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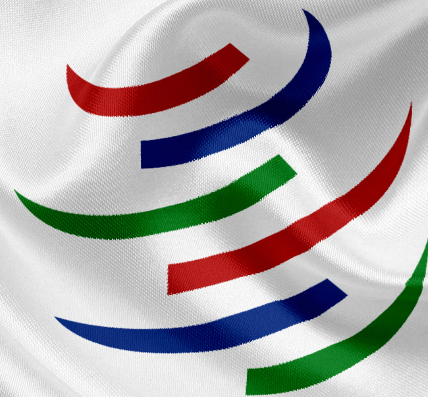

The EU's Proposal for WTO Modernisation: A Critical Assessment

Biswajit Dhar

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1. Introduction

In June 2018, the Council of the European Union gave the European Commission a mandate "to pursue WTO modernisation in pursuit of the objectives of making the WTO more relevant and adaptive to a changing world, and strengthening the WTO's effectiveness".[1] A few months later, a group of 13 countries, which also included the EU, met under the Chairmanship of Canada to "discuss ways to strengthen and modernize the WTO".[2] Couched under these broad-brush initiatives lay the intent to fundamentally alter the focus of the WTO, in particular, to make the multilateral trading system represented by the organisation respond essentially to the market forces. In other words, these proposals are making it clear that openness of economies would be pitchforked as the ultimate objective of the multilateral trading system.

This is a far cry from the way in which the founding fathers of the multilateral trading system had defined the objectives of the General Agreement on Tariffs and Trade (GATT) when the agreement was signed in 1947 as an ad hoc agreement before a formal institution, namely the International Trade Organization (ITO), was established.[3] The preamble of the GATT succinctly spelt out the objectives of the Agreement thus: " ... relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods".[4]

The underpinnings of the multilateral trading system remained unchanged even after the GATT gave way to the WTO in 1995. The Preamble of the Marrakesh Agreement establishing the WTO, used almost the same formulation as the GATT, to define the objectives of the organization, even though attainment of full employment, a much-avowed target for most countries during the post-World War II reconstruction, was virtually abandoned five decades later.

The founders of the GATT and the WTO were one in demanding that the multilateral trading system must be development-oriented, instead of being market-oriented. The unambiguous message from them was that as long as development deficits remain, as they do at the present juncture, trade must be the handmaiden of development. In fact, this aspect of the multilateral trading system was strengthened soon after the GATT became functional. We shall deal with this aspect in a subsequent discussion.

The development dimension embedded in the organization provides, in our view, a useful perspective to assess the proposed reforms of the WTO. It may also be pointed out that this is not the first time that an agenda for reforming the WTO has been proposed. During most of the first decade after the establishment of the organization, developing countries had taken the initiatives to strengthen the development pillars of all the covered agreements. As a result of the exertions made by these countries, WTO members agreed to launch the Doha Round negotiations, under the rubric of the Doha Development Agenda (DDA). The major difference between the DDA, and the recent proposals for reforming/modernising the WTO is that while the former was in sync with the

1. European Commission. 2018; 1.
2. Joint Communiqué of the Ottawa Ministerial on WTO Reform. 2018.
3. The ITO was never established because of the intransigence of the United States (US), the dominant economic power in the post-War era.
4. United Nations Economic and Social Council. 1947; 1.

objectives of the multilateral trading system, the latter are almost in denial of the objectives of the WTO. In the third section of the paper, we would, therefore, examine some of the reform proposals in a few key covered Agreements of the WTO, which will help us in putting the current reform proposals in context.

2. European Union's Proposal for WTO Modernisation

The EU's proposal for WTO Modernisation has three major strands: (i) "rule making and development", which essentially proposes expansion and modification of the structure and some of the core principles of the organisation, including by introducing new elements; (ii) focusing on procedural issues, especially issues relating to transparency; and (iii) reform of the dispute settlement mechanism. In spelling out the first two strands, the EU has proposed sweeping structural changes in the organisation, while in the case of dispute settlement, the EU has dwelled on the reluctance of the US to allow the Appellate Body to function normally. In this paper, we would consider the first two stands and analyse the likely implications on the functioning of the multilateral trading system.

2.1 "Rule making and development"

At the outset, the EU proposes an alternative approach for the WTO members' future engagements in the organisation. This approach is necessary, according to the EU, due to "the extreme difficulty in arriving at consensus decisions by all 164 Members" given their "divergent interests" and also because of "the current approach on development".[5]

The EU's approach has two parts, one, to address those issues in the WTO that are "key to global trade as it evolves", and, two, to "move the organisation towards a model of negotiations where individual issues can be built-up by interested Members under the auspices of the WTO toward eventual agreement by some or all Members forming integral part of the WTO framework".[6] The second part of the EU's approach tacitly follows what has generally been called as the "critical mass approach" wherein countries with dominant interest in furthering the trade liberalisation agenda try the form a "coalitions of the willing" to initiate negotiations for introducing new agreements in the WTO.[7]

The EU proposal on WTO modernisation includes three substantive issues, each of which has major ramifications for the multilateral trading system, which, as mentioned above, has a strong development pillar. These issues can broadly be divided into two categories. The first, which is part of the WTO rule-book, is disciplining of subsidies using improved reporting standards and reining-in of state-owned enterprises. While the question of subsidies has a larger context, including the way developed countries like the EU have relied on transfers from the public exchequer to support their enterprises, the issue of state-owned enterprises remains relevant largely because of the way China uses these enterprises. We shall, therefore, dwell with the issue of disciplining subsidies, which has a much wider ramification, and how this aspect can be approached in a reformed WTO.

5. European Commission. 2018; 1.

6. European Commission. 2018; 1.

7. Gallaghar and Stoler have discussed the possibilities of using the "critical mass" approach in the agriculture negotiations in the WTO. In their view, "a working hypothesis for a critical mass negotiation in agriculture requires the participation of WTO members accounting for 90 percent of global trade in agricultural products". For details, see Gallaghar and Stoler 2009; 386.

