

WORKSHOP RESOURCE BY

Centre for Financial Accountability

Rosa Luxembourg Stiftung



# Unpacking the WTO & Free Trade Agreements

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**Published by:**

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This publication is sponsored by the Rosa Luxemburg Stiftung with grants from the Federal Ministry for Economic Cooperation and Development of the Federal Republic of Germany. This publication or parts of it can be used by others for free as long as they provide a proper reference to the original publication". The content of the publication is the sole responsibility of the Centre for Financial Accountability and does not necessarily reflect the position of RLS.

New Delhi, December 2021



# Unpacking the WTO & Free Trade Agreements



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# About the Organisers

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## CENTRE FOR FINANCIAL ACCOUNTABILITY

Centre for Financial Accountability engages and supports efforts to advance transparency and accountability in financial institutions. We use research, campaigns and training to help movements, organizations, activists, students and youth to engage in this fight, and we partake in campaigns that can shift policies and change public discourse on banking and the economy. We monitor the investments of national and international financial institutions, engage on policies that impact the banking sector and economy of the country, demystify the world of finance through workshops and short-term courses and help citizens make banks and governments more transparent and accountable.

## ROSA LUXEBURG STIFTUNG

The ROSA LUXEBURG STIFTUNG (RLS) is a German political foundation that is part of the democratic socialist movement. True to the legacy of its namesake Rosa Luxemburg (1871-1919), it stands in solidarity with the workers' and women's rights movements. The organization serves as a forum for debate and critical thinking about political alternatives, as well as a research centre for social development. The RLS has close ties to the German party DIE LINKE. RLS provides political education and a centre for advanced social research in both Germany and throughout the world. RLS is one of six party-affiliated political foundations in Germany; it supports partners in over 80 countries striving for social justice, strengthening public participation, and social-ecological development.



# About the Workshop Facilitators

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**Ranja**

Sengupta

Ranja Sengupta is a senior economist and currently the head of the India office of Third World Network. An alumnus of the Jawaharlal Nehru University, her work spans agricultural institutions, international trade and investment policymaking, globalisation, poverty and inequality. She currently works on global trade and investment policies including those framed by the WTO and the Free Trade Agreements (FTAs) and their impact on development priorities in the Global South; including on, agriculture and the right to food, human development, employment and livelihoods, and access to critical services. She has been tracking the Financing for Development and the 2030 Agenda/ SDGs negotiations since their beginning, looking especially at means of implementation issues with a specific focus on international trade policy and development goals.

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**Shalini**

Bhutani

Shalini Bhutani is an independent legal researcher and policy analyst based in Delhi, who has done extensive work on the impacts of Free Trade Agreements, tracking how trade rules interface with agriculture and biodiversity in the Asian region. She is well known from the Forum against Free Trade Agreements, which is a network of India's civil society organizations, trade unions and peoples' movements that work together to highlight people's concerns on Free Trade Agreements (FTAs).

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## Biswajit

Dhar

Biswajit Dhar is a professor at the Centre for Economic Studies and Planning, Jawaharlal Nehru University, India. Prior to this, he was the Director-General of Research and Information System for Developing Countries in New Delhi, for five years and Professor and Head of the Centre for WTO Studies in the Indian Institute of Foreign Trade, New Delhi. He has been involved in trade policy issues, particularly in the context of the multilateral trading system, both as a researcher and a policy adviser to the Government of India. He has been a member of the Indian delegation to the Ministerial Conferences of the World Trade Organization. He has also served on expert panels set up by the Ministry of Statistics, Department of Chemicals and Fertilizers and Ministry of Environment and Forests. Dhar has been working extensively with a number of intergovernmental organizations including UNDP, UNESCAP, FAO, and UNCTAD, taking up issues related to the functioning of the global trading system.

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## D. Ravi

Kanth

Ravi Kanth is a columnist and commentator on global trade issues. Since 1986, he has worked for the Press Trust of India (PTI), and several newspapers – Indian Post, Independent, The Economic Times, and Business Standard – in New Delhi. Ravi has written extensively on the Uruguay Round negotiations in The Economic Times and Business Standard, Asia Times, and BNA where he broke several major news stories. He covered the Marrakesh Ministerial meeting that established the WTO in 1994. He has written news stories and op-eds on the developments at the WTO in Deccan Herald (Bengaluru), the World Trade Agenda (Geneva), the Economic and Political Weekly (EPW), Business Standard (India), Mint (India) and SUNS (Geneva). His reports in Washington Trade Daily are a source of information on the happenings within the closed-door meetings of the WTO for delegations, since 2000.

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# Editorial Note

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With the growing integration of economic activities around the world, international trade has become an interesting arena for observers of international political economy and development practices. The challenge, however, is that the global trade landscape is quite cluttered, you have the WTO dynamics, regional free trade agreements then the bilateral trade agreements and investment treaties and it gets quite dense when one attempts to understand these sets of issues. But it is also imminent for the people of the country, especially civil society and media, to have a good understanding of the principles and fundamental contours of international trade (both from an overarching institutional perspective and the bilateral agreement perspective) so that they can critically evaluate and comment on the various policy decisions and actions being taken by the government in trade-related negotiations.

Keeping in mind the larger context of the upcoming twelfth WTO Ministerial Conference and India's growing engagements with Free Trade Agreements, and to contribute to popular education on trade-related issues, the Centre for Financial Accountability along with Focus on Global South and Forum for Trade Justice co-organized a two-day capacity building workshop on "Unpacking WTO and Free Trade Agreements" with support from the Rosa Luxemburg Stiftung.

The workshops took place virtually in November 2021, however, it was also during the course of the workshop that the World Trade Organization indefinitely postponed its in-person twelfth Ministerial Conference to be held in Geneva. This decision was taken in light of the outbreak of a new strain of COVID-19.

The twelfth Ministerial Conference, now prospectively to be held in June 2022, is expected to be a very political affair. On one hand, the WTO proponents have been pushing for a three-pronged anti-development strategy - the Walker process; the new Fisheries subsidies disciplines; and paving the way for the legitimization of the "Joint Statement Initiative" plurilaterals and imposing a new process of WTO reform. On the other hand, the developing nations are demanding WTO turn around its agenda and focus instead on removing WTO barriers to ending the pandemic by agreeing to TRIPs Waiver; preserving and expanding Special and Differential Treatment in the Fisheries Subsidies negotiations as well as throughout the WTO, and removing WTO barriers to food security by finding a permanent solution to public stockholding.

This transcription booklet is an attempt by the organizers of the November 2021 workshop to create an easy-to-read resource material on WTO and FTA in order to share the content, discussions and deliberations of the workshop with a larger audience. This resource material involves transcription of talks on demystifying the global trade regime (WTO, FTAs etc.), identifying the convergences and some sectoral analyses of international trade, fisheries and agricultural sector. For ease of reading, the transcripts are mildly edited keeping intact the arguments of the facilitators. The edited versions of the transcripts also include some important references shared during the course of the workshop. This booklet is also available in Hindi on [cenfa.org](http://cenfa.org)



# DEMYSTIFYING THE WTO AND THE GLOBAL TRADE REGIME

**Ranja Sengupta**



It's great to be here. There's a lot of excitement around the twelfth Ministerial Conference<sup>1</sup> this year. Needless to say, it is one of the most political and the most difficult one with extremely contentious issues being pushed. The developing countries have issues that have been of interest to them historically, but these issues haven't been resolved, instead what we are seeing is further push for liberalization from the developed countries through multiple tracks. I'll come back to all those issues towards the end. First I want to start us off by describing how these trade and investment agreements came about.

The WTO came into being in 1995 and then, we have a whole host of so-called bilateral or regional free trade agreements. All of these together were supposed to make developing countries more able, carrying forward the whole idea behind globalization - that the most efficient producer will produce so that consumers all over the world will get products at the cheapest price and therefore, they will all benefit. But the reality is very different and the way we (India) have done these trade deals, both at the WTO and through the FTAs has made us increasingly unable to cater to our development needs. Over the years, we have not been able to meet our needs, be it in the arena of public health, food security and sovereignty, livelihoods, or even access to resources. And then when the crisis came (to the magnitude of the pandemic) we now realize we cannot produce anything that we need. A very small example could be the problem that the developing or the least developed countries faced in relation to vaccine manufacturing. Even though they had the capacity to produce it, they did not have the technology because these are blocked off through these trade agreements. And as of date, four countries dominate all medical products, be it the PPE kits, masks, vaccines or ventilators. But by the founding logic, this was not supposed to be the case. This has happened before too, in 2008, during the food crisis, a few countries that were able to produce food, were also restricting exports, leaving a lot of countries far away from self-sufficiency due to these very same trade deals. For example, India did restrict exports from

its end which is fine, because we could either feed our domestic population or export, ultimately proving that these trade deals never made us self-sufficient. Moreover, these trade deals have taken away our policy space, a good example is a government trying to build up COVID response for recovery for dealing with the pandemic related shocks but the trade rules have actually bound our hands. The situation as a whole makes us question why the effects of a global catastrophe have been so unequal between so-called "equal" trade partners. The whole issue is very nuanced and I will try to explain it to some extent here.

Below is a short run-through of the WTO structure and its components when it started -

- Agreements on Agriculture (AoA)
- Non-Agricultural Market Access (NAMA)
- General Agreement on Services (GATS)
- Trade-Related Intellectual Property (TRIPS)
- Trade-Related Investment Measure (TRIMS)
- Others - Standards and Safety, Textiles, Anti-Dumping Subsidies, NTBs, Dispute Settlement, Trade Facilitation etc.

