at the WTO for facilitating GVC trade would not only erode policy space in developing countries, but may not result in deepening integration of developing countries' firms in GVCs*"[5].

- In the same line, Manuel Montes highlights that "*[W]hat appears to be happening is that the set of standard policy prescriptions applying to trade liberalization are being resurrected on the occasion of the new discovery of GVCs. [Yet], because GVCs are by nature product, service, and even company specific there are very few general policy strategies to harness these for development interventions at the national level*"[6].

- The issues related to GVCs and small and medium enterprises are not new issues; they have been long debated among developing countries, which focus on the need for trade and industrial policies in order to achieve growth, break away from the commodities and middle-income trap, and move up from the bottom end of the commodity chain[7]. Economic diversification and industrial development continue to constitute the main trade-related challenge of developing countries.

- The proliferation of the narrative on GVCs is part of a narrative on globalization that projects a certain strategy on the way trade negotiations and agreements, as well as global governance, and a number of national policies should take place[8]. Experts note that the GVC question is often posed as a stark choice between participating and not participating in value chains, despite the fact that that developing countries have always been involved in GVCs – for instance as exporters of raw materials. The proper question is 'how' countries participate in GVCs[9], and how they can deepen their production capacities, so that they can garner a bigger share of the value added in GVCs.

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[4] See Report by the Facilitators in regard to Consultations on Ministerial Declaration (WTO document JOB/TNC/55 of 29 October 2015), prepared in the run up towards the Nairobi Ministerial Conference.
[5] Abhijit Das (2015), « WTO Negotiations on Global Value Chains », paper presented at South Centre conference, November 2015.
[6] Manuel Montes (July 2013) "Harnessing Global Value Chains"
[7] See: Presentation by Ambassador Faizel Ismail at a meeting organized by the mission of Ecuador and the South Centre (July 2013), reported in the South Bulletin.
[8] Ibid. Faizel Ismail.
[9] See : Manuel Montes (July 2013) "Harnessing Global Value Chains"; South Centre Analytical Note (July 2013) "Global Value Chains From a Development Perspective", available at:

– Some experts have highlighted the important role of Regional Value Chains noting that typically, developing countries' firms enjoy greater value added as compared to their participation in GVCs[10]. However, negotiations on GVCs under the WTO could ultimately be designed to "*maximise competition in the manufacturing segment of the GVC, while raising barriers in some of the other segments. The overall impact would be to lower the income generated by firms that are typically engaged in manufacturing, while generating monopoly profits for developed countries' firms through enhanced IP protection. This has serious consequences for policy making affecting the ability to build capacity of local firms, establishing new industries, diversification of production base, enhancing value addition and weakening the bargaining position of domestic firms vis-a-vis the developed countries' lead firms*"[11].

On addressing 'new issues' in the outcomes of the Ministerial Conference in Nairobi

– "New issues" have been proposed by few Members as an item for consideration at the 10th WTO Ministerial Conference to be held in Nairobi. A report[12] by three Ambassadors selected to facilitate the process of discussions around a Ministerial Declaration for the Nairobi Conference makes reference to a listing of 'new issues', which are presented as issues that "could be pursued after Nairobi" or as "recurring issues" (See para. 4.17 of JOB/TNC/55). The report mentioned the following issues: e-commerce, investment, SMEs and MSMEs, global value chains, government procurement, consideration of Mode 5 in services, environmentally harmful subsidies, among other issues.

– It is worth noting that the facilitators' report did not reflect a weighted opinion in their report, thus is many cases did not clarify how many delegations have called for such 'new issues'. The report notes at the same time that "Delegations expressed different and often divergent views on whether non-DDA issues should be included in any post-Nairobi work (para. 4.15 of Job/TNC/55) and that "some delegations said that no new issues should be introduced before the conclusion of the DDA and stressed that even then, they could only be considered on an exploratory basis and for some, by explicit consensus" (para. 4.15 of Job/TNC/55).

– The scope of the term 'new issues' is not clear; thus caution is needed with this term. The terms 'new issues' were not used in previous ministerial declarations or decisions taken by WTO members. The use of these terms would provide very broad grounds to expand the exploratory or negotiations mandates of the WTO. This would extend beyond addressing 'investment' 'competition' and 'government procurement', which are usually

http://www.southcentre.int/wp-content/uploads/2013/08/AN_GVCs-from-a-Development-Perspective_EN.pdf

[10] See: South Centre Analytical Note (July 2013) "Global Value Chains From a Development Perspective", available at: http://www.southcentre.int/wp-content/uploads/2013/08/AN_GVCs-from-a-Development-Perspective_EN.pdf

[11] Abhijit Das (2015), « WTO Negotiations on Global Value Chains », paper presented at South Centre conference, November 2015.

[12] (JOB/TNC/55) entitled "Tenth Ministerial Conference- Consultations on Ministerial Declaration" (29 October 2015)

referred to as 'Singapore Issues' or 'new issues'[13]. It could include extensive rules on e-commerce as proposed in the context of negotiating TISA, energy and trade, among other issues.

In regard to the Singapore issues
(See the original mandate on Singapore Issues in Annex 1):

– Experts considering the challenges associated with discussing the Singapore issues at the WTO pointed out that these are 'non-trade' issues that do not belong to the WTO. For example, principles such as national treatment that were created for a regime dealing with 'trade issues' may not be suitable when applied to 'non-trade issues'. If these issues are brought into the WTO, and WTO principles are applied to them, developing countries will be at a great disadvantage and would lose a great deal of their economic sovereignty, and their ability to make national policies of their own regarding economic, financial, social and political issues[14]. Moreover, it was noted that "the discourse on competition policy entirely in terms of the traditional WTO framework of market access, national treatment, transparency etc is prejudicial to [developing countries'] development interests"[15].

– It is worth noting that developed countries might like to bring many non-trade issues in the WTO, not because it would strengthen the trade system, but because they would like to make use of the dispute settlement and enforcement system of the WTO[16].