The second category has two issues, both of which are not covered by the WTO rules at present. These are comprehensive rules on investment and the so-called "forced technology transfer". The former issue has been deliberated for more than two decades by WTO members, and yet, the membership of the 164-member organisation has remained deeply divided on whether it should be included in the WTO. The latter issue has a strong resonance with an important aspect of one of the more important covered agreements, namely, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). This Agreement mentions technology transfer (from developed to the developing countries) as one of its key objectives and principles; but this objective is yet to materialise.[8]

As regards "forced technology transfer", the US Administration has spoken about this issue at least since the 1980s[9]. However, the focus on "forced technology transfer" increased manifold after the Trump Administration blamed China for forcing American countries to share their technologies.[10] With the EU seeking to develop WTO rules on "forced technology transfer", an issue that has been discussed, in recent years, solely in the context of Sino-American economic conflict is sought to be given wider currency. This move must be seen as an attempt by the developed countries to delegitimise the critical issue of technology transfer, which has remained an integral part of the development discourse for more than seven decades. All this while, the global consensus has been that the developed countries must provide to the developing countries technology on affordable terms, and this was seen as an important step towards reducing economic disparities between nations.[11] However, the owners of technology have not only gone against the consensus, but have also imposed formidable restrictions, including through the ratcheting up of intellectual property protection.

Given this backdrop, the narrative on "forced technology transfer" could set two processes in motion, both of which could hurt the developing countries further; one, it could deflect the attention away from the issue of transfer of technology, and two, it could fuel demands for further strengthening of intellectual property monopoly way beyond what is provided in the TRIPS Agreement.

This paper would critically analyse the three issues mentioned above. We would give an account of what the EU is seeking to achieve through its proposals and would then provide a detailed critique of EU's position, in light of the developmental objectives of the WTO. The paper would provide counter-proposals in the context of the three that must be considered if the WTO has to function on the principles that were laid down by the founders of the organisation.

3. Disciplining Subsidies: Does the EU Have a Case?

The EU provides an interesting perspective on subsidies, even when it makes a case for disciplining state support for businesses. The EU recognises that provision of industrial subsidies can be a "legitimate policy tool" in some cases. But, at the same time, the EU admits that "their use may

8. Developing country members have regularly raised this issue in the WTO. For one of the more recent interventions, see WTO.2017.
9. A study on Commercial Biotechnology conducted by the Office of Technology Assessment made a case of "forced technology transfer" against Japanese companies.
10. White House. 2018.
11. India made an important intervention using this line of argument following the implementation of the TRIPS Agreement. For details, see WTO. 2000.

also carry significant risks for global trade as they can disrupt production processes, affect business performance and skew the competitive field".[12]

On the question of disciplining subsidies, the EU argues for strict implementation of the WTO Agreement on Subsidies and Countervailing Measures (ASCM), which prohibits the grant of two categories of subsidies, namely, subsidies that are used to enhance export performance and subsidies that are used to promote domestic over imported goods. All other subsidies, the so-called actionable subsidies, are permissible. However, their use can be restrained if a WTO member complains that the actionable subsidies being used by another member adversely affects its interests. The EU's has pointed out that WTO members use a "number of egregious types of subsidies that heavily distort international trade, such as those contributing to the overcapacity plaguing several sectors of the economy",[13] which seems to allude to the manner in which China has established its substantial manufacturing capacities. The EU has held that these subsidies cannot easily be captured under the current rules of ASCM.

In this context, it may be noted that the EU is highlighting the need to discipline subsidies when its own enterprises are reliant on subsidies. Among the sectors in the EU member states that have benefited considerably from state support are agriculture, the airline industry, especially Airbus Industrie[14], and fossil fuels.[15] Additionally, the EU members' quest to reduce greenhouse gases through the emissions trading system also receives state support.[16] There is enough evidence to argue that the subsidies that the EU grants in these areas are distort global markets and, more importantly, allow its enterprises to corner a significant share of the global markets. We will discuss the subsidies granted to agriculture to delve deeper into the implications of subsidies.

3.1 Farm Subsidies and Why We Need Effective Disciplines

Historically, the EU, along with the US, has been among the two largest providers of farm subsidies. Although the WTO Agreement of Agriculture (AoA) has introduced disciplines on farm subsidies, the ability of large subsidisers to support their farm sector has hardly diminished.

As per the definition of farm subsidies given by the AoA, agricultural subsidies provided by the EU members in 2016-17 totalled nearly 76 billion Euros. Only the US provided more subsidies among all WTO members.

The US, on the other hand, had consistently increased its subsidies, from nearly $61 billion in 1995 to nearly $148 billion in 2013. Although farm subsidies have declined from the 2013 high after the Farm Act of 2014 was enacted, they continue to be more than twice the level of spending in 1995.

12. European Commission. 2018; 3.
13. European Commission. 2018; 5.
14. WTO. 2011.
15. Trilling. 2017.
16. Woerdman. 2015.

Table 1: Farm Subsidies Notified by the European Union in the WTO (€ billion)

Years	Green Box	Blue Box	Amber Box	Total Notified Subsidies
1995/96	18.8	20.8	50.6	90.3
1999/2000	19.9	19.8	47.9	87.7
2004/05	24.4	27.2	31.2	82.8
2009/10	63.8	5.3	10.2	79.3
2010/11	68.1	3.1	7.9	79.1
2011/12	71.0	3.0	7.9	81.8
2012/13	71.1	2.8	7.7	81.6
2013/14	68.7	2.7	6.8	78.2
2015/16	60.8	4.3	9.5	74.6
2016/17	61.7	4.6	9.4	75.5

Source: Compiled from the Notifications submitted by the EU in the WTO Committee on Agriculture.

Table 2: Farm Subsidies Notified by the United States in the WTO ($ billion)

Years	Green Box	Blue Box	Amber Box	Total Notified Subsidies
1995	46.0	7.0	7.7	60.7
2000	50.1	0.0	24.2	74.2
2005	72.3	0.0	18.9	91.2
2010	120.5	0.0	11.0	131.5
2011	125.1	0.0	14.4	139.5
2012	127.4	0.0	12.1	139.6
2013	133.3	0.0	14.3	147.6
2014	124.5	0.0	13.6	138.1
2015	121.5	0.0	17.2	138.7
2016	119.5	0.0	16.0	135.5

Source: Compiled from the Notifications submitted by the US in the WTO Committee on Agriculture.

