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## The Future of the World Trade Organization

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# The Future of the World Trade Organization

## Abstract

The continued difficulties of the World Trade Organization to achieve further multilateral trade liberalization in the Doha Round negotiations have raised questions about its continued relevance. This paper firstly identifies and assesses the key developments in the Doha Round that have contributed to the present stalemate. Secondly, it presents several options that the organization could consider for defining its future work program, given the new realities of global economic engagement, especially the emergence of global production networks. Most importantly, the paper assesses the possibility of including new disciplines covering areas that can help the growth of these drivers of global economic integration. Such an initiative could include three sets of issue: trade facilitation measures, an equitable investment regime, and effective disciplines for curbing non-tariff barriers.

## Keywords

World Trade Organization, WTO, Doha Round, trade, globalization

## Comments

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**The Future of the World Trade  
Organization**

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Biswajit Dhar

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**Abstract**

The continued difficulties of the World Trade Organization to achieve further multilateral trade liberalization in the Doha Round negotiations have raised questions about its continued relevance. This paper firstly identifies and assesses the key developments in the Doha Round that have contributed to the present stalemate. Secondly, it presents several options that the organization could consider for defining its future work program, given the new realities of global economic engagement, especially the emergence of global production networks. Most importantly, the paper assesses the possibility of including new disciplines covering areas that can help the growth of these drivers of global economic integration. Such an initiative could include three sets of issue: trade facilitation measures, an equitable investment regime, and effective disciplines for curbing non-tariff barriers.

**JEL Classification:** F13, F53

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## 1. INTRODUCTION

The multilateral trading system, long considered to be the first best option for liberalizing global trade, faces the most serious challenge in its six and a half decades of existence. The inability of the World Trade Organization (WTO) to deliver its promise to deepen and widen trade liberalization, an exercise this forum had initiated nearly 12 years ago, has raised questions about its continued relevance. And, yet, the reality remains that the WTO is the only organization that can take a comprehensive view of the increasing complexities of the evolving economic engagements between countries. The challenges the global community faces in this context are twofold. Firstly, there is a need to identify and assess the key developments in the Doha Round that have contributed to the present stalemate. Secondly, it is imperative to identify the options that the organization could consider for defining its future work program, given the new realities of global economic engagement. Since the start of the Doha Round negotiations, the drivers of economic integration have undergone significant changes. The most prominent of these is the emergence of global production networks (GPNs) as the drivers of economic integration between countries. The most compelling evidence in this regard is provided by South East Asia, the most integrated of all the regions. The shift from localized to fragmented production systems requires new approaches that the WTO must take cognizance of.

This paper addresses the two sets of issues indicated above and is divided into three sections. The first section of the paper focuses on the key developments in the Doha Round encompassing some of the more critical negotiating areas. An exercise of this nature is important, in our view, since it helps in analyzing the issues on which agreement has eluded the WTO Members. Thus, if the Doha Round is to be brought to an early conclusion, an objective shared by the major economies, the disagreements between the key players involved in the negotiations must receive focused attention. There is no gain in saying that the global economic recovery, which is on a knife-edge, would need the backing of a resilient multilateral trading system to get onto a more sustainable path.

Among the negotiating areas, agriculture and non-agricultural market access (NAMA) have been consistently in focus. More recently, and particularly since 2008, the discussions in agriculture and NAMA have centred on the Draft Modalities Texts tabled by the respective Chairs of the Negotiating Groups on Agriculture and NAMA in December 2008. Services and intellectual property rights are two issues that are of considerable importance for several developing countries as give rise to several critical concerns. In both these areas, developed countries have traditionally been the *demandeurs*, but in more recent years, and particularly since the beginning of the past decade, developing countries have been quite active in putting their own agendas on the table.

In the second section, we discuss the functioning of the dispute settlement mechanism of the WTO, one of the most prominent elements of the organization. The Dispute Settlement Understanding (DSU) adopted at the end of the Uruguay Round negotiations established rules for the settlement of disputes between WTO Members. The Dispute Settlement Body (DSB) established by the DSU distinguishes the WTO from other multilateral institutions as it provides the organisation with the necessary powers to resolve disputes between Member states. However, despite having included these features, architects of the WTO felt that the dispute settlement rules needed an

early review.<sup>1</sup> The review process was initiated in 1997 through informal consultations conducted by the Chairperson of the DSB.<sup>2</sup> This process was unable to yield results and therefore review of the DSU was included in the mandate of the Doha Round.<sup>3</sup> We shall point out that this review process provided the WTO Members with an opportunity to reflect on the problems they have encountered while using the dispute settlement rules.

In the final section, we dwell on the proposition that a possible way forward for the WTO is to reflect on the manner in which the rules of the organization might accommodate and support the new reality of GPNs, and assess the possibility of including new disciplines covering areas that can help the growth of these drivers of global economic integration. Such an initiative could include three sets of issue—trade facilitation measures, an equitable investment regime, and effective disciplines for curbing non-tariff barriers (NTBs).

## 2. KEY DEVELOPMENTS IN THE DOHA ROUND

The time that has elapsed since the start of these negotiations is testimony to the fact that the Doha Round has been the most vexatious of all the negotiating Rounds the multilateral trading system has witnessed since its establishment in 1948. Hindsight would perhaps suggest that this state of impasse was not entirely unexpected since developing and developed countries had widely differing perceptions on the future agenda of the WTO, which was primarily responsible for the failed Ministerial Conference in Seattle in 1999. The developing countries essentially focused on two sets of issues: one, rebalancing the Uruguay Round Agreements to make them more development-friendly, and two, ensuring that these Agreements were effectively implemented.<sup>4</sup> On the other hand, the developed countries led by the United States (US) and the European Union (EU), were keen to launch a new Round of negotiations and expand the scope of the WTO by introducing issues like labor standards.<sup>5</sup>

The agreement among the WTO Members to launch the Doha Round was a compromise between the positions held by the developing countries and the developed countries. This was reflected in the negotiating mandate that had the following dimensions: (i) comprehensive review of the Uruguay Round Agreements; (ii) review of

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<sup>1</sup> The decision was taken "... to complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement Establishing the World Trade Organization ..." In other words, the review was to have been completed by 1 January 1999. See, GATT (1994).

<sup>2</sup> Informal consultations were held by the Chairman of the DSB in 1997, signalling the commencement of DSU review. For details, see WTO (1998).

<sup>3</sup> WTO (2001a), paragraph 30.

<sup>4</sup> According to Robert Wolfe, "implementation" in WTO jargon means both that developing countries find it too hard to meet their Uruguay Round commitments quickly, despite the Special and Differential treatment provisions; and that developed countries have been too slow in meeting their obligations to developing countries." See, Wolfe (2004). The preamble to the Doha Ministerial Decision on "Implementation-Related Issues and Concerns," states that the Decision was adopted as a "concrete action to address issues and concerns that have been raised by many developing-country Members regarding the implementation of some WTO Agreements and Decisions, including the difficulties and resource constraints that have been encountered in the implementation of obligations in various areas." (WTO 2001b).

<sup>5</sup> WTO (2002a) and House of Representatives (1999).



implementation of the Uruguay Round Agreements<sup>6</sup>; and (iii) expansion of the negotiating mandate of the WTO. The review of the existing agreements had, in turn, two components: one, deepening the level of commitments of WTO Members to the unshackling of their domestic markets, and, two, rebalancing the agreements keeping in view the needs of the developing countries.

A fourth crucial outcome of the Doha Ministerial Conference was the Declaration on the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and Public Health.<sup>7</sup> This Declaration was a response to the submissions made by the developing countries that provided evidence to show that the implementation of the Agreement on TRIPS was adversely affecting access to medicines. The Declaration introduced several flexibilities that could be used by WTO Members to address the problem of access to medicines.<sup>8</sup>

For the best part of the Doha Round, the focus of the negotiations has been on three sectoral issues—agriculture, NAMA, and services. The impetus to focus on these areas was market access ambitions across groups of countries. Thus, while developed countries have been seeking enhanced access to the markets of their developing country partners in both agriculture and NAMA, some developing countries, like India, have long maintained that they have a substantial interest in services trade liberalization.

## 2.1 Doha Negotiations on Agriculture: Rebalancing the Agreement on Agriculture

Agriculture negotiations in the Doha Round are being guided by two sets of mandates. The first set of mandates provided in Article 20 of the WTO Agreement on Agriculture (AoA) has three clear guidelines. First, Members are expected to take into account their experience of implementing the reduction commitments (made at the end of the Uruguay Round), which spanned the three “pillars” of the AoA. Second, Members are to consider the effects of the reduction commitments on world trade in agriculture. Finally, Members are expected to take note of “non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market oriented agricultural trading system.” The above-mentioned mandate was reinforced by the Doha Ministerial Declaration, wherein it was agreed that the negotiations should be aimed at: (i) substantial improvements in market access; (ii) reductions of, with a view to phasing out, all forms of export subsidies; and (iii) substantial reductions in trade-distorting domestic support.<sup>9</sup> It was further stipulated that special and differential treatment for developing countries would be an integral part of all elements of the negotiations and would 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.

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<sup>6</sup> As mandated by the “Decision on Implementation-Related Issues and Concerns”. See, WTO (2001b).

<sup>7</sup> WTO (2001c).

<sup>8</sup> The Ministers agreed that the “TRIPS Agreement does not and should not prevent Members from taking measures to protect public health”. They added 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”, WTO (2001c), paragraph 4.

<sup>9</sup> WTO (2001a), paragraph 13.

Although the mandate for the review of the AoA seems quite comprehensive, there are two sets of lacunae that ought to be pointed out. Firstly, the review of the subsidies discipline spoke of "substantial reductions in trade-distorting domestic support."<sup>10</sup> This meant that the negotiations were to focus on only two forms of agricultural subsidies that were deemed to be "trade distorting"—price support and input subsidies. All other forms of domestic support, which the AoA had labelled as "Green Box" payments were excluded from the purview of the negotiations. Thus, the Doha mandate legitimized the false distinction that the AoA had made between agricultural subsidies by categorizing them as "trade distorting" or otherwise, even when the latter category included several forms of subsidies, which created distortions in agricultural markets.<sup>11</sup> The impact of this categorization of subsidies introduced by the AoA was that the large providers of agricultural subsidies in the developed countries shifted their subsidies onto the "Green Box,"<sup>12</sup> thereby insulating their domestic support policies from the subsidies disciplines.

The second lacuna in the mandate relates to market access, which does not take on board the problem of the growing incidence of NTBs in agricultural trade<sup>13</sup>. This lacuna is particularly galling in light of the fact that the Doha mandate provides that negotiations on market access for non-agricultural products would include NTBs. How critical this omission can be from the point of view of reforming agricultural markets would be indicated in a later section.

