WORLD TRADE AND DEVELOPMENT REPORT

Mega Regionals, WTO and New Issues

RIS
Research and Information System
for Developing Countries

World Trade and Development Report

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Core IV-B, Fourth Floor, India Habitat Centre
Lodhi Road, New Delhi-110 003, India
Ph.: +91-11-24682177-80, Fax: +91-11-24682173-74
E-mail: dgoffice@ris.org.in
Website: www.ris.org.in

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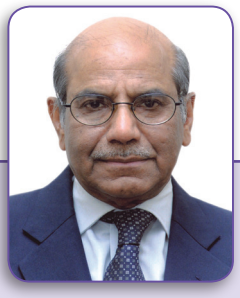


Ambassador Shyam Saran
Chairman, RIS

For developing countries like India, a rule-based, multilateral trade order assures an equitable, fair and non-discriminatory level playing field. The World Trade Organisation is the embodiment of that trade order and its success is vital for the developing world. However, the Doha Round of multilateral trade negotiations continues to be dead locked, even while regional trade arrangements and mega-trade blocs such as the Trans–Pacific Partnership and the proposed Trans-Atlantic Trade and Investment Partnership (TTIP) threaten to fragment the global economy and push developing countries to its margins.

Against this background, the forthcoming WTO Ministerial Meeting taking place in Nairobi from 15-18 December 2015 assumes critical importance. There are key issues on the agenda, including market access, safeguards against import surges of agricultural commodities and the inclusion of non-trade related issues such as environmental and labor standards as part of the negotiations.

The Research and Information System for Developing Countries (RIS) has focused on multilateral and regional trade issues since its inception. It has brought out a number of publications and research papers on such issues from the perspective of developing countries. It has held regular seminars and workshops to encourage a wide-ranging debate on WTO issues and has provided important inputs to decision-makers and trade negotiators. Its flagship publication, the *World Trade and Development Report* has been widely acclaimed.

RIS is convening a high level panel discussion on Trade, Development, WTO and Mega Free Trade Agreements on the sidelines of the WTO Ministerial Meeting in Nairobi. The current publication is intended to serve as a background document for the Panel.

This Report has been prepared by a research team led by Prof. S. K. Mohanty of the RIS and includes well-researched contributions from several experts from other institutions and think-tanks. I have no doubt that this publication will serve as a very useful and timely reference for academics, policymakers, civil society organisations and media and all those who are interested in global trade and economic developments.

Shyam Saran

Preface

Prof. Sachin Chaturvedi
Director General, RIS

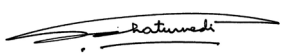
RIS has been undertaking studies on various dimensions of international trade related issues for providing vital policy research inputs to the developing countries. Apart from bringing out policy briefs, research monographs, discussion papers, etc., the institute has also organized a number of discussion meetings, seminars, workshops and international conferences for generating informed debate on the global trade architecture and in particular on the WTO related issues. In order to strengthen the analytical position of the developing countries at the WTO negotiations, RIS had also decided to bring out a flagship publication, the *World Trade and Development Report (WTDR)*. The first report in this series was at the Cancun WTO Ministerial followed by one at the Hong Kong WTO ministerial.

As the stalemate in the Doha round continues to affect the negotiations at the WTO forum, the forthcoming WTO Ministerial Conference in Nairobi (15-18 December) has become all the more important for developing countries. The emergence of mega-regionals and challenges before Doha Round are the crucial issues confronting the 10th Ministerial Conference. The unfair WTO deal of 1995 often force developing countries to adopt cautious approach while dealing with the powerful negotiators at the WTO fora as the former have to protect the interests of their farmers, small scale industry, labour and at the same time meet the challenges faced by their respective economies. Emergence of mega-regional free trade agreements have thrown up their own dynamics, deepening the Uruguay Round inequalities and delaying the implementation of the Doha Development Round. This is happening particularly when the developing countries are grappling with the challenges emanating from declining commodity prices, tighter external financial conditions and many other supply side constraints within their own territories which have spillovers from their external linkages. At the Doha round the developing countries asked for Special Safeguard Mechanism (SSM) for insulating their agriculture from these exigencies. G-33 has strongly articulated this position.

Keeping in view the importance of these developments, RIS is bringing out its flagship publication, World Trade and Development Report. The Report deals with the overall global trade scenario and focuses on specific areas such as TRIPS, Mega FTAs and public health; labour standards, government procurement agreement, dispute resolution, non-tariff measures and standards in mega-regional negotiations, services in WTO and mega FTAs, left out countries, relevance of special and differential treatment, etc. The WTDR, that also suggests the way forward and makes relevant policy recommendations, would be discussed at the panel discussion on Trade, Development, WTO, Mega FTAs to be organised by RIS on the sidelines of the Nairobi WTO Ministerial Meeting.

We are grateful to Ambassador Shyam Saran, Chairman and Dr. V.S. Seshadri, Vice-Chairman, RIS for their overall guidance and advice in preparing the present WTDR. I must compliment my senior colleague Prof. S. K. Mohanty, RIS for leading the research team that has prepared the WTDR with valuable contributions from the outside experts.

I am sure that policymakers, negotiators, business and industry circles, academia, civil society organisations, media, practitioners and all other concerned with the negotiations on the world trade issues would find the WTDR a useful policy research input emanating from RIS, which is always committed to serve as an effective think-tank of the developing countries.



Sachin Chaturvedi

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Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
ACWL	Advisory Centre of WTO Law
ADP	Anti-dumping Measures
AGCM	Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato)
AIDS	Acquired Immune Deficiency Syndrome
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASIL	American Society of International Law
BITs	Bilateral Investment Treaties
BoP	Balance of Payments
BOT	Build Operate Transfer
BRICS	Brazil, Russia, India, China and South Africa
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
CAGR	Compound Annual Growth Rate
CARICOM	Caribbean Community and Common Market
CBD	Convention on Biological Diversity
CETA	Canada-EU Trade Agreement
CGE	Computable General Equilibrium
CITES	Convention on international Trade in Endangered Species of Wild Fauna and Flora
CJK FTA	China–Japan–South Korea Free Trade Agreement
CL	Compulsory Licence
COMESA	Common Market for Eastern and Southern Africa
CTC	Cooperative Technical Consultation
CV	Countervailing Duties
DAC	Development Assistance Committee
DC	Developed Countries
DCVMs	Developing Country Vaccine Manufacturers
DFQF	Duty Free Quota Free
DHHS	Department of Health and Human Services
DSMs	Dispute Settlements Mechanisms
DSU	Dispute Settlement Undertaking
DT	Developing and Transitional Economies
EAC	East African Community
EEA	European Economic Area
EGA	Environmental Goods Agreement
EGS	Environmental Goods and Services

EMU	Economic and Monetary Union
EU	European Union
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
FIS	Fabbrica Italiana SpA
FTAAP	Free Trade Area of the Asia-Pacific
FTAs	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GMO	Genetically Modified Organisms
GPA	Agreement on Government Procurement
GPPH	Global Patent Prosecution Highway
GSP	Generalised System of Preferences
GSTP	Global System of Trade Preferences among Developing Countries
GTAP	Global Trade Analysis Project
GVCs	Global Value Chains
GWP	Gross World Product
HIV	Human Immunodeficiency Virus
HPV	Human Papilloma Virus
ICANN	Internet Corporation for Assigned Names and Numbers
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communication Technology
IFAs	International Framework Agreements
ILO	International Labour Organisation
IOE	International Organisation of Employers
IP	Intellectual Property
IPR	Intellectual Property Right
ISDS	Investor State dispute Settlement
ISP	Internet Service Provider
ITA	Information Technology Agreement
ITC	International Trade Centre
I-TIP	Integrated Trade Intelligence Portal
IUU	Illegal, Unregulated and Unreported
LAIA	Latin American Integration Association
LDCs	Least Developed Countries
LICs	Low Income Countries
LMICs	Lower Middle Income Countries
MA	Market Access
MC9	Ninth WTO Ministerial Conference
MEAs	Multilateral Environmental Agreements
MERCOSUR	Mercado Común del Sur (Common Market of the South)
MFN	Most Favoured Nation
MRAs	Mutual Recognition Agreements

NAAEC	North American Agreement on Environment Cooperation
NAALC	North American Agreement on Labour Cooperation
NACEC	North American Commission for Environment Cooperation
NAFTA	North American Free Trade Agreement
NT	National Treatment
NTBs	Non-Tariff Barriers
NTMs	Non-Tariff Measures
NVCs	Non Violation Complaints
OECD	Organisation for Economic Co-operation and Development
OHIM	Office for Harmonisation in the Internal Market
OSDD	Open Source Drug Discovery
P4 Agreement	Trans-Pacific Strategic Economic Partnership Agreement
PCEP	Regional Comprehensive Economic Partnership
PCT	Patent Cooperation Treaty
PPHs	Patent Prosecution Highways
PTAs	Preferential Trade Agreements
QRs	Quantitative Restrictions
R&D	Research and Development
RCEP	Regional Comprehensive Economic Partnership
RTAs	Regional Trade Agreements
S&DT	Special and Differential Treatment
SAARC	South Asian Association for Regional Cooperation
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SG	Safeguard Measures
SPS	Sanitary and Phyto-sanitary
SSC	South-South Cooperation
SSEC	South-South Economic Cooperation
SSM	Special Safeguard Mechanism
SST	South-South Trade
TAs	Trade Agreements
TBT	Technical Barriers to Trade
TFA	Trade Facilitation Agreement
TFTA	Tripartite Free Trade Agreement
TISA	Trade in Services Agreement
TPIP	Trans-Pacific Investment Partnership
TPP	Trans-Pacific Partnership
TRIMs	Trade Related Investment Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
TTIP	Trans-Atlantic Trade and Investment Partnership
UMICs	Upper Middle Income Countries
UNCTAD	United Nations Conference on Trade and Development
UPOV	International Union for the Protection of New Varieties of Plants

US	United States
USA	United States of America
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation

Executive Summary and Policy Recommendations

With the Tenth WTO Ministerial Conference in Nairobi, the efforts for trade liberalisation and strengthening of multilateral trading arrangement have come to a full circle. What started in 1995 with graduation from GATT to WTO has come to a point where several challenges for multilateralism are clearly discernible. As a result, it is not surprising that the usual excitement for WTO ministerial meeting is missing this time. The demand to close the Doha Development Round has triggered a deep sense of pessimism across low income and other developing countries. They have also been left outside the Mega-Regionals groupings, which have emerged in all parts of the world. Therefore, lowering of ambition at WTO is a direct outcome of these arrangements.

At the Bali Ministerial, India led other developing countries in raising the issue of agriculture and is now keen to press further for a permanent solution at the Nairobi meeting. The view that current global trading regime is tilted in favour of the developed countries is reminding us of inequalities emanating from the Uruguay round. G-33 has raised the issue of permanent solution for public stockholding programmes for food security in developing countries, in addition to Special Safeguard Measures (SSM) to counter possible impact of volatility in prices and imports. The G-20 grouping within WTO has also called for removal of disparities in agriculture trade rules. However, at the same time, the EU and Brazil are keen that developing countries phase out their export subsidies by 2025 and bring in changes in their export credit policies.

There seems to be no convergence at the agriculture committee. This has been extremely clear right from the Cancun WTO Ministerial in 2003, when implementation issues were overlooked by the developed countries. While several developing countries removed quantitative restrictions and paved way for price sensitive imports, the developed countries did not respond to their own obligations.

In light of these issues, the substantive contents of this Report are arranged across three broad sections and 10 Chapters. In Section I, Chapter 1 brings out the Contents and Directions of Mega Regionals. In Section II, there are four chapters, in which efforts are made to assess WTO specific issues in the chosen areas, vis-à-vis, the issues which are being raised at the Mega Regionals. In this section, Chapter 2 focuses on IPRs; Chapter 3 on NTM and Standards, Chapter 4 on Services, while Chapter 5 deals with Dispute Settlement Mechanisms. The Section III of the Report has tried to capture new issues, viz. Labour Standards (Chapter 6); Environmental Standards (Chapter 7); and Government Procurement (Chapter 8). The last section, Section IV, presents analysis on Implications of FTAs for excluded countries (Chapter 9) and new relevance of Special and differential Treatment (Chapter 10).

Mega Regionals – Emerging Dynamics, Opportunities and Exclusions

Signing of TPP is an unprecedented development in the annals of the economic history of the world. Along with TPP another three mega regionals, viz. TTIP, RCEP and FTAAP, have made significant headway in their negotiations, and are likely to be formed in the coming years. These four regional groupings are distinct from those of other existing regional grouping in terms of their content, scope and impact on the global economy. There is discussion about another four mega regionals namely, EU-ASEAN, EU-Japan, China-Japan-Korea FTA and Pacific Alliance, which have got similar features to be treated as mega regionals. UN (2015) has treated Trade in Services (TISA) and Tripartite Free Trade Agreement (TFTA) as mega regionals which can have a major hold over the global economic activities in the recent years. So far, there are references to ten mega regionals in the existing literature

Mega regionals can be distinguished from other regional groupings in the sense that they are embodying members of some of the most dynamic regional groupings of the world. TPP, TTIP, RCEP, FTAAP, etc. have either partly or fully subsumed dynamic members of different RTAs such as NAFTA, the EU, ASEAN, RCEP, Pacific Alliance, APEC, etc. When first five or eight top mega FTAs are considered, some sample countries may be chosen from the same set of 54 dynamic countries. These mega regionals are association of selected dynamic economics. In certain cases leadership is driven by industrialised countries such as TPP, TTIP, EU-Japan, etc. Whereas economic agenda of same RTAs are driven by emerging and other developing countries such as RCEP, CJKFTA, Pacific Alliance and Tripartite Free Trade Agreements.

Mega regionals have significant command over several important economic activities in the world economy. Their contributions are felt in several frontiers of economic activities including GDP, FDI, Foreign Exchange Reserves, Saving Ratios, Gross Fixed Capital Formation, etc. among others. In several mega regionals, simultaneous presence of members from developed and emerging countries are seen, stressing on different dimensions of their economic engagement. In many such cases, developed countries have shown their strong base in several macro-economic activities but lacking growth whereas emerging countries have shown their surging growth in these activities.

Since world economy has witnessed a new trend in the formation of regional groupings, there would be consolidation of RTAs and their rules are likely to be more stringent and comprehensive in future. Many countries have double membership in specific mega regionals as well as in other regional groupings in the world. Members in mega regionals having adjusted to the stringent policy environment may seek more high quality rules in other RTAs. Therefore, other RTAs are likely to face new challenges in the coming years to bring in radical changes in the existing rules in different RTAs. However, it is imperative from the recent global development that mega regionals will be guided by economic and political considerations. In this regard formation or expansions of mega regionals would be driven by mostly economic considerations.

Future re-alignment of mega regionals would be in the lines of only dynamic economies. The first eight mega regionals have got 54 countries. A few other dynamic economies of the world are yet to be included in any proposed mega regionals. Countries like Brazil, Turkey, Saudi Arabia, Norway, Argentina, South Africa, United Arab Emirates, Venezuela, Israel, Nigeria, Pakistan, Egypt and Bangladesh have the potential to join any mega regionals in future.

Looking at the current pattern of mega regionals there may be several new mega regional groupings in future in two different ways. Firstly, the existing and proposed mega regionals may be expended with the existing dynamic RTAs and vibrant economies, and secondly, there may be new mega regionals among the existing excluded countries with the support of other RTAs and dynamic economies. However, it is certain that world economy is likely to witness

numerous mega regionals in future. The report has identified 14 mega regionals to come up including six new ones.

In the past, developed countries had large access on global economic activities and there was limited space for other developing countries. However, with the limited economic opportunities available, these developing countries have performed spectacular accomplishment and in a way, surpassing performance of several developed and emerging countries during the last decade. Many of these high performing economies are from Asia, Africa, and Latin America. With the emergence of mega regionals, the situation may be tight for the excluded countries where there could be strong competition from member countries in several sectors, but the world may not be completely closed to these countries.

Initiating a new practice of preferential treatment to its members in mega regionals, they may not undermine the competitiveness of the excluded countries. Competitiveness of these countries is likely to pose a major challenge to the member countries which are trying to replace them through the route of trade diversion. Exclusion of non-member countries where they have significant competitiveness by member countries may substitute supplies coming from the non-member countries but they cannot offer competitive price, leading to surge in domestic prices for the consumers and producers in the markets of mega regionals.

Though developed countries have high stake in several economic activities in the world, their contribution in the total global economic activities are declining continuously over the last one decade. There is a strong attempt by the industrialised countries to make a reversal of such trends. This could be possible by having close economic association with dynamic countries as well as vibrant, regions of the world through forming 21st century mega regionals.

Since, a new trend has emerged in the world economy in a form of mega regionals, this process would continue for some more decades from now. It is expected that the surge of new mega regionals could re-appear in the global economy in two different ways. Firstly, the existing mega RTAs are to be expanded with the merger of dynamic RTAs and vibrant economies in the world. This may include excluded countries and RTAs. Secondly, there could be regrouping of excluded but high potential FTAs with other like-minded FTAs and dynamic economies. With the second type of realignment of dynamic economies there could be a possibility of inclusion of several excluded countries in the process of newly emerging mega regionals.

There has been a pronounced issue regarding the scope and opportunities for excluded countries. It may be recalled that developed countries have large access over various global economic activities, even before the formation or discussion about the mega regionals. During that period, the opportunities for the present excluded countries had limited economic opportunities in the world economy. Despite such limitations, several countries in the world from Asia, Latin America and Africa have performed well during the last two decades. They have developed strong competitive strength in several sectors both in trade and production. These countries have taken up strong competition with several emerging countries in the world. It may be argued that evolving a practice of preferential trade in mega regionals may not undermine the competitiveness of excluded countries.

Some of the old issues like Singapore issues are given prominence as 21st century issues in different forms. These issues are considered as game changer in the new arrangement. Legitimising these behind the border issues such as competition policy, labour standards, environmental issues, government procurement, etc. in regional context may likely be raised in the multilateral forums.

In the recently debated mega regionals, discriminatory provisions are very much embodied in the agreement. Such provisions are also conferred to more advanced members in the mega

regionals. In TPP discriminatory provisions are invoked for several affluent countries such as the US, Japan, Australia etc. It is likely that more discriminatory policies are to be incorporated for the insiders in the forthcoming mega FTAs. This would create more disadvantages for the excluded countries to get market access in these mega regionals.

Reduction of NTBs would bring substantial gains for the member countries in different mega regionals. Reduction of NTBs, harmonisation of standards among member countries is emerging as a policy strategy. This would support both member and non-member countries in mega regionals. But there is alternative strategy to endorse Mutual Recognition Agreements (MRAs) which would allow member countries to access each other market without harmonising their standards. The net effect of the MRAs could be different for member and excluded countries in mega regionals. While member countries can have access to large integrated market of its member countries without forging an agreement on harmonise standards, excluded countries are likely to face fragmented markets in such mega regionals.

New Contours of IPR Protection across Mega-Regionals

The importance of IPR for global trade may be understood from the fact that charges for the use of intellectual property in 2013 amounted to US$ 6.27 trillion. Royalty payments (for use of IPRs from other countries) were of the value US$ 3.23 trillion and royalty receipts of US$ 3.03 trillion. The total global trade in 2013 amounted to US$ 45.83 trillion.

An important feature since the TRIPS agreement implementation is that the trade linkage of IPRs is no longer limited to goods and services but in itself forms an object of trade, an outcome that was not anticipated at the time of finalisation of the Agreement in 1994 by the developing countries. Licences for patented technologies and franchises of trademarks and brand names and also copyright licences for publishing and reprints are now traded as they are. It is appropriate to take stock of the post TRIPS developments, an assessment of their impact on public health, the pending issues in WTO relating to IPRs and the impact of the bilateral and multilateral Free Trade Agreements (FTAs). Added to this is the agreement on Sustainable Development Goals (SDGs) that was adopted by the United Nations Summit for the adoption of the Post 2015 Development Agenda. Many developing and almost all LDCs are still in the process of adjusting their economies to the TRIPS compliant regime. However, some developing countries, as a whole kept pace with the developed countries and now China has the largest number of patent filings. Still, the major portion of trade in IPRs is limited to OECD countries.

TRIPS had stated upfront that the Members have to ensure that the rights did not create hurdles in adopting "measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance" to the "socio-economic and technological development" of the members of the agreement. The TRIPS Agreement had provided for differential adjustment periods for countries at different stages of economic development. The inclusion of various provisions relating to compulsory licence and government use and other flexibilities in the Agreement was in line with these objectives and principles, and is to be looked upon and interpreted from that angle.

As in the case of TRIPS Agreement, the TPP was also finalised under the leadership of the United States, who had strong economic interests in having intellectual property rights regime as per its laws included in the Agreement. There were, however, few positive developments in the case of TPP. The United States was explicit this time in its commitment to public health. A significant feature of the new treaty is the recognition given to traditional knowledge in examining patent application. The TPP, however, contains many provisions that may have certain procedural and some substantive implications for developing countries. There are, many provisions that go

beyond the TRIPS obligations and can pose new challenges to provision of affordable health care particularly by developing and LDC countries. One of the new provisions is for grant of patents for new uses of a known product and also for new methods of using a known product. This brings in a lower standard for determining patentability. Another provision that will put pressure on patent offices is the one relating to patent term adjustment for patent office delays. Similar is the case with patent term adjustment for unreasonable curtailment for pharmaceutical products to compensate for delays in the marketing approval process. Another provision that can have impact on public health is the one that provides for data exclusivity for clinical trial data for drugs for 5 years from the date of marketing approval and for biologics for 8 years. This also has the effect of extending the period of the patent and also delaying the entry of generics. Enforcement measures provided in the agreement, particularly the one on inclusion of ín-transit' goods in border measures also will have impact on availability of medicines in developing countries.

The Conundrum of Standards

Since tariff rates have reached the optimum low for most WTO members on account of unilateral trade liberalisation as well as MFN commitments, it appears that the future scope for trade liberalisation in regional trade agreements lies in the area of non-tariff measures. Non-tariff measures include sanitary and phytosanitary standards (SPS), technical barriers to trade (TBT), anti-dumping measures (AD), safeguards (SG), etc. Most of those NTMs are opaque, country-specific and hard to quantify.

For example, SPS measures correspond to the standards and procedures to protect human, animal and plant health from diseases, pests, toxins and other contaminants. Similarly, TBT features the technical regulations, product standards, environmental regulations, labeling and other related measures that have bearings on human health and animal welfare. WTO allows the member countries to impose NTMs as long as the large objectives of human health and social welfare are met. However, NTMs are often used as tools for trade protectionism being justified on the grounds of health and safety that are more stringent in comparison to the CODEX and other globally accepted standards.

In bilateral and regional trade negotiations, there is a greater tendency to include WTO-plus and WTO-extra provisions so as to gain higher market access in each other's markets and achieve substantive gains from trade especially in view of falling tariffs. The mega-regionals cover provisions pertaining to non-tariff measures, technical regulations, product standards, competition policy, labour standards, environmental standards, state-owned enterprises, and regulatory coherence. Unlike tariff, the negotiations on non-tariff measures (NTMs) in RTAs are piecemeal, less predictable and non-uniform.

However, the trend in imposition of NTMs by different countries does not show any clear pattern. A look at the NTMs measures imposed by the TPP, TTIP and RCEP members individually against each other over the period 2000-15 indicates a radical shift in the number and types of NTMs. Evidence indicates that trade protectionism through NTMs has increased in the affected economies in the post-recession period. In case of TPP, three members USA, Canada and Peru had imposed a diversity of NTMs in the past including anti-dumping, countervailing duty, import licensing, sanitary and phyto-sanitary measures. While anti-dumping measures have fallen during 2009-15, SPS measures seem to have grown in this period. The absolute number of NTMs is higher for the RCEP members. Barring a few, most of them reported good number of anti-dumping measures both in the pre- and post-recession period.

Whether it explains the tendency towards disguised trade protectionism by the affected countries in aftermath of the global recession in 2009 or not is subject to scrutiny. Regardless of the motives for imposition of NTMs in the post-recession period, the contemporary literature highlights the ambitious agenda for negotiations on NTMs in these three mega-regionals. TPP chapters on NTMs are reasonable comprehensive and forward-looking even though room for improvement still exists. In the context of TTIP, several issues like the role of science, appropriateness of standards, convergence of domestic regulatory systems, mutual recognition of standards development, conformity assessment and accreditation are viewed important. TTIP is expected to cover elaborate provisions on NTMs as the gains from reduction of NTMs are perceived to be higher for both the parties, the United States and the EU. The nature and coverage of NTM issues in RCEP negotiations is not very clear. It is believed that RCEP would include similar kinds of provisions on NTMs in line with TPP and TTIP at least with respect to the inclusion of the issues. The most vital aspects that the mega-regionals envisage for NTMs are the explicit importance to the importance of NTMs for higher trade, greater recognition of role of science in evaluating the rationale for imposition of standards and technical regulations, harmonisation of domestic standards, development of regional standards, and streamlining procedures for review, consultation, verification and dispute settlement.

Liberalisation in services and access for Developing Countries

Developing countries were opposed to the idea of including services in the framework of GATT/WTO during the Uruguay Round negotiations. However, finally they agreed under pressure and on the assurance that the agreement on services would allow enough flexibility to liberalise at their own pace and through four modes of supply. The GATS architecture envisages 'bargaining' and 'trade-offs' within the services sectors and across modes of delivery. WTO Members can negotiate reciprocal benefits in exchange for locking-in their policy reforms. GATS provides for successive rounds of negotiations as it aimed at progressively higher level of liberalisation. The first such round was to start not later than five years from the date of entry into force of the Agreement, i.e., 1 January 2000. Thus, despite the inconclusive outcome of the Seattle Ministerial in 1999, a new GATS round could be launched in 2000.

Just prior to the Hong Kong Ministerial Conference, a strong push by certain WTO Members, especially Australia, EU, Japan, Switzerland, Korea, and supported by the US to establish mandatory minimum market access commitments (benchmarks) under the new proposed mechanisms, 'complementary methods for services negotiations' that also called for a plurilateral approach, created a major controversy. The developing countries were asked to open up a minimum percentage of sub-sectors for participation of foreign service enterprises and providers particularly under mode 3. Under the proposals, developing countries were allowed to commit in a lower percentage of sectors than developed countries. But since the developed countries had already made commitments in more sectors, the proposals could, by and large, affect developing countries only.

Finally, the idea of benchmarking was abandoned but plurilateral negotiations were launched after the Hong Kong Ministerial, which has now come to be known as TISA (Trade in Services Agreement). The case for embedding TISA into the architecture of WTO rules alongside the GATS or in its place is weak on both procedural and substantive grounds to the extent that the on-going talks take place behind doors that remain closed even to the WTO Secretariat, let alone to many of the world's leading developing country suppliers of services, and involve potentially significant departures from GATS rules liable to complicate any hope for progress in multilateral journey.

It is quite difficult to make a proper assessment of the liberalisation across modes of supply, It is evident that, the emphasis of most commitments put forward by all countries is on commercial presence mode of supply, followed by movement of natural persons, if one considers the coverage of sector including both full and partial commitments. It is, however, noteworthy that in Mode 4, there are hardly any full commitments except by a few developing countries. Until recently, most developing countries were not in a position to benefit from the commercial presence mode of supply, given the high cost of establishment in developed countries and the weaknesses of developing countries' firms in terms of financial and human capital, technology and so on.

In TPP, the defining feature of the services component is that it has adopted a negative list approach as against the positive-list approach prevailing at the WTO. Such an approach of course puts greater pressure on market opening. One great risk with this approach is that anything that is not specifically excluded will become part of the commitment. This has serious implications as the contour of the services sector is continuously evolving due to changes in technology and innovation in services. TPP has minimum local presence requirements. Along with a negative list approach, there are separate agreements on financial services and electronic commerce. It raises the future implications for regulation of banking and insurance services that would be provided across the border and protection of consumers in several other areas as well.

Dispute Settlement Mechanism, FTAs and New Challenges

Dispute settlement is a major issue in any trade agreement and with the proliferation number of free trade agreements of all types questions about the functioning of DSMs in them and their relationship with WTO DSM are inevitable. WTO DSM has adopted many features from trade dispute settlement regime of GATT but also brought in new features that have added strength to that and in the process enhanced the credibility of WTO trade regulation regime. The free trade agreements with their respective DSMs may however, affect the utility and credibility of WTO DSM. The key question is, can they co-exist despite overlaps and contradictions or will they result in more fragmentation and less coherence. As more and more global trade in goods and services is conducted under mega regionals and RTAs/FTAs the dispute settlement norms under them will impact the dispute settlement mechanisms elsewhere, if not in the near future, in the long run. Despite this, WTO DSM is not likely to be weakened and may in fact play a more important role in the future.

The three main factors that have contributed to the prominence of the DSM are the following. First, the designers of the WTO have created one of the most legalised interstate dispute settlement systems worldwide, thus changing incentives structures of governments and increasing the number of cases being brought before the DSM. The prospect of winning cases where the losing party cannot block the process and prevent a formal verdict (as was the case under the General Agreement on Tariffs and Trade (GATT)) has appealed to many WTO members. Second, since progress in the Doha Round has been very slow, some WTO members have tried to affect these negotiations by resorting to litigation. Third, the potential increase in judicial law-making and the difficulties of overturning DSM rulings through formal WTO treaty amendments or interpretations have given rise to perceptions of imbalance between litigation and negotiation.

Analysis of 100 recent disputes (Vidigal, 2015) point out that of these only in two, EU and USA were pitted against each other while there were 12 disputes involving US-China and 7 disputes involved EU-China and China was involved in 23 disputes. US with 32 disputes tops the list with EU followed by 30. Only 34 countries from the 161 members have litigated the last 100 disputes. But the number of cases litigated is much less. While Asian countries have been prominent in using the WTO DSM African countries have almost not used it. No African

country has ever requested a consultation before the WTO and Egypt and South Africa are the two countries from Africa that ever participated as parties in WTO dispute settlement. While more empirical and theoretical work is important, the need to probe the near absence of LDCs in DSM and the growing importance of few developing countries in DSM need is obvious.

With respect to emerging mega-Regionals like TPP, RCEP and TPIP there is speculation that these three agreements will shift USA closer to the nodes of the Asia-Pacific region clustering. This may lead to a tighter global PTA network. In 1996 to bring greater discipline of review of notified RTAs the Standing Committee on Regional Trade Agreements (CRTA) was formed. But there was lack of progress in the functioning of CRTA. In 2006 'The Transparency Mechanism for Regional Trade Agreements' was adopted by WTO Members. Under this the duties and procedures to be followed by WTO members on the agreements they propose to negotiate, of the conclusion of the agreements and of the working of the RTAs, to WTO Secretariat. In 2010 Transparency Mechanism for Preferential Trade Mechanism was adopted. The 2011 World Trade Report dealt with PTAs and pointed out that different approaches have been put forth for improving coherence between PTAs and multilateral trading system.

The DSM is comprehensive and goes beyond typical DSM in most RTAs. It incorporates elements of WTO DSM with provisions for retaliation and provides for public participation. But when compared to WTO DSM, this is not a full DSM as there is no Appellate Body. On the other hand questions have been raised about the effectiveness of DSM under TPP. Although, TPP instructs its Panels to take into account WTO Panel and Appellate Body interpretations it may not be an easy task. Another question raised by him is the issue of Investor State Dispute Settlement (ISDS) under TPP as NAFTA and some other FTAs between TPP Parties have provided for mechanism for ISDS.

Introduction of Labour Issues through the Mega-Regionals

Labour standard has long been considered as a non-trade issue and developing countries resisted any attempts to make it part of the multilateral trade negotiations in the GATT-WTO framework given wide divergences in the levels of development between the developed and developing countries. However, efforts to bring in labour standards in the WTO have been there since the WTO Ministerial at Singapore in 1996. Nevertheless, the issue was shelved and it was decided that ILO and not WTO, should be the right platform to deal with such issues. The failure at the Singapore Ministerial to secure a link between trade and labour standards at the WTO resulted in developed countries, the US in particular, turning to FTAs as instruments to secure such links. In the current phase of globalisation there is a new push for labour standards. There has been a splintering of production processes, and a consequent shifting of large parts of manufacturing from high-income to low- and middle-income countries in the form of global value chains (GVC) related trade.

As against just 4 FTAs with labour provisions in 1994, a 2011 review found that 35 of 186 FTAs had labour provisions. The North American Free Trade Agreement (NAFTA) had a separate North American Agreement on Labour Cooperation (NAALC), which represents the first instance of an FTA linking labour conditions with trade. In the context of the ASEAN-led RECP there is no discussion on labour standards; rather there is a mention of flexibility. Along with government-to-government trade agreements, labour standards have also made their appearance in private trade agreements introduced by lead firms in global value chains (GVCs), under pressure from moral consumer movements and trade unions in the developed home countries of the lead firms.

Core labour standards are enshrined in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. They have four elements: freedom of association and the effective

recognition of the right to collective bargaining; the elimination of forced and compulsory labour; the abolition of child labour; and the elimination of discrimination, including gender discrimination, in respect of employment and occupation. The ILO's comparison of hourly compensation costs, taking the US to be equal to 100, of all employess in manufacturing shows that developing country costs are so far below developed country costs that even a doubling of developing costs due to labour standards compliance, would not make a difference to the cost advantage of developing over developed countries. The difference that costs of compliance could make is to competition between developing countries.

India has ratified four core ILO labour Conventions. However, in view of restrictions on the trade union rights of workers, discrimination, child labour, and forced labour, determined measures are needed to comply with the commitments India accepted at Singapore, Geneva and Doha in the WTO Ministerial Declarations over 1996-2001, and in the ILO's Declaration of Fundamental Principles and Rights at Work and its 2008 Social Justice Declaration.

The newer and broader regional or mega-regional FTAs include or are expected to include labour standards as part of enforceable commitments, subject to the same grievance settlement procedures as the rest of the FTA agreements. Some beginnings have even been made in including business and labour parties to complaints in FTAs. Some of the new FTAs go beyond core labour standards to include commitments on acceptable wage and other working conditions. In this matter, however, there needs to be care to allow for differential treatment depending on a country's level of development.

Environmental provisions and Challenges for Developing Countries

Several developing countries like India have consistently taken the position that non-trade issues such as environment cannot be a part of trade agreements and that while trade, like any other economic activity, will have environmental implications, trade as a policy instrument is not suitable to address environmental concerns. While the WTO does not create any specific obligations relating to environmental protection, several FTAs have provisions that mandate trade sanctions for non-compliance with environment related obligations as set forth under the agreement.

This broad and generic reference to environment, in the context of sustainable development, also recognises that while the preservation and protection of the environment is an important objective, it will be done in a manner consistent with their respective needs and concerns at different levels of economic development. There is a clear recognition therefore that protection of the environment as an ideal in itself, is not the WTO's objective, rather its focus is on the overall principle of sustainable development. WTO law does not exist in clinical isolation of international law and developments, including environmental concerns. However, environmental measures to restrict trade can be adopted only under certain strict conditions.

The primary proponents of environmental provisions in FTAs have been the USA, EU, Canada and New Zealand. Developing countries have increasingly been agreeing to environmental obligations in FTAs with these countries. All FTAs negotiated by the U.S. since the NAFTA in 1994, include chapters on environment. Canada's FTAs also contain comprehensive provisions on the environment, similar to U.S. FTAs. The culmination of these provisions can be seen in the Environment Chapter of the Trans-Pacific Partnership Agreement which has several elements that go beyond typical environment chapters of FTAs. All U.S. FTAs, except for the U.S.-Jordan FTA, prescribe remedies in the form of monetary compensation for non-compliance with environmental provisions. With the announcement of the TPP Agreement, the position of U.S., Canada, Australia, Japan, and New Zealand, have now all been aligned to substantially U.S.' approach. The main area where the Chapter goes beyond other FTA provisions is its focus on

Fisheries management. Sustainable fisheries management and measures to prohibit subsidies for illegal, unregulated and unreported (IUU) fishing, has been a key agenda item under the WTO negotiations; but has not resulted in any decision because of disagreements on key definitional issues, and because disciplining subsidies can adversely impact small and artisanal fishworkers in developing countries.

Liberalisation of trade in environmental goods and services (EGS) was placed as part of the WTO's agenda under the Doha Round negotiations. However, this is still a contentious issue at the WTO. Provisions on EGS find reflection in some FTAs in the form of broad commitments to cooperate, and not a concrete obligation to actually liberalise trade. However, recent developments to conclude a separate agreement on Environmental Goods, has a higher level of ambition in terms of its scope and coverage.

The 14 WTO original EGA participants accounted for 86percent (78percent of imports and 93percent of exports) of global trade in the 54 APEC subheadings in 2012. This figure includes re-imports and re- exports, as well as intra-EU trade, the exclusion of which would result in reduction of the estimate. The same study also notes that the trade in environmental goods accounts for only a small portion of all trade in many subheadings, and that 46 of the 54 HS subheadings on the APEC list reflect goods that are not used primarily for environmental purposes. This finding is a validation of concerns of several countries, including India, under the WTO negotiations on environmental goods. The study also notes that multiple-use products with certain environmental applications may be traded under HS subheadings not usually included in the analyses of trade in environmental goods. Achieving clarity on all these aspects, therefore, remains a key challenge towards arriving at a WTO-EGA.

Government procurement and Market Access

The Agreement on Government Procurement (GPA) of the World Trade Organisation (WTO), is a plurilateral agreement establishing a framework of rights and obligations for government procurement among its signatories from a set of WTO member countries. The fundamental aim of the GPA is to mutually open government procurement markets of goods, services and construction services among its parties, which guarantees competition, non-discrimination, transparency and fairness in all government procurement transactions.

The importance of government procurement is reflected by the huge size of the world procurement market. World's total potential non-defence government procurement has been estimated to be in the range of US$ 1.5 to US$ 1.7 trillion a year. China, India and Russia needs special mention here as these economies historically have a larger presence of the government at different levels with a large government procurement market. An important issue before the WTO GPA is the multilateralisation of this plurilateral agreement; otherwise it remains restricted to a few countries. In addition, there is a rising trend to cover government procurement in bilateral and regional agreements. Increasingly, in the context of various FTA negotiations, demands are being made for accepting bilateral obligations on government procurement. The scope of obligations requested by signatories of bilateral and regional agreements include transparency requirements and market access commitments. It has been pointed out that there could be both gains and losses for parties to GPA or accepting bilateral/regional commitments on government procurement.

The WTO's Ministerial Conference of 1996 in Singapore set up a multilateral Working Group on Transparency in Government Procurement. The aims of the Working Group were to conduct a study on transparency in government procurement practices in existing international instruments and national policies and thereby develop elements suitable for inclusion in an

appropriate plurilateral agreement. The Working Group identified 12 issues under four broad areas to be included in the agreement.

At the Doha Ministerial Conference in 2001, the case for a multilateral agreement on transparency in government procurement was recognised and it agreed to discuss and negotiate the agreement in the following ministerial conference. Nonetheless, the important pending government procurement issues were taken up separately and the renegotiation was concluded in December 2011 and the outcome of the negotiations was formally adopted in March 2012. At present, the Agreement has 17 parties comprising 45 WTO members. There are another 30 WTO members as observers in the GPA Committee with 10 members in the process of acceding to the Agreement.

There could be three potential gains from market access and transparency: (1) no restrictions in international trade is welfare enhancing, (2) non-discrimination enhances competition and minimises procurement cost, and (3) transparency in procurement can lower corruption and rent seeking. On the other hand, the costs are: (1) there are costs of switching over from the existing procurement regime especially if there are differences between the existing and those required by the GPA and the number of entities involved, (2) there are theoretically justifiable arguments for preferential treatment and against GPA and governments often go for such treatments without realising that their potential benefits are small, (3) with discrimination not restricting trade, the benefits from non—discrimination as under GPA can hence be small, (4) with restricted trade through tariffs and NTBs, the benefits from GPA may not be much.

Countries often justify inclusion of government procurement in bilateral/regional or in Economic Partnership Agreements (EPAs) as this helps to maintain the momentum of the existing domestic reform processes or promotes open procurement markets in the region. This is particularly beneficial for countries with limited size of their national markets and capacity of their manufacturing and service sectors. The potential costs of including provisions on procurement in the bilateral/regional agreements or EPAs come in two forms. First, any commitments on national treatment will prohibit the use preferences for domestic suppliers as a policy instrument. Second, there will be costs complying with transparency rules.

In TPP the Government Procurement chapter includes core commitments on national treatment, which require that a TPP Party extend to bidders on covered government procurement contracts the same treatment it extends to its own firms; and on most-favored-nation treatment, which require a Party to provide U.S. and other TPP firms at least as good treatment as it extends to any other Party's firms. Apart from stressing on non-discriminatory, fair and transparent procurement procedures, TPP specifies timely publication of complete information on the procuring entity, the specific procurement, the time frame for submission of bids, and a description of conditions for participation of suppliers. The coverage, as is agreed upon among some members of the regional group, is extensive and the commitment guarantees flexibility. However, there are set asides and exclusion including "Buy America" requirements attached to federal funds for state and local mass transit and highway projects and water projects; small business and other set-asides; procurement of transportation services; human feeding programs; and sensitive elements of Department of Defense procurement, including defense systems, materials and textiles.

World Outside Mega-FTAs

There is no doubt that Mega FTAs are a matter of concern for developing countries. All developing countries will not be affected equally. Broadly speaking, small countries will be differently affected than large countries such as Brazil, China India or Indonesia. Also countries with considerable

technological capability will be differently affected than countries with limited technological capabilities. Furthermore, the immediate effects of tariff changes will differ from the long term effect of rule changes, particularly changes in rules regarding investment and those regarding intellectual property rights regimes. As far as trade in goods is concerned, the importance of developing country markets has been growing both for other developing countries and for developed countries. In earlier times markets of the developed countries were more important and many developing countries were willing to bear the costs of other aspects of negotiations to get market access.

The mega trade deals that have already been negotiated or which are being negotiated cover only a small fraction of the countries of the world, though they dominate the world economy. However, their domination is decreasing. An important issue that arises from the limited coverage of these mega deals is what this portends for those countries who are not a party to these deals and these countries are mainly small poor countries. Studies indicate in general that the effect of the mega FTAs on non-members countries would be quite small.

Many of the Asian countries outside the TPP are already members of FTAs with TPP countries. Also, many of the countries inside the TPP are already members of FTAs with individual TPP members. Because of these two factors most of both positive and negative that usually accompany a large FTA like the TPP will not actually occur. Except for the US and Japan, the left out countries do not have significant trade with other members of the TPP. Therefore, the potential for trade diversion that would adversely affect the non-members is limited. Such trade diversion would be particularly important if the non-members are benefitting from GSP preferences which may get eroded. Only a small and shrinking percentage of global bilateral trade flows are eligible for preferences, a significant and growing proportion of trade flows have zero most-favoured nation (MFN) tariffs (implying that no duty preference can be provided) and less than 2percent of world imports enjoy preferences of over 10percent.

The positive result stem from trade creation because of higher incomes in the members effects and spill-over effects from streamlined EU and US regulations, particularly convergence of EU–US standards, with the potential of global standards. On the one hand it would have a positive impact as countries would have to produce to only one set of standards than a multiplicity of standards. On the other hand the standards adopted maybe significantly different from those currently in use raising the cost of meeting the standards. The effect of stricter IP regimes is even more difficult to evaluate. One of the major features which is generally accepted is that it will increase the costs of medicines. The evaluation of the effects of mega FTAs do not usually take into account the costs of implementing new standards.

New Contours of Special and Differential Treatment

As the WTO members meets for the 10th Ministerial Conference in the 20th year of its existence S&DT still holds the key to progress with issues of food security, livelihood and preference to LDCs highlighted as the most critical ones that the developing world would look upto. The whole idea of S&DT stood its ground on the question of equity and development. The principle derived its strength from wide recognition that in order to help the developing countries gain from trade despite lower institutional and sectoral preparedness the norm of non reciprocal preferences should hold when large and small countries engage through trade. The idea and mandated provisions of less than full reciprocity has been the main tool of S&DT under preferential tariff liberalisation in GATT-WTO.

With imperfect competition in global trade as a result of policy induced distortions in the global north in the first place, the South had its own right and reasons to S&DT. With the Doha Development Agenda mandating developmental priorities such issues were slated to get stronger. Post Doha the developed countries sought to redefine the scope of preferences and carved out special provisions for the LDCs. The large emerging economies nevertheless had significant gaps in development and withdrawing special preferences can substantially affect their developmental objectives.

Trends in aid for trade suggest that the top recipients of aid for trade among the LDC group are not yet part of the sophisticated and new age mega regional agreements like the TPP. Vietnam is the only member from the lower middle income category in the TPP. The other developing country members of the TPP are all in the upper middle income category. Integrating LDC member countries with emerging plurilaterals like TPP may not be achieved only through technical assistance and capacity building. Given that such countries continue to account for marginal share of world exports, S&DT provisions would be critical. Mega-regional agreements need to devise provisions of special concessions and technical assistance if in case they intend to bring on board the poorer countries.

The new plurilateral agreements like TPP may be based on exchange of preferences primarily to gain from access to market opportunities in member countries. Special flexibilities meant to promote development can take a backseat in the menu of priorities. TPP does not recognise less than full reciprocity under tariff elimination rules. The nature of flexibilities that are allowed in this particular North-South Plurilateral Trade Agreement gives us an impression of bilateral concessions in market access and protection of sensitive products and industries. Preferential rules that minimise adverse effects of free trade on development have been devised to address country specific contexts within developed and developing countries alike. Differential treatment to accommodate divergences in the level of development and preparedness has hardly been the norm.

Proponents of plurilateral agreements may be cautious about the limits of such arrangements. While on the one hand such agreements promote greater world trade among the participating countries (trade creation), the cost of trade diversion on the non members would prompt them to join such groups. However, without the scope for special and differential treatments and with greater reciprocity, prospects of development can be much delayed. On the other hand, with compelling S&DT issues the north would be less enthusiastic about north-south trade arrangements.

Key Recommendations

- The mega-regionals are association of selected dynamic economics however the centrality of WTO needs to be retained for effective global trade architecture.
- In certain mega-regionals such as TPP, TTIP, EU-Japan, etc., the leadership is driven by industrialised countries.
- Many countries have double membership in specific mega regionals as well as in other regional groupings in the world. Members in the mega regionals having adjusted to the stringent policy environment may seek more high quality rules in other RTAs. Therefore, other RTAs are likely to face new challenges in the coming years to bring in radical changes in the existing rules in different RTAs. The excluded countries should be aware of these developments.
- Presently, negotiating mega regionals have got 54 countries as members. A few other dynamic economies of the world are yet to be included in any proposed mega regionals. The report suggests that there is space for these excluded dynamic economies.

- It is likely that these dynamic economies may come up with new mega regionals. The existing and proposed mega regionals may be expended with the existing dynamic RTAs and vibrant economies or there may be new mega regionals among the existing excluded countries with the support of other RTAs and dynamic economies. The Report has identified 14 mega regionals to come up including six new ones. These options may be explored.
- Mega regionals are not only going to affect non-members but also the member countries. Exclusion of competitive non-member countries by the member countries may substitute supplies coming from the non-member countries, but they cannot offer competitive price, leading to surge in domestic prices for the consumers and producers in the markets of mega regionals. Non-member countries may use this as a bargaining strategy for negotiation.
- Even in the testing times of mega regionals, the excluded developing economies may prosper, provided they prepare themselves for coherent policy regimes, leveraging the strength of multilateral global trading system with due domestic reforms.
- Some of the old issues like Singapore issues are given prominence as 21st century issues in different forms. Legitimising these behind the border issues such as competition policy, labour standards, environmental issues, government procurement, etc. are likely be raised in the multilateral forums. Developing countries may be vigilant about such possibilities.
- The mega regionals discriminatory provisions are invoked for affluent countries. It is likely that more discriminatory policies are to be incorporated for the insiders in the forthcoming mega FTAs. This would create more disadvantages for the excluded countries to get market access in these mega regionals. This concern may be addressed by mega regionals.
- All negotiations on IPR issues covered by the TRIPS should be done within the ambit of WTO and WIPO.
- Developing countries should formulate and develop competition policies and instruments to prepare themselves for new IPR norms.
- Developing countries should oppose lowering the bar of patentability criteria through bilateral and plurilateral treaties.
- Countries of the South will have to resist, out of necessity, introduction of new norms in the IPR regimes that they would find difficult to fulfil and may not be conducive to their social policies.
- The public interest perspective has to be articulated strongly by governments in IPR discourses and necessary mechanisms for this be made involving think-tanks and civil society.
- Imposition of NTMs should be based on documented scientific evidence to the extent possible. TPP reiterates the provisions of the WTO SPS Agreement in this regard. TTIP, RCEP and other mega-regionals should strengthen this provision so as to contain the spread of trade-restrictive SPS measures.
- Harmonisation and regionalisation of standards should be encouraged and this should be integral element of NTM commitments in the future trade agreements, keeping in mind the implications of multiple standards.
- Mutual recognition of conformity assessment procedures and results, is critical to any meaningful negotiation on NTMs. In addition, mutual recognition arrangements should be established to promote cooperation among the certification and accreditation bodies in different countries.
- Development of standards should follow an inclusive and participatory process. Higher participation of developing countries in standards development process may ensure greater compliance and promote cooperation.
- Timely dissemination of notifications relating to introduction of new NTMs would be highly desirable.

- Countries maintaining NTMs should have reasonable degree of freedom in determining the level of protection they would wish to keep to protect the human, animal and plant health in their territories.
- Mega-regionals should aim clear, trade facilitating and transparent provisions for NTM commitments.
- In Services, since there is not much evidence that developing countries can gain significantly from mode 3 liberalisation by way of 'trade', WTO should place greater emphasis on 'liberalisation of services' rather than on 'liberalisation of trade in services'.
- Efficiency of service sector markets is important and opening up does not automatically bring in efficiency. Therefore, developing countries may not be compelled to liberalise their services sector multilaterally. Bringing in effective regulation of markets might be preferable.
- Developing countries feel that liberalisation of mode 4 might benefit them since they have surplus labour. However, since most of these countries have a surplus only in unskilled and semi-skilled labour, WTO should not pursue liberalisation of mode 4 only for highly skilled labour as is in the case of Trans-Pacific Partnership (TPP).
- The incentive for using DSM under new arrangements like TPP is that it provides for time bound results and provides for imposition of sanctions. WTO DSM has to be fast tracked.
- The mega-regional like TPP lack Appellate Body like WTO DSM and Panel Process alone is inadequate for a DSM to function effectively
- As, trade disputes in mega-regionals become very comprehensive with ISDS provisions, they should build their capacity on dispute settlement issues
- Lead firms based in the developed countries need to undertake commitments to secure implementation of labour standards in order to strengthen the scope of fair labour norms in GVCs.
- There is a need to reiterate the WTO approach towards environment issues, which emphasised the principle that while the preservation and protection of the environment is an important objective, it will be done in a manner consistent with their respective needs and concerns at different levels of economic development.
- Depending on the negotiating positions and political considerations to include environmental provisions, countries could also drive towards achieving a balanced outcome by referring to the overall goals of sustainable development as elaborated most recently in the United Nations General Assembly Resolution on Sustainable Development Goals.
    - Paragraph 30 of the Declaration provides that: States are strongly urged to refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance with international law and the Charter of the United Nations that impede the full achievement of economic and social development, particularly in developing countries.
    - Goal 2a mandates states to correct and prevent trade restrictions and distortions in world agricultural markets, including through parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect, in accordance with the mandate of the Doha Development Round.
- There is a need to address environmental issues beyond WTO. Addressing environmental provisions in a trade agreement requires an understanding of: (a) the nature of legal obligations emerging from provisions relating to the environment under an FTA; (b) the potential economic costs of specific environmental requirements, including requirements to maintain specific environment regulatory standards, as well as requirements relating

to adherence to any environmental sanitary and phytosanitary measures or technical regulations; (c) areas where technical assistance and capacity building would be necessary in ensuring compliance with environmental obligations; (d) the nature and extent of financial assistance required; and (e) the nature of dispute settlement and enforcement mechanisms.