The above tables show that the EU and the US have both altered the form in which they subsidise their respective agricultural sectors; moving away from Amber Box spending, which includes price support measures and input subsidies, to focusing on Green Box measures. Almost 87% of the EU's domestic support in 2015/16 was on Green Box measures, increasing from less than 21% in 1995/96. In 1999, 67% of the US' domestic support was on Green Box measures, which increased to over 91% in 2012. Almost one-half of the EU's Green Box spending in 2015/16 was on de-coupled income support, or direct income support. In contrast, the US focused more on its domestic food aid programmes, which have created assured domestic markets for US producers.[17] The EU and the US had thus shifted their farm subsidies away from the Amber Box, the spending on which was limited by the AoA.[18] One of the notable implications of this shift was that the EU/US could provide

17. For details, see Dhar and Kishore. 2016.

18. According to Article 6.4 of the AoA, limits on the so-called distorting subsidies are 5% of their value of production for the developed countries and 10% for the developing countries.

farm subsidies without being disciplined by the AoA. This benefited their agri-business interests, especially in the international markets where these interests have developed large stakes.

One important aspect of the EU/US domestic support programmes has been their focus on commodities in which the two WTO members have considerable presence in the global markets. Tables 3 and 4 provide the lists of products that have received high levels of subsidies in the form of price support in the EU and the US. We would like to point out that the producers of the commodities appearing in the table below could also benefiting from direct income support from their respective governments. However, it is not possible to quantify the direct income support received by producers of individual crops in the absence of the relevant data.

Table 3: Products Receiving High Product Specific Subsidies in the EU (€ million)

Products	1995/96	2000/2001	2004/05	2009/10	2014/15	2015/16
Butter	4209.7	4443.5	4084.1	2723.0	2850.4	2976.6
Common wheat	2593.1	2270.7	1842.4	1917.5	2213.7	2273.6
Skimmed milk powder	1806.2	1507.6	1215.7	953.5	1476.4	1558.5
Milk	N.A.	N.A.	176.2	671.9	183.3	593.9

Table 4: Products Receiving High Product Specific Subsidies in the US ($ million)

Products	1995	2000	2005	2010	2015	2016
Corn	32.1	2756.7	4490.0	15.1	2362.1	2344.8
Sugar	1090.9	1177.5	1199.2	1267.3	1524.9	1517.3
Soybeans	16.3	3606.4	69.2	4.5	1391.5	1207.2
Wheat	5.0	847.2	28.9	111.9	854.9	911.5
Cotton	32.0	1049.8	1620.7	81.2	853.1	833.7
Sorghum	0.5	83.8	139.8	0.0	210.4	167.4
Rice	11.6	624.4	132.5	9.6	60.1	86.2

Sources (for Tables 3 and 4): Compiled from the Notifications submitted by the EU and the US in the WTO Committee on Agriculture.

As can be seen from Table 3, the EU has provided high levels of subsidies to a few important dairy products and to wheat. Until the middle of the previous decade, producers of sugar were highly subsidised. After the WTO Dispute Settlement Body found that that the EU's subsidies on sugar were not consistent with its commitment under the AoA, the sugar subsidies' policy was discontinued.[19]

The US has consistently subsidised all the major cereals. The focus of US' subsidies was on was countercyclical measures, since the resource intensive producers in the US had to be provided high levels of subsidies to remain in the business when the prices of these commodities were low. In fact, the obvious rationale for providing the subsidies was to help the EU and the US to maintain their high shares in the international markets, which they were able to ever since the WTO was established in 1995 (Tables 5 and 6).

19. Brazil was the complainant in the dispute that was initiated in 2002 (WTO 2002b). Subsequently, 24 other countries, including Australia, Canada, China and the United States joined as third Parties. For a summary of the dispute see, WTO 2005.

Table 5: The EU's Share in Global Exports of its Highly Subsidised Products (in %)

Products	1995	2000	2005	2010	2016
Butter	64.1	55.3	61.9	58.3	57.4
Common wheat	31.7	27.8	27.6	35.0	36.0
Skimmed milk powder	76.5	69.9	63.1	62.4	56.4
Milk	94.2	93.0	90.4	90.6	85.8

Table 6: The US' Share in Global Exports of its Highly Subsidised Products (in %)

Products	1995	2000	2005	2010	2016
Corn	77.0	58.2	50.1	46.8	38.0
Soybeans	71.5	57.4	39.2	43.5	42.8
Wheat	31.9	23.7	22.6	19.0	13.1
Cotton	35.1	26.8	38.6	38.2	36.4
Sorghum	83.6	77.4	85.2	61.4	79.2

Sources (for Tables 5 and 6): Compiled from the Notifications submitted by the EU and the US in the WTO Committee on Agriculture.

The EU and the US maintained relatively high shares in the global exports of the commodities in which they reported significant levels of product specific support. However, in most products listed in the above tables, both these WTO members lost their export shares, with the US registering steep declines in its shares in soybeans and wheat; in case of the former due to the rise of Brazil, and in the latter, due to the Russian Federation. Competition faced by the EU and the US in their export markets has become the raison d'etre for their reliance on product specific subsidies.

The aforementioned evidence indicates that the agricultural sectors in the EU and the US are driven by their interests in trade. In most of the major commodities, and especially in case of the cereals, the EU and the US have high export dependency ratios. These figures become even more stark when compared with the corresponding figures from the two largest developing countries, namely, China and India. The tables below give the exports to production ratios for the three main cereals.

Table 7: Ratio of Exports to Production in Rice (in %)

Years	EU	India	US	China
1995	54.9	4.3	38.6	0.0
2000	57.4	1.2	31.0	1.6
2005	60.3	3.0	37.5	0.4
2010	61.3	1.5	34.0	0.3
2016	65.9	6.0	32.6	0.2

Table 8: Ratio of Exports to Production in Wheat (in %)

Years	EU	India	US	China
1995	26.9	1.0	54.6	0.0
2000	24.4	1.1	45.9	0.0
2005	24.4	1.1	47.5	0.3
2010	37.1	0.0	46.0	0.0
2016	45.7	0.2	38.3	0.0

Table 9: Ratio of Exports to Production in Maize (in %)

Years	EU	India	US	China
1995	17.1	0.2	32.0	0.1
2000	20.1	0.3	19.0	9.9
2005	19.4	2.9	16.1	6.2
2010	26.6	10.6	16.1	0.1
2016	27.1	1.9	14.6	0.0

Sources: (for Tables 7-9): Author's calculation based on data from FAOSTAT.

