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Industrial Policy and the WTO Rules-Based System

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ABSTRACT

The important issue of policy space and whether World Trade Organization (WTO) provisions act as binding constraints on a country's ability to grow has been a matter of debate for some time. Given the resurgence in the use of industrial policies, this issue will most certainly be revisited in the near future.

Against this background, this paper takes into account various approaches in examining the overlap between new industrial policies and the legal disciplines of the WTO to assess the extent of policy space available.

Specifically, it reviews the constraints imposed by WTO rules and disciplines when implementing border and behind-the-border measures often used to meet the objectives of industrial policies. The paper examines the nature of effective constraints due to the different types of WTO disciplines. The paper also considers the operational constraint in terms of the extent to which policies are similarly available to all nations. It shows that most measures are allowed under the WTO provided they do not cause adverse effects on trade of other partners. In general, this aspect is determined through WTO dispute settlement. The paper evaluates the effect of the WTO dispute settlement system and whether this imposes effective constraints on policy space. The paper finds that for most countries, especially the low income economies, effective constraints on policy space due to the WTO are not very significant. In a comparatively few cases, the system does however impose constraints on policy space, but not in general as such. Interestingly, for some measures such as standards, anti-dumping and countervailing measures, there appears to be a case for reducing the available policy space and imposing more disciplines.

The paper then shows that there is an objective basis to consider increasing the policy space available for a few measures such as local content, while at the same time making the applicable WTO disciplines more comprehensive to address a number of prevailing gaps within the WTO agreements. It then examines the ways in which some changes in the WTO regime and processes may be achieved, including ways to improve the WTO's monitoring mechanisms and identifying ways in which countries could enhance policy effectiveness.

In this context, the paper considers the likely impact on policy space resulting from ongoing large plurilateral negotiations, such as the Trans-Atlantic Trade Partnership, and the possibility of achieving some negotiated results within the WTO to increase policy space for a few measures where this may be required.

CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

EU	European Union
FDI	foreign direct investment
FTA	free-trade agreement
FYROM	Former Yugoslav Republic of Macedonia
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GNP	gross national product
GPA	Government Procurement Agreement
GVC	global value chain
ICC	International Chamber of Commerce
IMF	International Monetary Fund
IP	intellectual property
IPR	intellectual property right
ICTSD	International Centre for Trade and Sustainable Development
ITA-2	Information Technology Agreement 2
I-TIP	Integrated Trade Intelligence Portal (WTO)
LCR	local content requirement
LDC	least-developed countries
MFA	Multifibre Arrangement
MFN	most-favoured nation
NAMA	non-agricultural market access
NT	national treatment
OECD	Organisation for Economic Co-operation and Development
R&D	research and development
RCEP	Regional Comprehensive Economic Partnership
RTA	regional trade agreement
SME	small- and medium-sized enterprises
SOE	state-owned enterprise
SPS	sanitary and phytosanitary
STCs	Specific Trade Concerns
TBT	technical barriers to trade
TiSA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TRIMS	trade-related investment measures
TRIPS	trade-related aspects of intellectual property rights
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States
VERs	voluntary export restraints
WEF	World Economic Forum
WTO	World Trade Organization

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INDUSTRIAL POLICY AND WTO DISCIPLINES: INTRODUCTION

This paper examines the overlap between new industrial policies and the legal disciplines of the World Trade Organization (WTO) in the 21st century to assess the extent of the policy space available for implementing industrial policies without effectively being constrained by the relevant legal disciplines.

The important issue of policy space and whether WTO provisions are a binding constraint on a country's ability to grow rapidly have been discussed for several years now. Given the resurgence in the use of industrial policies, this issue will most certainly be revisited. There are different views on the limits imposed by the WTO system on the use of such policies.[1] One view is that the system imposes high levels of constraints on policy flexibility. According to this view, the rules do not allow developing countries to implement the very same industrial policies that present-day industrialised countries used in **their own** development process. A contrasting view is that there is in effect ample scope for policy implementation, and a large number of countries have grown rapidly and continue to do so within the existing policy space provided in the WTO framework.

No matter the viewpoint, a discussion on policy space should also keep in mind the important purpose of the multilateral trading system. The WTO agreement is a consensual effort by its members to give greater predictability and stability to the international trading system and increase market opportunities over time through a framework of disciplines for members. The applicable levels of these disciplines vary among members, with the highest levels of disciplines for developed economies, the lowest for least-developed economies, and flexibilities for developing economies provided according to their income and vulnerability.[2]

By limiting arbitrariness and potential trade conflicts, WTO disciplines in effect provide more policy space by giving enhanced policy certainty for investment and trade and by mitigating ad hoc or arbitrary policy actions. Lack of such clarity and predictability would imply additional policy efforts by individual countries and loss of growth opportunities to create operational conditions for their producers and traders similar to those prevailing within the WTO system. The possibility of a tit-for-tat protectionist policy response when such additional policies are implemented would also vitiate market conditions and the potency of the policies used by individual countries.

Against this background, this paper will consider five key aspects of the issue in assessing the adequacy of the policy space available.

First, it is necessary to consider whether existing WTO bound levels provide adequate policy space for achieving relevant objectives. This is conventionally considered in terms of whether — in order to achieve specific objectives — a relevant policy will be limited by a constraint imposed by the bound level of the discipline, e.g., the constraint prevents imposing an applied tariff higher than the bound tariff. The extent of policy space available due to a difference between the applied policy and the bound level of the policy under the WTO is the unrestricted policy space.

Second, it should be noted that the WTO framework not only imposes binding disciplines, but also carves out exceptions to certain disciplines. For example, the General Agreement on Tariffs and Trade (GATT) 1947 Articles VI, XVII, XIX, XX, and other WTO agreements provide flexibilities to address different objectives, such as infant industry development, environmental concerns, or measures against dumped or subsidised imports that cause material injury to domestic industry. To use these flexibilities, WTO members have to provide the appropriate justification and follow the specified due process, with transparency. The flexibilities in the WTO framework thus provide policy space with concomitant conditions.

Third, there is growing emphasis on a need to carve out additional exceptions to increase policy flexibility to achieve globally legitimate objectives. For example, there is a call for more easy conditions for implementing subsidies that allow scaling up clean energy technologies aimed at achieving globally agreed objectives without the burden of facing countervailing duties from others.

Fourth, additional policy space is sought regardless of underlying conditions.

Fifth, the focus is on policy space not in terms of lowering the levels of disciplines, but instead emphasis on the point that in certain cases, policy space needs to be reduced through higher disciplines to provide a more predictable trading system. Examples include disciplines in areas such as anti-dumping or countervailing measures, domestic regulations, or technical standards.[3]

1 *See*, for example, Akyuz (2008); DiCaprio and Gallagher (2006); Hoekman (2005); Lee et al. (2013); Mayer (2009); Natsuda and Thoburn (2014); Page (2007); and Santos (2012).

2 This is a broad reference to the criteria of special and differential treatment. Different agreements build on this basic principle and include some other features, such as how recently countries may have taken on high levels of obligations through accession and may therefore be exempt from additional disciplines.

3 Such views can be seen, for example, in Lee et al (2013).

Accommodating any demands for additional or even less policy space would require amending certain WTO disciplines, which in turn would need agreement among its members. Such an exercise, however, cannot be carried out in isolation of two important developments.

The first development is the present difficulty in negotiating significant changes to the WTO legal provisions, as shown by the lack of traction in the Doha Round negotiations. Any consensus requires an agreed balance between the two (or more) sides at the negotiating table with their different perspectives on policy space.

The other development is the ongoing mega-free trade agreement (FTA) negotiations that focus on extending the scope of the prevailing trade and investment rules. The large scope and trade coverage of these plurilateral negotiations make them highly relevant to any effort aimed at developing the regulatory content of the WTO. It is likely the disciplines emanating from these agreements will not result in greater policy space through more permissive disciplines, as shown, for example, by the recently concluded Trans-Pacific Partnership (TPP) Agreement.

In this context, this paper is organised as follows. Section 2 reviews the constraints imposed by WTO rules and disciplines when implementing certain behind-the-border measures often used to meet the objectives of industrial policies. When reviewing these measures, the section considers whether these policies are similarly available to all nations, rich as well as less developed. Section 3 evaluates tariff-related constraints, given the prominent use of such constraints in the phase of industrial policy that focused on import substitution for most of the 20th century. Section 4 assesses whether the use of the WTO dispute settlement system has acted as an effective constraint against the use of certain industrial policies. Section 5 reviews the effective legal constraint on retaliatory measures, such as anti-dumping and countervailing measures. Section 6 provides an analysis at the general level on whether there is indeed a need for additional flexibility within the WTO system. The next two sections consider the process of reviewing and adjusting WTO provisions. Section 7 examines how improving monitoring mechanisms is critical to better assess the adequacy of policy space and to determine areas for making changes to enhance policy effectiveness. Section 8 focuses on the process of adjusting disciplines, taking into consideration previous examples of changes made to GATT/WTO disciplines. Next, Section 9 considers the likely impact on policy space resulting from the ongoing large plurilateral negotiations and its implications on the multilateral system. Against this background, Section 10 provides the conclusions of this study.

Wherever relevant, the paper provides the text of WTO provisions discussed. Some questions that are not fully discussed in detail here are the subject of additional think pieces prepared by the E15 Group.[5] Though the paper provides certain views in a definitive manner, the purpose is to generate a discussion that yields relevant changes in the multilateral trading system.

DO WTO RULES CONSTRAIN INDUSTRIAL POLICIES?

This section examines the policy space available to implement select behind-the-border trade measures generally used to achieve industrial policy objectives.

A policy measure is not *a priori* WTO-inconsistent, unless explicitly prohibited. For all other policies, inconsistency or consistency depends on whether there is a determination by a dispute settlement panel and Appellate Body of the WTO that the measure is inconsistent with certain WTO disciplines. In this respect, the manners in which WTO disciplines apply to industrial policy can be categorised as follows:

1. Prohibited policies: Policies that are prohibited under WTO.

2. Non-actionable policies: Policies that are unconstrained by WTO disciplines, and therefore not subject to dispute claims.

3. Actionable policies: Policies that are subject to the dispute claims should they breach specific conditions. These conditions may be in terms of, for example, tariff bindings or not allowing quantitative restraints; non-discrimination — most-favoured nation (MFN) treatment and national treatment (NT) — notification of laws and actions; transparency; timeliness of procedures and other due process aspects; and a need to specify the justification for deviating from the basic disciplines of MFN and NT obligations or the binding limits imposed by other disciplines. The legally binding conditions differ for goods and services and within goods for industrial products and agriculture.

Keeping these categories in mind, we consider the policy space available to implement some key policies, such as subsidies; local content requirements (LCRs); government procurement; rules related to state-owned enterprises (SOEs); trade-related aspects of intellectual property rights (TRIPS); and regulatory requirements/standards.

4 List of think pieces available through http://e15initiative.org/themes/industrial-policy/

SUBSIDIES

Subsidies are among the most prominently used industrial policies for a range of different objectives and can be provided through a number of methods. Most can be considered in terms of two broad categories:[5] the direct provision of financial support; and the indirect provision of financial benefits, such as preferential tax policies or providing inputs at reduced prices for any industry. In both cases, there is a revenue loss to the government.

It is important to note that subsidisation as a policy tool is more easily available to developed nations given that poorer nations often lack the revenue base needed to extensively provide subsidies. For this reason, greater flexibility for the subsidy regime is often seen as lopsided in favour of richer nations. This applies even in the context of agriculture and services where the rules for subsidisation are more flexible than for industrial products.[6]

Prohibited subsidies

Only two types of subsidies are prohibited under the WTO, namely, export subsidies to industrial products and subsidies linked to LCRs.[7] If a WTO member were to use one of these two types of prohibited subsidies, other members wishing to complain against its use would have to follow the dispute settlement process to get a decision against the use of that subsidy.

In the case of export subsidies, the prohibition does not apply to subsidies provided by least-developed countries (LDCs) and developing countries with a gross national product (GNP) per capita of less than US$1,000 per annum: the list of exempted countries is mentioned in Annex VII of the Agreement.[8] Annex VII members, however, become subject to the established disciplines upon reaching a threshold of export competitiveness.[9] However, even though Annex VII members have more flexibility to use prohibited subsidies under WTO rules, they are often unable to take significant advantage of this additional flexibility given their lack of resources to provide the subsidy in the first place.

Apart from these two types of prohibited subsidies, all other subsidies are permitted. They are either non-actionable (there is no restriction on their use), or actionable and subject to countervailing measures and dispute settlement.

Non-actionable subsidies

"Non-specific" or general subsidies to industry are exempt from the disciplines of the Subsidies Agreement, and even anti-dumping or countervailing measures are not authorised against them. The notion of specificity is defined under Article 2.1(b) of the Subsidies Agreement: "A subsidy ... is specific to an enterprise or industry or group of enterprises or industries [and] ... within the jurisdiction of the granting authority ... or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific."[10] As an example, subsidies for research and development (R&D) or infrastructure support, not specific to any industry could conceptually come under the bracket of non-actionable subsidies, and therefore not be subject to any discipline.

The Subsidies Agreement adds even more flexibility by categorising subsidies provided to a subset of the industrial sector as non-specific, as long as an objective economic criterion is used to determine a horizontal segment of the industrial sector. This exemption is specified in Footnote 2[11] of the Subsidies Agreement, according to which a relevant "neutral" objective criterion or condition could be applied, which is economic in nature and horizontal in application. An example of such an objective criterion is to provide a subsidy irrespective of industry to the small and medium-scale sector based on number of employees or size of enterprise, which would then be deemed a non-actionable subsidy.

Furthermore, the WTO does not discipline the use of subsidies for services. If a subsidy were to be provided for services that are not passed on to goods, such a subsidy is deemed non-actionable. Likewise, agriculture-related subsidies also have certain exemptions, including a category of non-actionable subsidies under Annex 2 of the Agriculture Agreement (the so-called green box).