– The exercise undertaken in the dedicated working groups on Relationship between Trade and Investment (between June 1997 and June 2003), Interaction between Trade and Competition Policy (between July 1997 and May 2003) and Transparency in Government Procurement (between May 1997 and June 2003) showed that there are very wide gaps in the approaches among WTO Members on these issues, in addition to disagreement and lack of clarity in regard to the substance, implications and rationale of prospective multilateral rules in these areas.

– This is why, the WTO membership, upon a push from developing countries, came to the agreement to freeze these discussions in 2004. Whilst the DDA is on-going, the July Framework on Investment, Competition and Transparency in Government Procurement sets a standstill on the possibility of tackling the Singapore issues under the WTO. Accordingly, if some Members want to pursue negotiations on these issues, they cannot do so unless there is consensus to overturn the July Framework language.

– The July 2004 Framework language provided that: "*the Council agrees that these issues (i.e. Relationship between Trade and Investment, Interaction between Trade and Competition Policy*

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[13] The Singapore Ministerial Conference held in December 1996 issued a Ministerial Declaration that established working group on the relationship between trade and investment, one on the interaction between trade and competition policy, and another to conduct a study on transparency in government procurement practices. See paragraphs 20 and 21 of the Singapore Ministerial Declaration.
[14] Martin Khor "Key Points on Positions for New Issues and New Round in the WTO" (2000)
[15] Ajit Singh and Rahul Dhumale (1999) "Competition Policy, Development and Developing Countries", South Centre, page 17.
[16] Martin Khor "Key Points on Positions for New Issues and New Round in the WTO" (2000).

and Transparency in Government Procurement), mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round" (Para. g of the Text of the 'July package' — the General Council's post-Cancún decision[17]).

- Experts have noted that: for agreeing on new issues to be brought into the WTO, developing countries must insist on a strict criteria[18], including:
  - the issue is a trade issues appropriate of the multilateral trade rules;
  - The WTO is the appropriate venue, and there are not venues that are more appropriate;
  - The issue is sufficiently 'mature', in that Members have an understanding of it and how it related to WTO and their interests;
  - If brought into the WTO, the issues and how it will be interpreted will clearly be to the interest of developing countries and the majority of the membership;
  - There must be consensus of all Members that the issues should be brought in, and how it should be brought in.

On the negotiations process:

- Previous negotiators have noted that "past experience in the GATT/WTO has shown that once negotiations get started on a subject at the initiative of the major developed countries, these end invariably in agreements according to their aims and objectives". It was also noted that "faced with stiff opposition, the major developed countries often use the technique of moving step by step to achieve their objectives,…first they persuade the developing countries to agree to have 'studies' and/or 'discussions' in working groups, then they push for the exercise to be upgraded to 'negotiations' towards new agreements"[19].

- It is important to note that there are several stages by which an issue could be explored if considered as an issue to be brought into the WTO. These include:

1. Explore the issue 'conceptually' to address whether it is adequate or accepted as an issues that is legitimate for discussion under the WTO.
2. If conceptually agreed, then explore it in a working groups set up to discuss the issues. Setting up the working group does not mean members agree to negotiate an agreement on the issue. The working group could conclude that there is no need for an agreement. The mandate of the working group and the points that the group will explore and study are very important matter that Members should attend to. Therefore, if there is already a working group on a new issues that is not beneficial, it is possible and important to argue that the issues is not suitable to be made a subject of an agreement, or that the study of the issues is incomplete and therefore more time is required to study the issue further.
3. A negotiating group should be considered only after a working group concludes that the issue is mature to proceed to negotiating phase.

[17] See : https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm
[18] Martin Khor "Key Points on Positions for New Issues and New Round in the WTO" (2000)
[19] B.L. Das.

Following is a brief on the challenges associated with addressing the Singapore issues and other 'new issues' under the WTO

INVESTMENT

- The Doha Ministerial Declaration addressed the relationship between trade and investment is paragraphs 20, 21, and 22, and provided that "*further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment*" (paragraph 22 of the DMD WT/MIN(01)/DEC/1, 20 November 2001). These discussions were put on hold as a result of the decision taken by the General Council as part of the July 2004 Framework Package[20].

- In the deliberations of the Working Group on the 'Relationship between Trade and Investment', a number of developing countries called for addressing the obligations of investors and home states of investors (See for example: Communication from India, China, Cuba, Kenya, Pakistan and Zimbabwe WT/WGTI/W/152, Communication from India WT/WGTI/W/148, Communication from China WT/WGTI/W/160). India called for "a binding code of conduct on investors with a further stipulation that it shall be enforced by home countries through a set of precise domestic laws that can be achieved by any host country" (page 2/3 of WT/WGTI/W/148). The majority of developing countries continue to oppose negotiations on multilateral rules on investment, including through explicitly opposing 'new issues' under the WTO negotiations agenda.

- Experts have pointed to the inappropriateness of establishing an investment regime and multilateral disciplines on investment under a trade organization. Trade-related aspects of investment has already been dealt with in under the TRIMS Agreement, and developing countries Members have indicated the challenges they face with this agreement including in the proposals they presented under the 'Implementation Issues' agenda and the special and differential treatment mandate of paragraph 44 of the Doha Ministerial Declaration. It is worth noting as well that a review process of the TRIMS

[20] Before this process was initiated at the WTO, and starting in 1995, Member countries of the Organization for Economic Cooperation and Development (OECD) started intense negotiations on a multilateral agreement on investment. The negotiations failed in 1998 when first France, and then other countries, withdrew, especially after mounting pressures from developing countries and a global movement of civil society organizations.

Agreement is mandated under Article 9 of the Agreement[21]. The review has not taken place. A submission by India and Brazil (JOB(04)/93, 2 July 2004) speaks of the need to look at the impact of TRIMS on industries and on level of FDI attraction and quality of FDI etc.