AoA (which is about agricultural rules) and NAMA (which is about industrial goods) as agreements mainly targetting import duties and subsidies. For example, India has a sensitive agriculture sector and also a significant presence of infant industries and protects these sectors by putting up import duties and giving subsidies. High import duties and subsidy support, among other things, is how the developed countries have developed when they industrialized and have successfully crossed that stage of development. However, ignoring the context, developing countries like India are not allowed to give duties or subsidies. The AoA, since the beginning of the WTO, has been very contentious, because the developed countries have given huge subsidies in the past. Anyway, the GATS or the services agreement has not moved too much in the WTO.



<sup>1</sup> [https://www.wto.org/english/thewto\\_e/minist\\_e/mc12\\_e/mc12\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm)

The TRIPS agreement, historically and because of the pandemic-induced chaos has been in a lot in focus. This agreement created patent monopolies, the so-called 'innovators' and those who have the technology. Conveniently forgetting the fact that be it Moderna or AstraZeneca or Pfizer, a lot of public funds go into their success and end up having monopolies over the technology. But the TRIPS Agreement makes it mandatory for governments to legally recognize these monopolies, grant them patent rights and other kinds of copyrights to the innovator company which also means that then these companies can have monopoly control over production and also pricing and that precisely, is the root cause of all problem on this front. Then there was also investment measures (or TRIMS) and many other agreements but I think for us, what has been the key focus is the TRIPS, AoA and to a certain extent NAMA.

The WTO came into being in 1995 and then, we have a whole host of so-called bilateral or regional free trade agreements. All of these together were supposed to make developing countries more able, carrying forward the whole idea behind globalization - that the most efficient producer will produce so that consumers all over the world will get products at the cheapest price and therefore, they will all benefit. But the reality is very different and the way we (India) have done these trade deals, both at the WTO and through the FTAs has made us increasingly unable to cater to our development needs. Over the years, we have not been able to meet our needs, be it in the arena of public health, food security and sovereignty, livelihoods, or even access to resources. And then when the crisis came (to the magnitude of the pandemic) we now realize we cannot produce anything that we need. A very small example could be the problem that the developing or the least developed countries faced in relation to vaccine manufacturing. Even though they had the capacity to produce it, they did not have the technology because these are blocked off through these trade agreements. And as of date, four countries dominate all medical products, be it the PPE kits, masks, vaccines or ventilators. But by the founding logic, this was not supposed to be the case.

This has happened before too, in 2008, during the food crisis, a few countries that were able to produce food, were also restricting exports, leaving a lot of countries far away from self-sufficiency due to these very same trade deals. For example, India did restrict exports from its end which is fine, because we could either feed our domestic population or export, ultimately proving that these trade deals never made us self-sufficient. Moreover, these trade deals have taken away our policy space, a good example is a government trying to build up COVID response for recovery for dealing with the pandemic related shocks but the trade rules have actually bound our hands. The situation as a whole makes us question why the effects of a global catastrophe have been so unequal between so-called "equal" trade partners. The whole issue is very nuanced and I will try to explain it to some extent here.

## ISSUES WITH THE TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS

Because the TRIPS agreement has given monopoly rights to certain corporations, we have seen, globally, prices of medicines have increased, and therefore access to medicine has been severely compromised. Now many countries like India, Thailand, and some African countries produce what you call generic medicines but we have seen a major push from the advanced countries on behalf of these big pharmaceutical (as these companies sit in the US and EU etc) pushing their governments to recognize patent rights. The best example of the destruction caused because of these rules is the monopoly that these corporations exercised on the COVID vaccines. We have seen that this has been a major challenge, and I will come back to it. But how this came about is very interesting. Frankly, the whole intellectual property discussion didn't even belong in the WTO. It was supposed to be a trade agreement about the exchange of goods and services. The TRIPS Agreement was virtually written by corporations and entities like IBM, Pfizer and comparable groups from the US, EU Japan etc, got together lobbied with their governments. And Pfizer openly said, "Our combined strength



enabled us to establish a global private-sector government network, which laid the groundwork for what became TRIPS<sup>2</sup>. So it was to protect their interests, their monopolies that they push the TRIPS agreement into the WTO. But another interesting thing to ask is why did developing countries sign? I mean, developing countries are net consumers, not owners or exporters of intellectual property. So why did they (the developing countries) sign an unfair agreement of this sort and still hang on to it?

One, the WTO offered and continues to offer us (the developing world) most-favoured-nation (MFN) status on paper. However, in reality, that has never been observed - during the Trump regime, this became clear that even exports from MFNs can be walled. And even when the negotiations happen, every country is supposed to have one vote, there's so much pressure on developing countries and especially LDCs to sign on to what rich countries want. For somebody who follows the WTO agreements, they know how heavily political these transactions become. So even the MFN status is fair on paper and in principle, but it's not really operating in that way.

Two, the developing countries were told that in exchange for agricultural products and textiles they would get market access in the rich countries promising that they will discipline the subsidy that they gave back home. But 27 years down the line, we see that this has not materialised because of the continued presence of subsidies and non-tariff barriers in rich countries.

Third, the US was using Article 301<sup>2</sup> from their domestic laws which meant that the US trade ministry is supposed to protect the interest of US companies through Article 301 and if they see that these interests are being hurt, then they can actually take unilateral action. The TRIPS Agreement for the same reason also provides certain flexibilities. These flexibilities were fought for because after the TRIPS Agreement was signed, countries realized that it's very difficult to then protect public health objectives. But this hasn't turned out very well for the developing countries.

So, none of the reasons for developing and least developed countries signing TRIPS was actually delivered and they lost from both the TRIPS (compromising access to medicines, vaccines, healthcare overall by establishing monopolies and raising prices) and AoA.

Taking forward the concerns about key sectors, like public health, in 2001, the Doha Declaration on public health was signed, where it was also again reinforced that TRIPS agreement but also gave some flexibilities.

One, the government can issue a compulsory license if they feel certain prescription/medicine is very important but highly-priced because of the patent monopoly, they can ask other companies (giving them the license) to produce. Interestingly, in 2012, Natco Pharma was granted the first-ever compulsory license in India for the manufacture of a generic form of Bayer's Nexavar, a drug for liver and kidney cancer, US challenged this step under Article 301. This has happened with several other countries too, even though the compulsory license was legally provided.

On the AoA front too, we (India, other developing countries and LDCs) have heavily lost. For example, with the entry of the EU's subsidised rice, one of the Philippines' well-off regions got hammered. They are also using the free trade agreements now to get duties eliminated and really enter our countries, which Shalini will expand upon. Once import duties get removed, we will have a flood of subsidized products coming from the EU and US. We are negotiating FTAs with the EU for a long time and have launched negotiations with UK and US. And once that happens, we can be sure that import duties, which is the only protection we get in India (because we cannot give high subsidies, nor can we raise standards), will be gone. Because subsidies and standards are the ways rich countries protect their own agribusinesses and industrial fishers.



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## THE TRIPS AGREEMENT NOW

Ground inequalities transform unfair trade rules to more unfair impacts on marginalised groups – the poor, women, rural population – where access to healthcare is already less and become even lesser when facilities are costly (example of HIV-AIDS medicines and the growing cost of treatment). TRIPS waiver proposal by India and South Africa to waive obligations on COVID related technologies is now supported by 66 cosponsors, supported by 100 countries. In a very surprising move, the US has also supported a limited version of the waiver, because many say, the US also realized that it will also have problems with its own vaccine producers over this patent regime. This proposal could increase production and access worldwide, but a few countries are blocking it including the EU (Germany), Switzerland, UK. The Ottawa Group's Trade and Health Initiative is actually asking for more liberalization and that the countries should lower import tariffs and not put up export restrictions, should do e-commerce and use trade facilitation.

All these are very, very problematic issues for developing countries. Can you imagine all this happening in a crisis when we are all grappling with difficult situations, where developing countries are more hurt than developed countries because we don't even have the resources? We don't have the health infrastructure or access to the medicines vaccines to deal with it.

The rich countries are using this to push some very damaging provisions and this is now done through WTO Pandemic Response (Walker process, named after Ambassador Walker from New Zealand). We, at the Third World Network, tried supporting a lot of the negotiators in Geneva, to have a good position on the WTO Pandemic Response. But Ambassador Walker has refused to almost put in language on IP and the TRIPS waiver. The developing countries said that if you have to have a pandemic response, first, you must resolve the waiver issue. But they (the rich countries) divulge by saying that the waiver is being discussed somewhere else and

instead show the third way out of this whole issue i.e. shifting focus on manufacturing issues, not technology transfer and the EU Proposal as an alternative to waiver i.e. of employing on TRIPS flexibilities, which as I explained above cannot be materialized well.

## THE CHALLENGES TO FOOD SOVEREIGNTY FROM THE WTO

The AoA is neutral on paper but has facilitated exports of mainly developed subsidised products into developing country markets – we've seen the phenomenal entry of subsidized products like EU and US dairy, cereals, processed food, cotton have all found good space. When the AoA was signed, they managed to get huge concessions for themselves. Developed countries give much more domestic subsidies, have extra AMS entitlements and have not made cuts as promised and have always used the green box subsidies (is supposed to be those subsidies, which do not distort trade like research, disaster response etc) very creatively moving all their trade-distorting support to the green box, holding small producers in the developing countries hostage and becoming a challenge for local production, smallholder agriculture, biodiversity, food security and sovereignty in developing countries. UNCTAD has done some very good papers with similar findings.