### 2.1.1 Role of developing country coalitions in the agriculture negotiations

One of the features of the negotiations on agriculture has been the strong coalition building between the developing countries. Faced with a situation where the two dominant players in the global agricultural markets, namely the US and the EU, were reluctant to reform their domestic policies, especially their subsidies regime, to their farm sector, major developing countries led by Brazil and India formed the Group of Twenty (G–20) coalition<sup>14</sup> that played a determining role in the negotiating dynamics. The base paper, which marked the emergence of the G–20<sup>15</sup>, emphasized the point that the negotiations in the Doha Round should establish a fair and market-oriented trading system through fundamental reform in agriculture. The interventions made by this group have had two substantive dimensions. One, domestic support, including capping and/or reducing "Green Box" agricultural subsidies granted by some of the more prominent Members of the WTO, has to be substantially reduced and eventually removed, and, two, special and differential treatment for developing countries should be an integral part of the negotiations, and that non-trade concerns should be taken into account.

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<sup>10</sup> WTO (2001a), paragraph 13.

<sup>11</sup> Principal among these is direct income support to agricultural producers. This handout from the government enabled the producers to drive a wedge between the costs and prices, thus enabling them to sell their products below economic costs.

<sup>12</sup> The changed character of US subsidies' regime is the best illustration of the phenomenon of "box-shifting". The notifications submitted by the US to the WTO show that in 1995, "Green Box" subsidies accounted for 46% of its total domestic support; in 2010, the corresponding figure was 93%.

<sup>13</sup> The rise in non-tariff barriers can be gauged from the fact that while in 1995, the WTO Members had issued less than 200 notifications on sanitary and phytosanitary measures, in 2013, this figure had exceeded 1200.

<sup>14</sup> Current Membership of G–20: Argentina, Bolivia, Brazil, Chile, the People's Republic of China, Cuba, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela, Zimbabwe.

<sup>15</sup> WTO (2003a).

The latter element, in the view of the G–20, was to be addressed in the revised AoA through two mechanisms. First, products that are critical for realizing the objectives of food security, rural livelihoods, and rural development, the so-called Special Products, would not be subjected to any tariff cuts. Secondly, introduction of a Special Safeguard Mechanism (SSM) aimed at allowing developing countries to counter anticipated or actual import surges. The developing countries saw the Special Products and the SSM as measures that would help them in addressing the twin problems of food security and livelihood concerns in the face of mounting pressures to lower agricultural tariffs.

Support for Special Products and SSM was lent by another group of developing countries, the Group of Thirty Three (G–33),<sup>16</sup> which has focused solely on the need to include these two mechanisms in the AoA.<sup>17</sup> The G–33 argued that developing countries must have the right to designate as Special Products “at least 20% of its agricultural tariff lines” guided by an “illustrative, non-exhaustive, non-prescriptive, and non-cumulative list of indicators.”<sup>18</sup> The treatment of the Special Products was spelled out as follows: (i) at least 50% of the tariff lines designated as Special Products by any developing country Member would not be subject to any tariff reduction commitment; (ii) 25% of the tariff lines designated as Special Products would be subjected to a 5% reduction on bound import tariff rates; and (iii) the remaining tariff lines would be subjected to reduction on bound import tariff rates of no more than 10%. As regards SSM, G–33 argued that additional duty for guarding against actual or potential surges in imports could be imposed in respect of any agricultural product.<sup>19</sup>

The proposals of the G–20 aimed at reforming the structure of disciplines in the AoA stand to reason on account of the fact that the tariff reductions of the kind that the US and the EU have been demanding are possible only after distortions caused by the subsidies are substantially reduced in the markets for agricultural commodities. The large doses of subsidies provided by the US and the EU in particular, gave rise to uncertainties in the markets, as international prices have become more volatile as a result. At the same time, the G–20/G–33 proposals for inclusion of concrete mechanism such as lower tariff cuts, Special Products, and SSM had to be provided for in the revised AoA, so that some of the key concerns of the developing countries, in particular those related to food security and livelihoods, are addressed effectively.

The two coalitions of developing countries mentioned above have had a substantial impact on the negotiating dynamics. Their key proposals, particularly in respect of the Special Products and SSM, have become an integral part of the negotiations, although there is considerable disagreement among WTO Members as to how the SSM is to be designed.

Agriculture negotiations have made very slow progress given the wide range of differences between the major protagonists. However, the successive Chairs of the Committee on Agriculture have tried to steer the negotiations so as to broker a deal. The latest in this process was the draft modalities that were tabled by then Chairman of

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<sup>16</sup> Current Membership of G–33: Antigua & Barbuda, Barbados, Belize, Benin, Bolivia, Botswana, the People's Republic of China, Congo, Côte d'Ivoire, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, the Republic of Korea, Madagascar, Mauritius, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad & Tobago, Turkey, Uganda, Venezuela, Zambia, and Zimbabwe.

<sup>17</sup> WTO (2003b).

<sup>18</sup> WTO (2006).

<sup>19</sup> WTO (2005a).

the Committee on Agriculture, Crawford Falconer in July 2008. A revised version of these modalities is currently being considered by the WTO Members for sealing a deal on agriculture.<sup>20</sup>

### 2.1.2 Key Elements of the Falconer Modalities

The Falconer modalities provide a comprehensive framework for revising the AoA. However, the modalities seem to be falling short of realizing the overall objectives of the agriculture negotiations, as set out in the negotiating mandate in the Doha Ministerial Conference, as we shall indicate below.

In case of domestic support, a tiered approach to reducing the levels of support was adopted, aimed at targeting countries granting higher levels of “trade distorting subsidies.” Accordingly, the reduction in domestic support was proposed at several levels. First, reduction in “overall trade distorting domestic support” was proposed. The term “overall trade distorting domestic support” or OTDS was used to expand the ambit of “trade distorting support” so as to include a production limiting form of domestic support or so-called “Blue Box” support.<sup>21</sup> Secondly, it was proposed that trade distorting support or “Amber Box” support would be reduced substantially, using a tiered approach. This approach would ensure that countries providing higher levels of subsidies would make greater reductions. Thirdly, product-specific support was proposed to be capped at their respective average levels.

The proposed discipline on export competition includes elimination of export subsidies and export credits (with repayment periods beyond 180 days) by an end date to be decided during the negotiations. Operationally effective disciplines on food aid are also proposed to be established at the end of the negotiations.

Two sets of views can be expressed in response to the disciplines on farm support proposed in the framework text. The first is that the proposed discipline on domestic support and export competition would be able to reduce subsidies to a considerable extent on two counts. One, the proposed discipline on domestic support not only seeks substantial reduction in the Aggregate Measurement of Support (AMS), but also extends the discipline to cover the “Blue Box” measures that were hitherto left outside the AoA discipline. Two, there has been an agreement on the need to eliminate export subsidies and some forms of export credit, which is a major step forward given that the EU has been refusing to do so thus far.

The second, which is the critical view on the proposed disciplines on farm support, is that the framework would not be effective in reining in the subsidies. The lack of discipline in respect of the “Green Box” measures, which contains several elements that can distort markets, would render the proposed domestic support discipline largely ineffective. We had indicated above that the “Green Box” measures account for nearly 90% of US domestic support spending, while in case of the EU the corresponding figure was nearly 50%. Again, the agreement to eliminate export subsidies is a small consolation given that the EU, the largest user of this form of subsidies, made minimal use of them.

In the area of market access, Falconer has proposed that developed countries would have to reduce their bound tariffs in equal annual installments over five years with an overall minimum average cut of 54%, while developing countries would have to reduce their bound tariffs by 36% over a ten-year period.

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<sup>20</sup> WTO (2008a).

<sup>21</sup> WTO (2008a), page 4.

Both developed and developing Members would have the flexibility to designate an appropriate number of tariff lines as Sensitive Products, on which they would undertake lower tariff cuts. However, for these products, there has to be “substantial improvement” in market access, and so the smaller cuts would have to be compensated by tariff quotas for improving market access prospects. Developed countries would therefore have an opportunity to protect their commercially sensitive tariff lines.

According to the Falconer proposals, developing countries would be able to “self designate” 12% of agricultural tariff lines as Special Products guided by indicators based on the criteria of food security, livelihood security, and rural development. The proposed average tariff cut on Special Products is 11%, including 5% of total tariff lines at zero cuts. This proposal falls short of the expectations of the major developing country groupings like the G–33, which had insisted that they should be able to “self designate” a minimum of 20% of tariff lines as Special Products, with at least half of these being subjected to zero tariff cuts.

As regards the SSM, Falconer has proposed that either an import quantity trigger or a price trigger would trigger safeguard duties. The trigger for invoking the SSM determines when the safeguard duty can be imposed. It may be pointed out that if the import quantity trigger is set too high, the SSM would be rendered ineffective since the mechanism can be used only in the most exceptional circumstances. The same would hold true if the price trigger is set at too low a threshold.

Discussions on the design of an SSM have focused on three issues: (i) the trigger, i.e., when the mechanism would be applicable; (ii) the size of the remedy, i.e., the magnitude of safeguard duties to be allowed; and (iii) duration of the remedy and whether safeguard duties could be applied in consecutive years.

Discussions on SSM have been deeply divided largely because exporting countries have argued for very high initial triggers. For instance, one proposal was that the initial trigger should be fixed at 40%, in other words, imports have to be at least 140% of the imports in the previous period before safeguard duties can be imposed. The G–33 (and India) has argued that this was far too high a trigger, effectively denying them recourse to the SSM.

### **2.1.3 Recent State of Play**

In the run-up to the Bali Ministerial, both G–33 and G–20 have identified areas in which they are looking for changes in the AoA. The former grouping has pushed for early agreement to address food security issues, while the latter is seeking clear directions for introducing new disciplines in the export competition pillar of the AoA, which includes the issues of export subsidies, export credits, and international food aid.

#### **G-33 Proposal on Food Security**

Towards the end of 2012, G–33 tabled a proposal for the inclusion of specific elements in the Draft Modalities, which could address the problem of food insecurity<sup>22</sup> through three amendments in the “Green Box” (Annex 2 of AoA). These proposals are not new, having been included in the Draft Modalities of 2008. By tabling the proposals now, G–33 is aiming at an early decision at the Bali Ministerial.

The first of the proposed amendments are aimed at allowing developing countries to make payments on specific activities to promote rural development and poverty alleviation without being subjected to any disciplines introduced by the AoA. The

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<sup>22</sup> WTO (2012a).

proposal is to amend paragraph 2 of Annex 2 of AoA by including payments by developing countries for farmer settlement, land reforms, rural development, and rural livelihood security, such as provision of infrastructural services, land rehabilitation, soil conservation and resource management, drought management and flood control, rural employment programmes, nutritional food security, issuance of property titles, and settlement programmes.

Secondly, G–33 proposed that the existing provisions relating to public stockholding for food security purposes should be amended to allow developing countries to spend on acquisition of stocks of foodstuffs for supporting low-income or resource-poor producers and the cost of so doing will not be accounted for in their subsidies' bills. Two textual amendments that these countries have proposed would therefore allow developing countries to implement food security programmes "with the objective of fighting hunger and rural poverty" by procuring foodstuffs from the poorer farmers without being subjected to the AoA disciplines.

