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A Legal and Policy Perspective**

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India has been perceived now as a villain that stalled the entry into force of the WTO Trade Facilitation Agreement (TFA) and the associated "Bali package", a deal which was hailed as a landmark in the history of the WTO by none other than the then Minister of Commerce and Industry of India. The mood changed with the drastic reversal of the negotiating position post-Bali by India's new government at New Delhi. India's last minute pull out surprised and concerned most, and has been viewed with apprehension both in terms of the future of the WTO multilateralism, as well as, from India's own trade interest. India's standpoint is firmed by its genuine concern over food security and convinced by the fact that the developed countries may have fewer incentives for addressing food security once the TFA becomes binding. In the midst of allegations and criticisms, this paper does a reality check on the cause and consequence of India's negotiating position and its implication on India's domestic and international interests. This paper attempts to throw some light, both from a legal and a political economy perspective, on the various dimensions of the India's negotiating standpoint. The paper argues that despite the potential legal and political repercussions, India might overcome the hurdle unscathed. At the same time, the paper notes that the current fiasco and precarious position of India in the world stage, is the result of an incoherent policy formulation and negotiating strategy that engulf Indian decision making apparatus.

1. Introduction

India has been perceived now as a villain that stalled the entry into force of the World Trade Organization (WTO) Trade Facilitation Agreement (TFA) and the associated "Bali package", a deal which was hailed as a landmark in the history of the WTO by none other than the then Union Minister of Commerce and Industry of India, Mr. Anand Sharma.¹ For Roberto Azevedo, the Director General of the WTO, this was the deal that put the "'World' back into the 'World Trade Organization'."² The Bali decision was also seen as an important stepping-stone towards the completion of the Doha Development round of negotiations initiated in 2001. The mood changed with the drastic reversal of the negotiating position post-Bali by India's new government at New Delhi. India's last minute pull out surprised and concerned most, and has been viewed with apprehension both in terms of the future of the WTO multilateralism, as well as, from India's own trade interest.

¹Statement of Shri Anand Sharma, Minister of Commerce and Industry in Parliament on the 9th Ministerial Conference of WTO at Bali, Press Information Bureau Ministry of Commerce & Industry, Government of India, 17-December-2013 < <http://pib.nic.in/newsite/PrintRelease.aspx?relid=101827> >

² WTO (2013), Concluding Remarks by Mr. Roberto Azevedo Director General of WTO 7 December 2013, WT/MIN(13)/47, Geneva, 17 December 2013.

India's stand point is firmed by its genuine concern over food security and convinced by the fact that the developed countries may have fewer incentives for addressing food security once the TFA becomes binding. India's vote for the TFA now depends on finding a permanent protection for its farm subsidy schemes, specifically relating to minimum support price (MSP) and stockpiling for food security. Simply put, India is basing its consent for TFA as a bargaining chip to advance its domestic food security concerns, two key negotiating issues, otherwise unconnected, forming part of the 'Bali package'. The U-turn has been met with severe skepticism both internally as well as from other Member States. India has been accused of violating its promise made at Bali and derailing the new hope of negotiations.

India's vote for the TFA is vital because, unlike other multilateral organizations such as the World Bank Group or the International Monetary Fund (IMF), the WTO is a member driven organization where historically, decisions are arrived through consensus. The WTO agreement does provide voting as an option in the absence of a consensus, however, this procedure is seldom practiced. Consequently, any WTO member state, small or big, could veto consensus building and stall a successful outcome. In the current deadlock, India blocked the adoption of the trade facilitation protocol, which was to be finalized by July 31, 2014.

In the midst of allegations and criticisms against India, this paper does a reality check on the cause and consequence of India's negotiating position and its implication on India's domestic and international interests. Can India be justified in blocking the post-Bali consensus by invoking its food security concerns, derailing the Bali Package deal in the process? Or is this the result of a lack of consistent trade policy and national standpoint? Can India defend and survive the onslaught of community of nations? Indeed, the current government has espoused a stronger negotiating position than those accepted by the earlier government which was in power while the 'Bali package' was negotiated. This paper attempts to throw some light, both from a legal and a political economy perspective, on the various dimensions of the India's negotiating standpoint. The paper argues that despite the potential legal and political ramifications, India might overcome the hurdle unscathed. At the same time, the paper notes that the current fiasco and precarious position of

India in the world stage, is the result of an incoherent policy formulation and negotiating strategy that engulfs Indian decision making apparatus.

2. The Trade Facilitation Agreement (TFA): *The sole binding outcome*

The WTO Trade Facilitation Agreement (TFA) was negotiated to reduce administrative barriers *inter alia* at ports and customs, thereby saving transactional cost and ensure a hassle free flow of goods across borders. The Agreement ensures elimination of non-tariff barriers, expediting the movement, release and clearance of goods through effective cooperation between custom's authorities. Studies project that the Agreement, once implemented, could increase global GDP by upto US\$ 1 trillion and create 21 million jobs.³ The Organization for Economic Co-operation and Development (OECD) estimates that for every one-percent reduction in global trade costs, global incomes go up by US\$40 billion. As per the study, the TFA shall have the potential cost reductions estimated at 14.1% of total costs for low-income countries, 15.1% for lower middle-income countries and 12.9% for upper-middle income countries.⁴ In addition, improving efficiencies in customs and transport would integrate developing countries into the global economy and improve export competitiveness or foreign direct investment (FDI) inflow. Thus, the numbers uniformly and surely favour a swift implementation of the Agreement.

Trade facilitation is not new to the WTO. It appeared as one of the 'Singapore Issues' during the Ministerial Conference at Singapore in 1996.⁵ Then, the majority of the developing countries had opposed undertaking any new commitments without addressing their developmental concerns under the existing WTO covered agreements. Members refused to take any mandatory standards, which apart from having major financial implications had the challenge of facing a binding WTO dispute settlement mechanism (DSM) in case of non-compliance. It was also argued that the WTO is not the suitable forum for dealing with trade facilitation, as it would

³ Gary Hufbauer and Jeffrey Schott (2013), 'Payoff from the World trade agenda 2013,' *Report to the ICC Research Foundation*, April 2013 <http://www.iccindiaonline.org/reports/Peterson_Report.pdf>

⁴ Evdokia Moisé and Silvia Sorescu (2013), Trade Facilitation Indicators: The Potential Impact of Trade Facilitation on Developing Countries' Trade, *OECD Trade Policy Paper* no 144. It is estimated that a trade facilitation agreement could reduce business costs by between \$350 billion and \$1 trillion, and world trade could increase between \$33 billion and \$100 billion in global exports per year and \$67 billion in global GDP (World Bank, OECD, 2011). WTO (2013), Agreement on Trade Facilitation, WT/MIN(13)/W/8, Geneva, 6 December 2013.

⁵ Other Singapore issues were: trade and investment, competition policy, transparency in government procurement and trade facilitation.

only duplicate the work of World Customs Organization (WCO), an expert body.⁶ This did not prevent the members from agreeing to undertake an exploratory and analytical study on trade facilitation “on the implication of trade procedures in order to assess the scope for WTO rules in this area”.⁷ It was after several years in July 2004 that the WTO members formally agreed to negotiate a trade facilitation agreement, based on modalities contained in the “July 2014 package” under the Doha Development Agenda (DDA).⁸

At the Bali Ministerial Conference in December 2013, the WTO members finally reached a consensus on TFA, which was the only permanently binding outcome among the “Bali Package”.⁹ This is the first time a new agreement was expected to be brought under the umbrella of the WTO. TFA creates new rights and obligations for WTO Members and accordingly, must be incorporated into WTO law by listing it as one of the covered agreements under Annex 1A of the WTO Agreement. According to the Ministerial Declaration,¹⁰ post-Bali, the Preparatory Committee on Trade Facilitation, consisting of all members, established under the General Council, shall subject the text to a legal review,¹¹ draft a Protocol of Amendment (POA) to be inserted in the new Agreement and ensure the expeditious entry into force of the Agreement.¹² The General Council was expected to meet no later than 31 July 2014 to adopt the Protocol and to open the Protocol for acceptance until 31 July 2015.¹³

To bring developing countries and least developed countries (LDCs) on board, the TFA provides for a separate section on special and differential (S&D) treatment to support their implementation capabilities. As part of S&D treatment, it was agreed

⁶ Chakravarthi Raghavan (2003), Third World Network <<http://www.twinside.org.sg/title/5348a.htm>>

⁷ WTO, Singapore Ministerial Declaration, 18 December 1996, WT/MIN(96)/DEC, para 21.

⁸ The modalities of the trade facilitation negotiations in its Annex D.
http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf

⁹ Bali Ministerial Declaration WT/MIN(13)/W/36 dated 7 December 2013. This text was revised 19 times before acceptance. WTO, Agreement on Trade Facilitation Draft Ministerial Decision, 7 December 2013, WT/MIN813/W/8

¹⁰ Bali Decision on the TFA (WT/MIN(13)/36, WT/L/911, 7 December 2013

¹¹ The text annexed to the Draft Ministerial Decision is not the final text of the Agreement and is “subject to legal review for rectifications of a purely formal character that do not affect the substance of the Agreement”. The final revised text of TFA is available under the WTO document WT/L/931.

¹² Agreement on trade facilitation Ministerial, Decision of 7 December 2013, Ministerial Conference, Ninth Session, Bali, 3-6 December 2013, WT/MIN(13)/36, WT/L/911, 11 December 2013

¹³ The Protocol shall enter into force once two-thirds of members have completed their domestic ratification process. Article X:3 of the WTO Agreement.

that the LDCs and developing countries shall have a longer time frame for implementation, receive capacity building and technical assistance, and a moratorium on approaching the WTO dispute settlement against non-compliance with the Agreement for two year period. The language and phraseology are remnants of the standard S&D treatment provisions commonly found in most WTO covered agreements - soft law obligations couched in non-mandatory rhetoric with limited practical utility.¹⁴ Moreover, financial support, which formed the core of the LDCs and some developing country's proposal, since the commencement of the negotiations, was relegated to the status of non-binding footnote.¹⁵ Other core pillars such as self-designation and self-assessment of capacity to implement the provisions have also met with a similar fate.¹⁶

It is this Agreement and process that India managed to stop by withholding its consent, creating an impasse.