Those of you following the development at WTO must be aware that there is a proposal from developing countries, called the Public Stockholding for Food Security which came about because countries like India provide MSPs to their farmers. The MSP is seen by the developed countries as trade-distorting. But then from 2012, they've been telling India, Indonesia, Kenya, Egypt, Tunisia and many countries developing countries that they have exceeded the 10% (of the value of production) permissible limit of subsidy provisioning. So developing countries put in this proposal saying that policy instruments such as these are for Public Food Programs and for that, you need to subsidize the consumer. But unless you also subsidize the producer and support production, you frankly cannot have a public





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distribution system. So that has been under attack and developing countries fought for this in 2013, in the Bali Ministerial, where we got a peace clause, which means that we can give these subsidies and nobody will sue us. But these subsidies are still trade-distorting, and they put in huge conditions which frankly, no country can use as it is riddled with conditions. India tried to use it and has filed twice that it will use the peace clause for rice but it's facing massive challenges. The Bali Ministerial has mandated a permanent solution for it by 2017 and hence the twelfth Ministerial becomes crucial as even today developed countries are blocking it in every way possible.

Another issue of interest to the developing countries is the SSM or Special Safeguard Mechanism. Like we wanted Western countries to cut their own unfair subsidies, they have managed to turn it around in a way that we are being attacked through a demand on cutting down development box subsidies (meant just for low-income resource-poor farmers).

## **FISHERIES SUBSIDIES' NEGOTIATION**

These negotiations have been going on since 2017. Mandated by SDG 14.6, with the objective of marine conservation, they asked the WTO to discipline, though there was already a WTO mandate from 2001. But nobody had acted on it. So after the SDG thing came, here too, developed countries assumed the responsibility. But even in this sector, small developing countries are struggling hard to protect small fishers India and developing countries have been asking for special and differential treatment because our fishery sector is still underdeveloped, we still need to give subsidies to support small fishers. But even in this, there is major pressure to reduce support for small fishers and geographical and time limits have been placed as a qualifier i.e. only those fishers who fish within 12 nautical miles will be provided with this support.

## **THE 12TH WTO MINISTERIAL**

We are seeing that we are losing on the TRIPS front as the developed countries are not giving up and instead the WTO pandemic response (Walker process) is gaining ground while conveniently pushing the waiver out, ignoring voices from the developing countries. We might not get a permanent solution on agriculture, we are going to lose heavily on special and differential treatment in the fisheries sector too. And whatever India had proposed is all kind of taken out. Finally, the process of consultation leading to the twelfth Ministerial is terrible, all green room consultations on pandemic response and agriculture, offline inputs not allowed in fisheries, ignoring proposals by developing countries across the board and continue to be very opaque and non-participatory.



PRESENTATION II

Shalini Bhutani



# INDIA AND THE FREE TRADE AGREEMENTS: A BALANCE SHEET

Hello, everyone.

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I would like to start telling the story a little before 1995, which is also the birth year of the World Trade Organization. One of the things that the co-organizers requested me to do was to highlight particularly the dichotomies between the developing and the developed countries in this whole trade arena. I do also understand that many of you do not engage with the trade rules and investment agreements on an everyday basis. But I think the purpose of this two-day workshop is to also join the dots between the various trade agreements and our everyday lives, on what impact it has, across sectors, the breadth and the depth of the WTO and the Free Trade Agreements as well as the Bilateral Investment Treaties (BITS). Through my presentations, I would like to answer some of these questions as to how all of that relates to our everyday lives, whether it's the public services that we depend on or our access to water, our access to public health, what kind of agriculture and food systems we can have, what kind of banking and financial services we can have access to etc. So it's across the board. And that's why the nature of these trade and investment agreements, and the kind of protections that governments are now willing to give to the corporations behind these trade agreements, I think is very, very important to understand and to also piece the different pieces of the jigsaw together to see what kind of impact they have.

the corporate agenda and corporate control), some proposals have more weight than the others. The will of the developed world is being taken forward in these trade agreements, rules that are inherently playing against the interests of the developing world. This inherent bias becomes the reason for our struggles at these Ministerial conferences and also outside of it. Given these struggles by developing countries, the corporations and the developed countries are not content with the pace at which negotiations are happening at the WTO or the extent of how there is a resistance to adding new subjects and topics to be covered under global trade rules, over and above what are called the traditional issues and sectors that have been addressed in the WTO agreements. With this expansionist agenda, governments are now looking at Inter-governmental relations on trade and investment, outside of the WTO.

The trading system is based on how the developed and the developing world can engage with each other. But the fundamental thing is that they (the developed and the developing world) both are essentially different and entirely at different stages of development as well. And therefore, they cannot be treated equally. I think that's a fundamental principle for Law and Justice, that you cannot treat unequal partners equally. That is something that we need to also look into this garb of trying to bring everybody to a level playing field (also an attempt of the WTO), to bring everybody to the same negotiating table to set up a framework of international trade rules - is that being fair to the developing world, as well as to the least developed countries? As you may know, in the World Trade Organization today there are 164 countries that are members, officially, apart from the observer countries, those that are still in the process of joining the WTO; the majority of these countries are developing countries. Because of the economic clout and the political clout that the developed world has (and particularly given that there is really interestingly, the WTO came up only in 1995, even before that India signed on to its predecessor called the General Agreement on Tariffs and Trade (GATT) which was set up in 1948. It is important to look at that year because India got its political independence in 1947, which means we hadn't even made the Constitution of India then. And in 1948, we had already signed up to the GATT, which is the global agreement on trade. And it's only subsequently in 1950, that we have the Constitution of India. So you can say that we got political independence, but in terms of economic independence, and what kind of domestic policies we would like to design for a newly found Republic, a lot of that was also prescribed by the global trade agreement, and even today this remains an important talking point. So it's important to trace this engagement to the Constitution of India because we will also look at process questions and issues of how trade treaties are negotiated and whether they can be actually constitutionally challenged if they go against both democratic principles as well as the federal structure of decision making within our polity.

## India & FTAs



But having come to the mention of 1991 as really the point of origin for the so-called economic reforms, this was also the time when the new industrial policy was announced in India. There was also a template of Bilateral Investment Protection and Promotion Agreements (BIPAs) that was the first generation of bilateral investment agreements that the government of India framed. These were not so much in the news, there were almost 80+ such BIPAs that along with the changes in the industrial policy and economic reforms were rolled out domestically. Also, in 1992 the Parliament of India passed the Foreign Trade Act and that was the main domestic legislation through which the Directorate General of foreign trade and the Ministry of Commerce and Industry lays down an operating procedure on India's engagement with trade, tariff lines, etc, and within that, every five years and EXIM (export-import) policy is also notified. So every five years, we recalibrate these reference points depending on the circumstances of trade deficits or what you want to put on the negative list or sensitive list items (these are items that the nations don't want to drop custom duties on); those are then notified under this legislation. These are important to keep track of the amendments that happen both in the Foreign Trade Act as well as the EXIM policy that is notified every five years. Due to COVID, incidentally, the 2015 to 2020 EXIM policy was extended till September 2021 and so this is also a time when the new EXIM policy for the next five years is going to be announced.

Coming to 1995, things started flaring up about WTO, this is something that Ranja has already flagged for all of us. But outside of it, in the meantime, India was also getting into some of its first-generation free trade agreements. Now, I think it's important to recognize that the WTO itself is a free trade agreement. But there's a lot of language on development and development interests of the developing countries within the WTO agreement. Particularly, the manner in which the fundamental principle of special and differential treatment for developing countries and LDCs is placed in terms of having an extended timeline to implement and be in compliance with the WTO agreements, to get technical assistance, as a matter of right from the WTO and from other advanced countries, all of these were rights given to the developing countries within the WTO framework. But outside of that, there has been a lot of resistance from the developed world on all these issues, particularly in the recent past, there have been movements by the Government of India to negotiate South-South free trade agreements and bilateral economic relations.

One of the very first was in 1998, the India-Sri Lanka Free Trade Agreement, but it was only in 2003, that India negotiated an economic agreement with ASEAN. This 2003 agreement is seen as the forerunner of what came to be the Trade and Goods Agreement, which India eventually negotiated with ASEAN in 2009. But what is considered India's first free trade agreement is the one signed between India Singapore, also called the Comprehensive Economic Cooperation Agreement (CECA).

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## WHAT ARE WE TALKING ABOUT WHEN WE TALK ABOUT FREE TRADE AGREEMENTS?

There are different forms that these FTA take and in the WTO language, these are also called Regional Trade Agreements (RTAs<sup>3</sup>) and ironically WTO itself has been setting up a tracker<sup>4</sup> to keep track of the different regional trade agreements because the original justification given for the WTO was that there must be one place and one venue globally, where all the governments can come and negotiate global trade rules; because you have Country A negotiating with Country B, then Country B, signing a trade agreement with country C, and country C signing a different trade agreement with Country A and so you have this mishmash of different rules, different standards, and different tariff reductions in different bilateral plurilateral agreements or regional agreements. But the justification given for WTO was that we bring all the countries of the world onto one table and recognize their differences, we also give special treatment and particular rights to developing countries and LDCs. But that is not something that was palatable to a lot of the developed world as well as the corporations that the governments have nurtured. Therefore, you had this tendency for the developed world to also parallelly engage outside of the WTO to negotiate North-South and North-North agreements and we see a reflection of that in also the Joint Statement and Initiative (JSIs) that are being taken in the WTO to get a smaller group of countries into a negotiating mode and in a plurilateral or a bilateral form, and then 'multilateralize' it by trying and bringing it back into the WTO. So the FTAs and mega-regional FTAs is what we've seen more recently, is one such tendency to try and gain traction and have 'progress' on issues which corporations would like to have rules on in the WTO.