Actionable subsidies

Subsidies that are targeted to a limited number of enterprises or sectors, or are contingent on exports or domestic content are deemed actionable and therefore may be subject to retaliatory measures either through countervailing measures

5 In the WTO Subsidies Agreement, the definition of subsidies shows the various ways in which subsidies may be given. *See* Article 1 of the Agreement.

6 The greatest flexibility is for services, which does not as yet have rules developed to determine any disciplines for subsidies.

7 The text, given in Article 3.1 of the Agreement states, "Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
(a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;
(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."

8 *See* Article 27.2 of the WTO Subsidies Agreement for the exemptions to the export subsidy prohibition.

9 As provided in Article 27.5, "Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years."

10 Articles 2.1 and 2.1(a) of the Subsidies Agreement.

11 The policymaker should keep in mind the fact that the subsidy has to be general, not just de jure, but also de facto.

or through the dispute settlement process if they give rise to adverse effects to any member.[12]

Countervailing measures, of which 112 were in place at the end of June 2015, are the more frequent retaliatory action in comparison to WTO disputes. During the period 1 July 2014 to 30 June 2015, 22 provisional measures and 15 definitive countervailing duties were imposed by WTO members.[13]

During this period, very few disputes were raised, with only five claims raised under the Subsidies Agreement, of which only two were substantively limited to subsidy provisions.[14] Some of these relate to complaints that the subsidies in question are prohibited. Further, some of the dispute-related complaints against subsidies are often linked to other types of policy measures that involve, for example, local content or trade-related investment measures (TRIMs) (Table 1). Since Article 3 of the Subsidies Agreement prohibits local content-related subsidies, we provide below information on disputes related to TRIMs as well.

Thus, of the 164 WTO members, only a small proportion of countries actively use the dispute settlement mechanism for subsidies (Table 2). This indicates that the process is not often used as a constraining instrument to mitigate the use of prohibited/actionable subsidies by many members; and if it were to be used, it would likely be only against a very limited set of countries, mainly developed and larger emerging economies.

In summary, when assessing the policy space available to implement subsidies to achieve industrial policy objectives, we find that:

- There is flexibility under the WTO rules for providing subsidies, unless members wish to provide prohibited subsidies.
- Complete flexibility arises in the case of horizontal subsidies based on some general objective criteria or conditions; for subsidies provided to services; and for subsidies to agriculture that are specified in Annex 2 of the WTO Agreement on Agriculture.
- Industrial policies that are based on specific assistance to certain industries or enterprises would be deemed actionable and subject to WTO disciplines. However, only relatively few WTO members are in effect subject to dispute settlement.

LOCAL CONTENT

Local content measures are policies that require foreign producers to source a percentage of inputs from local suppliers. Hufbauer et al. (2013) have described LCR as including:

- Classic mandatory LCR percentages for goods and services;
- Tax, tariff, and price concessions conditioned on local procurement;
- Import licensing procedures tailored to encourage domestic purchases of certain products;
- Certain lines of business that can be conducted only by domestic firms; and
- Data that must be stored and analysed locally or products that must be tested locally.

Use of such measures is prohibited through the NT provision[15] in Article III of GATT 1947, specifically Article III.4[16] and Article III.5.[17] These disciplines are also covered under the WTO Agreement on TRIMs, with the relevant provisions in Article 2[18] and in the Illustrative List provided in the Annex.[19] Though local content policies have been subject to greater focus and use of late, an important point with

12 Adverse effects are mentioned in Article 5 of the Agreement, which states, "No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.: (a) injury to the domestic industry of another Member [footnote 11]; (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994 [footnote 12]; (c) serious prejudice to the interests of another Member [footnote 13]. This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture."

13 *See* Document G/L/1113; G/SCM/146, 29 Oct 2015.

14 Two of the five disputes related to the imposition of countervailing measures, and one was mainly a dispute concerning anti-dumping measures.

15 *See* Hufbauer et al. (2013); ICTSD (2013); WTI Advisors (2013); Johnson (2013); and Stephenson (2013).

16 "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

17 "No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources."

18 The text of Article 2 provides, for example: "Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994."

19 "(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or (b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports."

TABLE 1:

WTO disputes on subsidies and TRIMS, consultations requested, 2010-2015

Source: WTO website.

Year	Total (subsidies and countervailing measures)	Subsidies	TRIMs	Same dispute covering both subsidy and TRIMs
2010	3	2	1	1
2011	2	1	1	1
2012	7	3	6	1
2013	6	3	5	3
2014	3	2	1	1
2015	4	2	1	1

TABLE 2:

Parties in WTO disputes on subsidies/countervail and TRIMS, consultations requested, 2012-2015

Source: WTO Website

Notes: * The complaint relates to countervailing measures; ## The complaint relates to anti-dumping measures and to Subsidies Agreement; ** Certain member states as well as the European Union (EU); # A member state as well as the EU.

Subsidies/ countervail	Subsidies/ countervail	TRIMs	TRIMs
Dispute challenge to	**Complainant (user)**	**Dispute challenge to (user)**	**Complainant**
2012	**2012**	**2012**	**2012**
EU	China	EU**	China
China	Mexico	Argentina	Mexico
China	USA	Argentina	Japan
USA	China*	Argentina	USA
China	USA*	EU#	Argentina
USA	China*	Argentina	EU
USA	India*		
2013	**2013**	**2013**	**2013**
EU	Russian Federation*	Brazil	EU
Brazil	EU	Russian Federation	Japan
Pakistan	Indonesia*	Russian Federation	EU
USA	Republic of Korea*	EU	Argentina
EU	Argentina	India	USA
India	USA		
2014	**2014**	**2014**	**2014**
EU	Pakistan*	EU	Russian Federation
EU	Russian Federation		
USA	EU		
2015	**2015**	**2015**	**2015**
China	USA	Brazil	Japan
USA	Indonesia##		
EU	Russian Federation##		
Brazil	Japan		

respect to policy space is that the prohibition was already contained in the GATT regime and was not newly introduced by the WTO Agreement on TRIMs. In addition, the disciplines on TRIMs do not apply to services, which have their own set of disciplines linked to the schedules attached to the General Agreement on Trade in Services (GATS).

The prohibition on local content does not apply to government procurement, owing to the exception under Article III.8(a), which states, "The provisions of this Article shall not apply to laws, regulations or requirements governing the *procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale*" (Emphasis added). This exception is not extended to subsidies that are combined with local content implemented through government procurement, owing to the prohibition under Article 3.1(b) of the Subsidies Agreement. Disciplines become operational, however, if the country concerned is a member of the plurilateral WTO Agreement on Government Procurement.

Despite the limited flexibility to use local content policies, there has been a proliferation of the use of such policies. The relative ease of announcing local content policies, the political attractiveness of the message, and the widespread use by others, makes less developed economies rely more on such policies. However, often imposing such requirements in a resource scarce and capacity-constrained small market could result in operational cost increases, to the extent of making potential investment inflows commercially unattractive.[20] The irony is that incentives to mitigate such a rise in costs are provided through subsidy policies, which are more easily available in richer countries than in poorer countries.

As countries compete to attract foreign direct investment (FDI), it is important to determine whether the country would be able to maintain competitiveness despite using local content and the consequent operational cost increase; these countries are more likely to be richer countries, or emerging economies with a large consumer base.

GOVERNMENT PROCUREMENT

Government procurement refers to the purchase of goods and services by government agencies with public resources to fulfil national and public-oriented objectives. Rules that determine the purchase of such goods and services are not subject to the main disciplines of the GATT (Article III: 8a) and the GATS (Article XIII:1). As a result, governments may make use of what would otherwise be prohibited policy instruments, such as local content policies.

Disciplines that do apply in this area are mainly limited to the members of the plurilateral Government Procurement Agreement (GPA) and apply only to the coverage schedules of parties specified by member states in the Agreement's Appendix 1. It is noteworthy that this Agreement has only 19 parties covering 47 WTO members (counting the EU and its 28 members as one party)[21] and eight members in the process of accession to the Agreement.[22] Therefore, including both current members and those in the process of accession, the GPA would cover only one-third of the WTO membership. Most low-income economies and several emerging economies are neither members nor in the process of accession to this Agreement.

An important policy space limitation of the GPA mainly arises in the prohibition of local content provision through government procurement, a flexibility exchanged for increased mutual market access granted to members of the Agreement. The GPA establishes disciplines on the use of offsets through Article XVI.1 of the Agreement which states "Entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets." This is further reinforced in Footnote 7, which clarifies that "offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of local content, licensing of technology, investment requirements, counter-trade or similar requirements." The provisions do, however, provide for the possibility of giving a preference margin in procurement. Also, there is some additional flexibility for developing countries, which is negotiated at the time of accession.[23]

Other disciplines in the Agreement are mainly in the form of due process and "good governance" practices. These relate to transparency; non-arbitrary and fair procurement; the use of pre-established objective criteria; non-discrimination; providing sufficient time; and timeliness of procedures and making decisions. A number of non-member countries have

20 There is evidence of this. See, for example, Kuntze and Moerenhout (2013).

21 These include, Armenia, Canada, Hong Kong (China), the EU and its 28 members, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Republic of Moldova, Montenegro, Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei Ukraine, and the United States (US). After Brexit, and ultimately exiting the EU, the United Kingdom (UK) will have to be a separate individual member.

22 Countries in the process of accession are Albania, Australia, China, Georgia, Jordan, Kyrgyz Republic, Oman, and Tajikistan.

23 The relevant provision, Article XVI.2 states: "Nevertheless, having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of local content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement. The existence of such conditions shall be notified to the Committee and included in the notice of intended procurement and other documentation."

also adopted such "good governance" practices as a useful means to reduce arbitrariness and enhance the transparency and efficiency of their processes.

STATE OWNERSHIP AND OPERATIONS

State ownership and operations have gained attention in recent years as competition intensifies between countries with and without prominent state enterprises, and as these enterprises (including sovereign funds) play an increasingly important role as foreign investors. Establishing state-related enterprises has been justified for a variety of reasons, including as a means to develop key technology sectors that require a significant amount of investments that are too risky for the private sector and to invest in sectors with high positive externalities yet low commercial return.

The purpose of WTO rules related to state enterprises is summarised by Mattoo (1998) as follows:

> Multilateral trade rules on monopolies and state trading enterprises (STEs) do not create any general obligations to change either the market structure or the pattern of ownership. Nor are these rules primarily designed to prevent anti-competitive behavior in order to achieve economic efficiency. Rather, their purpose is to prevent monopolies and STEs from behaving in a way that undermines the multilateral market access obligations undertaken by governments. This concern arises because such enterprises may be subject to government control or, in the case of monopolies, because market power creates scope for autonomous behavior which has the effect of subverting multilateral rules.

The relevant WTO conditions are in Article XVII of GATT 1947 together with a WTO Understanding on the Interpretation of Article XVII of GATT 1947. The key provision in Article XVII.1 specifies that the commercial activity of a state enterprise shall be conducted in a non-discriminatory manner, and it shall, bearing in mind the other disciplines in the agreements, conduct its business based on commercial considerations.[24] Additional provisions include not breaching bound tariff levels and not implementing quantitative restrictions. In this sense, the applicable WTO general disciplines are the same as for other activities. Transparency and notification requirements are used to ensure that state enterprise activities are operated in a manner consistent with WTO principles and rules.

Interestingly, the scope of these disciplines cover not just state enterprises, but also non-governmental enterprises with exclusive and special rights or privileges through which they can influence trade.[25] This is explained in the first paragraph of the Understanding, which states:

> Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.

SOE related disciplines retain their flexibility with respect to government procurement. Thus, Article XVII.2 states, "The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting party's fair and equitable treatment" (footnote omitted).

In summary, the disciplines on state enterprises most often relate to notification and transparency of policies and operations. They ensure that state enterprises do not use their powers to act inconsistently with WTO principles and that their activities are based on commercial considerations, so that such enterprises do not use their privileges to create a non-level playing field or anti-competitive conditions for others.[26] Therefore, as long as such "good governance"

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24 "1. (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.
(b) The provisions of sub-paragraph *(a)* of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.
(c) No contracting party shall prevent any enterprise (whether or not an enterprise described in sub-paragraph (*a*) of this paragraph) under its jurisdiction from acting in accordance with the principles of sub-paragraphs (*a*) and (*b*) of this paragraph."

25 One view is that the definition of state enterprises covered by the provisions is vague.

26 McCorriston and McLaren (2001) say, "The issue of state trading has long been recognized in the GATT framework and the WTO has endorsed state trading enterprises as legitimate partners in trade. However, while state trading enterprises are legitimate participants in trade, the original 1947 Agreement attempted to regulate their behavior. Specifically, Article XVII addressed the state trading issue whereby state trading enterprises (i) were subject to the GATT principle of non-discrimination and most-favoured nation treatment (Article I), and (ii) should act on the basis of "commercial considerations". Further, Article II:4 states that, in the case of importing countries, they should not maintain mark-ups higher than the tariff levels bound in GATT. Restrictions on the activities of state trading enterprises are not limited to Articles I, II and XVII. State trading enterprises are also mentioned in Article III (on NT), Ad Article XI (on the elimination of quantitative restrictions), Ad Article XII (on restrictions to safeguard the balance of payments), Article XIII (on the non-discriminatory administration of quantitative restrictions), Article XIV (on exceptions to the rules on non-discrimination), Article XVI (on subsidies) and Article XVIII (on government assistance for economic development)."

type provisions are adhered to, there is sufficient policy space for SOEs to be used as a tool to deliver industrial policy objectives. Ciuriak and Singh (2015) examine how this policy space could be used to encourage the state to play an important role as risk-taker and investor for large uncertain projects, which potentially produce breakthroughs in enabling technologies.