The above tables clearly indicate that cereal production in large developing countries like India and China overwhelmingly meets their domestic demand, a complete contrast to the situation in industrialised countries. It must be noted that China and India are among the largest producers of rice and also produce substantial amounts of wheat, but their exports of these commodities relatively small shares of their total production. It can, therefore, be concluded from the above discussion that while developed countries subsidise their agricultural sector for exploiting global markets, large developing countries use agricultural subsidies essentially to ensure domestic food security and to promote rural livelihoods.

Importantly, the AoA recognises in its preamble that the reform of agricultural policies initiated by the Agreement "should be made in an equitable way among all Members, having regard to non-trade concerns, including food security ...",[20] but the rules and disciplines introduced by the Agreement do not, in any manner, operationalise the "non-trade concerns". Further, the agenda for "continuation of the reform process" under AoA, spelt out in Article 20 of the Agreement stated that the negotiations should take into account "non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system ..."

The Doha Ministerial Declaration, the first and the most expansive articulation by WTO members to reform the WTO, recognised the special character of agriculture in developing countries. The Ministers agreed "that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development".[21]

After the failed Cancun Ministerial Conference in 2003 derailed the Doha Development Agenda, WTO members put the process back on track through the so-called "August 1 Decision", which yet again emphasised the need to adopt appropriate agricultural policies for the developing countries: "Agriculture is of critical importance to the economic development of developing country Members and they must be able to pursue agricultural policies that are supportive of their development goals, poverty reduction strategies, food security and livelihood concerns".[22]

20. Agreement on Agriculture, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

21. WTO. 2001; paragraph 13.

22. WTO 2004; A-1.

It may be noted in this context that the Doha Round negotiations had considered proposals to amend AoA rules in an effort to make them respond to the needs of food security and rural development in developing countries. Two sets of proposals that made much progress in the negotiations were in the area of market access, namely, the proposal for designating "special products" and the "special safeguard mechanism".[23] Thus, while the need to protect developing country farmers from the uncertainties of the global marketplace was discussed, the fact that these that farmers in developing countries needed adequate support from their governments to meet their non-trade concerns like food security and livelihoods did not find much attention.[24]

It follows from the above discussion that there is a strong case to differentiate between agricultural subsidies provided by WTO members on the basis of whether production systems in the countries are geared towards furthering commercial/trade interests or meeting domestic food security. At present, the subsidies' disciplines of the AoA do not consider either the impact of domestic support measures on agricultural markets, or the categories of the producers benefiting from the subsidies, namely, small-scale producers or agri-business. Developing countries, therefore, need to initiate steps to amend the principles on which the AoA has laid down the subsidies' disciplines, and to also ensure that subsidies contribute to the realisation of the twin objectives of food security and rural livelihoods in developing countries. Real reforms in the agricultural subsidies can only occur if the AoA is able to prevent the agri-business to continue its expansion using support from their home governments.

4. Does the WTO Need a Multilateral Agreement on Investment?

As mentioned earlier, the EU has proposed inclusion of investment as one of the two "new" areas in the WTO. While doing so, the EU has emphasised that the "multilateral rule-book on investment, whether in services or other sectors of the economy, needs to be updated".[25] The new rules, according to the EU, would "introduce disciplines that would enable us to improve overall market access conditions for foreign direct investment (both in the services and non-services sectors) as well as address distortive and discriminatory practices including legal form restrictions and performance requirements (such as the sourcing or production of goods or services locally) in a more comprehensive manner". The EU has, therefore, spoken clearly of its objective to bring a comprehensive agreement in the WTO that would promote investment liberalisation.

4.1 Earlier Attempts to Include Investment and the WTO

This is not the first time that the EU is playing a prominent part in promoting the idea of a multilateral agreement on investment in the WTO. The first of its initiatives was taken immediately after the establishment of the organization, in 1995. The then EU Trade Commissioner, Sir Leon Brittan, was the first authoritative voice favouring adoption of a set of rules for investment liberalisation via the WTO and the Organization for Economic Cooperation and Development (OECD).[26] Sir Brittan was one of the strongest protagonists of a Multilateral Agreement on Investment (MAI), which

23. Both these proposals were supported by the G-33, a group of 47 developing countries.

24. Some countries proposed that "Development Box" was required to address the developing country concerns. See, WTO. 2000a.

25. European Commission. 2018; 5.

26. Sir Brittan viewed investment liberalisation as a transatlantic project, given the substantial interest that two sides of the Atlantic had, both as sources and destinations of foreign investment. For details, see, Brittan. 1995.

was proposed by the OECD members in 1995 and was to be adopted by 1998. The objective of the proposed Agreement, explained Sir Brittan, would not only be to enhance the rights of the foreign investors in their host countries, but, more importantly, to ensure that the host country governments are held to account if the investors feel that their rights are not well protected. The latter is the much-discussed Investor-State Dispute Settlement Mechanism (ISDS), which, as we shall discuss later, gives the investors the freedom to litigate against their host countries government in international tribunals.[27]

In the WTO, discussions on a possible MAI began with the Singapore Ministerial Conference in 1996 agreeing to establish a working group to examine the relationship between trade and investment.[28] A further step was taken in the Doha Ministerial Conference in 2001 when the trade and investment was included in the post-Doha work programme.[29]

In the post-Doha discussions on a possible multilateral regime on investment, India argued strongly that developing countries "need policy flexibility to determine the form of investment that would lead to highest growth".[30] It was interesting that the developing countries were demanding from the foreign investors what the latter had promised: "a spur to increased productivity, additional employment, open competition, rational production, technology transfer and the increase of managerial know-how".[31]