Now might I flag that at one level we are saying that this is free trade (Mukt Vyapar), a move to the global open markets (Khula Bazar), but some of these trade rules can be so restrictive at the same time. For instance, the TRIPS regime that Ranja explained in great detail, actually limits and gives exclusive rights to an IPR holder for 20 years, for instance. And so that puts restrictions on

other legitimate uses, whether in the public interest, or for instance, for farmers' freedom with respect to patented seeds, and proprietary technologies in agriculture, or for the challenge it poses to public health (with not only patents but also data exclusivity requirements for drugs and pharmaceuticals). So when they say free trade, they mean free from government regulation or provisioning and it's really about releasing the animal spirits of capitalism. When in WTO, one of the process issues is that decisions can't be taken without consensus hence, you take the FTA route with unequal partners, so that you can arm-twist the bilateral trade partner and put conditionalities on them. For instance, one of the early generation bilateral arrangements between the US and Sri Lanka, or between United States Trade Representatives and Vietnam is that they had a high-quality free trade agreement at a bilateral level, forcing them to agree on higher levels of IPR protection for the technology coming from the US, which is at a higher demand than what WTO asked these member countries to; so essentially, free trade agreements are about WTO+ trading system.

I think what's important to trace is that we not only started negotiating these free trade agreements, which were the first generation free trade agreements but in 2011, things really came to head when multinational corporations, getting the benefit of bilateral investment treaties, started suing the Government of India to protect their investors' rights. Under the India-Australia Bilateral Investment Treaty this issue came to the fore again as to how the bilateral investment treaties were granting investor protection rights and limiting the space for governments to regulate investors, particularly in the public interest. This includes a number of corporations like the Vodafone, Cairn Energy, Telenor, Nissan etc getting the power from these bilateral investment treaties and their provisions that in case a government make a law or any court ruling that go against the provision, or any executive decisions (like to cancel licenses for the spectrum or telecommunications), then they (the MNCs) can sue the government through private arbitration. In the WTO, we do have a dispute settlement body, but in free trade agreements and bilateral investment treaties, there are no such global fora that the government can go to for settling a dispute.



And that's why one of the risks of FTAs and bilateral investment treaties is not only the range of issues and policy spaces they intrude on but also the repercussions of getting into an expensive dispute settlement on these agreements with the private arbitration tribunals. It is also the first time that international law, through such FTAs and BITS, if there exists an Investor-State Dispute Settlement (ISDS) mechanism, the power has been given to MNCs to actually sue governments directly and claim several million dollars of damages. And so some of these cases are still pending against the government of India, which poses a certain risk.

For the same reason, in 2015, the Government of India's Ministry of External Affairs brought out a template for itself, sort of a model bilateral trade and investment agreement, in which they not only defined all that gets covered under the definition of investment (when foreign or even domestic investors put in money or set up an enterprise or seek an IPR) but also an assertion that when disputes happen, the corporations cannot bypass the domestic courts before setting up such private arbitration tribunals for dispute settlement. However, this model has not been tested yet and how much we will insist upon it when we enter into a new generation of BITS is something to be seen. So whether it is going to be a red line or common minimum, or the government will be willing to negotiate out some of the procedures and dilute some of the provisions of this model is something to be seen. It also depends on the power of the partner that the government is negotiating with.

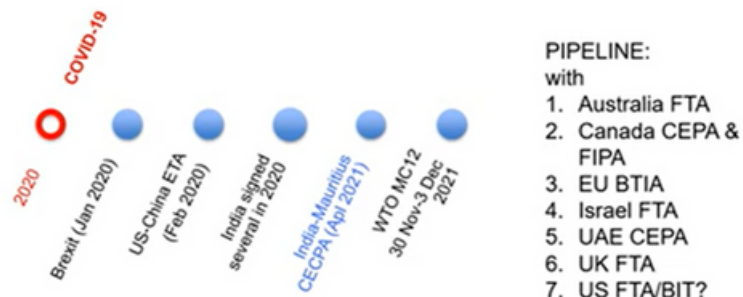
## GLOBAL TRENDS AND INDIA'S FTA POSITION AND STRATEGY

From a reluctant FTA partner after entering a WTO to the current times, a lot has changed and I would like to flag this shift. We were a relaxed, reluctant FTA partner and were not getting into too many bilateral agreements or FTAs. That position has changed over the last 2-3 years. There are several motivations for this shift and it is

important to locate India's FTA strategy in what is generally happening around mega-regional free trade agreements that have also emerged in the last two, three years across the world. One of the most notable among these is the CP-TPP, also called the Trans-Pacific Partnership <sup>11</sup>. It was originally TPP-12, with the US government also being a part of it, but under the then US President Donald Trump, the US exited from the partnership because China was part of this (as they also traded wars with US-China at that time). Currently, India is not a part of the CP-TPP but it is important to bring into context another generation of mega-regional free trade agreements that was trying to harmonize and bring together trading partners within the Asia Pacific region and the Pacific rim. Likewise, even in Africa, in May 2019, an African Continental Free Trade Agreement was conceptualized.

But it is notable that amidst the growing trend towards these mega-regional free trade agreements, India withdrew from the Regional Comprehensive Economic Partnership in November 2019, following some key sectoral concerns like impacts on the agricultural trade, possible hit to public health (because of the IP requirements) and also that the manufactured goods would have faced competition from other merchandise exporting countries such as China who would have received greater access to India's market. Another was the kind of tariff liberalization that RCEP required from day 1 of the RCEP coming into force. It is anticipated now that RCEP will come into force in 2022 after a minimum of 10 of the 15 participating countries ratify it. There were internal concerns from the (Indian) government on what kind of arrangement RCEP would put India into, particularly with countries like China, with which it does not have existing free trade agreements and the kind of tariff cuts it will require; but also on the front of services, intellectual property, investor protection, etc, concerns that India, at that time, were not ready to commit to. India's reluctance to join RCEP was also motivated by the extent of public outrage and the kind of popular protests that happened countrywide cannot be ignored - it was a political decision taken largely under public pressure<sup>5</sup>.

## India's FTAs



India has been rethinking its strategy to engage with FTAs and there are global trends and domestic pressure and public outrage behind this retraction. A whole bunch of new free trade agreements are currently being negotiated with several countries. Though 2020 was a lot more quiet in this regard. And as I have mentioned other geopolitical developments like Brexit (that came into force in January of 2020) meant that both India and the UK would be both willing to negotiate a free trade agreement on a bilateral level as a shift from earlier when United Kingdom was part of the EU (which itself is a big trading bloc). In 2007, India was also negotiating a bilateral trade and investment agreement with the European Union which went cold in 2013, following a lot of public protests. There were also several civil society processes, like the Right to Food and Human Rights Impact Assessment of such a proposed bilateral investment and trade agreement between India and the EU. But the government of India has now expressed its interest to revive the negotiations with the EU for such a proposed bilateral trade and investment agreement. So now we have a separate UK and EU bilateral process under discussion.

We are also in negotiations, separately, with other European countries like Norway, Iceland, Switzerland, Liechtenstein, which are outside of the EU, as part of the European Free Trade Agreement (EFTA) Association. We are also attempting a free trade agreement with them. Other negotiations that India is currently interested in include the one with Australia, Canada (Comprehensive Economic Partnership Agreement), UAE<sup>6</sup>, the US. After a slow and reluctant beginning, India's new ambitious and aspirational phase of getting into FTAs is putting it in a precarious position. It is essentially engaging with mostly developed countries and traditionally such a set-up has placed much higher demands on India, in terms of compliance, which will take us well beyond what WTO asks us and this would inevitably mean limits and restrictions in the domestic policy space.

## STRATEGY: WHAT DO WE DO ABOUT IT?

Now, this is something that even the Forum for Trade Justice has been flagging since 2009, the concerns of the civil society and people's movements about free trade agreements and bilateral investment treaties. So the experience from my engagement with the Forum and the evidence that people's groups themselves put on the table makes us quite sceptical about these developments towards such free trade agreements. In terms of the strategy, I think we need to ask and start answering three questions -

Why do we need free trade agreements? The evidence on the ground is clear and shows that India has not been able to get any benefits or harness the intended benefits. Accruing benefits out of these situations requires that one has domestic reforms and mechanisms by which one can harness the benefits of the agreement and at the same time be able to redistribute that wealth gained out of it. Also, we're not doing very well on other social or ecological

indices, be it the human development index, or the hunger index. These are things that need certain priority action from governments, whether it's the central or the state governments, and FTAs go right against that, in a collision course with them. So it's a question worth raising: Why do we need such FTAs?