TRIPS

At the time of the conclusion of the Uruguay Round, the TRIPS Agreement brought intellectual property rights (IPRs) into the international trading system, making it a major success for its advocates and for industries where intellectual property (IP) protection is crucial to their business models (e.g., pharmaceuticals, entertainment, and software). Developing countries were, however, mostly concerned about the integration of IP policies in the WTO and their effect on constraining policy space, and felt that only limited aspects of IP policies could be alleged to be trade related (for example, restrictive business practices in licensing agreements).

Much of the discussion on policy space in this area is related to securing policy space for facilitating technology transfer, a strategy critical for the structural transformation of economies. There are two opposing views on this issue of technology transfer and the policy space available. One argues the TRIPs regime encourages the generation of new technologies by incentivising companies to undertake risky investments in new technologies, while including provisions that facilitate the sharing of information, and the transfer of such technologies. The other argues that, in practice, the TRIPS Agreement constrains such transfers and curbs the flexibility to copy existing technologies.

Exceptions

The TRIPS Agreement left policy space for countries in many areas to design national laws according to their levels of development. For example, the Agreement allows domestic jurisdictions the policy space to determine the conditions under which an invention is patentable (e.g., the case of India vs. Novartis under Indian law). It also allows policymakers the discretion to establish exceptions and limitations on the use of the patent monopoly, for example, through compulsory licenses. Similarly, policymakers may prevent the abuse of IPRs by right holders through, for example, the use of competition policy or limit the practices that unreasonably restrain trade or adversely affect the international transfer of technology.

Other exceptions that provide a basis for flexibility in policy response include Articles XX and XXI of GATT 1947. Article XX of GATT 1947 provides general exceptions to disciplines applicable under different provisions. These exceptions are allowed under certain specified conditions, for instance those provided under Articles XX(a) to XX(j),[27] while avoiding disguised or arbitrary restrictions to trade or unjustifiable discrimination among nations. Whether or not this flexibility applies can be seen only on a case-by-case basis.

Additional policy space is granted on the basis of security exceptions through Article XXI of GATT 1947.[28] In certain situations, members have mentioned security considerations as a reason for adopting a policy to support a certain industrial activity in specific sectors. However, this provision cannot be used as an exception in general cases.

It should be noted that LDCs benefit from special waivers, which exempt them from complying with TRIPS in general and with respect to provisions dealing with pharmaceutical products. There is also a provision for a special regime for incentives to contribute to the transfer of technology (Article 66).[29]

REGULATORY REQUIREMENTS/STANDARDS

In the WTO committees dealing with standards,[30] members raise specific trade concerns on the grounds that regulatory requirements/standards may be used as a market restrictive tool to promote domestic over imported products, either by unjustifiably raising standards to reduce market access for foreign products or through a discriminatory application of standards. At the same time, it is recognised that non-tariff measures are required for a country to meet legitimate objectives, such as health, safety, and environment

27 Most relevant to our discussion would be the following parts of Article XX: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health; …
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption …"

28 Article XXI says, "Nothing in this Agreement shall be construed
(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or other emergency in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

29 Some proponents of TIPS in the US are not happy with the relative flexibility agreed in the TPP with respect to the protection periods for drug development data in comparison to US practice.

30 Committees on Technical Barriers to Trade and on Sanitary and Phytosanitary Measures.

regulations.[31] Figure 1 below shows the objectives most often used to justify the notified measures under the WTO Agreement on Technical Barriers to Trade (TBT).

Determining whether the standard/regulatory requirement is used to achieve a justifiable objective or whether it is being used as a restrictive tool is often very difficult to assess.[32] One way of getting a perspective on this is to examine the notifications of Specific Trade Concerns (STCs) further.[33] Once a country notifies the implementation of a new regulatory measure, trading partners may upon review, raise STCs that the measure in question has specific concerns, such as transparency, need for clarification, barrier to trade, rationale, etc. (Figure 2). The concerns raised indicate that, in a number of instances, WTO members have perceived these measures to be questionable, unclear, or even outright trade restrictive.

It should be noted that the countries that most frequently raise concerns about another country's regulations are developed economies (Figure 3). However, developing countries are increasingly active users of this opportunity, having frequently raised questions about STCs during 1995-2015. Of the 621 STC concerns raised during this period, developed countries raised 58.3 percent of these concerns, developing countries raised 40.4 percent, and LDCs raised 1.3 percent of the total STCs during this period.[34]

A given STC could be raised more than once in the WTO Committee. A close consideration of the countries whose measures are most often cited as STCs within the WTO Committee on Technical Barriers to Trade include the EU, the US, and a number of developing countries (Figure 4). Of the 490 such measures raised during 1995-2015, developing countries' measures accounted for 62.7 percent and developed countries for the rest (37.3 percent); no such measures from LDCs were cited as STCs in the WTO.[35]

Therefore, to the extent policy space is challenged, it is more by developed countries than developing countries; however, the measures that are a matter of concern are much more those imposed by developed countries. This is further confirmed in the below tables from Horn et al. (2013), which further examines the interrelationship between the type of countries subject to and against whom claims were imposed. The tables show that standards imposed by developed countries were the subject of three-fifths of the total concerns in sanitary and phytosanitary (SPS) measures and two-thirds in TBT (Table 3). If we include BRIC countries (Brazil, Russia, India, and China) along with developed countries, this number goes up to about four-fifths for SPS and TBT (Table 4). Given the limited number of concerns raised against the poorer countries, this could indicate the LDCs are not active users of non-tariff measures that are a matter of concern for others.

Large policy space available

It is interesting to note that in an article on TBT, Wijkstrom and McDaniels (2013, para 3.5) have concluded that the curb on policy space in this area is not very high, stating: "It is unlikely — and perhaps even undesirable — that trade officials at the WTO will anytime soon narrow the policy space in the WTO TBT Agreement that we have described above, whether through negotiations, committee work, or as a result of dispute settlement." The basis for such a conclusion is provided by Wijkstrom and McDaniels (2013) as follows.

> Each of the 129 STCs analysed presents a unique story — and link — to international standards. In an effort to categorise the discussions, we have identified three broad narratives as follows:
>
> **Challenge.** The vast majority (about 90 percent) relate to some form of "challenge" from one Member to another. The tone of the discussions may range from a polite request for clarification about the use or non-use of international standards in a measure, to a direct accusation that a Member is not following a specific (and in their view relevant) international standard and therefore violating a WTO discipline. ...
>
> **Defence.** Members sometimes emphasise that they are following a relevant international standard (as a basis for a technical regulation or conformity assessment procedure) as a way of deflecting other challenges under the TBT Agreement (e.g., that a measure is unnecessarily trade restrictive). This is a way of operationalising the "rebuttable presumption" contained in Article 2.5 of the TBT Agreement (the "safe haven" argument).[36]

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31 A good illustration of this is in the TBT Agreement, where the Preamble and Article 2.2 state, "Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement; ... Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment."

32 *See*, for example, WTO (2012), especially Parts B and C of the report. *See* also, Wijkstrom and McDaniels (2013).

33 For the stated objectives of measures which were subsequently notified as STCs, *see* Chart 25 of WTO Document G/TBT/38/Rev.1, dated 24 March 2016

34 *See* Chart 22 of WTO Document G/TBT/38/Rev.1, dated 24 March 2016.

35 *See* Chart 23 of WTO Document G/TBT/38/Rev.1, dated 24 March 2016.

36 The second sentence of Article 2.5 states, "Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, *and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade*." (Emphasis added).

FIGURE 1:

Notifications by objective, 1995-2015

Source: Chart 13 of WTO Document G/TBT/38/Rev.1, dated 24 March 2016.

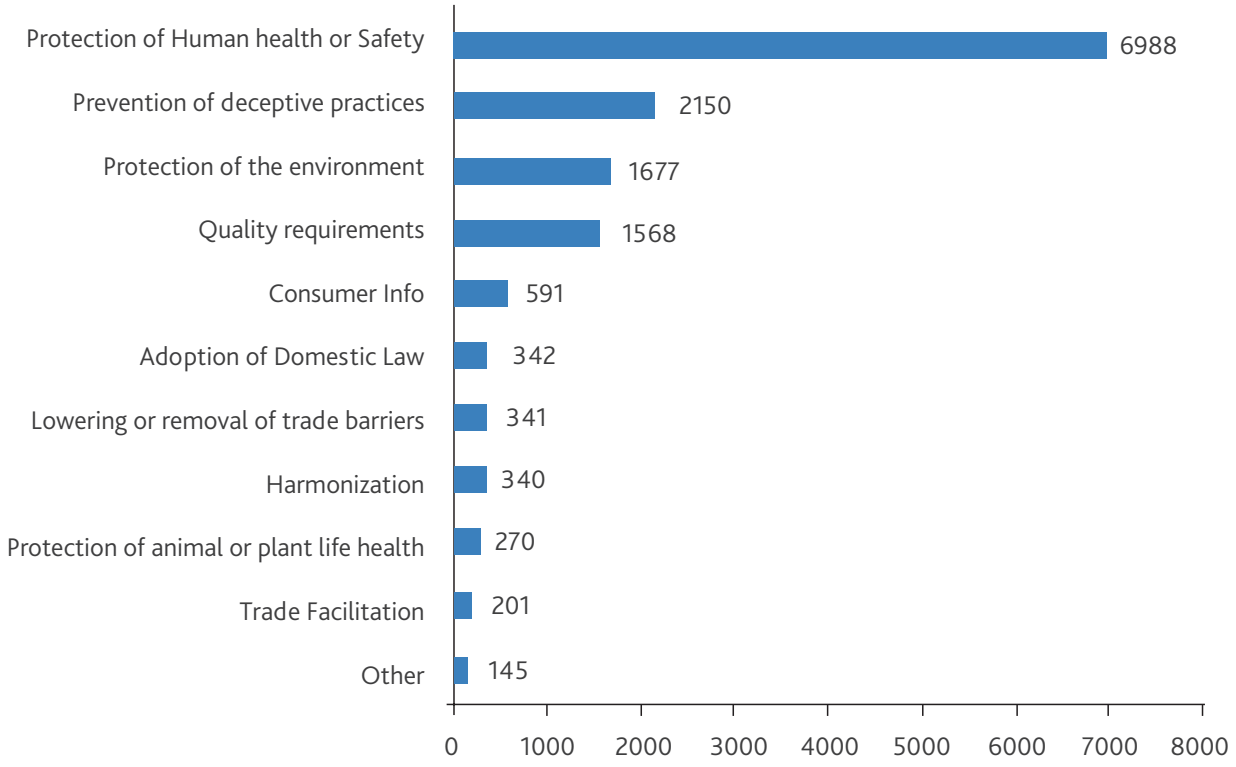
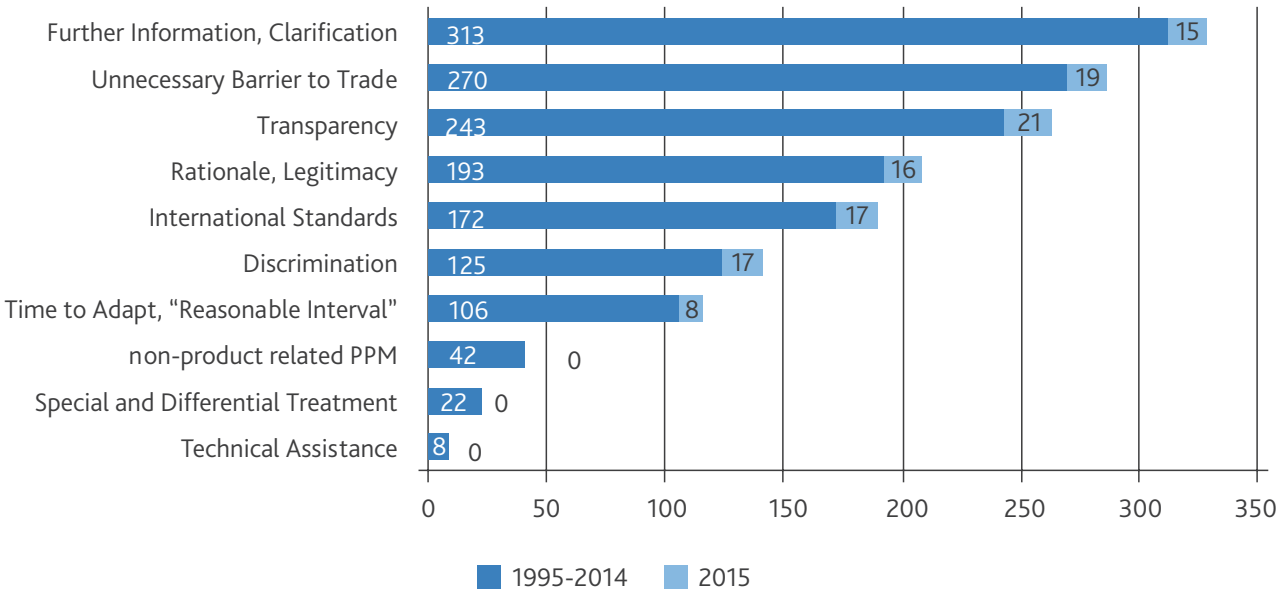


FIGURE 2:

Types of STCs raised in the WTO TBT Committee, 1995-2014, and 2015

Source: Chart 24 of WTO Document G/TBT/38/Rev.1, dated 24 March 2016.