- The feasibility of acceptance of environmental provisions would depend on their scope and impact at the domestic level. Hence it is important to evaluate the nature and extent of regulatory amendments and new enactments that may be required at the domestic level to ensure compliance with the proposed environmental provisions in the FTA.
- On Environment, a developing country can set the agenda on certain issues like on SPS/ TBT and Preferential Access to Clean Technologies for Addressing Environmental Concerns.
    - It is not necessary that the agenda on environment for a FTA by a developing country needs to be 'reactive' in all cases. It is also possible that there are several environmental concerns, for example, those pertaining to specific SPS or TBT concerns faced by exporters because of environmental regulations in the export market, or areas where access to environmentally friendly technology is required in the exporting country, for ensuring a certain pattern of development. These could potentially be highlighted as areas were cooperation and technical assistance is required under the FTA in order to facilitate market access into the developed country's market.
    - Developing countries may also seek to build in provisions relating to preferential access to clean technologies and renewable and energy efficient goods and services. Requirements for technical assistance and capacity building to enhance domestic capacity for developing EGS and clean technologies could also be considered as part of the FTA
- Positive assistance, both financial and technical, and capacity building, may be required if the FTA requires adherence to specific environmental regulatory norms. In this regard, developing country parties to a FTA would have to consider whether proposed provisions on environmental obligations are binding in nature. Legally binding obligations would need to be supported adequately through concomitant binding commitments from a developed country party to a FTA in the form of technical and financial assistance and capacity building to enable the other country to enact and enforce environmental regulations.
- As the aggregate of developing country markets may be progressively becoming more important, the threat of a joint trade bloc would be taken more seriously by the developed countries.
- It is required that the developing countries form their own PTA. This may require that large developing countries which may not have much to fear from these mega FTAs help smaller developing countries who may be big losers. This process may be further strengthened through initiatives to build a cooperative system that would encourage south-south FDI flows. Again developing countries can take actions to deal with the threat from the mega FTAs.
- Developing countries need to take steps to foster cooperation among their banks. Such cooperation would provide them with another source of export financing which may become over time independent of the currencies of the developed countries.
- In the past, the exports of LDCs to China have been very beneficial for their performance. If the larger developing countries grant LDCs preferential treatment, these may outweigh any trade diversion losses that they may suffer.

- At the WTO S&DT still holds the key to progress with issues of food security, livelihood and preference to LDCs highlighted as the most critical ones that the developing world would look upto.
- S&DT provisions should look beyond time frame and need to be adjusted with income levels of countries. Without the scope for special and differential treatments and with greater reciprocity, prospects of development can be delayed.
- Mega-regional agreements need to devise provisions of special concessions and technical assistance in case they intend to bring on board the poorer countries.
- If countries from the LDC group have to be integrated with the emerging plurilaterals, aid for trade may not be enough. Hence the relevance of the S&DT provisions.

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Mega Regionals-Which Way?

Introduction

The world economy has witnessed proliferation of regional trading agreements during the past two decades and most of those negotiations were undertaken in traditional sectors. In the post-WTO regime several regional groupings adopted 'WTO plus issues' to boost efficiency of regional groupings through deep integration. Certain RTAs went further in advancing 'WTO – extra' issues to deepen the existing level of integration. Many of them adopted special and differential treatment approach to accommodate specific needs of regional members which were placed at different stages of economic development. In order to address these critical issues in the formation of regional grouping, developing countries were often guided by the 'enabling clause' and developed countries adhered to Article 24 of the GATT for denying special and differential treatment to its member countries. In several other instances, GATS 'services clause' was invoked for the formation of regional grouping. Numerous RTAs resorted to various combinations of WTO provisions such as enabling clause, Article 24, and services clause to meet the aspirations of its member countries of these regional groupings.

In the late 2000s, emergence of mega regionals as the 'third wave' of regionalism has challenged the basic fabric of regionalism and its future. In this regard, signing of Trans-Pacific Partnership (TPP) is an important milestone in the process of regionalism in the world economy. This is an unprecedented development in the annals of the economic history of the world. Along with TPP another three mega regional, viz. TTIP, RCEP and FTAAP have made significant headway in their negotiations, and are likely to be formed in the coming years. These four regional groupings are distinct from other existing regional groupings in terms of their content, scope and impact on the global economy. There is discussion about another four mega regionals, viz. EU-ASEAN, EU-Japan, China-Japan-Korea FTA and Pacific Alliance, which have got similar features to be treated as mega regionals. UN (2015) has treated Trade in Services (TISA) and Tripartite Free Trade Agreement (TFTA) as mega regionals which can have a major hold over the global economic activities in the recent years. So far, there are references to ten mega regionals in the existing literature

Mega regionals can be distinguished from other regional groupings in the sense that they are embodying members of some of the most dynamic regional groupings of the world. TPP, TTIP, RCEP, FTAAP, etc. have either partly or fully subsumed dynamic members of different RTAs such as NAFTA, EU, ASEAN, RCEP, Pacific Alliance, APEC, etc. Some of these RTAs are from either developed

or developing categories or from both set of countries. When more mega regionals are to be formed in future, reorganisations of groupings are likely to take place among the same set of vibrant economies. When first five or eight top mega FTAs are considered, some sample countries may be chosen from the same set of 54 dynamic countries. They are blended with different combinations to form mega regionals. The preliminary observation leads us to infer that these mega regionals are association of selected dynamic economies. In certain cases leadership is driven by industrialised countries such as TPP, TTIP, EU-Japan, etc. whereas economic agenda of same RTAs are driven by emerging and other developing countries such as RCEP, CJKFTA, Pacific Alliance and Tripartite Free Trade Agreements.

Mega regionals have significant command over several important economic activities in the world economy. Their contributions are felt in several frontiers of economic activities including GDP, FDI, Foreign Exchange Reserves, Saving Ratios, Gross Fixed Capital Formation, etc., among others. In several mega regionals, simultaneous presence of members from developed and emerging countries are seen, stressing on different dimensions of their economic engagement. In many such cases, developed countries have shown their strong base in several macro-economic activities but they are lacking in growth whereas emerging countries have shown their surging growth in these activities. Developed countries have selectively chosen dynamic regional groupings such as RCEP, ASEAN, and a number of vibrant emerging countries to form different mega regionals. These mega groupings are likely to be expanded in future with a limited number of dynamic RTAs and countries.

Since world economy has witnessed a new trend in the formation of regional groupings, there would be consolidation of RTAs and their rules are likely to be more stringent and comprehensive in future. Many countries have double membership in specific mega regionals as well as in other regional groupings in the world. Members in mega regionals, having adjusted to the stringent policy environment, may seek more high quality rules in other RTAs. Therefore, other RTAs are likely to face new challenges in the coming years to bring in radical changes in the existing rules in different RTAs.

Mega regionals have got strong control over major economic activities in the world economy. In several mega regionals it is observed that the share of developed countries in several major economic activities has been declining whereas reversal of such trend is observed for other dynamic emerging countries in most of the mega regionals. This may be interpreted as an attempt of developed countries to integrate closely with the fast growing economies of the world to get synergised with the dynamic economies. Such attempt may enable developed countries to halt declining trend of their economic activities in various directions.

It is imperative from the point of view of the recent global development that mega regionals will be guided by economic and political considerations. In this regard formation or expansions of mega regionals would be driven mostly by economic considerations. Future re-alignment of mega regionals would be in the lines of only dynamic economies. For example, as discussed earlier, the first eight mega regionals have got 54 countries. A few other dynamic economies of the world are yet to be included in any proposed mega regionals. Similar is the case with several dynamic RTAs.

Looking at the current pattern of mega regionals there may emerge several new mega regional groupings in future in two different ways. Firstly, the existing and proposed mega regionals may be expanded with the existing dynamic RTAs and vibrant economies, and secondly, there may be new mega regionals among the existing excluded countries with the support of other RTAs and dynamic economies. However, it is certain that the world economy is likely to witness numerous mega regionals in future. In the process of re-alignment of mega regionals, there are several dynamic economies from the group

of excluded countries that may join different mega regionals in future.

The existing and proposed mega regionals have got large stake in major global activities since the Post-War period. With the formation of such large regional caucus, their hold over major global economic activities would be consolidated further but this may not be an alarming situation for the excluded countries. In the past, developed countries had large access on global economic activities and there was limited space for other developing countries. However, with the limited economic opportunities available, these developing countries have made spectacular accomplishment and in a way, surpassed performance of several developed and emerging countries during the last decade. Many of these high performing economies are from Asia, Africa, and Latin America. With the emergence of mega regionals, the situation may be tight for the excluded countries where there could be strong competition from member countries in several sectors, but the world may not be completely closed to these countries. Initiating of a new practice of preferential treatment to members in mega regionals, may not undermine the competitiveness of the excluded countries. Rather, competitiveness of these countries is likely to pose a major challenge to the member countries which are trying to replace them through the route of trade diversion. Exclusion of non-member countries where they have significant competitiveness by member countries may substitute supplies coming from the non-member countries but they cannot offer competitive price, leading to surge in domestic prices for the consumers and producers in the markets of mega regionals.

Developed countries mostly the US and the EU have selectively chosen dynamic regional groupings from emerging countries such as RCEP, ASEAN and a few vibrant economies to form mega regionals. These mega regionals are likely to be expanded in future.

In the coming years there would be consolidation of RTAs and trade rules are likely to be more stringent and comprehensive. This may be a reality because several members of the mega regionals are also happened to be members in other RTAs. Since members of the mega regionals have already implemented trade reforms by maintaining high standards, they may insist on introduction of more radical changes and imposing high standards on the existing trade rules.

Though developed countries have high stake of in several economic activities in the world, their contribution in the total global economic activities has been declining continuously over the last one decade. There is a strong attempt by the industrialised countries to make a reversal of such trends. This could be possible by having close economic association with dynamic countries as well as vibrant regions of the world through forming 21st century mega regionals.

Since a new trend has emerged in the world economy in the form of mega regionals, this process would continue for some more decades from now. It is expected that the surge of new mega regionals could re-appear in the global economy in two different ways. Firstly, the existing mega RTAs are to be expanded with the merger of dynamic RTAs and vibrant economies in the world. This may include excluded countries and RTAs. Secondly, there could be regrouping of excluded but high potential FTAs with other like mined FTAs and dynamic economies. With the second type of realignment of dynamic economies there could be a possibility of inclusion of several excluded countries in the process of newly emerging mega regionals.

There has been a pronounced issue regarding the scope and opportunities for excluded countries. It may be recalled that developed countries have large access over various global economic activities, even before the formation or discussion about the mega regionals. During that period, the opportunities for the present excluded countries had limited

economic opportunities in the world economy. Despite such limitations, several countries in the world from Asia, Latin America and Africa have performed well during the last two decades. They have developed strong competitive strength in several sectors, both in trade and production. These countries have taken up strong competition with several emerging countries in the world. For example, India finds difficulty in competing with Bangladesh in the garment sector, and several such instances can be drawn from several countries. This example may be put against the differential treatment conferred to the member countries of the mega regionals. It may be argued that evolving a practice of preferential trade in mega regionals may not undermine the competitiveness of excluded countries. Competitiveness of these countries is likely to pose major challenges for future expansion of the mega regionals, in terms of achieving economic efficiency and also excluding them from such trading arrangements

It may be recalled that some of the discarded issues like Singapore issues are given prominence as 21st century issues in different forms. These issues are considered as game changer in the new arrangement. Legitimising these behind the border issues such as competition policy, labour standards, environmental issues, government procurement, etc. in regional context may be raised in the multilateral forums. It is to be seen how these provisions in the global governance architecture are likely to shift trade equations in favour of affluent economies.

The Marrakesh Agreement has the provision to provide special and differential treatment (S&DT) to least developed countries in market access and other related areas. Such discriminatory provisions in trade agreements are meant for the less privileged partners in the WTO. But in the recently debated mega regionals, discriminatory provisions are very much embodied in the agreement. Such provisions are also available for more advanced members in the mega regionals. In TPP the discriminatory provisions are invoked for several affluent countries such as the US, Japan, Australia, etc. It is likely that more discriminatory policies are to be incorporated for the insiders in the forthcoming mega FTAs. This would create more disadvantages for the excluded countries to get market access in these mega regionals.

It is discussed widely that reduction of NTBs would bring substantial gains for the member countries in different mega regionals. In case of TTIP, nearly 80 per cent of the total expected gains from the market integration would come from radical reforms in NTBs. For reduction of NTBs, it is argued that harmonisation of standards among member countries is emerging as a policy strategy. This would support both member and non-member countries in mega regionals. It is observed by Baldwin (2014) that reduction of NTBs in the form of 10 per cent reduction in regulation costs between the US and Japan in the framework of TPP would reduce regulation costs in the range of 2-5 per cent to non-member countries. But there is another strategy to endorse Mutual Recognition Agreements (MRAs) which would allow member countries to access each other market without harmonising their standards. The net effect of the MRAs could be different for member and excluded countries in mega regionals. While member countries can have access to large integrated market of its member countries without forging an agreement on harmonise standards, excluded countries are likely to face fragmented markets in such mega regionals.

Global Recession and Emergence of Mega Regionals

There are several factors which have contributed to the proliferation of mega regional initiatives during the recent episode of the global recession. In the 1990s, there was a phase of regional cooperation among several countries of the world including those of the US and the EU, but the gains from such regional cooperation started diminishing during the last two decades. Secondly, there was a lack of agreement

among member countries of the WTO on the issue of Doha Development Agenda, leading to continuation of pessimism in multilateral global governance. Slow progress at the multilateral negotiations has led to new initiative on the formation of mega regionals. Thirdly, emerging countries have expanded significantly during the last three decades, particularly, Chinese performance has been spectacular in this regard. Rising growth profile of emerging and other developing countries, particularly in Asia and Africa, has a deterrent effect on the growth prospects of industrialised countries. Fourthly, developed countries required rapid reforms following the 'Euro Zone' and slowing down of the US economy. Fifthly, global shares of developed countries in many major economic activities have been declining during the last two decades. These factors have immensely contributed to argue for bringing in high standards sectoral negotiations with a view to reverse the declining trend of their hold on major global economic activities. These mega regionals can support industrialised countries to limit market access to many developing countries and also getting access to large markets of developed countries as well as other associated dynamic countries. This would keep their economic hegemony in the global governance and also to regain their economic domination, particularly those of the US and the EU in areas such as trade and investment.

Definition of Mega Regionals

It is argued that 21st century mega regionals are different from 20th century regional trading arrangements due to their deep integration among member countries and strong foothold in different global economic activities. WEF (2014) argues that each mega regional should have 24 per cent of stake in the global trade and stronghold on Foreign Direct Investment (FDI). Each mega regional should have two or more countries in the driving seat or serving as a hub for promoting global value chains. Draper, Lacey and Ramkolowan (2014) have defined mega regionals as a group of three or more countries forming a deep regional integration, collectively commanding over 25 per cent or more of the global trade and have regional agreement which goes beyond current WTO discipline.

Surge of Mega Regionals

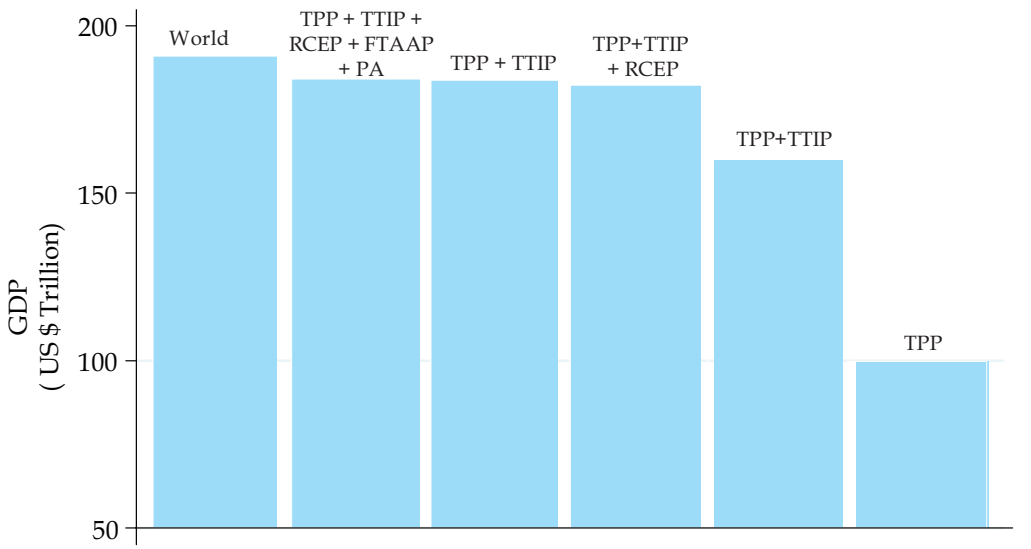
This Report attempts to define that mega regionals are those which are having strong clout over several global economic activities. The definition of mega regionals in earlier studies suffers from several shortcomings. The perception that a mega regional should command over 25 per cent of global trade or other global economic activities, have no econometric justification. Secondly, ten mega regionals are already identified in the literature and are under negotiations, but there is no comprehensive criterion for justifying them as mega regionals in any study. Therefore, identification of RTAs should be subjected to a defined criterion which need empirical examination. It may so happen that there may be several RTAs having the potentiality to form mega regional independently or jointly in associations with other qualified RTAs and dynamic economies.

In the current literature, four mega regionals are important at this point, particularly on the strength of their level of income and wealth. Their affluence has put them at the centre of the global governance. In most of the cases, income remains the barometer for all major economic activities in different geographical spaces. We postulate that GDP is primarily determined by four major economic factors. In this regard, trade has been one of the major drivers of growth in different countries/RTAs. Since the 1970s, several countries in the East and South-East Asia adopted 'export-led growth' approach during the period of global buoyancy and this strategy enabled them to grow fast, despite having limitations in this approach. Production fragmentation and trade in global value chain (GVC) are critical factors in promoting trade in several developed and developing countries. Secondly, resource base is an important determinant of growth. This

could happen through the use of domestic and foreign resources to improve open the resource base of a country/region. Thirdly, productive capacity of a country is important for maintaining high growth in a sustainable manner. Finally, the level of integration among member countries along with associated trade enabling policies are important for attaining high growth in any region. These factors have enabled mega regionals to consolidate their synergies for maintaining high growth.

Mega regionals have strong stakes in the world economy as shown from various studies. This was evident even before the formation of mega regionals. Recent changes in the global trade regime may contribute to further consolidation of developed countries' hold over major global economic activities. There are three mega regionals which have shared the substantial part of global GDP as shown in Figure 1.1. By separating overlapping membership in different mega regionals, we have taken combined share of different groups in the above graph. Members of TPP shared 52.3 per cent of Gross World Products (GWP) in 2012. Combined share in GWP increases to 83.9 per cent when TPP is joined with TTIP. It increases further to more than 90 per cent when combined GDP of the members of TPP, TTIP and RCEP is taken together. However, further additional of other mega regionals such as EU-ASEAN, EU-Japan, CJKFTA etc. is not adding further to their share in the global GDP. We observed three trends: (i) TPP, TTIP and RCEP have shared largest chunk of GWP and additional of more mega regionals may not contribute to their overall share in the GWP. (ii) In the first three mega regionals (TPP, TTIP and RCEP) 53 countries have participated and inclusion of Pacific Alliance increases the number of participating countries to 54. (iii) Membership of other mega regionals under negotiation such as EU-ASEAN, EU-Japan, CJKFTA etc. is drawn from these 54 countries. Therefore, future mega regionals are trying to focus on limited number of membership which are

Figure 1.1: Cumulative Share of Mega RTAs in GDP



Source: RIS based on World Development Indicator database, October 2015

Notes: World comprises of 159 countries

We have used data for the year 2012

based on economic and political consideration. New members from the excluded countries may join new mega regionals or with the existing ones, but only a few of them may be accommodated in these regional groupings.

Economic profile of 54 countries, which are part of mega regionals, is presented in Table 1.1. These countries are drawn from developed, emerging, other developing LDCs and transitional economies. These countries are reappearing in various proposed mega regionals under negotiations including TTIP, RCEP, FTAAP, Pacific Alliance, EU-Japan, EU-ASEAN and CJKFTA etc. and the recently concluded TPP.

Potential Mega Regionals and Implications for Global Economy

It is strongly felt that there could be several other potential RTAs which can emerge as mega regionals in future. In an empirical exercise, we have examined other RTAs which are having features to become potential mega regionals. The issue remains as to which regional trading agreements may be defined as the 'Mega Regionals'. Several studies have grappled with these definitional issues and have attempted to identify them on the basis of RTA's share in the Gross World Product (GWP) and their trade share in the global trade.

Table 1.1: Profile of 54 Economies making up the Mega FTAs: 2012

Country	Trade in G&S	GFCF	Remittances	Revenue	Foreign Exchange Reserves	GDP	Gross Domestic Savings	Labour*
Australia	1617.0	1645.0	9.3	722.8	187.0	3383.6	1742.8	48.2
Austria	1426.6	347.4	10.0	254.8	102.8	1394.9	433.2	17.6
Belgium	2742.0	430.8	38.2	416.9	115.6	1677.0	477.8	19.6
Bulgaria	172.3	42.2	5.4	26.2	76.4	138.2	40.8	13.4
Canada	2668.4	1274.9	3.5	452.1	196.8	3903.8	1264.8	57.9
Cyprus	85.3	14.3	0.4	18.8	4.5	80.7	14.4	2.4
Denmark	1115.6	224.2	4.8	355.9	340.9	1065.7	313.2	11.7
Estonia	120.7	22.5	1.5	10.2	1.1	62.5	26.9	2.8
Finland	720.2	215.1	3.3	171.6	41.7	861.1	215.9	10.9
France	5503.8	2315.7	84.7	2007.2	708.9	9367.1	2197.7	120.1
Germany	10829.0	2720.8	63.1	1455.3	956.0	12634.7	3541.8	166.9
Greece	466.4	111.4	2.6	186.4	27.7	831.7	94.6	20.2
Ireland	1474.4	133.1	2.7	190.9	6.5	867.6	321.9	8.7
Italy	3822.1	1437.5	25.3	1610.2	686.4	7139.7	1563.3	100.4
Japan	8427.2	7545.1	15.3	2849.7	7632.7	28251.5	6750.4	391.6
Latvia	94.3	26.9	2.7	7.2	28.2	74.4	24.6	4.2
Lithuania	193.5	27.7	5.6	55.7	31.8	122.1	34.3	6.2
Luxembourg	593.9	38.9	6.4	43.3	3.7	169.4	116.2	1.0
Malta	45.0	5.2	0.8	7.5	2.7	27.6	6.2	0.7
Netherlands	4205.2	598.5	6.3	572.8	209.1	2904.3	937.3	36.0
New Zealand	309.7	140.0	1.8	145.7	66.8	506.3	154.5	9.5
Portugal	557.6	128.7	14.7	157.1	85.1	766.7	131.6	21.9
Slovak Republic	580.2	73.5	7.2	39.9	9.4	328.2	91.8	10.9
Slovenia	219.5	34.1	2.3	27.2	3.6	155.1	43.2	4.1
Spain	2596.2	1012.9	36.6	336.1	191.4	4748.3	1179.1	94.7
Sweden	1608.8	474.1	3.1	356.4	201.2	1723.4	599.2	20.4
United Kingdom	5869.3	1581.1	6.6	2564.6	391.7	10139.4	1509.9	130.1
USA	16478.5	11525.0	24.1	5773.3	2181.6	56551.0	10121.1	637.3

Table 1.1 continued...

Table 1.1 continued...

Brunei	40.0	9.0	-	-	13.5	41.1	43.3	0.8
Hong Kong	1883.9	121.8	0.7	51.5	579.5	469.1	138.4	7.5
Korea, Rep.	4485.9	1360.9	24.7	589.6	1233.4	4661.0	1653.0	103.1
Papua New Guinea	-	-	-	-	3.7	7.8	0.0	3.2
Singapore	3178.6	281.7	-	107.2	966.8	775.2	610.5	12.1
Vietnam	564.9	116.5	33.0	-	79.0	350.1	191.6	210.5
Chile	515.2	239.8	0.6	126.1	156.5	659.2	268.8	33.8
China	10200.1	10618.4	108.7	1320.3	9391.8	13687.2	12705.3	2387.6
Colombia	180.9	164.1	7.5	53.9	69.4	405.8	163.2	47.0
Czech Republic	1001.5	204.7	5.4	83.4	170.5	620.4	258.8	21.1
Hungary	822.1	88.3	12.8	101.9	162.6	445.7	132.2	17.6
India	768.2	483.4	57.8	150.4	252.5	1393.6	542.3	478.0
Indonesia	875.6	820.1	19.7	122.0	308.0	1276.2	954.9	361.3
Malaysia	1412.9	298.2	5.0	127.9	532.8	794.2	457.4	51.0
Mexico	2572.7	984.4	86.8	-	620.8	4125.4	1040.8	213.5
Peru	239.7	185.6	10.4	78.1	239.5	471.9	217.2	65.4
Philippines	397.7	136.1	68.4	56.1	232.8	435.5	112.6	126.1
Poland	1374.5	357.2	13.0	261.2	403.5	1634.1	405.2	73.2
Russia	651.0	387.2	5.1	147.7	472.1	980.3	641.7	76.9
Romania	117.9	41.4	3.4	22.1	42.7	117.1	37.0	9.5
Thailand	1080.0	293.0	13.2	110.8	509.1	671.7	339.0	118.9
Cambodia	26.2	4.4	0.3	2.3	9.1	20.0	3.4	16.5
Lao	8.2	5.3	0.1	1.4	2.3	9.4	4.1	6.4
Myanmar	-	-	0.5	-	13.8	-	-	58.7
Croatia	149.2	41.9	5.2	35.5	56.0	181.4	44.6	7.4

Source: RIS databased based on World Development Indicator database, October 2015

Note: (i) '-' indicate unavailability of data, * in Million

(ii) The Mega FTAs used to identify these unique 54 economies are TPP, TTIP, RCEP, FTAAP, Pacific Alliance, EU-Japan, EU-ASEAN and CJK

(iii) Taiwan has not been reported due to unavailability of data

An attempt has been made to identify 'Mega' RTAs' on the basis of not just GDP and trade but other factors governing overall economic activities. The empirical analysis based on an economic model and methodology as well as results are presented in Box 1.1. These factors cover different facets of economic activities ranging from income, investment, trade, savings, remittances, etc. among others. We have use ten economic variables which are determinants of GDP of 59 FTAs at two points of time. Using an econometric analysis, it is observed that 14 RTAs are qualified to become Mega Regionals including some of the regional groupings which are under negotiation at present. The detailed methodological issues are discussed in Box 1.1. The identified RTAs are TPP, TTIP, RCEP, FTAAP, EU-ASEAN, EU-JAPAN, China-Japan-Korea FTA, TISA, EEA, EU-28, EMU, CAFTA-DR, NAFTA and LAIA. From the list of 14 potential future mega FTAs, last six regional groupings are not included in the literature so far. These RTAs are identified on the basis of econometric analysis and the existing level of integration between them.

Identification of Dynamic Economies

There are several excluded countries which have the potentiality to join any mega regional in future. In another econometric exercise, we have tried to identify some potential dynamic economies from the list of 105 excluded countries. In this case, GDP is considered as the key variable representing all economic

Box 1.1: Identification of Potential Mega RTAs

During the recent recessionary period, Mega Regionals are gaining ground as 21st century regional groupings in the world economy. A few mega regionals are discussed in the literature but several RTAs are having the potentiality to become mega RTAs in future. An econometric exercise is undertaken to identify future mega regionals along with those which are discussed in the literature.

Using a standard regression model for GDP determination and putting a diagnostic test, Chow (1960) proposed an F-test criterion to identify structural breaks in a regression equation wherein a structural break may be defined as a switch in the regression equation, i.e. changes in the regression coefficients. The idea of the Chow Test is essentially to fit the model equation separately for each subsample and to examine whether there are significant differences in the estimated equations for identifying possibility of other potential Mega FTAs having similar characteristics along those which are already identified in the literature.

For this purpose, sequential Chow test checks were conducted for structural instability across the whole data range by creating a subsample at each observation in the dataset. A significant difference indicates a structural change in the relationship. This test has been used to identify the possible set of RTAs which are behaviourally identical Mega RTAs in a sample of many RTAs. The model is estimated with a set of cross-sectional data of 59 Regional Trading Agreements (RTAs), using 10 variables. The 59 RTAs considered for the analysis consists of 7 Monetary Union, 3 Common Markets, 15 Customs Unions, 16 Free Trade Agreements (FTAs), 8 Preferential Trade Agreements and 10 Mega FTAs. Using cross-section data for the empirical exercise at two points of time, viz. 2007 and 2012, it is hypothesized that the economic effects through income variable is explained by host of other structural variables and hence the estimated model is:

GDP = f (Trade of Goods and Services, Gross Fixed Capital Formation, Tax Revenue, Trade in Parts and Components, Foreign Reserves, Remittances received and Foreign Direct Investment)

The equation is estimated at two points of time.

Year 2007:

GDP = -1.98E+10 (7.90E+10) – 1.13TradeGS*** (0.1719) + 2.89GFCF*** (0.171) + 4.53Rev*** (0.5864) + 1.23E+09PnC*** (1.78E+08) – 0.77ForRev*** (-0.7687) + 9.99Remit*** (2.86) + 7.12FDI*** (1.544)

R-Squared = 0.9976, n =59

Year 2012:

GDP = -4.55E+10 (-8.47E+10) – 1.11TradeGS*** (-0.2607) + 3.49GFCF*** (0.2964) + 3.17Rev*** (1.09) + 1.2E+09PnC*** (3.27E+08) – 0.73ForRev*** (0.2586) – 7.16Remit** (3.11) – 4.81FDI* (2.677)

R- Squared = 0.9981, n =59

Note: Standard errors are reported in parentheses. *, **, *** denote level of significance at the 10 per cent, 5 per cent and 1 per cent level, respectively.

where, GDP denotes Gross Domestic Product at constant prices; Trade GS for total trade of goods and services at constant prices; GFCF for gross fixed capital formation at constant prices; Rev1 for Tax Revenue at constant prices; PnC = Parts and Components Trade at constant prices; For Revenue for total reserves (including gold) at constant prices; Remit1 = Personal remittances at constant prices; FDI for Foreign Direct Investment, net at constant prices.

The results shows that regional GDP at constant prices and these variables are significant at different levels of significance. However, some variables are dropped due to their insignificant relationship and/or their high correlation with other variables in the model such as Labour Force, Gross Domestic Savings and Import of Ores. The model thus estimated led to the identification of 13 and 21 Mega RTAs in 2007 and 2012 respectively of which 14 RTAs are considered as potential Mega Regionals in future. These identified RTAs include TPP, TTIP, RCEP, FTAAP, EU-ASEAN, EU-JAPAN, CJKFTA, TISA, EEA, EU-28, EMU, CAFTA-DR, NAFTA and LAIA.

activities. Four sets of economic variables are used for the determination of economic activities. Using cross-section data, models are experimented at two points of time. As discussed in the Box 1.2, trade dimensions are captured by three variables, domestic and foreign resources by eight variables and productive capacity by two variables in the model. We have got a good fit of the equation using 59 major regional groupings from all regions of the world and these RTAs are having different levels of regional integration.

Further expansion of the identified RTAs to mega regionals depends primarily on two

Table 1.2: Intra- Regional Trade of Potential Mega RTAs (US Billion $)

Mega FTA	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	CAGR
TPP	2175	2263	2571	2847	3145	3327	3596	2699	3364	3866	4042	4026	4123	6
TTIP	4167	4981	5883	6317	7143	8293	9031	6931	7622	8818	8300	8527	8826	7
RCEP	1136	1402	1786	2082	2401	2796	3331	2779	3707	4446	4529	4530	4584	12
FTAAP	4040	4519	5400	6122	6947	7688	8500	6886	8869	10283	10750	10947	11125	9
EU-ASEAN	3745	4567	5460	5889	6722	7861	8637	6638	7402	8586	8087	8322	8556	7
EU-Japan	3593	4380	5219	5591	6347	7423	8102	6188	6806	7882	7324	7521	7741	7
CJK	378	493	640	729	827	943	1068	899	1178	1367	1337	1312	1316	11
TISA	7801	8945	10504	11390	12727	14405	15720	12088	13869	16132	15655	15870	16210	6
EEA	3518	4302	5135	5551	6337	7430	8173	6221	6833	7937	7399	7607	7814	7
EU-28	3371	4123	4918	5290	6039	7085	7747	5925	6506	7541	7006	7225	7450	7
EMU	2036	2529	3022	3214	3616	4265	4663	3616	3921	4508	4142	4242	4307	7
CAFTA-DR	61	66	68	71	78	85	93	78	94	114	119	118	119	6
NAFTA	1260	1308	1471	1635	1788	1888	2002	1504	1878	2163	2261	2321	2422	6
LAIA	81	90	127	161	200	243	299	221	280	342	346	344	321	12

Source: RIS database based on Direction of Trade Statistic online, IMF

Box 1.2: Dynamic Economies: Methodology for Identification and Results

In the light of the upcoming Mega RTAs, 54 countries are expected to be part of 8 Mega Regionals and most of them are happened to be dynamic in their economic performance. One cannot overlook the fact that substantial global opportunities are expected to be with 54 economies which happen to be closely integrated dynamic economies. However, in future the sustainability and the reintegration of different RTAs and countries to form Mega RTAs would be on the basis of vibrant economies and dynamic RTAs. In this regard, this empirical exercise is an attempt to identify dynamic economies out of the economies which have been excluded from the present so called mega regionals which are under negotiations.

It is postulated that economic activities of excluded countries represented by GDP, and its determinants would determine the basis of a identifying the dynamic economies which could be a part of mega regionals in future. This is the minimum condition to identify a country as a potential one to be the part of any mega regional. In this case, we have identified 10 variables, representing various economic dimensions affecting income in the model. Following a regression model, a diagnostic Chow test is used to discriminate between ideal set of potential mega FTAs from the total of 59 RTAs considered in the model. For checking potential set of mega regionals at different levels, the Sequential Chow Test has been used. The model used comprises of cross-sectional data of 105 economies which have excluded from the present negotiations of different Mega RTAs and 14 variables. The list of 105 countries considered for the analysis comprises of 3 developed economies, 53 developing, 4 emerging, 30 Least Developed Countries (LDCs), 13 Transitional and 2 others in the sample. The cross-sectional data for the empirical exercise was used at two points of time, viz. 2007 and 2012. We have hypothesized that the economic effects are best reflected by income variable which is explained by a few economic variables and the model is as follows:

GDP = f (Export of Goods and Services, Gross Fixed Capital Formation, Gross Capital Formation, Labour Force, Gross Domestic Savings, and Gross Savings)

Year 2007

GDP = -2.48E+09 (1.34E+09) + 0.27ExportGS*** (7.55E-02) + 3.725GFCF*** (0.1282) + 0.33GCF*** (0.1216) + 611.96Labour*** (115.9) + 0.56DomSaving** (0.282) – 1.17Saving* (0.3155)

R-Squared = 0.9933

Year 2012

GDP = -0.17320E+10 (0.2272E+10) + 1.0959ExportGS*** (0.1108) + 2.87GFCF*** (0.1019) + 0.30GCF** (0.1165) – 272.07Labour* (199.7) – 1.95DomSaving*** (0.2881) + 1.11Saving* (0.3030)

R- Squared = 0.9981

Where GDP denotes Gross Domestic Product at constant prices; ExportGS for export of goods and services at constant prices; GFCF1 for gross fixed capital formation at constant prices; GCF for gross capital formation at constant prices; Labour for labour force, Total; DomSaving for gross domestic savings at current prices; Saving for gross saving at current prices

Note: Standard errors are reported in parentheses. *, **, *** denote level of significance at the 10 per cent, 5 per cent and 1 per cent level, respectively.

The model estimation has identified 17 and 13 dynamic economies in 2007 and 2012 respectively. Using results of both years, 13 dynamic economies are identified. These countries identified include Brazil, Turkey, Saudi Arabia, Norway, Argentina, South Africa, United Arab Emirates, Venezuela, Israel, Nigeria, Pakistan, Egypt and Bangladesh. The potential countries which can be associated with future mega regionals, include two from developed countries, one from LDC and the rest from emerging countries.

factors. The intra-regional trade among 14 identified RTAs/mega regionals is presented in Table 1.2. Estimation of IRT is undertaken for the period 2002-14. There are two trends emerging from the analysis. Firstly, there are considerable level of differences in the level of intra-reginal trade among different RTAs (Table 1.2). In several cases, high IRT is associated with those RTAs which are linked with developed countries. Secondly, some of the high performing RTAs have strong trade linkages with developing and emerging countries. Some of these RTAs are RCEP, FTAAP, CJKFTA and LAIA. These results support the possibility of mega regionals in future.

The econometric model suggests that 13 dynamic countries from a list of 105 excluded

countries are identified as potential economies to join any mega regionals in future. These countries identified Brazil, Turkey, Saudi Arabia, Norway, Argentina, South Africa, United Arab Emirates, Venezuela, Israel, Nigeria, Pakistan, Egypt and Bangladesh as potential countries for the purpose. From the identified set of countries, two of them are from developed, one from LDC and rest ten from emerging countries. It is evident from the present analysis that future inclusion of excluding countries in the future mega regionals has limited scope. In this situation there may be several excluded countries which would be outside the ambit of future mega regionals.

Centrality of WTO in the World Trading System

Increasing Regionalization and Relevance of WTO

However, TPP is a reality now; one might ponder over the impact of such increased regionalism over the multilateral trade institution. The WTO has three types of functions: It provides as a platform for trade negotiations. It administers the WTO agreements through its dispute settlement mechanism and it helps build trade capacities of developing countries. While FTAs by definition are WTO plus and hence provided negotiated solutions for deeper trade integration, they are yet to show how they can also be effective in settling trade disputes. This is because most FTAs do not even have a concrete and well-structured dispute settlement mechanism. TPP has provision for dispute settlement mechanism but we are yet to see how it functions.

WTO has a distinct advantage in dispute settlement which cannot be matched by regional arrangement by virtue of its sheer membership as it covers almost all the major nations. WTO has already dealt with a large number of disputes. Many of the disputes were resolved even without involving the formal dispute settlement procedure and some were settled at the consultation stage. This could be possible because the WTO could act as the good office and also through the influence of third parties. Such a success could be difficult to replicate in a regional or bilateral forum. It has also been argued that third-party participation at the WTO – commonly criticized for making settlement less likely – significantly reduces disparities in post-dispute trade.[1] However, the centrality of the WTO with regard to Dispute Settlement Mechanism (DSM) cannot be undermined as shown in Box 1.3

Box 1.3: Primacy of WTO in the Dispute Settlement Mechanism

In the wake of proliferation of Regional Trading Agreements (RTAs) and Mega RTAs, the issue of dispute settlement between the parties involved, becomes pertinent. The considerable growth of fully articulated Dispute Settlement Mechanisms (DSMs) coincided with the establishment of World Trade Organisation in 2005 and peaked in 2009.

Several studies have tried to identify the reasons for the rise of regional DSMs over time and have examined postulate different hypothesis for the same. One among these hypotheses is the reinsurance hypothesis, which postulates that countries try to purchase a form of reinsurance while signing regional agreements with dispute provisions in order to downsize the level of risk. This hypothesis suggests three main reasons for countries to invest in DSMs in RTAs despite being members in the WTO system. Firstly, DSMs tend to build a confidence mechanism in the RTA itself; secondly they act as a safeguard for WTO-plus and WTO-extra disciplines, and lastly, it acts a valuable commitment to the principle of judicial independence.

However, despite the RTAs' increasing emphasis on regional DSMs, empirical investigation suggests continuation of disputes being heard at the WTO. WTO has seen an increase in disputes settlement cases between NAFTA members with an exception of MERCOSUR disputes. There appears to be a paradox of increasing intricate DSMs at the regional level, coupled with rising dependence on WTO for dispute settlement. Therefore, WTO plays the key role of central governance body for dispute settlement.

Source: RIS database based on Froese (2014).

However, if there is any challenge to the WTO remaining as an effective forum for settlement of trade disputes, it is from the most powerful nations showing contempt to the WTO rulings. Interestingly, while the so-called lack of progress on Doha Round as a potential threat to the credibility of WTO received huge attention from the experts and commentators, they largely remained silent on this aspect of the WTO. In 2002, Brazil moved the WTO challenging some of the features of the US cotton subsidy programme. In March 2003 a dispute settlement panel was established and it gave its decision in September 2004, ruling that (1) certain US agricultural payments for cotton distorted international agricultural markets and should be either withdrawn or modified; and (2) U.S. Step-2 payments and agricultural export credit guarantees for cotton and other unscheduled commodities were prohibited subsidies under WTO rules and should be withdrawn. Subsequently, the US made some changes to both its cotton and export credit guarantee programmes.

However, Brazil argued that the US response was inadequate and a WTO compliance panel ruled in Brazil's favour and was upheld on appeal. The US made some further changes but Brazil was still not satisfied and it threatened to raise tariffs on hundreds of millions of dollars in US goods including cars, electronics, and pharmaceuticals. This forced the US to reach an agreement with Brazil. The US agreed to pay Brazil $147 million a year for the privilege of continuing to subsidise its own farmers in a WTO-inconsistent way. It also granted a one-off payment of US$300 million to the Brazilian Cotton Institute. However, this settlement raises question as several other cotton producers including some very poor African countries are also victims of US unfair subsidies on cotton. Some experts have termed the US settlement with Brazil as "private peace at the expense of public justice".[2]

This is not the only case where the US decided to brazen out. The tiny Caribbean nation of Antigua and Barbuda challenged the US regarding measures applied by central, regional and local authorities in the US, affecting the cross-border supply of gambling and betting services from Antigua and Barbuda. The US argued that it did not commit internet gambling at the WTO but it lost yet another trade dispute in 2004. The US also lost at the Appellate Body in 2005. However, the US refused to change its laws or pay any compensation to Antigua and Barbuda. In December 2007, the DSB arbitrator ruled that the annual loss to Antigua and Barbuda was US$21 million and that Antigua could request authorisation from the DSB to suspend the country's obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) for the same amount annually. At the DSB session of January 2013, Antigua and Barbuda requested that the DSB authorise the suspension of concessions and obligations to the US in respect of IP rights and the DSB agreed to grant such authorisation. However, the authorisation had not been used so far by Antigua and Barbuda.

In the third area of its activities, the WTO has done very little so far. Under its Aid for Trade programme WTO encourages additional flows of Aid for Trade from bilateral, regional and multilateral donors to support requests for trade-related capacity building, support improved ways of monitoring and evaluating the initiative, encourage mainstreaming of trade into national development strategies by partner countries. Though there has been some improvement in recent years, developed countries have preferred providing trade aid bilaterally as they often tried to achieve their political objectives. The role WTO in trade related capacity building is important as it can make such activities free of political consideration of developed countries and also bring equity in distribution of trade aid. The Enhanced Integrated Framework (FIF) has not been able to meet its funding target which itself is quite moderate. But it is getting more importance now. Upon implementation of the trade facilitation agreement, the importance of the WTO in trade related capacity building is going to enhance as the commitments of several developing countries are linked to their receiving trade aid.

Regionalism and Multilateralism: Where is the Convergence?

The Doha Development Round, faced several roadblocks since its launch and in all such instances, concerns have been expressed that the lack of "progress" at the WTO will lead to increasing regionalism and that will lead to decline of the WTO. Before one can discuss whether such concerns are legitimate or not, it is important to recognise that multilateralism and regionalism are not either or issue. NAFTA was signed even as GATT/WTO made significant "progress" in the Uruguay Round and more so in the way the US wanted. The EU went for far deeper integration and expansion of its membership immediately after the conclusion of Uruguay Round. Regionalism has its own dynamics which is quite separate from that of multilateralism. Such argument has been put forward essentially to cajole developing countries to accept the demand made by them at the WTO without acceding commensurate concessions. While it is well recognized that multilateralism is the best bet for developing countries, it is also important to ensure that WTO promotes development rather than becoming a vehicle for exploitation.

The US has been signing bilateral deal with many countries giving preferential market access under their so-called policy of "competitive liberalization" essentially to open markets of other countries. When similar kind of market access is given to so many countries the value of the 'preference' itself gets substantially diluted. For example, after the signing of TPP, many countries who have signed bilateral agreement with the US but are not part of the TPP, will wonder what competitive advantage they have in the US market that is accruing due to the bilateral deal. In any case, what the US offers to others in return is quite negligible. The following remark of Ambassador Zoellick is noteworthy in this regard: "American openness is high and our trade barriers are low, so when we negotiate free trade agreements with our counterparts we almost always open other markets more than we must change our own.".[3] It is quite clear that the US has been following regionalism with little concern about multilateralism.

The nature of commitments made at the TPP clearly indicates that the US approach at the TPP forum in relation to various provisions of agreement, would have never been possible at the WTO. TPP also shows why there is not much "progress" in Doha Round – it has onerous conditions on IPR, investment, government procurement (much deeper than what was proposed in original Doha agenda), state enterprises, trade in remanufactured goods etc. that will lead to shrinking of policy space. It should also be recognised that TPP is also a geopolitical instrument from the US perspective. It has viewed ASEAN as a useful organization and the US policy towards ASEAN and East Asia is cast against the backdrop of great power rivalry in East Asia, and particularly China's emergence as an active diplomatic actor in its geographic backyard.[4] The TPP is the US response to such geo-political concerns.

Spread of Regionalism and Challenges for WTO

Rise of regionalism surely has its own complications as the traders have to deal with different tariff schedules, different rules of origin and several other challenges. But the final impact of an FTA depends on whether it is trade-creating or trade-diverting. The fact that traders often do not take the advantages of FTAs due to procedural challenges might mean that the trade diversion impact will be lower to that extent. Several studies have shown that very often trade creation effect is much stronger than the trade diversion effects particularly in the cases of South-South FTAs. Moreover, some South-South FTAs are not only trade creating but also trade expanding – increasing trade with third parties as well.[5] In the TPP, the focus is not so much on tariff cuts as tariff levels are already quite low in most member countries and hence trade diversion impact is likely to be insignificant.

As the US has already indicated the WTO might not be as attractive as before after it got the trade facilitation deal at the WTO and the TPP. However, the US will still have interest in the WTO as some of the major and growing economies of the world are not yet party to any RTA with the US. The TPP might involve some of the large emerging and developed economies but the future opportunities will lie in markets that are growing a fact that the US cannot ignore. Even the TTIP will not be of much help because the EU is not a growing economy and it is also experiencing serious troubles and concluding TTIP will not be easy anyway. Hence even for the powerful economies like the US, the WTO will continue to have some relevance even if it continues to look for alternative options. If the US is suggesting abortion of Doha round, it is not because it has less interest in the WTO but it has little to gain from the conclusion of the Doha Round. Therefore, pressure is built upto raise new issues at the WTO in place of the Doha Agenda.

Outlook for the Future

Increasing regionalism and signing of mega FTAs can create tensions and lack of movement at the WTO can throw new challenges, but it will be premature to declare demise of the WTO. Stalled "progress" at the WTO is also due to changing global politics and shifting of economic and political centre of gravity. This trend can also ensure that the WTO remains equally relevant. It is also quite clear that RTAs cannot replace the WTO due to both its membership and functions that RTAs can never match.

It is important for developing countries not to lose focus while negotiating the Doha Agenda and put their best foot forward to ensure development outcomes. The developing countries agreed for an early harvest at Bali and signed the trade facilitation agreement precisely to show some progress and improve the relevance of the WTO as a functioning organization. Lack of "progress" at the WTO will weaken the future of WTO notwithstanding the fact that they were hardly responsible for present impasse on systematic progress at the WTO. However, it seems they were hoodwinked once again, as once they got the Trade Facilitation Agreement (TFA), developed countries show lack of interest in the rest of the Doha Agenda and want it to be concluded without substantial progress. To allay the concerns that lack of progress on Doha Agenda will undermine the credibility of WTO, the developing countries agreed to the demand of developed countries which actually boomeranged as ensuring further progress has become even more difficult as developed countries are not showing much interest.

We also need to ask how the role of the WTO should be perceived - more and more opening of foreign markets or ensuring trade justice. Most would agree that it is the latter issue which is relevant for developing countries. Viewed from this perspective, continued violation of WTO rules even after WTO ruling and buying peace with powerful members while ignoring the interests of poor nations is a much bigger challenge to the credibility of WTO, compared to the so-called lack of progress in Doha Development Round of negotiations.

Endnotes

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2

Intellectual Property Rights and Public Health

Introduction

The year 2015 has been significant for global Intellectual Property Right (IPR) regime mainly for two reasons: One, it is the 20th year of implementation of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and two, it has seen a major new development in the field of intellectual property rights outside the World Trade Organisation (WTO) system[1]. Added to this is the agreement on Sustainable Development Goals (SDGs) that was adopted by the United Nations Summit for the adoption of the Post 2015 Development Agenda held in New York from 25th to 27th September 2015. The 17 Goals and their169 Targets are to be achieved by 2030.[2] Many of these goals, particularly Goal 3 on ensuring healthy lives and promoting well-being for all at all ages is dependent to a large extent on the Intellectual Property Right (IPR) regime. This is, therefore, an opportune time to take stock of the post-TRIPS developments, an assessment of their impact on public health, the pending issues in WTO relating to IPRs and the impact of the bilateral and plurilateral Free Trade Agreements (FTAs) provisions, particularly of the Trans Pacific Partnership Agreement (TPP), on intellectual property rights and the likely scenario of IPRs in the coming years.

In the first section, we look at the evolution of IPRs from a purely legal protection regime under World Intellectual Property Organisation (WIPO) to its entry in the form of TRIPS as one relating to trade and commerce under the World Trade Organisation (WTO) and the challenges and responses of the regime during the last twenty years. The section ends with a stocktaking of the impact of the same on economies of the world. The second section looks at the inclusion of IPRs in bilateral and plulrilateral treaties. The third section examines the IP issues in the TPP Agreement. The fourth section assesses the impact of non-WTO agreements, particularly of TPP, on TRIPS commitments and prospects. The next section makes an assessment of the possible impact of the new regime on SDGs. The paper ends with some policy recommendations.

TRIPS at 20

Ostensible argument for bringing in IPRs into the GATT was the positive impact that it would have on innovations. A perception was created at the time of the Uruguay Round that the multilateral system depended on recognition of the intellectual property protection (Otten in WTO 2015). For long various theories had been advanced and disseminated throughout the world that natural justice demanded protection of IPRs as a way to compensate creators and innovators. The philosophical underpinnings for many of the arguments in favour of IPRs were taken from Jeremy Bentham (*A Manual*

of Political Economy) and John Stuart Mill (*Principles of Political Economy*). The essays of William Landes and Richard Posner[3] on trademark and copyright that relied on such early philosophers of political economy and intellectual property came out during the negotiations. Even then, the developing countries that had very little tradable IP were of the view that it should remain within the exclusive domain of WIPO. At the same time, the precarious economic conditions of many of them and their trade deficits made them susceptible to pressures from the countries who had sizable IP to trade. The carrot, of course, for them was the prospects of increased market access and foreign direct investments (FDIs) in their economies. During the course of the trade negotiations, the collapse of the Soviet Union made the arguments against the market economy contrawise to the North's insistence on having IP regime within the architecture of the General Agreement on Tariffs and Trade (GATT) weaker. The negotiations, however, even when they were made by representatives of developing world who were not aware of the full implications of the new proposals on their economies, were quite complex and the North had to agree to provide many overarching provisions in the final agreement to ensure a balance of the private rights and public interest, one of the basic principles of IPR protection.

The TRIPS Agreement, in its Articles 7 and 8, regarding the objectives of the Agreement and the basic principles on which IP protection is based upon, had stated upfront that the Members have to ensure that the rights did not create hurdles in adopting "measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance" to the "socio-economic and technological development" of the members of the agreement.[4] The inclusion of various provisions relating to compulsory licence and government use and other flexibilities in the Agreement is in line with these objectives and principles, and is to be looked upon and interpreted from that angle.

Doha Declaration on Public Health

However, soon after the finalisation of the Agreement, the industry groups who were lobbying for the inclusion of IPRs in the GATT, which till the Uruguay Round was specifically for reducing tariff rates for various commodities to facilitate international trade and commerce, raised doubts about the competence of national governments and the circumstances in which to use such flexibilities. This required finally the Declaration on Public Health by the Ministerial Conference in Doha in 2001. The doubts relating to the circumstances that warrant issue of a compulsory licence were clarified by the Declaration which stated unambiguously that "the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all" and also affirmed the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose. Even after issue of such a clarification by the WTO Ministerial, whenever, any developing country uses the flexibility provisions, lot of criticism is raised in the media.