- How do we negotiate FTAs? This is a concern that even the Forum has been raising that there is no public disclosure and lack of public disclosure is the major concern for civil society across the region, not only in India. Article 253 of the Constitution of India gives parliament the power to negotiate and make laws for implementing any treaty agreement or convention that the country has negotiated through on the executive track. But this has to be in consultation with state governments and with a wider public consultation. But a lot of these conversations happen in the green rooms alongside big businesses and industry houses, the concerns of the constituency which was going to be impacted on the ground, whether it's the farmers or the fishers or the women's groups or patient collectives, are not internalized in these free trade agreements. This lack of transparency is questioned by civil society because until the draft texts are made publicly available, civil society cannot meaningfully engage and influence the kind of free trade or bilateral investment treaty that the government would enter into. This has been the demand from the Forum for Trade Justice too. We do not need secret deals, and all of these agreements need to be first ratified by the parliament of the respective nation getting into a free trade agreement. We don't have the process of parliamentary scrutiny in India as of now. For those of you who can recall, India became a member of the WTO through an executive act where several state governments such as Rajasthan and Tamil Nadu resorted to filing a case in the Supreme Court of India challenging the government's decision to enter into such a wide-ranging trade agreement without consultation with state governments. This was in the context of many of these subjects (like agriculture) belonging to the State List. So there is a constitutional challenge

and we need to address it; we need to demand that the government institutionalize a process by which these trade and investment agreements can be put to scrutiny and through which public consultation can meaningfully happen.<sup>7</sup>

- Who do we engage with on free trade agreements? Is it more beneficial to have a South-South arrangement? We have some experiences with other groupings like IPSEA, SAARC, ASEAN etc, but getting into FTAs with developed countries in a different ball game altogether. A popular demand that has been made by civil society organizations is that there must be ex-ante assessments of these trade agreements before they are entered into and signed on.

Towards the end, I think we need to vaccinate ourselves and build immunity against this new generation of FTAs. Thanks.

<sup>7</sup> [https://commerce.gov.in/wp-content/uploads/2020/02/FAQ\\_on\\_FTA\\_9April2014.pdf](https://commerce.gov.in/wp-content/uploads/2020/02/FAQ_on_FTA_9April2014.pdf)

PRESENTATION III

# SOME REFLECTIONS ON TRADE AND THE POLITICAL ECONOMY OF OUR TIMES

**Biswajit Dhar** →

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We are meeting today (November 27th, 2021) when it has come to light that the WTO twelfth Ministerial Conference, is postponed indefinitely for the second time. This adds to the uncertainty. This postponement is because of the COVID pandemic. The new strain from Southern Africa, which is now threatening many countries, is really a point for the delegations to ponder over. This is because some of the very important issues which were not taken up by the major countries, the hypocritical developed countries, such as the issue of TRIPS waiver need to be addressed head-on.

Without the global community coming together, and the developed countries taking a call on this issue, the world is not going to be a safe place at all. This cruel reminder has been given to us once again. I was looking at some of the data on the extent of vaccinations that have taken place in low-income countries. I found that only 5.6% of the population in low-income countries have received the vaccine or one dose of vaccine. The vaccine situation is extremely grim. It is not enough for developed countries to finally recognize that it's not enough for them to get vaccinated and cover themselves.

Some of these countries are now talking about a booster dose and stockpiling once again to make their populations safe. But in an interconnected world, and this is a world that they wanted, with more of trade and market access, in terms of the agenda that they were pushing for in the Ministerial Conference which was supposed to be held at Westminster, they should recognize that unless the last person is safe, global trade and economic entanglements between countries cannot be done in a safe atmosphere. This kind of hypocrisy should now end because this is the extent to which people in this world are not getting access to vaccines. You have to create a situation where more of these vaccines are available at affordable prices. This is where the importance of production being ramped up in developing countries comes in.

A large majority of the members of the WTO are in favour of the waiver proposal, and they want that the technology should be available to everyone who's able to produce vaccines in an affordable way and make it available to the last citizen of the world. So this serves as a very cruel reminder to the developed countries that it is not enough for them to remain safe. It is not enough for them to take care of their own interests. They have to be part of the global community. They have to be sensitive to the needs and aspirations of other countries, especially the developing and the least developed countries. Without this, global trade with the global economy just can't go forward. It is just impossible to visualize the global economy to be prosperous if a large majority of the people, the global citizens who reside in the low income developing countries and the least developed countries, are deprived of benefits of trade. This is the situation that India faces today because of the hammering the poorer people, the less advantaged people, took due to COVID. The loss of jobs and inadequate purchasing power, which has affected most economies, can't get back to normal unless the poorer people, the very large majority of people, in India and other countries get their incomes back and they get to share in the prosperity of the country. Without this, the economies just can't move. So, let me just give sort of an overall context.

## RECOVERY?

The global economy score, of course, has been on a rebound. There have been signs that the economy is coming back and global trade has been recovering. But, for many countries, including India, domestic demand is really not doing very well. It has been trade that is actually providing the trigger for growth, and most of you would know that India's trade, especially exports, have been doing very well this year. So, the demand stimulus has been coming from exports to an extent. Therefore, given the situation, it is very important that the global trade regime becomes more equitable as there is so much value that countries are deriving from their participation in trade.



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So, it is very important that the global trade regime becomes more equitable, especially now, when many economies in the developing world have had this serious impact of COVID to deal with. It is important for them to get a share of trade that serves them well. Now, this was actually the basis for the existence of the WTO.

## GENESIS AND THE PRESENT

Generally, the impression that goes around is, and this has been reinforced by the developed countries, that the WTO is all about trade liberalization. This is what the WTO is supposed to do: Encourage countries to open up their markets with whatever be their capacities to exploit open markets. The Marrakesh agreement which established the WTO stated in its preamble that trade was really a handmaiden of development. Trade was supposed to target full employment and was supposed to create more demand. So all the kinds of real development parameters, moving away from the growth story, are actually put in the first paragraph of the Marrakesh Agreement. It goes on to say that countries are going to be engaging in the exercise of liberalization in keeping with their respective capacities.

It was not going to be a kind of one-size-fits-all approach, which was the criticism made of the structural adjustment policies. WTO was a refreshing departure from what was being promoted then: the Washington consensus. Then, when the agreements were looked at, it was found that most of these were horribly imbalanced and went against the interests of the developing countries. This included agreements in agriculture, intellectual property, and so on. Even in terms of market access, it had gone against the developing country. In fact, an exercise was conducted while I was in my earlier institution for the Ministry of Commerce, where I showed that the extent to which India had given market access was far in excess of the sort of market access India had to obtain.

You can look at each and every kind of agreement and find this kind of imbalance. Not surprisingly, a few years later, at the behest of the developing countries, a paper on implementation issues was tabled and it listed no less than 99 points on which developing countries were unhappy because of all these imbalances in the WTO agreements. They wanted a change in the structure of the agreements. The collective will of the developing countries did quite remarkably because, in 2001, in the Doha Ministerial conference, they got what is called the Doha Development Agenda. It was their agenda for reforming the WTO. Many of these issues were actually encapsulated in the Doha Development Agenda and then negotiations began from there to sort of rebalance the agreement on agriculture and many other issues, including intellectual property rights.

These negotiations went on seriously from 2002 to 2008, until the financial crisis struck. Then the developed countries took advantage of uncertainties in the global economy and decided to abandon the Doha mandate, and it actually went nowhere. It became very difficult for the developing countries, and they themselves lost a bit of political will at that point. Finally, in 2017, at the eleventh Ministerial Conference in Buenos Aires, there was a very alarming language that said that there is no consensus amongst the members on whether the Doha Development Agenda is alive or dead. It clearly meant that the developed countries did not want to see the Doha Development Agenda alive. They wanted to see the whole development agenda dead. Therefore, despite the push from developing countries to keep the Doha Development Agenda going, the agenda became virtually dead.

All this got very well reflected in all the discussions and processes that took place in the run-up to the twelfth Ministerial Conference. For instance, in agriculture, there was a very clear mandate from the Doha Development Agenda as to how the agreement is going to be rebalanced, how it is important to look at the provisions relating to special and differential treatment for developing countries which

means the special provisions that the developing countries will enjoy. It was anchored on three very important and concrete objectives. The first was food security. The second was rural livelihoods, and the third was rural development. So, it was very clear that all the policies in agriculture and those that the WTO was dictating would be anchored on the three objectives of food security, livelihoods and pooled development.

For instance, a large part of the subsidies India gives is targeted towards low income and resource-poor farmers. This is a language the WTO uses and every country has the freedom to identify who these low income or resource-poor farmers are. Something that many people actually are not aware of is that the government of India has declared in the WTO that 99.43% of the holdings in India are cultivated by low income or resource-poor farmers. So, that is the extent to which farmers in India lack resources or incomes, according to the Government of India.

So, when this controversy about farm laws was going on, some of us were pointing out that it is the government that says that 99.43% of farmers are low income and resource-poor. Shouldn't the government have the responsibility of looking after the interests of these farmers<sup>8</sup>? Currently, the entire subsidies regime is being reviewed. The entire exercise is aimed at reducing subsidies. Of course, India is one of the largest providers of agricultural subsidies and, not surprisingly, the axe is going to fall on India as well if the current set of proposals is looked at<sup>9</sup>. Now, I think there is a need for civil society and people who are outside those hallowed premises of the WTO and the government buildings to rethink the response to WTO's threatening to scrap agricultural subsidies.

I've been giving some suggestions of parameters WTO should actually look at subsidies through. They should not be painted all in one colour, but one should actually look at them in terms of how much distortion they create in the global market. There is very clear evidence that the developed countries - the US, EU - are subsidizing

their agriculture mainly to capture markets. What India is doing, however, is mainly for protecting livelihoods and food security. Now, one can always say that India's development agenda has been flawed because it has not been able to move people away from agriculture, but the reality today is that a majority of the working force in India directly or indirectly depends on agriculture and they need to be supported. There is no alternate livelihoods for them, and one could clearly see the desperation in the exactly one year of farmers' protests that have taken place.