3. Food Security and the WTO discipline

The Agreement on Agriculture (AOA) was primarily designed to discipline developed country's farm subsidy programmes, where domestic agricultural policies provide high subsidies for agricultural production and help competitiveness of developed country's agriculture produce. The AOA commits members to cutting down subsidies both on production and on exports. The WTO AOA group subsidies into amber, blue and green 'boxes' depending on the trade distorting effect.¹⁷ An additional category called 'S&D box' or 'Development box' offers S&D treatment for developing countries by exempting certain subsidies from reduction commitments.¹⁸ Green box and Blue box subsidies are both permitted subsidies, but Blue box subsidies must not lead to increased production.

¹⁴ There are 145 S&D provisions spread across the different WTO Agreements. Of these, 107 were adopted at the conclusion of the Uruguay Round. See WTO, "Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions," Note of the Secretariat, WT/COMTD/W/77, 25 October 2000. See also R. Rajesh Babu, "Interpretation of the WTO Agreements, Democratic Legitimacy and Developing Nations", *Indian Journal of International Law*, 50 (1) 2010, pp. 45-90.

¹⁵ Footnote 16, Article 1.2, Section II, Agreement on Trade Facilitation, Ministerial Decision of 7 December 2013, WT/MIN(13)/36 WT/L/911

¹⁶ South Centre (2013), "Key Issues Still Under Brackets in the Trade Facilitation Text Presented to the Ministerial Conference in Bali," South Centre Paper, November 2013, p. 9.

¹⁷ WTO Agreement on Agriculture 1994.

¹⁸ Article 6.2, AOA.

The Green box has no upper limitation and covers expenditures in relation to the stockpiling for food security purposes and expenditures on domestic food aid to needy population. However, to be in Green Box, the Subsidy must (i) have no, or at most minimal, trade-distorting effects or effects on production, (ii) be “provided through a publicly-funded government programme not involving transfers from consumers” and, (iii) the support in question shall not have the effect of providing price support to producers.¹⁹ Subsidies that are in the form of direct payments to producers are not linked to production decisions, i.e. although the farmer receives a payment from the government, this payment does not influence the type or volume of agricultural production (“decoupling”) can also be included under the Green box.²⁰ No production is required to receive such payments.

All trade-distorting subsidies are grouped under Amber box, subjecting them to progressive reduction. Amber box domestic support is calculated in terms of “Aggregate Measurement of Support (AMS)” which combines all product-specific and non-product specific domestic support.²¹ Not all ‘amber box’ support must be counted against a country’s AMS limit. Subsidies that are under S&D box or within the *de minimis* threshold could be maintained.²² The S&D for developing countries under Article 6 of AoA permits support measures, whether direct or indirect, designed to encourage “agricultural and rural development” and that are an integral part of the development programmes of developing countries. However, government procurement at an administered price (market price support) shall not fall under the S&D box and must be calculated as part of Amber box. In other words, subsidies which provide price support to producers are considered trade distorting and are subject to reduction commitment under Amber box after a threshold.

Developing countries could, however, maintain the Amber box subsidy to a *de minimis* limit of 10% of the total production (5% for developed countries). If the domestic support exceeds the 10% limit, the Amber box subsidy must be reduced by 13.3% for developing countries (20% for developed countries) over a period of 10

¹⁹ Annex 2, Art. 1, AoA.

²⁰ WTO, Agriculture: Domestic Support,
<http://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm>

²¹ All annual domestic support measures, except exempt measures, provided in favour of agriculture producer are to be measured as AMS.

²² Article 6 of the AoA as all forms of domestic support except that placed in the blue and green boxes.

years. The base year on which the ‘fixed external reference price’ (ERP) is calculated for each commodity is 1986 to 1988 without taking inflation into account. India’s ERP denominated in Indian rupees was fixed at Rs.3520 (US\$ 262.5) per metric tonne for rice and Rs. 3540 (US\$ 264) per metric tonne for wheat.²³ The total product specific AMS was negative (- Rs. 24,442 crores) during the base period.²⁴ For this reason, from Uruguay Round until recently, no ‘Amber box’ reduction was required for India as its AMS was well within the *de minimis* threshold.²⁵ This, however, implies that India’s AMS limit is bound at zero and the *de-minimus* limit becomes India’s *de facto* limit for domestic support schemes. Domestic support above 10% *de minimus* level would automatically become WTO inconsistent. In other words, the developing countries which had not been using these measures earlier “are prohibited from using them in future beyond the *de minimis* limits.” Bhagirath Lal Das notes that:

This is patently unfair in the sense that countries which had been distorting the market in the past are allowed to continue distorting it to a substantial extent, whereas those that had refrained from doing so are prohibited from using these measures in the future.²⁶

India’s domestic support schemes are generally in the form of “minimum support price” for major agricultural commodities²⁷ and “input” subsidies provided to farmers in the forms of electricity, fertilizers, seeds, etc. The main implementing agency for the Government of India (GOI) is the Food Corporation of India (FCI), which procures agriculture products at ‘administered price’ or government determined price for stockpiling. As in 2014, India’s rice and wheat stockpiles are about 21.2

²³Sudha Narayanan, “The National Food Security Act vis-à-vis the WTO Agreement on Agriculture,” *Economic & Political Weekly*, vol xlix, no 5, February 1, 2014.

²⁴Taking both product specific and non-product specific AMS into account, the total AMS was (-) Rs.19,869 crores i.e., about (-) 18% of the value of total agricultural output. *WTO Agreement On Agriculture —A Background Paper*, <http://commerce.nic.in/wtojun2k_2.htm>

²⁵Article 7 (b), AoA.

²⁶ BhagirathLal Das, “WTO Agreement on Agriculture: Deficiencies and Proposals for Change” *TWN Trade & Development Series* 17, 2001, p. 11 <<http://www.twinside.org.sg/title2/t&d/tnd17.pdf>>

²⁷ Cereals (paddy, wheat, barley, jowar, bajra, maize and ragi); five pulses (gram, arhar/tur, moong, urad and lentil); eight oilseeds (groundnut, rapeseed/mustard, toria, soyabean, sunflower seed, sesamum, safflower seed and niger seed); copra, raw cotton, raw jute and virginia flu cured (VFC) tobacco. See *Manual on Agriculture Prices and Marketing*, Government of India Ministry of Statistics and Programme Implementation, Central Statistics Office, New Delhi October, 2010 <www.mospi.gov.in>.

million tonnes and 39.8 million tonnes respectively.²⁸ The reserve is considered more than double the government's buffer requirements for both commodities. Such stockpiled goods are redistributed at a subsidized rate (less than market rate) through the public distribution system (PDS) to eligible citizens at below the poverty line.

Public stockholding for food security purposes are allowed and there will be no WTO violation as long as the Government purchases food at 'current market prices' and sales from the stockpile is at 'no less than the current domestic market price' for the product and quality in question.²⁹ This is categorized as non-trade distorting subsidy and permissible under Green box. However, if the agriculture products are acquired and released at government 'administered price', which is the case with India, the difference between the 'acquisition price' (administered price) and the ERP is accounted for in calculating the country's AMS.³⁰ Since FCI acquires agriculture products at administrative price fixed by the government (MSP or procurement price³¹), any difference between the acquisition price and the external reference price shall be added to India's AMS.³² Until recently, the acquisition price was less than the ERP, which was pegged at 1986-88 price. Overtime, the administered price at which India was acquiring and stockpiling have gradually gone up, above and beyond the ERP thereby making it eligible for being calculated as AMS.³³

Therefore, if the 'administered price' minus ERP multiplied by eligible production is equal to or less than the *de minimus* 10% of value of production, there is no reduction commitment. However, the amounts spend by India under the Amber box domestic support schemes in the recent years have gone up exponentially, due to both inflationary reasons and additional commitments undertaken under subsidy schemes. In the past 10 years, the government administered price for rice and wheat

²⁸ "Factbox - India's food stockpiling and WTO stand-off," *Reuters*, July 29, 2014.

²⁹ Annex 2, paragraph 3, AoA.

³⁰ Footnote 5 of Annex 2. AoA.

³¹ Procurement price is generally lower than the open market price and higher than the MSP.

³² The administered price regime currently in vogue includes: Minimum support prices (MSP) for 24 commodities; Statutory minimum prices for sugarcane; Levy prices for rice and sugar; Central issue prices for rice, wheat and coarse cereals for sale under public distribution system (PDS). Administered Prices, Manual on Agricultural Prices and marketing, Ministry of Statistics and Programme Implementation, para. 2.3.2.

<http://mospi.nic.in/mospi_new/upload/Manual-on-Agricultural-Prices-and-Marketing.pdf>

³³ In 2014, India paid about Rs. 14,000/tonne of wheat and about Rs. 13,600/tonne of rice. "Factbox - India's food stockpiling and WTO stand-off," *Reuters*, Jul 29, 2014.

has doubled. The recent National Food Security Act 2013 has the consequence of further added to the existing subsidy basket of the government.³⁴ Recent studies show that the domestic support prices for wheat and rice, for instance, have increased by 72% and 75% respectively between 2005/06 and 2010/11. Input subsidies such as fertilizer, electricity, irrigation and seeds, rose at 214% to nearly \$30 billion.³⁵ Gopinath's study projects a more modest figure of about US\$12.0 billion by 2015 because of India's public stockholding.³⁶ This calculation, however, acknowledges that India has been 'shifting boxes.' Some of the subsidies initially in Amber box have been shifted to S&D and Green boxes where there are no reduction commitments. The legality of such transfers is open to interpretation. The substantial increase in India's agricultural subsidy has gone unnoticed, as India has not notified the same to the WTO since 2004.³⁷

In short, the studies show that India's domestic support for product-specific and non-product specific AMSs have increased considerably over many years until 2013. In the light of such an increase, India has found itself at the wrong side of the WTO rules, with difficulty in justifying its subsidy schemes in view of its WTO commitments. Surely, this would have a direct bearing on the continuation of the food security schemes that ensure security for farmers and poor. Other WTO members could challenge India's subsidy schemes through WTO dispute settlement actions, which could potentially compel India to substantially reduce its domestic support programmes. This would mean withdrawal or reduction in benefits offered to its farmers under the threat of sanctions.

4. The Bali Promise

³⁴ The estimated food grain requirement for the Act is 61.23 million metric tons at a cost of "about" \$23.1 billion, an increase of \$4.4 billion over current expenditures. Santosh Singh, 'Indian Cabinet Approves National Food Security Bill 2013,' USDA Foreign Agricultural Service Global Agricultural Information Network, GAIN Report Number: IN3037, 4 November 2013. See also "Factbox - India's food stockpiling and WTO stand-off," *Reuters*, Jul 29, 2014.

³⁵ JTB Associates (2011), "Domestic Support and WTO Obligations in Key Developing Countries," June 2011.