#### G–20 Proposal on Export Competition

One of the major decisions taken in the 6<sup>th</sup> Ministerial Conference held in Hong Kong, China in 2006 was that there would be "parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect ... by the end of 2013."<sup>23</sup> However, even as recently as in 2010–11, the EU and its Member states, which have been the largest user of export subsidies, had continued to use such subsidies.<sup>24</sup>

In view of the non-implementation of the commitment made by Members, the G–20 has proposed that a Ministerial Decision be adopted on Export Competition, which would include both export subsidies and export credits.<sup>25</sup>

According to this proposal, by the end of 2013, developed country Members shall reduce their export subsidy commitments both in terms of outlay and quantity commitments as follows: (i) budgetary outlays shall be reduced by 50%, and (ii) export quantity commitments shall be reduced to the actual average of quantity levels in the 2003–05 base period.

As regards export credit, G–20 has proposed that the maximum repayment term for developed countries shall not be more than 540 days from the "starting point of credit"<sup>26</sup> and end on the contractual date of the final payment.

The proposed Ministerial Declaration includes "special and differential treatment" (S&DT) for developing countries. In case of export subsidies, developing countries would continue to benefit from the provisions of Article 9.4 of AoA<sup>27</sup> for five years after the end of all forms of export subsidies. Furthermore, the limit for repayments of export

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<sup>23</sup> WTO (2005).

<sup>24</sup> The outlay on export subsidies was about €177 million, while the quantity of subsidized products was nearly 2 million tonnes. As compared to 2009–11, there was a halving of its outlay on export subsidies, but quantity of subsidised exports had declined by a modest amount: from 2.5 million tonnes to 2 million tonnes. For details, see WTO (2013a) and WTO (2012b), Table ES.1.

<sup>25</sup> WTO (2013b).

<sup>26</sup> The "starting point of a credit" shall be no later than the weighted mean date or actual date of the arrival of the goods in the recipient country for a contract under which shipments are made in any consecutive six-month period.

<sup>27</sup> These include provisions for subsidies to reduce the costs of marketing exports of agricultural products and internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

credit proposed for developed countries will be applicable to the developing countries three years after the former begin implementing it.

## 2.2 Non-Agricultural Market Access

The negotiations in the area of NAMA are being conducted with the mandate to “reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as NTBs, in particular on products of export interest to developing countries.”<sup>28</sup> Furthermore, WTO Members had agreed that the negotiations would “take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments ...”

Although the NAMA mandate gave direction to the WTO Membership to rein in NTBs, the focus of the negotiations in this area has been on reducing tariffs. In the initial phase of the negotiations, India, along with several other developing countries, favored only a moderate reduction in non-agricultural tariffs, which was more in keeping with the Uruguay Round approach.<sup>29</sup> In contrast, the US, the EU, and Canada set very high goals for tariff reduction across all countries, with the exception of the least developed countries (LDCs).<sup>30</sup> The approach of these countries (also called the “tariff harmonization” approach) was to ensure that tariffs on non-agricultural products are brought below a particular threshold (better known as the “coefficient”) using the “Swiss Formula.” In addition, they had argued for reducing the flexibilities available for developing countries.

The US–EU–Canada paper was significant because it changed the dynamics of the NAMA negotiations. The developing countries, which were opposed to tariff harmonization, accepted this approach after they were allowed to keep some sensitive tariffs lines unbound. In other words, developing countries agreed to deep cuts in non-agricultural tariffs across-the-board, except for sensitive products, on which relatively high tariffs could be imposed.

One important issue the NAMA negotiations have been dealing with is the use of NTBs. Most developed countries, but also some advanced developing countries, have been increasingly relying on NTBs, often as a border protection measure. An indication of the increase in NTBs can be obtained from the manner in which technical barriers to trade (TBT) have increased. In 1995, the year in which WTO was established, less than 400 notifications were issued, but by 2012 this number had increased to more than 2,100. This trend seems to suggest that WTO Member countries have increased their reliance on NTBs during a phase when tariff protection levels have been falling.

In 2008, the Chairman of NAMA, Luzius Wasescha, made a series of proposals for the lowering of tariffs on non-agricultural products.<sup>31</sup> Three coefficients—20, 22, and 25—were offered to developing countries, and the coefficient 8 was offered to developed countries. Importantly, for developing countries, a link between tariff reductions and flexibilities to keep tariff lines unbound was established.

The implications of the tariff cuts proposed by the NAMA Chairman on India and Brazil are provided in Table 1. The table shows that if the lowest coefficient were adopted, the

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<sup>28</sup> WTO (2001a), paragraph 16.

<sup>29</sup> WTO (2003c).

<sup>30</sup> WTO (2003d).

<sup>31</sup> WTO (2008b).

overall decrease in the bound tariffs of both countries would be relatively steep. In the case of India, the reduction of bound duties by 65% would bring average bound tariffs to 12% from about 34% at present. It may be argued that India can absorb this level of reduction given that the average of India's applied tariffs is currently around 11%.

**Table 1: Reductions in Average Bound Duties Resulting from NAMA Chair's Proposals**

Range of Coefficients	India	Brazil
Coeff= 20	64.9	60.8
Coeff= 22	60.4	58.6
Coeff= 25	57.3	55.5

Source: Author's calculations. (figures in %)

One issue that could introduce a significant element of uncertainty in the NAMA negotiations is that of sectoral zero-for-zero. This issue was included in the negotiating process through the so-called "July Framework" that helped to put the Doha Round on track in 2004 after the failed Ministerial Conference in Cancun.<sup>32</sup> Essentially, the sectoral initiative has involved WTO Members identifying sectors in which they are pushing for elimination of tariffs by a certain date. In December 2008, WTO Members listed 14 sectors for inclusion in the sectoral initiative (Annex Table).

Proponents of the sectoral zero-for-zero have justified the initiative on the grounds that it would help realize the NAMA negotiating mandate that emphasizes the need to "reduce or as appropriate eliminate tariffs." However, several developing country Members have opposed the initiative arguing that they would end up taking more commitments for tariff cuts than their developed country partners. Their opposition would seem justified, as the Doha mandate stipulates that the commitments of developed country Members should be greater than those of their developing country partners.

## 2.3 Services

Trade in services was brought under the purview of multilateral trade negotiations during the Uruguay Round which established a kind of framework agreement, called the General Agreement on Trade in Services (GATS), covering the entire gamut of services trade. But the achievement of the Uruguay Round in terms of the actual liberalization of services trade was rather modest.

Nevertheless, GATS provides a "built-in agenda" requiring the Members to enter into successive rounds of negotiations aimed at progressive liberalization, with the first such round to begin no later than five years after the entry into force of the WTO agreement (i.e., 1 January 1995). Accordingly, GATS negotiations were re-launched in January 2000 and this new round of negotiations came to be known as the GATS 2000 negotiations. The "Guidelines" for this negotiation had two mandates: (i) market access and (ii) rule-making. The GATS 2000 negotiations were subsequently subsumed under the Doha Development Agenda in November 2001.<sup>33</sup> Since then the GATS 2000 negotiations have been proceeding as part of the Doha Round.

### 2.3.1 GATS Negotiations on Market Access

In March 2001, the WTO Members adopted the modalities for the services negotiations, referred to as the "Negotiating Guidelines and Procedures." The

<sup>32</sup> WTO (2004), page B-2.

<sup>33</sup> WTO (2001a), paragraph 15.



Guidelines stipulated the “request-offer” approach as the main method of negotiating new “specific commitments.” Importantly, the Guidelines also recognised the need to provide an appropriate degree of flexibility to developing countries.

Initially negotiations adopted the bilateral request-offer approach. Under this approach, one country requests other countries to undertake commitments in particular sectors and modes of commercial interest. Revised requests and subsequent offers by all Members continue to be submitted until the commitments entered into can be adopted as final schedules. In other word, the bilateral request-offer approach involves a process of repeated reiteration—offer, negotiation, revision, resubmission, etc. The Doha Declaration also set out two important timelines for the negotiations: submission of initial requests by the Members by 30 June 2002, and “initial offers” by 31 March 2003. Subsequently, the July 2004 Framework Agreement<sup>34</sup> set May 2005 as the deadline for the submission of the “revised offers,” while urging the Members to submit the outstanding “initial offers” as soon as possible.

Due to various reasons, some technical and some political, the bilateral approach failed to generate sufficient momentum as less than half of the WTO membership came forth with their offers for liberalizing their services sectors. Against this backdrop, the Hong Kong Ministerial Declaration of December 2005 mandated the adoption of a plurilateral “request-offer” approach as a complementary method of negotiations with the aim of expediting the market access negotiations on services.<sup>35</sup> The Declaration called for plurilateral requests to be submitted by 28 February 2006. Accordingly, around twenty plurilateral groups had been formed in 2006, with the involvement of only around 35 countries out of the then 149 Member countries of the WTO. This clearly reflects the fact that only the major players in services trade have come forward to participate in the plurilateral negotiations on services. As per the Ministerial Declaration, a recipient country of a plurilateral request is obliged to accept the request; it is only obliged to “consider” that request while submitting a new round of “revised offers.” However, the offer emanating from a plurilateral request is to be granted on an MFN basis to all WTO Members, not only to the *demandeurs* of that particular request.

### 2.3.2 GATS Negotiations on Rule Making

At the end of the Uruguay Round, the set of rules comprising the GATS Agreement remained incomplete with regard to certain important aspects, such as Emergency Safeguard Measures, Government Procurement, Subsidies, and Domestic Regulation. The future shape of the GATS will be determined by these rules to a great extent. Rules also assume significance in determining the effectiveness of the market access commitments undertaken by a Member country. A Member’s choice of domestic reforms is also likely to be influenced by rules. The negotiations on rules, however, have progressed quite slowly so far. This is due in part to the divergent views of the Members in different areas of rules and in part to technical and conceptual difficulties involved in each aspect of rules.

Disciplining Domestic Regulation comprises one of the most critical areas of the rules negotiations under the GATS. The GATS explicitly recognizes the right of Members to regulate and introduce new regulations on the supply of services within their territories in order to meet their national policy objectives. Article VI: 4 of the GATS mandates the Members to develop disciplines aimed at ensuring that domestic regulatory measures do not constitute unnecessary barriers to trade in services. This mandate covers the following issues: (i) Qualification Requirements and Procedures (QRP); (ii) Licensing

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<sup>34</sup> WTO (2004), page C-1.

<sup>35</sup> WTO (2005), page C-3.

Requirements and Procedures (LRP); and (iii) Technical Standards (TS). Given the relatively advanced level of discussions on this issue, the Hong Kong Ministerial Declaration instructed the Members to finalize the disciplines on Domestic Regulation before the end of the 0044oha Round and as part of the single undertaking.

Disciplining Domestic Regulation can go a long way in complementing market access particularly in the areas of interest to developing countries (including India). Challenges for enhancing market access in the developed countries under both Cross-border services trade (Mode 1) and Movement of Natural Persons (Mode 4) lie in the range of state-imposed regulatory barriers, including burdensome visa formalities, registration and licensing requirements, fee structure, stringent quotas and qualification requirements, discriminatory taxes, levies, and standards faced by service providers from developing countries. However, a counter concern of many Member countries, including in particular developing countries, relates to the issue of regulatory autonomy. It is widely apprehended that disciplines on Domestic Regulation under the GATS may encroach upon the sovereignty of Member countries by requiring trade considerations to supersede legitimate domestic policy objectives. Against this backdrop, all submissions stress the need to strike a balance between respecting a Member's right to regulate, and curbing regulatory measures that could potentially undermine market access.