Article 6A

One of the areas of concern, even after the issue of circumstances for use of flexibilities were clarified was the capability of many countries to avail of the flexibilities, as they did not have the manufacturing capability in pharmaceuticals. The Doha Ministerial Conference, therefore, proposed an amendment to the TRIPS Agreement, the first and so far the only, amendment in the form of Article 6A to make special provisions for countries without manufacturing capability in the pharmaceuticals. Even after the hard fought amendment was approved, it has not yet been ratified by the required number of countries to make into the TRIPS Agreement. Use of the special provision, which has been availed of only in one instance, remains under a transitory measure. During 2014-2015, (up to 7 December 2015) 8 countries have ratified

this amendment to make the total number of ratifications 59 plus the European Union. In order to bring into effect the amendment requires ratifications by two third of the total membership of WTO, which as of date is 162.[5]

Transitional Arrangements

The TRIPS Agreement had provided for differential adjustment periods for countries at different stages of economic development: thus the developed countries got a one year period, the developing countries got variegated periods of 5 years for most provisions and for product patents up to 10 years, and the least developed countries (LDCs) got 10 years.[6] While there was no extension of the periods for developed countries and developing countries, in the case of LDCs, the period was last extended until December 2021.[7] The LDC members, however, requested for extension of the period for applying pharmaceutical patents for a longer period. At the end of long consultations, it was agreed to extend the period until January 2033 and is likely to be approved by the TRIPS Council. This since it effectively covers the period for achievement of the SDGs, is a pro-SDG move by the world community.

Non-Violation Complaints

The TRIPS also had provided that the Dispute Settlement Undertaking (DSU) would not apply to Non Violation Complaints (NVCs) under that Agreement for a period of five years.[8] During the negotiations, several countries preferred elimination of 'non-violation' complaints from the agreement, but finally went with the proposal of USA to have a moratorium period (Catherine Field).[9] During that period the TRIPS Council was to examine the scope and modalities for complaints of this type made after the Agreement and submit its recommendations to the Ministerial Conference for approval. Any decision to either extend the period or approve the recommendation is to be made only by consensus. During 2015, there was a move by the US and Switzerland to get a recommendation from the TRIPS Council to bring NVCs on TRIPS within the scope of the DSU. However, the recommendation did not receive adequate support and the two Members decided not to press for the same. It is proposed to continue to examine the scope and modalities of extending NVCs to TRIPS Agreement and make recommendations for consideration at the next Ministerial in 2017 and until then not to initiate such complaints.[10] Since many developing and almost all LDCs are still in the process of adjusting their economies to the TRIPS compliant regime, this is a positive development as opening up TRIPS to NVCs would have created many barriers to trade. Of course, such a move cannot get the approval of the WTO Ministerial without consensus; but the contrary decision also required consensus. Therefore, if the two Members pressed for the same, it would have created a stalemate. Such positive attitude by all governments is the need of the hour to sustain the WTO mechanism.

The above referred provisions have been originally introduced in the TRIPS agreement because of the concerns that developing and least developed countries had on the impact of the new regime on their public health programmes.

Number of Patent Applications and Grants

This is also the appropriate time to take stock of the global status of IPRs and the impact of TRIPS on the same. One of the expectations from the Agreement was that it would incentivise global R&D and innovation and also contribute to the transfer and dissemination of technology.[11] During the period from 1995 to 2013, global patent filings have increased from 1,047,400 to 2,567,900.[12] Taking stock of the period since 2005, when, the developing countries were fully implementing the TRIPS provisions, the number of patents increased from 1,702,900 in 2005.

An observable feature of this is that the developing countries, as a whole kept pace with the developed countries and now China has the largest number of patent filings which increased from 18,699 in 1995 to 825,136 in

2013. India and Brazil also showed increase in numbers from 6566 in 1995 to 43,031in 2013 in India and from 7448 in 1995 to 30,884 in 2013 in Brazil. In India, out of the total 42,632 patents in force, the share of patents owned by foreign nationals is 82 per cent.[13] Developing countries share of patent filings in other countries has tripled from 5 per cent prior to the TRIPS Agreement to around 15 per cent now.[14] (See Figure 2.1 and Table 2.1)

Patents in Pharmaceuticals

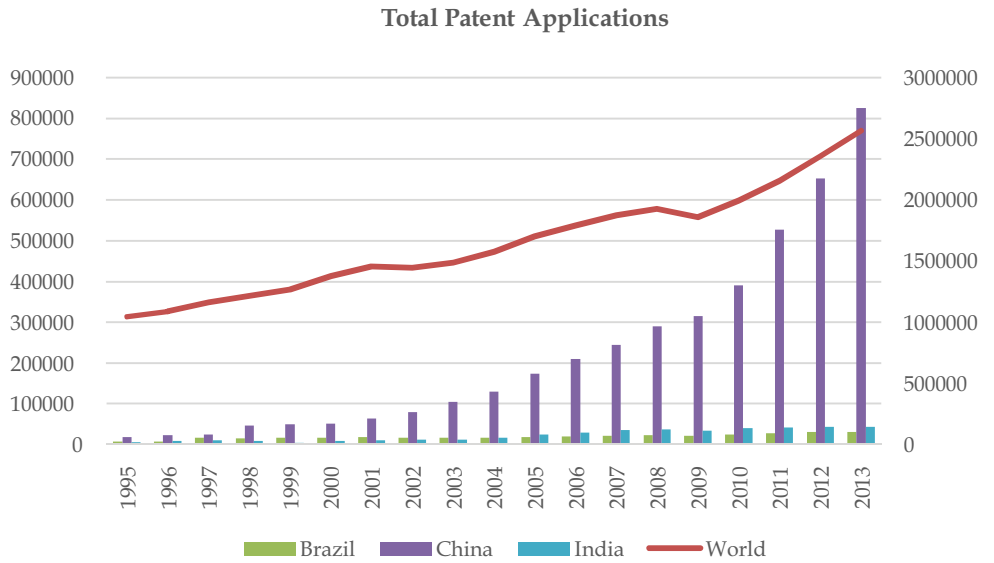
While, there has been increase in the total number of patents in the developing countries also, the high income countries dominate the category of pharmaceuticals which have direct relevance for public health , the high income countries, dominate that. The number of patents granted by China, though, remains high in pharmaceuticals too, more than that of the United States (See Table 2.2).

Technology Transfer

One way to assess technology transfers is by looking at the royalty payments as they are for IPRs. As per WTO, the value of cross border payments of royalties and licence fees for the use of IP was $ 300 billion in 2014. The BRICS countries received around $ 2.8 billion in royalties in 2014 representing slightly less than one per cent of the total royalties.[15] The emerging economies are, thus, in the area of IPR licensing, but in a minimalist way.

The total global trade in 2013 amounted to $45.83 trillion (measured in terms of exports). Royalty payments (for use of IPRs from other countries) were of the value of $ 3.23 trillion and royalty receipts of $ 3.03 trillion, representing 13.89 per cent of global goods trade.[16] One can on the basis of this data say that IPRs have emerged as a major segment of international payments. An important feature since the TRIPS agreement is that the trade linkage of IPRs is no longer limited to goods and services but IPR in itself forms an object of trade, an outcome that was not anticipated by the developing countries at the time of finalisation of the Agreement in 1994. Licences for patented technologies and franchises of trademarks and brand names

Figure 2.1: Total Patent Applications for Brazil, China, India and World



Note: Data for Brazil, China and India are shown on the primary axis (left). Data for the World is shown on the secondary axis (right).

Source: RIS database based on WIPO statistics.

Table 2.1: Total Patent Applications (direct and PCT national phase entries)

Country	1995	2000	2005	2010	2013
World	1047400	1377400	1702900	1996800	2567900
Brazil	7448	17283	18498	24999	30884
China	18699	51906	173327	391177	825136
India	6566	8538	24382	39762	43031
High-income	957234	1218136	1396269	1437386	1555674
Upper middle-income	64326	127004	252984	484417	935220
Low-income	1153	1179	7241	9236	2472
Lower middle-income	24687	31081	46406	65761	74534

Source: RIS database based on WIPO statistics.

Table 2.2: Patents Granted in Pharmaceuticals

Country	2010	2011	2012	2013
Brazil	114	82	39	101
China	5820	9010	9900	10372
United States of America	5133	5088	6034	6980
High-income countries	17930	20064	23054	21648
Upper middle-income countries	6601	9687	10554	11195
Lower middle-income countries	42	145	333	232
Low-income countries	21	33	50	57

Source: RIS database based on WIPO statistics. Last updated: March 2015.

and also copyright licences for publishing and reprints are now traded like commodities.

Data on the basis of level of economic development of the countries brings out interesting features of the impact of the IPR regime on developing and least developed countries.

The major portion of trade in IPRs is limited to OECD countries. The upper middle income countries are making significant payments, but not receiving in proportion. China's payment of charges for use of IPRs amounted to $ 21.03 billion in 2013, but its receipts were $ 0.89 billion only in that year. So is the case with the Republic of Korea which had made payments to the tune of $ 8.82 billion and received payments of $ 4.32 billion in 2013. During 2014, India made payments to the tune of $ 4.84 billion against which it received an amount of $ 0.65 billion only. In India's case the payments have increased by 7.21 times whereas the receipts have increased 3.19 times only during the period from 2005 to 2014, i.e. during the period India implemented the pharmaceutical product patent regime (Figure 2.2 and Table 2.3). The OECD countries enjoy substantial positive difference in their receipts of royalties over payments. The lower middle income countries pay more than ten times than what they receive. This reflects the situation that while in absolute numbers of patents and trademarks the developing countries may be catching up with the developed world, in market value terms of the IPRs, they are far behind the developed countries. So far as the LDCs are concerned, they are neither creators nor users of IPRs in any significant way indicating low economic and technological development. Specific targeted measures are needed to help them in developing their technological capability.

Use of TRIPS Flexibilities

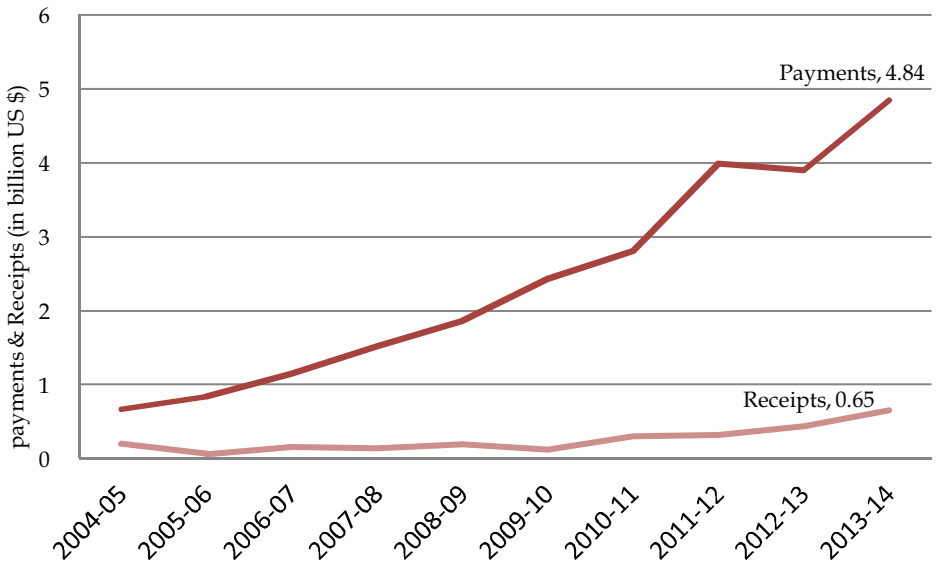
A significant post-TRIPS development was the Doha Declaration on Public Health that reiterated the TRIPS compliance of use of

Table 2.3: Payments and Receipts for Use of IPRs by Country Groups[17]

Country Name	Indicator Name	2006	2007	2008	2009	2010	2011	2012	2013
OECD members	Charges for the use of intellectual property, payments (BoP, current US$) in billion	117.85	130.21	159.64	158.74	166.92	180.00	182.29	191.49
OECD members	Charges for the use of intellectual property, receipts (BoP, current US$) in billion	151.79	177.21	191.86	186.60	205.92	235.46	235.33	245.77
Upper Middle Income Countries	Charges for the use of intellectual property, payments (BoP, current US$) in billion	15.91	19.01	21.80	22.73	25.68	28.53	33.01	38.06
Upper Middle Income Countries	Charges for the use of intellectual property, receipts (BoP, current US$) in billion	2.03	1.09	1.96	1.84	2.36	2.40	2.76	4.67
Lower Middle Income Countries	Charges for the use of intellectual property, payments (BoP, current US$) in billion	3.25	4.16	5.09	5.51	6.22	6.77	8.23	8.33
Lower Middle Income Countries	Charges for the use of intellectual property, receipts (BoP, current US$) in billion	0.53	0.51	0.44	0.48	0.47	0.68	0.67	0.81
Lower Income Countries	Charges for the use of intellectual property, payments (BoP, current US$) in billion	0.06	0.09	0.08	0.12	0.07	0.07	0.07	0.11
Lower Income Countries	Charges for the use of intellectual property, receipts (BoP, current US$) in billion	0.06	0.06	0.14	0.12	0.10	0.06	0.11	0.10

Source: RIS database based on World Bank, World Development Indicators.

Figure 2.2: Charges for the use of IPR (India)



Source: RIS database based on World Development Indicators.

flexibilities, the most important of which was the provision for compulsory licences in patents. However, the number of instances of the use of flexibilities such as compulsory licences and government use are very limited. In an October, 2015 presentation in WTO it is claimed that during the period from 2001 to 2014, there have been only 34 cases of compulsory licensing by 24 countries. The number of instances of government use of patents has been 48 by 34 countries.[18] The compulsory licence instances were mostly for HIV medication. The details of these instances are not available. However, data available in other collections also support the statement that the numbers of instances are limited. As per information available on cptech.org, while there have been many moves to grant compulsory licence or permit government uses in cases of pharmaceuticals, the actual permits were limited.[19] The following table brings forth the purposes and circumstances of issue of the compulsory licences which would be considered as representative.

Other countries that had used the compulsory licence route include Brazil, Egypt, and Zimbabwe. All these indicate that the use of the compulsory licence provision has been very few and India, the largest pharmaceutical manufacturer in the developing world, has issued only one licence. It has never used the provisions relating to government use. However, the existence of the provision for CL in the patent law could be used "as a threat to induce a 'voluntary' licence or investment in domestic production" as was the case with at least some developed countries (Catherine Field, Watal ed, 2015).[20] There are many instances where the initiation of the compulsory licence proceedings induced the originator companies to provide either voluntary licence as in the case of South Africa in 2001-2003 for HIV/AIDS drugs and Argentina and Taiwan in the case of pandemic flu cases in 2005. Many times, there were discounts or price reduction consequent on threat to use the flexibilities as in the case of Anthrax in the United States in 2001.[21] An important point is that the developed countries were not averse to use TRIPS flexibilities.

The low level of utilisation of the flexibilities by developing countries is surprising

Table 2.4: Details of Compulsory Licences issued by Some Countries in Pharmaceuticals

Country	Details of Compulsory Licence	Objective of compulsory licence
Canada	In 2007, Canada issued CL to manufacture and deliver to Rwanda the AIDS drug Apo-Triavir for export to Rwanda	To protect public health
Thailand	In 2006 – issued CL to import from India the HIV-AIDS drug Efavirence, for which Merck held patent. In 2007 – Issued two CLs to Government Pharmaceutical Organisation of Thailand on the HIV-AIDS drug Kaletra and heart disease drug Plavix.	To protect public health.
Taiwan	In 2005 - issued CL to manufacture and sell generic version of Tamiflue, for which Gilead Sciences held the patent.	To protect public health.
Malaysia	In 2003 – issued CL to local firm to import from India (Cipla) three drugs to treat HIV-AIDS.	To protect public health.
Indonesia	Indonesia issued CL (under government use, by Presidential decree) three times: 2004 – to manufacture and supply generic versions two HIV-AIDS drugs (Lamivudine and Nevirapine). 2007 – to manufacture and supply the AIDS drug Efavirenz, patented by Merck. 2012 - to make, import and sell generic versions of seven patented drugs used in the treatment of HIV-AIDS and hepatitis B.	To protect public health.
Ghana	In 2005 – issued government use CL for the importation of generic HIV-AIDS from India.	To protect public health.
Eritrea	In 2005 – issued government use CL for the importation of HIV-AIDS drugs.	To protect public health.
Ecuador	In 2010 – CL issued to Eskegroup SA on the HIV-AIDS drug Ritonavir, patented by Abbot.	To protect public health.
India	In 2012 issued CL to Natco, an Indian company for manufacture of Nexavar (sorafenib tosylate) a cancer drug patented by Bayer on account of high prices and non-availability of the drug in adequate quantity in India.	To protect public health
Italy	In 2006, The Italian Competition Authority (AGCM) granted CL to Fabbrica Italiana SpA (FIS) on Glaxo's Sumatriptan Succinate, an active ingredient used in the production of migraine medicine. Glaxo had initially refused the request of FIS to licence the technology. AGCM also ordered Glaxo to grant a number of additional procedural licences to allow FIS to save the time otherwise required to research and test an efficient manufacturing process for Sumatriptan Succinate.	To facilitate licensing of technology. To compensate for the time lost by refusing to licence a technology.
US	In 2001, the Secretary of Department of Health and Human Services (DHHS), US, threatened to exercise CL (for government use to authorise imports of generic ciprofloxacin for stockpiles against possible antrax attack. DHHS wanted to stockpile 1.2 billion pills. Bayer who held the patent on ciprofloxacin could not meet the demand in a timely fashion.	To protect public health.
US	In 2006, Johnson & Johnson was granted CL on three patents held by Dr. Jan Voda related to guiding-catheters medical devices for performing angioplasty. This case was decided under the US Supreme Court set standard for granting injunctions on patents.	To facilitate licensing of technology.
US	In 2007, the Federal Trade Commission found that Rambus had monopolised markets for four technologies in violations of section 2 of Sherman Act. The Commission ordered Rambus to compulsorily licence the four patented technologies to anyone interested in the technology. This CL was a remedial measure against illegal exercise of monopoly rights.	To remedy illegal monopoly created.
US	In 2005, the Federal Trade Commission issued CL to Abbot on Guidant's patent over RX delivery system for drug-eluting stents. This CL was granted while considering the anti-competitive effects of Boston Scientific's takeover of Guidant.	To avoid anti-competitive effects of mergers and acquisitions.

Source: RIS database based on Khor (2014); Love (2007); KEI Online; Chaturvedi and Kaur (2015); Intellectual Property Watch; and Indian Patent Office.

considering that they had negotiated hard for inclusion of these provisions in the TRIPS and also later for clarifications through the Doha Declaration on Public health. The prices of many essential medicines remain high in comparison to the purchasing power of patients in most developing countries. In fact, the developed countries were not averse to use such measures in the early years of their national efforts to provide public health. Countries like the US and Canada had used them as "an effective mechanism to limit abusive practices of the patent holder and help to force prices down (Kuanpoth, 2007). In fact, the US has issued the largest number of CLs even in recent years. However, developing countries face huge political pressure from developed countries if they attempt to issue compulsory licence. Compulsory licence is also a way "to acquire manufacturing capacity whenever the patent owner made use of its monopolistic rights to serve the market only by importation" (Tarrago, 2015).

Unresolved TRIPS Issues

Geographical Indications

The Doha Round had also taken up the issue of geographical indications. The TRIPS Agreement had provided for undertaking negotiations in the TRIPS Council regarding the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits. Initiation of these negotiations also brought into the Council the question of extending the same protection as available to geographical indications on wines and spirits to other products also, which was accepted in the Doha Ministerial Declaration as an issue to be addressed in the TRIPS Council. There, however, has been no consensus on this in the TRIPS Council and not much progress has been made during the past two years. The negotiations on the multilateral register are also proceeding slowly with no apparent results to be shown during the past two years.

Biotechnology, Traditional Knowledge, Biodiversity

The TRIPS Agreement, in Article 27.3 had mandated a review of the provision relating to exemption from patenting or otherwise of plants and animals other than mico-organisms.[22] The Doha Declaration in paragraph 19 instructed the TRIPS Council that in the review "to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD), the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1." Such a review is to be guided by the objectives and principles laid down in Articles 7 and 8 of the Agreement. The issues broadly fall into three categories, namely, review of the patentability of plants and animals, traditional knowledge and folklore, and the relationship between the TRIPS Agreement and the CBD. These issues have been on the agenda since then, but have made very little progress.

Technology Transfer

Article 66.2 of the TRIPS Agreement obligates specifically the developed country Members to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to Least Developed Country Members in order to enable them to create a sound and viable technological base. In the Doha Ministerial Conference (2001), it was agreed that the TRIPS Council would put in place a mechanism for ensuring the monitoring and full implementation of the obligations.[23] Such a mechanism was subsequently set up in 2003.

Electronic Commerce

The TRIPS Agreement was concluded contemporaneously with the development of electronic commerce (e-commerce). The contours of this new development, though, were not clear at the time. Subsequently in the 1998 Ministerial Conference a "Declaration on Global Electronic Commerce" was adopted.

Pursuant to that the WTO General Council set up a Work Programme on Electronic Commerce.[24] As per this the issues to be examined by the TRIPS Council include: protection and enforcement of copyright and related rights, protection and enforcement of trademarks, and new technologies and access to technology. These issues were explored in subsequent meetings, but have remained inconclusive because of the novelty and complexity of the issues. The issues also impinge on matters relating to transfer of technology, anti-competitive practices, domain names and the liability of Internet Service Providers (ISPs). Conclusive resolutions of the issues have not yet been made in the TRIPS Council.

IPRs in Bilateral, Regional and Plurilateral Trade and Investment Agreements

The developed countries were finding the multilateral process in the TRIPS Council rather slow on their proposals for stronger enforcement measures for intellectual property rights. They, particularly the US, have been using for long bilateral and regional trade and investment negotiations to achieve what they have failed to achieve in the WTO and WIPO fora. The US had even got such provisions incorporated in the pre-existing treaties (Kampf, 2015). They also looked forward to bilateral and multilateral treaties as a way to expand the scope of IP protection to include what is commonly being referred to as TRIPS Plus issues. These included a requirement on the parties to accede to the various World Intellectual Property Organisation (WIPO) administered treaties, protection for the test data on agro chemicals and pharmaceuticals that are furnished to the authorities for marketing approval of the product in the form of data exclusivity as different from the protection available under Article 39.2 of the TRIPS Agreement, patents for new uses of a pharmaceutical product, patents for software, narrower conditions for grant of compulsory licence than in the TRIPS Agreement, longer term of protection for copyright and related rights than in the TRIPS Agreement, expansion of the scope of trademarks to include marks on sounds and scents, patent linkage, and such other provisions.

The developed country partners mostly were trying to negotiate into their agreements with developing country partners, the same IP law as they were having. Such laws naturally are beneficial to a developed country since the national legeislations evolved over time in response to its techno-economic development. But extending the same regime to another jurisdiction whose techno-economic development is at a different level, mostly lower, is replete with problems for that country, as it is required to apply standards meant for another and higher stage of development. The same arguments as were advanced at the time of the Uruguay Round of GATT negotiations were advanced by the academics and think tanks who were supporting such extension such as it will lead to more FDIs and innovation. As to the innovation argument for intellectual property rights, the jury is still out with no conclusive proof on either side of the argument.

Bilateral investment treaties have been driven mostly by the desire of developing countries to have greater Foreign Direct Investment (FDI). Such investment by private capital required assurance of continued protection and continuance of favourable conditions in the countries in which investments are to be made. This included also intellectual property rights since the countries of the North who were the target to attract FDIs had strong IPR portfolios. Therefore, these treaties contained a provision that included intellectual property rights within the definition of investment.

In the investment treaties, as different from trade treaties, the provisions on intellectual property rights are generally part of definition of investment only. Most use the innocuous statement that investment includes, among other things, intellectual property rights.

Recent trends have been more towards defining it illustratively as in the German Model Text of 2005 which contains the following definition of investment:

"Investment shall comprise every kind of asset, in particular

- *Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;*
- *Shares of companies and other kinds of interest in companies;*
- *Claims to money which has been used to create an economic value or claims to any performance having an economic value;*
- *Intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will;*
- *Business concessions under public law, including concessions to search for, extract and exploit natural resources."*[25]

Some of the developing countries such as India used to insist on the expression, "intellectual property rights, in accordance with the relevant laws of the respective Contracting Party," as in its Model Text.[26] This provided it with the freedom not to proceed for TRIPS plus intellectual property rights. But whatever be the scope of the definition, when IPR is within the definition of investment in such treaties, the other provisions, including the one on dispute settlement automatically applies.

The bilateral investment treaties grant investors the right to sue the national governments directly, unlike the mechanism in WTO, which required Members to sue each other. Similar provision in NAFTA has been used to sue the governments of Canada and Mexico. Although, so far there has been no such case, the risk of the issue of compulsory licence being brought up as a case of expropriation under bilateral investment treaties, cannot be ignored.

The desire to get access to the markets of the developed countries, is the driving force behind bilateral Free Trade Agreements for developing and least developed countries as exports to developed countries were a large share of the value of their exports, despite their very limited product profile for export. Concessions and trade offs in areas which are of immediate market relevance for the developing countries make them agree to the inclusion of the demands of the developed countries on intellectual property rights in these Agreements.

Plurilateral Agreements

Overall, the strategy of the North appears to be to bind most of the developing countries through the bilateral agreements, initially and then move to regional agreements, which could be used as a stepping stone for getting the new norms on IPRs sanctioned by WTO agreements. In bilateral negotiations, the developing country partner is always at a disadvantage as its requirements in other fields, particularly relating to FDI and item specific market access make it agree to the IPR provisions as a small price.

ACTA

The Anti-Counterfeiting Trade Agreement (ACTA)(2011)[27] is a treaty that is specifically on enforcement of intellectual property rights, both domestically and across borders. It contained very strict conditions favouring the right holder. In this, provisions were also included to provide for judicial authorities to accept in civil infringement proceedings the value the right holder submits on the infringement and also to include in damages the "infringer's profits that are attributable to the infringement" (Art. 9). It also provided for seizure, forfeiture, and destruction of counterfeit trademark and pirated copyright goods (Art.25). Enforcement of intellectual property ri ghts provisions in the digital environment were not specifically addressed in the TRIPS Agreement. The ACTA, in Article 27, included detailed provisions on that too, more

in the line of WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). These two treaties had provisions against tampering or altering technological measures of protection used by a copyright and related right owner to prevent others from using the material without authorisation and also digital management information that enable potential users and others to approach the right holder for permission.

NAFTA

The North American Free Trade Agreement (NAFTA) (1994) was a regional agreement that was already in existence at the time of the entering into force of the TRIPS Agreement and it does not explicitly mention intellectual property rights. Its definition of 'investment' includes, *inter alia*, 'intangible' property, thus effectively bringing intellectual property rights within its scope.

RCEP

The Regional Comprehensive Economic Partnership (RCEP) being negotiated among 10 countries who form ASEAN and the countries in the region with whom ASEAN has FTAs, from 2012 onwards, also has a proposed chapter on Intellectual Property Rights. But the text of the Working Draft available in public shows no major departures from the TRIPS Agreement.

TTIP

The parties negotiating the Trans-Atlantic Trade and Investment Partnership (TTIP) are votaries of high level IPR protection and, therefore, the final agreement is likely to have TRIPS plus provisions as most of them already have such provisions in their national laws. However, in the external trade of IPR intensive industries EU is a net loser as per an analysis prepared by European Parliament Research Service in July 2014,[28] based on an analysis report published by European Patent Office together with the Office for Harmonisation in the Internal Market (OHIM). The analysis was for the period 2008-10. According to this, the EU had an export surplus only in designs, copyrights and geographical indications. In the areas of patents and trademarks, it was in huge deficit. Overall, in both IP intensive and non-IP intensive industries, its deficit amounted to Euro 173 billion. It may have to tread the IPR negotiations very cautiously, not to lose out further.

IPRs in TPP

The year 2015 saw the finalisation of the Trans-Pacific Partnership Agreement (TPP) among 12 countries. One of the subjects of this agreement that evoked much discussion, since the inception of the negotiations, was that of intellectual property rights. There had been many conjectures as to the scope and nature of the obligations that were being included in chapter 18 of the Agreement covers intellectual property rights.[29]

TPP has not yet been either ratified or brought in to force. Even after the treaty enters into force, it will be binding on the parties only and not on others. But as pointed out above, the possibility of similar provisions later becoming the international norms and standards cannot be ruled out because of the market clout of the partners and also since similar provisions are likely to be included in the TTIP. The following analysis looks at the issue from a developing country perspective in this background.

As in the case of TRIPS Agreement, the TPP was also finalised under the leadership of the United States, who had strong economic interests in having intellectual property rights regime as per its laws included in the Agreement.[30] The entry of US in the TPP negotiation signalled the inclusion of intellectual property rights, since it has been a major exporter of intellectual property rights. The P-4 Agreement, which had been concluded among the ten four negotiating partners, namely, New Zealand, Chile, Singapore and Brunei, though had within its scope intellectual property rights, that was merely a reaffirmation of their commitments to the TRIPS Agreement.[31]

There, however, were a few positive developments in the case of TPP. The United States was explicit this time in its commitment to public health as could be drawn from the following statement in the afore-cited factsheet, probably because of the challenge it itself is facing in public health:

> *Promote access to medicines by facilitating not only the development of **innovative, life-saving drugs and treatments**, but also the spread of **generic medicines**. This includes commitments in TPP that build on the principles underlying the "May 10th Agreement," which based flexibilities for certain pharmaceutical provisions on the level of development and capacity of individual trading partners. TPP also aligns with the Doha Declaration on TRIPS and Public Health and **affirm the rights of countries to take measures to protect public health.***

A significant feature of the new treaty is the recognition given to traditional knowledge in examining patent application. Apart from cooperation among countries to enhance the understanding of issues connected with traditional knowledge associated with genetic resources, and genetic resources in themselves, it also makes a specific provision to take into account publicly available documented information relating to traditional knowledge associated with genetic resources in patent examination. These provisions could go some way in implementing the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity, 2010.

At the same time, the agreement has not gone far enough to make mandatory disclosure of traditional knowledge associated with genetic resources in patent application an obligation, a demand by developing countries for long in WIPO. Such disclosure only will effectively prevent biopiracy and misappropriation of traditional knowledge.

The TPP, however, contains many provisions that may have certain procedural and some substantive implications for developing countries.

One of the obligations in the area of IPRs is the ratification of various IPR agreements[32] such as the early conventions namely the Paris and Berne Conventions. This is in line with other similar agreements and should not raise any problem for the countries who are already members of the WTO as the substantive provisions of these two conventions have already been incorporated in the TRIPS Agreement. It also provides for ratification of treaties such as Patent Cooperation Treaty and Budapest Treaty, that facilitate patent processing, the Madrid Protocol and Singapore Treaty in the area of trademarks, the International Union for the Protection of New Varieties of Plants (UPOV Convention) 1991 in the area of plant varieties protection and WCT and WPPT in the area of copyrights. Some of them contain obligations beyond what were provided for in the TRIPS Agreement, Some of these were already existing treaties and some were introduced to meet with the new developments in the field of technology. As far as developing countries are concerned ratification of the treaties may pose some problems as they will have to introduce technological up-gradation in their IP offices. The UPOV 1991 also imposes stricter obligations on protection of new plant varieties than in the previous versions of the Convention.

A significant omission is the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013).

The TRIPS plus obligations introduced in trademarks are more of the nature of meeting new challenges of technological developments and introduction of new practices in trade. Facility for registration of sounds and scents as trademarks will have to be provided by the trademark offices, besides introducing electronic trademarks system. This would require up gradation of existing facilities in

Box 2.1: TRIPS Disclosure Proposal

A large number of developing countries moved and supported a proposal for relevant changes in the TRIPS agreement so as to ensure norms for disclosure. There are basically three important constituents of this proposal. They may be identified as follows:

- The source and country of origin of the biological resource and of the traditional knowledge used in the invention;
- Evidence of prior informed consent from the authorities under the relevant national regime; and
- Evidence of fair and equitable benefit sharing under the relevant national regime.

In the light of this proposal, the burden of proof has shifted on the patent application who may be intending to use biological resources and/or traditional knowledge. Brazil in its proposal (IP/C/M/47) has suggested that if in case there is no national regime to provide such a permission then consent from the competent national authority in the area should be procured. In this context, the legal effects of non-disclosure or inadequate or wrongful disclosure leading to revoking of patents apart from possibility of a judicial review are some of the unsettled issues.

There is also a debate to make adequate changes in the Patent Cooperation Treaty (PCT) of WIPO to bring in provisions relating to declaration of the source of generic resources and traditional knowledge. It is proposed that patent applications be required to declare the "source" of generic resources and traditional knowledge. The term "source" should be understood in its broadest sense possible. This is because, according to the CBD, the Bonn Guidelines and the International Treaty of the FAO, a multitude of entities may be involved in access and benefit sharing.

Source: RIS (2007).

most trademark offices. Such steps require complex technologies and sophisticated hardware that many of the trademark offices in the developing world do not have. There are also provisions for relaxed standards for well known marks such as not to require as a condition for determining that a trademark is well known that the trademark has been registered in a jurisdiction or included on a list of well known marks or given prior recognition as a well known mark. It also makes it obligatory to have domain name dispute settlement similar to the one provided by the Internet Corporation for Assigned Names and Numbers (ICANN). These are provisions for more of an international harmonisation. The issue, however, is that of capacity of trademark offices in most developing countries and also the benefits that these countries will be getting from introducing these TRIPS plus provisions.

The provision to endeavour to cooperate among the patent offices has to be seen in the light of recent efforts by various patent offices to reduce workload and to speed up the patent granting process through cooperation, particularly through the Patent Prosecution Highways (PPHs). The Global Patent Prosecution Highway (GPPH) pilot programme came into effect from January, 2014 and has over 21 participating offices. It enables fast-tracking of the patent application examination process by sharing patent examination reports. Many patent offices have work sharing arrangements under the Patent Co-operation Treaty PPH Pilot programme under the auspices of WIPO. Some of the Patent Offices who participate in these various PPH Pilot programmes are those of Australia, Austria, Canada, China, Colombia, Czech Republic, Denmark, Estonia, Eurasia, Europe, Finland, Germany, Hungary, Iceland, Indonesia, Israel, Japan, Korea, Mexico, Nordic countries, Norway, Portugal, Romania, Russia, Singapore, Spain, Sweden, UK and USA. These efforts have the potential of leading to more harmonisation on patent procedure among countries and the possibility of an international patent grant evolving over years cannot be ruled out. In such a situation, the developing world will have to exert concerted pressure to retain the flexibilities as

Box 2.2: A New Marketing Strategy for Pharmaceutical companies

One of the arguments for introduction of product patent regime in pharmaceuticals was that it would incentivise transnational and local companies to put resources into research on cures for neglected diseases. The experience of the last few years has not substantiated this. Pharma companies are trying to get provisions included in various treaties for patenting of minor improvements or new uses. Devoting more resources for research into new medicines for diseases which are endemic in emerging economies like India, China, Brazil, etc. will be a better marketing strategy for pharmaceutical companies than attempting to extend patent period through obtaining patents for new uses and new methods of production. As the capacity of the people of the developing countries to pay for higher health care increases, the market for the new drugs would expand, thereby making it a profitable investment.

Source: James (2009).

envisaged in the TRIPS Agreement in order to ensure that public health efforts do not suffer.

There are, however, certain provisions that go well beyond the TRIPS obligations and can pose new challenges to provision of affordable health care particularly by developing and LDC countries. One of the new provisions is for grant of patents for new uses of a known product and also for new methods of using a known product. This brings in a lower standard for determining patentability. Provisions like Section 3(d) in the Indian Patents Act will affect countries who join the TPP. Such patents also will have the effect of extending the patent periods, particularly, in the pharmaceutical sector, by obtaining new patents for new uses or new methods and could keep many new medicines out of the reach of poor segments of society.

Another provision that will put pressure on patent offices is the one relating to patent term adjustment for patent office delays. The periods prescribed in the treaty are ideal and user friendly, the current practices of most of the patent offices of the world raise questions about the practicality of the same as offices in the developed countries are also taking much time. The periods of time taken by some of the major patent offices of the world for granting a patent in 2011, obtained from a study, are presented in Table 2.5. The time period varies across different fields of technology and the shortest and longest are indicated.

Since patents, once granted, are effective from the priority date, extension of the period on account of delays is not warranted and will have the effect of extending the patent only. This is not envisaged under the TRIPS.

Similar is the case with patent term adjustment for unreasonable curtailment for pharmaceutical products to compensate for delays in the marketing approval process. This puts extra burden on the drug regulatory authorities to expedite the approval process

Table 2.5: Time Taken in Processing Patent Applications

Patent Office	Shortest (in months)	Longest (in months)
United States	38.79	47.85
European Patent Office	53.00	70.43
Japan	71.72	85.31
Canada	77.02	101.27
United Kingdom	35.00	45.21
France	23.00	36.98
Germany	53.57	74.37

Source: RIS database based on www.invntree.com.

and may even have in some countries the unanticipated effect of improper grant of marketing approvals by the drug regulatory authorities to meet with time periods. Such a step may have serious health hazards as the approval may be given without adequate assessment of safety and suitability for particular population.

The above provision is to be seen in the context of the provision introducing patent linkage which introduces new responsibilities on drug regulatory authorities. The drug regulating or licensing authorities do not have the expertise to examine patent issues which belong to another legislation. It also will have impact on drug availability as it can unnecessarily delay entry of drugs, because of possible tactics that can be employed by the originator company. The system does not provide for adequate compensation or damage control for companies who may have been denied marketing approval on the ground that another company claimed a patent on that drug, in the event of the patent subsequently getting revoked.

Overall impact of both the provisions is extension of patent period for pharmaceuticals and, thereby, delaying competition from generics. In the absence of competition, the prices of the medicines can remain high.

Another provision that can have impact on public health is the one that provides for data exclusivity for clinical trial data for drugs for 5 years from the date of marketing approval and for biologics for 8 years. This also has the effect of extending the period of the patent and also delaying the entry of generics.

The TPP has proposed several measures that relate to copyright and also e-commerce. The agreement has proposed a minimum term of copyright protection of life plus 70 years for literary and artistic works, phonograms and performances as against the life plus 50 years minimum requirement in the Berne Convention for the Protection of Literary and Artistic Works and the TRIPS Agreement. Such an extension could keep such works out of public domain for longer period and may

Box 2.3: Pricing of Medicines by Pharma Companies: US Senate Investigation Finds Revenue Driven Pricing Strategy

An 18-month (2014-15) US Senate Investigation into the pricing of Gilead's drug Sovaldi revealed a pricing and marketing strategy designed to maximise revenue with little concern for access or affordability. The Committee found from internal company documents that the company had pursued a marketing strategy and priced Sovaldi at $ 1,000 per pill, -- $ 84,000 for a single course of treatment – that it believed would maximise revenue. Building on that price, its second-wave successor, Harvoni was later introduced at $ 94,500.

Senator Ron Wyden of the Committee says: "Gilead pursued a calculated scheme for pricing and marketing its Hepatitis C drug based on one primary goal, maximising revenue, regardless of the human consequences. There was no concrete evidence in emails, meeting minutes or presentations that basic financial matters such as R&D costs or the multi-billion dollar acquisition of Pharmasset, the drug's first developer, factored into how Gilead set the price. Gilead knew these prices would put treatment out of the reach of millions and cause extraordinary problems for Medicare and Medicaid, but still the company went ahead. IfGilead's approach to pricing is the future of how blockbuster drugs are launched, it will cost billions and billions of dollars to treat just a fraction of patients."

The investigation also found as per the report released in December 2015 that Gilead set price for Sovaldi with an eye toward ensuring a future high price for Havoni and that it justified the high price point based on price-per-cure.

Source: The Price of Sovaldi and Its Impact on the U.S. Health Care System Prepared By The Staffs of Ranking Member Ron Wyden and Committee Member Charles E. Grassley for the Committee On Finance United States Senate available at http://www.finance.senate.gov/ and other sources.

have impact on education and other fields.

The TPP also makes it obligatory to provide legal protection and effective legal remedies against circumvention of technological measures and digital management information that copyright or related rights owners use in their works and products. These are measures already agreed to in the WCT and WPPT. Since these measures affect access to knowledge, the implementation of these obligations need to be done keeping in view the exceptions allowed under the Berne Convention so that already permitted uses are not compromised or taken out.

Enforcement measures provided in the agreement also will have impact on availability of medicines in developing countries. The border measures are to include in transit goods. That would mean even if a pharmaceutical product is not having patent both in the originating country and the destination country, still the same can be stopped or even confiscated in a transit country, as it had happened few years ago with certain generic drugs from India meant for another country where those drugs did not have patent protection. This measure will put restrictions on international trade and commerce, strengthening the argument that IPRs have the effect of trade distortion, besides adversely affecting availability of affordable medicines in many developing countries. It is an indirect way of extending the patent regime of a particular country to other countries, thereby infringing the principle of sovereignty.

Impact of New Developments on TRIPS Agreement

The TPP has not yet come into force. The number of countries who are members of that is also not high, though they together account for about 40 per cent of global economy. However, the possibility of similar provisions being included in the Trans Atlantic Trade and Investment Treaty cannot be ruled out, since the parties involved are mostly developed countries who have been proposing for long TRIPS plus regimes. If that happens, then any future proposal by them to have identical or similar provisions in the TRIPS Agreement may have greater acceptability. Such a scenario will have great impact on pharmaceuticals and access to affordable medicines. It is the interest of very few sectors of industry that paved the

Box 2.4: IPRs and Challenges for Development of Affordable Vaccines

IPRs can and do create obstacles for developing country vaccine manufacturers from entering the vaccine market. For instance, this could impact the success of Gavi, the Vaccine Alliance, that is predicated on the provision of vaccines that are affordable and available in sufficient and reliable quantities. Gavi's current supplier base for new and underutilised vaccines, such as the human papillomavirus (HPV), rotavirus, and the pneumococcal conjugate vaccine is small. The concern among researchers is that following the globalisation of laws on IPRs through trade agreements, IPRs are impeding new manufacturers from entering the market with competing vaccines.

A Lancet study (2015) by Subhashini Chandrasekharan, Tahir Amin, Joyce Kim, Elaine Urrer, Anna-Carin Matterson, Nina Schwalbe and Aurelian Nguyen examines the extent to which IPRs, specifically patents, can create such obstacles for developing country vaccine manufacturers (DCVMs). Through building patent landscapes in Brazil, China, and India and interviews with manufacturers and experts in the field, they found intense patenting activity for HPV and pneumococcal vaccines that could potentially delay the entry of new manufacturers.

According to these researchers, DCVMs remain concerned about uncertainties surrounding patent claims and confront difficulties in assessing the complex intellectual property space of the HPV, rotavirus and pneumococcal conjugate vaccines, especially the last-mentioned. The upshot is that greater transparency is needed around patenting of vaccine technologies. Also, stricter patentability criteria suited for local development needs is imperative. The strengthening of IPRs management capabilities would help reduce impediments to market entry for DCVMs and ensure a sustainable supplier base for quality vaccines at affordable prices.

way for the inclusion of IPRs in the Uruguay Round of GATT. Until then the GATT dealt with only tariff issues. The inclusion of IPR happened despite total resistance initially by all developing countries. The change in the approaches of the developing countries was brought in through large scale lobbying by industries in developed countries and various pressures exerted by the proposers, including through the Special 301 mechanism (Watal 2015). As in the case of the bilateral FTAs, here also the titling factor was market access. Similar pressures coming up in the future cannot be discounted totally. What the countries of the South are to be cautious is that this factor is declining in importance because of other forms of NTBs such as quality and safety standards in the developed world are restricting market access for their products, and developing countries should not lock themselves based on an inappropriate pattern.

What is of significance is that the developed countries were the initiators of the TRIPS Agreement[33] and they were propelled into the same by their industry groups. Antony Taubman observes: "...inputs from the private sector, in particular the common statement of views put forward in 1988 by the US Intellectual Property Committee, the Japanese Keidanren, and the Union of Industrial and Employers' Confederations of Europe, guided the *demandeurs* in formulating their own negotiating positions."[34] Even campaign funds were influential in the US stance on drug patents (RIS, 2007).

Impact of Current and Emerging IPR regime on Public Health and SDGs

Goal 3 of the SDG talks about ensuring universal health. This would involve availability of affordable medicines in the countries which are still far from the goal. A major problem for them is the cost of medicine and most of them depend on generic manufacturers for low cost medicines. Extension of patents for pharmaceuticals and grant of patents for new uses, etc. can delay the entry of generics and the required competition in pharmaceutical manufacturing. That would adversely affect the target of their achieving the goal.

Besides, many other goals such as sanitation, provision of clean drinking water, climate control measures have all impacts on health care. Many of these areas require high end technology at an affordable cost to the low income countries. The new measures in the RTAs such as TPP have the potential to keep high end technologies beyond the reach of the low income countries unless, specific targeted measures are brought in by the international community.

Observations and Suggestions on Possible Policy Responses

Considering the overarching impact of intellectual property rights on economic activities and also public health the emerging IPR regimes consequent to the bilateral and regional trade and investment agreements pose major challenges to all countries, particularly of the South. They, especially with the growth of Internet, also affect access to knowledge. Each country will have to make informed policy choices and targeted strategies. They also have to be guided by the commitments in other fora such as the UN for achievement of Sustainable Development Goals (SDGs) by 2030. It is necessary to ensure that the policy space and operational flexibility in the programmes for achievements of SDGs are not narrowed by the new treaties. The following observations, suggestions and recommendations are for both international and national level action.

Approach to new IPR norms

Many of the promises and expectations from the TRIPS negotiations during the Uruguay Round have not been fulfilled, so far as the South is concerned. At the same time, IPRs have come to occupy a pivotal role in their economic policies and trade. Except for the emerging economies like that of China, most countries have not achieved the level of economic and technological capability that would enable them to move towards another

level of IPR protection. Therefore, countries of the South will have to resist, out of necessity, introduction of new norms in the IPR regimes that they would find difficult to fulfil and may not be conducive to their social policies.

Approach to Agreements outside WTO

The South in their own interest have to ensure that discussions and negotiations on IPRs are carried out in the global fora only, namely, within the ambits of WTO and WIPO and not done bilaterally or in select regional groups. The strategy to carve out pockets of influence from the world group is neither appropriate nor in the spirit of WTO and UNO. In bilateral and small groups, the bargaining position of the less developed countries is quite weak.

TRIPS and other international treaties make the IPR commitments, even when entered into bilaterally or regionally, global through the operation of the principles of non-discrimination enshrined in National Treatment and Most Favoured Nation treatment clauses. The developing country and LDC that engages in bilateral or regional trade negotiation therefore will have to exert special caution before making commitments in IPRs.

Since the possible cause of the North moving towards bilateral and regional frameworks for IPR negotiations could perhaps be because of a perception that the movement at the world bodies is rather slow, particularly on the issues they have been advancing. Both the North and the South should work in concert to make the bodies like WTO work faster as the global negotiations could bring in more certainty and conclusiveness in international rules and trade. That will be advantageous to both parties in the long term. It would require that both the groups should understand, address and accommodate as far as possible the concerns of the other in the negotiations in these bodies.

Creation of backup databases and studies

Countries of the South will have to proceed with data and fact based, rather than merely theory or perception based, approach in negotiations on IPRs. This will require development of databases and empirical studies. The South will have to invest and encourage Think Tanks and academic research organisations to do economic impact studies of IPRs in their jurisdictions and not merely be dependent on the inputs from the North. International organisations could also be persuaded to fund such activities.

Existing Commitments

Commitments made and concessions obtained in the past treaties need to be scrupulously observed and effected both to create stakeholder confidence and also in the public interest. As brought out elsewhere in this chapter, most of the TRIPS flexibilities remain largely unused by the developing countries. Resisting further proposals without availing of the existing provisions is not good strategy and will be only stonewalling forward movement. Similarly, non-implementation or lax implementation is not the way to make ratified treaties a success. In case of genuine difficulties, the same could be addressed at the appropriate fora. The responsibility also falls on the North to ensure that unilateral measures such as Special 301 is not used or threatened to be used in bilateral contexts, as against the undertakings made to the WTO.

Use of TRIPS flexibilities and SDGs

Since almost all members of the WTO have committed themselves to the achievement of SDGs, the flexibilities provided in TRIPS should be used by all for implementation of programmes for achieving the same like universal vaccination. Firm commitments on this will have to be made in the national policies and reflected in national budgets.

Anti-competitive Practices

IPRs create exclusive rights, but keeping in view the objectives and basic principles enshrined in the TRIPS and reiterated in the TPP, countries should formulate and develop

competition policies and instruments to ensure that IPRs do not lead to monopolistic practices. The best practices from developed countries could be adapted for this.

IPR Discourse

It is necessary to ensure that the IPR discourse is not dominated by particular narrative emanating from the private rights perspective alone. The public interest perspective has to be equally articulated and necessary mechanisms for this be made involving Think Tanks and media.

Public Health

Some of the provisions of the bilateral and regional agreements discussed above such as patentability criteria have adverse impacts on public health. The arguments of the South on this need to be backed up with more solid impact studies. Governments should initiate policies to take up such studies which can identify the issues and possible responses to them.

Patentability Criteria

Some of the provisions being introduced through various regional and bilateral treaties have the effect of diluting the patentability criteria in the TRIPS Agreement.[35] The countries of the South should oppose such dilution, as it will have serious adverse impact on access to affordable medicine. The patent examiners also will have to sensitised and trained on this.

Utility Models

Most countries of the South are at the lower rungs of technology development and may not be in a position to take advantage of the high end protection such as patents. The grassroots level innovations are mostly outside the purview of strict patentability criteria. Extension of utility model protection, as different from patents, will foster the development of technologies at the early stage of economic development.

R&D

Funding of R&D activity in most of the South is low. Technological advancement and consequential economic development will be possible only through research and the dependency syndrome on the North for technology development should not be allowed to dictate policy choices. National policies should aim at major enhancements of public funding of basic research, in view of long term benefits that will accrue from the same.

OSDD

Innovative models of drug discoveries, outside the patent regime, such as the Open Source Drug Discovery (OSDD) in India could be considered for implementation by other countries. Countries like India should be willing and forthcoming with technical cooperation and development partnership programmes for this.

Geographical Indications

The TRIPS agreement extended protection to many areas of crucial significance, such as geographical indications, for developing and least developed countries. The bilateral and regional agreements also include geographical indications. Countries of the South have to co-operate in extending technical cooperation to each other to develop machinery for securing protection of their geographical indications which have good market potential. Domestic protection is a pre-requisite for getting international protection.

Those countries that are rich mostly in areas other than spirits and wines have a stake in getting the same higher level of protection for those products as currently extended to spirits and wines. They must continue to press for the same in the TRIPS Council. They should also take measures to extend the same protection to all goods within their jurisdictions, since it is permissible within the TRIPS obligations.

Biodiversity and Traditional Knowledge

The South could cooperate in developing

modern databases on their biological and genetic resources and traditional knowledge. Those countries who have already taken steps such as India with its Traditional Knowledge Digital Library (TKDL) and biodiversity registers can extend technical cooperation in this regard.

CBD and TRIPS

The issue of the link between the Convention on Biological Diversity (CBD) and the TRIPS agreement is in a limbo.[36] Greater partnership and concerted action is required on the part of the South to persuade all countries to make forward movement in this. How such a link will contribute to the objectives and basic principles of the TRIPS will have to be stressed.

At the same time, countries who are rich in biological diversity and traditional knowledge should take measures to extend protection to their resources within the TRIPS regime itself. Provisions can be made in the patent laws for mandatory disclosure of biological resources and traditional knowledge used in an invention. That would also contribute to the implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity (2010).

Ratifications of Amendments and Treaties

Governments must come forward to ratify the amendment to TRIPS Agreement in the form of Article 6A and also for ratifying treaties like the *Marrakesh Treaty* to Facilitate Access to Published Works to Visually Impaired which do not adversely affect any sector and will bring the amendment and the treaty into effect at the earliest. It will also lead to greater harmonisation of international IP rules, besides sending right signals to the civil society

Conclusion

The TRIPS Agreement has stood the test of time and brought in many changes in the diversification of IPR capital. However, as feared at the time of finalisation of the agreement, it has had serious impact on health care. The low income countries had been largely dependent on generic drug producers to meet their medicinal needs. The availability of the flexibilities provided in the TRIPS Agreement was a major factor in keeping the medicine prices in some checks. Making the generics costlier and delaying generic competiton by treaty provisions can have serious consequences. This can also affect the development of generic pharmaceuticals in countries that do not have them.