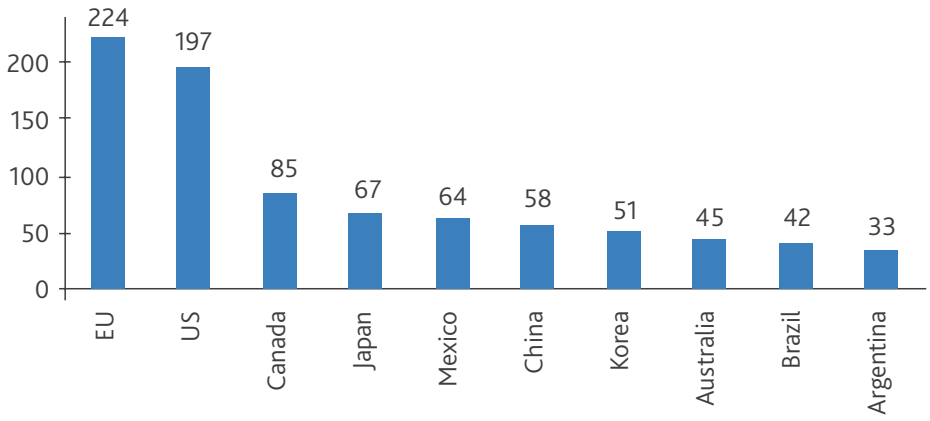


FIGURE 3:

WTO members most frequently raising STCs related to TBT, 1995-2015

Source: Chart 17 of WTO Document G/TBT/38/Rev.1, dated 24 March 2016.

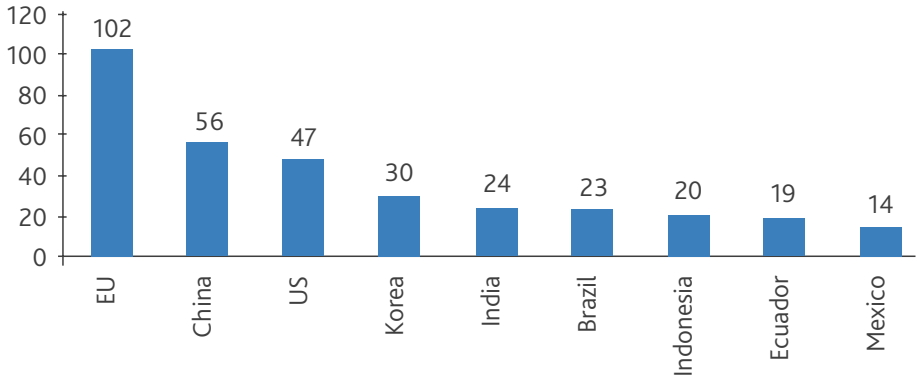


FIGURE 4:

Members whose measures were most frequently the subject of STCs, 1995-2015

Source: Chart 19 of WTO Document G/TBT/38/Rev.1, dated 24 March 2016.

TABLE 3:

Who is concerned with whom in SPS-specific trade concerns? (percentage distribution)

G2: The EU, and the US; IND: Other industrialised countries; BRIC; DEV: Developing countries other than LDC; LDC.
Source: Horn et al. 2013

Respondent →	BRIC	DEV	G2	IND	Total
Concerned					
BRIC	0.4	0.3	7.53	1.0	9.3
DEV	2.9	3.3	13.3	4.3	23.8
G2	11.0	9.4	5.05	8.3	33.7
IND	6.1	5.8	13.51	6.7	32.1
LDC	0.3	0.0	0	0.8	1.1
Total	20.7	18.8	39.38	21.1	100.0%

TABLE 4:

Who is concerned with whom in TBT-specific trade concerns? (percentage distribution)

G2: The EU and the US; IND: Other industrialised countries; BRIC; DEV: Developing countries other than LDC; LDC.

Source: Horn et al. 2013

Respondent →	BRIC	DEV	G2	IND	LDC	Total
Concerned						
BRIC	0.6	2.3	5.8	3.5	0.1	12.3
DEV	1.5	4.8	17.5	8.2	0.0	32.0
G2	4.8	7.6	4.5	8.8	0.0	25.6
IND	2.7	8.4	7.3	11.0	0.0	29.4
LDC	0.0	0.1	0.5	0.1	0.0	0.7
Total	9.5	23.1	35.6	31.6	0.1	100.0%

TABLE 5:

Response to challenges under TBT

Source: Wijkstrom and McDaniels (2013).

Note: Minor editorial changes have been made to clarify the message.

Response	Description
No clear response (largest number of cases)	In the majority of cases, the challenged member does not provide a clear response about the reasons why a particular international standard is not being used. The challenged member often addresses other aspects of concern in its response, and in most of the cases that fall under this type of response, the issue of international standards is one small part of a broader set of trade concerns with a measure.
Disagreement on application (use of) – second largest, less than one-third of no clear response	The most complex exchanges relate to disagreement on the application of a particular international standard. In the predominant mode, after being taken to task for not following a specific international standard, members claim that they are, in fact, following the standard in question. This sort of exchange would appear to reflect variations in how members use international standards as a basis for national regulation.
Deviation – somewhat smaller category than disagreement	This response involves a member being explicit about a deviation made from the international standard in question (to meet its legitimate objectives). Under this sort of response, members specify that the measure and the international standard are otherwise compatible. Applying the terms developed by ISO/IEC, this would imply the use of a "modified" international standard for the measure at issue.
Rejection – lower still, about half of deviation	In these cases, a challenged member rejects the international standard put forward by concerned members as the appropriate basis for regulation. Often the basis for rejection relates to the body or organisation that is setting the standard and may be tied to perceived flaws in the process through which the standard was set. For example, the challenged member may not be a member of that body or scheme (or could otherwise not participate) and would reject the standards. Applying the terms developed by ISO/IEC, this would imply that the measure and international standard were "not equivalent".
Resolution – smallest category	In a small number of cases, the responses suggest some degree of mutual understanding has been achieved. The resolution will often be reported some meetings after the initial concern was raised — usually with the challenged member having brought its measure closer in line with the international standard.

> **No (obvious) standard.** The lack of an obvious "candidate" international standard also creates tension. There have been instances where members mention apparent gaps in international standard setting as a reason for trade problems. For example, the lack of internationally agreed definitions has come up on a number of occasions, such as with respect to "liquor". There may also be cases where guidance is emerging (perhaps in a regional or sectoral context) but has not yet crystallised as a coherent international source of guidance. (Footnotes omitted)

Table 5 above shows that in a majority of cases, members neither provide additional clarity nor adjust the regulation in order to facilitate a resolution once a trading partner raises an STC. Given this type of response, we find that, in practice, there is a lot of policy space in this area.

Therefore, in order to reduce uncertainty, this may be an area in which more rather than fewer disciplines could be considered. The need for additional disciplines is further strengthened by emerging trends in the evolution of standards and related practices, such as:

1) A growing reliance on private standards in many markets.

   The proliferation of such standards may result in suppliers having to choose between various private standards or losing business for noncompliance.

2) Results of TBT related discussions in ongoing plurilateral negotiations.

   The relatively high trade share of members within these mega-regionals could result in non-members having to comply with potentially higher levels of regulatory requirements, so that they may still gain access to those markets;

3) The impact of "informal" initiatives, such as those taken by G7 economies in their Declaration of June 2015 (section on "Responsible Supply Chains").

   As a result MNEs in G7 countries will be responsible for monitoring compliance with social and sustainable development standards throughout the entirety of their supply chains. Local suppliers who lack the capacity to comply with standards could risk expulsions from global value chains (GVCs).

Developed nations may be in a better position to advance their interests in this area than developing countries. Opportunities from trade could, therefore, become increasingly skewed as the incidence of standards and technical barriers increases. In light of such trends, more disciplines combined with structured capacity improvement programmes may be required. The relevant disciplines could include better frameworks for good offices or for bringing various standards, including private standards, within the ambit of a common platform for the exchange of information, addressing concerns in a time-bound manner, and augmentation of capacity.

TARIFF BINDINGS AS A CONSTRAINT

Given the prominent use of market restrictive policies as a central industrial policy tool in previous decades, particularly in the successful delivery of the East Asian industrial policy strategy, this section will examine the effective constraint imposed by tariff bindings.

Tariff bindings,[37] in the WTO, act as a ceiling, which under normal circumstances, shows the upper limit an individual WTO member may apply their tariffs. These binding commitments vary across countries and by product. In practice, countries typically apply tariffs below the bound commitment, and the difference between the bound and applied tariffs is usually referred to as the "water" in the tariff. The "water" shows the available flexibility within the WTO system to increase the applied tariffs without breaching the binding level constraint.

Not all WTO members, in particular many developing countries, have their tariff lines bound. For example, in the WTO negotiations on non-agricultural market access (NAMA), there are 12 countries other than LDCs, that have fewer than 35 percent of their tariff lines bound under the WTO.[38] For such cases, the unbound tariff line shows there is no accepted national legal ceiling for applied tariffs. An example of this can be seen when comparing the tariff coverage of Bangladesh, Brazil, and India (shown in Annex 1). While Brazil has all its tariff lines subject to tariff bindings, India and Bangladesh do not. All three apply lower tariffs in general compared with their bound tariff levels.

The relatively low proportion of binding commitments and the high level of "water" indicate that, in many cases, there is in effect considerable flexibility within the WTO system to use tariffs as a policy instrument. An important point, in this respect, is that in the number of instances where developing countries have low flexibility to raise tariffs, it may arise not

37 Tariff binding can be breached in certain situations, such as balance of payments crises, to address dumped exports causing material injury to domestic industry or imports causing serious injury to domestic industry.

38 Côte d'Ivoire, Cameroon, Congo, Cuba, Ghana, Kenya, Macao (China), Mauritius, Nigeria, Sri Lanka, Suriname, and Zimbabwe

on account of the WTO system necessarily, but possibly because of the contingent requirements under International Monetary Fund (IMF) or World Bank programmes.

While there are WTO members with considerable tariff flexibility, there are also those with low water in their tariffs. As seen in Table 6, the latter are mainly developed countries, but also include some lower-income countries.[40] For such countries, the ability to breach the tariff binding would depend on whether or not they can use the exceptions or flexibilities provided within the WTO Agreement. Examples of exceptions that have been used as a basis to breach bound levels in previous years include, safeguards, balance of payments, or anti-dumping. Such exceptions showcase the policy flexibilities available through the use of due process and justified reasoning. Another example of an exception provided under the WTO is in Article XVIII.A of GATT 1947, which allows developing countries the flexibility to promote particular industries on the condition that the country compensates other members with substantial interest, usually in terms of greater market access in certain product areas identified for the purpose.[41] Given this requirement for compensation, such provisions are relatively more onerous for lesser-developed nations. If they breach their tariff bindings without relying on such flexibilities, their actions could be challenged under the dispute settlement process.

The discussion and the data above show a mixed picture of the policy flexibility available through tariffs. In cases where the policy space is adequate, and should the policymaker decide to make use of this space by implementing higher tariffs, a careful evaluation of the adverse implications on costs and thus a potential loss of competitiveness should also be taken into consideration. These adverse effects could limit opportunities in developing commercial relationships at a time when integrating or upgrading within international supply chains is critical to deliver industrial policy objectives.

39 Notes: Group 1 = Albania, Armenia, Australia, Botswana, Côte d'Ivoire, Cambia, Canada, China, Congo, Croatia, Cuba, Ecuador, the EC, Former Yugoslav Republic of Macedonia (FYROM), Gabon, Georgia, Guinea, Hong Kong, Japan, Jordan, Korea Rep., Kyrgyz, Macao, Madagascar, Mauritania, Moldova, Mongolia, Namibia, Nepal, New Zealand, Oman, Qatar, Saudi Arabia, Singapore, South Africa, Swaziland, Switzerland, Taipei Chinese, United Arab Emirates, the US, Viet Nam; Group 2 = Argentina, Bahrain, Venezuela, Bolivia, Brazil, Brunei, C. African Rep., Chile, Costa Rica, Djibouti, Dominican Rep., Egypt, El Salvador, Fiji, Guatemala, Guinea Bissau, Haiti, Honduras, Indonesia, Maldives, Mexico, Morocco, Nicaragua, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Senegal, Sierra Leone, Sri Lanka, Thailand, Turkey, Uruguay; Group 3 = Benin Burkina Faso, Burundi, Colombia, Iceland, India, Israel, Malaysia, Mali, Myanmar, Niger, Norway, Tunisia, Zimbabwe; Group 4 = Angola, Antigua and Barbuda, Belize, Dominica, Ghana, Grenada, Guyana, Jamaica, Malawi, Pakistan, St. Lucia, St. Vincent, Trinidad and Tobago, Uganda; Group 5 = Bangladesh, Barbados, Cameroon, Chad, Dem. Rep. Congo, Kenya, Kuwait, Lesotho, Mauritius, Mozambique, Nigeria, Rwanda, St. Kitts and Nevis, Solomon Islands, Tanzania, Togo, Zambia.

40 Although Table 6 is based on data for 2009, the qualitative message provided by it is valid at present as well.

41 Article XVIII.(A).7(b) states, "If agreement is not reached within sixty days after the notification provided for in subparagraph (a) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or withdraw the concession if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in subparagraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action."

TABLE 6:

Applied tariff and water in tariffs: average and standard deviation (%)

Source: Diakantoni, Antonia and Hubert Escaith, 2009, Mapping the Tariff Waters (December 1, 2009). World Trade Organization Staff Working Paper ERSD-2009-13.[39]

Groups	Applied Average Tariff	Average Water in Applied Tariff	Standard Deviation Tariff Average	Standard Deviation Water
1	7.7	5.7	2.7	2.4
2	10.5	24.4	3.1	1.2
3	12.6	25.4	5.4	19.8
4	10.8	51.2	3.3	11.5
5	12.5	76.9	2.9	10.1

DISPUTE SETTLEMENT AS A CONSTRAINT

While most industrial policies go unchallenged under the WTO dispute settlement system, some have been subject to disputes (Table 7). Such challenges show the effective constraint placed on the use of industrial policy through the WTO.

While countries often implement a host of measures that could potentially be challenged, the number of measures challenged in practice is relatively small. This could mean a combination of three different factors related to these measures:

- Most measures used by these economies are consistent with the WTO conditions;
- This consistency arises also based on the available flexibility or exceptions under the WTO;
- Even if inconsistent, the measures are challenged only when significant adverse effects are perceived by the complaining party.

Examining the types of countries whose measures are challenged through the dispute settlement process provides additional important insights concerning policy space. In practice, we find that only a small number of countries account for the majority of dispute cases, and as of 2005, the number of cases involving developed and developing countries have converged, both as respondents and complainants (Figures 5 and 6). Such convergence is to be expected, given that developing countries form a larger proportion of the WTO membership, and their stake in the system has increased, owing to their increasing trade share and in their capacity to participate in the system.