Prior to the start of the Doha negotiations, WTO Members had agreed to Domestic Regulation in the accounting sector.<sup>36</sup> Subsequently, Members agreed to establish "horizontal" disciplines, which are not sector-specific and are applicable to all measures affecting trade in services. As in the case of market access negotiations, negotiations on Domestic Regulation remained mired in differences between the major protagonists despite the fact that several Members had underlined the importance of a satisfactory outcome on Domestic Regulation as a means of ensuring the effectiveness of scheduled commitments.<sup>37</sup> At the same time, however, Members also observed that progress on Domestic Regulation disciplines had to be balanced with advances on the market access side of the services negotiations, and more broadly with progress in other areas of the Doha negotiations.

### **3. FUNCTIONING OF THE DISPUTE SETTLEMENT MECHANISM AND ITS REFORM AGENDA**

One of the major achievements of the Uruguay Round negotiations was the adoption of the Dispute Settlement Understanding (DSU), which provided rules for the settlement of disputes between WTO Members. The rules provided by the DSU were distinct improvements over those that existed under the GATT. Among the new rules was the so-called "reverse consensus" voting rule at key milestones in the dispute settlement process, legal review of panel reports by a permanent Appellate Body, establishment of deadlines for various phases of the dispute settlement process, and improved multilateral oversight of compliance. The general rules of the DSU apply to all the covered agreements.

The introduction of the "reverse consensus" rule addresses one of the major weaknesses of the GATT dispute resolution system. In keeping with practice, reports of the dispute settlement panels were adopted by consensus. This practice effectively

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<sup>36</sup> WTO (1998).

<sup>37</sup> WTO (2011), paragraph 76.

meant that the GATT panel reports could never be adopted. The “reverse consensus” rule, included in the dispute settlement understanding, provides that unless it decides by consensus not to do so, the dispute settlement body will (i) consider requests to establish panels, (ii) adopt panel and Appellate Body reports, and (iii) if requested by the prevailing Member in a dispute, authorize the Member to impose a retaliatory measure in case the defendant has not complied with the rulings of the panels and appellate body.

The speed of the whole process is controlled by the principal disputing governments, the complainant, and the respondent, with the complainant in the driving seat, and takes about 15 months from filing the complaint to the final ruling.

The setting of time lines for the settlement of disputes was another significant feature of the WTO DSU. According to Article 15 of the DSU, the duration from the filing of a complaint to the Appellate Body stage should be about 14 months, with the panel stage taking up more than three-fourths of this period. In practice, however, the time taken by the panels is substantially longer. The details will be discussed in the following section.

**Table 2: Main Stages in the Dispute Settlement System  
(with respective time periods)**

Stage	Description	Timeline
Stage 1	Bilateral consultations between the complainant and the respondent	2 months
Stage 2	Legal examination: a panel of three legal experts approved by the disputing governments	6–9 months
Stage 3	An appellate stage	2–3 months
Stage 4	Implementation of the rulings	subject to negotiation between the parties

Source: Author’s calculations based on WTO (2010).

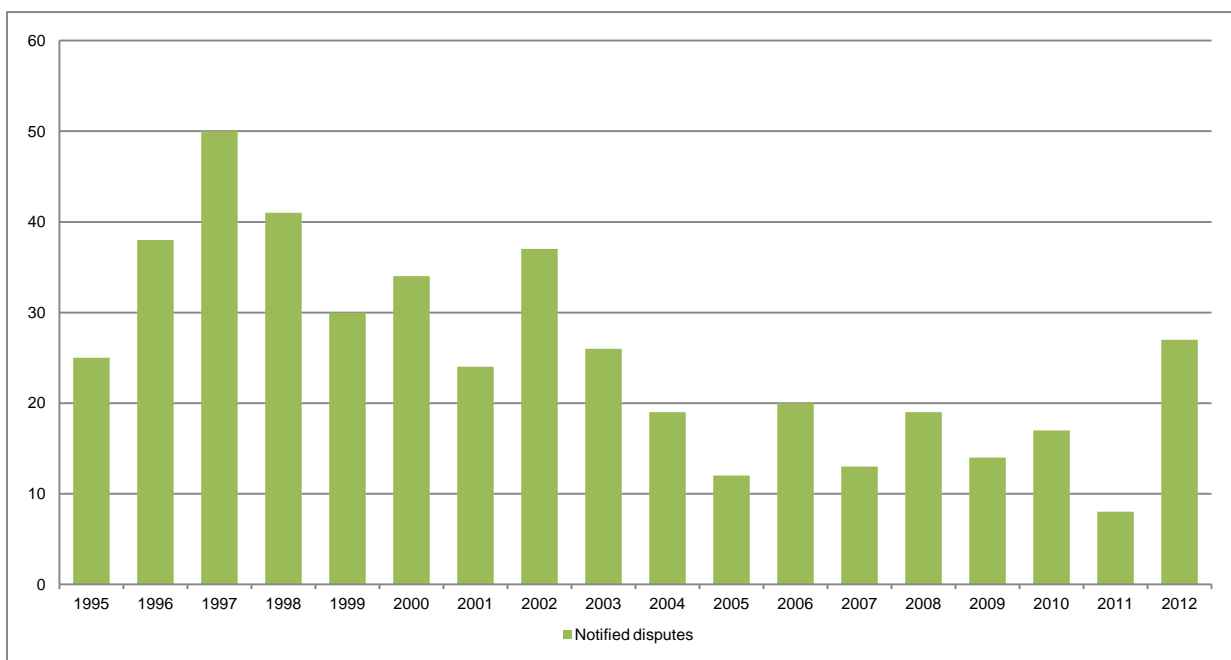
### 3.1 Implementation of the DSU: An appraisal

The use of the WTO dispute settlement mechanism would provide an indication as to its usefulness for the membership, particularly the developing and the least developed countries. The following discussion will provide the details of the use that the WTO membership has made of the dispute settlement rules.

Until February 2013, 456 disputes had been referred to the DSB.<sup>38</sup> These disputes had been notified by 485 complainants, meaning there were several disputes involving multiple complainants. The trend of notification of disputes shows that after the initial enthusiasm, which saw 50 notifications recorded in 1997, there was a secular decline until 2011. In fact, of the total disputes between 1995 and 2012, almost 50% were notified in the first six years. This is one of the clearest indications that WTO Members were sceptical about the ability of the DSB to resolve their disputes.

<sup>38</sup> On February 2013, the United States notified the 456<sup>th</sup> dispute against India.

**Figure 1: Trend in the Initiation of WTO Disputes**



Source: Author’s calculations based on WTO (2013).

The use of the DSB was quite skewed, with the Organisation for Economic Co-operation and Development (OECD) members (primarily developing countries) emerging as the largest users of the DSB. In almost 65% of the dispute cases, the complainant was a member of the OECD. Only once did a least developed country (LDC) approach the DSB as a complainant (Bangladesh vs. India). This group of countries had an even larger share among the respondents, with the share exceeding two-thirds of the total. OECD countries had the largest share of all respondents. While no complaint was brought against any of the LDC Members of the WTO, this group of countries participated in several disputes as third parties. This seems to be a positive development, for it would enable the LDC Members to prepare themselves for using the dispute settlement rules.

**Table 3: Participation of Groups of Countries in WTO Trade Disputes**

Country Groups	As Complainant	As Respondent	As Third Party
OECD members	313 (64.7%)	311 (66.3%)	829 (48.4%)
Non-OECD members	170 (35.1)	158 (33.7%)	869 (50.7%)
Least developed country	1 (0.2%)	0	15 (0.9%)
Total	484	469	1,713

Source: Author’s calculations based on WTO (2013).

The US and the EU were the largest users of the dispute settlement rules. About 40% of the all disputes brought before the DSB included one of these countries as a complainant. Brazil and India led the emerging economies in the use of the DSB, a list that also includes Argentina and Thailand. The People’s Republic of China, currently the largest trading nation, does not figure on this list.

An important aspect of the countries invoking the dispute settlement rules is that the African continent has not initiated any disputes. Several countries in the region have faced severe trade discrimination, which has prevented some of the poorest countries from benefitting from the opening of markets since the conclusion of the Uruguay Round. The major constraining factor for these countries had been their lack of

capacity to participate in the proceedings of the DSU, an issue that has figured prominently in the ongoing negotiations for the strengthening of the mechanism.

**Table 4: Top 10 Complainants**

Complainant	Number of Disputes
United States	105
European Union	87
Canada	33
Brazil	26
Mexico	23
India	21
Argentina	18
Japan	17
Republic of Korea	15
Thailand	13

Source: Author's calculations based on WTO (2013).

In terms of the covered agreements in which the disputes were notified, more than a third of these involved adjudication based on the GATT articles. If the other areas that were included in the GATT framework prior to the establishment of the WTO are considered, including anti-dumping and safeguards, the share of the traditional GATT areas increases to nearly two-thirds. Of the GATT articles referred to in the disputes, the three key articles—Articles I (General Most-Favoured-Nation Treatment), Article II (Schedules of Concessions), and Article III (National Treatment on Internal Taxation and Regulation)—were used the most (nearly 40%). This is not entirely unexpected since the commitments entered into by WTO Members under the various Uruguay Round agreements were built on the premise of non-discrimination *vis-à-vis* goods, service providers, and intellectual property owners, which is a major departure from the practices they had followed prior to their WTO accession.

Less than a sixth of the notified disputes covered the four new areas included in the multilateral trading system—agriculture, intellectual property, services, and investment. These results are somewhat surprising since this set of areas includes some of the more contentious agreements, like agriculture and intellectual property. A possible reason could be that the agreements covering all these areas (except investment) are included in the Doha Round, and could therefore be a greater focus on the part of the WTO Members to address their contending objectives through re-negotiating the existing texts rather than to get an interpretation by the dispute settlement panels on which they have no influence.

**Table 5: Broad Areas Covered in the Disputes**

Covered Area	Share of total
Agreement Establishing the World Trade Organization	4.7
Agriculture	7.0
Anti-dumping (Article VI of GATT 1994)	9.3
Customs Valuation	1.5
Dispute Settlement Understanding	1.5
GATT 1947	0.1
GATT 1994	36.0
Government Procurement	0.4
Import Licensing	3.8
Intellectual Property	3.1
Protocol of Accession	2.6
Rules of Origin	0.7
Safeguards	4.2
Sanitary and Phytosanitary Measures	3.9
Services	2.3
Subsidies and Countervailing Measures	9.5
Technical Barriers to Trade	4.4
Textiles and Clothing	1.6
Trade-Related Investment Measures	3.4

Source: Author's calculations based on WTO (2013).

Below we provide some facts regarding the use of dispute settlement rules by WTO Members, to get an indication about the ability of the DSB to efficiently settle disputes between Member states.

As indicated above, 456 disputes had been referred to the DSB by February 2013. Of these, 452 took longer than the two months the DSU has provided for consultations between parties. In other words, either these disputes should have been settled by mutual consent, or requests for the setting up of panels should have been put forth.