– The elements outlined below have been pushed by developed countries in the Working Group on the 'Relationship between Trade and Investment'. The experience under international investment treaties have revealed how these principles could be applied in a manner that significantly restraint countries' rights to regulate, and policy space in general. Below is a short brief:

- **National Treatment for foreign investors** – this standard when applied in the area of investment can and will most likely have a chilling effect on governments' ability to support the growth of local industries. This standard of national treatment stipulate that parties to the treaty shall accord investments by investors from the other party treatment that is no less favourable than that accorded to investments by its own nationals. The standard precludes the state from requiring performance requirements from the foreign investors differentiated from those required from the investments of their own nationals. Countries have often carved out several areas from the ambit of the 'national treatment' clause in their investment treaties, based on the overall economic considerations they have. Seeking to harmonize investment rules multilaterally, including through applying the national treatment principle across the board will be contrary to the realization that states need policy space to design investment rules through which to enable the contribution of FDI to the pace and pattern of industrialization.

- **'Most-favoured nation treatment'**- The 'most-favoured nation treatment' principle, in addition to 'national treatment' principle, pose significant challenges to the ability of countries to design investment policies relevant to their for industrialization and development objectives. Investment relations and policies are supposed to be elaborated based on the development and industrialization needs of countries. This implies that countries may choose to treat foreign direct investment coming from different countries differently, depending on the economic and development factors taken into consideration. This is why, countries have often been cautious in including the MFN clause under investment treaties. MFN could allow investors to claim higher standards of protection from the web of investment agreements their host country has besides the agreement between their host and home country.

- **Expropriation and indirect expropriation** – some Members can be expected to push for high standards of protection for investments, including 'indirect expropriation'. Expropriation is usually allowed but under strict conditions of compensation, requiring that expropriation be for public purpose, non-discriminatory thus not targeted at a

[21] *Article 9 "Review by the Council for Trade in Goods" provides that:* "Not later than five years after the date of entry into force of the WTO Agreement, the Council for Trade in Goods shall review the operation of this Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text. In the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy".

specific company or nationality, and in accordance with due process of law. Developed countries have covered 'indirect expropriation' under their investment agreements, or what is referred to as 'expropriation and measures tantamount to expropriation'. The latter covers cases where the state takes effective control of the investment but not through direct taking of the property. This would include for example a regulatory change that in effect result in halting the operations of the investment, even if the regulation sought to address issues of public interest such as health and environmental or safety conditions.

- **Limitations on performance requirements** – which would impose a wider range of prohibitions on investment measures compared to the TRIMS Agreement including for example on measures related to technology transfer; limits and conditions on equity; employment contribution; human resource development; rural development; housing and living conditions or contribution to research and development, etc.

- **Pre-establishment rights** – refers to the entry of investments and investors to a Member countries, offering foreign investors the right to entry and establishment with no or minimal conditions. Thus, each Party allows investors of other Parties to establish an investment in their territory on terms no less favorable than those that apply to domestic investors (national treatment) or investors from third countries (most-favored-nation treatment)[22]. Such treaties provide foreign investors with the right to invest on the same terms as domestic investors. This in effect liberalizes the environment for investment and lowers the degree of discretion in regulating entry matters, and effectively locks countries into longstanding commitments to open their borders and allow foreign investors to enter Pre-establishment is rarely granted without exceptions since every country has sensitive sectors where foreign investment is not permitted. Parties to investment agreement usually list a number of measures (for example, laws and regulations) or entire sectors where pre-establishment (free entry of investments and investors) does not apply. However, a static list could also pose problems for the future; developing countries often cannot pre-decide what sectors they want to control the entry of foreign investment to in the future, given the dynamic process of industrialization and development.

- **Free movement of capital** – foreign firms are unencumbered and can easily move capital and profits in and out of a country. This would make compulsory the maintaining of a free capital account system which has contributed to the transfer of financial vulnerability to developing countries and which laid the foundation to the wide fluctuations and instabilities associated with the inflows and outflows of capital. In the EU-Cariforum EPA, capital controls can only be imposed for a maximum of 6 months. It is worth noting that Malaysia needed to use them for 10 years to deal with the 1997 Asian financial crisis.

- **Investors be afforded minimum standard of treatment in international law**-Minimum standard of treatment' is considered customary international law, but is not specific – it could mean access to due process or the "denial of justice" issues (which could encompass both outside interference in judicial proceedings and misconduct on the part

[22] http://www.sice.oas.org/dictionary/IN_e.asp.

of the judiciary itself). However, the US and other developed countries consider that the Minimum standard of treatment include 'fair and equitable treatment and full protection and security'. This is what the TPP investment chapter includes (Article 9.6). While the referenced TPP article provides that: " Fair and equitable treatment includes the obligations not to deny justice in criminal, civil or administrative adjudicatory proceeding in accordance with the principles of due process…" it does not constraint the interpretation of FET to this obligation. Many investor-state arbitral tribunals have expansively interpreted minimum standard of treatment in BIT cases – finding violations in cases of regulatory action that may affect future profits of covered investors.

- For countries with large natural resources, this will have an impact on allowing foreign investors to have a deeper and more direct access to these natural resources. They will have to be treated in the same way as local companies, impacting on democratic decisions regarding stewardship of natural resources.

Additional factors that Members should take into consideration when considering whether they should agree to discuss investment under the WTO

- **The dominant model of international investment treaties currently in force is based on an old model that proved highly challenging to development and policy space of various countries.** The problem of the investment protection regime is rooted in the following deficiencies:

a) an imbalance in the provisions of the investment treaties, which focus on the investors' rights and neglect investors' responsibilities, while often lacking express recognition of the need to safeguard the host states' regulatory authority;
b) the vagueness of treaty provisions, which allows for expansive interpretation by arbitrators and for the rise of systemic bias towards the interest of the investors in the resolution of disputes under investment treaty law[23]. Such trends are often not in line with the original intent of the states negotiating the treaty;
c) the investor-state dispute settlement mechanism, under which arbitrators have asserted jurisdiction over wide scope of issues, including regulatory policies where constitutional courts had decided. The way the ISDS system has operated so far generates deep concerns in regard to democratic governance and accountability.