³⁶ Munisamy Gopinath, "India: Shadow WTO Agricultural Domestic Support Notifications" *International Food Policy Research Institute (IFPRI) Discussion Paper 00792*, September 2008, p. 23.

³⁷ The notification concerns domestic support commitments was dated 5 April 2011 for the marketing years 1998-99 to 2003-04. WTO *Notification*, Committee on Agriculture, G/AG/N/IND/7 9 June 2011. See also Lars Brink (2014), 'Support to agriculture in India in 1995-2013 and the rules of the WTO, *IATRC Working Paper #14-01*, April 2014. <<http://ageconsearch.umn.edu/bitstream/166343/2/WP%2014-01%20Brink.pdf>>

The Bali Ministerial Conference 2013 was a final attempt to break the stalemate and jumpstart the 2001 Doha Round of negotiations. Rather than pursuing all the negotiating issues under the Doha Development Agenda (DDA), the Members choose to opt for few issues where consensus was possible. Both trade facilitation and public stockholding for food security purposes were key issues that were taken up at the Bali Ministerial in December 2013. Public stockholding for food security purposes was critical for developing countries but were also controversial. India and other developing countries wanted current WTO farm subsidy rules diluted; however, consensus was not forthcoming as developed countries virtually blocked most proposals.

The Group-33 (G-33), a group of 46 nations including India, proposed that the WTO farm subsidy rules be relaxed for the developing countries to continue their support for food from low-income and resource-poor producers at administered prices as part of their food stockholding programmes. G-33 demanded that the Amber box *de minimis* cap be relaxed to accommodate their food security concerns or legitimize such subsidies within the context of ‘Green box’ or ‘S&D box’. They also proposed a change in the base year of 1986-88 for the purpose of ERP to 2000-2004 for developing countries, as the “excessive inflation” reduced or prohibited the flexibility provided to developing countries. The proposal became controversial as this was fundamentally against the ‘Green box’ or ‘S&D box’ requirement, and the surplus stock of food has the potential of being dumped into the international market distorting food price.³⁸

India went further than the proposal of the G-33 which had asked for a two year ‘due restraint’ against challenges through the WTO dispute settlement process. India convinced the G-33 in the process the need for a sustained solution. India insisted that the “interim solution cannot be a temporary solution nor be terminated and must remain in place till such time that a negotiated permanent solution is in place.”³⁹ Moreover, the proposal also does not protect challenges under the General

³⁸ Christophe Bellmann, Jonathan Hepburn, Ekaterina Krivonos and Jamie Morrison (2013), G-33 Proposal: Early Agreement on Elements of the draft Doha Accord to Address food security, *ICTSD Programme on Agricultural Trade and Sustainable Development; Information Note*; International Centre for Trade and Sustainable Development, Geneva, Switzerland, <www.ictsd.org>.

³⁹Statement of Shri Anand Sharma, Minister of Commerce and Industry in Parliament on the 9th Ministerial Conference of WTO at Bali, Press Information Bureau Ministry of Commerce & Industry,

Agreement on Trade and Tariff (GATT)⁴⁰ and Agreement on Subsidies and Countervailing Measures (ASCM), where the “peace clause” had already expired in December 2003.⁴¹ India’s had in 2001 proposed that even after the lapse of the ‘peace clause’ in 2003, as a S&D provision, measures taken by developing countries under Annex 2 (Green Box) and other domestic support measures conforming to Article 6 of AoA should be exempt for a period of ten years from imposition of countervailing duties under the SCM Agreement and Article XVI of GATT 1994 and shall also be exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions under paragraph 1 (b) of Article XXIII of GATT 1994.⁴² The current proposal was also in the similar line and demanded a permanent solution and adequate protection from all kinds of challenges.

At Bali, India and G-33 were only able to negotiate an interim solution which includes, (i) temporary shelter for developing countries that exceed its *de minimis* limits on AMS, (ii) negotiate for an agreement for a permanent solution for adoption by the WTOs 11th Ministerial Conference, (iii) until a permanent solution is found, Members shall be immune from dispute settlement challenges in respect of public stockholding programmes for food security purposes, and (iv) interim solution shall continue until a permanent solution is found. The ‘peace clause’ or ‘due restraint’ clause was, however, limited to traditional staple food crops and to existing subsidy schemes, and comes with a mandatory obligation for notification and transparency requirements.⁴³ If these conditions are not observed, subsidies can be open to challenge for WTO inconsistency. India under the old government welcomed the outcome and endorsed the Bali deal.

In short, India and other developing countries managed to get a temporary respite on their key concerns of continuing MSP and public stockpiling to safeguard the interests of the farmers and food security over the *de minimus* 10% Amber box permissible limit. In return, they compromised and agreed to a permanent agreement

Government of India, 17-December-2013 < <http://pib.nic.in/newsite/PrintRelease.aspx?relid=101827>>

⁴⁰ Article XVI, General Agreement on Trade and Tariff (GATT) 1994.

⁴¹ Article 13, AoA protects countries using subsidies which comply with the agreement from being challenged under other WTO agreements for a period of 9 years.

⁴² “Proposals by India in the areas of: (i) Food Security, (ii) Market Access, (iii) Domestic Support, and (iv) Export Competition,” Negotiations on WTO Agreement on Agriculture, Committee on Agriculture Special Session G/AG/NG/W/102, 15 January 2001, p. 9.

⁴³ Public Stockholding for Food Security Purposes, Ministerial Decision of 7 December 2013, Ministerial Conference, Ninth Session, Bali, 3-6 December 2013, para 2.

on trade facilitation. In July 2014, at a post-Bali meeting held in WTO Geneva Headquarters, India, under the new government, said it can't support a "trade facilitation" agreement reached in Bali without a parallel agreement allowing developing countries more freedom to subsidize and stockpile food.⁴⁴ India's veto was met with considerable criticism from around the world. Commenting on the about-turn by India, the US Trade Subcommittee Chairman Devin Nunes stated that:

It's one thing for a country to be a tough negotiator. It is entirely another to agree to a deal with your trading partners, and then just simply walk away months later, insisting instead on one-sided changes. That's what India has done here by going back on its word, running the risk of eliminating any sense of good will toward it."⁴⁵

Similar sentiments were expressed by the WTO Director General and other developed countries on the Indian action. Even the G-33 partner countries and many other developing countries were reluctant to support the Indian position during the initial stage.

5. The "Single Undertaking": Departure from Doha mandate?

Single undertaking is at the core of the WTO's negotiating practice. The Doha Ministerial Declaration establishes that "the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking."⁴⁶ This concept simply means that all the negotiating issues, which include issues of concern to both developed and developing countries, shall be negotiated, accepted and adopted together. If there is no moving forward on one issue, all other issues shall remain stalled, even when there was a consensus. This ensures all stakeholders, including the weakest member get their concern fully addressed before a final decision is reached. In that sense, the "single undertaking" concept ensures fairness and reduces the power imbalances that are inherent in a negotiation with advanced economies. Single undertaking assured even the LDCs a level-playing field and a potentially balanced outcome.

⁴⁴ Eric Bellman and Peter Kenny (2014), 'India Blocks WTO Agreement to Ease Trade Rules: India Says Effort to Promote Global Trade Should Be Linked to Food Security, *Wall Street Journal*, July 27, 2014.

⁴⁵ "Camp, Nunes Statements on Failure to Adopt Trade Facilitation Agreement," Press Release, <http://nunes.house.gov/news/documentsingle.aspx?DocumentID=390267>

⁴⁶ Para. 47, Doha Ministerial Declaration 2001.

At Bali, the WTO members decided to break away from this practice due to persistent deadlock in the multilateral talks on various negotiating areas of DDA, and agreed to focus on few areas for “early harvest”. It was reasoned that the 19 years old WTO multilateral system could be undermined if no progress is shown in at least some areas. Accordingly, Members decided to negotiate areas where progress can be achieved, “including focusing on the elements of the Doha Declaration that allow Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking”.⁴⁷ This smaller package included trade facilitation, which was at an advance stage of negotiation and some aspects of Agriculture negotiations, which are of critical to the developing countries.

Since the Bali ‘smaller package’ was not part of the ‘single undertaking’, this allowed the US and the EU cherry picking an agenda which is to their benefit. Needless to say that the benefits of TFA are substantial for the developed countries, much more than the developing countries, and obviously developed countries are keen on seeing the agreement in force. For the developed countries, TFA offers twin advantage of (i) smooth access for their goods through developing country’s borders, and (ii) no major financial cost or capacity constrains as their ports and customs are already modernized. In other words, TFA does not impose any additional burden on the developed world which is already TFA compliant. It is the bottlenecks at developing country’s custom borders that the TFA attempts to fix. This involves diverting public money for automation and modernization at all its ports, airports and land custom’s stations to reduce obstacles and ensure a smooth flow of goods across boarders.⁴⁸ The core concerns of the developing countries regarding undertaking time bound commitment and capacity and financial constraints got watered down in the negotiating process.⁴⁹

On the other hand, the G-33 had to satisfy with a last minute interim solution

⁴⁷ WTO (2011), Elements For Political Guidance, Ministerial Conference, Eighth Session, Geneva, WT/MIN(11)/W/2, 15 - 17 December 2011.

⁴⁸ The costs of implementing only three of the agreements - SPS, TRIPS and Customs Valuation, for an average typical developing country to be at least \$150 million. See statement made by India’s ambassador Hardeep Singh Puri cited in Chakravarthi Raghavan, “No binding rules on trade facilitation at WTO, says India” SUNS5348, 18 May 2003 Geneva, <<http://www.twinside.org/title/5348a.htm>>

⁴⁹ Yann Duval, “Cost and Benefits of Implementing Trade Facilitation Measures under Negotiations at the WTO: an Exploratory Survey”, Asia-Pacific Research and Training Network on Trade Working Paper Series, No. 3, January 2006. <www.unescap.org/sites/default/files/AWP%20No.%203.pdf>

on farm subsidy, with a promise to work towards a permanent solution within four years, by the 11th Ministerial Conference in 2017. The temporary solution and the ‘peace clause’ are directly linked to several performance conditionalities. In short, India and other countries failed to achieve a balanced Bali package, which overtly went in favour of the developed countries. The end product seems to be a lose-lose situation for developing countries – ended up assuming more obligations under TFA while getting much less in return in agriculture. The South Centre argues that the developing countries must have pegged the “entry into force of the TFA to the conclusion of the Doha Round Single Undertaking mandate.”⁵⁰ This only would counterbalance an extremely weak solution in food security resulting from the Bali Ministerial Conference. Otherwise, the developing countries would lose their capability to bargain for a permanent solution in food security, and other development issues dealt in the Doha Round.⁵¹ Further, mandate under para 47 of the Doha Declaration indicates that any early harvest “*may* be implemented on a provisional or a definitive basis.” In this case, the developing countries have conceded to implement TFA definitely.⁵²

It is in this context that India, with its new government in place, decided to revisit the Bali compromise and withhold its promise. India now questions the logic of departing from the practice of ‘single undertaking’, as it feels that the developed countries may lose interest in addressing its concerns once trade facilitation agreement is finalized. The only way forward is to counterbalance TFA with a food subsidy agreement. India wants concrete commitments on all Bali issues to move forward and is using trade facilitation as a bargaining chip to protect its food security concerns and farmers, an otherwise weak lobbying group in India.