Let us now consider the main countries involved in these disputes. Tables 8 and 9 show the trend in the number of disputes raised by and against particular developed countries from 2002 onward; this period is chosen to illustrate the situation after China joined the WTO. The developed members that account for the most disputes raised by and against them were the EU, the US, Australia, Japan, and Canada. The number of disputes raised by "others" became more prominent from 2013 onward, and these actions were mainly accounted for by the Russian Federation. Thus, taking these members together with the Russian Federation gives us all the developed country measures challenged during the last 10 years. In fact, the EU, the US, and the Russian Federation account for most of the cases.

The picture for developing countries is somewhat different (Tables 10 to Table 12). Unlike developed countries, for which disputes were often limited to few countries, the number of developing countries whose measures were challenged was often higher. Of these countries, China has been subject to a relatively large number of cases, while LDCs have had no complaints raised against them. Thus, the dispute settlement process is an effective constraint only for certain types of developing countries, i.e., the more advanced developing economies.

Since no cases were raised against LDCs, this implies no significant adverse effects were perceived by trading partners. Although such countries are not challenged, we should not overlook the important role the dispute settlement process plays for such countries. The process serves to protect the level playing field and trade opportunities by allowing such countries to raise disputes.[42]

We find not only that few countries are active users of the WTO dispute settlement system, but also the number of disputes a country has raised or faced within a single year is very small. Between 2002 and 2015, only China faced more than five disputes in a single year (2012). The US did in 2004 and 2012. No countries have raised more than five claims within any single year.

Thus, we see the dispute settlement process is not a major constraint on policy space.

42 *See* http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm. The situation is similar also for SPS and TBT issues, as illustrated in Tables 5 and 6, which show that LDCs have their concerns about the policies of others, while there are relatively few concerns about LDC measures.

TABLE 7:

WTO dispute settlement — by different WTO agreements

Source: WTO Secretariat; as on 6 May 2014.

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	Total	%
Complaints	25	39	50	41	30	34	23	37	26	19	12	20	13	19	14	17	8	27	20	2	476	--
Accession protocol	0	0	0	0	0	0	0	0	0	0	0	3	3	5	6	3	0	7	0	0	27	**6**
Agriculture	2	5	14	5	6	4	2	7	6	2	2	1	2	1	6	0	0	3	3	0	71	**15**
Anti-dumping	1	3	3	6	8	10	6	7	6	8	4	8	1	6	3	5	5	6	6	0	102	**21**
ATC	1	6	2	1	1	4	0	0	1	0	0	0	0	0	0	0	0	0	0	0	16	**4**
Customs valuation	3	1	0	1	1	3	1	0	1	0	0	1	1	2	0	0	0	0	1	0	16	**3**
DSU	1	1	0	1	1	1	1	0	0	2	0	0	0	0	0	0	0	1	0	0	9	**2**
GATS	1	3	2	3	1	3	1	0	1	1	0	0	1	3	0	1	0	1	0	1	23	**5**
GATT	24	28	33	25	17	22	18	34	20	18	6	20	12	15	13	16	7	27	20	2	377	**78**
GPA	0	0	3	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	**1**
Import licensing	1	1	13	5	4	1	2	3	1	1	1	0	0	0	0	0	0	4	4	0	41	**8**
Pre-shipment inspection	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	2	**0**
Rules of origin	0	0	2	1	0	0	0	1	0	0	0	1	0	2	0	0	0	0	0	0	7	**2**
Safeguards	0	0	2	2	4	3	7	11	1	0	2	2	0	0	1	4	0	5	1	0	45	**9**
SCM	0	7	10	11	3	7	4	7	6	6	2	9	5	5	1	3	2	7	6	1	102	**21**
SPS	5	3	3	5	0	2	1	5	6	0	0	0	1	2	3	1	0	3	0	1	41	**9**
TBT	8	5	4	5	0	2	3	2	4	0	0	0	1	3	3	1	0	3	3	0	47	**10**
TRIMs	0	7	5	3	1	1	1	2	0	0	1	3	2	0	0	1	1	6	5	1	40	**6**
TRIPS	0	6	5	4	5	3	1	0	1	0	0	0	1	1	0	2	0	3	2	0	34	**7**
WTO	0	0	0	1	2	6	5	5	4	2	1	5	0	1	0	2	0	3	3	1	41	**8**

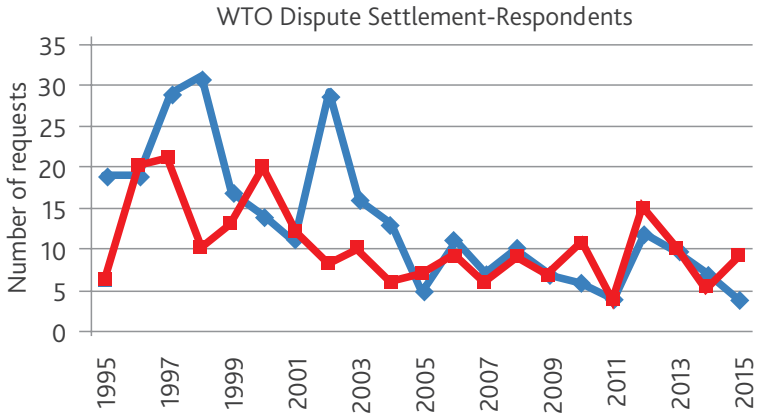


FIGURE 5:

Developed and developing countries as respondents in WTO dispute settlement

LEGEND:

Respondents - Developed

Respondents - Developing

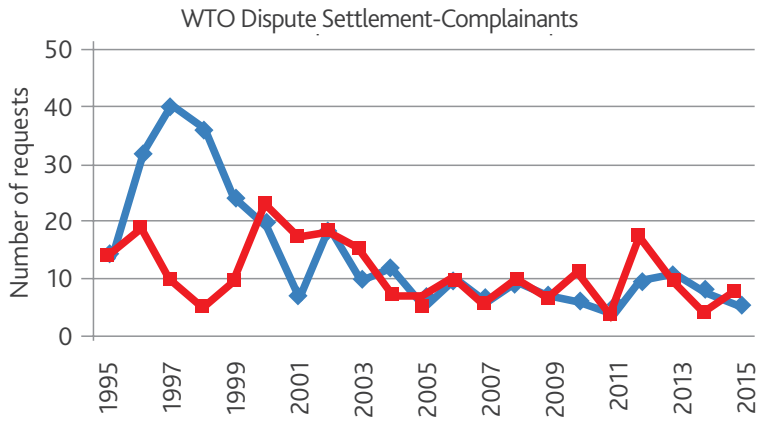


FIGURE 6:

Developed and developing countries as complainants in WTO dispute settlement

TABLE 8:

Developed country respondents in WTO dispute settlement, 2002 to 2015

Source: WTO, Legal Affair Database

Notes: EC/EU data includes individual member states. Ranking based on number of disputes in 2013, the most recent year for which full annual data is available.

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
DEVELOPED	**29**	**16**	**13**	**5**	**11**	**7**	**10**	**7**	**6**	**4**	**12**	**10**	**9**	**4**
EC / EU	6	8	4	2	3	3	4	4	3	0	3	4	3	2
US	19	6	7	3	5	3	6	3	2	3	6	2	2	1
Australia	2	1	0	0	0	1	0	0	0	0	3	2	0	0
Japan	1	0	1	0	1	0	0	0	0	0	0	0	0	0
Canada	1	0	1	0	2	0	0	0	1	1	0	0	1	0
Other	0	1	0	0	0	0	0	0	0	0	0	2	3	1

TABLE 9:

Developed country complainants in WTO dispute settlement, 2002 to 2015

Source: WTO, Legal Affair Database

Notes: EC/EU data includes individual member states. Ranking same as Table for respondents, for ease of comparison.

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
DEVELOPED	**19**	**10**	**12**	**5**	**10**	**7**	**9**	**7**	**6**	**4**	**10**	**11**	**9**	**5**
EC / EU	4	3	5	3	5	0	3	2	1	3	2	3	5	0
US	4	3	4	1	3	4	3	2	4	1	5	3	1	1
Australia	1	1	0	0	0	0	0	0	0	0	0	0	0	0
Japan	2	0	1	0	0	0	1	0	1	0	3	2	0	2
Canada	4	1	2	0	1	2	2	2	0	0	0	0	1	0
Other	4	2	0	1	1	1	0	1	0	0	0	3	2	2

TABLE 10:

Developing country respondents in WTO dispute settlement, 2002 to 2015

Source: WTO, Legal Affair Database

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
DEVELOPING	**8**	**10**	**6**	**7**	**9**	**6**	**9**	**7**	**11**	**4**	**15**	**10**	**5**	**9**
China	0	0	1	0	3	4	5	4	4	2	7	1	1	2
India	1	1	2	0	1	1	1	0	0	0	1	1	0	1
Brazil	0	0	0	1	1	0	0	0	0	0	0	1	0	1
Argentina	0	0	0	1	0	0	0	0	1	0	5	0	0	0
Korea	1	0	1	0	0	0	0	1	0	0	0	0	0	1
Mexico	0	3	2	1	1	0	0	0	0	0	0	0	0	0
Chile	1	0	0	0	2	0	0	1	0	0	0	0	0	0
Others	5	6	0	4	1	1	3	1	6	2	2	7	4	4

TABLE 11:

Developing country respondents other than those mentioned in Table 10 above, in WTO dispute settlement, 2010 to 2015

Source: WTO, Legal Affair Database

	2010	2011	2012	2013	2014	2015
Indonesia				3	4	2
Peru				1		
Colombia				1		
Pakistan				1		
Ukraine		1		1		1
Turkey			1			
South Africa			1			1
Moldova		1				
Philippines	1					
Armenia	1					
Dominican Republic	4					

TABLE 12:

Developing country complainants in WTO dispute settlement, 2002 to 2015

Source: WTO, Legal Affair Database

Notes: Ranking same as Table for respondents, for ease of comparison.

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
DEVELOPING	**18**	**16**	**7**	**7**	**10**	**6**	**10**	**7**	**11**	**4**	**17**	**9**	**5**	**7**
China	1	0	0	0	0	1	1	3	1	1	3	1	0	1
India	2	0	1	0	1	0	1	0	1	0	2	0	0	0
Brazil	5	0	0	0	0	1	1	0	1	0	1	0	1	0
Argentina	4	1	0	0	5	0	0	1	0	0	3	2	0	0
Korea	1	3	2	0	1	0	0	1	0	1	0	1	1	0
Mexico	0	3	0	2	1	1	3	1	0	0	2	0	0	0
Chile	2	1	0	1	0	0	0	0	0	0	0	0	0	0
Others	3	6	3	4	1	3	3	1	8	2	6	5	3	6

ANTI-DUMPING AND COUNTERVAILING MEASURES AS CONSTRAINTS

Negotiations on anti-dumping within the Doha Round show this is an area in which more rather than fewer disciplines are demanded. There is a need to reduce the scope of perceived levels of arbitrariness, so that measures are solely used to address "unfair trade" as is its intent, rather than leaving scope for them to be used as a protectionist measure.

WTO data show the use of such measures is increasing. There were 1,449 anti-dumping measures (definitive duties and price undertakings)[43] at the end of June 2014, and this increased to 1,502 by June 2015.[44] In comparison, countervailing (or anti-subsidy) measures in force increased from 103 in June 2014 to 112 by June 2015. Those using such measures as well as those subjected to such measures include both developed and developing countries, with no contingent measures oriented toward LDCs.

Interestingly, the largest users of countervailing measures have been developed countries, as shown by Tables 13 and 14. They mainly impose these measures on the larger emerging developing countries,[45] and to some extent on developed economies.

The amount of WTO members subject to a relatively larger number of definitive anti-dumping duties is increasing (as shown in Tables 15 and 16). Even for anti-dumping duties, the developing countries subjected to definitive duties are the larger developing economies. Thus, these measures as well are not posing major constraints on low-income economies in general.

Against this background, it is not surprising that some of the countries that have been subject to a large number of anti-dumping or countervailing measures seek greater disciplines and reduced flexibility for these measures.

43 WTO Document G/L/1079, dated 31 October 2014. See pages 15-18 of this document.

44 WTO Document G/L/1134, dated 30 October 2015.

45 See, for example, pages 19 and 20 of WTO Document G/L/1133. Dated 29 October 2015, and pages 23 and 24 of G/L/1077 dated 3 November 2014.

TABLE 13:

Countervailing measures imposed by WTO members (in force on 30 June 2014)

Source: WTO

Member	Countervailing Measures in Force	Member	Countervailing Measures in Force
USA	52	China	6
Canada	17	Mexico	2
EU	14	Peru	1
Australia	7	Turkey	1

TABLE 14:

Countervailing measures imposed by WTO members (in force on 30 June 2015)

Source: WTO

Member	Countervailing Measures in Force	Member	Countervailing Measures in Force
USA	60	China	4
Canada	18	Mexico	3
EU	15	Peru	1
Australia	9	Turkey	1
Ukraine	1		

TABLE 15:

WTO members subject to minimum of five definitive anti-dumping duties, July 2013 to June 2014

Source: WTO

Member	Countervailing Measures in Force	Member	Countervailing Measures in Force
China	54	USA	9
Korea	18	Thailand	8
EU	6 (plus Denmark 1; Finland 1; Germany 3; Greece 1; Italy 4; Romania 1)	India	5
Chinese Taipei	10	Indonesia	5

TABLE 16:

WTO members subject to minimum of five definitive anti-dumping duties, July 2014 to June 2015

Source: WTO

Member	Definitive Duties Imposed on Its Exports	Member	Definitive Duties Imposed on Its Exports
China	53	USA	8
Korea	15	India	7
Chinese Taipei	13	Germany	6
Thailand	10	Japan	6
Indonesia	10	Mexico	6
Malaysia	8	Turkey	5

NEED FOR ADDITIONAL FLEXIBILITY UNDER THE WTO?