Endnotes

1 For developing countries in some sectors it is 15 years and in some sectors like patents it is 10 years.

2 https://sustainabledevelopment.un.org/post2015/summit

3 William Landes and Richard Posner, "Trademark Law: An Economic Perspective," *Journal of Law and Economics*, 30 (1987), and "An Economic Analysis of Copyright Law," *Journal of Legal Studies*, 18 (1989).

4 Article 8 of the TRIPS Agreement

5 https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm

6 Article 65 of the TRIPS Agreement.

7 Article 66 of the TRIPS Agreement

8 Article 64 of the TRIPS Agreement

9 ***The Making of the TRIPS Agreement*** d. By Jayashree Watal and Antony Taubman, WTO, 2015, p.151.

10 https://www.wto.org/english/news_e/news15_e/trip_ss_23nov15_e.htm

11 Article 7 of the TRIPS.

12 WIPO statistics database, last updated: March, 2015.

13 Office of the Controller General of Patents, Designs and Trademarks, India, ***Annual Report*** (2013-14).

14 The absolute number of patents need not necessarily be an indicator of innovation in a country. The number may be more than other jurisdictions if a country is granting patents for new uses, new methods, small patents and patents for plant varieties. Further, the proportion of domestic and foreign patents also will have to compared. For example, in India during the last ten years (2004-2014) 79 per cent patents granted were obtained by foreign nationals. Applicants also seek patents

for the same invention in multiple jurisdictions ordinarily.

15 WTO, TRIPS brochure p.4.

16 World Development Indicators and WTS database.

17 **OECD Countries**

Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

Upper Middle Income Countries

Albania, Libya, Algeria, Macedonia, FYR, American Samoa, Malaysia, Angola, Maldives, Azerbaijan, Marshall Islands, Belarus, Mauritius, Belize, Mexico, Bosnia and Herzegovina, Mongolia, Botswana, Montenegro, Brazil, Namibia, Bulgaria, Palau, China, Panama, Colombia, Paraguay, Costa Rica, Peru, Cuba, Romania, Dominica, Serbia, Dominican Republic, South Africa, Ecuador, St. Lucia, Fiji, St. Vincent and the Grenadines, Gabon, Suriname, Grenada, Thailand, Iran, Islamic Rep., Tonga, Iraq, Tunisia, Jamaica, Turkey, Jordan, Turkmenistan, Kazakhstan, Tuvalu, Lebanon.

Lower Middle Income Countries

Armenia, Bangladesh, Bhutan, Bolivia, Cape Verde, Cameroon, Congo, Rep., Cote d'Ivoire, Djibouti, Egypt, Arab Rep., El Salvador, Georgia, Ghana, Guatemala, Guyana, Honduras, India, Indonesia, Kenya, Kiribati, Kosovo, Kyrgyz Republic, Lao PDR, Lesotho, Mauritania, Micronesia, Fed. Sts., Moldova, Morocco, Myanmar, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Philippines, Samoa, Sao Tome and Principe, Senegal, Solomon Islands, Sri Lanka, Sudan, Swaziland, Syrian Arab Republic, Tajikistan, Timor-Leste, Ukraine, Uzbekistan, Vanuatu, Vietnam, West Bank and Gaza, Yemen, Rep. Zambia.

Low Income Countries

Afghanistan, Liberia, Benin, Madagascar, Burkina Faso, Malawi, Burundi, Mali, Cambodia, Mozambique, Central African Republic, Nepal, Chad, Niger, Comoros, Rwanda, Congo, Dem. Rep., Sierra Leone, Eritrea, Somalia, Ethiopia, South Sudan, Gambia, Tanzania, Guinea, Togo, Guinea Bissau, Uganda, Haiti, Zimbabwe, Korea, Dem. Rep.

18 Presentation made at Public Health, Intellectual Property, and TRIPS at 20: Innovation and Access to Medicines; Learning from the Past, Illuminating the Future held on 28 October, 2015 https://www.wto.org/english/tratop_e/trips_e/trilat_symp15_e/Ellen_T_Hoen_trilatsymp_e.pdf

19 The number compiled from the cptech.org page is presented below:

Country	Number
Canada	01
Italy	03
Israel	01
Malaysia	03
Indonesia	01
Thailand	03
Ghana	01
Eritrea	01
Zambia	01
Zimbabwe	01
Mozambique	01
Total	**17**

20 *The Making of the TRIPS Agreement* ed. By Jayashree Watal and Antony Taubman, WTO, 2015, p. 142

21 Beall R, Kuhn R (2012) *Trends in Compulsory Licensing of Pharmaceuticals Since the Doha Declaration: A Database Analysis*. PLoS Med 9(1): e1001154. doi:10.1371/journal.pmed.1001154

22 Dhar, Chaturvedi, and Anuradha (2001).

23 Kumar (1998).

24 WT/L/274

25 German Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment issued by the Federal Ministry of Economics and Labour in 2005

26 Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA) at http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/

27 https://ustr.gov/acta

28 *Overcoming Transatlantic Differences on Intellectual Property: IPR And The TTIP Negotiations* http://epthinktank.eu/

29 https://ustr.gov/tpp/

30 https://ustr.gov/sites/default/files/TPP-Promoting-Innovation-and-Creativity-Fact-Sheet.pdf

31 Rajamoorthy, T., The Origins and Evolution of the Trans-Pacific Partnership (TPP), *Third World Resurgence,* No. 275, 2013.

32 Article 18.7 of the TPP

33 Adrian Otten *in The Making of the TRIPS Agreement* ed. By Jayashree Watal and Antony Taubman, WTO, 2015, p.57

34 ***The Making of the TRIPS Agreement*** d. By Jayashree Watal and Antony Taubman, WTO, 2015. P.31.

35 Chaturvedi (2005).

36 Chaturvedi (2009).

3

Non-Tariff Measures and Standards

Introduction

Since the conclusion of the Uruguay Round, the member countries of WTO have significantly lowered tariff rates on hundreds of product lines although the cases of tariff peaks and tariff escalation are still reported. Applied tariff rates are much lower in many countries compared to MFN bound rates. In RTAs, the parties have offered further liberalisation of their tariff regimes. As a result, the scope for trade negotiations with respect to tariffs is getting squeezed day by day, at least in the major trading nations. In bilateral and regional trade negotiations, there is a greater tendency to include WTO-plus and WTO-extra provisions so as to gain higher market access in each other's markets and achieve substantive gains from exports especially in view of falling tariffs. Unlike tariff, the negotiations on non-tariff measures (NTMs) in RTAs are piecemeal, less predictable and non-uniform. It is believed that the substantive part of future regional trade negotiations would include commitments pertaining to NTMs like anti-dumping measures (ADP), sanitary and phyto-sanitary (SPS) measures, technical barriers to trade (TBT), safeguard measures (SG), countervailing duties (CV), import licensing, and so on. Since most of these NTMs are country-specific and qualitative, the exact impact of these barriers on trade at a global scale is unknown.

As the impasse over the Doha Round made the future of WTO-led trade negotiations uncertain, the rise in the number of RTAs in the recent years across different regions of the world signals a new wave of regionalism. In particular, the new trade agreements that are currently being negotiated are characterised by a diverse membership drawn from different continents with notable differences in their level of development and divergent political, social and regulatory governance structures. Most importantly, the trade agreements such as TPP, TTIP and RCEP whose membership account for more than 70 per cent of world GDP are not only huge in terms of the critical mass they command in global economy but also because of the universe of provisions that would constitute the text of those agreements. These agreements are popularly viewed as high-ambition and high quality mega-regionals since the coverage of WTO-plus and WTO-extra provisions pertaining to technical regulations, product standards, competition policy, labour standards, environmental standards, state-owned enterprises, regulatory coherence and others are expected to be quite substantial. Since tariff rates have reached the optimum low[1] for most WTO members on account of unilateral trade liberalisation as well as MFN commitments, it appears that the future scope for trade liberalisation in RTAs lies in the area of non-tariff measures.

Many studies suggest strong gains from trade[2] by removing trade-restrictive NTMs which are very often used as proxy for trade protectionism by the countries.

The Chapter discusses the definitions, motives and measurement of NTMs, trends in application of NTMs in the world and in the participating countries of TPP, TTIP and RCEP, the scope and nature of negotiations on NTMs in existing RTAs involving countries in different parts of the world. In addition, some empirical estimates of gains in trade emanating from reduction of NTMs drawn from literature. In subsequent sections the relevance and adequacy of NTM provisions in mega-regionals by comparing and contrasting the SPS and TBT provisions in TPP with WTO standards and in relation to the proposals on NTM reforms in TTIP are discussed.

Definition and Measurement of NTMs

In a layperson's language, NTMs include all those policy and regulatory measures in a country that are not considered as tariff. However, there are certain policies particularly at-the-border trade facilitation measures which are not viewed as NTMs as such even though it could affect exports significantly. SPS and TBT measures could be strictly classified as NTMs. Anti-dumping and safeguard measures are considered as threatening measures even though these two are part of most of the global databases on NTMs. Earlier, NTMs were called as NTBs based on the logic that imposition of those measures restricts trade. Although NTBs and NTMs are interchangeably used in the literature, UNCTAD (2013) favours the use of NTMs in place of NTBs with the presumption that certain policies with regard to human, animal and plant health enhances human welfare, therefore need not necessarily fall in the category of trade barriers (Cadot and Ing, 2015). On the face of it, NTMs are diverse and the notifications are descriptive. There have been continuous efforts by WTO, World Bank, UNCTAD, ITC and other international agencies to understand and measure the NTMs at a global level for comparison and meaningful research on the subject. There are alternative definitions of NTMs based on the purpose and/or design of the measure. As per UNCTAD (2010),

> *"non-tariff measures are policy measures other than the ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both."*

As per WTO (2012), *"NTMs refer to policy measures other than tariff than potentially affect trade in goods."*

NTMs are classified into various categories based on different criteria. UNCTAD classification covers 16 chapters and each chapter is divided into depth up to three digits. Except one, the rest are import-based which are further clubbed in technical and non-technical measures. Technical measures include SPS, TBT and pre-shipment inspection and other formalities whereas the universe of non-technical measures covers contingent trade-protective measures; non-automatic licensing, quotas, prohibitions and quality control measures other than for SPS and TBT; price-control measures; finance measures; measures affecting competition; trade-related investment measures; distribution restrictions; restrictions on post-sales services; subsidies; government procurement restrictions, intellectual property and rules of origin (UNCTAD, 2013). NTMs can be classified based on their location of imposition (WTO, 2012). Some are applied at the border whereas some others are applied behind-the-border. Essentially, measures at the border are meant for foreign goods only whereas behind-the-border measures are equally applicable to domestic and foreign goods as well.

Besides definitions, the motives behind the NTMs are more pertinent to understand trade policy developments in the countries. The scientific basis of imposing NTMs is to protect the human, animal and plant health from risks

by setting standards for residues of pesticides, conditions of food preparation, processing and packaging, norms for food safety, labeling features, standards for manufacturing processes of industrial goods, technical regulations, and so on. Imposing countries notify the introduction of any NTM to the WTO and to the wider public by providing details of the reasons that warrant the adoption of that standard. In this respect, the countries enjoy fair amount of discretion in setting their national standards for food safety, labelling, manufacturing processes, certification and conformity assessment tests which, in principle, correspond to the benchmarks set by the international standards, guides and recommendations. The WTO chapters delineate the approaches and modalities with respect to imposition, application, review, dispute settlement, and redressal of any other matters leading to conflicts of interest. NTM-related arbitrations are also addressed through the dispute settlement mechanisms of the WTO and addressed by the SPS and TBT Committees respectively.

For greater understanding about the nature, forms and application of NTMs among the trading firms and wider dissemination of information, various consolidated databases have been developed by the international agencies. Among them TRAINS and WTO-ITIP are widely used these days. I-TIP database is comprehensive in many respects. It covers time series data on various NTMs for a large number of countries in different product categories with links to original notifications of the reported countries. Likewise, other databases provide relevant facts and information about the nature, incidence and severity of NTMs.

Proliferation of NTMs

The trend in NTMs imposed by different countries does not show any clear pattern. The rise or fall in different years correspond to developments in that period, hence lack a suitable data generating process like a typical time series variable exhibit. However, NTMs over a period or at a point of time could help make some inferences about the motives behind the imposition of NTMs. NTMs imposed by countries belonging to different region of the world show divergent patterns. Except Europe, anti-dumping measures are less in the post-recession period compared to the pre-recession years. Countervailing measures increased in the post-recession period, particularly in the Asian and North American countries. Import licensing measures were halved in number in the post-recession period. The fall in number of reported licensing measures is relatively sharper in Asia and Africa. Interestingly, the number of quantitative restrictions has grown by 7.7 times in the post-recession compared to the pre-recession era. Asia accounts for two-thirds of the QRs reported during 2009-15. It has increased remarkably for other regions of the world as well (Table 3.1). In case of safeguards, the incidence is more in Africa and Asian countries after the recession. Overall, the safeguard measures registered a modest growth in the period following the recession in 2009.

Although the SPS measures grew in the post-recession period, the increase is not alarming like QRs. It has gone down drastically in Europe and North America whereas Asia and Middle East countries witnessed a steady rise in the incidence of SPS measures. Unlike SPS measures, the TBT measures grew more after the recession for all the regions except Europe. It grew by a disproportionately high rate in Africa and Middle East relative to other regions such as Asia and North America. Europe was the exception where the number of incidence has actually dropped from 1532 in the pre-recession period to 999 in the post-recession period. As compared to other measures, SPS and TBT measures are critical for trade as the number of measures in these two categories constitute a large part of the NTMs imposed worldwide. While there could be some interesting patterns for individual countries in different regions, the overall state of NTM measures in the world in the recent years indicate organic growth in SPS and TBT measures.

In addition to the trends in NTMs applied in different regions, it is imperative to look at

Table 3.1: Imposition of NTMs by All Reporters

(No.)

Region/ Category	Pre-Recession (2000-08)							
	ADP	CV	LIC	QR	SG	SPS	SSG	TBT
Africa	116	6	12	1	9	117	-	395
Asia	879	9	58	67	25	1763	88	1881
Europe	371	31	32	6	41	611	254	1532
Middle East	11	-	1	-	14	106	-	524
North America	417	73	13	-	9	2048	130	939
LDC	-	-	6	-	-	21	-	99
Grand Total	2154	128	160	91	134	6264	538	7093
	Post-Recession (2009-15)							
Africa	47	6	-	21	19	141	-	1122
Asia	586	20	27	487	66	2135	155	2035
Europe	166	28	23	39	8	379	22	999
Middle East	16	-			6	423	-	2758
North America	212	105	8	31	1	1526	109	1024
LDC	-	-	2	32	1	-	-	-
Grand Total	1474	172	65	699	140	6510	256	9887

Source: RIS database based on WTO-ITIP.

Notes: "All reporters" refers to all the countries covered in the database. Grand total does not necessarily is the sum of the categories presented in the table.

the incidence of NTMs in terms of products. In fact, the product-wise analysis of NTMs at highly disaggregated levels would be more meaningful. However, due to different focus and lack of space, the analysis here would be restricted up to HS sections at two-digit level.

In the pre-recession period, the bulk of SPS measures were concentrated in products belonging to three HS sections e.g. live animals and products (HS 01), vegetable products (HS 02) and prepared foodstuff, beverages, etc (HS 04). The same products were also equally subjected to a good number of special safeguard measures. Besides agriculture sectors, the incidence of SPS measure is quite high for the products of chemical and allied industries (HS 06). Unlike SPS, a fairly large number of TBT measures were imposed for most of the sectors barring a few such as HS 08, HS 14, HS 19 & HS 21. The highest number of TBT measures was applied for products in the machinery and electrical equipment sector (HS 16). Similarly, products of two chapters namely base metals and articles (HS 15) and products of chemical and allied industries (HS 06) faced highest number of anti-dumping measures compared to other sectors. Other NTMs including import licensing, QRs and safeguards were applied across all the sectors even though the incidence was not that severe (Table 3.2).

As it was expected, there was reasonable growth in the number of NTMs introduced in the post-recession period. Both SPS and TBT measures were comparatively higher for the vegetable products (HS 02). Other measures such as anti-dumping, special safeguards and countervailing duties, TBT measures were higher than other measures in the post-recession period (Table 3.3).

A look at the NTMs applied by the TPP, TTIP and RCEP negotiating members individually against each other over the period 2000-15 indicates a radical shift in the number and types of NTMs. For instance, none

Table 3.2: Product-Wise Distribution of NTMs (All Reporters), 2000-08

(No.)

HS Chapter	Product Description	SG	SSG	CV	LIC	ADP	TBT	SPS	QR
01	Live animals and products	8	494	-	28	3	418	1891	13
02	Vegetable products	9	499	-	20	6	509	1436	10
03	Animal and vegetable fats	3	157	2	4	2	220	137	2
04	Prepared foodstuff, beverages, etc	15	518	-	26	14	815	845	7
05	Mineral products	2	-	1	9	5	487	17	10
06	Products of chemical and allied industries	23	38	3	60	137	971	342	43
07	Resins, plastics and articles	6	-	3	9	73	727	38	9
08	Hides, skins and articles	1	-	-	3	1	35	21	4
09	Wood, cork and articles	2	-	-	2	16	151	104	7
10	Paper, paperboard and articles	2	-	-	3	16	84	9	6
11	Textiles and articles	2	100	1	7	67	192	30	6
12	Footwear, headgear, etc	3	-	-	3	3	80	6	5
13	Articles of stone, plaster, ceramic, prod and glass	13	-	-	3	20	513	3	6
14	Pearls, precious stones and metals	-	-	-	3	-	20	1	5
15	Base metals and articles	22	-	14	10	158	511	2	7
16	Machinery and electrical equipment.	12	-	2	24	41	1326	46	19
17	Vehicles, aircraft and vessels	2	-	-	9	7	505	7	23
18	Instruments, clocks, recorders, etc	2	-	-	6	9	536	4	13
19	Arms and ammunition	-	-	-	11	-	18	-	17
20	Miscellaneous manufactured articles	2	-	1	7	15	553	6	13
21	Works of art and antique	-	-	-	2	-	13	2	6

Source: RIS database based on WTO-ITIP.

Note: It excludes the category "all members" as partners.

of the member states had resorted to any kind of SPS measures in the pre-recession period i.e. 2000-08. Unlike that, some SPS measures were reported for the same set of countries in the post-recession period i.e. 2009-15 (Table 3.4 to Table 3.6). Whether the rise in SPS measures reveals disguised protectionism or not is beyond the scope of this paper. However, there is some agreement over the fact that the tendency towards trade protectionism intensified in the affected economies due to uncertain and protracted recovery in the United States and Europe in the post-recession period.

Anti-dumping measures were higher for all the three mega-regionals in the making. The impact of recession was not properly reflected in the use of ADP measures as substantial numbrt of those measures were imposed in the years preceding the global recession in 2009. In case of TPP, three members USA, Canada and Peru had imposed a diversity of NTMs in the past including anti-dumping, countervailing duty, import licensing, sanitary and phyto-sanitary measures. While anti-dumping measures have fallen during 2009-15, SPS measures seem to have grown in this period. SPS measures were highest for Peru (71) followed by Chile (30), New Zealand

Table 3.3: Product-Wise Distribution of NTMs (All Reporters), 2009-15

(No.)

HS Chapter	Product Description	SG	SSG	CV	LIC	ADP	TBT	SPS	QR
01	Live animals and products	4	252	3	8	5	639	1704	162
02	Vegetable products	3	202	1	10	11	1055	1884	109
03	Animal and vegetable fats	1	42	5	-	5	287	246	70
04	Prepared foodstuff, beverages, etc	6	252	12	6	19	1643	912	87
05	Mineral products	2	-	5	14	13	466	67	101
06	Products of chemical and allied industries	11	22	29	27	287	1066	371	353
07	Resins, plastics and articles	7	-	16	5	202	992	125	76
08	Hides, skins and articles	-	-	-	-	-	28	13	76
09	Wood, cork and articles	-	-	2	1	40	179	41	77
10	Paper, paperboard and articles	5	-	5	6	62	70	12	65
11	Textiles and articles	10	-	9	5	97	177	23	74
12	Footwear, headgear, etc	-	-	-	3	5	72	3	49
13	Articles of stone, plaster, ceramic, prod and glass	8	-	5	1	82	588	8	54
14	Pearls, precious stones and metals	-	-	-	4	-	10	4	79
15	Base metals and articles	17	-	75	8	448	684	16	80
16	Machinery and electrical equipment.	3	-	14	8	111	2028	62	151
17	Vehicles, aircraft and vessels	1	-	7	8	20	502	11	77
18	Instruments, clocks, recorders, etc	1	-	-	7	17	644	5	95
19	Arms and ammunition	-	-	-	6	-	21	1	81
20	Miscellaneous manufactured articles	-	-	3	9	18	770	7	82
21	Works of art and antique	-	-	-	-	-	9	-	59

Source: RIS database based on WTO-ITIP.

Note: It excludes the category "all members" as partners.

(25) and Mexico (13 (Table 3.4). For TTIP, the number of reported cases of anti-dumping and countervailing measures has dropped sharply for both the United States and the EU in the post-recession period. Although the TTIP parties were the worst victims of recession, NTMs imposed towards each other in TTIP in the post-recession period were fairly small in number without having a clear sense of its severity. Given the disputes over consumer protection and food safety among the United States and EU over the past few years, the number of SPS measures imposed by them does not commensurate with the height of those concerns (Table 3.5).

The absolute number of NTMs is higher for the RCEP members. Barring a few, most of them reported good number of anti-dumping measures both in the pre- and post-recession period. Like TPP, the SPS measures by RCEP

countries increased during 2009-15. While no SPS measures were found during 2000-08, nine out of 16 members reported SPS measures in the post-recession period. With 23 measures New Zealand topped among the RCEP negotiating countries in case of SPS measures followed by Australia (19) and Philippines (15) (Table 3.6). Besides SPS, none of the members who are party to the three mega-regionals have imposed any TBT measure against each other as well.

Nature of Negotiations on NTMs in RTAs

Non-tariff measures include sanitary and phytosanitary standards (SPS), technical barriers to trade (TBT), anti-dumping measures (AD), safeguards (SG), etc. Most of those NTMs are opaque, country-specific and hard to quantify. As a result, the precise measure of the impact of NTMs on trade is empirically difficult. As there is very little bargaining space for tariff reduction, the commitment on NTMs are crucial component of trade agreements. In a broader sense, the imposition of NTMs is justified as those address certain public policy objectives. For example, SPS measures correspond to the standards and procedures to protect human, animal and plant health from diseases, pests, toxins and other contaminants. Similarly, TBT features the technical regulations, product standards, environmental regulations, labeling and other related measures that have bearings on human

Table 3.4: NTMs by TPP Negotiating Countries against other TPP Parties

(No)

Member	Pre-Recession (2000-08)		Post-Recession (2009-15)			
	ADP	CV	ADP	CV	LIC	SPS
USA	48	6	24	8	-	-
Australia	15	-	20	1	-	-
Brunei	-	-	-	1	-	-
Canada	14	1	5	1	1	1
Chile	-	-	-	-	-	30
Japan	1	-	-	-	-	5
Malaysia	4	-	1	-	-	-
Mexico	19	-	5	-	-	13
New Zealand	5	-	-	-	-	25
Peru	14	1	3	2	-	71
Singapore	1	-	-	-	-	-
Viet Nam	-	-	1	-	-	-

Source: RIS database based on WTO-ITIP.

Note: It includes TPP members for which data are available in I-TIP Database.

Table 3.5: NTMs by TTIP Negotiating Countries against Other TTIP Parties

(No)

Member	Pre-Recession (2000-08)		Post-Recession (2009-15)		
	ADP	CV	ADP	SPS	CV
USA	79	20	6	8	-
EU	10	2	4	7	2

Source: RIS database based on WTO ITIP

Note: It includes TTIP members for which data are available in I-TIP Database.

Table 3.6: NTMs by RCEP Negotiating Countries against Other RCEP Parties

(No)

Member	Pre-Recession (2000-08)		Post-Recession Period (2009-15)			
	ADP	CV	ADP	CV	QR	SPS
Australia	64	2	54	8	2	19
Brunei	-	-	-	-	-	1
Cambodia	-	-	-	-	-	-
China	74	-	24	-	-	-
India	229	-	134	2	-	1
Indonesia	24	-	39	-	-	-
Japan	3	1	2	-	-	1
Korea	39	-	21	-	-	5
Lao	-	-	-	-	-	-
Malaysia	22	-	19	-	-	-
Myanmar	-	-	-	-	-	-
New Zealand	18	-	2	-	6	23
Philippines	3	-	1	-	-	15
Singapore	-	-	-	-	-	-
Thailand	22	-	19	-	-	2
Viet Nam	-	-	3	-	-	1

Source: RIS database based on WTO ITIP

Note: It includes RCEP members for which data are available in I-TIP Database.

health and animal welfare. WTO allows the member countries to impose NTMs as long as the large objectives of human health and social welfare are met. However, NTMs are often used as tools for trade protectionism being justified on the grounds of health and safety that are more stringent in comparison to the CODEX and other globally accepted standards.

Most RTAs include a separate chapter for different NTMs like SPS, TBT and other measures (OECD, 2015). Some RTAs present deeper SPS and TBT commitments in annexes, ad hoc agreements and memoranda of understanding (Jurenas, 2015). In the TPP negotiations, the United States had proposed establishing certain mechanisms that would facilitate faster resolution of SPS disputes raised by the negotiating members. A 'consultative mechanism' involving technical experts was also proposed to address various kinds of SPS disputes. And, a 'rapid-response mechanism' was planned to quickly address the SPS measures concerning exports of perishable products. In most RTAs, the commitments with respect to SPS are in the form of guidelines and consistent with the WTO-SPS framework. Some RTAs contain a few concrete commitments and certain specific commitments to transparency and equivalence. However, there is scope for greater commitments to technical assistance and improving collaboration on standards and regulations through use of mutual recognition agreements (OECD, 2015).

WTO (2011) examined the commitments on NTMs in a representative set of Preferential Trade Agreements (PTAs). The analysis suggests that a significant number of PTAs have recognised the importance of mutual recognition of conformity assessment procedures and results and the harmonisation of standards and technical regulations. A

cursory look at the provisions on NTMs in a select RTAs such Indian –ASEAN, India-Japan, COMESA, etc indicate poor coverage of NTM-related issues even though the agreement refer to all pertinent matters concerning NTMs. On the other hand, TPP chapter on SPS and TBT presents the commitments in detail in the format of the WTO chapters. Regardless of the format of presentation, what appears very clear in these RTAs is that reforms in the NTMs are an ongoing process which requires strong cooperation among the trading parties.

Gains from NTM Reforms

Along with tariff reduction, the removal and harmonisation of NTMs is considered critical for the success of any regional trade agreements. Most of the RTAs that are in force today have included some provisions for harmonisation of standards, technical regulations and conformity assessment procedures and cooperation among members for greater regulatory coherence. However, the coverage on NTMs in terms of provisions in these agreements does not seem to be comprehensive and clear unlike for tariffs. In addition, quantification and aggregation of NTMs of different types and across countries is cumbersome and not flawless (Josling and Roberrts, 2011). As a result, the empirical estimates of potential gains from NTM reduction cannot be relied upon entirely for any judgment on the strength of provisions as trade-promoting or trade-restrictive. Removal of NTMs is beneficial for the host countries from two angles. Firstly, its direct impact could be manifested in the form of increased trade among the parties of the RTAs. Secondly, NTM reforms and harmonisation indirectly helps in trade cost savings.

The cost saving dimension is crucial for exporters in the developing countries. In most cases NTMs are not opaque and requires heavy compliance costs. While tariff gradually lose its relevance as an important trade barrier, NTMs are increasingly viewed as more trade-restrictive than tariffs (Berden and Francois, 2014). Imposition of NTMs escalates costs due to differences in modalities of application, certification methods, labeling requirements, ways of measuring technical characteristics and so on (Fontagne, Gourden and Jean, 2013). The severity of higher costs falls disproportionately in different sectors and for different countries based on the domestic regulations and systems for standards and certification. In particular, SPS and TBT measures have negative effects on agriculture trade (Jurenas, 2015).

Undoubtedly, reduction of NTMs leads to higher trade as lowering of tariff has reached a level of saturation in most countries of the world. However, unlike tariffs the precision of the magnitude of trade gains from NTM removal is questionable. In the context of TTIP, Bureau et al. (2014) find that 25 per cent reduction of NTMs along with full phasing out of tariffs may increase transatlantic trade by 40 per cent. Further, in the agri-food sector, EU exports to the United States may increase by 60 per cent whereas EU imports from the United States could increase by 120 per cent up to 2025. In terms of sectors, gains are stronger for red meat, sugar, white meat, and dairy. The presence of stringent standards and technical regulations raises the price of the products to be traded. Simplification and harmonisation of these regulations could bring the cost down and help the trading nations. In this regard, deep integration clauses in the trade agreements dampen the price raising impact (Disdier, Emlinger and Foure, 2015). Mutual recognition of conformity assessment procedures has the strongest effect than other reforms with regard to NTMs (Guimbard and Goft, 2014).

Similarly, other studies present encouraging results from NTM reduction by the TTIP parties. (WEF, 2014). Berden et al. (2009) finds that the reduction of NTMs leads to substantial national income gains for both the United States and the EU. For EU, the income gains are expected to come from motor vehicles, chemicals, cosmetics & pharmaceuticals, food & beverages, and electrical machinery.

Likewise, for the United States, the sectors that would benefit most from the NTM removal include electrical machinery, chemicals, cosmetics & pharmaceuticals, insurance and financial services. NTM reforms in the form of cross-recognition of standards, mutual recognition of regulation and development of standards could result in significant reduction in trade costs in sectors like primary agriculture, primary energy, beverages and tobacco, processed foods and petrochemicals (Egger et al., 2014). In general, NTM reduction and harmonisation is viewed positively among the stakeholders.

Aid for Trade Support for Capacity Building

With higher ambition, there is a greater recognition of regional and international cooperation in setting standards, mutual recognition of conformity assessment procedures and quality testing. Capacity-building and technical assistance is an important feature of trade negotiations on NTMs and trade facilitation. DAC countries provide aid for capacity-building under the 'Aid for Trade' initiative. This support is extended to the developing countries and the LDCs for the purpose of various trade policy objectives. Under industry category, technological R&D is a key component of aid support from the DAC countries. Aid for technological R&D also covers industrial standards, certification, accreditation, quality testing, metrology and others. Among the countries those are party to any of the three mega-RTAs and have received aid from DAC for technological R&D, a substantial chunk of this aid was received by Thailand, Viet Nam, Lao and Indonesia during 2004-07. In general, the aid flows declined precipitously for all the negotiating countries during the recession and post-recession years (Table 3.7).

For developing countries as a whole, total aid flows registered a steady fall after 2006. During 2000-06 the aid flows to developing countries increased from US$14.6 million in 2002 to US$116.8 million in 2006. The same trend applies to the LDCs and the upper middle income countries as well. However, the lower middle income countries witnessed a revival in the aid flows after a few years of slowdown following the collapse of Lehman Brothers in 2009 (Table 3.8).

Table 3.7: Aid for Technological R&D by DAC

(US$ Million at 2013 prices)

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Cambodia	-	-	0.03	0.03	0.09	0.64	0.59	0.04	0.01	0.01	0.12	-
Chile	0.49	0.52	0.87	1.27	0.36	0.23	0.17	0.25	0.35	0.16	0.04	0.08
China	0.61	1.25	1.47	2.23	2.07	3.01	0.62	0.28	0.62	0.93	0.72	0.40
Indonesia	0.31	1.18	1.51	1.50	0.93	0.71	1.10	1.33	0.43	0.63	1.33	1.82
Lao	-.	-	0.18	1.53	2.61	1.86	2.21	2.12	0.86	0.89	0.00	-
Malaysia	-	0.42	0.59	0.33	0.18	0.12	0.18	0.19	0.17	-.	-	0.00
Mexico	0.84	0.10	0.96	0.36	0.94	0.04	0.06	0.30	0.30	0.25	0.02	0.09
Myanmar	-	0.01	0.03	0.02	0.01	0.12	0.12	-	-	0.01	0.04	0.14
Peru	0.32	-	0.77	0.32	0.70	0.14	0.09	0.11	0.18	0.31	0.19	0.17
Philippines	0.00	0.62	0.45	0.76	0.50	0.40	0.45	0.33	0.36	0.16	0.09	-
Thailand	-	2.08	6.04	7.15	9.89	5.88	1.58	-	0.01	0.08	0.01	0.04
Viet Nam	0.88	0.18	0.74	1.03	2.50	1.87	2.27	1.25	1.23	0.96	0.54	0.34

Source: RIS database based on OECD, CRS.

Note: Data for technological research and development that includes industrial standards, quality management, metrology, testing, accreditation, certification is categorised with CRS code 32182 under the broad purpose industry.

Relevance and Adequacy of NTM Provisions

Among the three mega-regionals that are discussed in this chapter, TPP negotiations are now concluded and the chapters are shared in public domain. It would make sense to compare the TPP chapters on NTMs particularly SPS and TBT with the standard SPS and TBT chapters of WTO which serves as the benchmark for any trade negotiations at bilateral and regional levels. Apparently, the chapters on NTMs in the TPP Agreement seem to be comprehensive relative to the text/ chapters of other RTAs. In addition to the TPP chapters, the merits of the issues relating to NTMs that are debated in the context of TTIP and RCEP will also be discussed to judge the adequacy of provisions on NTMs in the mega-regionals. Mega-regionals are claimed to be "high ambition" and "high quality" agreements. In order to examine this claim we have highlighted the additional provisions in the TPP Agreement which may lead to conflicting interpretations without giving any value judgment about how good or how bad those are.

In general, the issues that are tabled for negotiations on NTMs cover the rationale for imposition, procedures for certification and conformity assessment, mutual recognition of conformity assessment procedures and results, transparency and equivalence, traceability, mechanisms for review, consultation and cooperation, and sector-specific concerns. Given this list of issues in the negotiation agenda, any typical RTA is expected to aim for commitments in proper alignment of standards and technical regulations in the member countries, harmonisation of standards, accreditation, quality testing, labeling, etc, minimising multiplication of labeling, abolition of redundant and burdensome testing and certification requirements, convergence in regulatory approaches, cooperation in development of standards and technical regulations, promoting mutual arrangements and so on (Fediol, 2014)..

Prima facie, the TBT chapter of WTO seems to be quite exhaustive in relation to the TBT chapter of WTO. While the provisions in TPP chapter broadly correspond to the WTO TBT chapter, some provisions appear to be corollary to the main provisions. Further, the language of the text reflects an authoritarian tone in TPP agreement which is mild and simple in the WTO chapter. The supplementary provisions to the main provisions could either help clarify the legal tenets of the main provisions or leads to alternative interpretations and misinterpretations. TBT chapter of TPP has different annexure for seven sectors including wine and distilled spirits, information and communication technology, pharmaceuticals, cosmetics, medical devices, prepackaged foods and food additives, and organic products which highlight the sector-specific provisions which is not the tradition of NTM chapters in the RTAs in force (Table 3.9).

Table 3.8: Aid for Technological R&D by DAC

(US$ Million at 2013 prices)

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Developing Countries	14.6	26.4	71.6	110.8	116.8	88.2	78.8	69.2	63.3	40.3	39.7	43.3
LDCs	0.4	0.2	4.1	10.3	24.8	15.0	12.1	9.3	5.3	7.6	5.7	6.4
Other LICs	0.0	0.0	0.6	0.3	0.4	0.0	0.0	-	0.0	0.0	0.3	2.6
LMICs	4.1	5.2	9.6	13.9	18.5	15.6	15.8	11.7	7.9	6.4	8.9	11.1
UMICs	7.0	7.5	19.4	18.0	25.6	13.8	3.8	5.9	7.3	6.6	4.4	3.9

Source: RIS database based on OECD, CRS. Last accessed on 07 Dec 2015 available at <http://stats.oecd.org/ >

Notes: Data for technological research and development that includes industrial standards, quality management, metrology, testing, accreditation, certification is categorised with CRS code 32182 under the broad purpose industry. .

In the context of TTIP, the matters pertaining to NTMs faced by the US and EU members have surfaced more sharply in the literature. Among the products/sectors that has attracted maximum attention in the run up to the TTIP negotiations cover genetically modified organisms, chlorine rinsed chicken, unpasteurised cheese, preservation of chicken, bovine meat, hormone-fed beef, water in which oysters rear, soybeans, automotives, electrical machinery, aerospace, communication services, insurance services, financial services and others.

The TBT chapter of TPP mentions that the conformity assessment procedures adopted by the parties adhere to the no less favourable treatment to conformity assessment bodies located in the territory of another country and each party shall accord the same or equivalent procedures, criteria and other conditions. This is slightly different from the WTO chapter on TBT. The WTO chapter says that conformity assessment procedures could differ as long as assurance of conformity to applicable technical regulations and standards is maintained. While both WTO and TPP provides enabling provisions for verifying the adequacy and reliability of conformity assessment results,

Table 3.9: Comparison of TPP Provision with WTO Guidelines

Issue	WTO	TPP
Conformity assessment (TBT) (Treatment of Conformity assessment bodies)	Conformity assessment procedures could differ as long as an assurance of conformity to applicable technical regulations and standards is maintained. Prior consultation is encouraged for verifying the adequacy and reliability of conformity assessment results (Art. 6 of TBT Agreement)	For no less favourable treatment to conformity assessment bodies located in territory of another party, each party shall apply the same or equivalent procedures, criteria and other conditions (Art. 8.6 (1)).
Conformity assessment (TBT) (Limitation on information requirements, protection of legitimate commercial interests and adequacy of review procedures)	TBT Agreement uses the terminology "shall ensure" and "what is necessary" in meeting these provisions	TPP uses the terminology "shall explain". The language sounds imposing and authoritarian. The provisions on information requirements appear to be higher than "what is necessary". May lead to competing legal interpretations (Art. 8.6 (4), Para 6 &7). However, Art. 8.6 (11, 12, 13) have some soothing provisions in case of acceptance or refusal of conformity assessment results.
Harmonisation of conformity assessment systems (TBT)	Adherence to international and regional systems for conformity assessment to the extent required necessary.	TPP provisions seem to be forward-looking. Includes role of NGOs and for-profit entities as conformity assessment bodies.
Science and risk analysis (SPS)	Prudential norms	In line with WTO SPS agreement. Clarity over specific aspects (Art 7.9 (3)).
Transparency and Information sharing (SPS)	Broad guidelines	Comprehensive

Source: RIS database based on Author's compilation.

TPP has some more supplementary provisions that may accommodate the interests of all the parties given their national priorities. However, since the chapter is a legal text, the addition of more provisions could either dilute the very purpose of introducing those or it would protect the parties from landing in disputes if the provisions are too general and lacks specific nuances relating to the subject matter of the main provisions.

A cursory look at the provisions for limitation on information sharing, protection of legitimate commercial interests and adequacy of review procedures in TPP appear to be higher than 'what is necessary' that the WTO chapter envisages. The review procedures include several alternatives which could help the parties to make the best use of each other's competence and facilities located in their territory for certification, accreditation and conformity assessment. However, the exceptions sometimes especially Art 8.6 (4), Para 6 &7 may lead to legal tussles due to misinterpretations of those provisions. Protagonists however can defend the adequacy of the provisions as Art. 8.6 (11,12,13) have some soothing provisions in case of acceptance or refusal of conformity assessment results.

Further, the TPP agreement says that the SPS measures are built upon the WTO measures and are aimed at protecting the health of humans, animals and plant life. It adds that those provisions would promote information exchanges so as to ensure equivalence. System-based audits would ensure that exporting party in paying due diligence to the regulatory controls. The impression that the SPS measures will be implemented in a way that will restrict trade than "what is necessary" raises many questions. The ambiguity of the term "necessary" can lead to multiple interpretations. Given that the SPS measures have to be economically feasible, the trade and regulatory officials have the jurisdiction over which "science-based" measures shall be adopted. This provides a loophole to the members against providing appropriate level of protection. Sub-standard scientific measures can be used to advocate a particular product on the basis of science. This will encourage the use of private certifications for food safety and might lead to misuse of acceptable food safety levels. This raises doubt on the intent of the measures measures (Mohanty and Chaturvedi, 2005). The objective seems to be expanding cross-border trade in food and agricultural products rather than what has been stated.

Provisions on trade in products of modern biotechnology can be found in the chapter, National Treatment and Market Access for Goods, implying that the products of modern biotechnology do not pose SPS issues rather will only be judged on the criteria of market access.

To resolve disagreements based on SPS measures the TPP members have the option of Cooperative Technical Consultations (CTC). The confidentiality clause which restricts the communications during the course of the CTC from being made public is also being frowned upon.

The TBT chapter states that the TPP Parties will have transparent, non-discriminatory rules for developing technical regulations, standards and conformity assessment procedures, while preserving TPP parties' ability to fulfill legitimate objectives. They agree to cooperate to ensure that technical regulations and standards do not create unnecessary barriers to trade. A time interval shall be provided between publication of rules and conformity check to give time for compliance. It also promotes common regulatory approaches across the TPP region.

The TBT chapter would also impose a "necessity test" on the labeling requirements such that the requirements are set in a way that they are no more than what is essential and least trade restrictive. This along with additional confidentiality protections on government regulators seeking information to regulate food ingredients could hinder the timely development of stronger federal standards relating to junk food warnings, GMO labeling and detailed information

about "proprietary" food additive formulas. Annex 8-D on cosmetics includes language downplaying the risk to human health or safety from cosmetics, limiting required reassessments of the product's safety in future, and encouraging voluntary oversight. This might lead to the ceiling of measures being set to the minimum and weak or absent standards on products of consumer use.

The minimalistic requirements that would come forth as a result of harmonisation of rules across the region and in an attempt to be least trade restrictive will have an adverse impact on the quality of products. Although the TPP text is quite exhaustive but the loopholes left out definitely give a lot of scope for speculations.

In this context, the NTM-related disputes related to trade in goods are presented in Table 3.10. It is observed that the share of TBT-related disputes have grown during 2007-11 compared to pre-recession period. It has actually doubled from 6 per cent during 2001-06 to 12.3 per cent during 2007-11 (Table 3.10). On the other hand, SPS cases have increased slightly to 10.8 per cent in the post-recession years from 9 per cent during 2001-06.

Sector-Specific Concerns

NTMs are supposed to meet some public policy objectives such as consumer protection, food safety, balance of payment difficulties, product quality and a host of other reasons. Some of those measures, in principle, serves the national interests and hailed as trade-promoting as it ultimately aims at more transparent, harmonised and standardised procedures to protect the human, animal and plant health and ensure appropriate industrial standards. This was probably the rationale which had paved the way for viewing NTMs as trade enablers than just non-tariff barriers (NTBs). With this shift in orientation from NTBs to NTMs, NTMs need not be always trade-distorting as the standards and technical regulations would promote best practices in food production and processing, treatment of chemical and pesticide residues in products, product quality and certification, labeling and packaging, industrial standards for manufacturing products, and so on. However, the hidden motives of the countries imposing the NTMs is hard to capture even though the description of the measure provides all necessary details pertaining to

Table 3.10: NTM-related Disputes Related to Trade in Goods

(%)

Measure/Sector	2001-06	2007-11	1995-2011
Anti-dumping	29.1	29.2	22.6
Agriculture	14.9	13.8	16.8
Textiles and clothing	0.7	0	4.1
Customs valuation	2.2	4.6	3.8
GATT	59.0	53.8	56.5
Government procurement	0	0	1.0
Import licensing	6.0	1.5	8.9
Rules of origin	1.5	3.1	1.8
Subsidies and countervailing measures	25.4	24.6	22.4
Safeguards	17.2	6.2	9.9
Sanitary and Phytosanitary measures	9.0	10.8	9.4
Technical barriers to trade	6.0	12.3	10.2
Trade-related investment measures	4.5	6.2	6.6
Total (Number)	134	65	393

Source: WTO (2012).

the desirability of such NTMs. In particular, several varieties of NTMs are imposed on agricultural products worldwide which are often considered rational as the national food systems and consumer preferences vary across the geographical regions. Likewise, the provisions on labour laws, working conditions and environmental standards that apply to manufacturing differ significantly from country to country. Developed countries often claim their superiority in these parameters of industrial production and justify the introduction of certain standards.

In view of these inherent conflicts in the rationale for imposition, motives and application of NTMs, it is imperative to highlight the specific requirements and challenges that the trading nations face in the context of negotiations on NTMs.

Agriculture

Agricultural products are subject to a diverse set of NTMs based on the grounds of consumer protection, food safety, pesticide residue levels, labeling and packaging and so on. Many a times the standards for food safety in developed countries such as EU appear to be very stringent relative to the standards in developing countries. As a result, some developing and LDCs have suffered huge losses in terms of export rejections (Kumar and Chaturvedi, 2007). SPS measures are highest in the case of agriculture products. The exporting firms face high compliance costs to meet those standards in the developed countries which many would interpret as trade barriers. TPP agreement has annexes dealing with processed food and additives which highlights the sensitivity of that sector in the overall scheme of reduction and harmonisation of NTMs. Developing countries lack resources, technical capacity and technology to comply with the higher standards in the advanced countries. The disputes surrounding chlorine rinsing of chicken, unpasteurised cheese, bovine meat between the United States and the EU in the context of TTIP negotiations are classic examples of the costs of non-harmonisation and denial of market access in the agriculture products due to proliferation of NTMs in the agriculture sector. Subsidy issue in the fisheries sector has often appeared as a contentious issue for export of fish products. Some developing countries that are dependent on the export of a few agricultural goods face the challenge of meeting the requirements of higher standards, quality testing and certification. It therefore requires cooperation in development of standards and sharing of resources and capacity for ensuring a fair compliance to food safety standards by the exporting nations.

Manufacturing

Like agriculture, manufacturing goods are subject to a number of TBT measures. These include technical regulations with respect to product quality, emission norms, good manufacturing practices, etc. Automotive sector is highly targeted for various TBT measures. In general, NTMs are prevalent in chemicals, pharmaceuticals, biotechnology, textiles and other sectors. Exports from developing countries are affected due to non-compliance of standards and technical regulations in different countries of the world. Production processes differ from country to country thereby requires cooperation in quality testing and assurance. Testing laboratory is often highlighted as a major impediment in complying with the technical regulations. There are suggestions in the literature to provide assistance in establishing testing laboratories and promote good manufacturing practice.

Cross-Cutting Issues in NTM Negotiations

The previous sections discussed the nature, proliferation and severity of NTMs in different regions of the world as well as in the negotiating parties of the three mega-regionals i.e. TPP, TTIP and RCEP. In addition, the comparison between the SPS and TBT chapters of WTO and TPP reveal a tendency towards bringing more clarity while the room for misinterpretation also increases with the inclusion of additional provisions or more description to the standard

provisions. However, more attention is required on a few aspects of NTMs in the forthcoming agreements on NTMs as given below.

Role of science

The rationale for application of NTMs should correspond to proven scientific evidences. The validity of that scientific basis should also be verified before citing it as a reason for imposition of SPS, safeguard and other measures. Higher standards without solid backing of science or on flimsy grounds need to be discouraged. Since the claims of misuse of NTMs for trade protection is gaining currency in some quarters, efforts should be directed towards more regional and international cooperation to create awareness and promote recognition of science-based standards.

Development of standards

In practice, countries follow different standards and technical regulations for their products. Historically, developing countries and LDCs have hardly any participation in the standard setting process (Kumar and Chaturvedi, 2007). Hence, the issues affecting the developing countries might have been poorly represented in the standard development process. In addition to CODEX, a number of private standards are being promoted by the leading multinational firms in the advanced countries. Although the multinational firms in those countries could be able to comply with those higher standards, it would not be easy for the firms in the developing countries to do so. Developing countries lack the necessary resources, technology and manpower to meet those standards. As a result, they lose market access in the long-run. It is therefore important to make the standards development process more participatory and representative so as to promote good and ethical practices with regard to development and application of standards.

Labeling

Product labels make significant difference in marketing of products. With growing awareness of consumer safety and rights, labeling of food products, wine and other products bears higher importance in the coming years. TPP has mentioned about the specific labeling requirements for wine and wine products in the EU. It applied strongly to packaged food items also. In that way, labeling is quite sensitive from the angle of consumer protection and adherence to product quality. Higher emphasis is warranted for proper labeling and dissemination of those labeling norms among the stakeholders.

Information Sharing

Very often, lack of transparency is highlighted as the reason for higher compliance by the exporting firms. Limited information or inadequate dissemination results in poor recognition of the standards and technical regulations that the trading nations introduce from time to time. In principle, countries report to the WTO about their notification relating to NTMs. However, it may attract wider dissemination unless the other mediums of information sharing are explored. In this perspective, countries should aim for more robust and transparent sharing of necessary information pertaining to the cause, nature and procedures of application of NTMs.

SUMMARY

The global trading environment witnessed extraordinary changes over the past two decades particularly after the ratification of the Uruguay Round of GATT negotiations in 1994. Countries have lowered trade barriers and embraced trade liberalisation at bilateral, regional and global levels in a very significant way. Along with ensuring their commitment to WTO trade agreements, the member countries of WTO have become party to several regional trade agreements which made the protagonists nervous about the future of multilateralism in the world. The impasse over the Doha Development Round negotiations compounded the fear further. However, many believe that the

co-existence of both multilateralism and regionalism in trade would be in the interests of the society and the people at large. In this parlance, one interesting development that needs worth mention is the treatment of non-tariff measures in trade agreements. Since tariffs have reached the optimum bottom for most of the countries, the bargaining space for trade negotiations lies in the area of non-tariff measures. Moreover, the studies find tremendous gains in trade from reforms in trade facilitation, harmonisation of standards and technical regulations, and regulatory coherence.

With proliferation of regional trade agreements worldwide, the nature and format of negotiations have undergone a paradigm shift as well. In most of RTAs that are in force today, there is some coverage on NTMs particularly with reference to the harmonisation of standards and mutual recognition of conformity assessment procedures. Mega-regionals have gone a step further and propose substantive commitments in various aspects of non-tariff measures. Unlike other RTAs, the mega-regionals propose to have separate chapters and annexes in order to ensure sufficient coverage of provisions on NTMs. The separate chapters for SPS, TBT, labour standards and others in the final text of TPP negotiations perhaps endorses such an orientation in trade agreements on NTMs. Amidst this optimism, the mechanisms for addressing the larger issues of NTMs in mega-regionals is yet to unfold once the TTIP and RCEP negotiations are concluded.

At present, the countries that are party to the three mega-regionals such as TPP, TTIP and RCEP still impose some NTMs mostly anti-dumping and countervailing measures against each other. Interestingly, the SPS measures have grown during 2009-15 compared to the preceding decade. Whether it explains the tendency towards disguised trade protectionism by the affected countries in aftermath of the global recession in 2009 or not is subject to scrutiny. Regardless of the motives for imposition of NTMs in the post-recession period, the contemporary literature highlights the ambitious agenda for negotiations on NTMs in these three mega-regionals. TPP chapters on NTMs are reasonably comprehensive and forward-looking even though room for improvement still exists. In the context of TTIP, several issues like the role of science, appropriateness of standards, convergence of domestic regulatory systems, mutual recognition of standards development, conformity assessment and accreditation are viewed important. TTIP is expected to cover elaborate provisions on NTMs as the gains from reduction of NTMs are perceived to be higher for both the parties, the United States and the EU. The nature and coverage of NTM issues in RCEP negotiations is not very clear. It is believed that RCEP would include similar kinds of provisions on NTMs in line with TPP and TTIP at least with respect to the inclusion of the issues. The most vital aspects that the mega-regionals envisage for NTMs are the explicit importance given for higher trade, greater recognition of role of science in evaluating the rationale for imposition of standards and technical regulations, harmonisation of domestic standards, development of regional standards, and streamlining procedures for review, consultation, verification and dispute settlement.