Available data on these 452 disputes shows that panels were set up in 235 cases, which roughly corresponds to 52% of total cases. In 43 of the total number of disputes, the parties found a mutually agreeable solution before the establishment of the panel. Thus, in less than 10% of the disputes notified, the parties involved found an acceptable solution at the consultations stage. A further 19 cases were decided by mutual consent after the establishment of a panel. This shows that in about one-seventh of the total notified disputes, the parties found a solution before going through the panel proceedings. However, there were two cases, the Japan–US dispute on “Measures Affecting Agricultural Products” and the Turkey–India dispute on “Restrictions on Imports of Textile and Clothing Products,” in which the parties found a mutually acceptable solution only after the Appellate Body had adjudicated.

Of the complaints filed by non-OECD countries, mutually agreed solutions were found in only in 9% of the cases, which is nearly half of the corresponding figure in cases of disputes initiated by OECD countries. In terms of the advancement of the dispute settlement process through the panel process, the OECD countries fared much better. While the panels had submitted their reports in 54% of the disputes they had initiated, only 45% of non-OECD country Members' dispute panels had submitted their reports. These figures clearly indicate that non-OECD Members of the WTO were able to get a better return on their efforts to resolve disputes with their partner countries. Once again, this may be due to developing countries being less well prepared for their involvement in the WTO dispute settlement process.

Although panels were established in 235 cases, the latest available information shows that panel reports were circulated in 185 cases. This relatively low number of panel reports circulated to Members is due in large part to inordinate delays in the process of adjudication.

The time lines for the 185 cases in which the panels had submitted reports, gives the impression of a rather indifferent WTO DSB. In only four of the 185 disputes did the panels submit their reports within 11 months of the filing of the complaint as stipulated by the DSU. At the other end of the spectrum are 53 cases where the panels took more than two years to submit their reports. In three of these disputes, all of which involve the US and the EU, the panels took nearly five years to submit their reports.

According to the DSU, the appellate body should be completing its proceedings within 14 months of the initiation of the complaint. This time frame could be observed in four of the 124 disputes that went to the appellate stage. In about half of these disputes, the appellate body reports were submitted more than two years after the initiation of the complaint. In the two "Large Civil Aircraft" disputes involving the US and the EU, the appellate body reports took nearly seven months from the date of filing the complaint to be released.

The functioning of the WTO DSU provides some telling insights into the nature of participation by developing countries. Not only was their level of participation much lower than that of their developed country counterparts, Africa, which has suffered trade discrimination over long periods, has not been able to use the dispute settlement rules. Participation in the proceedings of the DSB has also been relatively expensive for the developing countries. One indicator of this is that only a relatively small proportion of their complaints were resolved through mutually agreed solutions. Again, compared with the OECD countries, a larger proportion of the disputes initiated by the developing countries have not progressed up to the panel stage.

### **3.2 Issues in the DSU Review**

Not surprisingly, therefore, developing countries have raised several problems regarding the DSU in the ongoing review of the mechanism. One of the most comprehensive proposals in this respect was presented by the African Group.<sup>39</sup> The group pointed out that the major problems countries from this region face in seeking to use the dispute settlement rules include the following: (i) rules are complicated and using them is overly expensive; (ii) injury suffered has not been satisfactorily compensated in situations where the offending measures are withdrawn before or after the commencement of proceedings; (iii) the means provided for enforcement of findings and recommendations (trade retaliation) are skewed against and disadvantage African Members; (iv) special procedures for developing country Members have not addressed the core difficulties African Members face in seeking to use the rules; (v) in their interpretation and application of the provisions, the panels and the Appellate Body have in several instances exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country Members as enshrined in the WTO Agreement; (vi) the panel and Appellate Body composition and operation have not been conducive to ensuring the achievement of the development objectives of the WTO and of equity in geographical distribution; and (vii) any assessment and improvement of the DSU should be primarily based on the development objectives set out in the WTO Agreement.

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<sup>39</sup> WTO (2002b).

Elaborating on some of the issues, the African Group argued that in order to participate effectively in the proceedings of the DSB, developing countries Members “will need supplementary resources and means to be provided to develop both the institutional and human capacity.”<sup>40</sup> The Group further pointed out that the “Advisory Centre on WTO Law should not be considered as a panacea for all institutional and human capacity constraints of developing countries” since its “terms of reference are equivocal in certain instances, and it does not cover all developing countries.”

Other prominent developing countries have raised a number of issues, including the following: (a) a limit on the cases against developing countries each year (the People’s Republic of China’s view is no more than two per year); (b) reimbursing the costs of litigation to developing countries, especially in a case where they have won a favourable judgement (proposal from like-minded group of countries); (c) increased reasonable period of time (RPT) to developing countries for implementing the decisions of the panel and/or the Appellate Body; and (d) invoking of automatic cross retaliation in any sector by developing countries.<sup>41</sup>

The last mentioned issue is important for developing countries that have not been able to retaliate, even if they obtained an authorization from the DSB. Ecuador obtained a right to retaliate in the EC–Bananas case,<sup>42</sup> but could not exercise its right. Likewise, India, the Republic of Korea, Chile, and Brazil did not retaliate in the US–Byrd case after having obtained the authorization to do so.<sup>43</sup>

Apart from the issues concerning developing countries, discussions on the reform of the DSU have focused on two key issues. The first is the so-called “sequencing” issue, provided in Article 21.5 of the DSU. This article authorizes the setting up of a compliance panel in the event of a disagreement between the parties as regards compliance by the responding party, but does not specify the time when action to set up the compliance panel will be triggered. On the other hand, Article 22.2 provides that if there is no agreement on satisfactory compensation between the parties within 20 days of the expiry of the RPT granted to the responding party, the complaining party may request authorization to retaliate. These provisions could result in situations where the setting up of compliance panels has not been sought within 20 days of expiry of the RPT while the complaining party is obliged to request authorization to retaliate in order to preserve its right to retaliate. In other words, the sequencing between the establishment of a compliance panel to the disagreement between the parties in a dispute and the right to retaliate is not provided in the existing discipline.

The second lacuna is the lack of remand procedures in the DSU. The DSU provides a division of responsibility between the panel and the AB—while the panel establishes the facts and makes legal findings, the AB can only consider matters of law and its

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<sup>40</sup> WTO (2002b).

<sup>41</sup> Kaushik (2008), p. 28.

<sup>42</sup> The dispute was initiated in 1996 with Ecuador and four other countries, including the US, bringing a complaint against EU’s regime for the importation, sale and distribution of bananas. After the EU had failed to comply with the decision of the Panel and the Appellate Body, the arbitrators allowed Ecuador to initiate trade retaliation proceedings in the year 2000. However, a mutually agreed solution was found between the parties in 2001. For details see, WTO (1996), WTO (2000), and WTO (2001).

<sup>43</sup> The dispute was initiated in 2001 with nine countries (Australia, Brazil, Chile, the EU, India, Indonesia, Japan, the Republic of Korea, Thailand, Canada, Mexico) bringing a complaint against the Continued Dumping and Subsidy Offset Act of the US (Byrd Amendment). After the Panel and Appellate Body ruled against the US, arbitration proceedings were initiated with six complainants (India, Japan, the EU, the Republic of Korea, Brazil, and Chile). However, only two of these complainants, Japan and the EU, took retaliatory actions against the US. For details, see WTO (2013d).



interpretation. Thus, any change in the legal interpretation when this is considering a dispute requiring new facts, which may facilitate resolution of the dispute, cannot be sought by the. Several countries have proposed textual amendments to rectify this lacuna.<sup>44</sup>

#### **4. SUPPORTING THE GLOBAL PRODUCTION NETWORK: A PROACTIVE AGENDA**

Over the past two decades, Global Production Networks (GPNs) have emerged as a strong integrating force in the global economy. Not only have GPNs played a determining role in bringing economies closer together by stimulating the flows of goods and capital across countries, they have also contributed to knowledge diffusion, and have provided opportunities for local capabilities to emerge in countries that are part of the networks. This dimension has received relatively less attention in the literature on GPNs, which has discussed this new organizational form largely from the point of trade integration.

GPNs have been seen both as products of the process of liberalization of trade and financial flows as well as the catalysts for ensuring greater degree of openness in the global economy. Proponents of this thinking have argued that the unshackling of economies has triggered a change in transnational corporations, converting them from “tariff-hopping” investors to “global network flagships” that have integrated their dispersed supply, knowledge, and customer basis into the GPNs. Fragmentation of production caused by the “network flagships” is assisted by the existence of a plethora of specialized suppliers, usually spread over a large geographical spectrum.<sup>45</sup>

The logic of GPNs demands a high degree of competence all along the supply chain. The suppliers to the network flagship, which is usually the point of assembly of the final product, are not only required to meet the exacting quality standards and the price of the intermediates they are responsible for; they would also have to meet this rigid “just-in-time” schedule. But in order to ensure that the suppliers’ performances meet expectations, the network flagships need to transfer technical and managerial knowledge to them. There is therefore a need to upgrade the suppliers’ technical and managerial skills on a continuous basis. The increasing rate of product obsolescence seen in a large number of industries, in particular those producing products that use information and communications technology, put pressure on the network flagships to upgrade the technologies of their suppliers.<sup>46</sup>

Network flagships transfer knowledge across borders using a slew of mechanisms. Firstly, the transfer of knowledge may be mediated through market mechanisms, using licensing contracts and outright purchases of technology and plant equipment, among others, that may or may not involve foreign direct investment (FDI). Secondly, the network flagship may transfer technologies through the supply chain and in doing so would be exercising control over the manner in which the knowledge is disseminated to and used by the supplier. The type of control over the supply chain can be seen by the manner in which the operation of original equipment manufacturers, or the so-called “Tier I” suppliers, are managed by the network flagships.

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<sup>44</sup> See for instance, the joint proposal by Argentina, Brazil, Canada, India, New Zealand, and Norway. WTO (2007).

<sup>45</sup> Ernst and Kim (2002), pp. 1,417–1,429.

<sup>46</sup> Bernhardt and Milberg (2011).

Irrespective of the nature of GPNs, i.e., whether they are producer driven or buyer driven, network flagships are able to control the production process of their suppliers by actively transferring knowledge in the form of blueprints and technical specifications. The objective is to ensure that the suppliers meet the technical standards of the final products. Branded marketers like Nike and Reebok, managing the “buyer driven” networks, maintain close control over their suppliers by setting standards, sourcing raw materials, distributing them, and finally importing the finished products. GPNs are also able to encourage firms figuring in the networks to access knowledge indirectly through indirect mechanisms, as for instance import of sophisticated equipment to improve their production capabilities.

With the maturing of production networks, the pattern of knowledge acquisition has also been undergoing changes. Along with this has come the phenomenon of firms in the GPNs engaging in innovations that take them across value chains thereby giving the innovating firms more scope to operate independently.

The existence of successful GPNs, however, presupposes the existence of local suppliers that have the capabilities to absorb the knowledge disseminated by the networks. Furthermore, to remain in the GPN, local suppliers must constantly upgrade their absorptive capacity. Participation in GPNs cannot, therefore, be ensured unless the local suppliers are able to develop their technological capabilities and prepare themselves for inclusion in these networks.