Based on the above discussion, this section revisits the question of whether there is indeed a need for additional flexibility under the WTO.

In general, we find there is sufficient policy space available for countries to implement industrial policy oriented strategies, particularly for the low-income economies. Similarly, Gallagher (2008) in a detailed assessment of industrial policies and the extent of WTO restrictive policies argues, "there was a loss of policy space in goods trade, intellectual property rules, subsidies, investment rules, and services. However, when looked at as a whole (which has not been done in the literature), I conclude that there was still considerable policy space left for developing countries if they so chose to use it" (p. 67). This sentiment is echoed by Keun Lee (2015, p. 5), who encourages the active use of the policy space available: "It is our view that developing countries would be well advised to not take the WTO restriction on industrial policies as an excuse for not trying industrial policy because there still exists space for such policies under the WTO." There are some exceptions, and a case for greater flexibility in certain cases is made below. The general situation however does not show a major constraint on policy space as such. This aspect about policy space being available in general and the constraining nature of only certain policies is best summarised in an assessment by Sheila Page in UNCTAD's Trade and Development Report 2006, (Box 1).

Box 1 addresses an important headline message[46] of the UNCTAD 2006 Report: "International Trade Arrangements have limited policy space in several areas" (p. 193)

Despite the finding that there is indeed sufficient policy space available in general, there has been a call for more flexibility to be granted, particularly for developing countries. Such an argument is unlikely to find consensus at the WTO. The countries whose measures are often challenged under

46 The message contained in the UNCTAD 2006 Report is more complex than just this headline view (*See* pages XIII and XIV of the Report), but for the purpose this discussion, the latter is more pertinent.

BOX 1:

Summary of UNCTAD Trade and Development Report 2006 (by Sheila Page)

In spite of its headline claim that policy space has been lost, the report does not show that WTO rules have significantly restricted countries' ability to use policies on foreign investment, subsidies, and tariffs to implement industrial policy or that the changes proposed in the Doha Round would have a significant effect.

In fact, it finds that many tools of industrial policy remain open to developing countries, and that the restrictions that do exist come from regional agreements or non-trade agreements, not from the WTO. The WTO investment rules do "not restrict the provision of incentives to attract FDI. Regional and bilateral investment agreements can be considerably more restrictive" (p. 169).

The Report notes correctly that the Subsidies Agreement is "a significant tightening of disciplines," but finds that development subsidies have been tacitly allowed with neither developed nor developing countries challenging them (p. 171). Although it argues, in contrast to other observers, that the remaining permitted subsidies are not sufficient to allow an East Asian strategy for industrial development, it accepts that cost is a major constraint on any developing country's use of subsidies.

Even in TRIPS where, like all critics, it finds that the agreement severely restricts the traditional forms of developing country access to technology, it notes that "regional and bilateral trade agreements with developed countries … often foreclose part of the autonomy left open to developing countries by TRIPS" (p. 173).

In its discussion of tariffs, it tries to find a path between the welfare advantages of low uniform tariffs and the industrial policy tool of flexible and differentiated tariffs (p. 175). It argues that developed countries benefited more when they were developing from the "additional protection of natural trade barriers in the form of transportation and information costs," as the differential between transport costs of efficient and inefficient systems may be greater than in the past. It does not answer the question of whether any developing countries would find themselves with a seriously weakened possibility of using tariffs as part of an industrial policy given the proposed exemption of LDCs and lower cuts for other developing countries in the most recent Doha Round proposals.

Source: Box 3, p. 4 of Page (2007).

the dispute settlement process are developed countries, or richer developing countries perceived as emerging centres of economic activity (regionally or globally), which are deemed capable of causing adverse effects to the trade of those who challenge them. Given the increasing competition from such countries, revised provisions may focus on imposing more disciplines, rather than introducing greater flexibilities. Therefore, using the argument of providing more policy space to countries according to income levels as the basis of renegotiation of WTO disciplines to introduce flexibilities would likely not lead to a consensus, as is shown by the stalemate in the Doha negotiations.

An alternative criterion to expand policy space would be to consider additional flexibilities to achieve the delivery of legitimate global policy objectives, such as food security or environmental considerations. In such cases, the additional flexibility will need to be clearly specified and circumscribed by specifying balancing disciplines. This in turn implies a need to strengthen the monitoring mechanisms within the WTO, to assure members that the relevant conditions linked to greater flexibility are being met.

WTO MONITORING SYSTEM AND POSSIBLE IMPROVEMENTS

In the WTO, the monitoring of activities under each specific agreement takes place through councils or committees. Thus, the work of the WTO, including laws, regulations, and policies/measures adopted by members; information on specific issues; raising specific trade-related concerns; the possibility of consulting other members or informing them of domestic initiatives; and much more, are brought to the attention of members through these committees or councils. These bodies organise information sessions or circulate reports by other institutions linked to them as observers or special invitees to inform members of the relevant events and activities that may be taking place outside the WTO. The background papers prepared by the WTO Secretariat for these bodies and those submitted by individual members to inform others also provide good source material to conduct an appropriate monitoring exercise. These include specific issues covered by the agreements, as well as more general analysis, such as in reports prepared on regional trade agreements. Thus, in this sense, there is an ongoing monitoring of policies and actions through these bodies.

An important part of monitoring also takes place under the WTO dispute settlement system, initiated through requests for consultations that are either resolved through consultations or carried further forward for decisions by a dispute settlement panel or the Appellate Body.

Some of the other activities through which monitoring take place in the WTO system include:

Three types of trade policy review reports:

- the trade policy review mechanism report on individual countries;
- a report by the WTO Director General to the members on the overall global situation;[47]
- a report prepared for the G20 group at its request, together with the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD), covering measures relating to both trade and investment. The report highlights inter alia market-opening and market-restricting measures taken during the reporting period.[48]

A transparency mechanism for regional trade agreements (RTAs) also provides information through the RTAs database.

A special feature of the trade policy review mechanism is that the Secretariat has electronically compiled all the trade measures it has reported on since 2008.[49] This huge database has a whole range of measures, including the usual trade policy measures, such as tariffs and non-tariff measures, as well as others, for example, customs procedures and LCRs.

There are also a number of other databases on trade measures available to members. These have now been brought together under the Integrated Trade Intelligence Portal (I-TIP).

Reports produced on the basis of economic research, statistics on trade, tariffs, and other trade-related issues. These reports promote a better understanding of the evolving global trading system. Databases that have been developed under the auspices of research and statistics have added new insights into concepts, such as value-added-based trade or supply chains, and provided data to shed light on the operational activity level of such concepts.

47 These two reports are prepared for the Trade Policy Review Body, but are mentioned separately here, because each is a different major source of monitoring in the WTO.

48 These reports are available for reference on the WTO website.

49 *See* http://tmdb.wto.org/SearchMeasures.aspx.

GAPS

Though the information base of the WTO monitoring systems is large and encompasses various issues and concerns, there are also a number of gaps. Since much of the WTO database is based on information provided through notifications, an important gap is the lack of information attributable to insufficient notification of measures in practice and certain issues not being covered under the notification requirements. To address this gap, the trade monitoring part of the WTO Secretariat looks out for relevant information in the media, particularly news reports on market-opening or restricting measures, including subsidy programmes. Furthermore, notifications requirements are periodically expanded, when they are raised in relevant committees or as they become part of the monitoring reports prepared by members or the Secretariat at periodic intervals.[50] Nonetheless, the risk of certain measures not being notified is high, particularly if they are operated through state enterprises and those normally not covered by the media.

Another important gap in monitoring arises, owing to the type of discussions taking place on different measures by members. These measures are usually notified in terms of complaints brought by members to the WTO. The monitoring mechanism, however, does not facilitate any discussions to improve the understanding on how measures have evolved or to seek new ways of dealing with their adverse effects within the system. Thus, a gap arises in terms of a lack of serious discussion for seeking solutions to the difficulties or benefits arising through various measures.

POSSIBLE NEW APPROACHES

For considering changes in policy space, a more robust monitoring mechanism within the WTO is needed. Important examples of recent WTO initiatives that may address the gaps include seminars on new issues, such as one held on foreign exchange rates in March 2012 and the workshops on e-commerce held in 2013.[51] Other ways include engaging with external stakeholders or establishing platforms, such as those on RTAs or GVCs suggested by the International Centre for Trade and Sustainable Development (ICTSD) E15 exercise. Joint publications could be commissioned with some other international organisations or well-established international think tanks to examine the relevant issues in an objective way.[52] Private bodies, in particular, could provide a wealth of information related to the impact of trade measures.

Business organisations, such as the International Chamber of Commerce (ICC) or World Economic Forum, could examine specific issues together with WTO members.[53] A checklist of the types of trade policy that would need more flexibility could be prepared for discussion. The E15 Initiative through its various task forces has put forward a variety of suggestions, particularly the establishment of platforms to improve the interaction among various stakeholders in the WTO on issues such as RTAs and GVCs. The E15 proposals include suggestions for formal and informal initiatives, including greater use of best endeavours frameworks linked to increased capacity building assistance; they suggest options that could be implemented within the WTO itself or may be taken together with some other international organisations and ministries/departments. They also suggest solutions and insights with new approaches to recently emerging concerns.[54]

PROCESS OF ADDRESSING POLICY SPACE UNDER WTO PROVISIONS

HOW TO INTRODUCE FLEXIBILITY IN THE WTO SYSTEM?

The discussion on different measures and their WTO consistency suggests four different situations relating to policy space:

- Provide greater flexibility in disciplines for achieving wide social objectives rather than only a limited national objective (for example, environmental objectives).
- Provide more flexibility (conditionally or otherwise) to ease limits on policies that are allowed, subject to some conditions (e.g. the Bali Ministerial Decision on food stockholding)

50 The measures given in these reports are sent for verification to the countries reported to have taken them before including them in the report.

51 *See* the speech of the WTO Director General at the seminar at http://www.wto.org/english/news_e/sppl_e/sppl222_e.htm; links to these workshops are at http://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.

52 Such reports have been prepared, for example, with the United Nations Environment Programme, the International Labour Organization, the World Intellectual Property Organization, and the World Health Organization.

53 The initiative on treatment of trade finance as a less risky form of finance than other financial instruments had the ICC as an important partner to interact with the Bank for International Settlements.

54 For details, *see* http://e15initiative.org/publications/executive-summary-synthesis-report-full-report/

- Remove prohibitions (conditionally or otherwise) on policies that are barred by the existing disciplines, such as LCRs for goods.

- Introduce greater disciplines for some areas, such as anti-dumping, countervailing measures, and trade-related standards.[55]

Any such discussion would have to consider whether:

(i) The measure is restricted or covered by the scope of WTO disciplines (for example, horizontal subsidies or subsidies to small-scale industries are not restricted).

(ii) The existing flexibility in the WTO allows the policy to be used under specified situations (for example, the flexibility allowed under Article XX).

(iii) The possibility of testing the limits of the measure in the Dispute Settlement Understanding. In certain cases, the interpretation of the legal provisions may lead to expanding the conventional understanding of the scope of the disciplines (for example, the shrimp turtle case).

(iv) The scope and flexibility provided through other methods in the WTO system that could introduce change in the operational scope of existing provisions, for example,

  - Interpretative understanding;[56]
  - Amendment;[57]
  - Decision of a ministerial conference/council/committee;
  - Waiver;[58] and
  - Negotiations.

Some of these options do not involve collective understanding and decision-making by all members. They may require only an understanding by an individual member about the scope of a legal provision, discussion in the relevant WTO body, and then possibly a consensus among members, or at least three-fourths of members agreeing to the decision. Except for the case of individual understanding of a legal provision by a member (leading potentially to a legal dispute), these methods are, to a degree, various shades of negotiation. The difficulty of reaching an agreement will depend on the nature of binding changes sought through these various methods.

PREVIOUS EXAMPLES AND POSSIBLE NEW APPROACHES

There are previous examples of adjustments made to legal provisions, which could be useful to learn from or to replicate. One such example is the case of voluntary export restraints (VERs), which were seen as a major cause for concern during the Uruguay Round. VERs were inconsistent with the GATT provisions, but were increasingly being adopted with political complicity by exporting and importing countries. These measures were used in place of safeguards, given that the latter were regarded as not easy to use, owing to the required payment of compensation to the affected members, and because the legal provision governing import quota allocation was limiting the scope of flexibility of countries eager to counter the rapid increase in imports from nations whose market shares were increasing faster than the rest.

A solution was found in the Uruguay Round through, *inter alia*, two important changes in the new Agreement on Safeguards. One was modulation of quota allocation provided by Article 5.2(b).[59] The other was the possibility to avoid compensation under certain conditions specified in Article 8.3 of the agreement.[60] In exchange for such concessions, VERs were explicitly stated as illegal. Safeguard

55 As mentioned earlier, one view of policy space in industrial policy is the opposite of this, i.e., it is seen as the possibility of using anti-dumping and countervailing measures against trade perceived to create a non-level playing field.

56 Article IX.2 of the Agreement Establishing the World Trade Organization states, "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X" (Footnote omitted).

57 Article X of the Agreement Establishing the World Trade Organization gives the conditions for amendment.

58 Article IX.2 of the Agreement Establishing the World Trade Organization states, "In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths [FN] of the Members unless otherwise provided for in this paragraph." The footnote reads, "A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus."

59 The provisions states, "A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the departure from the provisions in subparagraph (a) are justified, and (iii) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury."

60 Article 8.3 states, "The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement."

rules were, therefore, changed to include flexibilities together with greater disciplines aimed at limiting the use of a GATT-inconsistent measure. The question to consider is whether this process could be replicated to address, for instance, the use of LCRs, given the pervasive use of these measures at present.