It is very important for India now that it has some time at its disposal, and it knows what is coming. The chair of the Agriculture Committee, informed us a few days back, has taken all these proposals off the table. This was regarding public stockholding for food security and this is at the heart of the public distribution and procurement systems. Normally, the WTO has been targeting production-related subsidies, but one consumption subsidy which has been targeted is the food subsidy which is implemented through this public procurement of food grains and then distributed from these stocks through the public distribution system to the poor.

There are certain thresholds beyond which India cannot give subsidies in this scheme. The threshold is 10% of the value of production and India will actually cross that threshold. So, there is a real danger that it will have to stop procurement and its public distribution system if it is to remain as a member of the WTO, and this is an issue that has to be decided by the membership of the WTO. There have been proposals which have come and one of these potential solutions was to suggest that countries who are running this kind of a system should not be able to procure more than 15% of their total production. For a long time, the total procurement that the government was doing was less than a third of total production: It was always about 29-30% of the total production. Last year, procurement of rice went up to almost 50%, and wheat went up to about 40%.

<sup>8</sup> <https://focusweb.org/publications/india-compromises-its-wto-strategy/>

<sup>9</sup> <https://focusweb.org/publications/interrogating-the-food-and-agriculture-subsidy-regime-of-the-wto-an-indian-perspective/>

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So, there is clearly an impact that the farmers' agitation has had on procurement and the government has also been saying that they have procured much more this year.

So, you can see what the impact is going to be of this proposal. From 50%, it will have to come down to 15%. One can understand what kind of impact this will have on the farmers. So, agriculture, on the issue of subsidies, is a real problem for India. Of course, there are associated problems with the opening up of markets, and this thread has been there for a long time. If we are forced to import subsidized food grains provided by the US and the EU, and other such subsidized commodities, then the lives and livelihoods of India's farmers will be in jeopardy and this will be a serious problem.

Civil society needs to be really engaged on this. It has been a little disappointing to note that the engagement of civil society on trade-related issues has actually fallen quite considerably. It is really gladdening that this capacity building workshop is being conducted and the organisation is getting the trade agenda onto its work programme. A final few points about fishery subsidies and it is a related issue. Like agriculture, the fisheries sector is dominated by small fisherfolk. Also like agriculture, it is a question of livelihoods and with a very long coastline, it is a significant issue. Now, most countries give subsidies to their fishermen. That is something that is very well known. There was a decision taken about 20 years back that subsidies provided to the fisheries sector were very harmful because they were leading to overfishing, illegal fishing and all kinds of other problems, resulting in a depletion of the fish stock. There was an environmental disaster looming large because of the depletion of the fish stuff. A decision was then taken to rein in all these fishery subsidies and to undo the damage that has been wrecked. Now, after 20 years, there is a draft prepared by the chairman of the negotiations. Upon looking at that draft, it is completely unbalanced and does not serve the country's interests at all. The kind of support that the government would like to provide to the small fishermen without which their livelihoods will be in

jeopardy cannot be provided because the subsidies can only be provided as long as the fisherfolk exploit the fish up to 12 nautical miles from the coast, a boundary called the territorial waters and that also can only be provided up till two years; after two years it cannot be provided. India has given a counter-proposal saying that the extent to which fisherfolk can fish should not be the boundary of territorial waters but should be that of the exclusive economic zone, which is 200 nautical miles from the coast, and the subsidies should be provided for 25 years, rather than two years: There should be some time for the adjustment to take place. The outcome is not known though, thankfully, there is some more time to deliberate and come to some decision on this.

The moot point that was being made is that the WTO Ministerial Conference had only one agenda: To increase the inequities in the global trading system. That was the bottom line everywhere; there was only the talk of market access and that of increasing the reach of developed countries into other countries. These developing countries, already struggling to come out of the COVID pandemic, would have been horribly handicapped if this kind of an agenda would have gone through in the Ministerial Conference. It is a blessing in disguise and there is a need to garner all strength, all resources, all arguments, and put the best foot forward in the months ahead so that, by the time the Ministerial Conference reconvenes, there are some serious counterpoints to make against the proposals that are there on the table. We will all join in and I am sure Ravi is going to put in his mind. As he reports and writes dispatches from Geneva, he can be involved more directly in these processes so that his capabilities and all the understanding that he has obtained can be put to good use for the betterment of the working people in this country.

PRESENTATION IV

D. Ravi Kanth



# WTO, MINISTERIAL MEETINGS AND NEGOTIATIONS OVER THE COURSE OF TIME

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Let's start from what happened yesterday night (26th/27th November, 2021), namely, the meeting getting indefinitely postponed, and we don't know when it will reconvene. Perhaps it could reconvene early next year, sometime in June or so. The interesting issue here is the kind of poetic justice in why the meeting was cancelled. Yesterday, the European Union had to put pressure on the organisers once the Swiss government stopped flights from Brussels and Southern Africa. It is here the whole irony begins, namely, the European Union being the one that has been blocking an agreement on the TRIPS waiver relentlessly with about three or four countries. As Biswajit rightly said, the access to vaccines is close to 5.6%, particularly in the poorest countries, LDCs and African countries. The developed countries have now come to know that if you leave the virus in parts of the poorest countries open, you can then try and over-vaccinate your people, even though there is opposition to the vaccines in this part of the world virus is also spreading there.

## The TRIPS Waiver

But the TRIPS waiver perhaps has been the fundamental challenge to them, because it actually sought one of the agreements called the TRIPS: Trade-Related Intellectual Property aspects. This is one of the agreements actually written by the pharmaceutical industry, way back when the Uruguay round started when the Americans introduced intellectual properties into the global trading system despite severe opposition at that time, particularly from India and several other countries. The Americans were able to ram it through promising that the developing countries will be paid adequately in areas like textiles. At that point of time. One of the destabilising agreements called the agreement on textiles and clothing was denying market access to the developing countries. Since then though, the TRIPS Agreement has actually been one of the biggest problems for a variety of issues, particularly with regards to access to therapeutics and vaccines as seen by the kinds of battles that

have been led such as those during the antiretrovirals, and the AIDS problem in South Africa. So why am I saying all this?

As Biswajit also said about the Marrakesh agreement, it focuses heavily on what is called sustainable development, sustainable reduction of tariffs, and sustainable environment. The word sustainable keeps figuring in almost all the paragraphs of the preamble language. But today, the most important assault on or during these negotiations is on development. There was a meeting with the EU trade commissioner. Journalists were called and I was also invited. There, they were saying that it is not the development that is important for us but the inclusiveness. Now, if one were to have only inclusiveness with the kind of disparities in market access, in income, in the overall industrialization that had taken place over the last 200 years, and in access to a whole range of things, the concept of inclusiveness doesn't make much sense since they will not be included in development at all. It would mean that inclusiveness actually perpetuates the inherent or inbuilt asymmetries as well as the inequalities in the trading regime. So, it goes completely diametrically opposite to what has been said in the Marrakesh Agreement. I mean, the Marrakesh agreement has two parts. One is the chapeau language and the other has the laws, the economic edifice that was built into the laws, which are part of the GATT negotiations and all the laws, the outcomes and the results that have come about from the General Agreement on Tariffs and Trade. Therefore, it is a combination of economic laws and these economic laws, as we discovered over the last 30 years, are very unequal. They are very unhelpful for developing countries to actually grow in terms of areas where they have not grown. Agriculture, of course, is the mainstay for developing countries. But, even in other areas like industry, for example, you have an issue called trade-related investment measures or even if one wants to develop in the pharmaceutical sector by going up the ladder through reverse engineering which all these countries did. In fact, the European Union, the United States and about seven or eight other countries ensure from meeting to meeting that what they want should prevail.



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## A meeting-by-meeting run-through

It is also interesting to note that during the last 26 years, and Biswajit would agree, there has been no concretely defined beneficial outcome that has come about for developing countries despite their repeated calls for redressal of various issues. They have not managed to get the kind of outcomes that the so-called northern countries, the US, EU and all, managed from the Marrakesh agreement that was signed in 1994. In 1996, which was when the first WTO Ministerial meeting took place in Singapore, they brought the Information Trade Agreement (ITA). Here again, they wanted a kind of tariff elimination on many ITA products which the developing countries are at that point of time developing.

If there is a tariff elimination regime for these ITA products, it will be extremely difficult for one to develop their own ITA industries. In fact, there have been studies which show that India has suffered heavily due to the ITA agreement and following the tariff elimination that had taken about. Then we come to the second Ministerial meeting, which is called the 50th anniversary of the GATT WTO, and which took place in Geneva. There again, they try to push not just the ITA, but a new round with an overarching agenda, covering a whole range of issues. This was done by the European Union, primarily followed by the United States and other developed countries. They were actually fearing that they have to deliver something in agriculture, which is one of the issues that has been written into the WTO agreements that, following five years of the implementation of the Uruguay round results, members will start having negotiations on agriculture. This is in Article 18 of the agreement on agriculture. Then, there is also a requirement that members will continue to negotiate on issues pertaining to various things in the services sector. Now, this was their goal: They did not want to realise that there are serious problems which the developing countries started encountering from the Uruguay round of negotiations that has so many covered agreements, from agriculture to anti-dumping, to subsidies and

countervailing measures, the TRIPS, the GATS, a whole range of dispute settlement processes, and the two-stage disputes. This was in 1998.