- **Several countries, both developed and developing, are seeking to reform their investment treaty models** (See Annex 2 for more details on the challenges of the investment protection regime and experiences of developing countries reviewing their investment treaties)**. While the reform process of the international investment protection regime is evolving among different regions, it is still at a nascent stage. Moreover, the approaches to reform still substantively vary among countries.** For example, some countries are withdrawing from investment treaties, and seeking to find alternatives either through national laws or through designing new model investment treaties attentive to the sovereign right to regulate. However, others seek to maintain the system. They propose cosmetic changes that do not systemically attend to the challenges of the existing investment protection regime, such as proposing to limit reforms to

[23] For more information see the work of Gus Van Harten.

adding appeals facility to the investment-state dispute settlement system enabled under the investment treaties. This proposal will not have systemic implications on the ISDS system and will not limit the use of the system to challenge regulatory action taken by the State in the public interest.

- **Within this context, commencing discussions on investment rules under the WTO would not serve the interests of developing countries**. Such a process:

  - will be a set-back to the emerging trend of reform that several developing countries are trying to move forward, because it would shift the attention and efforts of countries seeking reform to the process at the WTO before undertaking comprehensive reforms at the national and regional levels.

  - would not help in addressing the challenges emerging from the current international investment rules system, because the approaches to reforming the investment protection regime vary significantly among developing countries and developed countries seeking investment rules through mega regionals, such as the TPP and TTIP. This situation carries the risk that developed countries would push to impose the model developed under the latter agreements. It is worth noting that USTR have clearly indicated in regard to TPP that: "This (the agreement) is intended to be an agreement that's a model for the rest of the world";

  - moreover, the challenges emerging from the web of international investment agreement (currently over 3,200 agreements according to UNCTAD) and the ISDS system will not be addressed through the multilateral rules on investment. Countries need to consider withdrawing from problematic treaties or amending them if possible in order to address these challenges. For those purposes, countries should pursue reforms and alternatives at the national and regional levels;

- Alternatively, developing countries could seek further discussions with other developing countries working on reforming their approach to international investment protection treaties, both through bilateral and regional processes. Such discussions could seek to deepen the dialogue among developing countries and promote a better understanding of the investment rules that would be supportive of their development and industrialization objectives. It could also clarify and put in place means for cooperation among developing countries in the process of pursuing reforms of the international investment protection regime.

- Proponents argue that investment disciplines under the multilateral fora will attract more FDI to developing countries. There is no evidence in support of the claim that investors seek jurisdcitions where they attain high levels of protections and regulatory flexibilities. According to a World Bank study (2011)[24]: "both a review of the empirical

[24] Kusi Hornberger, How Much Does Investment Climate Matter? Joseph Battat, and Peter Kusek (2011) "Attracting FDI; How Much Does Investment Climate Matter?", published as World Bank Group- View Point: Public Policy for the Private Sector, available at:

literature and analysis using new data sources suggest that business opportunities—as represented by, for example, the size and growth potential of markets—are by far the most powerful determinants of FDI". When reviewing the impact of rules agreed through international investment agreements, the UNCTAD Trade and Development Report (2014)[25] noted that: "results do not support the hypothesis that BITs foster bilateral FDI. Developing country policymakers should not assume that signing up to BITs will boost FDI..they should remain cautious about any kind of recommendation to actively pursue BITs". Furthermore, surveys of investors and political risk insurers provide that empirical evidence have shown that it is exceedingly rare for foreign investors to factor in investment treaties (including liberalization agreements) when committing capital abroad, including deciding on the destination and volume of their investments. Similarly, availability and pricing of public and private political risk insurance is very rarely affected by presence or absence of an investment treaty[26].

COMPETITION

– The Doha Ministerial Declaration addressed the mandate to deal with the interaction between trade and competition policy in paragraphs 23, 24, and 25. Paragraph 25 provides that: "…further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them".

– The proposal at the WTO appeared to aim at having a uniform minimum standard of competition policy in different countries. An agreement of competition rules under the multilateral fora is likely to add a layer of rules that curb the role of developing countries in guiding the entry and operation of foreign trading firms, which may further expose their domestic firms to the competition with powerful multinational firms and constraint the government's discretion in giving preference to domestic firms[27]. Developed countries are also likely to seek rules that strike down the role of state-owned enterprises in developing countries.

Considerations for developing countries:

– For competition policy to be supportive of development, it must have the goal of supporting industrial development, and the ability of local companies to thrive in the

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http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/327-Attracting-FDI.pdf

[25] See: Trade and Development Report 2014, p. 159, available at: http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=981

[26] See: Lauge Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence". In Yearbook on International Investment Law & Policy 2009/2010. New York: Oxford University Press; Jason Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment: Some Hints from Alternative Evidence". Virginia Journal of International Law, 51:397 (2010-2011).

[27] Bhagirath L.Das "New Issues and New Round in the WTO" (year)

domestic, regional and international market place. Ajit Singh[28] underlines that for a developing countries, the purpose of competition policy cannot simply be promotion of competition as a good thing per se, but to foster economic development.

– Experts note that the kind of competition policy needed in developing countries requires a different set of economic concepts than the ones used in advanced countries. At the WTO, developed countries pushed for multilateral disciplines that ensure 'fair play' and 'level playing field'. Manuel Montes explains that "Because advanced economies have the largest and the most capable international enterprises, the governments of advanced economies have a clear commercial interest in establishing their approach to competition policy as international obligations, especially by the developing countries. This approach is often referred to in short-hand as a "level playing field" which applies the same rules of entry and participation to all players. In such a playing field, large companies with superior financing and technological capabilities, can sweep the competition. In developing countries, where markets are much smaller, the result could be the monopolization of domestic markets by international companies, resulting in less, instead of more, competition."[29].

– Martin Khor[30] formulates the problem this way: Competition law and policy, in appropriate forms, are beneficial to a country's development. However each country must have full flexibility to choose a model which is suitable, and which can also change through time to suit changing conditions. Having an appropriate model is especially important in the context of globalisation and liberalisation where local firms are already facing intense foreign competition. In particular, developing countries must have the flexibility to choose the paradigm of competition and competition policy/law that is deemed to be more suitable to their level of development and their development interests.