The proliferation of GPNs poses a significant challenge to the multilateral trading system for its basic construct is based on the existence of localized production within nation states. Production sharing across national borders of the kind that has been spawned by GPNs requires new instruments and institutions that are supportive of such networks. This, in our view, requires a focus on three behind-the-border areas—trade facilitation measures, investment policy, and NTBs for the adoption of possible globally accepted frameworks and agreements.

From the point of view of GPNs, justification for including trade facilitation in this group of issues is considerable. Enterprises figuring in the GPNs are required to meet tight delivery schedules. Transparent sets of rules and adequate infrastructure at the border are the necessary wherewithal that help them realize their objective. Reforms of the existing facilities offered in different jurisdictions with a view to harmonizing them to the extent possible given the resource constraints faced by developing countries in particular, are therefore a desirable set of outcomes. In fact, the negotiations on trade facilitation in the WTO are aimed at making progress in this direction.

A multilateral agreement on investment became a non-starter after the OECD-backed proposal for such an investment agreement met with resistance not only in developing countries, but from within the group of developed countries. Notwithstanding this development, there has been an unrelenting movement towards adoption of a *de facto* investment agreement at the global level through bilateral investment treaties and economic partnership agreements. However, in recent years, it has become evident that such agreements are imposing a variety of constraints on host countries. Not surprisingly, there has been a steep increase in disputes involving foreign investors and their host states. This development could be detrimental to GPNs since they are dependent on cross-boundary movements of enterprises. A better understanding of the contentious elements of the existing investment agreements could trigger a move towards a more equitable global investment regime.

NTBs have been the insurmountable barrier the multilateral trading system has had to cope with since its establishment. In more recent years, technical barriers have emerged as the fountainhead of NTBs. This was confirmed in the course of the

ongoing negotiations on non-agricultural market access. Taming the proliferation of these technical barriers or standards requires global action.

Below we discuss the elements of each of these four areas, which could help in taking the GPNs to the regions that have been yet left untouched.

## 4.1 Trade Facilitation

Although several of its elements form part of the GATT, trade facilitation was unveiled as an integrated framework to address customs related issues, including that of transit, at the first WTO Ministerial Conference in Singapore in 1996. The issue thus became one of the “Singapore Issues,” along with investment, competition, and government procurement. After much discussion, the issue was included in the WTO work programme in the Doha Ministerial Conference. While the other “Singapore Issues” were taken off the table in the Doha Round for want of consensus,<sup>47</sup> trade facilitation was included in the negotiations as a part of the “July package” in 2004.

Trade facilitations are mandated to produce an appropriate set of rules both from a technical point of view and from the perspective of the development imperatives of developing countries. In more precise terms, the negotiations “aim to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit”.<sup>48</sup> The negotiations are also aimed at enhancing “technical assistance and support for capacity building” and to develop “provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues.” The negotiations are expected to “take fully into account the principle of special and differential treatment for developing and least-developed countries” and, in keeping with this spirit, the mandate clarifies that the countries in question are not expected “to undertake investments in infrastructure projects beyond their means.”<sup>49</sup>

Developing countries were initially opposed to the expansion of the remit of the WTO by including trade facilitation in the Doha agenda if adequate efforts were not made to address issues arising from the implementation of the Uruguay Round commitments. They questioned the developmental impact of trade facilitation, besides arguing that they did not have the resources to implement the commitments the proposed agreement would impose on them.

However, despite the initial scepticism there seems to be an emerging consensus that developing countries would benefit from a WTO Agreement on trade facilitation. A widely accepted view is that in developing countries customs procedures and the supporting infrastructure are generally not very efficient, and that this results in higher transaction costs. “Doing Business,” the annual survey of the World Bank, provides endorsement of this point.

Given the weight of evidence emerging in favor of the various elements of trade facilitation, including simplification and harmonization of customs procedures and improvement of border infrastructure and management systems, there is no doubt that

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<sup>47</sup> In respect of each of the “Singapore Issues,” the Doha Ministerial Declaration had stated “that the negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, *by explicit consensus*, at that Session on modalities of negotiations.” See WTO (2001a), paragraphs 20–27.

<sup>48</sup> WTO (2004a), D-1.

<sup>49</sup> WTO (2004a), D-1.

the introduction of these measures would not only increase developing countries' capacity to trade, but businesses in these countries will also be able to integrate into global supply chains. Better coordination amongst the customs authorities would increase operating efficiency of the agency, and this in turn will enable the system to generate more revenue through a transparent mechanism. A recent study conducted by the OECD Secretariat using data on "trade facilitation indicators" from for 106 non-OECD countries, which include 95 WTO Members and 11 WTO observers, showed that the benefits accruing to developing countries, both as importers and exporters, could be substantial if appropriate reforms are undertaken.<sup>50</sup>

The negotiations on trade facilitation have been dealing with a plethora of issues that could eventually form a part of the agreement. These include issues relating to transparency, like publication and availability of information through publication, internet and enquiry points, operational issues like the release and clearance of cargo, introduction of risk management and post clearance audit and disciplines on expedited shipments, and institutional issues like establishing a single window for clearance of goods, elimination of pre-shipment and post-shipment inspections, and uniform forms and documentation requirements for clearance of goods. Besides, the above-mentioned freedom of transit and customs cooperation are key elements of the discussions.

While the broad contours of an Agreement on trade facilitation seems clear,<sup>51</sup> several contentious issues continue to engage WTO members. Developing countries have been insisting that there should be firm commitments on capacity building and technical assistance, which will enable them to tackle the challenge posed by the proposed agreement.

Despite the progress made in the trade facilitation negotiations, several obstacles stand in the way of an eventual agreement. Major developing countries like India and Brazil are not likely to favor a "stand alone" outcome, as trade facilitation is integral to the Doha package, and thus part of the "single undertaking". In other words, these countries will be reluctant to agree on a deal on trade facilitation without agreement on some of the key areas in the Doha negotiating mandate. Again, while there is no doubt that most of the lesser developed countries would benefit from an eventual deal on trade facilitation, since the benefits would not accrue to them in the absence of the technical assistance and capacity building commitments from the developed countries, it seems unlikely that a globally acceptable outcome can be realized soon.

## 4.2 Towards a Balanced and Equitable Investment Regime

Like trade facilitation, a multilateral agreement on investment has also been on the fringes of the discussions in the WTO since the Singapore Ministerial Conference. The Doha Ministerial Conference in 2001 included trade and investment issue in the post-Doha work program with the following mandate: "Recognizing the case for a multilateral framework to secure transparent, stable, and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area ... and hence agreed that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by "*explicit consensus*," at that session on modalities of negotiations."

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<sup>50</sup> OECD (2012).

<sup>51</sup> For the most recent version, see WTO (2013e).

The Doha Ministerial Declaration also provided some indications regarding the nature of work the Working Group on the Relationship between Trade and Investment (WGTI) was to undertake as follows: “In the period until the Fifth Session, further work in the Working Group on the relationship between trade and investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest.”<sup>52</sup> It was agreed that special development, trade, and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances, with due regard to other relevant WTO provisions. It was also agreed that account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

In the post-Doha discussions on a possible multilateral regime on investment, India, along with other developing countries, argued strongly in favor of the “need [for] policy flexibility to determine the form of investment that would lead to highest growth.” India made the point that the definition of investment would itself have important implications for the development prospects of developing countries.<sup>53</sup> It was pointed out that greenfield investments would be more conducive to furthering the developing goals than mergers and acquisitions, as investments of the former kind could result in better economy-wide linkages. According to India, any inflows of capital that are inimical to the domestic industry, particularly small and medium-sized enterprises, and have adverse effects on employment would need to be carefully regulated. And, finally, India stated that developing countries need to retain the ability to screen and channel foreign investment so as to meet their domestic interests and priorities.

Arguments made against a multilateral regime on investment by developing countries led by India resulted in the eventual exclusion of investment issue from the Doha Round negotiations. A decision was taken by WTO Members in July 2004 that this issue “will not form part of the [Doha] Work Programme ... and therefore no work towards negotiations ... will take place within the WTO during the Doha Round.”<sup>54</sup>

The position that India and other developing countries took in the discussions in the WGTI needs to be considered in the context of the initiative taken by the OECD countries to formalize a “Multilateral Agreement on Investment,” or MAI. The MAI, a draft of which was discussed by OECD Members during 1998–2000, contained far-reaching proposals aimed at bringing about significant changes to the foreign investment regime. It should be pointed out that the proponents of the MAI themselves found it difficult to support the initiative at a later stage, and consequently efforts to formalize the agreement were abandoned.

Any progress on investment issues at the multilateral level should therefore be mindful of problems that were encountered while negotiating the OECD MAI. The major roadblock faced in these negotiations stemmed from the sweeping rights that were promised to foreign investors. At least three areas were prominent in this regard—

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<sup>52</sup> WTO (2001a), p. 4-5.

<sup>53</sup> WTO (2002c).

<sup>54</sup> WTO (2004), paragraph (g).

definition of investment, expropriation of investment, and investor-state dispute settlement. Our view is that these three areas need to be re-visited in light of the growing evidence that is informing a better understanding of the issues involved for both the home and the host states. This would help in developing a multilateral regime on investment, which besides providing adequate protection to the foreign investor, provides the necessary policy options to the host countries to further their development objectives.

#### 4.2.1 Definition

What constitutes an investment is a key element of an investment treaty for it lays down the extent to which foreign investors can get protection against direct and/or indirect expropriation in their host countries. Most Bilateral Investment Protection Agreements (BIPA) that are currently in operation include a broad definition of investment. These treaties usually cover “every kind of asset,” which is typically followed by a non-exhaustive list of covered assets.

Three observations regarding the definition of investment included in the BIPAs should be made here. The first is that by agreeing to include forms of investment such as “rights to money or to any performance under contract having a financial value”<sup>55</sup> in the definition, host countries have often left the door open for an expansive interpretation of what should constitute “investment.” This issue was brought up by the UNCITRAL tribunal adjudicating *White Industries vs. Republic of India*, which is discussed below.

While host countries in the developing world, including India, have encountered problems with foreign investors over the ambiguous definition of investments that are included in their BIPAs, the capital exporting countries have taken steps to overcome this problem. These countries have subjected their BIPAs to periodic reviews; the best example of which is the US. The US initiated its bilateral investment treaty (BIT) programme in 1981 and has reviewed its Model BIT twice in a period of eight years.

The first review resulting in the 2004 Model BIT was triggered by the Trade Act of 2002, which stated, the “principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that *foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States ...*”<sup>56</sup> (emphasis added).

The second review, the outcome of which is the 2012 US Model BIT, resulted from President Obama’s Trade Policy Agenda of 2009 that called for a “review [of] the implementation of our FTAs and BITs to ensure that they advance the public interest.”<sup>57</sup> This review was driven by yet another set of concerns: “whether [US] FTAs and BITs give foreign investors in the United States greater rights than U.S. investors have under U.S. law; whether the FTAs and BITs give governments the “regulatory and policy space” needed to protect the environment and the public welfare; and whether an investor should have the right to submit to arbitration a claim that a host government has breached its investment obligations under an FTA or a BIT.”<sup>58</sup>

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<sup>55</sup> Agreement between the Government of the Republic of Kazakhstan and Government of the Republic of India for the Promotion and Reciprocal Protection of Investments of 1996.