India raised an issue that has always been of critical for the recipients, namely, the form in which foreign capital was flowing in. Captured as the definition of investment, this issue has important implications for the development prospects of developing countries.[32] India's view was that while green-field investments would be conducive to furthering the developing goals as compared to brown-field investments, or acquisition of existing enterprises in the host countries, as investments of the former kind could result in better economy-wide linkages. According to India, any inflows of capital that are inimical to the domestic industry, particularly small- and medium-sized enterprises and have adverse effects on employment would need to be carefully regulated. And, finally, India stated that developing countries need to retain the ability to screen and channelize foreign investment so as to meet their domestic interests and priorities.[33]

Arguments made against a multilateral regime on investment by developing countries, including India, led to the eventual exclusion of the investment issue in the Doha Round negotiations. A decision was taken by the WTO Members in July 2004 that this issue "will not form part of the [Doha] Work Programme ... and therefore no work towards negotiations ... will take place within the WTO during the Doha Round".[34]

27. The tribunal proceedings are held under the rules of the International Centre for Settlement of Investment Disputes (ICSID) or United Nations Commission on International Trade Law (UNCITRAL).

28. WTO. 1996; paragraph 20.

29. The Doha Ministerial Declaration mentioned that "... the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. WTO. 2001; paragraph 22.

30. WTO. 2002c; paragraph 1.

31. European Commission. 1996.

32. WTO. 2002c; paragraph 1.

33. WTO. 2002c; paragraph 5.

34. WTO. 2004, paragraph (g).

The position that India and other developing countries took in the discussions in the WGTI, should in the context of the initiative taken by the OECD countries to formalise the MAI. As discussed above, a draft of the MAI was discussed by the OECD Members during the late-1990s, which included provisions aimed at introducing an investment protection regime that was heavily skewed in favour of the foreign investors. But, despite taking this initiative, the proponents of the MAI themselves found it difficult accept a mutually agreeable framework of investment rules covering all sectors, and consequently efforts to formalise the agreement was given up.

4.2 Investment Facilitation for Development

A new track for discussing investment related issues, namely, investment facilitation, appeared in 2016[35], as a follow-up of the Nairobi Ministerial Conference. The contours of investment facilitation were defined subsequently by a group of developing countries that sponsored a Ministerial Decision in the Buenos Aires Ministerial Conference on "Investment Facilitation for Development".[36] These countries proposed a framework for facilitating foreign direct investment that would: (i) improve the transparency and predictability of investment measures; (ii) streamline and speed up administrative procedures and requirements; and (iii) enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention. The sponsors clarified that these discussions under the rubric of investment facilitation would clarify the proposed "framework's relationship and interaction with existing WTO provisions, with current investment commitments among Members, and with the investment facilitation work of other international organizations". They also clarified that "discussions shall not address market access, investment protection, and Investor-State Dispute Settlement".[37]

This proposal was somewhat contradictory for the following reasons. On the one hand, the sponsors of the Draft Ministerial Declaration supported the drawing up of rules that would facilitate entry of foreign investors in the host countries, including by streamlining and speeding up "administrative procedures and requirements", all of which are important components of the market access frameworks adopted by the host countries. But, on the other hand, they did not want the framework to include "market access" issues.

It was not as if all proponents of investment facilitation were thinking alike. The Russian Federation, another country that backed inclusion of investment facilitation in the WTO, saw this issue as a step towards an eventual multilateral framework for protecting foreign investors. Russia took the position that investment facilitation must form the "basis for future market access and treatment disciplines" and that the "rules should include elements for their future development and expansion to regulating market access and treatment for investments".[38] These proposals suggest that in its quest for getting investment facilitation included in the WTO, the EU could find support from a small, but influential group of countries, whose share in the total inflows received by developing countries as a whole was a little above 45% in 2017.

35. WTO. 2016.
36. Backing the Decision were the following countries: Argentina, Brazil, Chile, China, Colombia, Hong Kong, China, Kazakhstan, Liberia, Mexico, Nigeria, Pakistan, Qatar, and Republic of Korea. WTO. 2017c.
37. WTO. 2017c; paragraph 2.
38. WTO. 2002c; paragraph 1.

However, the EU would have to contend with the fact that in the earlier discussions on an investment agreement in the WTO, there were a number of areas in which the developing countries had contested the enhancement of rights of investors. These contestations, we would point out, have increased in a number of jurisdictions, most notably in India and China. We would discuss the justification or otherwise of the EU's proposal to get a multilateral agreement on investment included in the WTO in the following section.

4.3 Key Elements of a Multilateral Agreement on Investment that the EU has been seeking

The structure of investment agreements which the EU had proposed in the discussions on a possible MAI in the WTO had a few key elements. These included, (i) definition of investment; (ii) pre-establishment national treatment; (iii) expropriation and (iv) investor state dispute settlement (ISDS) mechanism. These elements also form the core of the investment agreements that are part of the EU's preferential trade agreements.

4.3.1 Definition

What constitutes an investment is a key element of any rulebook on investment, even if the rules are only designed to "facilitate" operation of investors in their host countries. Identification of investment is crucial for safeguarding investor rights, namely, the extent to which foreign investors can get protection, including against direct and/or indirect expropriation in their host countries. This issue is equally important for the host countries for it is central to the benefits that they can expect from foreign investors, a point that India had made in the WTO.

Definition of foreign investment takes either of the two forms, namely, an "asset-based definition" or an "enterprise-based definition".[39] Most bilateral investment treaties (BITs)[40] that are currently in operation for protecting investor rights have adopted the broader asset-based definition. This definition usually covers "every kind of asset", and often includes a non-exhaustive list of covered assets.

Three observations regarding the asset-based definition of investment included in the BITs should be made here. The first is that by agreeing to include in the definition forms of investment such as "rights to money or to any performance under contract having a financial value"[41], host countries have often left the door open for an expansive interpretation of what should constitute as "investment". Such an approach can be detrimental to the interests of the host countries in case of a litigation with foreign investors.[42]

While host countries that are mostly from the developing world[43], including India, have encountered problems with the foreign investors over the ambiguous definition of investments that are included

39. WTO. 2002a; paragraphs 3-6.

40. These agreements are also called international investment agreements or IIAs. We will also be using a more generic term, investment protection agreements to describe these agreements in our discussion, The BITs have been singed only between developed and developing countries. There are some investment protection agreements that the developing countries have signed, which are part of the free trade agreements like NAFTA.