6. Legal and political fallout

India’s uncompromising solo stand on “Bali package” has attracted serious domestic

⁵⁰ South Centre, ‘Discussing the Legal Basis for Entry into Force of a Trade Facilitation Agreement,’ Analytical Note, SC/TDP/AN/TF/4, November 2013, <http://www.southcentre.int/wp-content/uploads/2013/12/AN_-MC9_4_Discussing-the-Legal-Basis-for-Entry-Into-Force-of-TFA_EN.pdf>

⁵¹ Ibid.

⁵² Several countries, including India, South Africa, Bolivia, Cuba, Venezuela, Zimbabwe, and the Solomon Islands had taken the position that the TFA is not a stand-alone agreement, and that its entry into force must be part of the single undertaking under the Doha negotiations, SUNS #7853 dated 28 July 2014.

and international criticism. The Bali compromise on stockpiling for food security was initiated and supported by large group of 46 developing countries - the G-33. Post-Bali India was unable to carry forward the coalition and the only countries that supported its position were South Africa, Bolivia, Cuba and Venezuela. This is in that sense India's lone battle. Indeed, one may say that the India would have benefited immensely had it garnered the support of the G33 and brought on board the larger developing countries. The negotiating position changed post the new government assumed office and a very short time was left between government formation and the deadline.

Having said that, the developing countries agreed to Bali package owing to both domestic and international pressures, and not because they were convinced of its benefits. The mood at the Bali Ministerial was palpable from the final joint statement of Bolivia, Cuba, Ecuador, Nicaragua and Venezuela that the Bali Package contains a "substantial imbalance which has to be corrected", and noted that "no text can be presented on a 'take it or leave it' basis."⁵³ Most developing countries, though reluctant to explicitly support, are direct beneficiaries of India's stand. Moreover, India has only reiterated the original negotiation position reflected in the Doha Agriculture modalities. Indeed, it has been observed that once the initial anguish over the India's stand and the "lost opportunity" end, there has been growing support for the India's position and there is evidence to conclude that India is getting tacit support from the G-33 members.⁵⁴

In the interim, we shall briefly address in this section some of the repercussions of the Indian stand on "Bali package" and the possible defense in the event other WTO Members, particularly the developed countries, choose to challenge or bypass India and push for the TFA. We shall also try to analyze the legitimacy of the Indian stand, both from the domestic policy perspective and the WTO rules.

6.1 'Bypass India' option

⁵³ WTO (2013), Final Statement of Bolivia, Cuba, Ecuador, Nicaragua and Venezuela at the Ninth WTO Ministerial Conference 7 December 2013, WT/MIN(13)/30, Geneva, 11 December 2013. See also Joint Communiqué to the Ninth WTO Ministerial Conference From: Antigua & Barbuda, Bolivia, Cuba, Dominica, Nicaragua, Saint Vincent and the Grenadines, Saint Lucia And Venezuela, Countries Members of the Bolivarian Alliance for the Peoples of our America (Alba-Tcp) Bali, 4 December 2013

⁵⁴Sengupta, supra note 67.

Top on the hazard list is the possibility of other WTO Members going ahead with the TFA without India by calling for a vote. As the US Ways and Means Committee Chairman Dave Camp opined, India's actions to "bring down implementation of the Trade Facilitation Agreement are completely unacceptable" and hoped that TFA could be salvaged "either with or without India."⁵⁵ Technically, for this agreement to get adopted, Article X of the WTO Agreement provides an option of voting if the consensus was not forthcoming. If two-thirds of the WTO membership supports the TFA, it would become part of the WTO.⁵⁶ Since the amendment alters the rights and obligations of the WTO members, TFA shall take effect only for those members who have accepted the same. However, the Ministerial Conference could decide by a three-fourth majority that any Member, which has not accepted it within a period specified, "shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference."⁵⁷ India position has resonated only with few countries. This would mean that, by the letter of the WTO law, the developed countries could insist on a vote and possible get a two-third majority.

Given the consensual nature of the decision making practice in the WTO, this scenario is highly unlikely as this proposition has some key drawback. Firstly, a vote to amend the WTO Agreement would upset the well established consensus practice in the WTO decision making, established and observed over decades. Secondly, and most importantly, consensus practice favours the developed countries, a numerically inferior group in the WTO. In a member driven organization like the WTO, with one member one vote policy, any departure from consensus practice shall cater to the interest of the developing countries by virtue of their numerical dominance in all the WTO decision-making bodies. The obvious result of insisting on a vote and break away from tradition would have the effect of developing country groupings dominating the WTO, thereby developed countries loosing the tacit control. Thus, commonsense suggest that a threat of vote would be in vain, the developed countries cannot and shall not attempt such an option.

⁵⁵ "Camp, Nunes Statements on Failure to Adopt Trade Facilitation Agreement," Press Release, <<http://nunes.house.gov/news/documentsingle.aspx?DocumentID=390267>>.

⁵⁶ Article X.1, WTO Agreement. Only for amending the following articles there is a need for acceptance by all Members: Articles IX and X of WTO Agreement; Articles I and II of GATT 1994; Article II:1 of GATS; Article 4 of the Agreement on TRIPS. See Article X.2, WTO Agreement.

⁵⁷ Article X.3, WTO Agreement.

In addition, the TFA target improving custom procedure and removing red-tape in developing countries. The major beneficiaries of this Agreement are developed countries manufactures whose goods would have a smooth transit to developing country markets. It would be illogical to proceed without India, a huge market by itself. In the absence of India, the deal itself may not make any sense and the benefit of the agreement would be undermined. “India is the second biggest country by population, a vital part of the world economy and will become even more important. The idea of excluding India is ridiculous” Tim Groser, New Zealand's minister of overseas trade said.⁵⁸ The recent official statement from the US and the UK also endorses the importance of India's vote for the deal. TFA without India will not move forward and possibility of India's isolation is rather slim.

6.2 The “due restraint” clause

Another major concern, the fallout of the post-Bail impasse, is the non-availability of ‘due restraint’ clause agreed at Bali Ministerial against potential legal disputes challenging inconsistent subsidies. Also known as the ‘Peace Clause,’ the provision gave countries greater freedom to maintaining subsidies which could otherwise be WTO inconsistent.⁵⁹ There is a widely held perception that India's food stockpiling cost has exceeded its limits and has broken the WTO rules. India might be exposed to subsidy disputes challenging the validity of its administered price support and food stockpiling programmes, and may be compelled to wage unending legal battles at the WTO. The AoA as it was conceived originally, contained a “due restraint” clause which protected countries using subsidies from legal challenges which can come into effect in January 1, 1995.⁶⁰ However, the Peace Clause was for a period of nine years and expired on December 31, 2003. The new proposal at Bali was part of a long standing demand to extend/revive the ‘peace clause’ albeit, only for

⁵⁸ Kounteya Sinha, ‘India's leadership for trading system important: UK deputy PM,’ *Times of India*, Aug 8, 2014, <<http://timesofindia.indiatimes.com/business/india-business/Indias-leadership-for-trading-system-important-UK-deputy-PM/articleshow/39840031.cms>>

⁵⁹ The Peace clause provided legal protection against subsidies and countervailing measures, Article XVI, GATT and Part III of SCM Agreement and Non-violation nullification or impairment of the benefits of tariff concessions under Article II GATT in the sense of paragraph 1(b) of Article XXIII of GATT. See Gopal Naik, “Expiry of Peace Clause in WTO's Agriculture Agreement: Implications” in Ramesh Chand (ed), *India's Agriculture Challenges: Reflections on Policy, Technology and other Issues* (CENTAD 2005), pp. 47-48.

⁶⁰ Article 13, AOA.

developing countries.⁶¹ Indeed, whether India has violated with AoA, in the absence of the ‘peace clause’, may depend on how one chooses to interpret the rules, with the ultimate arbitrator being the WTO panel and the Appellate Body. However, the fear of a challenge in the WTO DSU is real and India may be compelled to justify its legitimate development concerns before an international forum.

Indeed, the interpretation of the WTO rules must be consistent with the preamble to the WTO Agreement and the preambles to the covered agreements, which gives colour, texture and shading to the rights and obligations of Members.⁶² The substantive obligations in the AoA and other covered agreements must be read in the light of the broader objective and purpose set out in the Preamble.⁶³ In the AoA Preamble, the developed countries agreed, unequivocally, that the reform programme should be equitable to all Members, “having regard to *non-trade concerns, including food security ...*”, and recognizes that the special and differential treatment for developing countries is an integral element of the negotiations.⁶⁴ Similarly, the preamble to the WTO Agreement, it was agreed, “that there is need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.”⁶⁵ In addition, Article 27 of the SCM Agreement recognizes the important role played by subsidy in economic development programmes of developing countries.⁶⁶ Thus, a combined reading of the preambles and the S&D treatment provisions in the AoA clearly emphasis on the developmental dimension of subsidies and acknowledges its need for developing countries.

India’s legitimate food security objective and its long-standing concerns for small-time farmers are well established. The actions of India must be interpreted in

⁶¹ Proposals by India, *supra* note 42.

⁶² *US — Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, 12 October 1998 paras. 152, 153 and 155.