– Accordingly, the main questions developing countries Member States ought to address is whether it is appropriate to develop and implement disciplines on competition policy under the multilateral fora of the WTO focusing on harmonization and convergence to the competition law models applied in developed countries, and what benefits would they accrue from such a negotiations mandate?

Experiences of advanced economies with competition policy:

History has shown that countries' competition laws evolve over time to suit their stage of development.

– For example, during Japan's development period, its competition policy was oriented towards strengthening domestic firms' capacities to produce industrial goods, raise their

[28] Ajit Singh, University of Cambridge (2001) "Competition Policy, Globalization and Economic Development", statement made to the German Parliament Study Commission on 'Globalization of the World Economy- Challenges and Responses'.
[29] Manuel Montes, International Disciplines on State Enterprise Policy, May 2013
[30] Khor, Martin (2008) *Bilateral and Regional Free Trade Agreements: Some Critical Elements and Development Implications*. Penang: Third World Network, p. 59.

productivity which ultimately led to strengthened ability to compete with foreign companies. This often involved forcing individual companies to share technology and information with each other; it also involved forced mergers so that Japanese companies became large enough to take advantage of economies of scale and subsequently compete with their foreign counterparts[31].

- The Republic of Korea was also very conscious about the pervasiveness of scale economies in many priority sectors[32]. In order to achieve minimum scale, the government carried out state-initiated and state-subsidized mergers, which included two automobile firms in 1965, five PVC firms in 1969 and other mergers in fertilizer, overseas construction and shipping[33].

- This is different from the kind of multilateral 'competition' rules that developed countries envisage for the WTO. The EU model is about ensuring a 'competitively neutral' environment. According to the EU, foreign firms should enjoy national treatment and have a 'free competition environment' in the host country.

What is 'competitive neutrality' and what implications does it carry in regard to state-owned enterprises?

This concept arises in the work of the Organization for Economic Cooperation and Development (OECD). 'Competitive neutrality' when applied to state enterprises, is a form of competition policy[34]. Montes notes that the 'competitive neutrality' standard effectively requires that state-related enterprises operate no different from private enterprises.

- The standards that the OECD (2012)[35] advocates as elements of competitive neutrality for government-related enterprises include:
  - Streamlining government business, including "limits . . . on the ability to expand or diversify business activities" on the part of government economic activities;
  - Distinguishing the costs between the commercial and public service activities
  - Requiring publicly connected enterprises to earn rates of return at the level of comparable businesses;
  - Requiring publicly connected enterprises to operate, "to the largest extent feasible, in the same tax and regulatory environment as private enterprises";

[31] Singh, Ajit (2002). "Competition, Corporate Governance, and Selection in Emerging Markets". *Economic Journal, Vol. 113*, No. 491, pp. F443–F464. Referenced in: Manuel Montes, International Disciplines on State Enterprise Policy, May 2013

[32] Chang, Ha-Joon (2006) "The Political Economy of Industrial Policy in Korea" in Ha-Joon Chang, p.78- *The East Asian Development Experience: The Miracle, the Crisis, and the Future*. Penang: TWN and Zed Books, pp. 63-107.

[33] Chang, Ha-Joon (2006) "The Political Economy of Industrial Policy in Korea" in Ha-Joon Chang, *The East Asian Development Experience: The Miracle, the Crisis, and the Future*. Penang: TWN and Zed Books, pp. 63-107.

[34] Manuel Montes, International Disciplines on State Enterprise Policy, May 2013.

[35] OECD (2012b) *Competitive Neutrality: Maintaining a Level Playing Field Between Public and Private Business,* OECD Publishing.

- o "Debt neutrality," meaning that state enterprises must be subject to "financial market disciplines and are not provided concessionary financing";
- o State procurement policies and procedures should be competitive, non-discriminatory and safeguarded by appropriate standards of transparency.

(See: Annex for more details list of polices that could be restricted under competitive neutrality- Jane Kelsey commenting on the rules discussed under TPP)

- While the effort failed in the WTO, the United States has been incorporating "Competition Policy" in its free trade agreements (FTAs). The US has tabled "competitive neutrality" to the agenda of TPP negotiations on international investment, claiming that state-owned enterprises should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership.

- The TPP SOE chapter[36] covers state owned enterprises (SOEs) that meet the definition (basically that it is principally engaged in commercial activities and government owns more than 50% of shares or controls more than 50% of voting rights or the ability to appoint a majority of the board of directors. SOEs with revenue less than 200 million special drawing rights are exempt from the main disciplines). The main rules under this TPP chapter are essentially the following: (a) the SOEs must provide national treatment and most favoured nation treatment in purchases and sales of goods and services (i.e. open the purchasing and sale), and (b) there are restrictions on the assistance (e.g. grants, debt forgiveness, loans, loan guarantees, equity, goods/services) that a government can provide directly or indirectly to its SOEs if it has adverse effects or causes injury in a variety of situations. The Chapter includes limited exceptions and negotiated schedules of non-conforming activities to these rules.

- It is worth noting that while developed countries seek to constraint the role of developing country state-owned enterprises, they implement multiple other indirect ways in support of their enterprises. In the case of developed countries, the most prominent examples at the federal level are in defense-related industries, such in the aerospace (design and building of airplanes) and in the electronics sectors. "The U.S. commercial aircraft industry has long been a major beneficiary of federal research and development programs managed by NASA and the armed services. Government policy in the aircraft industry not only has supported pre-commercial research in civilian and military aircraft technologies, but has also aided the adoption and application of the results of the research" (Mowery and Rosenberg 1980, pp. 169-170). Accordingly, the US government's relationship to Boeing, the country's largest aircraft manufacturer, is not through ownership, but through subsidies and procurement[37].