41. This term was used in India bilateral investment promotion and protection agreements before the Model Text governing such investments was revised in 2015. For a commentary on India earlier framework for investment protection, see WTO. 1999.

42. India experienced the adverse impact of this definition in its fist investor-state dispute settlement case. For details, see, Dhar, Joseph and James. 2012.

43. It may be recalled we had mentioned earlier that the BITs have been signed only between developed and developing countries.

in their BITs, capital exporting countries have taken steps to overcome this problem. These countries have subjected their BITs to periodic reviews; the best example of which is the United States. The US initiated its BITs programme in 1981 and had reviewed its model BIT twice in a period of eight years.

The first review resulting in the 2004 Model BIT was triggered by the Trade Act of 2002, which stated, the "principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that *foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States* ..."[44] (emphasis added).

The second review, the outcome of which is the 2012 US Model BIT, resulted from President Obama's Trade Policy Agenda of 2009 that called for a "review [of] the implementation of ... FTAs and BITs to ensure that they advance the public interest"[45]. This review was driven by yet another set of concerns: "whether [US] FTAs and BITs give foreign investors in the United States greater rights than U.S. investors have under U.S. law; whether the FTAs and BITs give governments the ''regulatory and policy space'' needed to protect the environment and the public welfare; and whether an investor should have the right to submit to arbitration a claim that a host government has breached its investment obligations under an FTA or a BIT".[46]

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

Two major recipients of foreign direct investment, namely, India and China, have adopted more restricted definitions of investment in recent years. The former adopted revised its definition while amending its Model Text for the Indian Bilateral Investment Treaty in 2015, while the latter did so while adopting its new Foreign Investment Law in March 2019.

The definition of investment adopted by India defines an enterprise, which is identified, among other things, as one that has "real and substantial business operations". An enterprise with such defined as one that has made significant contributions to the host state, including: (i) substantial and long-term commitment of capital; (ii) engaged a substantial number of employees in the territory of the Host State; (iii) assumed entrepreneurial risk; (iv) substantial contribution to the development of the Host State through its operations along with transfer of technological knowhow. Further, India also excluded several forms of assets of an enterprise from the definition of investment, like portfolio investments, claims to money arising solely from commercial contracts for the sale of goods or services, and goodwill, brand value, market share or similar intangible rights.

44. Trade Act of 2002.
45. USTR. 2009.
46. For details, see the report of the House of Representatives. 2009.

China's new Foreign Investment Law defines foreign investment as "investment activities of foreign natural persons, enterprises or other organizations (hereinafter referred to as foreign investors) directly or indirectly in China ..." The following activities can be undertaken by foreign investors: (i) setting up foreign-invested enterprises in China alone or jointly with other investors; (ii) obtaining stocks, shares, property shares, other forms of equity, or other similar rights and interests of enterprises within the territory of China; and (iii) investing in new projects in China alone or jointly with other investors.

Differences between countries on definition of investment held progress back when the possibilities of an investment agreement in the WTO was discussed prior to 2005. This challenge remains, as the China/India practises show.

4.3.2 Pre-establishment National Treatment

Historically, governments, especially those in the developing world, have tried to regulate the entry of foreign companies into their economies for a number of reasons. Host governments have regulated the entry of foreign investors and establishment of businesses in their territories with a view to realizing national economic policy goals, in general, and public policy goals such as national security, public health and safety and public morals. These objectives are realized by imposing conditions on foreign investors before they enter their host economies. Such regulations, in effect, discriminate between foreign and the domestic investors, since the latter are not subjected to these regulations before establishing their businesses. In other words, countries adopting such policies denied national treatment at the pre-establishment stage to foreign companies.

The EU treats pre-establishment national treatment as one of the core elements of laws governing foreign investment. The basis for so doing are the principles of free movement of capital and freedom of establishment that are codified in Article 63 of Treaty on the Functioning of the European Union (2007) and which prohibits imposition of any restriction on capital movements between the EU Member States and between the EU Member States and third countries. However, in March 2019, the EU Member States adopted a regulation "establishing a framework for the screening of foreign direct investments into the Union" through which it is now "possible for the Union and the Members States to adopt restrictive measures relating to foreign direct investment on the grounds of security or public order, subject to certain requirements".[47]

The European Commission has argued that the EU regulations allowing imposition of restrictions on foreign investors follow principles of proportionality and legal certainty.[48] These principles require that the procedure and the criteria for the investment screening are defined in a non-discriminatory and sufficiently precise manner. Potential investors must be able to know such mechanisms in advance and to seek judicial review. Accordingly, Article 4 of the new regulation, adopted in 2019, lists factors "that may be taken into consideration by Member States or the Commission" to determine "whether a foreign direct investment is likely to affect security or public order", covering a wide range of areas belonging to "critical infrastructure, including energy, transport, water, health,

47. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, preambular paragraph #3.

48. European Commission. 2017; 4.

communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure".[49]

The measures adopted by the EU and its Member States to thus regulate entry of foreign investors can be used to deny pre-establishment national treatment, much like those that developing countries have adopted. The key issue is whether the EU agrees to the principles of reciprocity when negotiating bilateral investment agreements with its partner countries.

4.3.3 Expropriation

Although in common parlance, expropriation of investment is equated with nationalisation, in the world of BITs, this term is used in several different situations. The complexities involving the term "expropriation" (the other term commonly used is "takings") can be understood from the fact that this term is used by investors whenever they find hindrances in their operations in their host countries. The United Nations Conference on Trade and Development (UNCTAD) pointed out that there can be three broad categories of expropriations: (i) direct expropriation includes nationalization and/or outright physical seizure of property; (ii) indirect expropriations which permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way; and (iii) regulatory measures, i.e. acts taken by States in the exercise of their right to protect public interest, which may have the same effects as an indirect expropriation.[50]

All investment treaties provide for expropriation under certain circumstances. Investment treaties such as NAFTA, US-Australia BIT, ASEAN-Australia-New Zealand FTA, and India's BITs provide that expropriations of investment are not allowed except for public purposes, in a non-discriminatory manner and on payment of fair and equitable compensation. It may be pointed out that the definition of investment holds the key to the determination of expropriation. Thus, in countries, which have a more precise definition of investment (as in the case of the United States discussed above), claims of expropriations, may be far fewer as compared to those possible in India.