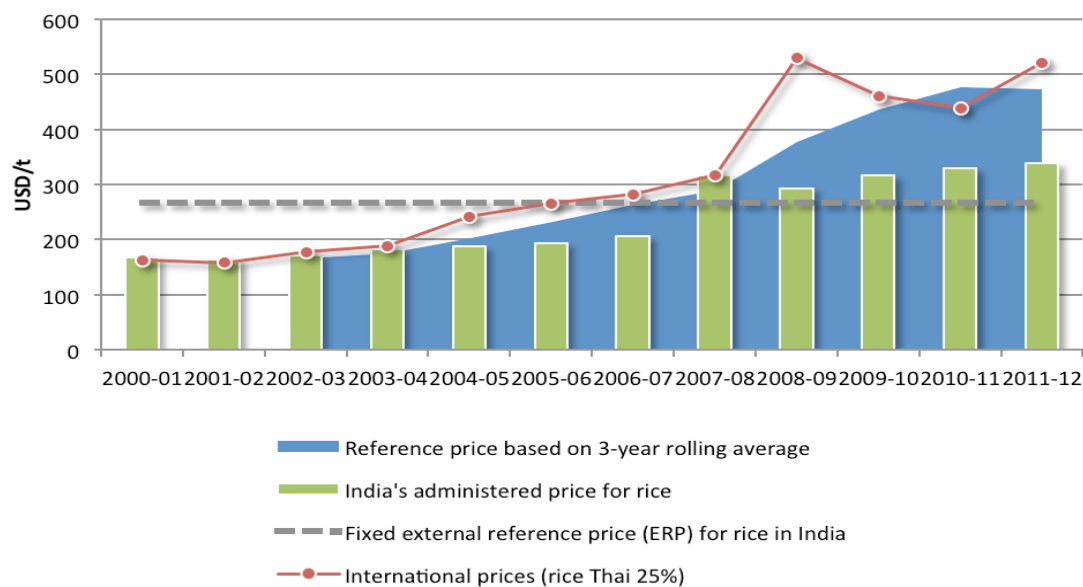
⁶³ *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Article 21.5 — New Zealand and US)*, Panel Report, WT/DS103/RW, WT/DS113/RW, 11 July 2001, paras. 6.19–6.20.

⁶⁴ Preamble, Agreement on Agriculture. See also Article 20, Agreement on Agriculture.

⁶⁵ *US — Standards For Reformulated And Conventional Gasoline*, Appellate Body Report, WT/DS2/9, 20 May 1996, p. 30.

⁶⁶ *Brazil — Export Financing Programme for Aircraft (Article 21.5 — Canada)* Panel Report, WT/DS46/RW 9 May 2000.

the broader context of the WTO provisions stated above and stated legitimate policy objective of food security. Indeed, the intent of the AoA is not to prohibit subsidy totally, rather, restrain those subsidies that distort international trade. Studies have pointed out that India’s subsidy schemes have minimal trade distorting effect. Christophe Bellmann, for instance, after comparing India’s administered price for rice in US\$, the fixed ERP, and world prices during 2000 – 2012 periods, concludes that the Indian administered price remains below the world price.⁶⁷



Source: Bellmann 2014

In other words, the India’s subsidy schemes, even though they may legally exceed the WTO threshold of 10% *de minimis*, have minimal distortion on international trade. Further, as seen above, while India’s administered price is higher than the 1986-88 ERP, it is still below the world market price, meaning that there is minimal or no trade distortion by the administered price mechanism.⁶⁸ Given the least trade distorting effect of Indian subsidies and in view of the broad objective of the AoA preamble, India could possibly reason out its case at the WTO dispute settlement system.

⁶⁷ Christophe Bellmann (2014), ‘The Bali Agreement: Implications for Development and the WTO’, *International Development Policy, Revue internationale de politiques de développement* [Online], 6.1. Online since 11 February 2014 <<http://poldev.revues.org/1744> ; DOI : 10.4000/poldev.1744>

⁶⁸ E. Diaz-Bonilla (2013), “Some Ideas to Break the Stalemate on Agricultural Issues at Bali” <<http://www.foodsecurityportal.org/some-ideas-break-stalemate-agricultural-issues-bali>>

In addition, the legality of the domestic support measure also depends on the interpretation of the India's total annual AMS, and the content of the Green box and S&D box flexibilities.⁶⁹ For instance, the Green Box supports subsidies in the form of direct cash payment to farmers for creating necessary agriculture infrastructure, research and other extension services. India may also consider appropriate use of Article 6.2 of the AoA, which protects any direct or indirect government support, provided to encourage agriculture and rural development, investment subsidies, etc., to low income farmers. India may have to convince that the 1986-88 fixed reference price established at the Uruguay Round does not reflect the current realities and accordingly price and inflation must be adjusted before a finding of inconsistency with AoA.⁷⁰ In support, India may also demand a favourable interpretation in the context of Article 18.4 of the AoA which provides that "due consideration shall be given to the influence of excessive rates of inflation on the ability of any Member to abide by its domestic support commitments".

Another method liberally employed by the developed countries to protect its domestic support schemes, which can and has been used by India is "box shifting" i.e., shifting subsidies from the 'Amber box' which has reduction commitment to 'Green box' and 'Blue box', or the S&D box in the case of developing countries. Developed countries were able to maintain or increase their already high subsidies by maneuvering domestic support measures between boxes.⁷¹ In fact, the total amount of subsidies in OECD countries since Uruguay Round has "gone up instead of going down, despite the apparent promise that Northern subsidies will be reduced."⁷² The overall levels of support for domestic producers in developed countries went up because of the increased use of support measures allowed under the Agreement.⁷³ Subsidies in Amber box are transferred to Green box since 1995 under the reforms of

⁶⁹ Lars Brink, "Support to Agriculture in India in 1995-2013 and the Rules of the WTO" IATRC Working Paper #14-01, April 2014, p. 7.

⁷⁰ A. Hoda and A. Gulati (2013) *India's Agricultural Trade Policy and Sustainable Development* (Geneva: ICTSD). Bellmann, supra note 67.

⁷¹ Statement by Martin Khor, Director, Third World Network at the United Nations ECOSOC opening session in Geneva on 30 June 2003. <<http://www.twinside.org.sg/title/twninfo36.htm>>

⁷² Ibid.

⁷³ Bhagirath Lal Das, "Negotiations on Agriculture and Services in the WTO: Suggestions for Modalities/Guidelines" TWN *Trade & Development Series No. 10*, 2001.

US Farm Bills and the EU Common Agriculture Policies (CAP).⁷⁴ The US domestic support in Amber box decreased from \$6.2 billion in 1995 to \$4.1 billion in 2010, whereas, the green box subsidies increased from \$46 billion in 1995 to \$120 billion in 2010.⁷⁵ The EU domestic support in amber box declined from €50 billion in 1995 to €6.5 billion in 2010, however, green box support increased from €9.2 billion to € 68 billion in the same period.⁷⁶ This practice is not limited to the US and EU. The domestic support under Green box has increased over 150% in Australia, around 75% in Norway and more than 50% in Switzerland and Canada.⁷⁷

However, the legality of the practice of ‘box shifting’ to avoid WTO inconsistency of agricultural subsidies has been a question under both the AoA and SCM Agreement.⁷⁸ For instance, the WTO Appellate Body in 2005 had ruled that the US fixed direct payments were not being decoupled and hence cannot be grouped as a Green Box subsidy.⁷⁹ This may also be the case with the EU’s allegedly decoupled payments - mainly the Single Payment Scheme (SPS) classified currently under the Green Box.⁸⁰ Berthelot notes that contrary to the AoA Article 6.2 provision on input subsidies, the US and the EU did not notify in the AMS their huge direct payments to feedstuff.⁸¹ In short, the WTO dispute settlement challenges are not going to a one way, but would open a flood of claims and counterclaims, as most countries have

⁷⁴Rashmi Banga (2014), “Impact of Green Box Subsidies on Agricultural Productivity, Production and International Trade” Unit of Economic Cooperation and Integration amongst Developing Countries (ECIDC) UNCTAD June 2014, p. 1.

⁷⁵Ibid, p. 10.

⁷⁶Ibid, p. 8.

⁷⁷ The US food aid alone has increased from 65% in 2002 to around 79% of total green box subsidies in 2010. Rashmi Banga (2014), supra note 74, p. 11.

⁷⁸ Agricultural subsidies have to be analyzed first under the AoA, and only if necessary under the SCM. However, some argue that the SCM does not apply at all to agricultural subsidies because the AoA is *lex specialis*. See Chambovey, “How the Expiry of the Peace Clause Might Alter Disciplines on Agricultural Subsidies in the WTO Framework” *Journal of World Trade*, vol. 36 p. 309.

⁷⁹*United States - Subsidies on Upland Cotton (Brazil)* WT/DS267/AB/R, 3 March 2005. Other cases where domestic subsidies have been found to have dumping effect as well as explicit export subsidies, See also *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products (US)* WT/DS113/AB/RW, 3 December 2001 and *Canada - Measures Affecting Dairy Exports (New Zealand)*, WT/DS103/AB/RW2, 20 December 2002; *European Communities — Export Subsidies on Sugar* (WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, 28 April 2005. See also, Richard H. Steimber & Timothy E. Fosling, “When the Peace ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenges,” 6 (2) *Journal of International Economic Law* 2003 369

⁸⁰ Jacques Berthelot, “Bali food security deal a first step towards WTO rule reform?”, *Third World Resurgence* No. 281/282, Third World Network, January/February 2014, pp 39-43 <<http://www.twinside.org.sg/title2/resurgence/2014/281-282/cover09.htm>>.

⁸¹ Ibid.

interpreted the WTO rules to their advantage. The chance of a WTO dispute settlement invocation would therefore be limited.

Studies have concluded that subsidies either in the form of ‘direct cash transfer’ (which is permitted under WTO AoA) or ‘administered price’ (not permitted under WTO AoA) may be equally bad in economic terms. The AoA legitimize ‘direct cash transfer’ including ‘payment-in-kind’⁸² because they are considered as having minimal trade distorting effect and so classified under the Green box. Whereas ‘administered price’ mechanism has been classified under Amber box. The choice of differed boxes for above mentioned subsidies seems to result in a *de facto* discrimination where most of the Northern subsidies fall under the permissible category, whereas, India’s and most developing country subsidy fall under the restricted Amber box. According to Khor,

“Due to this peculiar categorization, the developed countries have shifted their domestic agriculture subsidies from directly price-related subsidies (which are subjected to reduction commitments) to direct payments and other “indirect” subsidies (which are exempted). This artificial distinction between "trade-distorting subsidies" and "non-trade-distorting subsidies", thus paving the way for the continuation or increase in overall subsidies.⁸³

In other words, the root of the current problem is the erroneous classification of subsidies, made respectable and not subject to discipline, even though they give an unfair advantage to the farms receiving the subsidies. Thus, by simply shifting boxes, developed countries could claim to be meeting their legal obligation of reducing the Amber Box subsidies under the AMS. At the Uruguay Round, the developing countries did not fully realize the full implication of the different forms of support such as direct payment to producers, infrastructural services, pest control, environment programme, etc., which were legitimized under Green box and the Blue box.⁸⁴ They agreed into the developed country’s demands without understanding the

⁸² ‘Payments-in-kind’, denotes a transfer of economic resources, in a form other than money, from the grantor of the payment to the recipient. *Canada — Dairy*, Appellate Body Report, WT/DS103/AB/R, 13 October 1999, paras. 87–88.