<sup>56</sup> Trade Act of 2002.

<sup>57</sup> USTR (2009).

<sup>58</sup> For details, see the report of the House of Representatives (2009).

The definition of investment appearing in the US Model BIT was comprehensively amended in the review undertaken in 2004 and this definition was adopted in the 2012 BIT as well. The preambular language was changed from “every kind of investment owned or controlled directly or indirectly, including equity, debt; and service and investment contracts” to “every asset that an investor owns or controls, directly or indirectly, *that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or assumption of risk*” (emphasis added). At the same time, the forms of involvement of foreign enterprises that can receive protection under the BITs were narrowed down and, importantly, these bore a direct relationship with the long-term forms of participation.

An appropriate definition of investment will also help to protect a country’s interest in the arbitration process. The majority of investment treaty disputes are filed at the International Centre for Settlement of Investment Disputes (ICSID).<sup>59</sup> The ICSID Convention does not define investment and its interpretation is left to the tribunals.<sup>60</sup> Providing a broad definition of investment bestows the tribunal with considerable discretion in determining whether a particular asset meets the criteria of investment, which otherwise may not qualify for investment as per the domestic law.<sup>61</sup>

#### 4.2.2 Expropriation

Although in common parlance, expropriation of investment is equated with nationalization, in the world of BITs this term is used in several different situations. An indication of the complexity involving the term “expropriation” (the other term commonly used is “takings”) can be gauged from the fact that this term is used by investors whenever they find hindrances in their operations in their host countries. UNCTAD points out that there can be three broad categories of expropriations: (i) direct expropriations include nationalizations and/or outright physical seizure of the property; (ii) indirect expropriations which permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way; and (iii) regulatory measures, i.e., acts taken by States in the exercise of their right to protect the public interest, which may have the same effects as an indirect expropriation.<sup>62</sup>

All investment treaties provide for expropriation under certain circumstances. Investment treaties such as North American Free Trade Agreement (NAFTA), US–Australia BIT, Association of Southeast Asian Nations (ASEAN)–Australia–New Zealand FTA, and India’s BIPAs provide that expropriation of investment is not allowed except for public purposes, in a non-discriminatory manner and on payment of fair and equitable compensation. It may be pointed out that the definition of investment holds the key to the determination of expropriation. Thus, in countries, which have a more precise definition of investment (as in the case of the US, discussed above), claims of expropriations may be far fewer compared with India.

The investment protection agreements the US has entered into with advanced countries, e.g., the NAFTA and the US–Australia BIT, have a significant set of exclusions from expropriation, and these relate to intellectual property rights. This

<sup>59</sup> 27 out of 35 disputes in 2007 were filed in ICSID. For details, see IISD (2008).

<sup>60</sup> IISD (2008), page 21.

<sup>61</sup> So far, 279 cases have been registered with ICSID whereas 126 cases have come up in UNCITRAL. Out of the 46 new disputes registered in 2011, 34 were with ICSID. For details, see UNCTAD (2012a).

<sup>62</sup> UNCTAD (2012b), page 6.

exclusion is also included in the US Model BIT. The relevant article states that provisions on expropriation do not “apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement”.<sup>63</sup> Interestingly, this exclusion is absent in the BITs concluded with the developing countries. Particularly important in the list of exclusions from appropriation is compulsory licence, an instrument that can be used by countries to counter excessive use of monopoly rights by patent holders.

The customary international law and most of the investment treaties provide for three conditions to make the expropriation lawful: it must be for a public purpose, it must be non-discriminatory, and compensation must be paid. Some investment treaties such as NAFTA, US–Australia FTA, and ASEAN–Australia–New Zealand FTA, provide for a fourth parameter, the “due process” (Tienhaara 2010). The indirect expropriation, however, is very controversial, as no parameter has been prescribed to judge whether an expropriation has taken place. The Model BITs of the US provide for certain criteria to decide whether an act amounts to indirect expropriation. They are [among other factors] the economic impact of the government action, the extent to which the act interferes with the reasonable expectations of the investor, and the character of government action.<sup>64</sup>

#### 4.2.3 Investor-State Dispute

Several commentators have written critically about a number of aspects of the investor-State dispute mechanism. They have alluded to the “pro-investor” bias of the BITs and the process of the investor-State arbitration, including the ability of the courts in the host countries to deal with the rulings of the arbitration panels.

A key feature of the investor-State dispute process is that it gives investors superior bargaining power *vis-à-vis* their host countries. This dimension manifests itself in several forms. The first is that the consent of the investor is essential for initiating an investor-State dispute under the BITs. Commentators have suggested that this element introduces “an inherent pro-investor bias in the system”<sup>65</sup> since investors will participate only if it is in their interest to participate in the dispute. The ICSID arbitration process introduces a second “pro-investor” bias. ICSID Convention does not require an investor to exhaust local administrative or judicial remedies as a condition to arbitration, whereas a Contracting State may require the exhaustion of such remedies. Interestingly, some commentators have justified this dimension of the “pro-investor bias” thus: “A foreign investor, justifiably in many instances, will not have confidence in the impartiality of the local tribunals and courts in settling any disputes that may arise between him and the host state.”<sup>66</sup>

Commentators have pointed out that the arbitration tribunals are often insulated from control by the judicial authorities of the host countries since “investment treaties provide that investor-State disputes are to be treated as commercial disputes for the purposes of the New York Convention. This restricts the degree to which domestic courts can refuse to enforce an investor-State award on the grounds that it goes

<sup>63</sup> The United States-Australia Free Trade Agreement of 2005.

<sup>64</sup> Annex B.4 of US Model BITs 2004 and 2012.

<sup>65</sup> Tienhaara (2009), page 5.

<sup>66</sup> Dodge (2006), page 11.



beyond the bounds of commercial arbitration.”<sup>67</sup> The Supreme Court has recently overturned a decade old ruling, which had allowed Indian companies to approach Indian courts against unfavourable awards by foreign arbitration panels.<sup>68</sup> This will give a further boost to foreign investors in their disputes with Indian companies and the Government of India. What seems more egregious is that the arbitration rules allow judicial review of the decisions of the panels based solely on the laws of the country where the arbitration is held. Furthermore, in their attempts to create business for the arbitration industry, many countries have revised their national laws to provide for less vigorous judicial review of foreign arbitration awards. As mentioned above, BITs give investors the right to initiate disputes against their host states, so when deciding on a jurisdiction investors often opt for locations that limit the judicial review of international arbitration. Belgium went as far as removing any kind of judicial oversight by Belgian courts on international arbitration awards.<sup>69</sup>

Controversies over investor-State dispute mechanisms have spilled over into the negotiations on the Trans-Pacific Partnership Agreement (TPPA),<sup>70</sup> which has been described as *the* 21<sup>st</sup> century trade agreement by its most prominent protagonist, the US. Among the issues figuring in the TPPA negotiations is an investment agreement that would have “provisions for expeditious, fair, and transparent investor-State dispute settlement ...”<sup>71</sup> The negotiations on the investment chapter of the TPPA have met with strong opposition from Australia, which has rejected the inclusion of investor-State mechanisms. In its trade policy statement of 2011, the Gillard Government was against “provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses.”<sup>72</sup> At the same time, the Government also announced that it would no longer seek “inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses.” The Gillard Government declared that it “will discontinue this practice”<sup>73</sup>.

This turnaround in Australia’s position was not without reason. The Gillard Government had been involved in a dispute over packaging of cigarettes, which it was trying to regulate through the Tobacco Plain Packaging Act 2011. The Bill was brought to regulate the retail packaging and appearance of tobacco products among others, “to increase the effectiveness of health warnings on the retail packaging of tobacco

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<sup>67</sup> The New York Convention, officially known as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was concluded in 1958. This treaty offers greater scope for the enforcement of international arbitration awards primarily because the Convention dropped the requirement that an arbitration award had to comply with the laws of the state in which it was enforced. Instead, the Convention maintained that in order to be enforceable, the award had to comply only with the laws of the state in which the arbitration was held. This implies that State Parties to the Convention “relinquished national judicial control over awards made in other jurisdictions”. For details see, Van Harten (2005), p. 605.

<sup>68</sup> Decision dated 6 September 2012 of the Constitution Bench of the Supreme Court in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service (BALCO)*.

<sup>69</sup> Van Harten (2005).

<sup>70</sup> Countries currently engaged in the TPPA negotiations are Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, the US, and Viet Nam.

<sup>71</sup> USTR (2011).

<sup>72</sup> Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity, April 2011, p. 14.

<sup>73</sup> This development is interesting because developed countries have always maintained double standards with respect to investor-State disputes. While they have insisted on including this provision in their BITs with the developing countries, in the very few BITs they have signed amongst themselves this form of dispute is either excluded or has not been used in recent years. For details, see Dodge (2006).

products.”<sup>74</sup> The tobacco giant, Philip Morris Asia Ltd, which controlled the operation of its subsidiary in Australia, challenged this legislation. The firm used the investor-State dispute provisions of the Australia–Hong Kong, China BIT to challenge the Australian Government’s legislation on plain packaging of tobacco products. The reverberations of this dispute were heard in the trade policy statement of 2011. The Government declared that it “has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products ...”<sup>75</sup>

### 4.3 Taming the Non-Tariff Barriers

Since its establishment in 1948, the multilateral trading system has been tasked with the elimination of border protection measures arising from the pursuit of discriminatory policies. The process of trade liberalization that was thus initiated has since become almost synonymous with the lowering of tariffs. Yet, the critical issue of NTBs has remained largely unaddressed. The consideration given to this issue appeared to be just enough to protect the protagonists of trade liberalization against criticism that they were reluctant to ensure distortion-free markets were put in place. The results were along expected lines. For a number of decades, GATT had to face the criticism that it had established a regime that had worked for the lowering of tariffs while ignoring the growing incidence of NTBs.

WTO could scarcely do any better. Disciplining NTBs was included as a part of the negotiations on non-agricultural products. More importantly, the two agreements that were explicitly included in the Uruguay Round package for monitoring the growth of standards in recent decades have been questioned regarding their effectiveness, and were substantially left outside the purview of the current round.

The Doha Ministerial Declaration was a major departure from the past when it mandated the market access negotiations to address the problem of “non-tariff barriers” instead of the more ubiquitous “non-tariff measures” that had been included in previous mandates. This change in nomenclature had two significant dimensions. First, the focus on NTBs could be considered a step towards clarifying the scope of the negotiations. As discussed above, the focus of the Uruguay Round market negotiations on NTBs created the problem in that several of the “non-tariff measures” were being discussed in other negotiating groups, and this created jurisdictional overlaps. The second dimension, and one which caused a new set of problems, was that the Declaration gave no guidance as to how NTBs would be identified. In fact, much of the negotiating capital has been devoted to defining the scope of the negotiating mandate on NTBs.