The investment protection agreements that the United States has entered into with advanced countries, e.g. the NAFTA and the US-Australia BIT, has have a significant set of exclusions from expropriation, and these include intellectual property rights. Such an exclusion also figures in the United States Model BIT. The relevant article states that provisions on expropriation do not "apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement".[51] Interestingly, this exclusion does not find mention in the BITs concluded with the developing countries. Particularly important in the list of exclusions from appropriation is compulsory licence (CL), an instrument that can be used by countries to counter excessive use of monopoly rights by patent holders.

49. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, preambular Article 4.

50. UNCTAD. 2012a; 6.

51. Article 6.5 of 2012 US Model Bilateral Investment Treaty. For details see, 2012 US Model Bilateral Investment Treaty. 2012.

The customary international law and most of the investment treaties provide for three conditions to make expropriation lawful: it must be for a public purpose; must be non-discriminatory; and compensation must be paid. Some investment treaties such as NAFTA, US-Australia FTA, ASEAN-Australia-New Zealand FTA provide for a fourth parameter, the 'due process' (Tienhaara 2010).

Indirect expropriation can be quite controversial, as no parameter is prescribed to judge whether an expropriation has taken place. The model BITs of the US provide for certain criteria to decide whether an act amounts to indirect expropriation. These are [among other factors] the economic impact of the government action, the extent to which the act interferes with the reasonable expectations of the investor and the character of government action[52].

In the global regime of investor protection that is currently in place, most countries have not included indirect expropriation in their rulebook.

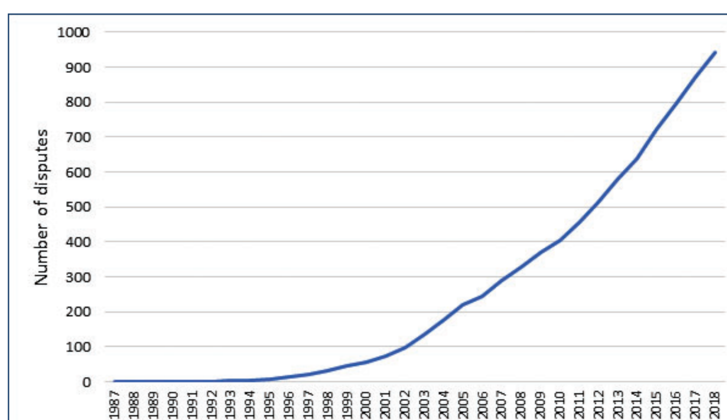
4.3.4 Investor-State Dispute

A key feature of the investor-State Dispute Settlement (ISDS) process is that it gives the investor superior bargaining power *vis-à-vis* their host countries. This dimension manifests itself in several forms. The first is that consent of the investor is essential for initiating an investor-State dispute under the BITs. Commentators have suggested that there this element introduces "an inherent pro-investor bias in the system"[53] since investors will participate only if it is in their interest to participate in the dispute. The ICSID arbitration process introduces a second "pro-investor" bias. ICSID Convention does not require an investor to exhaust local administrative or judicial remedies as a condition to arbitration, whereas a Contracting State may require the exhaustion of such remedies. Interestingly, some commentators have justified this dimension of the "pro-investor bias" thus: "A foreign investor, justifiably in many instances, will not have confidence in the impartiality of the local tribunals and courts in settling any disputes that may arise between him and the host state"[54].

Investment protection agreements have brought considerable transactions costs on the host countries, not the least because of the steadily rising cases of disputes. Between 1987 and 2018, there are 942 known cases of disputes, and almost half of these disputes were initiated since 2013 (Chart 1). It may also be mentioned here that a majority of the cases were initiated against the developing countries.[55]

52. Annex B.4 of US Model BITs 2004 and 2012. For details see, 2004 Model BIT. 2004 and 2012 US Model Bilateral Investment Treaty. 2012.
53. Tienhaara. 2009; 5.
54. Dodge. 2006; 11.
55. UNCTAD. 2018; 2.

Chart 1: Trends in Investor-State Disputes (1987-2018)



Source: UNCTAD.

Data on the compensation demanded by the claimants are available for 829 of the known cases of ISDS. The claims have been $100 million or more in 69% of the cases; in nearly a third of these cases, the compensation demanded has been a $1 billion and more (Table 10).

Table 10: Amount of compensation Sought by claimant

Amount of compensation (USD or USD equivalent)	Number of cases
Less than $1 million	5 (0.06%)
$1 - 9.9 million	43 (5.2%)
$10 - 99.9 million	209 (25.2%)
$100 - 499.9 million	230 (27.7%)
$500 - 999.9 million	73 (8.8%)
$1 billion or more	98 (11.8%)
$500 - 999.9 million	73 (8.8%)
$1 billion or over	98 (11.8%)
Total cases	829

Source: UNCTAD.

Available evidences on investment protection agreements show that the host countries' liabilities on account of implementation of these agreements were increasing rapidly. This is contrary to the dominant narrative on investment liberalisation, which speaks of the benefits that the host countries, especially in the developing world, can enjoy because of the participation of foreign investors in their economies. We shall discuss in the following section that foreign investors have always promised to deliver a package of intangibles, including technology and managerial skills, which would contribute to the development of their host countries. Instead, foreign investors seem to be contributing to the leakage of financial resources from developing countries, as the indicated above. The mentioned evidences do not justify either the continuance of the BITs in their present forms, or the proposals to develop a multilateral agreement on investment based on framework of the BITs. Instead, there is a stronger case for reviewing these agreements with a view to shedding their overwhelming pro-investor bias, which several developing countries, including India, have been making for a several decades.

5. "Forced Technology Transfer": Is This Issue Obfuscating the Reality?