The third Ministerial meeting was in Seattle, in 1999. At that meeting, things collapsed because of the introduction of, at that point in time, what is called the Social Clauses. The Social Clauses include trade and labour, and trade and environment which were not part of the WTO at that time. But President Clinton coming to the conference was a clear signal that he was writing this agenda, which was not acceptable to the developing countries. So the meeting collapsed. When they tried to revive it, this was the fourth Ministerial meeting, and it took place in Doha and produced the development agenda.

One of the friends of developing countries, who has been a trade minister for South Africa, called Rob Davis, would always say that the developing countries got the title, which is the Doha Development Agenda. But in reality, the success and results have all accrued to the developed countries. In fact, the agenda's fundamental reform seeks foundational reforms in the trading regime. And I remember that time in Doha when the trade minister of India managed to do creditable work by in fact blocking things. Finally, in order to head his calls, the big boys agreed to what is known as explicit consensus on four controversial issues. These are called the Singapore issues which are trade, investment and training, government procurement and competition policy. The last one is called trade facilitation. This is being cited as these four requirements as outcomes of the Singapore Ministerial meeting were inserted in the Doha Development Agenda. With the caveat that, at the fifth Ministerial meeting which was in Cancun, there has to be explicit consensus on these four issues, which are not essentially beneficial and stymie development in developing countries such as in trade in investment which has now come back in the form of investment facilitation. Government procurement is something that is still there, but India is amongst one of many developing countries that have not signed the government procurement.

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So, at Cancun, which was in 2003, at the fifth Ministerial meeting, all these four issues collapsed. There was massive opposition. In fact, interestingly, that opposition was led by a trade minister from Malaysia called Rafidah Aziz, along with the former trade minister of India, Arun Jaitley at the Cancun meeting. So, these four Singapore issues failed to gather consensus at Cancun and the meeting also collapsed not just because of the Singapore issues, but due to agriculture as well. At that point in time, cotton had come into play and, in fact, the four cotton countries managed to get an international opinion in their favour, rightly so. The Americans opposed heavily the entire dossier of issues in agriculture at Cancun. So, the Cancun Ministerial failed. Then, we move to 2004 where, again, to revive things after the failure of Cancun, ministers met in Geneva at that point of time and they agreed on what is called the July 31st agreement in which interesting parameters have come about. A fresh reassessment of things was done and, again, there India played an important role through Kamal Nath. What happened in that July agreement is that for the first time LTFR was introduced. It stands for Less Than Full Reciprocity: The developed countries will take larger cuts in terms of reduction of tariffs or addressing other issues in proportion or reciprocity to developing countries that will take smaller cuts. In all areas, this was the principle that was established at the 2004 July meeting and the big boys, the Americans and the Europeans, in return for some of these new things that had been included in the agreement managed to get what is called trade facilitation. So, out of the four Singapore issues, they resurrected trade facilitation out of the overall remaining issues to be addressed. This was the bargain at that July meeting.

So then we moved from 2004 to the sixth Ministerial meeting, which was in Hong Kong. It produced what is called the Hong Kong Ministerial Declaration, which is one of the major advancements or major gains for developing countries in terms of getting more clarity on what needs to be done in agriculture. For example, the

Declaration included language saying that cotton subsidies will be addressed expeditiously, ambitiously and without any further delay. So, there were clarifications with regards to issues that are much more grounded in a kind of language that has been useful for developing countries. The developed countries agreed to them very grudgingly knowing full well what they are capable of doing later.

So, when we move to 2006, it is the year when, for the first time in the history of global trade negotiations, the then Director-General, Pascal Lamy from the European Union, who was an EU trade commissioner before taking up this assignment at the WTO, suspended the negotiations. This was unheard of in the history of trade negotiations. Why did he do this? He wanted to help the Americans. At that time, the Bush administration, which was going for the elections at that time in the US states, was facing a huge defeat. In fact, agriculture was the most important issue. If any commitments on agriculture were to be made, it would further undermine the electoral prospects. So, talks remained suspended on the Doha Development Agenda in 2006, till the period of 2007. In early 2008, there was a chair of agriculture negotiations, who was generally seen as a positive and helpful chair for trade negotiations. His name is Crawford Falconer and he is from New Zealand. He revived the negotiations in a way through what is called fireside chats and a lot of other initiatives. We arrived at the 2008 Ministerial meeting, which was supposed to agree on what is called the modalities on how tariffs should be reduced on agriculture products, special safeguard mechanism, special products and a range of several other issues. In fact, if you go through the particular modalities drawn by Crawford Falconer, he accommodated in a very balanced way the interests of the developed and the developing countries in a way that people living in countries from both North and South appreciated his work and were ready to consider the modalities.

Then the meeting collapsed again in 2008. At that meeting, the Americans pulled the plug and said that they cannot accept because the American farm lobby was actually camping at the WTO meeting. On the day of the meeting when things seemed to improve, there was an understanding that the Americans will bring down their AMS (aggregate measurement of support), which indicates the subsidies that are most trade-distorting. Initially, the Americans agreed to bringing them down to 15 billion. Suddenly, the American farm lobby, which was present at that meeting, just walked out. Of course, India also walked out but on a different ground, which is called the SSM thresholds. Special Safeguard Mechanism (SSM) thresholds are where if there is a sudden sustained surge of products, the retaliatory measures by the receiving country imposing some kind of tariffs are safeguard tariffs.

So the Ministerial meeting collapsed in 2008, and then they tried to revive the WTO's Doha Round of negotiations. It is also important to mention here that, in 2008, the Americans walked out of the Doha Round effectively because they saw that they were not going to get much from the negotiations on market access and agriculture. So, they went and started what is called the TPP Agreement: Trans-Pacific Partnership Agreement. It was already started by Chile and Singapore and a couple of more countries and the US joined that. It started actually navigating the talks, as is typical of its trade hegemonic self. So it managed to procure a fairly good deal of what is called the TPP, where it got massive market access in agriculture from Japan. Then, the US withdrew from the WTO. In fact, the actual withdrawal started with the TPP agreement, but they had to put up the charade of being very involved in WTO negotiations as it is one of the hegemons which started the GATT and the WTO system. So it did not want to lose its control over this. We come to 2011 now, which is when the eighth Ministerial meeting took place. This was, again, in Geneva and they decided to reinvigorate negotiations. The central purpose here was that agreements that are ripe for harvesting should be targeted and developing countries were totally misled on this with nobody seeing the writing that was

on the wall. This was the US's design, namely that we address agreements that are ripe for harvesting. That is how they picked up the trade facilitation agreement, while not engaging in other areas. The developing countries also agreed to this, and they joined the negotiations. From the eighth Ministerial Conference in Geneva, for the next two years, they singularly focused on this (because of the American pressure and the Europeans). So the Americans created the scare, that if we don't conclude this trade facilitation, we will not stay in this WTO.

Between the eighth and ninth Ministerial meeting, that's 2011 and 2013 (in Bali, Indonesia), whatever happened there is interesting again - the trade facilitation agreement is being concluded. But in India, in 2008, Anant Sharma was the Indian Trade Minister and the Indian government was on a boil in the sense that basically you're giving up territory on a major market access agreement. They always say trade facilitation is sort of a simplification of customs procedures and issues related to how things are held up at the ports and that's not the main goal. I mean, the real goal is seeking market access through trade facilitation. In Bali, Indians and G33 (group of developing countries which is led by Indonesia), brought the issue of public stock holding (PSH) programs for food security, because at that time, things were already on a knife edge on issues concerning PSH programs. India has started overstepping the limits that are written in the WTO rulebook, particularly on the de minimis. So India, along with a several developing countries, put this issue and brought it to the center stage and they also threatened that if they don't get this PSH agreement and body then they will block the trade facilitation agreement. So, finally, the US and other EU and Cairns Group of exporting countries (this is one of the ginger groups which is very powerful in agriculture negotiations). Cairns is a place in Australia where, for the first time, all the agriculture producing countries gathered. This was actually in the Uruguay round, and they did up a very ambitious agenda. This group also involves Russia which continuously puts forth ambitious proposals of market access, reduction in tariffs, plus domestic support subsidies, all subsidies. It's

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important to mention that the WTO's Agreement on Agriculture has this thing called the amber box subsidies and these are subsidies that have to be progressively reduced. Then you have de minimis, which is for developing countries and says that under 10% will be exempted from any cuts, but if your production levels cross 10%, as it happened in India now on rice, where the Indian de minimis went beyond 10%.

The Bali peace clause, which was clarified again in November 2014 was revoked by India for the first time, last year and has been revoked again. The Americans and others are really shouting and accusing India of undermining the WTO rules and whole lot of other things, in the last one and a half years. At Bali, we had a bargain, and the bargain was that the developing countries will agree to trade facilitation in return for a permanent solution (for the existing interim solution) for public stockholding programs for food security, essentially, exempting countries like India and few others in the matter of cereals, i.e. rice, wheat and a couple of other items that they can breach the rules which are already there in the Agreement on Agriculture. So that's the highlight of the Bali meet - the developed countries succeeded in a very big way by capturing or pocketing the trade parlance (means you get an agreement, you pocket it, and then you stop the eye, you know, you create hurdles and other areas unless your interests or your concerns are addressed). So all these northern countries pocketed the trade facilitation agreement, which is their main demand,

Start 2014 and 2015, during the Doha round, the Americans (the EU and other developed countries) said, we are not going to deal with any issues in agriculture. In the Doha agreement, we won't deal with any of the issues in agriculture from now. This was them basically just turning their back to the negotiations, which was supposed to be held for making this interim solution on public stockholding programs for food security, permanent.