Another flexibility could be considered for the provisions that require compensation to be provided, e.g., the renegotiation of existing commitments under Article XXVIII of the GATT, or encouraging infant industry under Article XVIIIA. Such compensation makes it difficult for the poorer countries to use the available flexibility. There is a precedent for such a change, namely, payment of compensation being waived in the Uruguay Round Agreement on safeguards, provided certain conditions were met. A similar effort to limit the period of use or the scope of beneficiaries may be considered as a basis for waiving compensation in such cases (see below).

In this process of seeking change, we have to bear in mind that targeted changes may be more feasible than those with a somewhat wider focus. For instance, take the industrial promotion scenario envisaged by Akyuz (2005):

> Tariffs are introduced once a particular line of industry is entered, and kept at their initial maximum levels for a certain period before being brought down at a constant rate as the industry matures. For the reasons already noted, technology-intensive industries have higher initial levels of protection and support than resource-based and labour-intensive manufacturing. As technological capacities are built successfully, subsequent shifts to more advanced sectors become relatively easier than the earlier move from labour-intensive to technology-intensive activities.

The above statement seeks a general increase in flexibilities for technology-intensive products in an era when several WTO members are looking for greater market opening (i.e. reduce flexibility) under the Information Technology Agreement 2 (ITA-2). In such a situation, a general increase in flexibility would be extremely difficult, if not impossible.

At present, there appears to be some reluctance in the WTO to negotiate any large move from existing disciplines. The concern about free-riders among many of the large economies tends to push negotiations outside the WTO toward plurilaterals. In light of such trends, the important issue becomes whether there are some ways in which WTO members may consider combining different positions and move ahead within the WTO.

We need to consider methods that potentially could garner broad support, including relatively flexible mechanisms that are contained within the WTO itself. For example, since the purpose of WTO disciplines is "fair competition," could it be possible to replicate the framework used within the Telecom Reference Paper?[61] It may also be possible to consider changes for a specified period with annual declining flexibility toward the existing bound level. This possibility could be applied, for instance, to products and countries that may not be "export competitive" in terms of some pre-agreed criteria, such as that specified in Articles 27.5 and 27.6 of the WTO Agreement on Subsidies and Countervailing Measures. We have seen from the discussion above that, in effect the low-income economies do not face constraints on policy space, owing to the legal framework of WTO. The approach we suggest here will expand upon that and include other situations as well where those actions that are not likely to cause "adverse effects" on the trade interests of others may be considered for possible flexibility as well.

KEY QUESTIONS IF ADDITIONAL FLEXIBILITIES ARE TO BE CONSIDERED

There may be different ways of addressing these issues in the WTO, but each method would need the larger economies to be a party to that change (to avoid the "free-rider" concern), and most WTO members would have to support an initiative to introduce greater flexibility. When considering flexibilities, it is important to address the following issues:

a. What would happen if such flexibility is availed of by all WTO members? Would that situation be better than the one that has the present legal disciplines?

b. To the extent that members do discuss the possibility of greater flexibility in the WTO, what would be the conditions under which a consensus on such an initiative could be built? For example, could it be one where larger social benefits (for example, the environment) provide the basis for this?

c. Any effort at introducing flexibility would be accompanied by an effort to limit the perceived negative fallout of reducing the disciplines. Would there be, for example, monitoring and overview mechanisms, such as those discussed in the context of the food security waiver proposal agreed at the Bali ministerial meeting?

d. Is it possible to get some collaborative move in areas that require greater disciplines, such as anti-dumping, countervailing measures, or standards?

61 *See* http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

IMPACT OF FREE TRADE AGREEMENT NEGOTIATIONS

The WTO negotiations under the Doha Round have faced major difficulties. As a result, much more attention is given to mega-regionals, such as the TPP, the Transatlantic Trade and Investment Partnership (TTIP), the Regional Comprehensive Economic Partnership (RCEP),[62] and the large plurilateral negotiations on services, under the Trade in Services Agreement (TiSA), which will all have an impact on the new set of disciplines related to services.

The issues covered by these mega-regionals are wide-ranging. For example, the TPP includes topics on greater market access in goods and services, IPRs, foreign investment, competition policy, environment, labour, SOEs, e-commerce, competitiveness and supply chains, government procurement, TBT, transparency in healthcare technology and pharmaceuticals, and regulatory coherence.[63]

Interestingly, some of these issues would not have been emphasised through the mega-regionals, were it not for the geo-economic changes in the past two decades. For instance, exporters from developed economies that have lost market share, often attribute their loss to unfair policy regimes in emerging economies rather than an actual decline in their competitiveness. As a result, a number of the subject areas in the ongoing negotiations attempt to address the former concerns rather than the latter.[64]

The three mega-regionals,[65] the TPP, the TTIP, and the RCEP, have 49 WTO members (counting the EU as 28 members), out of a total 162 WTO members (Table 17). Thus, most WTO members are out of these negotiations. In fact, the whole of Africa is not a part of it.

Although negotiated by a limited number of members, the impact of these negotiations is important at the global level, given that the trade shares of the negotiating members account for over half of world trade. The impact explored by Ciuriak and Singh (2014) shows that these agreements may result in more onerous requirements in several areas, resulting in two key types of constraints:

- Higher level of legal constraints compared to the WTO by: (i) reducing of flexibilities presently available under the WTO; (ii) higher disciplines in areas not covered by the WTO; and, (iii) the increase in disciplines over time through the establishment of a framework with an ongoing work programme and the replication of mega-regional agreements as models for future agreements to be built on.

62 The TPP is likely to have more disciplines and standards than the RCEP.

63 For more details, *see* Fergusson et al. (2016), "The Tans-Pacific Partnership (TPP): in Brief," Congressional Research Service, 7-5700 .

64 Harsha V. Singh, TPP and India: An Initial look of the way ahead, ICTSD, Geneva, 2016 (forthcoming)

65 Regional Comprehensive Economic Partnership Agreement (RCEP), Trans-Pacific Partnership Agreement (TPP), and Trans-Atlantic Trade and Investment Partnership (TTIP). After conclusion of TPP, some countries have announced interest in joining in the Agreement. However, even if these countries join, the total number of members will be less than 100.

TABLE 17:

Membership of mega-regional FTAs

* = Keen to join the TPP, and process for membership has begun

= FTA with the EU, negotiated or under negotiation. This information is provided because of possible link to TTIP results in the future.

Source: Prepared by the Authors

	TPP	RCEP	TTIP
Countries in more than one Agreement	Australia, Brunei Darussalam#,	Australia, Brunei Darussalam#,	United States
	Japan, Malaysia#, New Zealand	Japan, Malaysia#, New Zealand,	
	Singapore	Singapore#,	
	United States, Viet Nam#	Viet Nam#	
Member of only one Agreement	Peru, Canada#, Chile#, Mexico#	South Korea*#, Myanmar#, Cambodia#, China	EU
		India#, Indonesia#, Laos#,	

- Higher market entry conditions for commercial transactions resulting from the higher standards in large developed economies in terms of both the content and scope of coverage (e.g., including environmental and labour considerations). Producers from non-member countries will also have to meet these new requirements to successfully access the markets or link up with value chains in the countries that are part of the mega-regionals.

CONSTRAINTS DUE TO HIGHER LEGAL DISCIPLINES

The higher legal constraints will apply in the first instance on the members of these mega-regional agreements. They will, however, have two implications that go beyond these agreements.

First, over time, as more markets become linked to these agreements (for example, as more countries join the TPP), there will be a commercial and political impetus to extend these toward a more global framework of trade disciplines. Some of these higher levels of legal constraints may get a push to be embodied over time in global agreements, such as the WTO. This would be important if fragmentation in world trade regulatory regimes is to be avoided.

Second, given that these mega-regionals are introducing greater policy constraints within their frameworks, the members of these agreements are unlikely to agree to easier disciplines in any negotiations within the WTO.

Given the likely higher levels of disciplines imposed by the mega-FTAs, we need to seriously consider whether it would be possible to introduce flexibility within the WTO system. The answer lies in the possibilities mentioned earlier, e.g., the flexibilities apply to economies below some specified income threshold or to a specific category, such as the LDCs; would the approach of linking flexibilities to the delivery of larger social objectives (such as environment) gain more traction; should more flexibility be sought through the design of transition mechanisms for temporary introduction of flexibility, subject to a review process? Answers to these questions could show the way on how to introduce some flexibility with the WTO and meet the aspiration for additional policy space to implement specific industrial policy.

CONSTRAINTS ARISING DUE TO MARKET CONDITIONS BASED ON THE HIGHER DISCIPLINES EMPHASISED IN MEGA-REGIONALS

As new FTAs, including mega-regionals get established, market access will likely become more difficult, owing to a higher level and wider scope of standards. The situation would likely become much more complex, because private standards in major markets would incorporate the criteria emphasised by these agreements and, in fact, would likely go beyond the levels envisaged by the negotiators of these agreements. This will introduce the possibility of exclusionary/difficult requirements for conformity assessments to determine whether the exports from non-members meet the specified conditions for the relevant standard. This may result in trade diversion away from non-members of these FTAs, particularly for developing countries, which may not have the capacity to meet the higher standards. Legal flexibilities would not help in such a situation, because the constraints would be embodied in the market conditions and not legal rules. In such a situation, access to markets would require the upgrading of domestic capacity to meet the requisite conditions, including the standards required to get market access. Therefore, technical assistance and targeted support to developing economies would become an essential part of the solution.

ADDRESSING THE EXCLUSIONARY EFFECTS OF MEGA-REGIONALS

In the next 5 to 10 years, a critical element for non-member countries to remain competitive through industrial policy strategies will be to anticipate and address the likely effects of mega-regionals. In particular, countries will have to take account of and prepare for the market-related constraints.

In addition, those negotiating the mega-regionals also need to recognise the global reach of trade and investment, way beyond the coverage of mega-regionals themselves. Thus, they must build systems that lead toward inclusive approaches. Specific attention will have to be paid to ensure provisions/procedures are inclusive, specifically in the areas of rules of origin and conformity assessment procedure requirements of standards. More analytical work and diplomatic effort is required for this purpose. Perhaps some movements could be made within the WTO framework itself, which could encourage these mega-regionals to consider inclusive systems.

In addition, supplementary efforts beyond the scope of industrial policy may be required.

To facilitate inclusiveness, it is necessary to establish mechanisms that preserve the option of flexibility while moving toward higher levels of disciplines. Thus, a phase-in period similar to that provided to all members of the TPP could be made available to the developing countries. Such a transition period could also be treated as applicable to the process required for developing countries making efforts to improve their capacities to meet higher standards. Similar to the Trade Facilitation Agreement, some financial support mechanism may be established for this purpose, and a value-chain-oriented process may be considered.

Examples of such flexibilities exist in both the WTO and the TPP. For example, the WTO Agreement on Subsidies and Countervailing Measures Articles 27.4 and 27.6 provide transition periods in two different contexts. The abolition of the Multifibre Arrangement (MFA) and the implementation of patents-related provisions in the WTO TRIPS Agreement both included phase-in periods of 10 years. In the TPP, countries, including developed nations, have long transition periods, ranging to up to 30 years, for reducing their tariff levels. Another example is the suggestion by Ciuriak and Melin, which makes the case for exemption of small- and medium-sized enterprises (SME) exports from customs duties if these exports are below a specified threshold level.[66] It may also be worthwhile for the mega-regional negotiators to consider whether easier rules may prevail for SMEs from non-member low-income countries and for all exports from LDCs in general.

CONCLUSIONS

With respect to the issue of policy space, we saw that in general the WTO framework provides much more policy space than that assumed to be available. While there are some constraints on specific policies, often such limitations are not imposed on low-income countries, but rather to some extent on middle- and upper-income countries. With respect to the effective constraint caused by dispute claims and retaliatory measures, we find again that low-income countries are in effect exempt, and constraints typically are focused on developed countries and the larger developing countries.

Despite adequate policy space on the general level, there are some areas where more flexibilities may be considered, especially when such policies are used widely by a large number of WTO members, or if the policies promote some larger global objectives, such as those related to the environment. Two areas that could be starting points for consideration include subsidies and LCRs. Alternatively, this paper also explored cases for which more disciplines may be considered, such as in the case of anti-dumping and trade-related standards. Therefore, we find that any discussion on policy space could be categorised according to at least the following:

(a) More policy space is not needed;

(b) More policy space is needed for a specified and widely felt reason;

(c) Less policy space is needed through higher disciplines to curb the extent of arbitrariness possible in the policy used.

Prior to considering additional flexibilities however, it is important to acknowledge the value of the existing system of WTO disciplines, which provides a stable and predictable system for trade and investment. If flexibilities were to be introduced, consideration would need to be given to whether this would undermine the predictability and stability of the system. What conditions would be required for WTO members to gain confidence that changes will not result in a general step back from the progress made thus far?

66 Ciuriak D. and H. Melin, 2014, "Promoting Small Business Utilisation of Market Access under the Mega-Regionals," ICTSD Blog dated 3 November 2014. http://e15initiative.org/opinions-ciuriak-1/

TABLE 18:

Likely changes due to mega-regionals and implications for non-members

Source: Prepared by the authors based on Ciuriak and Singh (2016)

	Changes Due to Mega-Regionals	Effect on Country Not Member of Mega-Regional	Whether Domestic Industrial Policy Can Help Address Issue
1	Lower tariffs faced by members of mega-regionals	Possible trade diversion	Not likely, unless major efficiency increase takes place or initial tariff reduced was low
2	Exclusionary Rules of Origin	Will intensify trade diversion effect	No
3	New Rules for creating "Level Playing Field"	Will need additional policy efforts to meet requirements	Yes
4	High and wider scope of Standards	Will need additional policy efforts to meet requirements	Yes
5	Difficult or exclusionary conformity assessment requirements	Access to markets of mega-regional countries will become difficult	Very difficult for low-income economies. Will require major effort and costs

There are different methods to pursue changes within the WTO. However, at present, this seems to be a difficult proposition given the diverging viewpoints on key issues among various WTO members. Nonetheless, there are examples from the past (such as the phasing out of VERs) that could be further examined to understand how changes in the multilateral trading system could be enacted even when negotiating interests widely diverge.