ENDNOTES

1 Current literature on trade policy indicates a gradual fall in applied tariff rates across the board. Optimum low is an observation, not an empirical finding.

2 As reduction and harmonisation of NTMs would lower both the cost of exporting and importing, we prefer to use trade instead of exports only.

4

Trade in Services

Introduction

Developing countries were opposed to the idea of including services in the framework of GATT/WTO during the Uruguay Round negotiations. However, finally they agreed under pressure and on the assurance that the agreement on services would allow enough flexibility to liberalise at their own pace and through four modes of supply. The four modes of supply, including movement of capital and labour, were developed as part of GATS framework agreement so that the member countries could organise and schedule their market access (MA) and national treatment (NT) commitments and obligations. Thus, in the context of GATS/WTO, the concept of international services 'trade' encompasses, in addition to traditional cross-border transactions, foreign direct investment and the movement of labour.

The members are under no obligation to make commitments in all of the modes or in all the sectors. They have complete freedom to choose sectors and modes in which they want to make commitments. The members are free to make commitments in all the four modes in a particular sector, or selectively choose among them in the chosen sectors. Moreover, GATS has provided for further negotiations to liberalise beyond initial commitments. The architecture envisages 'bargaining' and 'trade-offs' within the services sectors and across modes of delivery. WTO Members can negotiate reciprocal benefits in exchange for locking-in their policy reforms.

Considering that services constitute the most important sector, not only in developed countries, but also in many developing countries, the inclusion of this sector was imminent, sooner or later. Share of services in GDP, on an average, is now more than 70 per cent in developed countries and more than 50 per cent in developing countries. Moreover, the developments in the field of information and communication technology (IT) in recent years have expanded the range of services that can be traded internationally. Many of the services that were considered non-tradable till recently, are now actively being traded though much of this started picking up since the mid-1990s, just after the signing of the GATS. Thus, the inclusion of services in the GATT framework was not necessarily against the interest of developing countries. However, as it always happens, developing countries had little understanding on any new issues that have been brought into the GATT/WTO. As a result, the way it was framed was to serve the interests of developed countries only.

GATS – Nature of Commitments

Under GATS, members are to make specific commitments on market access (Article XVI) and national treatment (Article XVII) in individual sectors. The trade effects of GATS depend predominantly on the extent and nature of these commitments. Article XVI enumerates six types of limitations – including numerical and value quotas, foreign equity ceilings, and restrictions on the legal form of establishment – whose use is prohibited unless they are inscribed in the schedule.

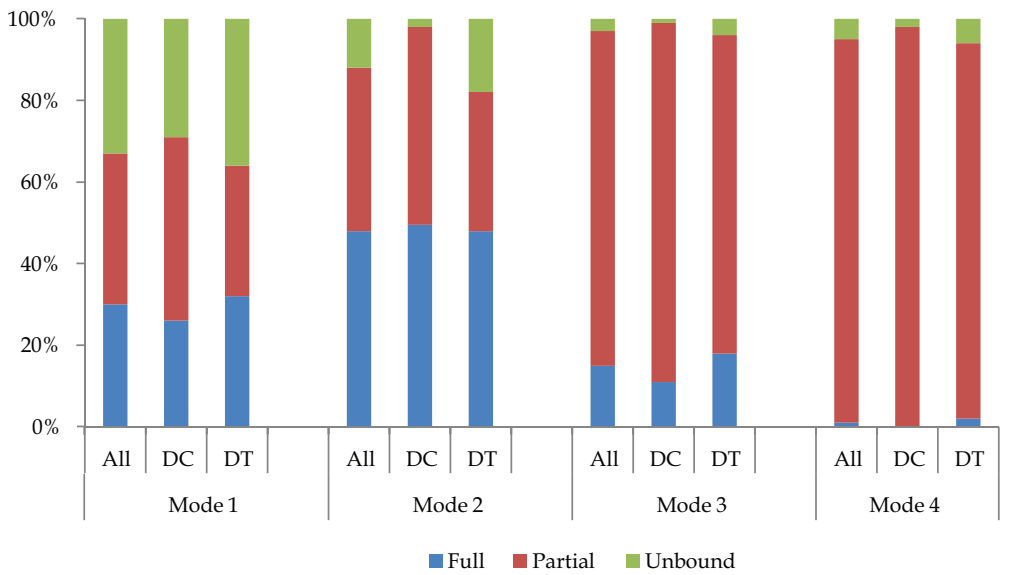
Pursuant to Article XX:2, measures considered inconsistent with both Article XVI and Article XVII are to be scheduled in the market access column. Most schedules are divided into two parts, one horizontal and one sector-specific section. Horizontal limitations reflecting policy constraints of a general, economy-wide nature apply across all sectors listed in the schedule. The binding effects of commitments under the GATS are comparable to tariff binding under the GATT.

The absence of commitments in a sector may not necessarily mean that market access or national treatment is denied. However, member retains the possibility to introduce any type of limitations or to ban trade altogether, at any time. Similarly, Members are free to offer more liberal conditions than those laid down in their schedules, on the condition that the basic MFN requirement be respected. Members' specific commitments vary widely in sectoral coverage, extent of limitations to market access and national treatment and modes of supply coverage.

It is quite difficult to make a proper assessment of the liberalisation across modes of supply, Figure 4.1 gives a rough idea for overall binding as well for two groups of countries: developed, and developing (including transition, and least-developed) economies. It is evident that, the emphasis of most commitments put forward by all countries is on commercial presence mode of supply, followed by movement of natural

Figure 4.1: Structure of market access commitments by mode

(August 2004, Percentage of bindings)



Note: Calculated on the basis of a sample of 37 sectors deemed representative for various services areas. All (All Members); DC (Developed Countries); DT (Developing and Transition Economies, including Least Developed Countries)

Source: Nanda (2008).

persons, if one considers the coverage of sector including both full and partial commitments. It is, however, noteworthy that in Mode 4, there are hardly any full commitments except by a few developing countries[1]. This, probably, reflects the fact that movement of natural persons is allowed in almost all sectors but they are linked to intra-corporate transferees and movement of highly skilled professionals.

The bindings undertaken for mode 2 are quite liberal. In fact, if one considers only full commitments, then, this is the most liberal mode, while bindings on mode 4 are the least liberal of all. However, the commitments in mode 2 is hardly of any use as governments may have few instruments to prevent their nationals from moving abroad for procuring services or to influence their consumption once they have left the country.

It is interesting to note that transition economies and least-developed countries have tended to undertake more open commitments reflecting the fact that many of them are acceding countries that were forced to take such commitments (Marchetti 2004). Commitments made under mode 1 seem to be the least open if one considers the total coverage (both full and partial commitments), though this mode is comparable to mode 3 and better than mode 4 if one considers full commitments only. It is quite an irony that mode 1 commitments could be the least liberal, considering that this is the only mode that involves trade in services in a purely conventional sense. Strictly speaking, if commercial presence is a form of trade, then all FDI projects are also a form of trade. Mode 3 essentially means entry of investment into the WTO through the backdoor. This is quite significant because today much of FDI is taking place in the services sectors which now account for more than two-thirds of total FDI inflows.

Until recently, most developing countries were not in a position to benefit from the commercial presence mode of supply, given the high cost of establishment in developed countries and the weaknesses of developing countries' firms in terms of financial and human capital, technology and so on. Even now, only a few developing countries can think of taking advantage of mode 3 liberalisation. For the same reasons, developing countries are not able to make use of Mode 1 even when delivery of some services is technically feasible, as developed countries require commercial presence for providing these services. Developed countries have, however, been able to facilitate trade in services in mode 1 through another agreement at the WTO – TRIPS can be useful in promoting IPR-related services. In fact, royalties and licence fees constitute the single largest component of services in the category of 'other services'.

It has also been noted that developed countries were interested only in the liberalisation of movement of capital in services sector, but they included mode 4 under pressure from the developing countries (Mattoo 2001). If it is so, then one must conclude that the developing countries have been short changed. Since mode 4 commitments are in the limited categories of intra-corporate transferees (i.e. managers, specialists, executives) and business visitors, they are essentially to facilitate movement of capital rather than movement of natural persons *per se*. For developing countries, these commitments have little value in light of their connection with Mode 3 commitments and the fact that national treatment in most cases is left unbound.

During the Uruguay Round of trade negotiations, developing countries considered GATS to be against their interests. However, in the aftermath of GATS, developing countries have reportedly been able to increase their share in the global trade in services. Thus, it has often been argued that the developing countries have benefited from the GATS and they are likely to benefit more from further deepening of services trade. The statistics that the share of developing countries in the world export of services rose, and more importantly its linkage with GATS, should be taken with a pinch of salt. Within the developing world, growth of export has been uneven, as only Asia has seen growth in the share in exports

while export shares of Africa, Latin America and the Caribbean have been stagnant. Moreover, linking this growth to GATS is quite problematic as many of the services that are being traded now are due to advent of new technologies and GATS has hardly played a role (Nanda 2008).

Doha Round and Developing Countries

GATS provides for successive rounds of negotiations as it aimed at progressively higher level of liberalisation. The first such round was to start not later than five years from the date of entry into force of the Agreement, i.e., 1 January 2000. Thus, despite the inconclusive outcome of the Seattle Ministerial in 1999, a new GATS round could be launched in 2000. Though, formally it was launched in March 2001 when the Council for Trade in Services adopted a two-page document setting out Guidelines and Procedures for the Services Negotiations (document S/L/93). The request-offer approach was accepted as the 'main method of negotiations'. The Doha Declaration of November 2001 reaffirmed these guidelines as a basis for continuing the negotiations and integrated the services into the general Doha Agenda of negotiations with some changes in the target dates for the submission of initial requests and offers. The 'July Package', adopted by WTO Members in 2004, further extended the target date for revised offers to May 2005.

Just prior to the Hong Kong Ministerial Conference, a strong push by certain WTO Members, especially Australia, EU, Japan, Switzerland, Korea, and supported by the US to establish mandatory minimum market access commitments (benchmarks) under the new proposed mechanisms, 'complementary methods for services negotiations' that also called for a plurilateral approach, created a major controversy. The developing countries were asked to open up a minimum percentage of sub-sectors for participation of foreign service enterprises and providers particularly under mode 3. Under the proposals, developing countries were allowed to commit in a lower percentage of sectors than developed countries. But since the developed countries had already made commitments in more sectors, the proposals could, by and large, affect developing countries only.

The overwhelming majority of developing countries remained fiercely opposed to any kind of benchmarks arguing that the proposals went against the basic principles and structure of the GATS, which enable developing countries to select the degree to which they choose to make commitments, and in which sectors. Finally, the idea of benchmarking was abandoned but plurilateral negotiations were launched after the Hong Kong Ministerial, which has now come to be known as TISA (Trade in Services Agreement).

From the developing countries, India has taken the lead to make requests on movement of natural persons as well as mode 1 and mode 2. The other requesting members are: Argentina, Brazil, Chile, China, Colombia, Dominican Republic, Egypt, Guatemala, Mexico, Morocco, Pakistan, Peru, Thailand, and Uruguay. The mode 4 request seeks Members to make commitments in providing effective market access highlighting that the existing commitments in Mode 4 are predominantly horizontal and by and large restricted to personnel movement in relation to commercial presence (Mode 3). Therefore, the request urges the recipients to make commitments by recognising 'common categories of movement both linked to as well as de-linked from commercial presence in the horizontal commitments.'[2] This request is addressed to nine developed Members: namely, United States, EC, Australia, Canada, Japan, New Zealand, Switzerland, Norway and Iceland. The request lists the market access and national treatment limitations for each of the defined category to which the Members have been asked to schedule removal commitments and address specific MA conditions such as qualifications, period of employment, duration of stay, removal of economic needs tests and transparency in such tests, and removal of wage parity, etc.

Interestingly, the request on mode 1 and mode 2 has been made to 21 countries some of which are developing[3]. Even some of the requesting members are developed countries.[4] The request notes, whether or not there are actual restrictions on the ground for cross border supply of services, the fact remains that gaps in current commitments of Members exist, which need to be plugged for better MA opportunities. The request seeks Members to make full market access and national treatment (new/improved) commitments in Mode 1 and Mode 2 in sectors/sub-sectors of interest where gaps in commitments do exist in Members' schedules. Due to uncertainty in classification of certain services delivered electronically as either Mode 1 or Mode 2, the Members have been requested to make similar commitments for both Modes of supply. However, in situations where the two types of service supply can be differentiated, different commitments are warranted in Mode 1 and Mode 2.

Services in Mega FTAs

In TPP, the defining feature of the services component is that it has adopted a negative list approach as against the positive-list approach prevailing at the WTO. Such an approach of course puts greater pressure on market opening. One great risk with this approach is that anything that is not specifically excluded will become part of the commitment. This has serious implications as the contour of the services sector is continuously evolving due to changes in technology and innovation in services. In the Antigua Barbuda Internet gambling case, the US, after losing the case at the WTO, realised the implications of such commitment. When it made the commitment, it did not realise that someday internet will become the vehicle of gambling. The US has been trying to find ways around and even exploring the idea of withdrawing the commitment. It only shows how difficult things could be for developing countries, if a country like the US, with probably the strongest legal and scientific backing in the world, can fail to realise the possible implications when making commitments. In the internet gambling case, the US decided to ignore the WTO ruling, and Antigua and Barbuda has so far failed to take action in the form of suspension of IP rights even after getting it authorised by the WTO, possibly because it does not want to antagonise a powerful nation. However, if a developing country faces similar situation, it will not be in a position to ignore the WTO or any other dispute settlement body.

Going by the experience of recent decades, developing countries like India felt that there are greater opportunities from services exports through mode 1 and demanded more opening through this mode. TPP has gone for significant liberalisation in this regard as it has decided to do away with local presence requirements. Should developing countries be happy with such an approach? In reality, they should be deeply concerned. Along with a negative list approach, there are separate agreements on financial services and electronic commerce. It raises the future implications for regulation of banking and insurance services that would be provided across the border and protection of consumers in several other areas as well. The only saving grace in this regard is that Vietnam and Malaysia will not be subject to dispute settlement as far as agreement on electronic commerce is concerned. For a country like India which is not yet ready for allowing FDI in multi-brand retail, opening up of electronic commerce to cross-border trade seems to be an impossible proposition.

Just like the GATS arrangement of mode 4 supply of services being allowed only in case of intra-company transfer and highly skilled professionals, TPP has also allowed movement of independent professionals in case of engineering and architectural services and legal services. These are categories of professionals with high level of skills and developing countries are unlikely to benefit from such commitments. On the other hand, there is a possibility that professionals in these sectors in developing countries might have to deal with unfair competition. In contrast, in the India-Japan FTA, Japan has allowed

entry of professionals like instructors in the areas of yoga, Indian cuisine, Indian classical music and dance, and English language. In the financial services sector, on which there is a separate agreement, the host country will not be able to put restriction on employment of local people in foreign affiliate firms, a normal practice followed in many developing countries.

Much is not known about TISA except through Wikileaks as the US has been able to negotiate with other members secretly just like TPP. But the TPP agreements give enough indication of the overall approach that it might be adopting. However, it is quite strange that the US and other parties have been allowed to use the WTO platform to conduct secret negotiations. According to a well-known expert, the case for embedding TISA into the architecture of WTO rules alongside the General Agreement on Trade in Services or in its place is weak on both procedural and substantive grounds to the extent that the on-going talks take place behind doors that remain closed even to the WTO Secretariat, let alone to many of the world's leading developing country suppliers of services, and involve potentially significant departures from GATS rules liable to complicate any hope for progress in multilateral journey. (Sauvé 2013)

Recommendations

There has not been any comprehensive assessment of impacts of GATS on developing countries, in part, due to the dearth of trade data in services, in particular with regard to commercial presence. Since, there is not much to show that developing countries can gain from mode 3 liberalisation by way of 'trade', the demandeurs emphasise the potential benefits that developing countries are going to reap due to liberalisation of their services through improvement in efficiency. So the emphasis is on 'liberalisation of services' rather than 'liberalisation of trade in services'.

Efficient markets for services are important. But does opening up automatically bring efficiency? In fact, most services markets are characterised by market failures which means opening up does not necessarily bring efficiency. It is important to ensure effective regulation, which is not so easy particularly when small countries, with limited resources, have to deal with big TNCs. Moreover, if the objective is only to make the services sector in developing countries more efficient, then there is no need to bring it in under a multilateral discipline. Developing countries can liberalise unilaterally, and one does not need to force them to do something that is good for them.

Nevertheless, developing countries have been showing some flexibility in terms of their commitments under mode 3 though they fall short of high expectations of the developed countries. However, the offers made by developed countries in mode 4 particularly by the US are nowhere near what some developing countries expect. In fact, the US has made it quite clear that the developing countries should not expect much in this area. Developed countries however showed willingness to give some concessions on mode 1.

During the Uruguay Round, while the developed countries were able to pursue their interests under GATS, the trade interests of developing countries were simply ignored. Hence, more liberalisation through mode 1 and mode 4 on the part of the developed countries is essentially a backlog of the Uruguay Round. In fact, since mode 1 can be considered as trade in services in the conventional sense, their liberalisation should ideally be the core of GATS. Strictly speaking, mode 3 and mode 4 do not belong in the WTO. However, as they are already there, and developing countries have already made significant commitments in mode 3, it is legitimate on their part to demand greater concessions on mode 4 in way that will benefit them. Most developing countries believe that they are likely to gain from liberalisation of mode 4 as they have enormous surplus of labour. However, the fact is that they have surplus of labour only in unskilled and semi-skilled categories. Many of them actually have

shortages of skilled labour. Hence, if mode 4 liberalisation is pursued only for highly skilled labour as in the case of TPP, it will only serve developed countries and developing countries can even be hurt.

Considering that many of the services sectors are labour intensive, developing countries have high potential to gain from the expansion of trade in services. But this may not happen simply by liberalising the services sector, as experiences of many developing countries show. This may simply mean that ownership of services sector changes hand from domestic to foreign without creating much expansion. In many African countries, the ownership of service sector companies are now predominantly in the hands of foreign companies, yet the services provided are considered to be poor, inaccessible to many and expensive in most sub-sectors in most countries. Liberalisation of mode 1 can, on the other hand, have an expansionary effect on the services sector in developing countries. However, once again TPP is not the model that will benefit developing countries due to weak regulatory capacity and low level of consumer education. In the liberalisation of trade in services, developing countries should get strong special and preferential treatment and allowed to offer less than full reciprocity.

ENDNOTES

1 In fact, these commitments are mostly by a few least developed countries.

2 See WTO document TN/S/W/31 at http://www.wto.org.

3 The recipient members are United States, EC, Canada, Japan, Korea, China, Malaysia, Philippines, Indonesia, Brazil, Argentina, Egypt, South Africa, Peru, Colombia, Uruguay, Brunei Darussalam, United Arab Emirates, Australia, Norway and Thailand

4 The requesting members are Chile, Hong Kong China, India, Mexico, New Zealand, Pakistan, Switzerland, Singapore, Taiwan, Penghu, Kinmen and Matsu.

5

Dispute Settlement

Introduction

Dispute settlement is a major issue in any trade agreement and with the proliferation number of free trade agreements of all types questions about the functioning of Dispute Settlements Mechanisms (DSMs) in them and their relationship with WTO DSM are inevitable. WTO DSM has adopted many features from trade dispute settlement regime of GATT but also brought in new features that have added strength to that and in the process enhanced the credibility of WTO trade regulation regime. Will the free trade agreements with their respective DSMs will affect the utility and credibility of WTO DSM? Can they co-exist despite overlaps and contradictions or will they result in more fragmentation and less coherence? There is an ever increasing body of literature that addresses such issues. Drawing on them and in the context of recently concluded TPP, this chapter comes to some tentative conclusions on such issues. The important fact is that as more and more global trade in goods and services is conducted under mega regionals and RTAs/FTAs the dispute settlement norms under them will impact the dispute settlement mechanisms elsewhere, if not in the near future, in the long run. The chapter contends that despite this, WTO DSM is not likely to be weakened and may in fact play a more important role in the future. It also contends that understanding the implications of DSMs under mega-regionals for developing countries is important as there are costs and benefits in opting for different DSMs.

WTO DSM 1994-2015

WTO DSM is often called as the 'jewel in the crown'. In the last two decades, its prominence has increased. DSM has handled 500 cases in a short span of two decades. This is no mean achievement considering the fact there are many DSMs available to parties who are members of different trade agreements.

According to Bernauer, Elsig and Paulwelyn (2012)

"Three main factors have contributed to the prominence of the DSM. First, the designers of the WTO have created one of the most legalised interstate dispute settlement systems worldwide, thus changing incentives structures of governments and increasing the number of cases being brought before the DSM. The prospect of winning cases where the losing party cannot block the process and prevent a formal verdict (as was the case under the General Agreement on Tariffs and Trade (GATT)) has appealed to many WTO members. Second, since progress in the Doha Round has been very slow, some WTO members have tried to affect these negotiations by resorting to litigation. Third, the potential increase in judicial law-

making and the difficulties of overturning DSM rulings through formal WTO treaty amendments or interpretations have given rise to perceptions of imbalance between litigation and negotiation." (P 1305, ebook].

They point out some of the issues with WTO DSM but point out that members of the WTO may not agree for any grand reform of WTO. The major advantages of WTO DSM include a rich body of jurisprudence, high quality outcomes, very high compliance rate and broader participation in the process by members of WTO. In terms of issues for consultations, GATT 1994 tops the list with 395, followed by Anti-Dumping 110 and subsidies 108 while Agriculture accounts for 74 consultations. [Hughes 2015]. While EU and USA have been the most frequent users of WTO DSM in terms of numbers, among developing countries Brazil, Mexico, China and India are prominent users. Normally it takes two years after composition of a Panel for dispute resolution.

WTO DSM and Developing Countries

The literature of DSM and developing countries is expanding including case studies of disputes, developing countries' participation and outcomes in DSM and whether developing countries have been able to make effective use of DSM. Analyzing the last 100 disputes Vidigal (2015) point out that of these only in two, EU and USA were pitted against each other while there were 12 disputes involving US-China and 7 disputes involved EU-China and China was involved in 23 disputes. US with 32 disputes tops the list with EU followed by 30.[1] Only 34 countries from the 161 members have litigated the last 100 disputes. But the number of cases litigated is much less. While Asian countries have been prominent in using the WTO DSM African countries have almost not used it. No African country has ever requested a consultation before the WTO and Egypt and South Africa are the two countries from Africa that ever participated as parties in WTO dispute settlement. Mitchell (2013) analyzing 424 disputes involving 607 participants shows that developing countries have participated in 256 times i.e 42% and in 51% of the cases EU and USA have participated. But the participation of LDCs is very low with an LDC participating in DSM only once. Although developing country participation in WTO DSM is increasing LDCs share is still miniscule. While dismissing the argument that developing country members lack legal capacity to make effective use of DSM, she argues, that there seem to be no inherent bias against developing countries. But Zeng (2013) taking a different position argues that lack of legal capacity constraints developing countries in two ways, it impedes their ability to get concessions from defendants in the consultation stage and it reduces the likelihood of their winning pro-plaintiff panel rulings. But according to Hoda (2012) DSM has worked well for developing countries. According to him, out of 60 complaints raised by developing countries from 1995 to February 2012, legal ruling was in their favor in 42, they lost in six complaints while mutual agreement prevailed in 12. He also takes the position that DSU has worked better for developed countries pursuing case against developing nations. Of the 64 cases analyzed by him, in 23 there was mutual settlement and in the 41 other cases the verdict was in favor of the party raising the dispute in 39. Further in the eight contested cases, where in India raised issues against developed countries, India won in seven, but out of the six cases in which complaints were raised by developed countries India lost in five. According to him the most serious challenge in protecting and defending the interests of developing countries is the lack of human and financial resources.

According to Evans and Shaffer (2010) while countries with larger economies and large trade flows are able to effectively use the DSU, their legal capacity also matters

(pp. 3421-342). In the literature different methodologies have been used to assess the reasons for developing countries success or failure with DSM but there is no consensus on what factors matter most in deciding the outcomes. Although some scholars hold the view that DSM is biased against developing countries, there are contrary views also. While one view is that members lacking in legal and administrative expertise don't participate as complainants and only countries that possess a certain level of expertise participate in WTO panel adjudication (Hoekman et.al 2009). Busch, Reinhardt and Shaffer (2009) argue that legal capacity is critical in determining whether a country can take action when it is targeted in the DSM. Thus it is likely that LDCs and smaller developing countries may not be able to effectively use the WTO DSM and are also vulnerable when cases are brought against them.

The literature on developing countries and DSM is increasing but as authors adopt different methodologies and analyze from different perspectives, consensus in the literature cannot be expected. While some argue that DSM is biased against developing nations, some others argue that data does not validate such claims. Similarly, while few authors highlight the importance of legal capacity in developing countries, at least one study disputes such a claim. While more empirical and theoretical work is important, the need to probe the near absence of LDCs in DSM and the growing importance of few developing countries in DSM need is obvious. While individual case studies or country wide case studies highlight some aspects, given the diversity in the matters in dispute and the outcomes and the remedies sought and obtained there is a need to combine more theoretical and empirical work in this area.

RTAs, WTO and DSM

The proliferation of Regional Trade Agreements (RTAs) and Preferential Trade Agreements has raised questions about governance of global trading system. Brown and Stern (2011) consider that WTO disciplines have remained the core of global trading system and multilateral disciplines provide the basic framework for building these agreements. But they also concede that WTO is losing its predominant role in liberalisation of border barriers to trade, resulting diminished importance for multilateral negotiations in reducing the trade barriers. According to them, another shift is that the USA is no longer the sole dominant power and both USA and EU have now to share the management of multilateral system with emerging market and developing countries and WTO will be less important as a body focusing on trade liberalisation.

According to Pauwelyn and Alschner (2015)

"WTO Members – be it in committee or dispute settlement – do not really check or challenge whether PTAs actually comply with General Agreement on Tariffs and Trade (GATT) Article XXIV, the Enabling Clause (pursuant to which PTAs exclusively between developing countries can be concluded) or General Agreement on Trade in Services (GATS) Article V. Moreover, GATT Article XXIV and, even more so, GATS Article V and, certainly, the Enabling Clause offer a great deal of wiggle room for WTO Members to conclude PTAs of all sorts". (pp. 1169-1170 in ebook version)

Further, they point out that not meeting Article XXIV conditions would not invalidate NAFTA or make in it invalid and GATT Article XXIV could not be used to justify US preferences granted to Canada but not to EU. So they have to be granted to both or should be denied to both, as otherwise that would be a violation of GATT Article 1 i.e. MFN treatment. So according to them, GATT Article XXIV is not a prohibition but an exception. They take the position that in matters not covered by WTO's limited MFN provisions such as labour, environment and competition, the PTA is not subject to MFN.

Thus the restrictions imposed by WTO rules on members concluding plurilateral trade agreements has serious limitations. Analyzing the PTA networks they point out that most clusters of PTAs correspond to specific regions but countries from South East Asia and East Asia form a large cluster with countries from the Americas. While in Asia and Americas deep PTAs are found while the PTAs in Africa and Middle East are shallow. Although China and India are in the same region China has much deeper agreements than India. An important observation made by them is that few interconnected players dominate the deep PTA network. The WTO-extra commitments found in deep PTAs are crafted by few interconnected hub countries and this may facilitate the emergence of a coherent unit of WTO extra norms, which in turn may be issues at the multilateral level. With respect to emerging mega-Regionals like TPP, RCEP and TPIP they speculate that these three agreements will shift USA closer to the network's center with nodes of the Asia-Pacific region clustering together. This may lead to a tighter global PTA network.

In 1996 to bring greater discipline of review of notified RTAs, the Standing Committee on Regional Trade Agreements (CRTA) was formed. But there was lack of progress in the functioning of CRTA. In 2006, 'The Transparency Mechanism for Regional Trade Agreements' was adopted by WTO Members. Under this, the duties and procedures to be followed by WTO members on the agreements they propose to negotiate, of the conclusion of the agreements and of the working of the RTAs, to WTO Secretariat. In 2010 Transparency Mechanism for Preferential Trade Mechanism was adopted. The 2011 *World Trade Report* dealt with PTAs and pointed out that different approaches have been put forth for improving coherence between PTAs and multilateral trading system. (WTO 2011).

As countries enter into different PTAs with different tariff schedules , rules of origin and overlapping arrangements it is becoming difficult for developing countries to manage, particularly when the average African country is party to four agreements and average Latin American country party to seven agreements. The increase in the number of regional trade agreements and PTAs may impede progress towards a more rule based and transparent multilateral trading system. (Chauffour and Maur 2011).

Article XXIV was adopted by GATT in 1947 and this was carried forward in 1994 into the WTO. The relationship between application of safeguards or exemption under RTAs and Article XXIV has been dealt with in many cases. After reviewing many cases involving Article XXIV , de Mestral points out

".. , sixty five years after the adoption of GATT and sixteen years after the creation of the WTO, and despite the existence of literally hundreds of RTAs, the law governing their relationship with WTO remains a matter of considerable uncertainty. The DSB will effect to certain provisos of RTAs such as the exemption of safeguards as long as the parallelism principle is respected. The exact reading of the exemption for 'laws and regulations' is far from clear, as is the relationship between Articles XXIV and Article XX. " (P 804)

de Mestral (2013) points out that significant difficulties remain in the way of WTO and RTA dispute settlement. The 'fork in the road' provisions in many RTAs leave the choice to complainant and if the complainant has chosen WTO then defendant does not has the choice of stopping the process under the terms of choice for forum clause. He suggests that given the complex co-existence of the WTO and 400 and odd RTAs problems arising should be dealt with a manner more consonant with fairness and legal principle. However as the scope of issues being covered by mega regional FTAs is expanding translating this into practice is not easy.

Reviewing the DSMs in 261 RTAs Froese (2014) , categorises them into four.

In Category A there are no negotiated DSMs and no provisions for dispute settlement are mentioned. In Category B, parties agree for consultation only without resorting to a judicial mechanism. In Category C basic arbitral provisions are provided and referral to an external mechanism that handles such disputes in the context of regional integration is also made in some RTAs. The DSM may include forum shopping clause. In Category D , a fully articulated DSM is provided with rules for panel composition, a time line for dispute resolution and forum exclusion causes etc. Some RTAs also include investor-state dispute settlement provisions while some like NAFTA have separate dispute settlement provisions such as Chapter 19 antidumping and countervailing duty review provisions. When DSM in an RTA is similar to that of WTO there is a high degree of automaticity and rule driven processes. Of the 261 RTAs 143 come under Category A i.e. No DSM, while 28 come under Category B i.e. Consultation only, and, 36 come under Category C with basic provisions and Full DSM is found in 54 RTAs. Significant growth of fully articulated DSMs in RTAs was between 1995 and 2013 and Category B type DSMs rose and fell between 1980 and 2001. But the availability of different types of DSM has not resulted in large number of cases involving them *vis a vis* WTO DSM. While there were 181 completed panels in WTO on state to state dispute settlement, this was just 10 under MERCOSUR, 3 under NAFTA and none under ASEAN. Another interesting fact is that despite Chapter 19 and Chapter 11, state to state disputes only 3 disputes were brought to NAFTA, while 17 cases involving NAFTA partners came through panel process at WTO. In the context of MERCOSUR only Brazil and Argentina are active users of WTO DSM. And as both trade more with Europe and North America than with other countries in MERCOSUR dispute settlement pattern reflects this.

Chase et.al (2013) in their extensive study of DSMs in 226 RTAs classify the DSMs under the three models : political/diplomatic; quasi-judicial and judicial. The frequency of RTA-DSM models is as below

DSM Model	No. of RTAs	Share of the total %
Political	69	30
Quasi-Judicial	147	65
Judicial	10	5
Total	226	100

They point out that the following types of RTAs come under the political model, RTAs that have no dispute settlement mechanism provisions, RTAs that provide for negotiated settlement and/or, the referral of a dispute to a political body and RTAs that have provisions for referral of a dispute to a third party adjudication with right to veto such referral to RTA members. In the RTAs, that use quasi-judicial model, automatic right of access to third party adjudication is provided subject to caveats. Although an adjudicating body may be formed for resolving a specific issue and dissolved after issuing decision, in some RTAs there is provision for in the first stage an adjudicating body with a standing body at the appellate stage. A significant number of RTAs provide for quasi-judicial model of DSM and the DSM can also include a rule that the ad-hoc adjudicating body's decisions are not binding. In the Judicial model, there is automatic right of referral of a dispute to a third party adjudication.

Ahn (2013) points out that many Asian FTAs adopt a 'WTO type' DSM while those involving USA employ 'NAFTA Type' DSM. It is also pointed out that Japan and Singapore explicitly agreed to duplicative jurisdiction by FTA and WTO although many Asian FTAs provide exclusive jurisdiction for FTAs. In implementation also there are two major trends in Asian FTAs with majority of them opting for NAFTA type implementation.

Thus there is diversity in DSMs under FTAs/RTAs and the parties often choose what suits their needs most. The paradox is

that despite although there is an increase in number of RTAs, only few RTA-DSMs are active and this is also in plurilateral RTAs. *The World Trade Report 2011* pointed out that WTO members use WTO DSM to resolve disputes with RTA partner. An analysis of data from 1995-2010 in the report pointed out that disputes between RTA members constitute 19 per cent of all disputes and in this the largest share is that of disputes between NAFTA. Despite the availability of RTA-DSMs , RTA partners have often chosen to use WTO DSM. On the other hand WTO acquis is being referred to in many disputes brought under different RTAs. Marceau, Izaguerri and Lanovov (2013) provide the following table to give an idea about this phenomenon.

Forum	Total cases referring to WTO Acquis
Ad Hoc Canada US-FTA	3
Andean Court of Justice	42
CARICOM	1
Economic Court of CIS	4
NAFTA Chapter 19	31
NAFTA Chapter 20	3
MERCUSOR	9
Total	93

They show that WTO acquis is applied in four major circumstances 1) establishing factual details, 2) applicability of procedures and processes 3) clarifying a principle or interpretation and 4) Assisting in interpreting a norm or a legal test. Given the rich WTO jurisprudence developed by Panels and AB relying on WTO acquis provides coherence, particularly normative coherence. This enables avoiding contradictory decisions by WTO DSM and DSMs under RTAs. For example in Retarded Tires IV, MERCOSUR tribunal accepted the physical properties as described by AB. In applying treaty interpretation and general principles of international law WTO acquis is relied upon by DSMs under RTAs.

The increasing use of WTO DSM by RTA parties and the use of WTO acquis by DSM bodies in RTAs indicate that WTO DSM's importance is not likely to diminish despite proliferation of RTAs and their different models of DSM. Moreover, as the new mega regional FTAs incorporate new issues like environment, human rights and labor, the bodies under DSM are likely to rely more on WTO acquis for reasons cited above.

In the literature, there are divergent views on impacts of proliferation of RTAs and their DSMs and a major issue is whether this will result in fragmentation or bring in more coherence with WTO. There are many questions like how norms and DSMs of overlapping trade agreements will interact. Most of the PTAs/RTAs are propelled by few countries who are key players and most of the PTAs/RTAs are region specific. Often they have WTO-extra and WTO Plus norms and as the number of trade agreements that incorporate such norms increases will it influence the other trade agreements that are in the offing and in the long run will these be the new normal. But the problem is that this is happening without participation of countries that are WTO members but not parties to these norms. It can be argued that these will result in more liberalisation of trade and services and parties are willing to go beyond WTO norms understanding the costs and benefits and hence this should be welcomed. On the other hand, this may also result in more fragmentation and lack of coherence among WTO norms and norms of RTAs or for that matter among norms of RTAs on governing trade. More research is needed to understand the implications of this.

Our brief analysis shows that WTO DSM is not likely to be weakened and even as parties engage in negotiations and becoming parties to more RTAs, the reliance of WTO DSM is not likely to decrease.

Thus despite concerns about fragmentation, WTO DSM will continue to

play a key role in trade dispute settlement. But given the uncertainties in the laws governing relationship between WTO and RTAs, it is also likely that difficulties in reconciling WTO DSM and RTA DSMs will arise in future, particularly when the mega regionals incorporate new issues and opt for a broader coverage than the earlier generation RTAs. With more than 400 RTAs notified and many in the offing this could emerge as a major issue. Still how the parties to the future RTAs and mega-regionals will use the DSMs under the respective trade agreements is not clear.

DSM IN TPP : AN OVERVIEW[2]

On 4 October 2015, the Ministers of 12 Trans-Pacific Partnership countries declared the conclusion of negotiations. TPP is considered as a mega regional FTA can be a pioneer in many ways and is very comprehensive. It includes new and emerging trade issues and cross-cutting issues such as internet and digital economy, participation of state owned enterprises in global trade and investment. TPP has 30 chapters with schedules and annexures.

The objective of the dispute settlement is to allow to Parties to expeditiously address disputes among them in implementation of TPP. It is envisaged that the Parties will make attempts to resolve dispute through cooperation and consultation besides encouraging the use of, wherever relevant, alternative dispute settlement mechanisms. If this is not feasible, disputes are to be settled through impartial and unbiased Panels. With few exception, the mechanism provided in TPP is applicable across the TPP. If consultations do not result in resolution Parties can request establishment of a Panel and the Panel would be established within 60 days after the date of receipt of request for consultations. In case of perishable goods, the limit is 30 days. Panels will be comprised of three international trade and subject matter experts, who would be independent of the Parties to the dispute. The available procedures ensures that a Panel can be formed even if a Party does not appoint a Panelist within the specified time. To ensure that the integrity of the system is maintained there is a Code of Conduct for the Panelists.

Time bound settlement of disputes is envisaged under the DSM. The Panelists are expected to present the initial report within the 150 days or 120 days in cases of urgency. The Parties can offer comments and this report will be confidential. The Final Report must be presented no later than 30 days after the presentation of the initial report. It is mandated that this should be made public within 15 days and this is subject to the protection of confidential information, if any, in the report. The Chapter provides for the use of trade retaliation if the Party has not fulfilled its obligations or fails to comply.

An important feature of the TPP DSM is that the public in each TPP will be able to follow proceedings and public can attend the hearings except when the disputing Parties disagree on this. Panels can consider requests from non-governmental bodies based in territory of any disputing Party, for providing written views regarding the dispute to the Panels. Final report presented by Panels will be made available to the public.

Thus the DSM is comprehensive and goes beyond typical DSM in most RTAs. It incorporates elements of WTO DSM with provisions for retaliation and provides for public participation. But when compared to WTO DSM, this is not a full DSM as there is no Appellate Body. On the other hand questions have been raised about the effectiveness of DSM under TPP. For example, Lester (2015) asks whether a Panel Process alone is sufficient. He points out that although TPP instructs its Panels to take into account WTO Panel and Appellate Body interpretations it may not be an easy task. Another question raised by him is the issue of Investor State Dispute Settlement (ISDS) under TPP as NAFTA and some other FTAs between TPP Parties have provided for mechanism for ISDS. A summary of Investor State Dispute Settlement (ISDS), Mega-Regionals is given in Box 5.1.

Given the ambitions and scope of TPP, the functioning of DSM under TPP will be watched with interest. As parties to TPP are also parties to many other FTAs, overlaps are inevitable and how effective will the DSM be is an important issue. Whether the parties to TPP will resort more to WTO DSM over DSM under TPP or whether they will use the DSM under TPP to the full extent. The incentive for using DSM under TPP is that it provides for time bound results through Panel Reports and provides for retaliation. Still whether the Panel Process alone is adequate for a DSM to function effectively given the scope for disputes under the wider canvass of TPP is an important question.

Conclusion

Our brief analysis of WTO DSM and DSM under RTAs and FTAs shows that despite fears of fragmentation and over proliferation of DSMs the importance of WTO DSM continues. The mega regional offer more scope for trade and service liberalisation but also have WTO plus and WTO extra norms. Countries that are willing to get deeply integrated in the global value chains and regional economies may prefer to opt for them despite the trade offs as they may fear that they will be left out from these if they stick to WTO norms only and take a non-negotiable position in many issues. However, with respect to DSM a DSM under RTA or mega-regional provide for a

Box 5.1: Investor State Dispute Settlement (ISDS), Mega-Regionals

Investor State Dispute Settlement (ISDS) mechanisms are enshrined in Regional Trade Agreements (RTAs). In the absence of a global convention on protection of foreign investment, bilateral investment treaties were proposed to protect investors' interest against ex-propriation in countries with a weak legal system, The Germany-Pakistan Bilateral Investment Treaty of 1959 being the first one. In 1965, ICSID Convention was established by the members of the World Bank . The primary purpose of ICSID is to provide conciliation and arbitration facilities to resolve international investment disputes. The roots of ISDS can be traced to these developments in 1950s and 1960s. The usual venues where these disputes are heard and resolved are the International Centre for Settlement of Investment Disputes (World Bank), the International Chamber of Commerce, the United Nations Commission on International Trade Law or the International Court of Justice. Since the 1980s as BITs proliferated the importance of ISDS has increased.

Countries which are leading FDI originators, are either members of TPP and/or of TTIP. ISDS mechanisms are controversial because they enable investors to sue nations directly in Panels than in domestic courts and developing nations are often targeted under these. 90% of the claims under ISDS were made by investors from USA and EU. In 2013, of the 57 new cases 45 were brought by developed countries. For developing countries, ISDS poses a challenge as it makes them vulnerable to claims based on the provisions of Regional Trade Agreements. Expansive interpretation of terms like indirect expropriation has been controversial. Under TPP investor who commences claim against a state must formally waive any right to pursue a claim in the national courts, except an application for interim measures. TPP provides an exception under which states not to be prevented from adopting measures that it considers suitable ensure that "investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives".

As many of the parties to RTAs and mega-regionals are also recipients of FDI incorporating ISDS mechanisms in trade agreements makes ISDS as a more acceptable norm for investor dispute settlement. However experts are of the view that, ISDS mechanism creates economic distortions as it reduces the policy space available to governments. For developing countries like India, incorporating ISDS mechanism in trade agreements will pose a challenge as it may reduce policy space and sovereign rights may be questioned. But ISDS has been incorporated in most of the bilateral investment treaties (BITs) and in many RTAs including NAFTA.

In the absence of a credible dispute settlement mechanism under WTO for investment related disputes, there is a need to evolve a system that can function as an alternative to ISDS.

Source: RIS database based on Author's compilation.

less expensive and time bound solution than the WTO DSM and this in turn can facilitate greater participation by developing countries and LDCs. More over the forum shopping option can also be effectively used.

But developing countries need to assess the merits and demerits of DSM under mega regional and understand the implications of forum shopping. While some times forum shopping may open up new options or can result in less harmful results, it may not always be available. Another trend is that as DSM in mega-regionals becomes very comprehensive including ISDS provisions, they should build their capacity in dispute settlement issues. In this, the lessons from their limited participation and lesser success rates should be taken in to account. In the WTO context, Advisory Center of WTO Law (ACWL) is available for developing countries but no such centre or mechanism is available in the context of RTAs. Perhaps it is time to think of specific capacity building measures to enable developing countries to meet the challenges from RTAs and mega-regionals and bodies similar to ACWL can be set up either at regional levels or as bodies associated with respective RTAs/PTAs.

ENDNOTES

1 http://www.ejiltalk.org/wto-the-first-500-disputes-and-the-last-100-disputes/ last visited 10 December 2015.

2 This section is based on the text of TPP available in the USTR site and commentaries in different sites such Council on Foreign Relations, American Society of International Law (ASIL) on provisions TPP. This is not an exhaustive analysis of the DSM under TPP.

6

Labour Standards

Introduction

This note deals with the question of labour standards and the link with Trade Agreements (TAs), paying particular attention to the recent Mega-Free Trade Agreements (Mega-FTAs). After a brief setting of the history of the discussions on labour standards, linking it with the spread of new forms of trade in the manner of global value chains (GVCs), this note then goes on to deal with what have come to be called the Core Labour Standards adopted by the ILO in 1998, The Core Labour Standards are held to be universally applicable to employment and are distinguished from other labour standards, such as those with regard to wages, that are linked to the levels of development of countries.

While the introduction of labour standards in the WTO's multilateral system was dropped in the 1996 Singapore Ministerial, these standards then appeared in two other trade-related agreements. One was that of Trade Agreements (TAs). These TAs are of two types – the unilateral trade preferences of the General System of Preferences (GSPs); and the largely bilateral and regional free trade agreements (FTAs). Subsequently, some form of labour standards, including the ILO's Core Labour Standards have entered into various FTAs, starting with the North American Agreement on Labour Cooperation (NAALC) that was part of NAFTA. A discussion of labour standards in FTAs is followed by considering the likely role of labour standards in the emerging Mega-FTAs, such as the Trans Pacific Partnership (TPP), the Trans Pacific Investment Partnership (TPIP), and the Regional Comprehensive Economic Partnership (RCEP).

Along with government-to-government TAs, labour standards have also made their appearance in private trade agreements introduced by lead firms in global value chains (GVCs), under pressure from moral consumer movements and trade unions in the developed home countries of the lead firms. Thus, parallel to the above developments linked to FTAs and Mega-FTAs, there has been the emergence of international labour standards negotiated by global unions, resulting in what are called International Framework Agreements (IFAs). Unlike the FTAs which involve governments as parties, the IFAs have become a way for international labour standard negotiations between global employers and workers' unions.

A word of explanation is needed about why private agreements between lead firms and their suppliers are included in this discussion about labour standards in trade agreements. Even as governments negotiate trade agreements, it is really private entities or enterprises that carry out trade. With the rise of GVCs this trade is structured as transactions

between lead firms and their suppliers. These transactions are largely cross-border transactions and thus qualify as international trade. A large volume of international trade, up to 60 per cent of international trade, is really the cross-border transactions within GVCs (OECD, ILO and WTO, 2013). Consequently, as a manner of introducing labour standards into trade relations, it is necessary to study how labour standards enter into the governance of private transactions.

In policy terms to the private standards in governance of trade relations (as between lead firms and their suppliers) and the evolution of these governance relations may have some lessons for the manner in which they could be included within TAs. The growth of the International Framework Agreements (IFAs) between firms and global unions and covering multiple locations is relevant in this regard.

This narrative of the development of labour standard negotiations in international trade matters, is followed by an analysis of key issues in the development of labour standards in the context of FTAs – the advance in distinguishing Core Labour Standards, which should be applicable to workers in all countries, irrespective of their levels of development from those labour standards that are linked to development levels; the linking of labour disputes with settlement procedures in FTAs or the enforceability of commitments made by both developing and developed countries; the way of combining enterprises and workers organisations, along with governments, as parties in FTA disputes; the shift from talks of trade sanctions for violations of labour standards to that of fines. The last section concludes the discussion, arguing that it is necessary to move from private and voluntaristic standards to enforceable labour standards in countries and regions, by processes building on the ILO's tripartite structure of governments, enterprises and workers.

LABOUR STANDARDS AND TRADE

There are two strands of literature on the connection between labour standards and trade. First, there is the literature that points out that international trade could have an impact on labour standards within a country. Trade allows for an increase in the scale of production, and thus an increase in demand for the factor which is used more in the exported products, and a reduction in demand for the factor that is used less in the exported products. Thus, there would be a benefit to labour in a country exporting labour intensive commodities and a benefit to capital in a country exporting capital-intensive commodities.

This is the classic Samuelson-Stolper theorem on trade and factor prices. The prediction of this theorem that trade could have an adverse effect on wages has been the basis of many strands of opposition to globalisation, not least that by Samuelson himself in one of his last writings. The same theorem can be used to argue that trade would benefit labour standards in labour surplus countries, since it would lead to an increase in the demand for the abundant factor.

The second strand of literature is that which looks at the likely impact of imposed labour standards on trade. Setting up labour standards that are based on developed country standards, as, for instance, in increasing wages, would reduce the competitiveness of a country that relies on exports of labour-intensive commodities. This is the classic argument made by employers from developing countries.

EVOLUTION

Labour standards refer to the conditions of employment or employee rights, which have been created by national legislation and also by the ILO through various instruments. They have entered into discussions on international trade in the current period of globalisation. Of course, there was an earlier attempt at harmonisation of labour standards

internationally, on the abolition of slavery or other forms of forced labour, which was taken up the International Labour Organisation (ILO) in the first half of the last century. But labour standards have come up as a serious concern in international trade matters only in the current phase of globalisation, where there has been a splintering of production processes, and a consequent shifting of large parts of manufacturing from high-income to low- and middle-income countries in the form of global value chains (GVC) related trade. This GVC-related trade is becoming an increasingly important manner in which international trade is organised. The difference is that GVC-trade is not in whole commodities, cloth versus wine, as in Ricardo's famous example of comparative advantage, but a trade in tasks with, for instance, the cut-make-trim (CMT) tasks of garment manufacture being carried out in low-wage developing countries, while the design-branding-marketing tasks are carried out by lead firms in developed countries. Such GVC-trade is now estimated to account for more than 60 per cent of total international trade (OECD, WTO and ILO, 2013).

This change in the nature of international trade and the resulting shift in the international distribution of manufacturing were driven by technological advances - e.g. containerisation, which reduced transport costs; and the spread of information and communication technologies (ICTs) which made possible the modularisation of production. There, however, were reactions to the shifting of production and the loss of relatively low-paid jobs in the high-income countries. The loss of jobs was attributed to 'unfair' competition from developing countries, based on their lower labour standards than those prevailing in the developed countries. These demands were often triggered by reports of the use of child labour in some of the exported production, leading to the charge of 'social dumping'. Along with protectionist political forces, trade unions and moral consumer movements, applied pressure to make GVC trade conditional on better labour standards in developing countries. Thus, there was the demand to link trade with acceptable labour standards in the supplier countries.

On the other side of the coin, with the competitive advantage of developing country suppliers being based on lower-cost production, there was resistance to any attempts to increase these costs through the higher wage costs that would inevitably be the result of higher labour standards. Producers in developing countries opposed such linking of labour standards and trade as a form of 'non-tariff barriers' (NTBs) that were meant to protect high cost manufacturing in the developed countries. At a more general level, there was opposition to setting labour standards that would interfere with the working of the market mechanism, a policy prescription that followed the reigning Washington Consensus Doctrine.

The possible linking of labour standards with trade was discussed at WTO meetings, most notably in the Singapore Ministerial of 1996. There it was decided that not WTO but the ILO, was the appropriate multilateral forum for the discussion of labour issues and negotiation on labour standards. But the WTO and ILO would come together to work on technical issues in order to bring about a 'coherence' in labour standards. Any such coherence, however, was not linked to trade matters, including the use of trade sanctions against those countries not adhering to agreed labour standards. Of course, labour matters under dispute cannot be brought in under the WTO dispute settlement system; while the ILO's dispute settlement system is weak, to say the least.

The failure at the Singapore Ministerial to secure a link between trade and labour standards at the WTO resulted in developed countries, the US in particular, turning to TAs as instruments to secure such links. This was in parallel to the general shift from the WTO to TAs which also took place with regard to TRIPS, where the developed countries tried to get patent rights beyond that provided in TRIPS. The manner in which the developed countries used TAs to introduce labour

standards into trade matters is discussed below in the next section.

CORE LABOUR STANDARDS

While stating the WTO was not the appropriate organisation to deal with labour standards, the Singapore Ministerial made an important statement on labour standards. "We renew our commitment to the observance of internationally recognised core labour standards,".[1]

This commitment to core labour standards that were "internationally recognised" helped clarify the debate over labour standards. This helped distinguish between two types of labour standards, those that were understood to be universally applicable and those that were relative to the level of development of a country. The universally applicable or core labour standards are held to be so important from a human rights angle that they should be realised in all countries. These core labour standards are enshrined in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. They have four elements: freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced and compulsory labour; the abolition of child labour; and the elimination of discrimination, including gender discrimination, in respect of employment and occupation.

These core labour standards (CLS) are held to be so important as to not require any form of ratification by members; rather, membership of the ILO can be said to be conditional on acceptance of these core labour standards. The 1998 International Labour Conference declared, "…all Members, even if they have not ratified the Conventions in question, have an obligation to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning fundamental rights at work" (ILO, 1998). Some FTAs refer to the 1998 Declaration on Fundamental Principles and Rights at Work, while others refer to core labour standards; but there is no difference between the two.

The other set of labour standards is that which is relative to the level of development. The most important of these labour standards is that of wages. Wages do vary internationally according to the level of development of the economy. The shift of manufacturing and many services from developed, high-income countries to developing, low- or middle-income countries, is based on the ability of the latter to provide capabilities at a lower cost than they can be provided in high-income countries. An imposition of wage levels irrespective of the level of development of a country would clearly destroy the contemporary basis of international trade, other than in location specific resources.