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[36] See: http://www.mfat.govt.nz/Treaties-and-International-Law/01-Treaties-for-which-NZ-is-Depositary/0-Trans-Pacific-Partnership-Text.php.

[37] See. Manuel Montes, International Disciplines on State Enterprise Policy, May 2013. Additional background information: The US defense department, working with private companies, solicits designs for needed equipment, and bids out their production to private companies. Even without an ownership stake, the relationship between the state and the enterprise can be quite intimate in the so-called defense-related industries. A data table from the Boeing-Airbus World Trade Organization dispute (EC 2007)) suggests that Boeing Company of the United States received subsidies both from the federal government and three states (Washington, Kansas, and Illinois), participated in stated-funded research programs including "exclusive or early access to data, trade secrets, and other

TRANSPARENCY IN GOVERNMENT PROCUREMENT

– The Doha Ministerial Declaration addressed transparency in government procurement in paragraph 26, which provided that: "*negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants' development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers…*". The whole on work Transparency in Government Procurement was put on hold as a result of the 2004 July Framework where it was agreed that this issue, along with work on investment and competition, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round" (Para. g of the Text of the 'July package' — the General Council's post-Cancún decision[38]).

– Government procurement, of goods and services, in developing countries forms a big portion of the gross domestic product, accounting for 20 to 25% in some cases (This proportion exceeds 25% in the case of Malaysia for example)[39]. Sanya Reid Smith points out that government purchasing provides major source of demand for domestic service suppliers. Reserving that for domestic companies is often used as a tool to facilitate social and economic development, employment generation and development in marginalized or disadvantaged communities, and as a wealth redistribution tool.

– Overall, government procurement and policies related to it have very important economic, social and even political roles including: as a macroeconomic instrument, especially during recessionary periods, to counter economic downturns; as tools to boost domestic economy and participation of locals in economic development and benefits; in addressing groups and communities that are under-represented in economic standing;

knowledge resulting from government funded research", obtained "services of NASA employees, facilities, and equipment to support the R&D programmes listed . . . and paying salaries, personnel costs, and other institutional support," use of "the research, test and evaluation facilities owned by the US Government, including NASA wind tunnels, in particular the Langley Research Center," and "procurement contracts with the US LCA industry for more than adequate remuneration."
The acronym "LCA" bears explanation. It stands for "large commercial aircraft" and points to the fact the disputed industry between the EU and the US is classified as a commercial product. Thus, while the US designates certain industries as related to national security (to exempt these from its international obligations in competition chapters of free trade agreements), some are quite commercial in nature. Mowery and Rosenberg (1989, pp. 169-170) report that: "The cumulative 1945-82 R&D investment in aircraft from all sources amounts to nearly $104 billion in 1972 dollars. Of this total, almost 75 percent, $77 billion was provided by military sources. Industry-financed R&D during the period amounted to $17.4 billion, roughly 15 percent of the total."

[38] See : https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

[39] Sanya Reid Smith (2015)Preliminary Analysis of leaked proposed TISA Annex on Government Procurement", referencing the Centre for International Development at Harvard University, and McCrudden, G. Gross "WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study", The European Journal of International Law 2006.

and to provide preferences for firms from selected other countries, such as other developing countries or those with whom a country holds special commercial or political relationships.[40]

- When it comes to market access issues, it is much easier for developed country companies to establish themselves in the developing country market than for the developing country company to be established in the developed country. Hence market access will be uneven.

- Negotiations on transparency in government procurement could potentially be the first step towards expanding negotiations to market access. Moreover, existence of an agreement on transparency would likely be the slippery slope that could lead in years ahead to a full market access agreement. It is worth noting that no developing country is currently party to the plurilateral government procurement agreement existing under the WTO auspices[41].

The EU model of transparency in government procurement:

The EU FTAs are far reaching in this area. For example, the articles entitled "Transparency of government procurement" under the EU-Cariforum include elements of market access. This article requires that the Parties "…shall ensure that their procuring entities provide for effective dissemination of the tendering opportunities generated by the relevant government processes, providing *eligible suppliers* with all the information required to take part in such procurement…" (Emphasis added. See Article 168 of the EPA between CARIFORUM States and the EU). Eligible suppliers could include the EU companies established in the domestic markets of the Cariforum countries.

- Moreover, the detailed transparency criteria in these agreements could even encompass a kind of 'necessity test' for the bidding criteria under the tendering process, requiring for example that the criteria be 'objective' as well as 'pre-established'.

E-COMMERCE

The Moratorium on E-Commerce:

- The 1998 Second Ministerial Conference in Geneva agreed a Declaration on global electronic commerce[42], in which Members declared that they "….will continue their current practice of not imposing customs duties on electronic transmissions", and provided that "…the General Council shall, by its next meeting in special session, establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, including those issues identified by Members…" (re-iterated by paragraph 34 of the Doha Ministerial Declaration).

[40] Martin Khor (2003), "The WTO 'Singapore Issues': What's at Stake and Why it Matters", Third World Network.
[41] https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm
[42] WT/MIN(98)/DEC/2, 25 May 1998)https://www.wto.org/english/tratop_e/ecom_e/mindec1_e.htm

- In Bali, a Ministerial Decision was taken on the work programme on e-commerce (WT/MIN(13)/W/3), under which Members decided to continue the work under the Work Programme on electronic commerce, and the need to examine trade related aspects "…of, inter alia, enhancing internet connectivity and access to information and telecommunications technologies and public internet sites, …cloud computing, the protection of confidential data, privacy and consumer protection."

- Issues related to electronic commerce have been examined by the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS and the Committee on Trade and Development in addition to five discussions dedicated to cross-cutting issues[43] under electronic commerce, held under General Council's auspices.

- Proposing e-commerce as one of the 'new issues' for post-Nairobi discussions would likely entail expanding the mandate on e-commerce. Developed countries are expected to push the approaches they have been developing and pushing outside the WTO, including for example under the TPP and TISA negotiations. Much of their efforts focus on issues pertaining to data transfers, including disciplines (or relaxation of disciplines) on movement of information or cross border information flows and local presence requirements. For example, usually, data protection laws exist to strike a balance between the rights of individuals to privacy and the ability of businesses to use data for business purposes. The proposals under TISA seek to grant freedom to business on how they use the data, including personal information, without being subject to restrictions[44].