⁸³ Martin Khor, “The WTO Agriculture Agreement: Features, Effects, Negotiations, and What is at Stake”, *Third World Network*, <twinside.org.sg/title2/latestwto/AOFAO.doc>

⁸⁴ Suman Modwel (2004), “The WTO and Agriculture: Why Is India so Furious?” *The Journal of World Investment & Trade* vol. 5 (2) 2004, p. 16. Ramesh Chand and Linu Mathew Philip (2001), “Subsidies

consequence of their actions, and are now compelled to align their practices with the practices of the developed countries. India has already started the process of moving towards direct transfer of cash subsidies for its various programmes.⁸⁵

In the absence of an economic rationale for such classification of subsidies, the question narrows down to the WTO legality and its classification under boxes. Given the developmental nature of the developing countries' subsidies, it should be the prerogative of the state to design the appropriate method of domestic support and the WTO rules must show deference to national policy goals. The Panel in *Brazil — Aircraft* appropriately noted, "it is the developing country Member itself which is best positioned to identify its development needs and to assess whether its export subsidies are consistent with those needs. Thus, in applying this provision we consider that panels should give substantial deference to the views of the developing country Member in question."⁸⁶ Straitjacket and prescriptive approach could be counterproductive. In a country like India, where establishing individual's identity by itself a challenge, domestic support in the form of "direct subsidy transfer" may be self-defeating. The minimum support price and the public distribution system could be a more economically viable option for countries like India, particularly when such methods of providing support may have no or minimal distortion of international trade.

The key to solve the current deadlock is not to view agriculture subsidy from a narrow perspective of AoA "legality", which the present negotiation has taken. Rather, the solution lies in the political and contextual understanding of the role of subsidy in India and elsewhere. The US and the EU provide four to 10 times more agriculture subsidies per person than those provided by India.⁸⁷ India's precarious

And Support In World Agriculture: Is WTO Providing Level Playing Field?" *Economic and Political Weekly*, Vol. 36 (32), pp. 3014-3016.

⁸⁵ Aman Malik, "Cabinet clears way for direct transfer of fertilizersubsidy Step is another sign of government intent to move towards direct transfer for all programmes," Live Mint, Fri, Oct 11 2012. <http://www.livemint.com/Politics/J3i0tAKzOdKW9Ek3XmGqIM/Govt-raises-urea-price-by-Rs-50tonne.html?utm_source=copy>. See also, Interim Report of Task Force on Direct Transfer of Subsidies for Kerosene, LPG and Fertilizers, Ministry of Finance, June 2011. <finmin.nic.in/reports/Interim_report_Task_Force_DTS.pdf>

⁸⁶ *Brazil - Export Financing Programme for Aircraft*, Panel Report, WT/DS46/R, 14 April 1999, para. 7.89.

⁸⁷ Mihir Shah, 'Food Security and Rodrik's Trilemma', *The Hindu*, Thursday, August 14, 2014. The Indian subsidy on food is only \$44.6 per person while it is \$170 per person in the EU and \$448.7 per

position is due to the oversight of its negotiators at Uruguay Round who were unable to comprehend the implications of what they agreed. India agreed at Uruguay that the subsidies should be illegal if it exceeds a meager 10 per cent of the value of production calculated on a fixed very low 1986-88 reference price. They assumed that since the domestic support was way below the *de minimis* level, India was safe, which in the hindsight was misplaced.

6.3 Undermining multilateralism

Beyond the “lost opportunity”, India is also blamed for the Bali debacle, which could lead to the demise of the WTO and multilateralism. Currently there are around 253 RTAs notified to the WTO today. RTAs have grown much more rapidly during the WTO when compared to the GATT era.⁸⁸ Exponential growth of regional trade agreements (RTAs) has been sighted as the reason that undermined the multilateral trading system.⁸⁹ Arvind Subramanian calls the rise of ever mega RTAs an “existential threat” and warns, “multilateral trade as we have known it will progressively become history.”⁹⁰ Lack of progress at the Doha Development round of negotiations since 2001 have lead to an explosion of bilateral and multilateral approaches. Mega RTAs such as the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) are currently under negotiation. The TPP has been dubbed as the trade agreement of 21st Century, whereas, WTO agreement has already been considered as archaic rules of 20th Century. TTIP, an ambitious and comprehensive agreement, is expected to bring

person in the US. RanjaSengupta, “WTO: West’s Smoke & Mirror Tactics” *Business World*, 7 August 2014 <<http://www.businessworld.in/news/economy>>

⁸⁸ On average this has meant 24 notifications per year since the formation of the WTO, compared to 3 on average during the GATT years. See WTO News: Speeches - DG Roberto Azevêdo, “Regional trade agreements ‘cannot substitute’ the multilateral trading system” 25 September 2014 http://www.wto.org/english/news_e/spra_e/spra33_e.htm

⁸⁹ Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade*, (OUP 2008). Limao, Nuno (2006), “Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the US”, *American Economic Review*, 96:896-914.

⁹⁰ Trade: “In my backyard,” *The Economist*, October 12, 2013. See also, Nuno Limão, “Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the United States” *The American Economic Review*, Vol. 96 (3) 2006 896-914. Jagdish Bhagwati “U.S. Trade Policy: The Infatuation with Free Trade Agreements” in Jagdish Bhagwati and Anne O. Krueger, *The Dangerous Drift to Preferential Trade Agreements*, AEI Press, 1995.

significant economic gains for the EU (€120 billion) and the US (€95 billion).⁹¹ Such mega-regionalism could lead to discrimination and trade conflicts.⁹²

The argument seems to be highly exaggerated. Indeed, the delay and the deadlock in the Doha Development round may have the potential of undermining the WTO as institution and multilateralism as a process. At the same time, it is pointed out that RTAs is not a new phenomenon and are the realities of today and would continue to see an exponential widening and deepening of this architecture.⁹³ It has also been suggested that eventually achieving RTAs by default would lead to multilateral trade liberalization. The increasing use of concepts such as the most-favoured-nation (MFN) treatment principle in the RTAs and the “spaghetti bowl”⁹⁴ effect on RTAs could lead to strengthen multilateralism. The move towards regionalism is a natural process which would continue even if DDA succeeds. Baldwin notes that “taking the world to global duty-free trade will require a multilateralisation of the world’s existing and emerging regionalism” and the WTO is the only international organization “well-placed to help tame the tangle of free trade deals at the global level.”⁹⁵

Moreover, it has been pointed out that while most RTAs grant their partners a higher level of market access in goods and services than that are available through the WTO, for other issues, such as provisions on anti-dumping rules, intellectual property rights, etc, there is no major improvement over the WTO provisions. According to the WTO Director General, “there are many big issues which can only be tackled in an

⁹¹ Simon Lester, “One Year into the TTIP Negotiations: Getting to Yes” *Free Trade Bulletin No.* 59, September 29, 2014 <http://www.cato.org/publications/free-trade-bulletin/one-year-ttip-negotiations-getting-yes>. See also Final Report of the U.S.–EU High Level Working Group on Jobs and Growth, February 11, 2013, <http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/final-report-us-eu-hlwg>

⁹² Arvind Subramanian and Martin Kessler, “The Hyperglobalization of Trade and Its Future”, Global Citizens Foundation, Working Paper 3, 2013, <http://www.gcf.ch/wp-content/uploads/2013/06/GCF_Subramanian-working-paper-3_-6.17.13.pdf>

⁹³ Matthew Wilson, “Friend or Foe? Regional Trade Agreements and the WTO” *ICSID Bridges* 12(11) February 2008.

⁹⁴ “Spaghetti bowl” phenomena refers to a problem with RTAs that they can create a web of overlapping and inconsistent trade rules that complicates global sourcing (Rules of Origin) and raises transactions costs. Bhagwati, Jagdish and Arvind Panagariya (eds) *The Economics of Preferential Trade Agreements*, AEI Press 1996. See also, Jeffrey J. Schott, “The future of the multilateral trading system in a multi-polar world”, Discussion Paper, German Development Institute 2008, p. 10 <<http://www.iie.com/publications/papers/schott0608.pdf>>

⁹⁵ Richard E. Baldwin, “Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade” *The World Economy* (2006), pp. 1451, 1508.

efficient manner in the multilateral context through the WTO.”⁹⁶ Thus the opinions are at best divided on the question of regionalism endangering multilateralism. In addition, the developed countries are the major gainers of multilateralism and a greater onus lies on them to ensure the success the WTO negotiations.

Further, TTP and TTIP negotiations are more complex and difficult than the early projected. In the context of TTIP, there are various contentious issues that the EU and US must overcome, such as US liberalize its financial services markets; EU's argument for stronger protections for its “geographical indications”; EU data privacy protections undermined by the US NSA spying scandals; investor-state dispute settlement mechanism etc.⁹⁷ As far as TTP is concerned, the negotiation which was expected to conclude by 2013 is already delayed. Negotiating countries are divided on a number of issues, including opening up Japan’s auto and farm markets, government procurement, pharmaceutical patents and limiting the role of state-owned enterprises etc.⁹⁸ Given the strategic nature of TTP and TTIP, the likelihood of a FTA among the BRICS (Brazil, Russia, India, China and South Africa) countries to counterbalance is increasing.⁹⁹

6.4 Missed deadline and a broken promise

The Director General of the WTO notes that “if we missed the 31 July deadline for the adoption of the protocol on the Trade Facilitation Agreement, it would be likely to have an impact on all areas of our work.” The DDA was initiated in 2001, with lot of opportunities for consensus on several negotiating issues all along the years. The Members choose not to early “harvest” most of the issues, citing “single undertaking” principles. Further, the current proposal on stockpiling and agriculture subsidy was already part of the 2008 draft negotiating text on Agriculture

⁹⁶ WTO 2014, *supra* note 88.

⁹⁷ Simon Lester, “One Year into the TTIP Negotiations: Getting to Yes” *Free Trade Bulletin* No. 59, September 29, 2014 <http://www.cato.org/publications/free-trade-bulletin/one-year-ttip-negotiations-getting-yes>.