Any discussion on the loosening of disciplines in the WTO cannot take place in isolation from ongoing developments in the bilateral and plurilateral FTA negotiations (especially the mega-regionals). These negotiations will likely focus on enhancing the levels of disciplines, rather than the granting of additional flexibilities, and will impact the policy flexibility available not only to negotiating members, but also to non-members as well. Given such a development, it is important to question the likelihood for any changes on issues related to policy space within the WTO.

Another feature of these mega-regionals is the likely increase in market access constraints, through the development of exclusionary systems based on rules of origin or conformity assessment regimes. Members of large FTAs will have to consider policies that maximise inclusiveness in order to limit possible adverse effects, particularly on the lower-income countries. Whereas non-members will have to make more concerted efforts to build their supply side capacities to ensure new disciplines will not limit the effectiveness of their industrial policies, the members of mega-regionals must also give special consideration to this factor, as we live in an interconnected world with economic prospects depending on the overall global participation in trade and investment transactions.

Given these developments, the WTO system would need to deliberate the steps that could help move the multilateral and plurilateral regimes toward each other, while recognising, where appropriate, a need for greater flexibility under specified conditions.

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67 Notes: Group 1 = Albania, Armenia, Australia, Botswana, Côte d'Ivoire, Cambia, Canada, China, Congo, Croatia, Cuba, Ecuador, EC, FYROM Macedonia, Gabon, Georgia, Guinea, Hong Kong, Japan, Jordan, Korea Rep., Kyrgyz, Macao, Madagascar, Mauritania, Moldova, Mongolia, Namibia, Nepal, New Zealand, Oman, Qatar, Saudi Arabia, Singapore, South Africa, Swaziland, Switzerland, Taipei Chinese, UAE, USA, Viet Nam; Group 2 = Argentina, Bahrain, Venezuela, Bolivia, Brazil, Brunei, C. African Rep., Chile, Costa Rica, Djibouti, Dominican Rep., Egypt, El Salvador, Fiji, Guatemala, Guinea Bissau, Haiti, Honduras, Indonesia, Maldives, Mexico, Morocco, Nicaragua, Panama, Papua NG, Paraguay, Peru, Philippines, Senegal, Sierra Leone, Sri Lanka, Thailand, Turkey, Uruguay; Group 3 = Benin Burkina Faso, Burundi, Colombia, Iceland, India, Israel, Malaysia, Mali, Myanmar, Niger, Norway, Tunisia, Zimbabwe; Group 4 = Angola, Antigua and Barbuda, Belize, Dominica, Ghana, Grenada, Guyana, Jamaica, Malawi, Pakistan, St. Lucia, St. Vincent, Trinidad and Tobago, Uganda; Group 5 = Bangladesh, Barbados, Cameroon, Chad, Dem. Rep. Congo, Kenya, Kuwait, Lesotho, Mauritius, Mozambique, Nigeria, Rwanda, St. Kitts and Nevis, Solomon Islands, Tanzania, Togo, Zambia.

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ANNEX 1

TABLE 19:

Tariff profile of India

Product groups	Final bound duties				MFN applied duties		
	AVG	Duty-free in %	Max	Binding in %	AVG	Duty-free in %	Max
Animal products	106.1	0	150	100	31.1	0	100
Dairy products	65	0	150	100	33.5	0	60
Fruit, vegetables, plants	100.1	0	150	100	30.8	1.0	100
Coffee, tea	133.1	0	150	100	56.3	0	100
Cereals & preparations	115.3	0	150	100	31.3	15.4	150
Oilseeds, fats & oils	169.7	0	300	100	37.4	0	100
Sugars and confectionery	124.7	0	150	100	35.9	0	60
Beverages & tobacco	120.5	0	150	100	69.1	0	150
Cotton	110	0	150	100	6.0	80.0	30
Other agricultural products	104.8	0	150	100	22.5	13.2	70
Fish & fish products	100.7	0	150	11.1	29.9	0.1	30
Minerals & metals	38.3	0.4	55	61.3	7.6	0.5	10
Petroleum	-	-	-	0	4.9	18.5	10
Chemicals	39.6	0.1	150	89.0	7.8	0.5	10
Wood, paper, etc.	36.4	0	40	64.2	9.0	4.0	10
Textiles	27.8	0	129	69.9	12.2	0	118
Clothing	37.5	0	58	58.4	13.0	0	65
Leather, footwear, etc.	34.6	0	40	51.6	10.2	2.5	70
Non-electrical machinery	28.6	6.3	40	95.4	7.1	4.7	10
Electrical machinery	27.8	24.6	40	93.5	7.3	16.7	10
Transport equipment	35.7	0	40	70.0	21.7	3.7	100
Manufactures, n.e.s.	34	13.5	40	43.9	8.8	5.7	10

TABLE 20:

Tariff profile of Brazil

Product groups	Final bound duties				MFN applied duties		
	AVG	Duty-free in %	Max	Binding in %	AVG	Duty-free in %	Max
Animal products	37.8	5.4	55	100	8.2	10.5	16
Dairy products	48.8	0	55	100	18.3	0	28
Fruit, vegetables, plants	34.1	1.0	55	100	10.2	5.6	55
Coffee, tea	34.1	0	35	100	13.3	0	20
Cereals & preparations	42.9	0.8	55	100	10.6	14.7	20
Oilseeds, fats & oils	34.6	0.4	35	100	7.9	10.8	30
Sugars and confectionery	34.4	0	35	100	16.5	0	20
Beverages & tobacco	37.7	0	55	100	17.0	1.7	27
Cotton	55	0	55	100	6.9	0	10
Other agricultural products	28.8	7.9	55	100	7.8	8.9	20
Fish & fish products	33.6	3.8	35	100	10.3	4.6	32
Minerals & metals	32.9	0.6	35	100	10.0	7.2	35
Petroleum	35	0	35	100	0.1	97.2	6
Chemicals	21.1	0.4	35	100	8.2	1.6	18
Wood, paper, etc.	28.4	2.6	35	100	10.6	3.6	18
Textiles	34.8	0	35	100	23.3	0	35
Clothing	35	0	35	100	35.0	0	35
Leather, footwear, etc.	34.6	0	35	100	16.0	0.8	35
Non-electrical machinery	32.4	0.4	35	100	12.9	12.0	35
Electrical machinery	31.9	2.6	35	100	14.1	12.2	25
Transport equipment	33.1	0	35	100	18.6	10.7	35
Manufactures, n.e.s.	33	0.8	35	100	15.2	9.7	35

TABLE 21:

Tariff profile of Bangladesh

Product groups	Final bound duties				MFN applied duties		
	AVG	Duty-free in %	Max	Coverage of Binding in %	AVG	Duty-free in %	Max
Animal products	192.6	0	200	100	19.3	6.8	25
Dairy products	157.5	0	200	100	23.5	0	25
Fruit, vegetables, plants	193.2	0	200	100	20.3	2.7	25
Coffee, tea	187.5	0	200	100	21.3	0	25
Cereals & preparations	196.3	0	200	100	13.7	15.4	25
Oilseeds, fats & oils	193.7	0	200	100	9.5	34.1	25
Sugars and confectionery	190.6	0	200	100	18.5	0	25
Beverages & tobacco	200	0	200	100	25.0	0	25
Cotton	200	0	200	100	3.5	30.0	5
Other agricultural products	190	0	200	100	11.6	14.7	25
Fish & fish products	106	0	200	4.6	23.9	3.3	25
Minerals & metals	35.6	12.5	50	0.9	12.7	3.7	25
Petroleum	-	-	-	0	15.7	0	25
Chemicals	34.3	0	125	2.1	9.9	5.3	25
Wood, paper, etc.	40.9	0	50	4.4	15.5	8.8	25
Textiles	37.5	0	50	0.7	19.4	0.2	25
Clothing	-	-	-	0	24.4	0	25
Leather, footwear, etc.	3	0	3	0.7	14.4	0.6	25
Non-electrical machinery	48.6	0	125	5.7	4.7	0.9	25
Electrical machinery	26.5	0	50	0.8	12.7	0.3	25
Transport equipment	20.1	0	50	9.8	11.6	11.8	25
Manufactures, n.e.s.	22.1	0	50	6.0	12.6	3.5	25

ANNEX 2

TABLE 22:

WTO dispute settlement — requests for consultations by developed countries (as of 27 April 2016)

Action	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
Total WTO Requests for consultations	**25**	**39**	**50**	**41**	**30**	**34**	**23**	**37**	**26**	**19**	**12**	**20**	**13**	**19**	**14**	**17**	**8**	**27**	**20**	**14**	**13**	**6**	**507**
Complainants – Developed	**14**	**32**	**40**	**36**	**24**	**19**	**7**	**19**	**10**	**12**	**5**	**10**	**7**	**9**	**7**	**6**	**4**	**10**	**11**	**9**	**6**	**3**	**300**
Australia	0	1	1	0	2	1	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	7
Canada	5	3	1	4	2	1	3	4	1	2	0	1	2	2	2	0	0	0	0	1	0	1	35
EC / EU	2	7	16	16	6	8	1	4	3	5	3	5	0	3	2	1	3	2	3	5	0	1	96
Japan	1	3	1	1	2	1	0	2	0	1	0	0	0	1	0	1	0	3	2	0	2	1	22
US	6	17	17	10	10	8	1	4	3	4	1	3	4	3	2	4	1	5	3	1	2	0	109
Respondents – Developed	**19**	**19**	**29**	**31**	**17**	**14**	**11**	**29**	**16**	**13**	**5**	**11**	**7**	**10**	**7**	**6**	**4**	**12**	**10**	**9**	**4**	**2**	**285**
Australia	2	1	1	2	0	0	0	2	1	0	0	0	1	0	0	0	0	3	2	0	0	0	15
Canada	0	1	5	3	1	0	1	1	0	1	0	2	0	0	0	1	1	0	0	1	0	0	18
EC / EU (incl. indiv. member states)[68]	8	5	10	15	4	3	3	6	8	4	2	3	3	4	4	3	0	3	4	3	2	0	97
Japan	4	4	3	1	0	0	0	1	0	1	0	1	0	0	0	0	0	0	0	0	0	0	15
US	4	8	10	6	11	11	6	19	6	7	3	5	3	6	3	2	3	6	2	2	1	2	126

68 2000 – Belgium – Rice (WT/DS210); 1999 – France – Flight Management System (WT/DS173); 1998 – France – Income Tax (WT/DS131), Ireland – Income Tax (WT/DS130), Greece – Income Tax (WT/DS129), Netherlands – Income Tax (WT/DS128), Belgium – Income Tax (WT/DS127), Greece – Motion Pictures (WT/DS125); 1997 – Sweden – IPRs (WT/DS86), Denmark – IPRs (WT/DS83), Ireland – Copyright and Neighbouring Rights (WT/DS82), Belgium – Telephone Directory Services (WT/DS80), Ireland – Computer Equipment (WT/DS68) and UK – Computer Equipment (WT/DS67); 1996 – Portugal – Patent Protection (WT/DS37).

TABLE 23:

WTO dispute settlement — requests for consultations by developed countries (as of 27 April 2016)

Action	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
Total WTO Requests for consultations	**25**	**39**	**50**	**41**	**30**	**34**	**23**	**37**	**26**	**19**	**12**	**20**	**13**	**19**	**14**	**17**	**8**	**27**	**20**	**14**	**13**	**6**	**507**
Complainants – Developing	**14**	**19**	**10**	**5**	**10**	**23**	**17**	**18**	**16**	**7**	**7**	**10**	**6**	**10**	**7**	**11**	**4**	**17**	**9**	**5**	**7**	**3**	**235**
Argentina	0	1	1	0	0	1	1	4	1	0	0	5	0	0	1	0	0	3	2	0	0	0	20
Brazil	1	0	4	1	0	7	4	5	0	0	0	0	1	1	0	1	0	1	0	1	0	2	29
Chile	1	0	1	0	0	1	3	2	1	0	1	0	0	0	0	0	0	0	0	0	0	0	10
China	–	–	–	–	–	–	–	1	0	0	0	0	1	1	3	1	1	3	1	0	1	0	13
India	1	4	0	3	1	2	2	2	0	1	0	1	0	1	0	1	0	2	0	0	0	1	22
Korea	0	0	2	0	1	3	0	1	3	2	0	1	0	0	1	0	1	0	1	1	0	0	17
Mexico	2	3	0	0	3	1	1	0	3	0	2	1	1	3	1	0	0	2	0	0	0	0	23
Thailand	1	3	0	0	1	2	1	0	2	1	0	1	0	1	0	0	0	0	0	0	0	0	13
Respondents – Developing	**6**	**20**	**21**	**10**	**13**	**20**	**12**	**8**	**10**	**6**	**7**	**9**	**6**	**9**	**7**	**11**	**4**	**15**	**10**	**5**	**9**	**4**	**222**
Argentina	0	1	1	4	3	3	3	0	0	0	1	0	0	0	0	1	0	5	0	0	0	0	22
Brazil	1	4	2	1	1	2	1	0	0	0	1	1	0	0	0	0	0	0	1	0	1	0	16
Chile	0	0	3	0	0	2	4	1	0	0	0	2	0	0	1	0	0	0	0	0	0	0	13
China	–	–	–	–	–	–	–	0	0	1	0	3	4	5	4	4	2	7	1	1	2	0	34
India	0	1	7	4	1	0	0	1	1	2	0	1	1	1	0	0	0	1	1	0	1	0	23
Korea	3	2	3	0	3	0	0	1	0	1	0	0	0	0	1	0	0	0	0	0	1	1	16
Mexico	0	1	1	1	0	3	1	0	3	2	1	1	0	0	0	0	0	0	0	0	0	0	14

Implemented jointly by ICTSD and the World Economic Forum, the E15Initiative convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.

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