- In the run-up towards the Nairobi Ministerial Conference, a draft decision on the 'Work Programme on Electronic Commerce' (WT/MIN(15)/W/26, of 1 December 2015) was agreed and raised to the Ministerial Conference, which provide for "*continu(ing) the work under the Work Programme on Electronic Commerce since our last session, based on the existing mandate and guidelines*". Thus, discussions on e-commerce are to continue on the basis of approaches and issues already addressed in previous decisions on e-commerce, the latest of was taken in Bali (WT/MIN(13)/W/3). However, proposing e-commerce as one of the 'new issues' for future work at the WTO could still entail a push by some WTO Member countries towards expanding the mandate beyond what is reflected in the decision on the 'Work Programme on Electronic Commerce' (WT/MIN(15)/W/26).

- Below is a summary of the propositions that the United States and the European Union have been promoting.

[43] The issues discussed included: classification of the content of certain electronic transmissions; development-related issues; fiscal implications of e-commerce; relationship (and possible substitution effects) between e-commerce and traditional forms of commerce; imposition of customs duties on electronic transmissions; competition; jurisdiction and applicable law/other legal issues (source: https://www.wto.org/english/tratop_e/ecom_e/ecom_briefnote_e.htm).

[44] Burcu Kilic and Tamir Israel "Analysis of the Leaked TISA Annex on Electronic Comerce" (2015)

The EU and the US 'Trade Principles for Information and Communication Technology Services"

In 2011, the EU and the US agreed to 'Trade Principles for Information and Communication Technology Services", which- according to the paper of principles- they intend to promote implementation in their bilateral trade relations and trade negotiations with third countries[45].

The Principles cover:

- Transparency for laws, regulations, procedures, and administrative rulings of general application affecting ICT and trade in ICT services;
- Open networks, network access, and use: including requiring governments not to restrict the ability of suppliers to supply services over the internet on cross border and technology neutral basis;
- Cross border information flow;
- Local infrastructure: whereby governments are expected not to require ICT services suppliers to use local infrastructure, or establish a local presence as a condition of supplying the service;
- Foreign ownership: requiring governments to allow full foreign participation in their ICT services sectors, through establishment or other means;
- Use of spectrum;
- Regulatory authorities: ensuring regulatory authorities are legally distinct and functionally independent from all services providers;
- Authorization and licenses;
- Interconnection;
- International cooperation.

The US paper on e-commerce at the WTO

In December 2014, the United States announced a paper on e-commerce (S/C/W/359, 17 December 2014), whereby it reflected the following views:

- Cloud computing is a critical component for e-commerce and it is essential that trade commitments reflect a high degree of openness for this service;
- Ensure freedom of cross-border data flow and not prevent services' suppliers of other countries or customers of those suppliers from electronically transferring information internally or across borders, accessing publicly available information or accessing their own information stored in other countries;
- Governments not to require ICT service suppliers to use local infrastructure or establish a local presence as a condition of supplying services;
- Governments not to give priority to national suppliers of ICT services in the use of local infrastructure or give preferential treatment to national suppliers of ICT services in the use of local infrastructure;
- Reconsider the utility of localization requirements, including measures that require consumers' personal data to be processed and stored within their borders.

[45] The paper notes that the principles do not apply to financial services.

The US E-commerce proposal under TISA

The US had presented a similar proposal under the Trade in Services Agreement (TISA) negotiations (dated: 25 April 2014)[1]. The proposal addresses, among other issues, the following areas:

- Local presence: prohibiting government from requiring local commercial presence (through an agency, branch, or subsidiary) as a condition for cross border supply of a service.
- Local content: prohibiting government from requiring a service supplier to buy, use, or give a preference to locally produced goods or locals who supply goods, or e-content that was created, produced, published, contracted, or commissioned in a particular country, among other limitations;
- Local technology: whereby government cannot require transfer of a particular technology or proprietary knowledge to a local person or firm, or require purchase, use or give preferences to technology produced locally, among other limitations;
- Movement of information: whereby a government cannot stop a service supplier from another TISA country from transferring, accessing, processing or storing information in its country or any countries in the world, when those activities are connected to the services supplier's business, among other limitations;
- In addition to rules on open networks, network access and use, as well as electronic authentication and electronic signatures.

[1] This section is based on: Briefing on US TISA Proposal on E-Commerce, Technology Transfer, Cross-border Data Flows, and Net Neutrality, by Prof. Jane Kelsey (University of Auckland) and Dr. Burcu Kilic (Public Citizen, Washington).

ANNEX (1): THE ORIGINAL MANDATE ON SINGAPORE ISSUES (1996):

The WTO Ministerial Conference held in Singapore in December 1996 stated in paragraph 20 that "*Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:*

- *establish a working group to examine the relationship between trade and investment; and*
- *establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework…*"

Paragraph 21 provided that Members agree to "*establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement; and direct the Council for Trade in Goods to undertake exploratory and analytical work, drawing on the work of other relevant international organizations*".[46]

[46] **SINGAPORE WTO MINISTERIAL 1996: MINISTERIAL DECLARATION WT/MIN(96)/DEC**, 18 December 1996, available at: https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

ANNEX (2): RETHINKING INVESTMENT TREATY MODELS; DEVELOPING COUNTRY EXPERIENCES

1. Several countries, both developed and developing, have been reviewing their approach to investment treaties, including looking at ways of reducing their legal liability under bilateral investment treaties (BITs), especially given the surge in recent investor-state dispute settlement (ISDS) cases based on these treaties.

2. The discussion on the reform of the international investment agreement (IIA) regime seems to be at a conjuncture. According to UNCTAD 2014 World Investment Report, at least 40 countries and 4 regional integration organizations are currently or have been recently revising their model IIAs[47]. While there seems to be a majority opinion among states that reform is needed in the system[48], however, states are taking different approaches to reform.

