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A Legal and Policy Perspective**

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The Post-Bali Debacle and India's Strategy at the WTO: 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

India's stand point is firmed by its genuine concern over food security and convinced by the fact that the developed countries may have

India in the world stage, is the result of an

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

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

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 threshold.²⁵ This, however, implies that India’s AMS limit is bound at zero and the limit becomes India’s limit for domestic support schemes. Domestic support above 10% *de minimis* 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

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

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

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

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

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

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

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 different 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”

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

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

significant economic gains for the EU (!120 billion) and the US (!95 billion).”⁹¹ Such
mega-

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,

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

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 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

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 a

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.

¹²²Roy and Saha, *supra* note 120.

¹²³The Ministry under the scheme of

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