#### 4.3.1 Defining the scope of NTBs

In one of the early submissions to Negotiating Group on Market Access (NGMA), New Zealand focused on this issue in a systematic manner, pointing out that the top seven of the so-called NTBs identified by its exporters included those that could, on examination, be found to be “WTO-legal.”<sup>76</sup> They included standards and certification, customs procedures, food safety and health requirements. To obviate this problem, New Zealand suggested the scope of the negotiations on NTBs could be defined using

<sup>74</sup> Article 3 of the Tobacco Plain Packaging Act 2011. For details, see Parliament of Australia (2011).

<sup>75</sup> Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity. April 2011, page 14.

<sup>76</sup> WTO (2002d).

the following classifications: (a) issues that might be addressed in negotiations elsewhere under the Doha mandate; (b) issues or proposals involving substantial change to existing WTO agreements; (c) proposals involving clarification of existing rules; (d) issues involving disputed interpretation of rules; (e) issues open to bilateral resolution; (f) products of interest to developing countries; (g) capacity issues; (h) implementation issues; and (i) special and differential provisions.

Canada provided similar guidance on defining the scope of the negotiations on NTBs, based on the views expressed by the country's exporters.<sup>77</sup> Canada identified four sets of so-called NTBs. These were: (a) quotas; (b) import licensing, rules of origin, customs valuation, Sanitary and Phytosanitary Measures (SPS), and technical barriers to trade (TBT); (c) tariff classification; (d) border-related measures including customs procedures, fees and administration. Of these four categories, Canada's view was that the NTB negotiations could take up only the first set of issues, since all the other sets included issues that either were a part of existing WTO agreements or were being negotiated in other negotiating groups.

India made yet another suggestion, which addressed a more specific issue concerning the developing countries.<sup>78</sup> In India's view, legitimate instruments that developing countries might use under the various WTO agreements for development of their industries should not be included as NTBs. For example, export tariffs or levies are generally used to generate resources to develop an industry by diversification in the product profile and development of value-added products for export. India, therefore, suggested that "export duties be negotiated ... outside the Doha mandate."

A parallel process for identifying NTBs was initiated by the NGMA chairman in 2002. This process resulted in the submission of a large number of notifications in which WTO Members identified the NTBs their exporters were facing.<sup>79</sup>

In their submissions, members identified three sets of NTBs that, in their view, were outside the purview of the NTB negotiations being conducted by NGMA. These were: (a) NTBs related to existing WTO agreements (e.g., customs valuation, import licensing, SPS, and TBT) that are not subject to a specific negotiating mandate; (b) NTBs related to other WTO agreements that are also the subject of a negotiating mandate (e.g., Anti Dumping and Countervailing Duties); (c) NTBs that are already part of the Doha Declaration (e.g., trade facilitation, transparency in government procurement, and services).

Members identified the relevant GATT/WTO Articles/Agreements that could be applied to the NTBs thus identified. The NTB categories with the highest incidence of notifications were TBTs (530 NTB entries, almost half the total), customs and administrative procedures (380 entries), and SPS (137 entries). Quantitative restrictions, trade remedies, government participation in trade, charges on imports and barriers falling under the other groups accounted for less than 5% of total NTB entries. Interestingly, SPS measures were also identified as NTBs.

Nearly four decades after the initiation of a multilateral negotiation on the reduction of NTMs for free global trade and enhancing market access, the world is now facing one of its most difficult and complex regimes. Since the establishment of the WTO in 1995, both the number of TBTs and the spread of such measures across the Member countries are fast outstripping and undermining the trade liberalization achieved by way

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<sup>77</sup> WTO (2002e).

<sup>78</sup> WTO (2002f).

<sup>79</sup> Between 2003 and 2006, 24 notifications were issued under the series TN/MA/W/46.

of tariff reduction and elimination. As the table below clearly shows, the use of TBTs by WTO Member countries has been on the rise, especially under the WTO regime. In 1995, 389 TBT notifications were issued, which went up to nearly 2,200 in 2012.

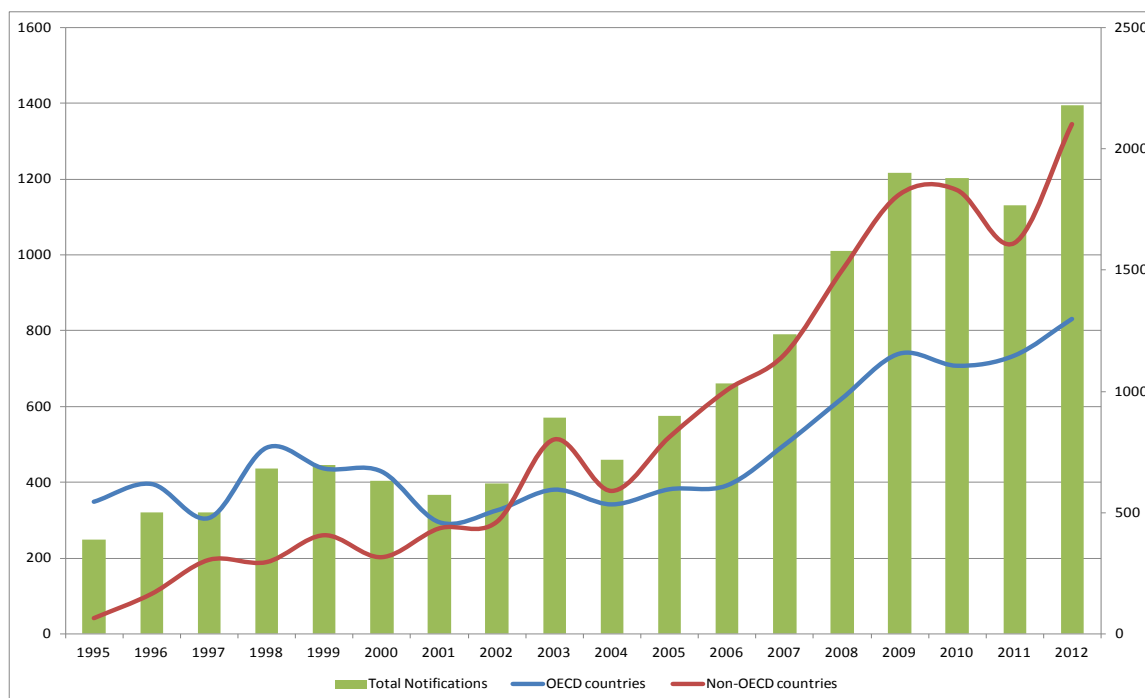
**Table 6: Use of Technical Barriers to Trade by WTO Members, 1995–2012**

Years	OECD countries	Non-OECD countries	Total Notifications
1995	348	41	389
1996	395	105	500
1997	305	195	500
1998	491	189	680
1999	436	260	696
2000	428	202	630
2001	294	278	572
2002	325	295	620
2003	380	513	893
2004	341	377	718
2005	381	519	900
2006	391	643	1,034
2007	498	737	1,235
2008	621	959	1,580
2009	740	1,160	1,900
2010	708	1,172	1,880
2011	735	1,032	1,767
2012	832	1,346	2,178

Source: WTO.

As the table shows, the number of TBT notifications issued has increased consistently except in the years affected by the downturn at the end of the 1990s and 2000s. A more noteworthy feature of TBT notifications is the steep increase in the number of countries that have been involved in issuing notifications. In 1995, only 26 of the 123 WTO Members issued TBT notifications, but by 2012, 74 Members were active in issuing TBT notifications. Quite obviously, the increase in the number of countries active in terms of issuing TBT notifications was due to increased interest shown by non-OECD countries, a large proportion of which are developing countries. Again, the number of these countries that issued TBT notifications far outstripped the OECD countries. This phenomenon is illustrated by the following figure showing trends in TBT notifications. In 1995, the share in the total notifications issued of non-OECD countries was below 10%. But by 2012 the share of those same countries had increased to more than 60%. The emergence of non-OECD countries as new players in the application of TBTs is reflected in the increased number of notifications made by them—from 41 in 1995 to almost 1,350 in 2012.

**Figure 2: Trends in Technical Barriers to Trade Notifications Across Country Groups**



## 5. CONCLUDING REMARKS

Negotiations in the Doha Round face formidable challenges primarily because the negotiating process has been beset with problems. As indicated in this paper, negotiations in agriculture and NAMA had been fast-tracked, while critical areas like services and intellectual property rights remained on the back-burner. Although agriculture and NAMA negotiations have shown some progress, the impetus for concluding the negotiations seems to be eluding the negotiators since the major players are still in disagreement over some of the most critical issues.

Services negotiations have made the least progress both in the area of market access and rules. The complexities of negotiating market access possibilities across the 12 services sectors together with the framing of an array of rules, have contributed to the slow progress. At various points in the negotiating process, attempts were made to initiate plurilateral negotiations involving the principal *demandeurs* of services trade liberalization. However, a wide gulf in the expectations of these countries prevented any forward movement.

The Doha Round has unequivocally shown that there are inherent risks in conducting comprehensive trade deals at the multilateral level, arising at two levels. Firstly, the architects of the Doha Round provided a mandate for arriving at a balanced outcome, taking into consideration the results of all the negotiating areas. The second problem was that the WTO was called upon to address a number of behind-the-border issues as well as non-trade concerns while re-designing a number of key Uruguay Round agreements. These problems would suggest that the Doha Round could be suffering from a design flaw, which needs to be rectified to be able to advance.

Another significant issue which is part of this thinking on the way forward should be the new dynamics of trade that have been set in motion by the emergence of global

production networks. It has been argued that these networks have helped markets to integrate in an efficient manner and that there is need on the part of policymakers to find ways of supporting them. In this paper, we have indicated a few areas which need careful policy intervention for the strengthening of global production networks. This is a task the WTO Members could set themselves as they prepare for the Bali Ministerial Conference.

**Annex Table: List of tariff Sectoral Initiatives Proposed**

<b>Sectoral Initiative</b>	<b>Participants</b>
Automotives and related parts	Japan
Bicycle and related parts	Singapore; Switzerland; Taipei,China; Thailand
Chemicals	Canada; the European Communities; Japan; Norway; Singapore; Switzerland; Taipei,China; United States
Electronics/ electrical products	Hong Kong, China; Japan; Republic of Korea; Singapore; Thailand; United States
Fish and fish products	Canada; Hong Kong, China; Iceland; New Zealand; Norway; Oman; Singapore; Thailand; Uruguay
Forest products	Canada; Hong Kong, China; New Zealand; Singapore; Switzerland; Thailand; United States
Gems and jewellery	Canada; the European Communities; Hong Kong, China; Japan; Norway; Singapore; Switzerland; Taipei,China; Thailand; United States
Hand tools	Taipei,China
Open access to enhanced healthcare	Singapore; Switzerland; Taipei,China; United States
Raw materials	United Arab Emirates
Industrial machinery	Canada; the European Communities; Japan; Norway; Singapore; Switzerland; Taipei,China; United States
Sports equipment	Norway; Singapore, Switzerland; Taipei,China; United States
Textiles, clothing, and footwear	European Communities
Toys	Hong Kong, China; Taipei,China

Source: WTO (2008), Fourth Revision of Draft Modalities for Non-Agricultural Market Access, TN/MA/W/103/Rev.3, 6 December, Annex 7.

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