3. Among developing countries, much of the recent debate and controversy in regard to BITs have revolved around their implications on policy space that developing countries need to promote development. The rising number of ISDS cases has revealed how the rules under BITs, and the way they have been expansively interpreted by private investment arbitrators encroach on government's ability to regulate in the public interest.

4. Investors have used the ISDS system to challenges regulatory measures in multiple areas, and in both developing and developed countries, including:

- Bank regulators' response to the global financial crisis (Ping An v. Belgium)
- Debt restructuring (Cyprus Popular Bank v. Greece)
- Ban on nuclear power after the Fukushima meltdown (Vattenfall v. Germany)
- Land reforms (Border Timbers v. Zimbabwe)
- Division of spoils between countries (Sudapet v. South Sudan),
- Economic relations/ labor policies (Maiman v. Egypt and Veolia v. Egypt)
- Actions by the Supreme Court and Central Bank (Duetsche Bank v. Sri Lanka).
- Health and medicines and tobacco regulations: Eli Lilly v. Canada (patents),; Philip Morris v. Australia (tobacco), and Philip Morris v. Uruguay (tobacco); Ethyl v. Canada (toxic gas additive), settled (resulted in payment to investor and toxics ban reversed).
- Environmental regulations: Vattenfall v. Germany I (coal); Lone Pine v. Canada (on fracking); Chevron v. Ecuador; Renco v. Peru (metal smelter pollution); Metalclad v. Mexico (toxic waste); S.D. Myers v. Canada (toxic waste).

[47] See: UNCTAD (2014), World Investment Report, p. 115 & UNCTAD- June 2014- IIA issue note 3, "Reform of the IIA Regime: Four Paths of Action and a Way forward".
[48] UNCTAD held debates on this issues for UN Member States during its World Investment Forum (WIF) 2014 (session entitled: "Reforming the International Investment Agreements Regime", October 2014) and in February 2015.

- As well as regulations in the areas of waste management, mining, public safety, financial regulations, labor, agriculture, public services….

5. The main question in front of developing countries today is about the nature of the reforms that will help reshape the system into one that is conducive and supportive of development and industrialization prospects of developing countries. For developing countries, the reforms should help establish conditions where foreign direct investment (FDI) could provide a stable source of support to industrialization and development, including through supplementing domestic resources, enhancing productive capacity, and supporting technological progress and industrial upgrading.

6. Several developing countries have taken steps towards reviewing their commitments under international investment agreements and developing new model BITs. The South Centre have followed and documented the processes undertaken by South Africa, Indonesia, India, Ecuador, and Bolivia.

7. Developing countries seeking to reform their approach to investment protection treaties have reviewed their existing IIAs and their implications. Some set a moratorium on signing and ratifying new agreements during the time of the review. Some countries like South Africa, Indonesia, Ecuador and Bolivia chose to withdraw from all or some treaties. South Africa chose to replace BITs by a new national Investment Act entitled "Promotion and Protection of Investment Bill" that clarifies investment protection standards in line with the South African constitution. Indonesia chose to develop a new model BIT, so did India. Ecuador reverted to investment contracts as the main legal instrument defining the relation with investors, including setting clear obligation on the investor such as performance requirements. Some states are pursuing alternatives at the regional level, through developing model rules that take into consideration the developmental concern they face collectively, such as the discussions taking place at the African Union level.

8. It is worth noting that several states are seeking to clarify the obligations of investors through the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. This process is based on the mandate established through resolution A/HRC/RES/26/9 of the Human Rights Council (July 2014).

9. However, approaches of different countries vary. While several developing countries are seeking to balance their model treaties, including through limiting and clarifying the scope of protected investors and investments and clarifying obligations of investors and home states of investors, other countries still perpetuate the model of imbalanced investment treaties that solely focus on the protections of the investor[49].

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[49] See: Comments of the South Centre on Norway's model BIT, available here: https://www.regjeringen.no/no/dokumenter/horing---modell-for-investeringsavtaler/id2411615/?uid=fb3dbdf4-b88a-4488-b3b7-8e93935c247b, (date: September 14, 2015)

ANNEX (3): LIST OF POLICES THAT COULD BE RESTRICTED UNDER COMPETITIVE NEUTRALITY

- low cost of capital through subsidised loans, low interest rates and other forms of below market---rate financing, government bonds with implicit guarantees, grants, equity infusions, non---commercial relationships with state---owned banks, preferred access to private bank capital, debt forgiveness;
- favourable tax treatment, including through lower transaction costs;
- protection from bankruptcy and bailout support for stressed enterprises;
- exemption from payment of full dividends and requirements for full reinvestment in the enterprise;
- preferential access to resources, such as land, and other raw materials;
- preferential rates for utilities, such as electricity and water;
- targeted infrastructure development, such as road and rail lines;
- concessional export credits and export credit guarantees (although these are covered by the WTO's Agreement on Subsidies and Countervailing Measures);
- government procurement from SOEs and by SOEs from other state enterprises or local suppliers;
- links to domestic technology research facilities, and preferential R&D and technology transfer arrangements;
- favourable regulatory treatment and standard setting;
- differential financial reporting and other transparency requirements;
- differential licensing requirements and oversight through separate regulatory bodies or reporting regimes;
- exemptions from competition, consumer and fair trade practice rules, company law, other general laws and regulations;
- lack of redress for competitors to challenge uncompetitive practices; and
- subsidies for operations, including universal service obligations, which are not based on actual cost or enable for cross---subsidisation, are not open to competitive tender, provide beneficial or preferential access to networks and infrastructure, or increase market opportunities.

Source: Kelsey 2012, pp. 3-4[50].

[50] Kelsey, Jane (2012) "The Risks of Disciplines on State-Owned Enterprises in the Proposed Trans-Pacific Partnership Agreement." paper prepared for the stakeholder programme at the 11th round of Trans---Pacific Partnership Agreement negotiations in Melbourne, 4 March 2012.