Now we arrived at Nairobi, this is the tenth Ministerial meeting of the WTO where they created a language in the outcome document, saying that there are countries which support the Doha negotiations and then there are countries which do not support the continuation of the Doha negotiations and they also include language that from now on, you know, plurilateral agreements, which are basically limited to the signatories of that initiative (and invariably, these plurilateral negotiations are controlled by the the powerful countries). So they (the developed countries) declared this in 2015 and refused to have any outcome on the permanent solution for public stockholding programs. This was an empty promise for the future. For instance, if you read the Nairobi Ministerial agreement in all its functional areas, it does not figure the conversation on a permanent solution. This was the success of the United States as they were successful in ensuring the erasure of the word 'Doha' in 2015, which has then been carried on in 2017 and the Ministerial did not have any outcome - this was the eleventh WTO Ministerial meeting in Buenos Aires in December 2017.

There was no agreement there, except that this is again, another interesting development, namely that other than trade facilitation, which is their first priority, their second priority is the fishery subsidies. The ground work for fisheries subsidies actually started in 2011 in Geneva. In Buenos Aires, they managed to get Ministerial decision on fisheries, wherein they said they (the developed world, wanting to discipline fisheries) used for the first time the language of the United Nations Sustainable Development Goals, which is SDG 14.6. This was basically an act of reinforcing SDG 14.6. Now, essentially the negotiations on fishery subsidies should be according to the mandate of the UN SDG14.6 and also the Buenos Aires Ministerial decision which had reinforced the language of the SDG14.6.



Now, what we see between 2017 and 2021, in the fishery subsidies negotiations, is that they have created a architecture in which the big industrial countries, I mean, the big subsidizer (there are about 10 of them - they are essentially China, European Union, the United States, Japan, Canada, then Korea, Taipei among others), who are engaged in industrial scale fishing with a range of subsidies. So, the subsidies are illustrated in Article 5.1 of the chair's latest draft Ministerial agreement. They said that these subsidies will be exempted, provided, these countries can demonstrate that they are taking measures to protect and safeguard certain vulnerable fish stocks by taking measures to ensure that they continue to survive. There's a very broad kind of caveat, nobody can actually prove that they are taking those measures, but you can show that we are doing it and under the pretext of doing that you are now being exempted from these subsidies. So effectively the process has killed the goal set out in Article 5.1, UN SDG 14.6 and the Buenos Aires Ministerial Declaration, which aims to effectively prohibit subsidies which are given to over fishing and over capacity pillar and then you also take some measures in the illegal unreported unregulated (IUU) pillar. This was such a blatant asymmetrical agreement - the big subsidizers are allowed to continue with their industrial scale fishing based on our subsidy structure which will result in the depletion of the global fish stocks. This language has been killed in the current draft i.e. the Agreement on Fisheries' Subsidies.

Also more interestingly, while these big certain big subsidizers managed to get what is often dubbed as reverse special and differential treatment, because they can continue with their subsidies, provided they show that, you know, they're taking measures to protect all this vulnerable fish from fish stocks. It is quite illogical and unfair and this has been the opinion of many developing countries who said that this is completely imbalanced and it is not in accordance with the mandate. And at the same time, US wanted to differentiate and bring a controversial concept called the differentiation of developing countries for availing special and differential treatment. In this the US was joined by the EU and others

developed countries in supporting that process where all developing countries will not be treated on the same footing - that some countries will get access, other countries will get a transition in terms of S&DT flexibilities higher than some other developing countries.

For those interested, if you see the language in Article 5.4, of the current draft Ministerial decision, it starts with a footnote - the footnote 12. This footnote was aimed at excluding China. It says that countries with global fish stocks of 10% or more than 10% will not be able to use this special and differential treatment. This is contrary to the demands that are made by India and many other developing countries, including Indonesia, which have huge fishing communities. In fact, India should be doubly worried about what could come out of this agreement. If they're not able to get the kind of flexibilities they sought, especially the exemptions for 25 years. So, that has not been addressed and has been left to the negotiations. So unless India fights very hard at those negotiations, it may not get 25 years clause and it might also not get several other flexibilities. So the whole agreement is written with asymmetries in the fishery sector.

Now we move to agriculture. In agriculture, there were two things that are happening simultaneously - there are certain mandated issue (from the tenth Ministerial, to the eleventh and now to the twelfth Ministerial). In this Ministerial meeting, the permanent solution for public stockholding programs, is supposed to be concluded rather it is mandated to be concluded. While this is an issue, the Americans will never accept a permanent solution in this regard, in fact, it is them who blocked an agreement in Buenos Aires in 2017 which proposed an incremental demand over and above what was achieved at the Bali interim peace clause. This was in 2017, when we had one of the best negotiators from India (J.S. Deepak) and his contribution to this whole issue has been immense and significant because he not only stopped the trade facilitation agreement and stopped India from signing the 2014 protocol. He also tried very hard on the permanent solution in Nairobi too. In fact, if you read the Chair's (the facilitator) text during the Buenos Aires



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negotiations, who was himself an Ambassador from Kenya - the draft puts all these ideas, permanent solution (which was Deepak's main contribution) etc, and also the discussion on the subsidy reduction commitments and a whole lot of things - but this was single handedly blocked by the United States (this was the Trump administration).

Now we are at the twelfth Ministerial meeting. The agriculture track is one of the classic cases where you have to see the linkages with the chair too. This year, the Chair is the Ambassador from Costa Rica which is an aggressive participant in the Cairns Group. The Chair has produced a draft agreement, which has been severely trashed in a meeting that took place earlier in November, where India used very strong language and said that, "you (the Chair) has almost blew up any prospects for outcomes at the MC 12". So what the Ambassador of COsta Rica (also the Chair) did was that, she just said that this permanent solution is opposed by several countries and there are wide divergences and that this issue cannot be addressed now and that it needs to be taken to the 13th Ministerial Conference. The kind of language the Chair used is very inimical to the interests of developing countries. Instead she put issues like market access and reduction in trade distorting subsidies on a higher pedestal, which is what the Cairns Group of countries wanted and the language also targeted not just the production-related subsidies, but also the input subsidies and range of other things. The WTO AoA has an Article 6.2, where the green box for developing countries ( developing countries subsidies on irrigation power and a range of things) are exempted from any reduction commitments. So these Cairns Group of countries led by United States, they wanted the elimination of it too, I mean Article 6.2 has been an eyesore for them to be completely brought to the reduction commitments. This has been going on from 2014 till now, targeting Article 6.2, de minimis programs and range of subsidies which developing countries give.

## WTO REFORMS

Apart from these two sectors, the biggest challenge is on an area called the WTO reforms and this is a major challenge for developing countries to come to grips with and fight. Under the garb of WTO reforms what the developed countries wanted to do, primarily US and EU, is eliminate the principle of consensus decision making. If you see the Marrakesh agreement, it has language that agreements multilaterally negotiated, should be adopted by consensus and that all the members must be party to; and if any one member raises opposition, then the agreement is blocked.

The second thing they want to do is the differentiation (in the garb of the negotiating function). The demand of the developed world is that WTO should differentiate developing countries in using their self-designated status in availing special and differential treatment. So this is primarily to push India, Indonesia, South Africa, and 30 other countries out of availing this status.

Third under the WTO reforms, they want to legalize the informal plurilateral joint state initiatives. These essentially started in 2017 in the Buenos Aires meeting, these groups of developed country brought issues like investment facilitation, digital trade, electronic commerce, and then the disciplines for micro small and medium enterprises. These are primarily concerns of the northern countries and countries like India and South Africa blocked these proposals and once they were blocked at the meeting, these countries went outside of the meeting hall, and started announcing some Joint Statement Initiatives in the four aforementioned areas. This was surreal, you know, and hilarious too that suddenly these countries suffer a defeat in the actual multilateral process and they are ready to shift the boats and declare JSIs. These JSIs are contrary to the processes that is set in Article 9 of the Marrakesh agreement, which sets out the rules for arriving at decision making at the WTO.

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Fourth, is the Walker's report named after New Zealand's Ambassador David Walker. New Zealand is part of the Ottawa group. This group is using the pandemic to push through a range of trade liberalization and market access reforms without addressing the core issue, of TRIPS waiver which is the best solution. The process basically excluded the demand of TRIPS waiver and in place of that he has issued a very dangerous agenda to increase trade in health.

Are we at an inflection point?

We are definitely at an inflection point as the developing countries have not been able to show their solidarity, in the manner required. It is required in relation to the WTO reforms where they have to unitedly oppose the kind of proposals that are being made on negotiating function, and then on changing the rules themselves.

The WTO has three pillars - The negotiating function, the dispute settlement, and the notification and implementation function concerned with enhancing or strengthening the role of the WTO Secretariat. The first leg has been almost permanently paralyzed. The second one i.e. a two-stage dispute settlement is weakened by the United States of America, as it has blocked the selection of eight members of the appellate body (basically trying to the kill the appellate body). And so, you have the appellate bodies, in the two stage dispute settlement system, you have first panel stage, where disputes are taken.

Moreover, the current Director General is such an ambitious Director General, she had been earlier Managing Director of the World Bank, and she thinks agreements have to be concluded at any cost, regardless of their failure or ability to meet the mandates. It's poetic justice, to the European Union and others who have been blocking fairly developmental initiatives including the TRIPS.

So, this is what the situation is like. I will stop here with my inputs.

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