⁹⁸ “Ministers miss deadline for Trans-Pacific Partnership,” 11 December 2013 <http://www.abc.net.au/news/2013-12-10/an-tpp-talks/5148338>; Elliot J. Feldman, “The pivot to Asia and the inevitable failure of the Trans-Pacific Partnership,” June 23 2014, <http://www.lexology.com/library/detail.aspx?g=64175cf7-2586-4b5a-bb59-49fe3bf5e3f1>

⁹⁹ Vai Io Lo, Mary Hiscock (ed) *The Rise of the BRICS in the Global Political Economy: Changing Paradigms?* Edward Elgar Publishing 2014, pp.72-73. Sachin Kumar Sharma and Murali Kallummal, “A GTAP Analysis of the Proposed BRICS Free Trade Agreement” Presented at the 15th Annual Conference on Global Economic Analysis “New Challenges for Global Trade and Sustainable Development”, Geneva, Switzerland June 27 – 29, 2012.

modalities.¹⁰⁰ One cannot put the onus solely on India for going back on the ‘piecemeal’ Bali package rather than accepting the failure as systemic and collective. If the system has failed, and the Doha Round has derailed, the developed countries are equally at fault for their uncompromising positions.

Missing deadlines are nothing new to the WTO. For instance, a recent deadline to implement export subsidies elimination in 2013 as stipulated in the Hong Kong Ministerial Declaration was missed with developed countries being the culprit.¹⁰¹ Similarly, the developed countries agreed to work through the Sub-Committee on Cotton ambitiously, expeditiously, and specifically, and to eliminate all forms of export subsidies for cotton provided by developed countries in 2006.¹⁰² The TFA is, thus, only one in the long line of ‘missed deadlines’ from the inception of the WTO. “Many of these missed deadlines and unfulfilled obligations are central to the demands of developing countries ... and a vast majority of missed deadlines is because of the US and developed countries withholding consensus.”¹⁰³ Thus, it is not worthwhile to amplify the ‘lost opportunity’ and one should get in terms with reality that the developing countries are now more conscious of their concerns and interest than they were during the Uruguay Round of negotiations, which in the hindsight was not as beneficial as was projected.

Finally, by going back on its promise, did India undermine its image among its peers? This should be the last of worries given the paramount nature of issues at stake. India’s farm subsidy and stockpiling have two fold welfare objectives, ensure agricultural productivity, thereby ensuring food security, and secondly, guaranteed

¹⁰⁰ The text provided that the base level for reductions in Overall Trade-Distorting Domestic Support shall be the sum of (a) the Final Bound Total AMS (b) for developing countries 20 per cent of the average total value of agricultural production in the 1995-2000 or 1995-2004 period as may be selected by the Member concerned and (c) the higher of average Blue Box payments as notified to the Committee on Agriculture, or 5 per cent of the average total value of agricultural production, in the 1995-2000 or 1995-2004 base period as may be selected by the Member concerned. Revised Draft Modalities for Agriculture, TN/AG/W/4/Rev.4, 6 December 2018, p. 4 and para 1-3 of Annex B, p. 39 <http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.doc>. See also Bellmann, *et al* 2013, *supra* note 38; G-33 proposal: early agreement on elements of the draft Doha accord to address food security; ICTSD, Programme on Agricultural Trade and Sustainable Development, Information Note, International Centre for Trade and Sustainable Development, Geneva, Switzerland, <www.ictsd.org>.

¹⁰¹ The Hong Kong Ministerial Declaration WT/MIN(05)/DEC 2005 where it was stated that “... agree to ensure the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect to be completed by the end of 2013”.

¹⁰² Paragraph 11, Hong Kong Ministerial Declaration WT/MIN(05)/DEC).

¹⁰³ Chakraborty Raghavan, “Misplaced claims of deadline sanctity for TFA”, South-North Development Monitor (SUNS) #7855, 31 July 2014.

income support farmers for such produce. Farm subsidy by all practical sense is a lifeline for the producers of agriculture commodity and guarantees farmers a minimum price for agriculture produces preventing distress sale. This also ensures a stable price environment for farmers which is very important for increasing agricultural production and productivity.¹⁰⁴ In addition, stockpiling is important for redistribution of food to poor through the public distribution system, export of the same could not be justified.

India is a country where about 69% (700 million) of the population, are dependent on the rural economy for their livelihood, with an annual per capita income of US\$175 as compared to national per capita income of US\$480.¹⁰⁵ Nearly 70% of cultivable land is prone to the vagaries of the monsoon and farmer's suicide is an everyday occurrence. Most farmers are illiterate and many even don't have identity card let alone a bank account which are essential for secure subsidy. In such a scenario, the farm subsidy and welfare measures that are essential lifeline, are nonnegotiable, apart from the Constitutional mandate of building an equitable society. Besides, countries like the US that are in the forefront of accusing India, also share the dubious distinction of going back on treaty commitments, either be it Havana Charter in 1947 or the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) in 2001, citing national interest.¹⁰⁶ The legitimate welfare of the people is paramount, and India has every right pursuing this objective.

7. Inconsistent national policy and policymaking

The AOA is inherently worded to serve the interest of the developed countries, particularly the EC, the US, and Japan, which can continue to maintain a very high level of support for agriculture through the exempt category. Ofcourse, the developing countries understood the reality quite late. However, this does not preclude the fact that India and other countries have agreed to this agreement at the Uruguay Round

¹⁰⁴ Price Support Scheme (PSS): The Operational Guidelines
<<http://agricoop.nic.in/imagedefault/cooperation/pssguidelines.pdf>>

¹⁰⁵ Shishir Priyadarshi "Decision-Making Processes in India: The Case of the Agriculture Negotiations," *Managing the Challenges of WTO Participation: Case Study 15*
<http://www.wto.org/english/res_e/booksp_e/casestudies_e/case15_e.htm>

¹⁰⁶ US Position on International Treaties, Global Policy Forum, July, 2003
<<https://www.globalpolicy.org/empire/26665-us-position-on-international-treaties.html>>

and therefore are bound by the obligations listed in the same. Trade distorting or not, the AoA provides for sufficient leeway to redesign the domestic support measures to suit the conditions laid down in the agreement, as has been managed by the developed countries. For developing countries, this would demand a clear understating of domestic policy goals, national priorities and clever maneuvering. For India, the key is to frame an unambiguous national policy and “a negotiating and litigation strategy which allows the Indian people to protect their visual interest.”¹⁰⁷ This would depend on India’s ability to consciously restructure and manage its existing domestic support programmes, something that India had failed put in place.

Unfortunately, India’s current policymaking apparatus is inhibited with inconsistencies. In the context of AoA, India’s implementation practices have been questioned at various WTO forums. Specifically, concerns were raised and clarification sought on the inconsistent subsidy practices, and the AMS calculation methodology adopted by India. For instance, one of the anomalies in the Indian subsidy scheme is in the context of rupee or dollar as a base currency for calculation of AMS. India initially calculated its AMS in Indian rupees,¹⁰⁸ however, shifted to US dollars without any explanation.¹⁰⁹ India converted the support prices to US dollars using an exchange rate of Rs. 13.4 = \$1, which is the average official exchange rate during the 1986-88 base period.¹¹⁰ The result was fixed ERP. It has been contested that this practice deviates from the requirement in Article 1(h)(ii) of the AoA to calculate the level of support actually provided during any year “with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV” of India's Schedule.¹¹¹ By converting its ERP to US dollars at the rate of Rs 13.4 per US\$, India is alleged to have used an exchange rate that has seriously distorted the comparison between the fixed ERP and applied administered prices.¹¹² While the attempt is to protect Indian interest in sustained domestic support

¹⁰⁷ B. S. Chimni (1999), “India and Ongoing Review of WTO Dispute Settlement System” *Economic and Political Weekly*, 30 January, 1999, pp. 264-7 at 267.

¹⁰⁸ WTO, India’s Notification to the Committee on Agriculture, G/AG/AGST/IND.

¹⁰⁹ WTO, India’s Notification to the Committee on Agriculture, G/AG/N/IND/7.

¹¹⁰ JTB Associates (2011), *supra* note 30.

¹¹¹ See WTO, India’s Notification to the Committee on Agriculture, G/AG/AGST/IND. WTO, “Points Raised by Members Under the Review Process,” *Compilation Of Questions for the Meeting On 29 September 2011 Committee On Agriculture*, G/AG/W/87, 22 September 2011.

¹¹² *Ibid* para 45.

for agriculture products, India is yet to provide a logical legal explanation on the change in practice.

Further, India in its notified to the WTO, had classified the Government procurement at MSP not as “market price support” but as public stockholding for food security purposes.¹¹³ India’s has clarified that AoA footnote 5 to para 3 of Annex 2 covers both the acquisition and the release of foodstuffs at administered prices. As required, India notifies the difference between the acquisition price and the external reference price as AMS¹¹⁴ However, concern has been raised against this interpretation. India is alleged to have followed a policy of “double subsidization” for producers of major crops such as rice and wheat. Large input subsidies are provided, and administered prices are announced before the sowing season with guaranteed procurement. In addition, it has been pointed out that in the AMS calculation, India used only government purchases rather than total production in the equation, which was the case in the earlier notification and the right approach according to some.¹¹⁵

India has classified all agriculture input subsidies in S&D box permissible under Article 6.2 of AoA, claiming that 98.97 per cent of Indian farm holdings are low-income, resource-poor farmers.¹¹⁶ For this purpose, India classified all farmers owning less than 10 hectares of land as low-income and resource-poor farmers. Even land holdings over 10 hectares may qualify as resource-poor as these are covered by land ceiling laws and would largely be un-irrigated lands.¹¹⁷ The US has also pointed some anomaly regarding the data which has been projected by India. As per the Indian interim budget, the estimate for Food Security Act in 2014-2015 is Rs 115,000 crore (US\$18.8 billion). Whereas, India’s National Sample Survey Office the poverty gap per its latest Consumption Expenditure Survey is Rs 55,744 crore (US\$9.1 billion) in 2011-2012. The US notes that the cost of implementing National Food

¹¹³ Annex 2, para 3 of the AOA.

¹¹⁴WTO, “Responses to Points Raised by Members under the Review Process,” *Compilation of responses to questions raised during the Committee on Agriculture*, 17 November 2011, Committee on Agriculture, G/AG/W/92, 16 January 2012, p. 27.

¹¹⁵ Ibid.

¹¹⁶ WTO, India’s Notification to the Committee on Agriculture, G/AG/N/IND/7. See also Responses To Points Raised By Members Under The Review Process, *Compilation of responses to questions raised during the Committee on Agriculture meeting on 29-30 September 2011*, G/AG/W/88, 21 October 2011. p. 19. See also, WTO, Points raised by members under the review process *Compilation of questions for the meeting on 5 and 6 June 2014*, Committee on Agriculture G/AG/W/127, 26 May 2014, p. 9.