ENFORCEMENT OF LABOUR STANDARDS

Labour standards, or labour provisions in TAs can be of different types. In classifying them we use the typology developed by Ebert and Posthuma (2011). They classify labour provisions into three types according to the measures they use to bring about their enforcement: sanctions, incentives and promotional. The former is usually discussed in the literature, as the link is between labour standards and trade sanctions. But there are also trade systems where incentives are given to meet given standards. A good example of this is the US-Cambodia Textile Agreement, which gave Cambodian garment manufacturing firms an incentive in the form of assured orders on meeting normative labour standards (Polaski 2009). The third type is promotional, where support is provided for countries to develop the legal systems and practices to meet required labour standards.

Can one really distinguish sanction, which are negative, from incentives, which are positive? The withdrawal of an incentive, such as provided in the GSP, is identified as a sanction. But the condition of meeting normative standards in order to qualify for GSP preferences can be seen as an incentive. Thus, as Ebert and Posthuma (2011) point out many countries ratified the ILO's core

labour standards in order to qualify for GSP preferences. In this case, the GSP can be seen as an incentive. At the same time, a country that already has, or seeks to acquire, GSP preferences may be penalised for its failure to meet the core labour standards. This has happened in a few cases, notably that of Bangladesh after poor factory conditions were exposed by the Rana Plaza factory collapse. Thus, while maintaining the distinction between positive incentives and negative sanctions, depending on the starting point, they are merely two sides of the same coin.

The 1996 Singapore Declaration took labour standards out of the WTO. But this did not mean an end to attempts to link labour standards with trade. Rather, two different types of initiatives replaced the WTO effort. The first was the introduction of private standards; and the second the introduction of standards into the bilateral and multilateral arenas. We deal with labour standards in FTAs and then go on to consider labour standards in enterprise-level international transactions.

LABOUR STANDARDS IN FTAs

As mentioned above, with the WTO declared not to be the organisation for taking up labour standards and with the overall deadlocked multilateral negotiations, attention shifted to bilateral and regional FTAs. Typically the FTAs with labour provisions have been with the US, and more recently, the EU (ACT/EMP, 2015: 6). As against just 4 TAs with labour provisions in 1994, a 2011 review found that 35 of 186 TAs had labour provisions (Ebert and Posthuma, 2011).

Unilateral Trade Preferences

Can the honouring or implementation of core labour standards be linked with trade relations? The EU has made core labour standards a requirement for a country to get GSP trade preferences for low-income countries. This condition has been upheld by the WTO's Appellate Body in a recent judgment (2009). With this, acceptance, if not fulfillment, of core labour standards can be a condition for securing trade *preferences*, though it probably would not hold as a condition for normal trade on MFN basis. Trade preference is additional to normal trade conditions and for such a concession a core labour standards condition seems acceptable.

Trade Agreements

The North American Free Trade Agreement (NAFTA) had a separate North American Agreement on Labour Cooperation (NAALC), which represents the first instance of an FTA linking labour conditions with trade. NAALC, however, did not set any labour standards; it merely required members to implement their national labour polices. There was the additional proviso that these labour laws could also be amended, whether to strengthen or weaken them.

More recent US FTAs with Peru, Colombia, Korea and Panama, all contain labour standards that are enforceable. The EU/Korea FTA, on the other hand, does not include an enforceability clause.

The Canada-EU Trade Agreement (CETA) marks a break in having a chapter on "Labour and Trade." This commits the parties to minimum labour standards, (the ILO's core labour standards); the parties also agree to promote the Decent Work agenda dealing with establishing minimum employment standards, as also health and safety measures (CETA, 2014). These are additions to the Core Labour Standards. Further, the obligations on labour are enforceable through the procedure for resolution of disputes established in that chapter. This setting up of a dispute resolution mechanism is a departure from earlier trade agreements, where labour provisions were stated as objectives but had no enforceability. Enforceability requires going beyond states, which are the signatories of trade agreements, to commercial entities, which are they key actors in trade matters.

Enforceability of labour standards also requires extending the notion of the responsibilities of businesses. Many countries

now have legislation that makes their corporations liable for actions on corruption-related issues undertaken on their behalf anywhere in the world. The UN Compact on Responsible Business Practices (UN, 2005), based on the Ruggie Principles, has put forward the responsibility of business to 'Protect, Respect and Remedy' human rights and related labour standards and extended this through 'Due Diligence' to sub-contractors and others in the value chain. These principles have been concretised in the OECD's *Guidelines* (2011) and *Responsible Supply Chain Management* (2013). These, of course, are not directly trade-related actions; but they do relate to the responsibilities of business in international trade, whether secured through the FDI route or through their roles as lead firms in GVCs. In line with these advances in enunciating the international responsibilities of businesses, there have been some steps in including labour standards in the now-emerging Mega-FTAs, encompassing large regions, such as the Asia-Pacific economic region.

From FTAs To Mega-FTAs

Given the paucity and recent appearance of labour clauses in FTAs, what is likely role of labour clauses in the Mega-FTAs that are in the pipeline? We can compare two such Mega-FTAs, the Regional Comprehensive Economic Partnership Agreement (RCEP), which China is negotiating and the Trans-Pacific Partnership (TPP), which involves the US. These Mega-FTAs have a large overlap in terms of countries covered, but they importantly exclude China in the case of the TPP and the US in the case of RCEP. This brings out the different strategic dimensions of the two Mega-FTAs.

An analysis of 13 Chinese FTAs points out these FTAs have no or watered down labour clauses (Chittooran, 2015); while recent US-led FTAs (with Peru, Colombia, Korea and Panama) all have labour clauses and dispute settlement mechanisms such as are in place for the agreement as a whole. These US FTAs recognise basic workers' rights (ILO's core labour standards); require countries to maintain and enforce their own labour laws; and includes penalties in the form of fines for violations.

In line with the above trends, in the context of the China-led RECP there is no discussion on labour standards; rather there is a mention of flexibility. This exclusion of labour issues from the RECP can be seen to be in line with China's general approach of not raising matters that it regards as internal affairs of a country, whether it is human and democratic rights or labour standards.

The TPP, on the other hand, has provisions on both core labour standards and "an obligation to adopt and maintain laws and practice governing acceptable conditions of work… relating to minimum wages, hours of work, and occupational health and safety as determined by each Party" (New Zealand Foreign Affairs and Trade, nd, 2). In addition, these "provisions would be fully enforceable, including that trading partners be held accountable for failures to meet the labor obligations" and that too "through the same dispute settlement mechanism and trade sanctions as the rest of the agreement" (USTR, 2014).

Thus, there is a clear difference between the high-income country, US-led and the middle-income country, China-led Mega-FTA in terms of labour standards; the latter ignore them while the former goes beyond core labour standards to bring in "acceptable conditions of work", besides making labour provisions enforceable through the same dispute settlement mechanism and subject to the same trade sanctions as the rest of the agreement.

Incentives and Labour Standards

The US-Cambodia Textile Agreement differed from other TAs in offering positive incentives for conforming to labour standards: verified compliance with labour standards was rewarded with additional export quotas (Polaski, 2009). The verification and the rewards were at the individual firm level.

Following improvements in labour standards, this model was extended to other developing countries. Currently called the Better Work Programme, it is operative in 8 countries in Asia, Africa and Central America.

A World Bank study (2005) found that this approach had created a "labour standards compliant" niche in the Cambodian garment industry; a niche that had more stable orders than other firms.

There are two ways in which the incentivised labour standards might work. One is that the incentive of getting more and secure orders serves to cover the costs of improved labour compliance (--). The other, and more intriguing possibility is that improved labour conditions also allow a firm to increase productivity and thus itself cover increased labour costs. A recent study of labour practices in India found that a garment manufacturer with better labour standards, such as permanency of employment, was able to produce with lower rejection rates and better quality, leading to the firm being preferred by buyers (Nathan, 2015). There is a large literature that links improved labour conditions with increases in productivity and improved enterprise performance (Ichinowski and Shaw, 2003).

LABOUR STANDARDS IN TRADE CONTRACTS

Enforceability of labour standards is usually discussed in the context of TAs. But they are also relevant in the case of enterprises, which are the entities that carry out trade. As discussed in the next section, private standards have absence of international agreements on labour standards, it was lead firms in GVCs that came up with private standards.

Private Standards

In response to the growing media spotlight on a series of serious labour violations in supplier factories of GVCs, starting with the well-publicised case of Nike's suppliers in East Asia, a number of social actors became involved in re-forming GVCs in ways that yielded a somewhat better position for labour. Some actors, such as moral consumer movements and trade unions, were in the home countries of the GVC lead firms; others were in the manufacturing countries, as trade unions and labour-support organisations; and yet others were in international agencies and government.

Even while consumers in industrial markets benefited from low prices of garments and other commodities produced through GVCs based on wage arbitrage between developed and developing economies, media reports of sweatshop conditions in offshore supplier factories created moral outrage among a subset of consumers, leading to the rise of ethical trade as well as credence goods (Humphrey and Schmitz, 2008). Campus-based student organisations joined trade unions in home countries to put pressure on image conscious brands to change labour practices in their overseas supplier factories (Quan, 2008). Through their consumption decisions consumers—or a subset of them—made clear that they cared about the conditions under which the products they purchased were made and could penalise brands by withholding demand. Indirectly, this outrage against brands that were seen as violating labour standards abroad perhaps drew on a deeper economic anxiety over deindustrialisation and the job-loss that had resulted from the outsourcing of production to low-wage countries by these same brands. Nevertheless, the moral economies of consumption helped foster a link between consumers in rich countries and acceptable standards of labour in developing countries (Evans, 2010).

Brands and lead firms' responses to sweatshop expose in the media resulted in several specific actions, mainly the adoption by most of the brands of company codes of conduct that were expected to govern their relationship with suppliers. These codes were voluntary, but to participate in their value chain suppliers were required to adhere to a set of production and labour standards and working conditions. The monitoring of compliance with company codes was eventually shifted

to third party actors that gave rise to an 80 billion dollar auditing industry (Miller et al. 2011, 10). Simultaneously consortia of companies in alliance with multilateral NGOs established ethical trade practices, branding and labelling – to signal compliance. Labelling was particularly used in the matter of child labour, which was initially the focus of many consumer campaigns. The rise of these voluntary codes of conduct resulted in a broader "privatisation of labour enforcement" driven by lead firms and other private, non-profit and multilateral actors, often outside the nation state (Applebaum 2004; Locke 2013).

With this new form of labour enforcement, the auditors or certifiers, and their sponsors, the brands and retailers, turned into the active agents in the process of monitoring labour standards (Ross 2014). Workers and their unions, wherever they existed, were brought into the auditing process only to be interviewed about standards. They did not drive the process of setting, monitoring or securing implementation of standards.

Limits of Private Governance

As several recent studies have shown, there is a growing consensus that the privatisation of labour enforcement of the 1990s and early 200s had limited beneficial results, and left large areas of labour violation quite untouched (Locke 2013; Barrientos et al. 2010; Ahmed and Nathan on Bangladesh (2016); and the papers in Bair et al. (2014) are some examples of assessments of the effectiveness of the private labour enforcement process. The findings of these studies suggest that enforcement was most successful in the case of child labour, and somewhat successful in matters that could be easily checked, such as the provision of toilets and other such facilities on the shop floor. In other words, private compliance worked to some extent in areas where reputational risk directly threatened business – such as in the case of consumer-facing lead firms coordinating their GVCs brands and retailers were much more exposed to risk of reputation than in more arms length markets.

Equally, at the suppliers' end, in cases such as child labour, what was important was the threat of losing business. This calculation was clear in the case of Bangladesh and India, where suppliers reported that it was the threat of losing business that forced them into compliance with 'big-ticket' company codes such as eliminating child labour from the shop floor (for Bangladesh, see Ahmed and Nathan, 2016; for India, Carswell and de Neve 2012).,

By contrast however, company codes of conduct and voluntary compliance did poorly in matters that were less visible, such as forced overtime in response to tight turnaround times, or the non-provision of statutory benefits, such as a contributory Provident Fund (PF). Audits were less stringent and often neglected the lower levels of supply chains, such as home-based work. And, as the series of factory fires and collapses across Asia (from the 1997 Kader toy factory in Hong Kong to the 2013 Rana Plaza building collapse in Bangladesh) show, they failed to detect or bring to light glaring structural defects in wider supplier production systems..

The impacts and limitations of private compliance have been discussed in numerous case studies, including those in Nathan, Tewari and Sarkar (2016), but a recent compilation of data from audits conducted by the brands-sponsored Fair Labour Association (FLA) in more than 100 supplier units in the garment sector in Asia by Daniel Vaughan-Whitehead (2014), is illustrative and shows that there is a long way to go in terms of a widespread living wage and other aspects of decent work. As Locke put it, in a world of fast fashion and cutthroat price-competition, "Suppliers are asked to invest in improving labour and environmental conditions but are pressured to (and rewarded for) producing ever-cheaper goods with shorter lead times," (Locke 2013, 35). Indeed, the pressure on suppliers to both reduce costs and invest in improving labour conditions without price supports – public or private -- stands out as a central point of contention and contestation within several analyses of GVCs (e.g. Anner, Bair and Blasi 2014). Nevertheless, reputational risk to non-compliant consumer facing buyers did

generate some changes in labour standards in GVC-related trade.

If trade agreements are moving from bilateral and regional FTAs to mega-regional FTAs, labour agreements too are moving beyond national boundaries to encompass the global locations of GVC operations. We bring this role of multi-country labour standard agreements because they represent a trend that could be integrated into the manner of inclusion of labour standards in Mega-FTAs.

International Framework Agreements

The importance of new forms of union engagement with buyers and brands is illustrated by the role of the International Textile, Garment and Leather Workers Federation (ITGLWF) in entering into a multi-national agreement with the Spanish firm Inditex, the owner of the brand Zara, and the innovator of the 'fast fashion' system of changing product lines every few weeks, as against the earlier standard seasonal fashions. Under this International Framework Agreement (IFA) between Inditex and ITGLWF, Inditex agreed to the application of the ILO's core labour standards throughout the company's supply chain; and the extension of the agreement to all workers, "…whether directly employed by Inditex or by its external manufacturers or suppliers"; and for the scope of this agreement to include workplaces not represented by the ITGLWF (IndustriAll 2014).

At the renewal of the Inditex-IndustriAll GFA in July 2014, this GFA covered some 6,000 factories and 1 million workers worldwide (IndustriAll 2014). The agreement applies to all categories of workers, whether those of contractors, sub-contractors, or home workers. The hiring of contractors and sub-contractors without prior approval of Inditex is forbidden and contractors are held responsible for employment conditions in sub-contractor organisations. But as IndustriAll admits, "… the task [of implementing and monitoring] is not easy due to the fragmentation of production and the high number of subcontractors who themselves subcontract production" (IndustriAll 2014a, 9).

At the end of 2012, there were 88 functional IFAs and Global Framework agreements, or GFAs (Helfen and Fichter 2013). They represent a new possibility in the improvement of labour standards, an international agreement on labour standards between a GVC-lead firm and an international workers' federation. The limitation of this GFA, however, is that it remains a 'statement of intent' and is not a legal document that is justiciable: "While [GFAs] aim to establish certain rules that regulate the corporation's labour practices at the global level, they are not collective bargaining agreements that can be enforced in national or international law" (Stevis and Boswell 2007, 175). But they constitute, as Helfen and Fichter put it an 'arena', a political space that is "still contested and emergent, and hence more applicable to processes of institutionalisation" (2013, 55). Institutionalisation of global labour relations could, at some point, lead to an International Labour Court, as suggested by Miller et al. (2011) and Nathan (2013).

KEY ISSUES

From the above narrative, one can identify some key issues with regard to labour standards in Mega-FTAs and other FTAs.

Core Labour Standards and Acceptable Conditions of Work

There is general agreement on the recognition of the ILO's core labour standards as part of FTAs between developed and developing countries. The US, in particular, is required by its Bipartite Agreement (between the US President and the US Congress) to include these core labour standards in FTAs. The under-negotiation TPP and TIPP, however, go beyond core standards to include "acceptable conditions of work" within its ambit.

In a formal sense, acceptable conditions of work go beyond the core labour standards. But some of them may well be as important for workers' welfare as the core labour standards. Safety in factories is one such issue. As the Bangladesh Rana Plaza tragedy demonstrated, the safety of life of workers is surely a core

labour standard, the violation of which would jeopardise the vey lives of the workers. Consequently, while accepting the notion of core labour standards, one may need to extent them to include some minimally acceptable conditions of work, as safety requirements.

Protectionism

One often repeated complaint about labour standards in FTAs is that they are protectionist in nature, meant to stave off the shift of labour-intensive manufacturing and service production to lower-income developing countries. A recent commentary (Abhijit Das, 2015) on the TPP and TIPP repeats the protectionist argument. However, it should be noted that an ILO study of labour provisions in trade agreements (Ebert, Posthuma, 2011) and related cases found no evidence of protectionist cases being filed in conjunction with FTAs.

Implementation of labour provisions certainly has a cost. But provided there is no provision of equal wages, which never seems to have come up for discussion, will the additional cost of compliance really make a difference to trade between developed and developing countries? Will developing countries lose their cost advantage in labour-intensive products because of the costs of labour compliance? The ILO's comparison of hourly compensation costs, taking the US to be equal to 100, of all employees in manufacturing shows that developing country costs are so far below developed country costs that even a doubling of developing country costs due to labour standards compliance, would not make a difference to the cost advantage of developing over developed countries. Hourly compensation costs in the Philippines, for instance, in 2014 were just 6 per cent that in the US (ILO, 2015, KILM). Would even a doubling of that rate to 12 per cent have made any difference to the shifting of manufactures to Asia?

The difference that costs of compliance could make is to competition between developing countries. The developing country that complies with labour standards could end up with higher labour costs, provided there is not an increase in productivity accompanying the increase in wages.

It should be pointed out that the wide differences in per capita income and thus wages between developed and developing countries, protectionism to save the existence of labour-intensive industries in developed countries has not worked in history. This is for right from the attempts of British mill owners to prevent the growth of the textile industry in India down to the present-day attempts of protectionists in the US, EU or Japan.

Securing Adherence to Labour Standards: Enforceable Commitments

There are two sides to enforceable commitments. On one side are the developing countries, who are being asked to conform to normative labour standards. On the other side are the developed countries, or enterprises that are lead firms in those countries, who are being asked to stand by their commitments. These commitments are to provide finance for promotional elements in labour standards. In this section we first deal with the development of enforceability with regard to developing countries and then with regard to lead firms, which are by and large from developed countries.

The key issue is, in practice, how is adherence to accepted labour standards to be secured? Countries may be required to pass legislation in line with the core labour standards, as is the case with regard to securing GSP trade facilities. An FTA may require that any gap between the 1988 ILO Declaration and national laws be bridged. This may be made a condition of membership of the FTA.

But there may well be a gap between law and practice, or a failure to implement national laws. Laws are a necessary factor in securing accepted labour standards, but they do not guarantee their implementation. Implementation is carried out not only by

governments and their administrations, but also by enterprises. The law may allow for workers' right of association. But it may not exist in practice; first, because enterprises take action to prevent workers' realising this right; and, second, because administrations are lax in their implementation of these laws, through not carrying out inspections or imposing fines for violations.

Securing compliance with laws requires that there be a procedure within the FTA for violations, a procedure for settling disputes and addressing issues. FTAs do have dispute settlement procedures, but they largely relate to commercial matters. Labour issues are not included within their ambit, as is the case with the Korea-EU FTA. But CETA and now the TPP and TIPP change this trend in framing dispute settlement procedures for labour issues. TPP goes even further in allowing for the same dispute settlement procedure that applies to the broader TPP agreement, with the exception of requiring consultation before employing the dispute settlement procedures. There is a progression in setting up dispute settlement systems – from keeping labour issues from out of their ambit, to making separate provisions for labour disputes as compared to other commercial disputes, to now (in the TPP) setting the same dispute settlement systems for labour as other disputes.

Enforceable Commitments by Lead Firms

A key weakness of both the lead firm company codes and the IFAs is that they remain voluntary agreements. In a sense, they are statements of intent, rather than commitments that can be enforced. But recent developments in the wake of the 2013 Rana Plaza garment factories' collapse in Bangladesh have brought in some aspects of enforceability in these labour-related commitments. In what is known as the Accord, a number of mainly European lead firms entered into an agreement with the global union, IndustriALL, and made commitments of sums of money for improving factory safety in Bangladesh garment factories. Unlike earlier agreements (e.g. after the Tazleen factory fire, also in Bangladesh in 2007) the commitments under the Accord are binding and can be taken up in European Courts.

In another move in this direction IndustriAll, has entered into an MOU with a number of brands to work for industry-level bargaining in a supplier country (ACT, 2015). The objective is to eliminate wage competition at the supplier-country level, or "to take labour costs out of competition" (ACT, 2015) so as to support a movement towards a living wage. Taking labour standards out of competition, however, would require, at some point, action on a regional or even global level. But what the multi-country, industry-level agreement points to is the shift to the global arena for negotiations on labour standards.

Dealing with Non-Investment Influences

Where FDI is undertaken in the context of FTAs, there is no problem in securing adherence to labour standards. Where national labour laws are brought in consonance with FTA standards, national settlement procedures can be used to secure compliance. But the matter is more complicated in the case of non-investment ways of influencing labour conditions, as is done by GVCs through lead firms. Lead firms influence employment conditions, for instance, through their business practices, such as volatile orders with short lead times (see *Nathan, 2016* for an analysis of the influence of GVC practices on labour conditions). In addition there are the more difficult problems of forced labour in many raw material supply chains, such as for rare minerals, such as tantalum or coltan, used in all electronics production.

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of the ILO, the UN's Global Compact, the OECD's MNE Declaration and so on are all beginnings in dealing with labour conditions in global operations. But the ILO convention on multi-national enterprises (MNEs) does not apply to GVCs, since it applies only to local units of parent companies; and most GVC

relationships do not involve investment or ownership by the lead firms. Rather they are contracted relationships between sellers and buyers of products and services. The contracting relationship not only benefits the lead firms, but also provides them varying degrees of influence over labour and working conditions in the supplying entities.

The actions of supplier firms are regulated, even if poorly so, by the labour laws in their own countries. But there has been no regulation or articulation of lead firm responsibilities in labour conditions in GVCs. The governance void has been filled by private regulation, often responding to moral consumer pressures in developed countries. But there is substantial evidence of the inadequacy of private regulation of labour standards, with the frequent factory fire and building collapses only the most dramatic evidence of the weaknesses of existing regulatory mechanisms. Consequently, it is necessary to consider new ILO instruments that will deal with labour conditions in GVCs.

The California Transparency in Supply Chains Act (2012) requires all businesses operating in California and having global business in excess of $200 million to carry out due diligence on the issues of trafficking and forced labour with entities in the supply chain.

In line with this California Act, the OECD *Guidelines for Responsible Supply Chains* (2013) also requires lead firms to conduct *due diligence* all along the supply chains of minerals from conflict-affected and high-risk areas. In taking action that supports the livelihood development of artisanal miners, the OECD proposes that "while sourcing from artisanal and small-scale mining ("ASM"), supports the formalisation of security arrangements between ASM communities, local government and public or private security forces… (OECD, 2013: 25).

All these, however, are piecemeal measures. The globalisation of production through GVCs has exposed the existence of a "global governance gap" (Gereffi and Mayer, 2010). There are no global or transnational organisations mandated to deal with these labour issues to bring private parties into dispute settlement procedures. The recent US-Peru FTA allows labour and employers to be complaining parties. Such provisions can be carried forward into the Mega-RFTAs, as has been proposed for the TPP and TIPP.

In trying to fill this global governance gap, some issues need to be taken care of. First, it is necessary to go beyond national governments (the Parties in FTAs) to include business and workers' organisations as interested or affected parties, thus giving them legitimacy in the settlement systems.

Second, the commitments made in FTAs should be enforceable and not just aspirational statements. Third, the manner of enforcing settlements or of imposing penalties for violations should be that of fines and not of trade bans or embargos. Trade embargos would hurt not only the erring businesses, but even more the workers employed in them. A ban, for instance, on garment exports from Bangladesh following the Rana Plaza tragedy would have been an unimaginable disaster for about 5 million workers and their families and, in addition, would not have helped solve the problem of poorly constructed and unsafe factory buildings. But the US did use a trade sanction through the withdrawal of GSP preferences, a withdrawal accompanied by a 16-point Action Plan on freedom of association and acceptable conditions of work (USTR, 2014). Earlier experiences with regard to child labour in India and Bangladesh show that the threat of losing business was a key factor in implementing agreed upon labour standards.

It is then necessary to consider the difference between a trade embargo and a trade sanction – the latter leading to an increase in the import price as a result of the withdrawal of preferences, while the former leads to cessation of imports. In addition, in event of a trade sanction, it would be useful to link this with simultaneous promotional action to resolve the problems leading to the trade sanction, such as happened with

Bangladesh after the Rana Plaza disaster.

CALIBRATED MEASURES

FTAs tend to have very blunt instruments, of trade sanctions, to deal with disputes. But it would be preferable to develop calibrated measures, differentiating between levels of non-compliance. A gross violation of human rights, as with the apartheid regime in South Africa, could be met with a trade embargo. A national deficiency of laws with regard to core labour standards, for instance, if a country's labour laws do not allow for the right of labour to organise, might be dealt with lesser, but broad trade sanctions. In this case of deficient laws the violation is by the country, but of a lesser order than with a mater like apartheid.

But in violations of labour standards by firms, including both buyers and suppliers in a value chain, there could a fine imposed on non-complaint firms. Rather than affect all firms in a country, or even all units in an industry, it would be better to target non-compliant firms for fines. This, in fact, is the method normally used in labour disputes, where the non-compliant firms are the ones on which fines are imposed.

DIFFERENCES BETWEEN EMPLOYERS AND WORKERS

The question of the enforceability of labour standards in conjunction with or through TAs has shown differences between employers and workers. Employers take the stand that there should be no interference in the working of the market mechanism. As the International Organisation of Employers (IOE) points out, "To date the employer position has been steadfastly against linkages, seeing them as a protectionist Trojan horse. That position is unlikely to change in the short-term" (IOE, 2006, 'The Evolving Debate on Trade and Labour Standards", : p. 18).

Of course, this is the developing country employers' perspective. Developed country firms may not be opposed to labour standards, provided they are confined to developing countries and do not involve their own transactions with developing country enterprises. The whole UN Compact on the Responsibilities of Business, however, is meant to extend the responsibility of leading firms for labour conditions all along their supply chains.

Unions in the developing countries, on the other hand, have been calling for enforceability of labour standards. The coalition of Asian garment workers' unions in the Asia Floor Wage Alliance, including unions from Bangladesh, Cambodia, India, Indonesia, Pakistan, and Sri Lanka are in favour of not just implementing core labour standards, but going forward to including living wages as a component of wage agreements in the garments industry. Given the role of developed country lead firms as buyers in global value chains, the unions would like a mechanism that could bring in these lead firms and make them accountable.

At a global level too, IndustriALL and other global unions, are also searching fro mechanisms that would make global labour agreements enforceable. The ILO does not have effective enforcing mechanisms. There is still need for international enforcement procedures; something that would, of course, be opposed by employers everywhere.

CONCLUSIONS

After the early very controversially argumentative days of linking fulfillment of labour standards with trade possibilities, some consensus has emerged, at least in principle. The consensus is that the core labour standards, which all trading members are subject to as members of the ILO, is a non-negotiable part of labour standards, which is even a condition for securing privileged trade, as with the US and EU's GSP preferences. This, however, does not mean that non-fulfillment of these core labour standards should be met with trade bans or boycotts, but should be followed by endeavours to help the non-fulfilling partners to advance to fulfillment of the core labour standards.

At the same time, lead firms mainly

based in developed countries, need to be required to make enforceable commitments to promotional work to secure implementation of labour standards.

The newer and broader regional or mega-regional FTAs include or are expected to include labour standards as part of enforceable commitments, subject to the same grievance settlement procedures as the rest of the FTA agreements. Some beginnings have even been made in including business and labour as parties to complaints in FTAs. Some of the new FTAs go beyond core labour standards to include commitments on acceptable wage and other working conditions. In this matter, however, there needs to be care to allow for differential treatment depending on a country's level of development, according to its per capita GDP.

But in any measures related to labour standards an important question is whether a country, an industry or a firm should be the target of punitive measures. In cases of very serious violations of human rights (as in apartheid South Africa) there could be a case for the trade sanction to affect the whole country. But in labour-related violations it would be better to distinguish between enterprises that comply with or violate labour standards. Fines could be imposed on non-compliant enterprise, rather than all enterprises in a country or industry.

ENDNOTE

[1] (WTO, Singapore Ministerial Declaration, https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm, last accessed December 12, 2015).

7

Environmental Provisions

Introduction

This article focuses on the evolution of environmental provisions in trade agreements. Its focus is on the references to environment under the agreements of the World Trade Organisation, and traces the further elaboration of environmental provisions in regional Free Trade Agreements (FTAs), and most recently in the mega-FTA – the Trans-Pacific Partnership Agreement (TPP).

Several developing countries like India have consistently taken the position that non-trade issues such as environment cannot be a part of trade agreements and that while trade, like any other economic activity, will have environmental implications, trade as a policy instrument is not suitable to address environmental concerns. There is, however, no literature on whether as a matter of law and policy, trade agreements are an appropriate forum to address environmental issues, except for a background note prepared by the WTO Secretariat in 1997 which observed that trade instruments are not the first-best policy for addressing environmental problems.[1] The same report also found that there is a positive correlation between removal of trade restrictions and increased availability of environmental goods and services and cleaner technologies;[2] but such a conclusion is equally applicable for all goods and services, and not just those pertaining to the environment.

Economists such as Professor Jagdish Bhagwati has also argued that free trade should not be subject to any restrictions. He has noted that free trade would eventually lead to economic growth and better income levels, which would translate into investment in higher environmental standards.[3] He has also pointed out that there are no environmental implications of free trade; and that trade should not be used as a tool to impose environmental standards as the welfare implications of free trade are independent of environmental standards.[4]

Despite the linkage between trade and environment being tenuous, environmental provisions in trade agreements have been evolving rapidly in terms of scope and complexity. While the WTO does not create any specific obligations relating to environmental protection, several FTAs have provisions that mandate trade sanctions for non-compliance with environment related obligations as set forth under the agreement. This article discusses the nature of environmental provisions that are increasingly finding reflection in trade agreements, and assesses how these may be addressed by developing countries.

WTO and Environment

The Marrakesh Agreement Establishing the World Trade Organisation ("WTO Agreement")

in its preamble states that Members recognise "*that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.*"

This broad and generic reference to environment, in the context of sustainable development, also recognises that while the preservation and protection of the environment is an important objective, it will be done *in a manner consistent with their respective needs and concerns at different levels of economic development*. There is a clear recognition therefore that protection of the environment as an ideal in itself, is not the WTO's objective, rather its focus is on the overall principle of sustainable development.

Other than the Preamble, environmental provisions find a place under the General Exceptions to trade obligations,[5] and the agreements relating to Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS).

General Exceptions under GATT and GATS

GATT Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules. Two exceptions are of particular relevance to the protection of the environment: paragraphs (b) and (g) of Article XX. Pursuant to these two paragraphs, WTO members may adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health (paragraph (b)), or relating to the conservation of exhaustible natural resources (paragraph (g)). The GATS under Article XIV provides for an exception related to environment that is worded similar to Article XX(b).

GATT Article XX and GATS Article XIV on General Exceptions consists of two cumulative requirements. For a GATT/ GATS-inconsistent environmental measure to be justified as an exception, a member must perform a two-tier analysis proving: first, that its measure falls under at least one of the exceptions (e.g. paragraphs (b) to (g), and, then that the measure satisfies the requirements of the introductory paragraph (the "chapeau" of GATT Article XX/ GATS Article XIV), i.e. that it is not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and is not "a disguised restriction on international trade".

There have been several prominent disputes at the WTO dealing with the trade and environment interface.[6] A few basic propositions that emerge from the jurisprudence that has been developed so far are as follows:

- WTO law does not exist in clinical isolation of international law and developments, including environmental concerns. However, environmental measures to restrict trade can be adopted only under certain strict conditions.
- Multilateral solutions to environmental issues are the preference; a WTO Member should therefore make *serious efforts to negotiate* such solutions. If despite such efforts, an agreement cannot be concluded, then unilateral measures for protection of environment may be taken, even outside that country's jurisdiction.
- Adequate scientific evidence and risk assessment lie at the core of any action under the WTO's SPS Agreement which allows for measures to protect human, animal and plant life and health.
- Tests of *necessity* and availability of *less trade restrictive measures* need to be applied prior to application of any trade restriction on environmental grounds.

WTO's TBT and SPS Agreements

The WTO Agreement on Technical Barriers to Trade seeks to ensure that product specifications, whether mandatory or voluntary (known as technical regulations and standards), as well as procedures to assess compliance with those specifications (known as conformity assessment procedures), do not create unnecessary obstacles to trade. In its preamble, the Agreement recognises countries' rights to adopt such measures to the extent they consider appropriate — for example, to protect human, animal or plant life or health, or the environment.

The WTO Agreement on Sanitary and Phytosanitary Measures deals with food safety, and human, animal and plant health and safety regulations. It recognises members' rights to adopt SPS measures but stipulates that they must be based on a risk assessment, should not create unnecessary obstacles to trade (should be applied only to the extent necessary to protect human, animal or plant life or health), and should not arbitrarily or unjustifiably discriminate between members where similar conditions prevail.

FTAs and Environment

General Overview

The primary proponents of environmental provisions in FTAs have been the USA, EU, Canada and New Zealand. Developing countries have increasingly been agreeing to environmental obligations in FTAs with these countries. These provisions are either present in the main text of the FTA, or in separate side agreements. Such provisions typically pertain to any or all of the following aspects: obligations relating to 'high standards' in domestic environmental laws, mechanisms for resolving disputes involving environmental provisions, principles of cooperation on environmental issues and provisions on technical assistance and capacity building. These provisions are worded as a blend of legally binding provisions and non-binding provisions.

All FTAs negotiated by the U.S. since the NAFTA in 1994, include chapters on environment. These agreements explicitly provide for an obligation by the Parties to effectively enforce their environmental law, and include mechanisms to ensure enforcement of this commitment through dispute settlement and public submissions mechanisms. They also provide for environmental cooperation between the parties, and are accompanied by an environmental co-operation agreement or memorandum of understanding that establishes the framework for such cooperation. Canada's FTAs also contain comprehensive provisions on the environment, similar to U.S. FTAs. The culmination of these provisions can be seen in the Environment Chapter of the Trans-Pacific Partnership Agreement which has several elements that go beyond typical environment chapters of FTAs.

EU's early FTAs, such as those with Mexico[7] and Chile[8] and the Mediterranean countries[9], contained few broadly worded provisions on environment. However this has been progressively changing in complexity. The EU-Cariforum EPA and the EU-Korea EPA and most recently in the proposed EU-Canada CEPA, that the EU has devoted a separate chapter to environmental provisions.

All U.S. FTAs, except for the U.S.-Jordan FTA, prescribe remedies in the form of monetary compensation for non-compliance with environmental provisions. In the event such compensation is not paid by a party, then as a last resort, there can be tariff suspensions. EU FTAs leave open the issue of 'compliance measures' to the judicial mechanism hearing the dispute, which may include monetary compensation, but not suspension of concessions. Several U.S. FTAs also provide for a 'public submission' mechanism to the institutional authority responsible for implementing the FTA, which allows for civil society participation.

New Zealand initially addressed environmental concerns in side agreements on environmental cooperation, which use softer language of 'intent' and 'endeavour' of

parties to achieve environmental objectives and ensure environmental cooperation. Japan's approach, like New Zealand's, was also focused on principles of cooperation to achieve specified environmental goals. Australia's early stand on this issue was that environmental issues need to be addressed separately from trade agreements. In its FTA with the U.S., however, Australia agreed to environmental provisions, which are similar to those used in other U.S. FTAs.

With the announcement of the TPP, the position of U.S., Canada, Australia, Japan, and New Zealand, have now all been aligned to substantially U.S.' approach. The environment chapter in the EU-Canada FTA takes EU's approach closer to the TPP countries' approach.

Environment under the TPP Agreement

The environment chapter of the TPP is broadly based on the environment chapter in U.S. FTAs. Its key provisions are the following

- Parties are mandated to *effectively enforce their environmental laws*; and not to weaken environmental laws in order to encourage trade or investment.
- Parties are required to fulfil their obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and to take measures to combat and cooperate to prevent trade in wild fauna and flora that has been taken illegally.
- They reaffirm their commitment to implement the multilateral environmental agreements (MEAs) they have joined.
- Parties agree to promote sustainable forest management, and to protect and conserve wild fauna and flora that they have identified as being at risk in their territories, including through measures to conserve the ecological integrity of specially protected natural areas, such as wetlands.

The main area where the Chapter goes beyond other FTA provisions is its focus on *Fisheries management*. Sustainable fisheries management and measures to prohibit subsidies for illegal, unregulated and unreported (IUU) fishing, has been a key agenda item under the WTO negotiations; but has not resulted in any decision because of disagreements on key definitional issues, and because disciplining subsidies can adversely impact small and artisanal fishworkers in developing countries.

Under the TPP's Environment chapter, the following provisions on fisheries management apply.

- TPP Parties agree to ensure sustainable fisheries management and promote conservation of important marine species.
- Parties are mandated to combat illegal fishing, and to prohibit some of the most harmful fisheries subsidies that negatively affect fish stocks, and that support illegal, unreported, or unregulated fishing.
- They also agree to enhance transparency related to such subsidy programs, and to make best efforts to refrain from introducing new subsidies that contribute to overfishing or overcapacity.

The other major elements pertain to the institutional framework for the chapter. The following provisions are noteworthy:

- The Parties commit to provide transparency in environmental decision-making, implementation and enforcement.
- The Parties agree to provide opportunities for public input in implementation of the environment chapter, including through public submissions and public sessions of the environment committee established to oversee chapter implementation.
- The Environment chapter is subject to the dispute settlement procedure laid out in the Dispute Settlement chapter. This means that the compliance and enforcement of environmental chapter could be sought through trade sanctions.
- The Parties further agree to encourage

voluntary environmental initiatives, such as corporate social responsibility programs.

- Parties commit to cooperate to address matters of joint or common interest, including in the areas of conservation and sustainable use of biodiversity, and transition to low-emissions and resilient economies.

Other Approaches to Addressing Environmental Concerns

Regional economic groups of developing and lesser developed countries, such as the MERCOSUR,[10] ANDEAN Community,[11] ASEAN,[12] SAARC,[13] CARICOM[14], EAC[15] and the SADC,[16] recognise 'environmental issues' as an important element for regional cooperation. However, environmental issues are dealt by these groups in separate agreements or understandings, and not as part of a FTA. There are also no provisions in their agreements providing for trade and environment linkages. While economic cooperation is one of the pillars of these groups, environmental issues cannot be said to be something emerging out of the economic relationship alone, or because of it. Both are treated as distinct and separate elements of the regional inter-relationships between the countries.

Among major developing economies, Brazil, Russia, India and China have supported and participated in all major multilateral environmental agreements. Their FTAs typically include some references to the environment as part of the sections on the preamble and/or general objectives. These are worded as statements of intent, rather than binding legal obligations. Some FTAs entered into by China however find environmental provisions of a more elaborate nature. These are primarily worded as 'soft' obligations in its agreements with the ASEAN, New Zealand, Taipei-Panama and Singapore.

Environmental Goods and Services ('EGS') under FTAs

Liberalisation of trade in environmental goods and services (EGS) was placed as part of the WTO's agenda under the Doha Round negotiations.[17] However, this is still a contentious issue at the WTO. Provisions on EGS find reflection in some FTAs in the form of broad commitments to cooperate, and not a concrete obligation to actually liberalise trade. However, recent developments to conclude a separate agreement on Environmental Goods (Environmental Goods Agreement, which is discussed below), has a higher level of ambition in terms of its scope and coverage.

TPP commits parties to address and remove non-tariff barriers in respect of Environmental Goods, and also commits them to address these issues on a bilateral and plurilateral basis. As seen in the discussion below, several of the TPP members are participating in the EGA negotiations.

Before discussing the approach of the EGA, we outline below examples of provisions from different FTAs dealing with EGS:

The EU-Canada FTA text in the Chapter on Environment commits parties to make efforts to facilitate and promote trade and investment in environmental goods and services, including through addressing the reduction of non-tariff barriers related to these goods and services.

The EC-Cariforum Agreement refers to specific provisions dealing with commitment of the parties "*to make efforts to facilitate trade in goods and services which the Parties consider to be beneficial to the environment. Such products may include environmental technologies, renewable and energy-efficient goods and services and eco-labelled goods.*"[18]

The CAFTA-DR also contains provisions for cooperative action for developing and promoting environmentally beneficial goods and services.[19]

The Japan-Mexico FTA also refers to cooperation in the field of "*encouragement of trade and dissemination of environmentally sound goods and services*".[20]

The U.S.-Morocco FTA provides that "*Parties recognise that strengthening their co-operative relationship on environmental*

matters can encourage increased bilateral trade in environmental goods and services".[21]

Environmental Goods Agreement under the WTO

Inspired by the ITA model, a few countries are contemplating an Environmental Goods Agreement under the WTO. Interestingly, the focus of this proposed agreement is only on tariff reduction for Environmental Goods, and does not focus on Environmental Services, which was the broader mandate under the Doha Round.

A Joint Statement[22] issued by fourteen WTO Members (Australia; Canada; China; Costa Rica; the European Union; Hong Kong; China; Japan; Korea; New Zealand; Norway; Singapore; Switzerland; Chinese Taipei and the United States) at the World Economic Forum at Davos in January 2014, notes that the Environmental Goods Agreement would reinforce the rules-based multilateral trading system and benefit all WTO Members by applying the MFN principle.

The negotiations were officially launched in July 2014, and uses the list of 54 environmental goods developed by the Asia-Pacific Economic Cooperation (APEC) as the basis for negotiations to reduce applied tariffs. There have been eight rounds of negotiations so far, and the number of participating countries has increased from 14 to 17, with the inclusion of Turkey, Iceland and Israel.

Like the ITA, the Joint Statement on the EGA notes that the agreement would take effect once a critical mass of WTO Members participates. Determining what the 'critical mass' is yet to be achieved. In the ITA's case, this was pegged at 90 per cent of world trade in IT products.

A study estimates that the 14 WTO original EGA participants accounted for 86 per cent (78 per cent of imports and 93 per cent of exports) of global trade in the 54 APEC subheadings in 2012.[23] This figure includes re-imports and re- exports, as well as intra-EU trade, the exclusion of which would result in reduction of the estimate.[24] The same study also notes that the trade in environmental goods accounts for only a small portion of all trade in many sub-headings, and that 46 of the 54 HS sub-headings on the APEC list reflect goods that are not used primarily for environmental purposes.[25] This finding is a validation of concerns of several countries, including India, under the WTO negotiations on environmental goods. The study also notes that multiple-use products with certain environmental applications may be traded under HS sub-headings not usually included in the analyses of trade in environmental goods.[26] Achieving clarity on all these aspects, therefore, remains a key challenge towards arriving at a WTO-EGA.

It is also noteworthy in this regard that there have been proposals for addressing both Environmental Goods and Services in a comprehensive manner at the WTO, in a manner that would avoid the risk of preferential treatment for a product or service that does not have an environmental end use. India for instance had recommended the 'project based approach' which will require specific certification of end-uses. This approach was dismissed by the United States and the EU as being expensive and cumbersome. Argentina proposed a middle path through the Integrated Approach, which India also supported in a joint paper, with the aim of reconciling positions on having a 'core list' of single use goods, and the remaining linked to specific demonstration of end-uses ('project-based' approach). This too, however, has not been seriously considered by the WTO membership.

Experiences with Implementation of Environmental Provisions

Since most FTAs with environmental provisions are very recent in nature, there are not many empirical studies examining implementation of their provisions. There has been no definitive study on the effectiveness of environmental provisions in FTAs. Domestic enforcement of environmental laws is often influenced by aspects such as availability of

adequate resources and effective institutional mechanisms. Although several FTAs entered into by the U.S. and the EU specify financial resources and technical capacity building as aspects that the developed country partner would assist in, these have not necessarily resulted in effective enforcement of environmental laws.

Challenges of Implementation: Studies in relation to the NAFTA-NAAEC

Some of the significant studies and analysis of 'effectiveness' in implementation of environmental provisions under a FTA have been undertaken in respect of the North American Agreement on Environment Cooperation (NAAEC), which is the side agreement on environment entered into by NAFTA countries- the U.S., Canada and Mexico. These studies highlight some of the laudable aspects, as well as several practical limitations in implementing environmental provisions under a FTA. A recent paper from the USTR emphasises the contribution of the NAFTA-NAAEC in providing a clean and healthy environment for residents along the U.S.-Mexico border.[27] The technical cooperation efforts of the North American Commission for Environment Cooperation (NACEC) and its positive results have also been commended by independent research, such as its:[28]

- Role in establishing a Pollution Release and Transfer Registry (PRTR) in Mexico;
- Support for research and symposia dedicated to understanding the effects of trade on the environment in North America;
- Public submission mechanisms whereby civil society organisations and citizens can petition the commission for issues relating to compliance with the environmental obligations 29; and
- Created a number of pilot funding programmes that build the environmental capacity of small and medium-sized enterprises and civil society organisations.

However, other studies have highlighted several limitations in implementing environmental provisions under the NAAEC, the critical reason being lack of adequate resources. For instance, one study reasons through persuasive data and analysis, that environmental conditions worsened in Mexico in the post-NAFTA period and that Mexico failed to steer benefits of economic integration into increasing environmental protection.[30] The study highlights that NACEC was not "*designed to significantly reverse environmental consequences of economic growth in Mexico*", and argues that the NACEC with an annual budget of USD 9 million was "insufficient" to make a dent into the problems that cost the Mexican economy USD 40 million annually.[31] Another study makes a similar finding that the budgetary allocation for the NAAEC was inadequate for the mandate of the NACEC,[32] and represents an "insignificant fraction of resources dedicated to the environment in North America".[33] Yet another study evaluating U.S.'s trade policy and capacity building initiatives in the context of FTAs concludes that it is "*challenging to translate good intentions into effective policy*".[34]

Conclusions and Recommendations

WTO's Approach

The WTO's principal concern is trade, and it does not create specific obligations relating to environmental conservation or management. The Preamble to the WTO Agreement makes a broad and generic reference to environment, in the context of sustainable development, and also recognises that while the preservation and protection of the environment is an important objective, it will be done *in a manner consistent with their respective needs and concerns at different levels of economic development*. There is a clear recognition therefore that protection of the environment as an ideal in itself, is not the WTO's objective, rather its focus is on the overall principle of sustainable development.

Other than the Preamble, environmental provisions find a place under the General

Exceptions to trade obligations,[35] and the agreements relating to Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS). None of these provisions create any 'environmental obligations' on WTO Members; rather, they create policy spaces for Members to enact regulations in limited circumstances, on environmental grounds, and further circumscribes it with several legal obligations on how such rights may be exercised.

There have been several attempts by some developed country WTO Members to bring a sharper focus on environmental obligations within the WTO; but there has been an equally strong opposition to this. The Doha mandate in this regard was to examine certain aspects of the linkage between trade and environment, and further explore liberalisation of trade in environmental goods. There has however been no consensus on these issues because of differences between Members. Developing country Members primary concern has been that environment, as with other non-trade issues, should not become a convenient tool liable for misuse as a protectionist tool. Obligations regarding conservation and protection of the environment, in their view, is not WTO's mandate, and that countries are adequately addressing these in multilateral environmental agreements.

Shift of Approach on Environment from WTO to FTAs

The inability of pushing the Environmental agenda under the WTO has resulted in gradual proliferation of bilateral and regional free trade agreements that have separate chapters or annexes on Environment, that create obligations to protect the environment. The most recent manifestation of Environmental provisions is in the text of the TPP Agreement, as well as in the draft EU-Canada FTA. The U.S. and EU are also reportedly negotiating a separate environmental chapter under the proposed TTP Agreement. The key difference in the TPP and US FTAs on the one hand, and EU's FTAs, on the other, appears to be that EU's FTAs do not subject the environmental chapter to the main dispute settlement chapter of the FTA, nor do they provide for trade sanctions for violation of the environmental provisions. Instead, a separate set of experts/ panel is provided under the Environment Chapter, whose findings are required to be considered by the Parties.

The U.S. approach, which finds reflection under the TPP Agreement, is on having separate experts and an Environmental Committee to address issues under the Environment Chapter. This does not however exclude the role and relevance of the Dispute Settlement chapter for provisions of the Environment chapter. This leaves the space open to use trade sanctions to enforce environmental obligations.

Developing countries have mostly so far only 'reacted' to the trade and environment inter-linkages in FTAs as proposed by developed countries. As the axis of trade negotiations is moving away from the WTO, the negotiating space for developing countries to complete resisting environmental provisions is fast shrinking. Agreeing to environmental principles in bilateral and mega FTAs, will eventually also compromise any resistance to environmental provisions in trade agreements that a country may want to preserve at the WTO.

Based on the foregoing discussions, an attempt is made in this Part V to highlight issues which developing countries may need to consider while examining environmental provisions in FTAs they seek to enter into, in order to ensure that issues that are relevant to them are addressed effectively.

Recommendations

i) Reiterating WTO: The Best Approach

The best possible outcome would be for a FTA to simply refer to the balanced and well-nuanced preambular language of the WTO Agreement, which as noted in the introduction to this article emphasised the principle that while the preservation and protection of the environment is an important objective, it

will be done *in a manner consistent with their respective needs and concerns at different levels of economic development*.

ii) Elaboration of Sustainable Development objectives

Depending on the negotiating positions and political considerations to include environmental provisions, countries could also drive towards achieving a balanced outcome by referring to the overall goals of sustainable development as elaborated most recently in the United Nations General Assembly Resolution on Sustainable Development Goals. With regard to trade, some of the elements in this resolution are as follows:

- Paragraph 30 of the Declaration provides that: States are strongly urged to refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance with international law and the Charter of the United Nations that impede the full achievement of economic and social development, particularly in developing countries.
- Goal 2a provides mandates states to correct and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect, in accordance with the mandate of the Doha Development Round.

Apart from this the Resolution refers to trade related assistance for developing countries, and the need for special and differential treatment for such countries. Affirming these principles could be one way in which to achieve a balanced outcome on the issue of environment.

iii) Addressing Environmental Issues beyond WTO

Addressing environmental provisions in a trade agreement requires an understanding of: (a) the nature of legal obligations emerging from provisions relating to the environment under a FTA; (b) the potential economic costs of specific environmental requirements, including requirements to maintain specific environment regulatory standards, as well as requirements relating to adherence to any environmental sanitary and phytosanitary measures or technical regulations; (c) areas where technical assistance and capacity building would be necessary in ensuring compliance with environmental obligations; (d) the nature and extent of financial assistance required; and (e) the nature of dispute settlement and enforcement mechanisms.

iv) Assessing Feasibility and Impact of Environmental Provisions

The feasibility of acceptance of environmental provisions would depend on their scope and impact at the domestic level. Hence it is important to evaluate the nature and extent of regulatory amendments and new enactments that may be required at the domestic level to ensure compliance with the proposed environmental provisions in the FTA.

v) A Developing Country can set the agenda on certain issues

SPS/TBT Issues

It is not necessary that the agenda on environment for a FTA by a developing country needs to be 'reactive' in all cases.[36] It is also possible that there are several environmental concerns, for example, those pertaining to specific SPS or TBT concerns faced by exporters because of environmental regulations in the export market, or areas where access to environmentally friendly technology is required in the exporting country, for ensuring a certain pattern of development. These could potentially be highlighted as areas were cooperation and technical assistance is required under the FTA in order to facilitate market access into the developed country's market.