¹¹⁷ Ibid.

Subsidy Act is “approximately twice the amount it would cost to provide all below poverty households with enough cash to cross the poverty line.”¹¹⁸

These are only few instances of Indian practices and policies that might fall foul with the WTO rules. India might come up with a logical explanation for these practices to follow up and support its policy, practice and interpretation. However, the inconsistencies also show the *ad hocism* and piecemeal approach adopted by India towards WTO commitments. The legality of India subsidy schemes vis-à-vis the WTO rules which is the subject of the current fiasco, is the upshot of the traditionally opaque and bureaucratized policy formulation process in India. India lacks an independent policy formulation and institutionalized consultation process. The policy making and the negotiating positions are invariably set by an unsteady bureaucracy and the negotiating team, even today, are predominantly government officials. Indian “negotiating positions are almost without exception recommended by Commerce Ministry officials, examined by the Committee of Secretaries, and then approved by the concerned Cabinet sub-committee.”¹¹⁹ Lack of institutionalized policy making and coordination is reflected even within the government ministerial structure. For instance, there is no institutionalized connect between the Ministry of Agriculture, which is the nodal ministry for all issues pertaining to agriculture, and the nodal ministry for WTO, the Ministry of Commerce and Industry which review implementation and lead trade negotiations.

Consultations with national academic and research institutions and stakeholders are selective, piecemeal and need-based. During the Uruguay Round of trade negotiations, India was largely a cautious and passive player.¹²⁰ No academic institutions or stakeholders were consulted for formulating key negotiating positions. In fact, the central government did not consider it necessary to even consult the state governments despite being a significant stakeholder and agriculture being a state

¹¹⁸ WTO, Points raised by members under the review process Compilation of questions for the meeting on 5 and 6 June 2014, Committee on Agriculture G/AG/W/127, 26 May 2014, p. 9.

¹¹⁹ Interview with Julius Sen, a former high ranking bureaucrat in the Indian administrative service, in Shishir Priyadarshi, “Decision-Making Processes in India: The Case of the Agriculture Negotiations, Managing The Challenges Of WTO Participation, *WTO Case Study 15* <http://www.wto.org/english/res_e/booksp_e/casestudies_e/case15_e.htm>

¹²⁰ Amit Shovon Ray and Sabyasachi Saha, “Shifting Coordinates of India’s Stance in the WTO: Understanding the Domestic and International Economic Drivers”, 98, in Amrita Narlikar and Brendan Vickers(Eds), *Leadership and Change in the Multilateral Trading System* (MartinusNijhoff Publishers 2009).

subject under the Indian Constitution.¹²¹ Indeed, much have changed since the Uruguay Round, and wider consultations in the decision making process are now encouraged. However, the dominant views in many of the stakeholder consultations are government orchestrated or controlled or may have an industry bias. Many of the research institutions and “think-tanks” are funded by governments and act more as micro-level data collection units rather than providing an independent analysis and opinion on the negotiating issues. The bureaucracy has the final say on what data or opinion needs to be taken depending on the appropriateness of these positions. It was precisely because of these reasons that the Indian negotiators signed at the Uruguay Round an agreement they were unable to comprehend, and the current turn around in the negotiating position is the evidence of such a myopic national vision. The consequence of such an approach is also evident from India’s lack of capacity to tackle WTO cases especially when the opponents are developed countries that are well equipped with legal manpower and expertise.¹²²

Wider consultation, stakeholder discussion and public participation could have ensured the emergence of a coherent and consistent national view on issues of direct implication for governance. Indeed, the landscape is changing, however, much needs to be done to ensure a robust decision making process, including establishing a culture of expert consultations away from bureaucratic choice and influence, and ensure a well-defined and consistent national policy. In fact, the recommendations must come from the ‘independent’ academia and think tanks, with the government playing an active role in concretizing the policy. A key aspect of this exercise would be to nurture expertise through establishing centers of excellence across India, with an independent research agenda. India did so in the context of intellectual property rights, by establishing Intellectual Property Rights (IPR) Chairs in various premier institutions, interestingly under the Copyright office of the Ministry of Human Resource Development (MHRD).¹²³ The Chairs are, however, Ministry driven with meager budget outlay generally used towards payments of chair professors’ salary or conducting national seminars. There is general lack of incentive, functional autonomy

¹²¹Priyadarshi, *supra* note 119.

¹²² Roy and Saha, *supra* note 120.

¹²³ The Ministry under the scheme of Intellectual Property Education, Research and Public Outreach (IPERPO) has so far set up 18 IPR Chairs in various universities and institutes considering their potential for development and growth of IPR Education, Research and Training.
<<http://copyright.gov.in/frmlistiprchair.aspx>>

or focus for the IPR Chair scheme.¹²⁴ Not surprisingly, many of the Chairs remain inactive and the budget underutilized because of the documentation and procedural difficulties.¹²⁵ Apart from the occasional gathering in academic seminars, it is unclear on how the facility is used to strengthen the national IPR policy and strategy.

The need is to strengthen WTO law and policy studies, given the fact that our core domestic concerns in the WTO are not solely in the Trade Related Intellectual Property Rights (TRIPs) but more in other covered agreements such as the Agreements on Agriculture, Sanitary and Phytosanitary Measures (SPS), Technical Barriers to Trade (TBT), Services (GATS) and strengthening the legal apparatus against WTO dispute settlement challenges. It does seem that India has been overzealous in promoting and educating about the WTO TRIPs Agreement which is largely seen as designed to protect developed countries' IPRs in developing countries.¹²⁶ Such zeal must be shown in areas that are critical for leveraging and protecting India's business and people's interest at the WTO and in other countries. In the absence of these initiatives and misplaced priorities, India shall remain ill prepared in meeting the WTO challenges and shall continue to witness such disconcerting turnarounds in the future.

8. Conclusion

To conclude, India might eventually emerge unscathed both politically and legally, from the current opposition and pressure. Any option of moving forward with the "Bali package" without India would be unwise. Challenges, either through dispute

¹²⁴ Report of the Expert Committee on the Continuation of the Scheme of Intellectual Property Education, Research and Public Outreach (IPERPO) in the XII Five Year Plan 2012-17, New Delhi 2013.

¹²⁵ Ibid.

¹²⁶ Of the total patents of 30,822 in force as on 31 March 2009, only 6,158 patents are held by Indians. See Annual Report of office of the Controller General of Patents, Designs, Trade Marks and Geographical Indications, 2008-09 <<http://www.ipindia.nic.in/>>. For the debate, see generally, R. Rajesh Babu, Constitutional Right to Property in Changing Times: The Indian Experience, *Vienna Journal on International Constitutional Law*, vol. 6(2) 2012, pp. 225-229; Biswajit Dhar and Niranjana Rao, "Dunkel Draft on TRIPS: Complete Denial of Developing Countries Interest" 27 *Economic and Political Weekly* (1992) 275; Sudip Chaudhuri, "Dunkel Draft on Drug Patents: Background and Implications" 28(36) *Economic and Political Weekly* (1993) 1861-1865; V.G. Hedge, "Intellectual Property Rights and Asian-African States" in AALCO, *Commemorative Essays in International Law* (New Delhi 2006) 133.

settlement or of political isolation would only further undermine the WTO rules and multilateralism. It is just a matter of time that India's standpoint resonance across WTO membership, specifically among the developing countries. The experience would further strengthen India's leadership position and presents an opportunity to rebuild a coalition based on a renewed understanding. The developed countries, on the other hand, know well that the concern of food security is legitimate and realistic, and the only way to bring India on board is to accept its genuine demand. India has expressed its full support for the TFA, provided it is bundled with its food security concerns, a small leeway given the enormous policy shift taken by India. Since the final deadline is 31 July 2015, a short postponement of signing would not hinder the TFA or the Doha round.

India's demand for S&D treatment could be justified on a high moral ground. It is a reality that for India and other low-income countries, agriculture accounts for over 70% of the labour force, whereas it is only 4% in high-income countries.¹²⁷ Irrespective of any international legal and political fallout, India cannot overlook the interest of a large majority of its population who are directly depended on such welfare schemes. It is paradoxical that the AoA was one of the few agreements in the WTO framework conceived to protect developing country's interest in agricultural goods. The developed countries have used all available loopholes to maintain their subsidy regime, and farming subsidy programmes of the US, the EU and Japan run into billions of US dollars. Whereas, the developing countries are forced to relinquish their already meager subsidy schemes citing legal complexity. Bali was undeniably an unequal package, and the earlier government did concede to international pressure while agreeing to a temporary solution, with a due restraint clause attached to several conditionalities. For India, food security must come first and that the trade policies should be customised to guarantee it.¹²⁸ The new government is trying to salvage the lost opportunity, which is a bold move in the right direction.

¹²⁷UNCTAD (1999) "Examining Trade in the Agricultural Sector, with A View to Expanding the Agricultural Exports of the Developing Countries, and to Assisting them in Better Understanding the Issues at Stake in the Upcoming Agricultural Negotiations", TD/B/Com.I/EM.8/2, 23 February 1999.

¹²⁸José Graziano da Silva, UNFAO Director-General, said that "Food security comes first and trade policies should be customised to guarantee it". FAO, Food security tops agenda of FAO Director-General's meeting with India's Prime Minister Modi, 10 September 2014, New Delhi, India<<http://www.fao.org/news/story/en/item/243183/icode/>>

Having said that, India must do a reality check and set its own house in order. WTO agreements are highly invasive and technically complex legal instruments. To understand and implement the legal niceties and economic rational of different covered agreements and its legal linkages, requires expertise and experience. As mentioned above, one of the key reasons for India's on going situation owes its reason to the naivety with which Indian negotiators approached the Uruguay round. India can take this as learning and mend its way towards a more professionally managed WTO affair, rather than a bureaucratic, piecemeal approach which seems to be the current state. This will help India in the trade negotiations, not just at the WTO but also at the ongoing free-trade agreement negotiations. India must strengthen its independent research base in key fields, specifically in different aspects of the WTO, dispute settlement being the core. Such expertise should form the fulcrum of national policy formulation and for strategizing for negotiation and disputes resolution, with the Government taking the lead. Given the enormity of the WTO and RTA obligations and rapidly expanding negotiating agenda, India lags significantly behind their western and larger Southern counterparts in establishing a multi-disciplinary pool of expertise and the institutional base to meet the WTO challenges and associated domestic concerns.