Preferential Access to Clean Technologies for Addressing Environmental Concerns

Developing countries may also seek to build in provisions relating to preferential access to clean technologies and renewable and energy efficient goods and services. Requirements for technical assistance and capacity building to enhance domestic capacity for developing EGS and clean technologies, could also be considered as part of the FTA.

vi) Financial and Technical Assistance

Positive assistance, both financial and technical, and capacity building, may be required if the FTA requires adherence to specific environmental regulatory norms. In this regard, developing country parties to a FTA would have to consider whether proposed provisions on environmental obligations are binding in nature. Legally binding obligations would need to be supported adequately through concomitant binding commitments from a developed country party to a FTA in the form of technical and financial assistance and capacity building to enable the other country to enact and enforce environmental regulations.

Specific obligations on enacting and maintaining environmental regulations by a developing country party should be made conditional on actual development assistance and capacity building provided by the developed country party for the same.

Provisions requiring cooperation to reach certain environmental goals, as well as those mandating technical and financial assistance and capacity building, should be built into the FTA as essential conditions. Clear benchmarks for monitoring implementation of such provisions is necessary. Specific areas in which cooperation, technical assistance and capacity building is required should be prioritised and work programmes around these need to be monitored.

vii) No Trade Sanctions for addressing Environmental obligations

From a developing country perspective, mechanisms emphasising on consultation and cooperation should be the focus, rather than binding dispute settlement and sanctions resulting from non-compliance with environmental requirements. While as a theoretical principle, availability of binding dispute resolution mechanisms and their enforceability is a critical measure for ensuring 'effectiveness' of any law, in the case of environmental provisions, effective implementation of the provisions is a function of several other factors, such as technical and financial resources committed for the same. In view of this, it may be advisable to opt for binding dispute resolution for enforcement only when all the elements for securing effective implementation of the provisions are built into the FTA, including technical and financial assistance required for implementing any new environmental laws and standards.

ENDNOTES

1 WTO Secretariat, "Environmental Benefits of Removing Trade Restrictions and Distortions", WT/CTE/W/67, 7 November 1997. *Also see,* WTO, Trade and Environment at the WTO: Background Document (2004).

2 Id.

3 Jagdish Bhagwati, "The Case for Free Trade", in "Debate: Does Free Trade Harm the Environment?" Scientific American (November, 1993) 41-57.

4 Jagdish N. Bhagwati & T.N. Srinivasan, *Trade and Environment: Does Environmental Diversity Detract from the Case for Free Trade?*, *in* Jagdish N. Bhagwati, Robert E. Hudec(eds.), Fair Trade and Harmonization: Economic Analysis (1996). A similar position has been reiterated in *Environment in Peril?*, *in* Jagdish N. Bhagwati, In Defense of Globalization (2004), 145.

5 Article XX of the General Agreement on Tariffs and Trade and Article XIV of the General Agreement on Trade in Services.

6 *United States- Standards for Reformulated and Conventional* Gasoline WT/DS/1 (20 May 1996); *United States- Import of Certain Shrimp and Shrimp Products* WT/DS/58 (6 Nov., 1998),

United States- Import of Certain Shrimp and Shrimp Products- Recourse to Article 21.5 of the DSU, WT/DS/58 (21 Nov. 2001).

7 EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreement, December 8, 1997, available at http://www.fco.gov.uk/resources/en/pdf/pdf13/fco_ref_ts13-01a_coop_eco (last visited on May 5, 2009).

8 EU-Chile Association Agreement, November 18, 2002, available at http://trade.ec.europa.eu/doclib/html/111620.htm (last visited on May 5, 2009).

9 Euro-Mediterranean Agreement Establishing an Association Between the European Communities and their Member States, of the One Part, and the State of Israel, of the Other Part, November 20, 1995 available at

ht http://europa.eu/eur-lex/pri/en/oj/dat/2000/l_147/l_14720000621en00030156.pdf (last visited on May 5, 2009); Euro-Mediterranean Interim Association Agreement on Trade and Cooperation Between the European Community, of the One Part, and the Palestine Liberation Organization for the Benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the Other Part, 1997, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21997A0716(01):EN:HTML (last visited on: May 5, 2009); Euro-Mediterranean Agreement Establishing an Association Between the European Communities and their Member States, of the One Part, and the Arab Republic of Egypt, of the Other Part, June 25, 2001, http://ec.europa.eu/external_relations/egypt/aa/06_aaa_en.pdf (last visited on: May 5, 2009)

10 Mercado Común del Sur- this refers to the Southern Common Market which comprises oof Argentina, Brazil, Paraguay, Uruguay.

11 Andean Community comprises of Bolivia, Colombia, Ecuador and Peru.

12 There are 10 ASEAN Members who have constituted the ASEAN Free Trade Area (AFTA): Brunei Darussalam, Cambodia, Indonesia, Laos PDR, Malaysia, Philippines, Singapore, Thailand and Vietnam.

13 Seven countries in the South Asian region are SAARC Members: Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

14 CARICOM is a group of 15 Caribbean countries: Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Monserrat, Trinidad & Tobago, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Surinam.

15 East African Community comprises of Kenya, Tanzania and Uganda.

16 Southern African Development Community has the following members: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

17 Paragraph 31(iii) of the Doha Declaration is focused on the reduction or, as appropriate, the elimination of tariff and non-tariff barriers to environmental goods and services.

18 Article 183(5), EC-Cariforum EPA. Article 190 refers to promotion and facilitation of public awareness and education programmes in respect of environmental goods and services in order to foster trade in such products between the Parties.

19 Article 17.9(3), Dominican Republic-Central America-United States Free Trade Agreement, August 5, 2004, available at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (last visited May 5, 2009).

20 Article 147(1)(c), Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership, September 17, 2004, available at http://www.mexicotradeandinvestment.com/agreement.html (last visited on May 5, 2009).

21 Article 17.3(7), U.S. – Morocco Free Trade Agreement (U.S. and Morocco), June 15, 2004, available online at http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html (last visited on May 5, 2009).

22 'Joint Statement Regarding Trade in Environmental Goods' (24 January 2014) <http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152095.pdf> accessed 25 August 2015.

23 Rene Vossenaar, 'Securing Climate Benefits in the Environmental Goods Agreement' (27 November 2014) 8(10) BIORES <http://www.ictsd.org/bridges-news/biores/news/securing-climate-benefits%E2%80%A8-in-the-environmental-goods-agreement> accessed 25 August 2015. The paper also notes that non-EGA participants with the largest value of total trade in the 54 subheadings of the APEC list for the period 2011-13 are, in descending order, Mexico, Malaysia, India, Russia, Thailand, Brazil, Turkey, South Africa, Indonesia, Saudi Arabia, the Philippines, Israel, and Vietnam. Turkey and Israel have now applied to join the EGA.

24 ibid.

25 ibid.

26 ibid.

27 Office of the United States Trade Representative, *NAFTA Facts*, March 19, 2008, Available at www.ustr.gov (Last visited on April 21, 2009). The note elaborates that as of March 2008, nearly $ 1 billion has been provided for

135 environmental infrastructure projects with a total estimated cost of $2.89 billion and allocated $33.5 million in assistance and $21.6 million in grants for over 450 other border environmental projects. The note also emphasises that the Mexican government has also made substantial new investments in environmental protection, increasing the federal budget for the environmental sector by 81% between 2003 and 2008. The two funds for this purpose referred to by the USTR include: (a) NACEC Fund for Pollution Prevention Projects in Mexican Small and Medium Enterprises (FIRPEV), and North American Fund for Environmental Cooperation (NAFEC).

[28] *See for example,* David Markell, and John Knox, eds. 2003. *Greening NAFTA: The North American Commission for Environmental Cooperation*, (MIT, 2004).

[29] Articles 14 and 15, North American Agreement on Environmental Cooperation.

[30] Kevin P. Gallagher, 2008, 74-76.

[31] *Id.* A similar finding is made in Gary Hufbauer., et al., 2000.

[32] Gary Hufbauer, et al., 2000 pp 159-60.

[33] *Ibid.*

[34] John, Audley and Ulmer, V., *Strengthening Linkages between U.S. Trade Policy and Environmental Capacity Building*, (Carnegie Endowment for International Peace, Working Paper No. 20, 2003), p. 3.

[35] Article XX of the General Agreement on Tariffs and Trade and Article XIV of the General Agreement on Trade in Services.

[36] Chaturvedi and Nagpal (2003).

8

Government Procurement

Overview

The Agreement on Government Procurement (GPA) of the World Trade Organisation (WTO), is a plurilateral agreement establishing a framework of rights and obligations for government procurement among its signatories from a set of WTO member countries. The agreement is plurilateral within the framework of the WTO, which means that not all WTO members are parties to the Agreement. Government Procurement is the third of the Singapore Issues apart from Trade and Investment and Trade and Competition Policy, which was initiated at the Tokyo Round of the General Agreement on Trade and Tariffs (GATT). Currently, the GPA contains detailed requirements regarding competition, fairness and transparency in government purchases.

The fundamental aim of the GPA is to mutually open government procurement markets of goods, services and construction services among its parties, which guarantees competition, non-discrimination, transparency and fairness in all government procurement transactions. In achieving this aim, the signatory countries have agreed to provide non-discrimination (through MFN) and national treatment to suppliers of goods and services in other signatory countries in all procurement covered by the Agreement, and there will be transparency and fairness in their laws, regulations and procedures relating to government procurement. Non-discrimination and provision of national treatment is achieved by eliminating discrimination between domestic and foreign products, services and suppliers, by enhancing the transparency of laws and practices and by ensuring fair, prompt and effective enforcement of international provisions on government procurement. Such an agreement is expected to contribute to the liberalisation and the expansion of world trade, and hence its inclusion in WTO.

The importance of government procurement is reflected by the huge size of the world procurement market. The world's total potential non-defence government procurement has been estimated to be in the range of US$ 1.5 to US$ 1.7 trillion a year. This is in tune with the estimate in 1996 by Hoekman (1998), of total potential non-defence government procurement of about US$ 1 trillion, about three quarters of the GDP of signatories of WTO GPA. The government procurement market is large in most developed and emerging market economies. China, India and Russia need special mention here as these economies historically have a larger presence of the government at different levels with a large government procurement market.

An important issue before the WTO GPA is the multilateralisation of this plurilateral agreement, otherwise it remains restricted

to a few countries. In addition, there has been a rising trend to cover government procurement in bilateral and regional agreements. Increasingly, in the context of various FTA negotiations, demands are being made for accepting bilateral obligations on government procurement. The scope of obligations requested by signatories of bilateral and regional agreements include transparency requirements and market access commitments. It has been pointed out that there could be both gains and losses for parties to GPA or accepting bilateral/regional commitments on government procurement.

This chapter provides an overview of the current status of the Government Procurement Agreement under WTO and includes the following sections. Section 8.2 traces the history and evolution of GPA highlighting the motivation for its introduction. Section 8.3 attempts to assess the gains to different stakeholders. Sections 8.4 and 8.5 discuss the general sentiments of the clause and the legal provisions underlying the GPA respectively. Section8.6 discusses the recent developments in the context of some of the four Mega-FTAs (i.e., TPP, TTIP, RCEP and FTAAP). Section 8.7 concludes highlighting key features of the chapter.

History and Evolution: Motivation for introduction of this clause

The WTO Agreement on Government Procurement (GPA) was preceded by an agreement at the Tokyo Round under the GATT. The issue of government procurement, which was brought into discussion in the Tokyo Round of Trade Negotiations within GATT in 1976, was concluded in 1979 and came into force in 1981. Early efforts to bring government procurement under internationally agreed trade rules were undertaken in the OECD framework. The amended and revised Tokyo Round agreement was further revised and expanded as a WTO Agreement in 1994 (GPA 1994) which entered into force on 1 January 1996.

Within two years of the implementation of GPA 1994, the GPA was set to be renegotiated according to a built-in provision of the 1994 Agreement. The WTO's Ministerial Conference of 1996 in Singapore set up a multilateral Working Group on Transparency in Government Procurement. The aims of the Working Group were to conduct a study on transparency in government procurement practices in existing international instruments and national policies and thereby develop elements suitable for inclusion in an appropriate plurilateral agreement. The Working Group identified 12 issues under four broad areas to be included in the agreement. These areas are with regards to the definition of government procurement and the scope and coverage of a potential agreement; the substantive elements of a potential agreement on transparency in government procurement, including various aspects of access to general and specific procurement-related information and procedural matters; compliance mechanisms of a potential agreement and issues relating to developing countries, including the role of special and differential treatment as well as technical assistance and capacity building.

At the Doha Ministerial Conference in 2001, the case for a multilateral agreement on transparency in government procurement was recognised and it was agreed to discuss and negotiate the agreement in the following ministerial conference. A special mention needs to be made that the conference addressed, among other things, an issue of particular concern to developing countries by explicitly stating that "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". However, at the Cancun Ministerial Conference in 2003, WTO members could not agree on launching negotiations on GPA. In the absence of any substantive outcome on this, the issue of government procurement along with other impending Doha Development Agenda issues

was referred to the WTO General Council. However, the General Council decided against taking up Singapore Issues in the Doha Work Programme and was thus kept out of the ambit of WTO negotiations for a long time.

Nonetheless, the important pending government procurement issues were taken up separately and the renegotiation was concluded in December 2011 and the outcome of the negotiations was formally adopted in March 2012. The Agreement was revised further in March 2012 to include an expanded coverage of procurement. The current agreement of 2014, which has no expiration date, came into force in April 2014. The revised agreement improves upon the GPA 1994 in a number of ways, which includes:

- a complete revision of the wording of the various provisions of the Agreement to streamline them and make the text easier to understand;
- developments in current government procurement practices, including the use of electronic tools and the advantages therein;
- clarifications and improvements with regards to S&D provisions for developing country members in order to facilitate their accession.

The revised text also introduces a specific new requirement for participating governments and their relevant procuring entities to avoid conflicts of interest and prevent corrupt practices in a bid to promoting good governance in incumbent countries as well as in those aspiring to accede to the Agreement. The revised agreement also has built in provisions to remain dynamic in order to take into account for negotiations issues relating to government procurement – non-discrimination, national treatment and transparency – emerging in the global economy. In doing so, the GPA parties have also agreed to undertake a number of work programmes which will influence the future evolution of the Agreement.

All member countries of WTO can be a party in the GPA. The parties, which have acceded to the Agreement later, are bound by the Agreement since its entry into force. At present, the Agreement has 17 parties comprising 45 WTO members. There are another 30 WTO members as observers in the GPA Committee with 10 members in the process of acceding to the Agreement. The tables that follow show the parties and their respective dates for accession to the Agreement as well as the list of WTO member countries who are observers of this agreement.

Dependent on history, it can be observed from Tables 8.1 and 8.2, the parties to the WTO Agreement on Government Procurement are developed countries, while no developing countries and emerging market economies are part of the agreement. Some of the members of latter group have only acquired the observer status. It can be further observed without hesitation that developing countries have considerations with regards to GPA which are distinctly different from that of developed countries. One such consideration, which has been in place, is multilateralisation of GPA.

The GPA is administered by the Committee on Government Procurement in WTO which is composed of representatives of all its parties. The enforcement of the Agreement is realised through the domestic review mechanism at the national level and the WTO dispute settlement mechanism at the international level.

Key Elements of the Issue

The GPA, which comprises the text of the Agreement and parties' market access schedules of commitments, establishes rules requiring that open, fair and transparent conditions of competition be ensured in government procurement. Apart from national treatment, transparency is a key element of the agreement and the requirements are listed in a comprehensive set of rules that form bulk of the agreement. These requirements include rules regarding technical specifications, tendering procedures, qualification for suppliers,

invitation to tender, selection procedures, time limits, documentation requirements, procedures for award and negotiation, limited tendering, transparency and publication of awards and of reasons why tenders have failed.

The GPA 1994 had a scope wider than that of the Tokyo Round of agreement covering procurement of goods and services (including construction services), and lease, rental and hiring arrangements. It has been extended to purchases by sub-central government entities as well as to other government entities including public utilities. Despite wider coverage, the revised agreement also has elements which are similar to the earlier one. The common elements include:

- guarantees of national treatment and non-discrimination for the suppliers of parties to the Agreement with respect to procurement of covered goods, services and construction services as set out in each party's schedules;
- provisions regarding accession to the Agreement and the availability of special and differential treatment for developing and least-developed countries;
- detailed procedural requirements regarding the procurement process designed to ensure that covered procurement under the Agreement is carried out in a transparent and competitive manner that does not discriminate against the goods, services or suppliers of other parties;

Table 8.1: Parties to the Government Procurement Agreement

Parties	Date of entry into force/accession	
	GPA 1994	Revised GPA
Armenia	15 Sep 2011	5 June 2015
Canada	1 Jan 1996	6 Apr 2014
European Union with regard to its 28 member states:		6 Apr 2014
Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom	1 Jan 1996	
Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia	1 May 2004	
Bulgaria and Romania	1 Jan 2007	
Croatia	1 Jul 2013	
Hong Kong , China	19 Jun 1997	6 Apr 2014
Iceland	28 Apr 2001	6 Apr 2014
Israel	1 Jan 1996	6 Apr 2014
Japan	1 Jan 1996	16 Apr 2014
Korea, Republic of	1 Jan 1997	Pending
Liechtenstein	18 Sep 1997	6 Apr 2014
Montenegro	15 July 2015	15 July 2015
Netherlands with respect to Aruba	25 Oct 1996	4 July 2014
New Zealand	12 August 2015	12 August 2015
Norway	1 Jan 1996	6 Apr 2014
Singapore	20 Oct 1997	6 Apr 2014
Switzerland	1 Jan 1996	Pending
Chinese Taipei	15 Jul 2009	6 Apr 2014
United States	1 Jan 1996	6 Apr 2014

Source : RIS database based on Author's compilation.

Table 8.2: Observers to the Government Procurement Agreement

Observer government	Date of acceptance by Committee as observers
Albania *	2 October 2001
Argentina	24 February 1997
Australia*	4 June 1996
Bahrain	9 December 2008
Cameroon	3 May 2001
Chile	29 September 1997
China *	21 February 2002
Colombia	27 February 1996
Costa Rica	3 June 2015
Georgia *	5 October 1999
India	10 February 2010
Indonesia	31 October 2012
Jordan *	8 March 2000
Kyrgyz Republic *	5 October 1999
Malaysia	18 July 2012
Moldova *	29 September 2000
Mongolia	23 February 1999
Oman *	3 May 2001
Panama	29 September 1997
Pakistan	11 February 2015
Russian Federation	29 May 2013
Saudi Arabia	13 December 2007
Seychelles	16 September 2015
Sri Lanka	23 April 2003
Tajikistan*	25 June 2014
Thailand	3 June 2015
The former Yugoslav Republic of Macedonia (FYROM)	27 June 2013
Turkey	4 June 1996
Ukraine *	25 February 2009
Viet Nam	5 December 2012

Source : RIS database based on Author's compilation.

Note: * Negotiating accession.

- additional requirements regarding transparency of procurement-related information (e.g. relevant statutes and regulations);
- provisions regarding modifications and rectifications of parties' coverage commitments
- requirements regarding the availability and nature of domestic review procedures for supplier challenges which must be put in place by all parties to the Agreement;
- provisions regarding the application of the WTO Dispute Settlement Understanding in this area;
- a "built-in agenda" for improvement of the Agreement, extension of coverage and

elimination of remaining discriminatory measures through further negotiations.

The rules pertaining to GPA do not automatically apply to all procurement activities of each party. Rather, the coverage schedules play a critical role in determining whether a procurement activity is covered by the Agreement or not. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the Agreement.

There are three methods of tendering – open, selective and limited – which are permitted, with the former two being preferred. All three methods are complemented by competitive negotiations. Under open tendering, any interested supplier may submit a bid in response to a call for tenders. Selective tendering involves preselected potential suppliers and is usually expected to speed up the tendering process. Under limited tendering procedures, the buyer contacts individual suppliers individually and is allowed under specific cases as there may be chances of its abuse thereby reducing competition, discrimination among suppliers or providing protection to domestic producers or suppliers.

However, there are certain differences with regards to services. Even though the General Agreement on Trade in Services (GATS) exempts government procurement from the main market access provisions of the GATS, it establishes a multilateral negotiating mandate on the procurement of services. However, WTO members hold different views with respect to the scope of the mandate. While some members take the view that negotiations under this mandate can involve market access and non-discrimination as well as transparency and other procedural issues, other members attempt to exclude most-favoured nation (MFN) treatment, market access and national treatment from the scope of the mandated negotiations.

Nonetheless, thresholds and coverage are important elements of GPA. The table 9.3 that follows defines the thresholds across countries. The thresholds in the current revised agreement are undoubtedly high, and these thresholds vary across government entities. The threshold for other entities is the highest, while that of the sub-central government is higher than that of the central government. Further, across all government entities, construction services have a higher applicable threshold over government purchases of goods and services. Within this thresholds are the coverage for individual countries. Even though thresholds for countries vary, they are defined within a range. The coverage however varies significantly across countries. For instance, the coverage of the USA, the country with highest procurement by the government and with the spread over federal as well as sub-central and other government entities, is most comprehensive. With high thresholds, the government procurement market in developed countries continues to remain inaccessible to developing and least developed countries. The only possible way the developing and least developed countries stand to gain from government procurement market access is through subcontracting and outsourcing to these countries by the main awardee of the procurement contract who will be necessarily from the developed world.

Benefits and Costs to Different Stakeholders of its implementation

There are three potential gains from market access and transparency: (1) no restrictions in international trade is welfare enhancing, (2) non-discrimination enhances competition and minimises procurement cost, and (3) transparency in procurement can lower corruption and rent seeking. There can be an increase in export markets as a result of purchases by government of other countries. The general perception is that the second source of gain may be small especially for developing countries with few suppliers; the developing country suppliers often run the risk of being wiped out of the market. This

is important as discrimination may also be welfare improving. There might be costs as well. One source of gain is through better market access and gains from trade and the second source is through the cost savings and quality gains likely to result from the discipline imposed by the GPA. There can be reduction in negative externalities that arise from corruption. There are potential benefits from discrimination.

The costs are: (1) there are costs of switching over from the existing procurement regime especially if there are differences between the existing and those required by the GPA and

Table 8.3: Thresholds Indicated in Revised GPA (in SDR)[1]

Party	Central Government		Sub-central Government		Others	
	Goods and services[2]	Construction services	Goods and services[2]	Construction services	Goods and services[2]	Construction services
Thresholds generally applicable	130,000	5,000,000	200,000	5,000,000	400,000	5,000,000
Armenia	130,000	5,000,000	200,000	5,000,000	400,000	5,000,000
Canada	130,000	5,000,000	355000	5,000,000	355000	5,000,000
European Union[3]	130,000	5,000,000[4, 5]	200,000[6]	5,000,000[4, 5]	400,000	5,000,000
Hong Kong, China	130,000	5,000,000	No sub-central government level.		400,000	5,000,000
Iceland	130,000	5,000,000	200,000	5,000,000	400,000	5,000,000
Israel	130,000	8,500,000[7]	250,000	8,500,000	355000	8,500,000
Japan	100,000	4,500,000[8]	200,000	15,000,000[9]	130,000	4,500,000 or 15,000,000[8]
Korea	130,000	5,000,000[4]	200,000 or 400,000	15,000,000[4]	400,000	15,000,000
Liechtenstein[3]	130,000	5,000,000	200,000	5,000,000	400,000	5,000,000
Aruba	100,000	4,000,000	No sub-central government level.		400,000	5,000,000
Norway[3]	130,000	5,000,000	200,000	5,000,000	400,000	5,000,000
Singapore	130,000	5,000,000	No sub-central government level.		400,000	5,000,000
Switzerland[3]	130,000	5,000,000	200,000	5,000,000	400 000	5,000,000
Chinese Taipei[10]	130,000	5,000,000	200,000	5,000,000	400,000	5,000,000
United States	130,000	5,000,000	355000	5,000,000[11]	US$ 250,000 or 400,000	5,000,000[11]

Source : RIS database based on Author's compilation.

Notes: [1] As made clear by the disclaimer on this website, this table is provided for educational purposes only and has no official or legal status whatsoever. The exact content of Parties' commitments, including derogations and other relevant specifications, should be verified in the light of the Parties' Annexes to Appendix 1 to the revised GPA.

[2] Except for construction services.

[3] With regard to domestic review challenging the award of procurement contracts for an amount below the threshold applied to the same category of procurement by certain Parties, the provisions of Article XVIII (domestic review procedures) do not apply to suppliers of products or services from the Party concerned.

[4] Including Build-operate-transfer (BOT), public works concessions or other forms of Public Private Partnerships (PPPs) covered by the revised GPA.

[5] For public works concessions by Korea and suppliers of such services: SDR 15,000,000.

[6] For goods and services from Canada: SDR 355,000.

[7] As of the sixth year of entry into force of the revised GPA for Israel: SDR 5,000,000.

[8] For architectural, engineering and other technical services: SDR 450,000.

[9] For architectural, engineering and other technical services: SDR 1,500,000.

[10] Procurement by Chinese Taipei is only covered by the GPA in respect of each Party when the threshold is the same or higher than that applied by the other Party to the same category of procurement (General Note 1). This note does not apply to Israel or the United States under for Sub-Central Government procurement.

the number of entities involved, the costs of transition might be large for developing countries and least developed countries, (2) there are theoretically justifiable arguments for preferential treatment and against GPA and governments often go for such treatments without realising that their potential benefits are small, (3) with discrimination not restricting trade, the benefits from non-discrimination as under GPA can hence be small, (4) with restricted trade through tariffs and NTBs, the benefits from GPA may not be much.

Due to increase in the number of sellers, participation in the bilateral government procurement agreements and the multilateral GPA would create an environment which would move the economy from imperfect competition towards perfect competition. This, in turn, would bring down the prices and increase consumer welfare. Benefits may also accrue from increased market access, particularly in services, in significant foreign markets. This, however, may not be fully realised on account of supply side constraints of supplier countries and the fact that import penetration in government procurement markets in main economies is rather modest and perhaps does not exceed even 5 per cent of total procurement. It is often observed that despite opening up of government procurement markets, that too unilaterally, and enacting procurement laws by most developed countries including the US and the EU, public procurement market in these countries remains concentrated with restrictive business practices being followed.

Further, there would be a 'leakage' in government's attempts to boost the economy through increased spending during a downturn. This can especially be the case when governments are trying to increase their expenditure during the prolonged recession since 2008. It is also often argued that accession to bilateral government procurement agreement and the multilateral GPA would also restrict the development policy space available to developing and least developed countries. It is one of the reasons why some large emerging market economies including India have not yet acceded to the multilateral GPA. In this context it is worth mentioning that the ability to assist local companies, and particular socio-economic groups or ethnic communities, or underdeveloped regions, would be curtailed. It is also likely that if countries accede to GPA they are less likely to have the flexibility to protect and support public sector entities under a strict subsidy discipline in WTO.

General Sentiments

The developed countries have intended to make the Agreement a multilateral market access agreement as well as broaden the provisions regarding transparency, while the developing and least developed countries are apprehensive of a multilateral market access agreement and have intended to restrict the Agreement to issues regarding transparency in public procurement. A Working group was earlier formed on Public Procurement to study the subject and secured among the Members on the desirability of achieving transparency. The developing countries are opposed to an agreement that is legally enforceable through the WTO as it often reduces their development policy space. It is also observed that while developed countries are mostly signatories to this plurilateral agreement, developing countries have mostly stayed away from being signing the agreement. Even though the developing countries, the emerging market economies in particular, have moved in the direction of enacting their own domestic government procurement law, they have at best remained observers to the GPA. In this context, it is worth observing the progress with GPA accession for some emerging market economies.

Brazil is not a member of the WTO Plurilateral Agreement on Government Procurement. In general, the law offers non-discriminatory treatment to all bidders but in certain cases preference is given to Brazilian suppliers or products. In the most recent WTO Trade Policy Review for Brazil, the country indicated that they have no intension of joining the GPA. In 2010, the country

has significantly revised its procurement legislation by granting domestic preferences permanently by allowing preferential margins of upto 25 per cent in case of goods and services produced in Brazil and in accordance with the country's technical standards. Even though the country negotiated a MERCOSUR Protocol on Government Procurement along with Argentina, Paraguay and Uruguay as part of the regions commitments to deeper integration, this has not been implemented. In other PTAs as well as regional agreements, for instance in the FTAA, Brazil avoided procurement commitments.

China committed to joining the GPA as part of its WTO accession in 2001, but the terms of its GPA membership are still under negotiation. In December 2007, China submitted an initial offer to join the GPA. The offer, however, included high domestic content thresholds and neglected to cover procurement by sub-central government entities or in the services sector. This was considered insufficient. Since then, the country has submitted five offers will proposal of opening up under plurilateral GPA. Nonetheless, the Government Procurement Law (GPL) governs China's procurement market. However, it is alleged that despite a wide variety of ways to government procurement, only a few foreign enterprises have been able to compete successfully in China's public procurement market.

India has actively participated in the WTO, particularly in the DDA negotiations, and has played a satisfactory role as an observer in GPA since gaining the status in 2010 . India has unilaterally introduced the Government Procurement Bill in the Parliament in 2012, it is being criticised that the country does not have an overarching government policy. Even though the country has made some progress by India on certain aspects of its government procurement regime, it is still possible to enhance the openness and transparency of the procurement system by reducing preferences and set-asides. Further, the procurement policies are not consistent across different agencies of the government; they vary among the ministries of the central government, as well as between states and the central government, and public sector entities. The National Manufacturing Competitiveness Policy has advised a higher local content requirement in information technology sector. This is in sharp contrast to the basic framework of the WTO Plurilateral Agreement on Government Procurement.

On Russia's accession to the WTO in 2012, the country confirmed its intentions of joining the GPA by 2016. It became an observer to GPA in 2013. The country committed to conduct government procurement in a transparent manner following published laws, regulations and guidelines. As an intermediate step to GPA, the country is underway with regional procurement commitments under Eurasian Economic Union.

Even within developed countries, there are widespread dissatisfactions with each other's commitments. For instance, the United States and the European Union have engaged in often contentious negotiations over access to government procurement, for more than 20 years. The EU is dissatisfied with the level of procurement that the US has opened under the WTO Government Procurement Agreement and, as a consequence, it does not give the US its most comprehensive coverage. The US has been constrained in responding to the EU's requests for greater access, especially to state procurement, by both its federal structure of government and by domestic purchasing requirements. At the current time, neither party has proposed a way to break the impasse.

From the sentiments of the emerging market economies as delineated above, it can be said that these countries are taking measured steps towards the plurilateral GPA, which is in a way delaying the process of GPA accession. These countries, even though are committed to accede to GPA, are in no way ready for a multilateral agreement. The apprehensions of these developing and least developed countries arise from (1) lack of significant gains in market access in agriculture and non-agriculture to developing and least developed countries despite wide

ranging multilateral trade liberalisation under WTO, (2) slow realisation of gains from Uruguay Round, (3) minimal access to the large government procurement markets in the US and the EU by developing and least developed countries, despite opening up of these markets, (4) large differences in technical standards between developed, developing and least developed countries, (5) marked differences in capabilities, skill requirement and preparedness to shift to a new regime of public procurement, and (6) possible reduction in development policy space especially with regards to local content requirements in emerging sectors and clean technology. Further, even though transparency in procurement is expected to lower the incidence of corruption, it has not been so for many countries which are parties to GPA.

Legal Nature of Obligations

The signatories of the GPA, in order to gear up to the needs of a non-discriminatory, transparent and an effective multilateral framework and the conduct of international trade with flexibility to accommodate country specific circumstance and development, financial and trade needs of developing countries and thereby encourage non-signitory countries to accede, have agreed to lay down certain rules for a fair conduct of the Agreement in terms of Articles which are binding on all signatories and the countries who accede to GPA. The Agreement lays down rules about electronic use for covered procurement ensuring that information technology is used for the purpose and maintaining mechanisms that ensure the integrity of requests for participation and tenders. In this regard, time and deadlines are important and are expected to be adhered to. The rules include laying down the definitions of, among others, commercial goods and services, construction services, electronic auction, procedures of tendering such as open, selective and limited tendering, notice of intended procurement, procuring entity, qualified supplier and supplier, multi-use list, standard, and technical qualification. The scope of the Agreement applies to all covered procurement for governmental purposes meant not for commercial sale or resale and each signatory is required to notify its coverage for central government entities, sub-central government entities, all other government entities, goods and services including construction services. The agreement lays down strict guidelines for valuation of a procurement, especially for the purpose of whether a particular transaction is covered or not, as well as in the case of lease, rental, hire purchase of goods and services. In government procurement, the rules of origin are no different from the rules of origin applied in case of normal imports.

The rules also accord special and differential treatment to least developed countries and also to those developing countries requiring separate treatment for development needs. Based on its development needs, a developing country may on request adopt or maintain one or more of the following transitional measures, during a transition period and in accordance with a schedule, and applied in a manner that does not discriminate other signatories. These include a price preference programme, an offset provided it is clearly stated in the notice of intended procurement, the phased-in addition of specific entities or sectors, and a threshold that is higher than its permanent threshold. While the S&DT in case of least developed countries is applicable for a five year period and that for developing countries would depend on the time required to fulfill the special obligation but not exceeding three years. The WTO Committee on Government Procurement is assigned to deal with developing countries and their transition, with a scope to review this Article on developing countries and their special requirement every five years.

The rules of GPA requires the signatories to provide information on rules and regulation pertaining to the procurement system, publish notice for intended covered procurement in the appropriate paper or electronic medium furnishing all details along with a summary

notice that is readily accessible, notify all planned procurements to be carried out in a year at the beginning of the period. The rules of GPA also lay down the conditions to be met by a supplier in terms of legal and financial capacities and the commercial and technical abilities in case of participation in a procurement along with details on registration and procedures for qualification of suppliers in case different modes of tendering and use of multi-use lists in case of procurement by various government entities. The technical specification of government procurement requires basing on international standards which however should not create obstacles with regards to international trade and preclude competition. Further with regards to tender documentation, a procuring entity shall make available to suppliers all information necessary to permit suppliers to prepare and submit responsive tenders, thereby allowing access to full information by the suppliers. However, any changes in the procurement requirement require notification upfront. Treatment of tenders and award contracts, publication of award information, maintenance of records and documents with regards to the awards are also brought under the legal framework of the Agreement.

The Agreement has scope of judicial review. In case of any mismatch between the procuring entity and seller, there is scope for consultation leading to a mutually satisfactory solution. It can also take recourse to the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes for settlement of disputes, but shall not result in the suspension of concessions or other obligations.

Recent Developments under different RTAs and Mega RTAs

The economic benefits from international rules on government procurement flow mostly from increased specialisation and competition within national markets as well as more efficient purchasing. It is important to note that governments save scarce resources using international norms for public procurement. In government procurement, as in other policy areas, economic gains from reform can be achieved through unilateral measures. Even though countries across the globe have initiated unilateral reform of government procurement based on international guidelines and accession to international agreements, the progress has been tardy. It is already being noted earlier, there are only a few countries which have acceded to the international agreement. As noted earlier, individual country's progress with enactment of domestic public procurement rules are at various stages and reactions to acceding to the GPA are varying. Nonetheless, countries have progressed with various bilateral and regional agreements with strong public procurement rules built into these agreements. In an earlier section, while understanding the sentiments and the progress towards acceding to GPA for different countries, it was observed that different countries have progressed with government procurement commitments under bilateral and regional arrangements. The countries often justify such a trend of inclusion of government procurement in bilateral/regional or in Economic Partnership Agreements (EPAs) as this helps to maintain the momentum of the existing domestic reform processes or promotes open procurement markets in the region. This is particularly beneficial for countries with limited size of their national markets and capacity of their manufacturing and service sectors. The potential costs of including provisions on procurement in the bilateral/regional agreements or EPAs come in two forms. First, any commitments on national treatment will prohibit the use preferences for domestic suppliers as a policy instrument. Second, there will be costs complying with transparency rules. In what is follows is a brief discussion on government procurement provisions in Transatlantic Trade and Investment Partnership (TIPP) and Trans Pacific Partnership Agreements.

In February 2013, in the final report of the United States-European Union High Level Working

Group on Jobs and Growth (HLWG), the EU and US shared the goal to improve access in government procurement market on the basis of national treatment. The objective of the HLWG is to enhance business opportunities through substantially improved access to government procurement contracts at all levels of government on the basis of national treatment. Subsequently, each side has elaborated on their objectives for the TTIP. In March 2013, the US notified the Congress of its intention to launch negotiations of TTIP and its objectives. It subsequently pointed to its interests in expanded access to procurement in construction, engineering and medical devices. In July 2013, the European Commission published initial TTIP Position Papers, including one on public procurement.

In addition to its stated objectives, the US may be expected to seek access to the procurement

that the EU covers under the revised GPA, which is otherwise denied to the US. The coverage thus widens with the inclusion of procurement of services by the EU's sub-central government entities, procurement by EU utilities, access to EU works concessions and procurement of more than 200 central government entities of member states. Expanding procurement under the TTIP will be difficult since most of the easily covered procurement has already been offered. Moreover, the EU and the US have engaged in extensive negotiations over many of the remaining issues, most recently in the revision of the GPA. Nonetheless, there are some areas in which the two parties should be able to build on their existing commitments.

The Trans-Pacific Partnership (TPP) levels the playing field for workers and businesses in America, by ensuring markets in some of the fastest growing Asian markets. TPP's Government Procurement chapter will help create export opportunities for American producers of manufactured goods and services and hence employment in various US industries ranging from information technology to transport machinery, medical technologies, professional services, and many other products. In TPP the Government Procurement chapter includes core commitments on national treatment, which require that a TPP Party extend to bidders on covered government procurement contracts the same treatment it extends to its own firms; and on most-favored-nation treatment, which require a Party to provide U.S. and other TPP firms at least as good treatment as it extends to any other Party's firms. These procurement provisions do not apply to loans and grants or other forms of assistance from a government. For example, this means federal loans and grants provided by the Department of Transportation and the Environmental Protection Agency to U.S. states and local entities, is not under TPP government procurement jurisdiction. Apart from stressing on non-discriminatory, fair and transparent procurement procedures, TPP specifies timely publication of complete information on the procuring entity, the specific procurement, the time frame for submission of bids, and a description of conditions for participation of suppliers. The coverage, as is agreed upon among some members of the regional group, is extensive and the commitment guarantees flexibility. However, there are set asides and exclusion including "Buy America" requirements attached to federal funds for state and local mass transit and highway projects and water projects; small business and other set-asides; procurement of transportation services; human feeding programs; and sensitive elements of Department of Defense procurement, including defense systems, materials and textiles.

Conclusions and Policy Implications

The plurilateral Agreement on Government Procurement, as the name suggests, is not binding on all WTO members. In a bid to reduce rampant corruption worldwide and improve competition in all transactions thereby raising consumer welfare, multilateralisation of the Government Procurement Agreement is often advocated. Even though the developed

countries espouse such a case of a multilateral GPA, it is observed from the above narrative that they often themselves do not practice the tenets of non-discrimination, fairness and transparency, as in a good government procurement agreement. The agreement details about the entire process of award contract, but remains silent on post-tendering process and monitoring of contracts once awarded. It can be further observed that the thresholds of procurements in the existing plurilateral GPA are high, which puts the developing and least developed country suppliers at a disadvantage by not allowing entry into a larger market. Technical specifications in government procurement contracts often act as deterrents to entry, especially for producers and suppliers from poorer countries. The suppliers from developing and least developed countries are further constrained as they are at a disadvantage compared to their developed country counterparts in terms of their scale and scope of operations, skill, quality adherence and timeliness with regards to delivery. Such considerations need to be taken into account before developing and least developed countries agree to a multilateral government procurement agreement. It is further observed that even in FTAs or Mega FTAs, the market in developed countries remain restricted and the scope of gains especially by small countries from government procurement is minimal. Given these imbalances in the existing WTO rules on government procurement and disadvantages the developing countries are likely to face, a plurilateral agreement rather than a multilateral one is the best possible option. The existing plurilateral framework, however, requires certain modifications.

For the developing countries to gain from the current scenario, several steps can be undertaken. These include capacity building in developing and least developed countries and necessary help from developed countries to build such capabilities in order to better understand and respond to the technical specifications, enacting full proof domestic government procurement laws with larger coverage and higher procurement thresholds, and allowing for development policy space in terms of local content requirements, clean technology, protection to small businesses and strategic sectors.

9

Implications for the Excluded Countries

Introduction

The mega trade deals that have already been negotiated or which are being negotiated cover only a small fraction of the countries of the world, though they dominate the world economy. However, their domination is decreasing. An important issue that arises from the limited coverage of these mega deals is what this portends for those countries who are not a party to these deals and these countries are mainly small poor countries. In this chapter, we discuss the effect of these deals on countries left out. As noted above, these mega RTAs are of interest because their ambitions extend well beyond trade and trade policy. They extend the ambit of issues, such as trade in services, technical barriers to trade, and intellectual property, beyond negotiated in earlier pacts. Furthermore, these seek to include new issues not previously in trade deals, e.g., competition policy, regulatory coherence, and standards for labor and environment. Consequently, their effects are likely to be far reaching.

Mega-FTAs: Potential Impact on Trade

The literature broadly consists of two different strands. One is to look at the effects of the PTAs on specific countries or groups of countries taking into account the specifics of their trade patterns. Two, analysts use CGE models to estimate the effects of trade liberalisation. They use the GTAP model with its detailed analysis of the effect of trade policy. Both categories of studies find that in general the effect of the mega FTAs on non-members countries would be quite small.

Many of the Asian countries outside the Trans-Pacific Partnership (TPP) are already members of FTAs with TPP countries. Also, many of the countries inside the TPP are already members of FTAs with individual TPP members. Because of these two factors, most of both positive and negative that usually accompany a large FTA like the TPP will not actually occur. Except for the US and Japan, the left out countries do not have significant trade with other members of the TPP. Therefore, the potential for trade diversion that would adversely affect the non-members is limited. Such trade diversion would be particularly important if the non-members are benefitting from Generalised System of Preferences (GSP) preferences which may get eroded. As Baldwin (2013) summarises, only a small and shrinking percentage of global bilateral trade flows are eligible for preferences, a significant and growing proportion of trade flows have zero most-favoured nation (MFN) tariffs (implying that no duty preference can be provided) and less than 2 per cent of world imports enjoy preferences of over 10 per cent (Baldwin and

Lopez-Gonzalez, 2013). Furthermore, Baldwin (forthcoming) notes that if complementarities between insider and outsider states are high and the TTIP and TPP result in trade expansion for member states, this will most likely suck in imports from those outsiders to supply expanding production plants in the signatory states. Furthermore, the potential for trade diversion is further diminished because the more developed countries in the TPP do not compete with the products exported by the left out countries, particularly the smaller countries in Sub-Saharan Africa. The latter observation would apply even more strongly to the TIPP. This is very significant as a major effect of PTAs is that the terms of trade of non-member countries deteriorate. The terms of trade effect is of two kinds. Prices of exports of non-members to the members of the PTA decline as they try to maintain their competitiveness in the face of declines in the prices of goods from members following a decline in the tariffs facing those goods.

A number of studies suggest (Cheong (2013) and Petri et. al. (2012)) that the overall impact of either the TPP or the TTIP on non-member states may be small, a 0.07 per cent reduction in the rest of the world's Gross Domestic Product. On the other hand, a EU-commissioned study finds that the TTIP would lead to marginal gains to low-income countries of about 0.09 per cent to 0.2 per cent depending on the depth of liberalisation. The positive result stem from trade creation because of higher incomes in the members and spill-over effects from streamlined EU and US regulations, particularly convergence of EU–US standards, with the potential of global standards.

There do not seem to be any substantive studies of the impact of standardisation of standards. On the one hand, it would have a positive impact as countries would have to produce to only one set of standards than a multiplicity of standards (the European study referred to above). On the other hand, the standards adopted may be significantly different from those currently in use raising the cost of meeting the standards. An earlier study by Finger and Schuler (1999) of the costs of implementing the Uruguay Round of agreements had found the costs to be significant. Many countries had difficulty in adjusting to the new requirements and a special programme was implemented to help countries with the implementation (Integrated Framework for Trade Related Technical Assistance).

The effect of stricter IP regimes is even more difficult to evaluate. One of the major features that is generally accepted is that it will increase the costs of medicines.

The evaluation of the effects of mega FTAs do not usually take into account the costs of implementing new standards since these would be very country specific, nor of stricter IPR regimes as there is no consensus about them.

Policy Options for Non-Member Countries

The major option available to developing countries is to enhance South-South Cooperation (SSC). SSC has evolved from narrow technical cooperation possibilities to holistic approaches of mutual cooperation based on development compact. The objectives and instruments of Development Compact are summarised in Box 9.1. This would be good on its own merits and would also increase the bargaining power of developing countries vis-a-vis the developed countries who are the movers behind many of these mega FTAs. Earlier attempts to negotiate a GSTP have not been successful. RCEP is one option. Another could be to build cooperation around the BRICS framework. Such SSC could go much beyond trade (Agarwal and Whalley, 2015). The contours and scope of South-South Economic Cooperation is presented in Box 9.2.

Impact of Market Access Denial to Excluded Non-Member Countries on Mega Regionals

As discussed earlier, mega regionals leave limited space for accommodating excluded countries in their fold. Discriminatory practices followed for their member countries have left

Box 9.1: Development Compact

The idea of 'the development compact' has evolved through the years since it was first mooted by Norway's Foreign Minister Thorvald Stoltenberg in 1989 as 'development contract'. The concept was further refined as 'mutuality of obligation' and 'reciprocity of conditionality' by Prof. Arjun Sengupta in 1993. These terms were propounded for North-South exchanges; however, the new context of development compact with the Southern actors at its core has seen variations from the past. Now, it is no longer about the imposition of conditionalities on recipient countries but more on the principles of SSC such as mutual gain, non-interference, collective growth opportunities with absence of conditionalities.

"Development compact', works at five different levels:

- **Trade and Investment:** preferential trade • trade permits • improvement of infrastructure for trade facilitation • providing business facilitation services • assistance for improving regulatory capacity • providing investment funds • developing intra-regional supply chain • regional and sub-regional trade agreements • providing freely convertible currency for trade • tax preference for FDI.
- **Technology:** technical cooperation • joint academic and scientific research • turnkey projects • technology transfer with or without component of capacity building • subsidising licensing or exemption from IPR arrangements.
- **Skill up gradation:** training programmes – both off-site and on-site • scholarships • third country training programmes • deploying volunteers • conducting feasibility studies • prototype production and training centre.
- **Lines of credit:** loans on concessional rate of interest – with or without capacity building component • loans at commercial rate of interest for different time periods.
- **Grants:** writing-off debt • grants in kind.

The lines of credit and grants may be pooled under financing mechanisms. The engagement by the emerging economies with the other southern countries has provided major pull factor for wider engagement across the five elements.

Source: FIDC Policy Brief No. 5 (2015).

very limited space for the excluded countries to gain market access. It is empirically observed that several member countries are not having competitive strength in various lines of productions, whereas number of excluded countries have competitive strength in those product lines. Though an individually excluded may have supply constraint in meeting the voluminous import requirements of a mega regional partner, excluded countries can meet such requirements as a group. However, the level of discrimination and strategy to deal with issues relating to NTBs would determine the space for member and excluded countries to have market access in mega FTAs. Denial of market access to excluded countries could make mega regionals more uncompetitive and, therefore, prices of such imports are likely to be escalated in the importing markets. It would be difficult for member countries to replace competitive exports from the excluded countries and maintain competitive price in the domestic economy.

Impact on the US: Trade Diverting Effects of Excluded Countries

With the conclusion of TPP negotiations, the US has to depend more on TPP member countries for imports. This may have three effects on the US economy. Firstly, product competitiveness issues are getting prominence while dealing with imports from the member and non-member countries. Secondly, the US economy is expected to face price escalation in several lines of products due to possible trade diversion effect. Thirdly, the possibility of replacement of imports from the non-member countries by the TPP member countries is likely to raise several issues relating to supply constraints. Supply imbalance may cause further pressure on price.

The empirical analysis conducted in this report has examined dependence of the US on imports from the member and non-member countries of TPP (Table 9.1). The analysis has considered 4502 products (at 6 digit HS) which

Box 9.2: Scope of South-South Economic Cooperation

Since the financial crisis, there has been a change in the direction of economic activities towards greater South-South exchanges. South-South trade (SST) in goods has increased phenomenally. Southern exports to other countries of the South now account for more than 50 per cent of the exports of most developing regions and large developing economies. There has been significant diversification as the share of intra-regional exports has declined in all regions.

The South-South Economic Cooperation (SSEC) can be developed in the areas of trade, FDI, and technology so that the beneficial effects are multiplied. There is considerable scope for improved SSEC in these areas. Tariffs on imports from developing countries are high and provide scope for differential preferences for imports from developing countries. FDI flows, both outward from developing countries and inward to developing countries, have increased as a share of GDP. The services sector predominates in receiving capital from developing countries.

FDI from developing countries could be encouraged by preferential tax arrangements. Similarly, commercial links could be developed by having weaker requirements of entry for banks from developing countries than for banks from developed countries. Also common regulatory practices could be developed, particularly on a regional basis. Such harmonisation would encourage banks to set up branches in other countries.

There is considerable scope for cooperation in the areas of research, technology development and student exchanges. Research is needed on how best the SSEC in the areas of trade, commercial relations including FDI, and technological development can be enhanced. Research is also needed on how the weakness of financial relations, where sudden withdrawal of loans or funds can subject a country to a serious macroeconomic crisis, can be avoided in the context of SSEC.

As companies in developing countries have matured, they have become TNCs and not merely a step in the production process governed by others. As a result, South-South transactions have spread from trade to outward flows of foreign direct investment (FDI) and to transfer of technologies that they themselves have produced, creating scope for cooperation in these areas. The scope for cooperation in the area of science and technology has increased considerably as more and more developing countries are able to create technologies. Also many large commercial banks have arisen in developing countries. This creates the opportunity for financial collaboration through establishment of more branches of developing country banks in other developing countries so that the savings of developing countries can be more optimally allocated across developing countries.

Foreign exchange reserves held by developing countries have been increasing. Developing countries have as yet made limited progress in pooling their reserves through schemes such the Chiang Mai Initiative Multilateralised and the Contingent reserve Arrangement. Their desire for reform of the IMF and the World Bank has stalled. Further progress may depend on evolution of their own Southern institutions.

Source: Agarwal (2013).

the US imports from the rest of the world. In case of 2346 products, excluded countries are emerging competitive as compared to member countries. These competitive products constitute more than 52 per cent of the total product lines considered in the analysis. For examining price competitiveness, we have used 'trade creating effects' and the methodology is discussed in Box 9.3.

In the US market, supply of competitive products from non-member countries is examined based on broad economic classification. Non-member countries have export competitiveness in 2088 products where more than 50 per cent of the total lines are concentrated in the group of semi-finished goods as shown in Figure 9.1. Market restriction for these products would affect industrial productivity of the US. Parts and component sector is likely to be affected significantly where 22.5 per cent of total competitive product lines are exported by the non-member countries. However, capital goods and primary goods sectors are likely to be affected least in the US market. Denial of market access to non-members would affect the US industries more intensively than that of the primary sector. Price escalation would be felt in most of the segments of imports but the highest cost increase is expected in the parts and component sector, which is followed by semi-finished goods sector. Similarly, finished capital goods sector is likely to witness more than 200 per cent price hike. Primary goods

Box 9.3 Measuring Competitiveness in a Supply Constraint Mega Regional

In the dynamic global economy, Mega regionals are becoming game changer. The excluded economies/ RTAs are expected to have less markets in these regions because of stringent 21st century regional grouping. In a situation, where excluded countries are denied market access in the Mega regionals, several efficient countries do not supply their products with competitive prices. In that situation, other inefficient member countries would replace efficient member countries with high cost using the route of trade diversion.

The extent of trade diversion by these Mega RTAs is going to create price inefficiency which would ultimately feed into the prices faced by the consumers in the mega regionals. in this empirical exercise, the case of the US in the TPP is examined where denial of market access to non-member countries would allow inefficient TPP member countries to enter into the trade arena to replace supplies of the excluded countries, leading to escalation of prices in the US. In this context, the empirical analysis shows dependency of the US on 11 other member countries of TPP and non-member countries in different lines of products.

The trade competitiveness is examined in a partial equilibrium framework, estimating export competitiveness in the basis of trade creation and trade diversion effects (Viner, 1950). In this approach, if a product is competitive naturally, on the basis of comparative cost advantage, it becomes trade creation. If a product is naturally uncompetitive, but acquires competitiveness through tariff adjustment under preferential arrangement, it becomes trade diversion.

For the estimation of price competitiveness, each product is considered separately at a disaggregated level (i.e. at 6-digit HS level). The export price of each product (at the 6-digit HS level) from the member countries of TPP is compared with the corresponding prices offered by non-member competitors in the US market.

Let us assume that member countries exports i^{th} product to the US at a given price (PX_{Nij}). Further assume that another non-member competing suppliers also export the same product to the US at a different price (PX_{kij}), where PX_{Nij} denotes export price of member countries of TPP, for the i^{th} product in the j^{th} market (US), where PX_{kij} represents export price of k^{th} non- member competitor, for the i^{th} product in the j^{th} market, and N represents member countries.

For the i^{th} product, if a non-member country has price competitiveness over other member countries in the j^{th} market then the export price of a non-member country should be lower than that of a member. In such a case, the condition may be denoted as:

$$PX_{Nij} > PX_{kij}$$

The difference in the prices of member and non-member countries by product at 6 digit Harmonised System (HS), where non-member countries are more competitive than member countries, would reflect the trade diverting effects of TPP and the extent of price escalation that is going to be transferred to the consumers of the US market, when a competitive non-member country is denied market access in the US market.

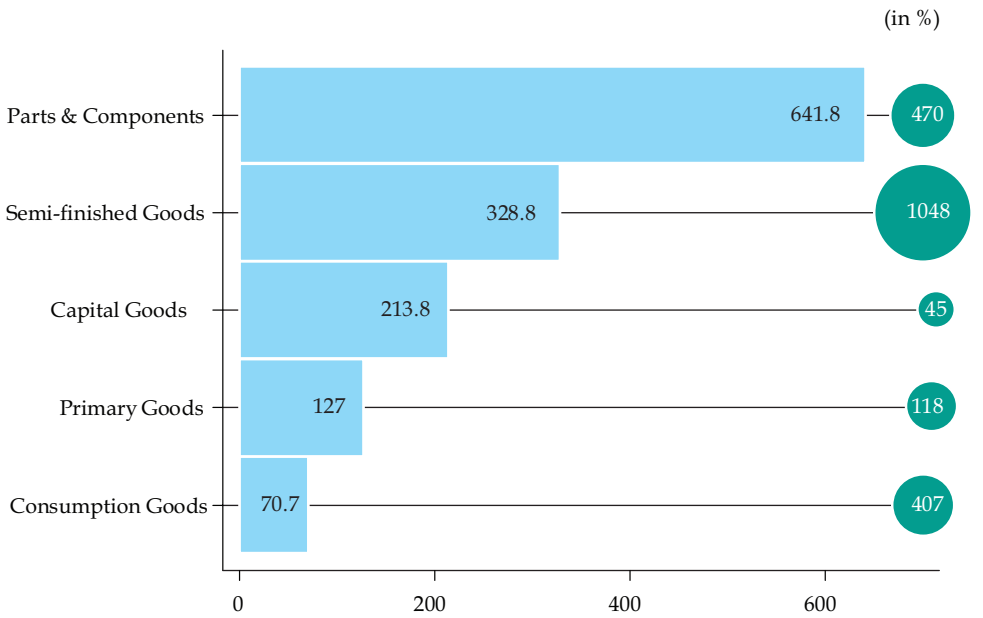
Source: Mohanty (2014).

sector is likely to be affected moderately, with price escalation to the extent of 127 per cent.

Price escalation in different trade sectors has been revealing in the US market. Price rise is expected to become sharp in sectors like chemical, base metals and automotive sector. Moderate level of price rise is likely to occur in all broad agricultural sector except for the fruits and vegetables. Price rise in the mineral sector is expected to rise by more than 119 per cent. Similar trends may be expected in selected industrial sectors such as pulp of wood, gems and jewelry and precision instruments.

It is imperative from the US imports that most of the important trade sectors are likely to be affected in case, market access is denied to non-member of TPP. Both agriculture and non-industrial sectors are to be affected, if differential treatment becomes too wide in favour of the member countries. In the manufacturing sector, most capital intensive sectors are likely to be affected more than others. It would be difficult for the member countries to replace supply of the excluded countries in the US market. Shortage of imports supply may have down side risks for the US

Figure 9.1: Expected Price Escalation for US by Broad Economic Activities



Source: RIS database based on COMTRADE, UN.

Note: The size of the circle represent the number of product lines in each category at 6 digit HS.

economy. It may be observed from the above empirical analysis that denial of market access to non-member countries in mega regionals may affect adversely the member countries.

Mega-FTAs and Developing Countries

There is no doubt that Mega FTAs are a matter of concern for developing countries. All developing countries will not be affected equally. Broadly speaking, small countries will be differently affected than large countries such as Brazil, China, India or Indonesia. Also countries with considerable technological capability will be differently affected than countries with limited technological capabilities. Furthermore, the immediate effects of tariff changes will differ from the long term effect of rule changes, particularly changes in rules regarding investment and those regarding intellectual property rights regimes.

As far as trade in goods is concerned, the importance of developing country markets has been growing both for other developing countries and for developed countries. In earlier times markets of the developed countries were more important and many developing countries were willing to bear the costs of other aspects of negotiations to get market access. For instance, countries accepted a stronger IPR regime during the Uruguay Round (UR) in hopes of getting better access for services and textiles. But this situation no longer prevails as markets of developing countries are more important. But this may still not improve the bargaining power of developing countries particularly smaller developing countries. Markets such as the US, EU or Japan may be much more important for most countries than individual developing country markets, even though the total of developing country markets may be more important. The issue before developing countries is, therefore, how to combine the markets of developing countries? As the total of developing country markets may be more important and are progressively becoming more important, the threat of a joint trade bloc would be taken more seriously by the

developed countries. But even the attempt by smaller countries to combine may led to threats from the developed countries. So the lead will have to be taken by the larger developing countries. Real leadership will have to be shown by them in order to draw in the other smaller developing countries. Though the total effect of the FTAs may be small, the effect on some developing countries may be large or some countries may have the apprehension that it may be large. Facing this threat, requires developing countries to form their own PTA. This may require that larger developing countries, which may not have much to fear from these mega FTAs help smaller developing countries who may be big losers. Therefore, the FTA among developing countries may have to be asymmetrically structured between the bigger and smaller countries. However, the smaller developing countries may need to fine tune their own negotiating strategies with respect to the larger developing countries in order not to push them too far so that the negotiations fail and they are left to the mercy of the developed countries.

A similar argument could broadly apply to trade in services. But in the area of services the bargaining position may be weaker as the developed have a significant advantage in some services. But developing countries may be able to use their growing importance in trade to get a better deal in services.

An area of services that is very significant in these mega FTAs is the area of investment and the right given to companies to sue governments for actions that hurt their bottom line. Here also FDI flows from developing countries are becoming more important. Also, the technology that may accompany these FDI flows may be more suitable for

Table 9.1: Expected Price Escalation in the US Market: Trade Diverting Effects of TPP

(in %)

HS Section	Description	Price Escalation
1	Live Animals and Animal Products	116.2
2	Vegetable Products	76.4
3	Animal or Vegetable Fats & Oils	181.7
4	Prepared Foodstuff, Beverages etc	60.0
5	Mineral Products	190.6
6	Products of Chemicals	661.4
7	Plastics & Articles thereof	92.0
8	Raw Hides & Skins, Leather, etc.	14.6
9	Wood & Articles of Wood	51.0
10	Pulp of wood or of other Fibers	116.5
11	Textile & Textile Articles	182.3
12	Footwear, Headgear and Umbrella	68.8
13	Articles of Stone, Plaster, Cement	55.5
14	Natural or cultured pearls, jewellery	100.3
15	Base Metals & Articles of Base Metal	674.3
16	Machinery & Mechanical Appliances	57.2
17	Vehicles, Aircraft and Vessels	616.8
18	Optical, Photograph & Cinematography	186.4
20	Miscellaneous Manufactured Articles	116.2

Source: RIS based on COMTRADE, UN.

other developing countries. So again we need initiatives to build a cooperative system that would encourage south-south FDI flows. Again developing countries can take actions to deal with the threat from the mega FTAs. The bargaining position of developing countries is strong as they are the faster growing areas and so more attractive as FDI destinations. But as they grow the needs of individual developing country for investible resources may lead them to make concessions to the developed countries to attract FDI to supplement their own savings. This is a question of collective action by developing countries.

Banks in many developing countries are large reservoirs of financial savings. But as yet few banks of developing countries have branches in other developing countries. Therefore, developing countries can take steps to foster cooperation among their banks. Such cooperation would provide them with another source of export financing which may become over time independent of the currencies of the developed countries. One way of easing the path to cooperation could be through developing common regulatory, at least at the regional level initially.

The establishment of the New Development Bank (NDB) and the Asia Infrastructure Investment Bank are important initiatives to increase financial assistance. But the mandate of these may need to be broadened to enable them to lend for any projects and not merely infrastructure projects. They should be urgently made operational so that developing countries can begin to utilise their resources.

The area of greatest vulnerability for developing countries is the IPR regime. The larger developing countries are improving their innovation capabilities and are earning considerably more in royalties see Chapter 2. But still they are much greater importers of technology than exporters so the net payments are every high. Smaller developing countries are almost entirely importers of technology as they lack technological capability The IPR regime negotiated under the TP is not very different from the WTO regime, see Chapter 2. However, there is no guarantee that things will not get worse and there is no immediate prospect of developing countries as a group improving their innovation capabilities. Small beginnings have been made by developing countries to cooperate in research. But these efforts need to be stepped up considerably. Even then the bargaining position of developing countries will remain weak. The only way to compensate for this weakness is to use their improving position in goods trade.

We now discuss the effects of these trade deals on LDCs. The trade of LDCs is unlikely to be very much affected. The possibilities of trade diversion are limited because their export baskets are very different from those of the developed countries. The only members whose trade might adversely affect them are Cambodia and Vietnam. In the past their exports to China have been very beneficial for their performance. If the larger developing countries grant them preferences these may outweigh any trade diversion losses that they may suffer. They are likely to gain from faster growth in developing countries that would provide a bigger market for their export. They should push for SSC as this is likely to raise their growth rates.

As far as investment is concerned, they should try to broaden their sources of investible funds. They should also push for membership of the NDB and try to make it operational as soon as possible so that they can have another source of long term finance. They would also benefit from any scheme of commercial banking cooperation among developing countries.

Their biggest vulnerability remains to a stronger IPR regime. As noted above, they have not made full use of the flexibilities introduced at Doha. The solution is a very long term one for strengthening their research capabilities. They could use SSC to help accelerate the pace of acquiring capabilities.

10

Relevance of Special and Differential Treatment

Introduction

Around the middle of the last century as the world recovered from the crises of economic turmoil and unprecedented military destruction, leaders from the industrialised world sought disciplined international engagement and stable economic relations. International trade was indispensible on both counts. Regulating trade practices and predictability of trade rules was a big challenge in this regard. In this pursuit, General Agreement on Tariffs and Trade (GATT), was signed in 1947, as a multilateral agreement for regulating trade. This became a successful endeavour and a sustainable process surviving post war atmosphere of cynicism and mistrust. The process continued over the next forty years and had eight rounds of negotiations. It covered trade in goods and negotiations on tariff liberalisation.

However, towards the last leg of the GATT negotiation, there was growing recognition that international trade was more than trade in goods – it included considerations of technology transfer and use, services and trade rules that went beyond tariffs and quotas. The developing countries were apprehensive about expanding the negotiations under all these categories. The Uruguay Round of the GATT led to the establishment of the World Trade Organisation (WTO) which took shape as a multilateral trade institution towards the end of the last century with wider reach and mandate and supposedly with greater conviction of free and fair trade. Subsequently, the failure of the global north to accommodate the concerns of the global south in trade negotiations ended up in a compromise on the progress of the multilateral process in the later years.

Although international trade serves as an engine of growth and enhances production through specialisation, it has been acknowledged through theory and evidence that with difference in size of economies and with distortions in the input and the output markets trade is not meant to benefit equally (neither countries nor sectors). The developed countries needed to compensate the developing ones and help them protect key sectors and build capacities to benefit from trade, without compromising on the livelihoods of large sections of their populations both in the tradable and the non tradable sectors. Such policies were clubbed as Generalised System of Preferences (GSP) on tariffs which later evolved into Special and Differential Treatment (S&DT) provisions across sectors of trade and negotiations. The post WTO world has not been an easy road either. Empowered with institutionalised veto powers, developing countries remodelled the

course to explicitly incorporate the concerns of the developing world. The large developing countries like India were emphatic in this regard. S&DT provisions were sought more aggressively, only to a shrinking relevance in the years that would follow. However, one perceives increasing divergence of interests within the developing world with Least Developed Countries (LDCs) trying to negotiate preferential treatments from the middle income countries as well.

While, preferential trade agreements of the bilateral and regional nature have been a reality throughout, the multilateral process has its own importance in terms of being the most robust institutional architecture of international governance of trade and related issues. On the other hand, GATT rules allowed for bilateral and regional preferential agreements within member states. The smaller agreements, it was thought would complement the multilateral process through group consensus. On the other hand, the benefit of having selective arrangements bilaterally or regionally was meant to encourage preferential trade, reap economies of scale, exploit complementarities, and at times foster investments. The trade creation and trade diversion effects of such arrangements have been a matter of debate.

However, faced with prospects of slower delivery in the multilateral system (with mandated equal say of largest possible number of participating countries) the developed countries are desperate to work out consensus outside the system on issues of their interests mainly to protect market access and technological dominance of their own producers. This has led to newer arrangements in the form of plurilateral agreements (mega regional trade and investment treaties) mainly between developed and co-opted developing country partners. The worry is, not only in terms of irrelevance of the multilateral system with rules on trade primarily being drafted out of its purview but also in terms of the future of the provisions that were meant to safeguard the interest of the weaker members especially the developing and poor countries. Special and differential treatment is one such issue.

The most recent plurilateral agreement the Trans Pacific Partnership (TPP) (significant by its share of world GDP and trade), pending ratification by its members of the text and content, may be analysed to look into the scope of preferential treatment meant for achieving developmental objectives, if at all. There is a strong apprehension that the scope of S&DT gets further reduced in such arrangements and ultimately shrinking the relevance and diminishing the objective that such provisions originally stood for i.e. international development. In this paper, we analyse three facets of the problem. One, why S&DT provisions have been a point of divergence and subsequent contention within the multilateral system? Second, whether new plurilateral agreements incorporate such provisions and on what grounds? And third whether there is direct connection between the developed countries' compensating the developing ones through aid for trade and the latter's participation in the plurilateral arrangements? If this is not the case, then we can safely say that North-South FTAs would only have minimum adherence to the objectives of development and distribution, and would end up promoting unequal gains.

Genesis and Evolution of S&DT in GATT-WTO

The GATT system included special provisions based on the concept of non-reciprocal preferential treatment (commonly known as less than full reciprocity provisions) for developing countries and least developed countries in order to enhance their participation in international trade. The underlying logic was to address underlying inequality and development concerns. Developing countries are at different stages of development in the economic, finance and technology realm and they are behind the developed countries. Hence, in order to catch up they require special

treatment and flexibilities. These provisions, better known as Special and Differential Treatment (S&DT) have been an integral part of multilateral trade rules since the Havana Charter (1947).

Another problem faced by developing countries is the secular decline in the term of trade as analysed in the Prebisch-Singer hypothesis. The price of primary commodities declines relative to the price of manufactured goods over the long term, which causes the terms of trade of primary-product-based economies to deteriorate. This highlights the need for industrialisation and role of external factors in the development process. The role of S&DT provisions could also be seen in this context. The 1958 Haberler report confirmed that export earnings of developing country are insignificant to meet their development needs. The report highlighted trade barriers in developed countries to exports from developing countries as the main cause. By 1963, a committee which was formed in response to Haberler report, advocated removal of all trade barriers on products of interest to developing countries. In 1965, during the Kennedy round, Part IV on Trade and Development was added to GATT. This new part IV covered three new articles XXXVI to XXXVIII which envisaged provision of favourable market access conditions to developing countries notably in primary & manufactured products.[1] However, as Keck and Low(2004) have noted "while designed to promote development and developing country interests in the trading system, Part IV was never more than a set of best endeavour undertakings with no legal force".

The 1979 decision on Differential and More Favourable Treatment (at the close of the Tokyo Round), reciprocity and fuller participation of developing countries, also known as the enabling clause, provided permanent legal cover for the generalised system of preferences, for S&DT provisions under GATT agreements, for certain aspects of regional and global preferential agreements among developing countries, and for special treatment for least developed countries. S&DT in preferential tariff elimination has been recognised in the principle of less than full reciprocity in Part IV of GATT, the enabling clause, for situations that warrant relaxation of the Most Favoured Nation (MFN) principle of GATT Article 1.1.

However, during the Uruguay round, there was a shift in expectations about responsibilities to be expected from developing world due to the high growth rate experienced by some developing countries and realignment in economic thinking with more emphasis on the role of the market, including for development. The Leutwiler Report (1984) argued that S&DT was of limited value and advocated that developing countries should rather take advantage of their comparative strength (see Box 10.1).

Subsequently, Uruguay round negotiations diluted S&DT treatment provisions to best endeavour clauses. Nevertheless, WTO recognised the "need for positive efforts

Box 10.1: Leutwiler Report

One of the major critiques of S&DT came up in form of the Leutwiler Report (GATT 1985), which was commissioned in November 1983 by the then Director-General of the GATT, Arthur Dunkel. In order to meet the 'present crisis in the trading system', the Report recommended 15 specific, immediate actions, one of which addressed the problem of trade and development. This recommendation reads:

'Developing countries receive special treatment in the GATT rules. But such special treatment is of limited value. Far greater emphasis should be placed on permitting and encouraging developing countries to take advantage of their competitive strengths and on integrating them more fully into the trading system, with all the appropriate rights and responsibilities that this entails' (The Leutwiler Report, GATT 1984:44).

Source: World Trade and Development Report, RIS, 2003.

designed to ensure that developing countries and especially among them least developed countries secure a share in the growth in international trade commensurate with the need of their economic development". But, the thrust shifted from enhanced market opportunities for developing countries to transition periods and technical assistance. Both these provisions, however, have been inadequately provided.

S&DT provisions under the WTO with respect to key areas and agreements is summarised in Box 10.2. Lack of proper

Box 10.2: S&DT Provisions in WTO Agreements

Agreement on Agriculture

- The schedules of developed country members exhibit greater than average reductions in tariffs on a range of products, particularly of interest for Developing countries.
- Developing countries have been given flexibility to implement reduction commitments over a period of up to 10 years while LDCs have been exempted from reduction commitments. The least developed countries (LDCs) were also exempted from making commitments to reduce export subsidies and domestic supports.
- Investment subsidies and agricultural input subsidies would be exempted from domestic support reduction commitments.
- There is a provision which allows governmental stock holding programmes for food security.

Technical Barriers to Trade (TBT)

- Article 12.2 suggests that interests of developing countries would be taken into account while implementing Agreement on TBT with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing countries.
- There are provisions for participation of developing countries in international standardising bodies and international systems for conformity assessment, technical assistance to strengthen their abilities for regulating and enforcing technical standards and establishment of institutions and legal framework which would enable developing countries to fulfil their obligations.

Agreement on Sanitary and Phytosanitary (SPS) measures

- S&DT provisions are covered in Article 9 & 10. Both articles recognise special needs of developing and least-developed countries. Provisions in the article include phased introduction of new measures, longer time frame for compliance & technical assistance.

Trade Related Investment Measures (TRIMs)

- TRIMs encompass agreement on flexibility of commitments, of action and use of policy instruments as provided under Article IV. Article 5.2 provides for special transition time period to the LDCs in order to comply with TRIMS. Moreover, there are provisions for extension of transition period (Article 5.3).

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

- The TRIPS Agreement contains provision relating to S&DT which basically intend to provide transitional time period (Article 65.2 and 65.4); technical assistance (Article 67) and provisions relating to LDC Members (Article 66.1 and 66.2).

Understanding on rules and procedure governing the settlement of dispute

- The Understanding on Rules and Procedures Governing the Settlement of Disputes contains 11 provisions pertaining to S&DT. Among others, it includes additional consideration to address special needs of developing countries and encouraging their participation in settling the disputes.

Agreement on subsidies and countervailing Measures

- Agreement recognised that subsidies may play an important role in economic development. There are almost 16 S&DT related provisions in the Agreement on Subsidies and Countervailing Measures.

Source: World Trade and Development Report, RIS, 2003.

mechanism to ensure effective implementation of S&DT provisions in the WTO has been a major area of concern for developing countries. This, as noted in earlier RIS publication (World Trade and Development Report, 2003), "undermines basic objective of S&DT provisions, which is to create a level playing field for unequal players in the Multilateral Trading System". Ahead of the Doha Ministerial, twelve developing countries addressed a joint submission to the General Council in September, 2001 to seek a mandate for negotiation of a framework agreement on S&DT which would make them mandatory and legally binding through the dispute settlement system of WTO. Consequently, the Doha Ministerial Conference recognised the issue and agreed for review of S&DT in order to strengthen it and make it precise , effective and operational (Para 44). However, there has been no progress on this issue despite extension of the deadline two times, first to December 2002 and then to February 2003.

Nonetheless, there have been some development at the Doha development agenda so far. For instance, duty free quota free (DFQF) market access for products of LDCs, to actively consider waiver application by LDCs and allow grace period for implementation of WTO agreements. However, robust legal infrastructure and granting of substantial S&DT is still far from being realised (Yanai, 2013). The Bali Ministerial Conference in December 2013 established a mechanism to review the implementation of S&DT provisions. The mechanism will empower the members to analyse and review all aspects of the implementation of S&DT provisions contained in multilateral WTO agreements, Ministerial and General Council Decisions .The objective is to improve the implementation of reviewed provisions or re-negotiation of reviewed provisions. The importance of S&DT in agrriculture and the case for India is summarised in Box 10.3.

The Ninth WTO Ministerial Conference (MC9) in Bali, Indonesia concluded an agreement on Trade Facilitation which contains new binding rules and disciplines to facilitate the flow of goods across borders. There are special provisions, within the S&DT contours, that allow developing and least developed countries to implement the Agreement at their own pace. Each country will determine, based on category A, B & C classification, when it will implement each of the technical provisions, and, it can identify provisions that it will only be able to implement upon the receipt of technical assistance and support for capacity building.

Scope of Flexibilities under Mega (North-South) RTAs: Case for TPP

The Trans-Pacific Partnership, between the Pacific Rim countries including industrialised and emerging economies, is being regarded as a pluriliateral or mega regional free trade agreement. Parties have confirmed the launch of this partnership in October 2015 and the text of the agreement is pending ratification by the member states. The text of the agreement which was for a long time confined to the negotiators only has been made public. Governments in member states are in the process of coming out with informative summaries of the text to guide and convince their domestic constituency. We refer to the text uploaded by the Government of New Zealand to decode the agreement in terms of its provisions in preferential market access and concessions. A long held view has been in terms of higher standards and deeper integration that such an agreement would promote. We try to look at some of the areas like tariff liberalisation, rules of origin, standards, investment etc. to bring out suggestive lessons on allowances meted out in this new agreement and their implications on developmental and domestic policy space in the member countries. This is important to judge the extent of exchange of mutual preferences and endeavours towards accommodating differential levels of development of member state.

Table 10.1: Trans-Pacific Partnership - National Treatment and Market Access for Goods

TPP Members	Tariff Elimination	Appendices	Maximum Tariff Elimination Time (years) under Certain Categories
Australia	Common		4
Brunei	Common		11
Canada	Bilateral	Tariff Rate Quotas (Appendix A) Appendix between Japan and Canada on Motor Vehicle Trade (Appendix B)	12
Chile	Bilateral		8
Japan	Bilateral	Tariff Rate Quotas (Appendix A) Agricultural Safeguard Measures (Appendix B-1) Forest Good Safeguard Measure (Appendix B-2) Tariff Differentials (Appendix C) Appendix between Japan and the United States on Motor Vehicle Trade (Appendix D) Appendix between Japan and Canada on Motor Vehicle Trade(Appendix E)	21
Malaysia	Common	Tariff Rate Quotas (Appendix A)	16
Mexico	Bilateral	Tariff Rates, Quotas and Tariff Differentials Appendix A, B and C)	16
New Zealand	Common		7
Peru	Common		16
Singapore	Common		
United States	Bilateral	Tariff Rate Quotas (Appendix A) Agricultural Safeguard Measures (Appendix B) Tariff Differentials (Appendix C) Motor Vehicle Trade (Appendix D) Earned Import Allowance Program (Appendix E)	30
Vietnam	Common	Tariff Rate Quotas (Appendix A)	16

Source: RIS database based on TPP Text, Ministry of Foreign Affairs and Trade – New Zealand (http://goo.gl/a7QVSM).

In Table 10.1 we have summarised some salient features of the TPP agreement in terms of its provisions for tariff liberalisation. The tariff elimination schedules vary by country with some maintaining different tariff elimination schedules (product-specific) for other member countries (bilateral). We also tabulate the nature and number of annexes to each country's tariff schedules. The more the number, there are higher chances that domestic interests prevail across sectors. Such annexes define sector specific rules and provisions on tariff elimination and rationale for specific safeguards. Others indicate import restrictions. In this regard, the developed country members like the USA, Japan and Canada account for most annexes. We have also tried to see the length of tariff elimination period that each of these countries have allowed themselves. Of course, tariff elimination is meant to follow certain stage rules where tariff schedules would include provisions of initiating zero tariffs on some

goods as the agreement comes to force and follow such elimination on rest of the goods in stages. We incorporate the maximum that each country gets in terms of elimination of tariffs across most product categories. Interestingly, although the developing country members like Malaysia, Vietnam and Mexico gets long tariff elimination periods, countries like the USA and Japan have retained even greater flexibility in this regard. An analysis of share of products and nature of products against stage of tariff elimination would be necessary to comment on the extent of such flexibilities and whether developed countries continue to enjoy special privileges in plurilateral agreements. However, one general comment would be that average timelines of tariff elimination in TPP goes much beyond the practice under the WTO.

In Table 10.2, we present the indicative nature of bilateral concessions in terms of market access among selected developed country members of the TPP (most of them have bilateral tariff elimination schedules as explained earlier). The 4x5 matrix presented in the form of table (Table 10.2) has countries named on the left most column as well as on the top most row. The first column indicates the countries and the concession they allow to the other partner countries appear in corresponding cells. It is interesting to note the extent of bilateral market access preferences that the developed country members of the TPP have accorded to each other. One of the significant sectors in this regard are automobiles and allied products. Market access in agriculture appears to be equally contentious among developed countries. Although, the TPP agreement calls for phasing out of the export subsidies and duties, and other forms of farm support it maintains a variety of import restriction provisions like quotas and tariff rate quotas in agricultural, livestock and dairy products both in the process and primary categories. In a separate Box 10.4 we enumerate some country specific concessions on categories of products towards import/ export liberalisation.

Beyond tariff liberalisation, market access issues may be looked at from the point of view of rules of origin. Under Chapter 8 on Textile and Apparel, the Annex 4-A on Specific Rules of Origin for Textiles and Apparel Products is supplemented with Appendix 1 to Annex 4-A to include Short Supply List of Products. This means that in case the TPP partner countries do not produce enough of a particular fabric or yarn to meet production needs, then the short supply list allows apparel using these specified materials from outside the TPP region to qualify for TPP's reduced tariff rates. Vietnam is expected to benefit the most from such flexibilities.

Again in motor vehicles, the TPP stipulates that 45 per cent of imported vehicles and core parts should originate in a TPP country; and 40 per cent of other auto parts will have to originate in a TPP country. The methodology to calculate regional value content is given in Article 3.5 of Chapter 3. Under the North American Free Trade Agreement, 62.5 per cent of the value of cars and 60 per cent on auto parts imported from a NAFTA country must be made within the NAFTA region. This implies that TPP offers greater market access in North America for non-NAFTA TPP members.

It is often argued that plurilaterals like the TPP are meant to harmonise technical standards for trade in goods and services. Therefore, we tried to identify if there are instances where such rules may be relaxed to promote welfare through domestic regulations in participating countries. We highlight one such case. In Information and Communications Technology Products (Annex 8-B under TBT), for example, Section B on Electromagnetic Compatibility of Information Technology Equipment (ITE) Products deals with requirements for electromagnetic compatibility of products. While the article stipulates that supplier's declaration of conformation should generally be acceptable and sufficient, it would not apply with respect to any product: (a) that a Party regulates as a medical device, or a medical device system, or a component of a medical

Table 10.2: Nature of Bilateral Concessions in Market Access in Goods

	US	Canada	Japan	Australia	New Zealand
US		Concessions in ROO for petroleum products	TRQ in wheat and related products, dairy sugar, cocoa Quota in Cakes, Wheat	Market access in Sugar	
Canada	Market Access in Agriculture -Dairy and Poultry (allowing in relatively small quantities of duty-free imports, while maintaining a steep tariff wall that protects the supply management regime.) TRQs in dairy products, Sugar		TRQ in wheat and related products, dairy, sugar, cocoa Quota in Wheat Automobiles: Market access (MFN and removal of NTBs) and lower domestic-content rules for vehicles and car parts, overriding rules in NAFTA(Separate Appendix)	Market Access in Agriculture -Dairy and Poultry (allowing in relatively small quantities of duty-free imports, while maintaining a steep tariff wall that protects the supply management regime.)	Market Access in Agriculture -Dairy and Poultry (allowing in relatively small quantities of duty-free imports, while maintaining a steep tariff wall that protects the supply management regime.)
Japan	TRQ for beef, sugar The United States will abolish its tariffs on Japanese cars in the 25th year after TPP takes effect. (Long phasing period) (has secured a protection period of over 30 years for its cars with the tariffs and safeguards) Japan shall not adopt any requirement under the Preferential Handling Procedure (Special Appendix in TPP for motor vehicles trade between US and Japan)	Market access in meat and pork		Market access in rice, sugar, beef dairy, fruit, vegetables, horticulture	
Australia	TRQs in sugar, ice cream, condensed milk, butter, milk powder, cheese, Safeguard measures in dairy products (milk powder)		TRQ in wheat and related products, dairy, sugar, cocoa TRQ for rice Quota in Wheat		

Source: RIS databased based on TPP Text, Ministry of Foreign Affairs and Trade – New Zealand (http://goo.gl/a7QVSM).

Note: ROO: Rules of Origin; TRQ: Tariff Rate Quota ; NAFTA : North American Free Trade Agreement.

Box 10.3: Continuing Relevance of Special and Differential Treatment (S&DT) in Agriculture

Before the Uruguay Round, agriculture essentially remained outside the purview of the GATT[2], which in a way allowed export subsidies on agricultural primary products and most certainly allowed import restrictions under certain conditions. Farm lobby politics in developed countries ensured high levels of domestic support for their agricultural sector, completely distorting agricultural trade. The Uruguay Round of multilateral trade deliberations thus rightly started approaching issues beyond import restrictions to bring down the prevailing scale of distortions in trade in agricultural products, primarily in the form of massive farm subsidies offered by developed countries. The Agreement on Agriculture, intended to set the ground for a fair and market oriented agricultural trading system with reform programmes comprising of specific commitments to reduce farm support, export subsidies and to promote market access within a stipulated time frame.[3]

Subequently, given that agriculture was recognised to be at the heart of the Doha Development Agenda,[4] the Doha Ministerial Declaration flagged off the Doha Round with promises of substantial improvements in agricultural market access and reductions in trade distorting domestic support in agriculture, while paying *equal* attention to developing country concerns:

"We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture for special and differential treatment to be made an integral part of agricultural negotiations and for including non-trade concerns in the negotiating agenda."[5]

For India, agriculture is a major area of concern, as it supports the livelihood of 65-70 percent of India's population of 1.2 billion. Any multilateral negotiation on agricultural market access and farm subsidies is bound to have its implications for Indian agriculture and the vast population dependent on it. In an attempt to protect this vulnerability and to ensure food security, India continued with a protectionist trade policy in agriculture. Agricultural trade was never quite favourably considered, even to the extent of imposing export taxes on certain food crops. Moreover, India continued to pursue its commitment to provide various input subsides to agriculture, concomitant with its policy objectives of food security, rural development, rural employment and crop diversification.[6]

At the previous ministerial meeting of the WTO in Bali in 2013, agreement was reached on a small number of issues under negotiation in the long-running Doha Round of WTO Negotiations. The set of issues, broadly known as the Bali Package after the location of the 9th WTO Ministerial Conference during which the agreement was reached, comprised three main components, one of which related to the use of public procurement for food stockholding which can be used by developing countries in pursuit of food security objectives.[7] The agreement included altering the way trade-distorting support is calculated by recalibrating the external reference price instead of fixing it in 1986–88, using a different method of taking inflation into account, or a "peace clause" shielding any breaches of the agreed limits from legal challenge. Also discussed was redefining "eligible production" — which is one part of the calculation of trade-distorting support to mean the amount actually bought instead of all the produce that could have been sold to the government.[8] However, progress thereafter has been elusive.

India has been a strong votary of S&DT for food security and livelihood and had played prominent leadership role in Bali. India, despite being one of the largest agricultural producers continues to suffer from significant gaps is access to food given the size of the population and faces situations of agricultural distress resulting from both external and internal factors. In the run upto the Nairobi Ministerial, India has already voiced its strong commitment in ensuring early conclusion and ratification of Bali package with regards to public procurement policies towards food security in developing countries.

Source: RIS, compiled from Panagariya (2007), Ismail (2007), Ray and Saha (2009), FAO (2014) and WTO Official Website.

Box 10.4: Relaxations on Import/ Export Liberalisation under TPP (Country-wise)

a) United States on all species of logs, some categories of marine vessels
b) Canada on all species of logs, unprocessed fish, alcohol, small vessels (Relaxations on national treatment distribution services of wine and spirit)
c) Brunei Darussalam on certain categories of goods (nationally determined)
d) Mexico on Hydrocarbons, used automobile parts
e) Peru on clothing and footwear, used vehicles and auto parts
f) Vietnam on import/export restrictions for re-manufactured goods, right hand drive motor vehicles and parts, used clothing and footwear, range of used electronics and household gadgets, used medical equipment, used parts for tractors, used engines, timber

Source: RIS databased based on TPP Text, Ministry of Foreign Affairs and Trade – New Zealand (http://goo.gl/a7QVSM).

device or medical device system; or (b) for which the Party demonstrates that there is a high risk that the product will cause harmful electromagnetic interference with a safety or radio transmission or reception device or system.

It is generally agreed that mega regional agreements are also meant for encouraging foreign investments through greater investor protection. Investment treaties discourage discriminatory domestic policies that favour public sector investments. We explore the flexibilities that TPP offers in this regard. This should give us an idea as to whether public sector investments have a role to play in domestic economies (in which sectors and on what grounds). Subject to certain conditions, TPP appears to allow expropriation or nationalisation of a covered investment either directly or indirectly for a public purpose. Secondly, investment rules accommodate situations of compulsory licensing in accordance with the TRIPS Agreement. Country specific concessions on National Treatment and MFN rule in services are presented in Table 10.3. Likewise, country specific concessions on National Treatment and MFN rule for State Owned Enterprises is given in Table 10.4. The flexibilities listed in these two tables indicate continuing relevance of concessions within trade integration processes. Service sectors across countries still have elements of protectionism apparently on varied grounds ranging from sensitivity of sectors in strategic areas to employment elasticity; development linkages; protection of resources and environment; and, access and equity. At the same time, the public sector continues to play an important role even in the TPP member states in areas like infrastructure. The draft agreement in a sense recognises such realities through the concessions on National Treatment and MFN rule for State Owned Enterprises. Some concessions are directed towards developmental objectives in both developed and developing countries of this coalition.

However, TPP may be prima facie restrictive for services sectors (limiting the scope of public sector participation) and might draw the limits for the public sector in general through stricter MFN rules in procurements and by further reducing the space for national treatment norms. In financial services, TPP stipulates that each party shall accord to investors of another Party treatment no less favourable than that it accords to its own investors, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory. And, that no party shall adopt or maintain a measure that creates conditions of competition that are more favourable to a postal insurance entity with respect to the

Table 10.3: Country Specific Concessions on National Treatment and MFN Rule in Services in TPP

Mexico	Agriculture, Livestock, Forestry, and Lumber Activities , Retail Trade, Communications, Transportation ,Energy etc.
Chile	Communications, Energy, Mining, Fisheries, Fisheries and Fishing - Related Activities, Sports, Hunting, and Recreational Services etc.
Brunei Darussalam	Manufacturing and Services Incidental to Manufacturing, Agriculture and Services Incidental to Agriculture, Fisheries and Services Incidental to Fisheries, Forestry and Services Incidental to Forestry, Construction Services, Environmental Services etc.
Vietnam	Professional Services, Distribution Services, Other Business Services, Telecommunications Services, Audiovisual Service, Educational Services etc.
Peru	Services related to Fishing, Radio and Television Broadcasting Services, Audio-Visual Services, Professional Services
Canada	Business Service Industries, Professional services, Energy, Transportation, Communications
Japan	Agriculture, Forestry and Fisheries and Related Services, Automobile Maintenance Business, Business Services, Collection Agency Services, Construction, Distribution Services, Education, Learning Support, Heat Supply, Information and Communications, Manufacturing, Mining and Services incidental to Mining, Oil Industry, Security Guard Services, Transport, Water Supply and Waterworks, Aerospace Industry
United States	Atomic Energy, Mining, Air Transportation, Land Transportation, Communications – Radio Communications,
Australia	Professional Services, Fishing and services incidental to fishing, Communication Services, Health Services, Transport Services etc.

Source: TPP Text, Ministry of Foreign Affairs and Trade – New Zealand (http://goo.gl/a7QVSM).

supply of insurance services as compared to a private supplier of like insurance services in its market. Countries may not impose limitations on the number of financial institutions whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test. State owned enterprises in their purchase of a good or service shall have to accord equal treatment to eligible agencies from TPP member states.

Trends in Aid for Trade: Implications for North-South Preferential Arrangements

Aid for Trade, along with special and differential treatment, technical assistance and training, and the Enhanced Integrated Framework are integral to the WTO mandate. While many developing countries have successfully used international trade as a vehicle for development, a number of others, mainly the LDCs are still left behind. High trade costs inhibit numerous developing countries & LDCs from fully exploiting the market access opportunities that the multilateral trading system creates. Trade costs include cumbersome and time-consuming border procedure, obsolete or ill-adapted infrastructure, limited access to trade finance, and the complexity and cost of meeting quality standards. The WTO Ministerial Declarations of 1996 and of 1998 expressed concern over this "marginalisation" of LDCs and certain small economies in the international trading system.

Aid for Trade has in some form been part of overall Official Development Assistance (ODA) through grants and concessional loans targeted at trade-related programmes and projects.[9] In February 2006 the WTO established a Task Force, with the aim of "operationalising" Aid for Trade. WTO Task Force defines aid for trade to comprise of technical assistance for trade policy and regulation, economic infrastructure, building productive capacity and trade related adjustments. For our analysis, we consider aid for trade under five sub-categories — trade policy and administrative management, trade facilitation, regional trade agreements, multilateral trade negotiations and trade education/training. Aid for Trade commitments from donors — governments, international and regional development

Table 10.4: Country specific concessions on National Treatment and MFN rule for State Owned Enterprises in TPP

Australia	The Entity may accord more favourable treatment to Indigenous persons and organisations in the purchase of goods and services
Brunei Darussalam	Brunei Darussalam may require an Entity involved in the petroleum industry within the territory of Brunei Darussalam to purchase specific services from Bruneian nationals or enterprises or from certain specified foreign nationals or enterprises.
Chile	Entity may accord preferential treatment to enterprises in the territory of Chile in up to 10 per cent of the total value of its annual purchases of goods and services
Mexico	Mexico or its state enterprises or state-owned enterprises may provide non-commercial assistance to the Entity for the sole purpose of carrying out government-mandated projects with social implications and economic development in the following areas: a) Pipeline transportation and storage of gas; and b) Distribution of gas
Peru	Existing and future state-owned enterprises may accord more favourable treatment to socially or economically disadvantaged minorities and ethnic groups in the purchase of goods and services

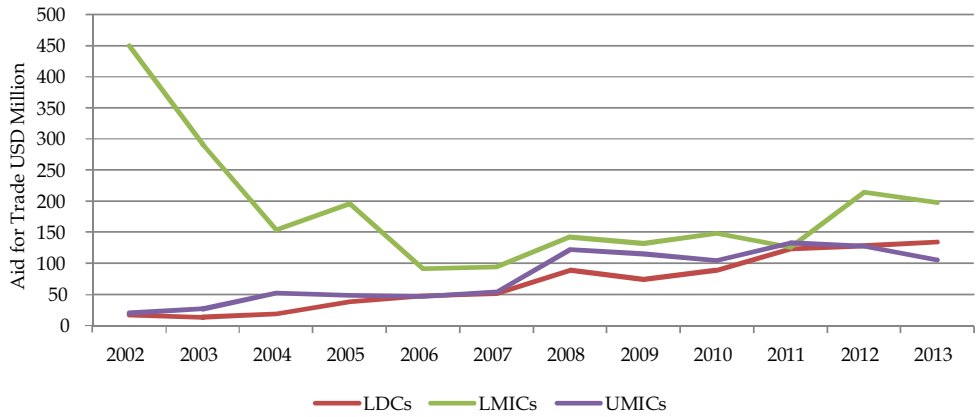
Source: RIS database based on TPP Text, Ministry of Foreign Affairs & Trade – New Zealand (http://goo.gl/a7QVSM).

Table 10. 5: Aid for Trade given by DAC, US$ Million (Constant 2013)

Year	LDCs	LMICs	UMICs
2002	16.38	449.21	20.38
2003	13.27	291.02	26.99
2004	19.08	153.64	52.57
2005	38.18	195.63	48.61
2006	47.61	92.09	47.14
2007	51.62	94	54.36
2008	89.03	142.37	122.14
2009	74.16	132	114.98
2010	89.21	148.7	104.75
2011	123.04	125.89	132.61
2012	128.26	214.5	127.9
2013	134.26	198.06	106.08
CAGR	19.16	-6.6	14.74

Source: RIS database based on OECD, CRS databases accessed on 7 December 2015.

Figure 10.1: Aid for Trade given by DAC, USD Million (Constant 2013)



Source: RIS database based on OECD, CRS.

institutions reached US$ 41.5 billion in 2011, up 57 per cent from 2005.

Currently, there are approx 140 aid-for-trade recipient countries broadly classified into four income groups, Upper Middle Income Countries (UMICs), Lower Middle Income Countries (LMICs), Least Developed Countries (LDCs) and other Lower Income Countries (LICs). In the following Table 10.5 and Figure 10.1 we present the volume of aid for trade to these country groups and how it has changed over time in recent periods. Although the share of the LMICs has been the maximum, this has registered a steady fall in absolute and relative terms with significant fluctuations. The volume of aid for trade to the LDCs has however increased significantly over the period between 2002 and 2013.

Among the TPP member states Chile, Malaysia, Mexico, Peru and Vietnam continue to receive aid for trade. Among these five countries, Vietnam is the only member from LMIC while the other four countries are from the UMIC category. Vietnam also receives the maximum amount of aid for trade among the TPP member countries (Table 10.6).

In Table 10.6, we indicate the volume of aid for trade received by the TPP member countries and compare these numbers with that of two countries from the LDC group which receive large volumes of aid for trade viz. Afghanistan and Tanzania. Among the aid for trade recipient TPP members, Vietnam has been able to increase its share in world exports at a faster rate than the others. The two LDC countries receiving more aid for trade than Vietnam continue to have much lower shares in world exports. Naturally, if countries from the LDC group have to be integrated with the emerging plurilaterals, aid for trade may not be enough. Here lies the relevance of the S&DT provisions. While the developed country members of the TPP might seek to provide assistance for capacity building in the developing partner countries such intentions are not explicit in the text of the agreement.

Conclusion

As the WTO members meet for the 10th Ministerial Conference in the 20th year of its existence, S&DT still holds the key to progress with issues of food security, livelihood and preference to LDCs highlighted as the most critical ones that the developing world would look upto. No doubt, such selection of issues in itself speaks volumes about the eroding relevance of such flexibilities in other sectors. The whole idea of S&DT stood its ground on the question of equity and development. The principle derived its strength from

Table 10.6: Aid for Trade & Share in World Export of Selected TPP Members & LDC, USD Million (Constant 2013)

Year	TPP Members										LDC			
	Chile		Malaysia		Mexico		Peru		Vietnam		Afghanistan		Tanzania	
	Aid for Trade	Share (%)	Aid for Trade	Share (%)	Aid for Trade	Share (%)	Aid for Trade	Share (%)	Aid for Trade	Share (%)	Aid for Trade	Share (%)	Aid for Trade	Share (%)
2002	0.19	0.275	0.08	1.487	0.16	2.541	0.34	0.121	5.29	0.264	0.05		0.27	0.014
2003	0.31	0.293	0.68	1.417	1.15	2.232	1.87	0.122	8.85	0.273			0.46	0.015
2004	0.32	0.369	2.36	1.413	0.47	2.098	1.99	0.142	12.22	0.296	4.57		1.04	0.016
2005	0.27	0.414	0.70	1.397	0.32	2.113	4.83	0.169	15.00	0.320	12.27		4.79	0.016
2006	0.59	0.501	0.54	1.357	0.34	2.111	6.07	0.201	12.52	0.336	13.32		3.16	0.016
2007	0.40	0.508	0.76	1.303	1.23	2.012	2.93	0.208	7.58	0.360	18.37		1.93	0.016
2008	0.75	0.413	0.68	1.272	0.37	1.864	6.60	0.200	8.74	0.401	50.66	0.003	2	0.020
2009	0.56	0.455	0.55	1.291	0.52	1.887	7.82	0.220	8.74	0.469	14.97	0.003	1.5	0.024
2010	0.61	0.477	1.53	1.334	5.5	2.002	11.70	0.240	15.74	0.485	22.99	0.003	10.35	0.027
2011	0.70	0.460	1.17	1.283	1.38	1.974	13.20	0.262	11.05	0.548	32.98	0.002	20.21	0.027
2012	0.74	0.446	1.55	1.301	1.25	2.119	14.98	0.265	11.01	0.655	33.89	0.002	18.78	0.032
2013	0.29	0.424	0.68	1.262	2.40	2.099	7.51	0.235	16.00	0.730	28.57	0.003	20	0.024
CAGR (%)	3.59	3.67	19.52	-1.36	25.32	-1.58	29.42	5.69	9.66	8.85	69.72	-	43.15	4.59

Source: RIS datbase based on OECD, CRS, & WITS COMTARDE online database, accessed on 7 December 2015.

wide recognition that in order to help the developing countries gain from trade despite lower institutional and sectoral preparedness the norm of non reciprocal preferences should hold when large and small countries engage through trade.

While overall gains from free trade may be positive for participating countries, S&DT helps to even out sectoral imbalances in the developing world. Otherwise the margin of benefit falls substantially with irreversible loss in welfare measured in terms of unequal distribution of gains. Moreover, with imperfect competition in global trade as a result of policy induced distortions in the global North in the first place, the South had its own rights and reasons for S&DT. With the Doha Development Agenda mandating developmental priorities such issues were slated to get stronger. But that did not happen for a variety of reasons. One such reason was the perceived dichotomy of growth and development experienced in the emerging world. The developing countries got segmented into the middle income and low income groups. The developed countries sought to redefine the scope of preferences and carved out special provisions for the LDCs. The large emerging economies nevertheless had significant gaps in development and withdrawing special preferences can substantially affect their developmental objectives.

Trends in aid for trade suggest that the top recipients of aid for trade among the LDC group are not yet part of the sophisticated and new age mega regional agreements like the TPP. Vietnam is the only member from the lower middle income category in the TPP. The other developing country members of the TPP are all in the upper middle income category. We have argued why integrating LDC member countries with emerging plurilaterals like TPP may not be achieved only through technical assistance, and capacity building. Given that such countries continue to account for marginal share of world exports, S&DT provisions would be critical. Mega-regional agreements need to devise provisions of special concessions and technical assistance if in case they intend to bring on board the poorer countries.

We conclude, that the new plurilateral agreements like TPP may be based on exchange of preferences primarily to gain from access to market opportunities in member countries. While theories of comparative advantage, intra-industry trade and global value chains might have sector specific relevance, converging specialisation and resource intensity would nevertheless promote protectionist measures. Special flexibilities meant to promote development can take a backseat in the menu of priorities. The idea and mandated provisions of less than full reciprocity has been the main tool of S&DT under preferential tariff liberalisation in GATT-WTO. TPP does not recognise less than full reciprocity under tariff elimination rules. The nature of flexibilities that are allowed in this particular North-South Plurilateral Trade Agreement gives us an impression of bilateral concessions in market access and protection of sensitive products and industries. Preferential rules that minimise adverse effects of free trade on development have been devised to address country specific contexts within developed and developing countries alike. Differential treatment to accommodate divergences in the level of development and preparedness has hardly been the norm.

Therefore, the important question is whether the global community still look at trade through the lens of development. If not, the ones promoting plurilateral agreements may be cautious about the limits of such arrangements. While on the one hand such agreements promote greater world trade among the participating countries (trade creation), the cost of trade diversion on the non-members would prompt them to join such groups. However, without the scope for special and differential treatments and with greater reciprocity, prospects of development can be much delayed. On the other hand, with compelling S&DT issues the North would be less enthusiastic about North-South trade arrangements.

ENDNOTES

1 There are several reasons for this positive development that include birth of UNCTAD, the growing number of newly independent states following decolonisation in Africa, Asia and the Caribbean, the Cold War, and the success of developingg countries in placing their issues centre-stage in the GATT.

2 Panagariya (2005).

3 Panagariya (2005).

4 Ismail (2007).

5 Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, WTO, Geneva. http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

6 Ray and Saha (2009).

7 FAO (2014).

8 WTO Officil Website.

9 Such assistance also came from multilateral agencies. For example the Integrated Framework for Trade Related Technical Assistance (IF) of the World Bank was intended to strengthen the Trade related assistance delivered to LDC through helping them in meeting WTO requirements, Uruguay round commitments and enhancing their capacity to analyse trade policy. However, IF has limited success because of lack of clear priorities, ill-defined governance structure and low level of funding. Nonetheless, the program's most successful example is Cambodia, which has actively embrace the trade agendas, recently achieved entry into the WTO, and attributes some of the success to IF which was well-financed and well-organised. This illustrates the potential for positive impact of IF (Aggarwal and Cutura, 2004).

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The World Trade and Development Report

Research and Information System for Developing Countries (RIS) has been on the forefront for conducting studies on international trade related issues from the perspective of the developing countries. RIS has been bringing out its flagship publication the *World Trade and Development Report* (WTDR), an invaluable policy research resource for policymakers, development economists, civil society organisations and those concerned about development and policy space for the South.

The present *WTDR* is being brought out on the occasion of the Nairobi Ministerial and in the background of mega regionals like TPP, TTIP and others. The Doha Development Round needs to be completed to ensure support for a rule-based multilateral trading order, which is most welfare-enhancing for developing countries. Therefore, the vast majority of developing countries have underlined the need for fulfillment of the commitments made by the developed world for the Doha Round.

The latest *WTDR* argues that multilateralism is under serious challenge from the new approach of some of the countries towards norm setting outside the multilateral fora. These new agreements exclude a lot of countries from norm-setting. Thus, there is an urgent need for inclusive arrangement in global economic governance that allows participation of all countries in the global trade. Increased physical costs of participating in trade invoked by high technical standards, procedural requirements and Non-Tariff Measures would not help the developing countries.

The Report emphasises that in case the Doha Round is abandoned, the biggest losers will be the developing countries. The report also underlines that while flexibility is required, remaining firm on core issues like food security concerns and a special safeguard mechanism in agriculture is needed to help developing countries to cope with surges in imports and a crash in prices. It should also be underlined that TPP's standards are a matter of concern in areas like labour, environment, government procurement and intellectual property rights that imperil public health objectives of the developing countries. The *WTDR* also makes a number of suggestions and relevant policy recommendations for consideration by those who are interested in issues related to global trade and economic development.

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RIS
Research and Information System for Developing Countries

Core IV-B, Fourth Floor, India Habitat Centre
Lodhi Road, New Delhi-110 003, India.
Ph. 91-11-2468 2177-80, Fax: 91-11-2468 2173-74-75
Email: dgoffice@ris.org.in
Website: http://www.ris.org.in