According to the EU, the WTO must address "forced technology transfer. This phenomenon has been defined as one "where foreign operators are directly or indirectly forced to share their innovation and technology with the state or with domestic operators". Such policies, argued the EU, made the trading environment unfair and had to be dealt with adequately by including new rules to fill the "gap of the current rulebook".[56] Popularised by the Trump Administration in the context of the trade war with China, forced technology transfer is now high on the rule-setting agenda of the so-called "Trilateral" (the EU, Japan and the US).[57]

Number of issues arise in the context of the claims made by the "Trilateral" on forced technology transfer. In our view, the first and the most important is the attempt to shift the focus away from the issue of "technology transfer" from the industrialised to the developing countries, which has been an integral part of the development debate since the end of the Second World War. The UNCTAD defines technology transfer as "the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service"[58]. The World Intellectual Property Organization (WIPO) conceptualized technology transfer in a broader context as "a series of processes for sharing ideas, knowledge, technology and skills with another individual or institution (e.g. a company, a university or a governmental body) and of acquisition by the other of such ideas, knowledge, technologies and skills. In the context of transferring technologies from the public sector and universities to the private sector, the term 'transfer of technology' is used in a narrower sense: as a synonym of 'technology commercialization' whereby basic scientific research outcomes from universities and public research institutions are applied to practical, commercial products for the market by private companies".[59]

5.1 Early Reference to Technology Transfer in the Multilateral Trading System

In several multilateral forums, including in the discussions among the Contracting Parties of the then GATT, there was an explicit agreement between the participating countries on the importance of transferring technology to the less developed countries.

One of the first references to transfer of technology from the developed to the then underdeveloped countries can be found in the Havana Charter[60], which provided the framework for the International Trade Organization, the institution that was to replace the General Agreement on Tariffs and Trade (GATT) in the late 1940s. The Havana Charter included provisions on "Co-operation for Economic Development and Reconstruction" (Article 10), which, among other things, spoke of "facilitating and promoting industrial and general economic development and consequently higher standards of living, especially of those countries which are still relatively undeveloped". While dwelling on the "Means of Promoting Economic Development and Reconstruction" (Article 11), the Havana Charter emphasised the need for "adequate supplies of capital funds, materials, modern equipment and technology and technical and managerial skills".

56. EEAS. 2018.

57. EEAS. 2019. The Ministers agreed "to cooperate on enforcement, on the development of new rules, on investment review for national security purposes and on export controls ...".

58. UNCTAD. 2012b; 4.

59. WIPO, 2011a; 4-5.

60. United Nations Conference on Trade and Employment. 1948.

Article 11 included some critical operational details on technology transfer. It underlined that Member states of the ITO "shall co-operate … in providing or arranging for the provision of such facilities …, and Members shall not impose unreasonable or unjustifiable impediments that would prevent other Members from obtaining on equitable terms any such facilities for their economic development". The Havana Charter had, thus, provided a framework that would allow the then underdeveloped countries to get access to technology essential for their development and on equitable terms. This sums up the position that developing countries have held for the past seven decades, that technology they require for meeting their development imperatives must be accessible on affordable terms.

On this issue of access to technology on equitable terms, the Havana Charter went further. In its provisions on Restrictive Business Practices (Chapter V), number of practices were specified, which "restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade". One of the key practices included was "preventing by agreement the development or application of technology or invention whether patented or unpatented". This, in other words, implied that agreements that imposed restrictions on the use of technology and invention, could be considered as restrictive business practices.

5.2 Mainstreaming of Technology Transfer in the Multilateral Economic Agenda

A Resolution adopted by the United Nations General Assembly (UNGA) in 1959 sowed the seeds of the long-drawn engagements on the issue of North-South technology transfer. The Resolution emphasised the "value of an increase in the international exchange of scientific and technical experience" and called upon the economically and technically most developed countries in acquiring scientific and technical knowledge that would make possible an accelerated development and an increase in living standards".[61]

A 1961 UNGA Resolution, "The Role of Patents in the Transfer of Technology to Under-Developed Countries" provided the first explicit connection between the patents system and transfer of technology to the developing countries. The Resolution was built on the premise that "access to knowledge and experience in the field of applied science and technology is essential to accelerate the economic development of under-developed countries and to enlarge the over-all productivity of their economies".[62] This Resolution requested the UN Secretary General to initiate a study of the patent system and to analyse the underdeveloped countries' need for technology was being realised.

The study, submitted in 1964, found that the underdeveloped countries faced a number of constraints in their efforts to acquire imported technologies. In order to attract technologies from advanced countries, the recipient countries had to meet "minimum terms and conditions of the foreign patentee". In other words, the owner of technologies had to be offered incentives before they had agreed to allow exploitation of their technologies in underdeveloped countries.

An important finding of the study was the costs of acquiring the technologies, arising from the abuse of "monopoly of technical knowledge, management knowledge, capital resources and marketing

61. UNGA. 1959.
62. UNGA. 1961.

access enjoyed by the firms and economies of the mature advanced countries". According to the study, "the basic problem to tackle for the international community is the one-sided relationship under which the possession of know-how and capital resources are so unequally distributed". Among the costs that the underdeveloped countries had to bear was the balance of payments burdens, "resulting from this one-sided relationship", which took many different forms.

Since it was established in 1964, the UNCTAD has played a major role in highlighting technology transfer as one of the key development constraints faced by the developing countries. Thus, in the Final Act leading to the formation of the organisation, the following recommendation was made on transfer of technology: "Developed countries should encourage the holders of patented and non-patented technology to facilitate the transfer of licences, know-how, technical documentation and new technology in general to developing countries, including the *financing of the procurement of licences and related technology on favourable terms*" (emphasis added).

The unfair bargain faced by the developing countries in the market for technology emerged as a major issue in the 1970s. The trigger for the mainstreaming of this issue was provided by the "International Development Strategy for the Second United Nations Development Decade", a United Nations General Assembly Resolution adopted in 1970 (Resolution# 2626). On transfer of technology, the Resolution said as follows: "The developed and developing countries and competent international organizations will draw up and implement a programme for promoting the transfer of technology to developing countries, which will include, inter alia, the review of international conventions on patents, the identification and reduction of obstacles to the transfer of technology to developing countries, facilitating access to patented and non-patented technology for developing countries under fair and reasonable terms and conditions, facilitating the utilization of technology transferred to developing countries in such a manner as to assist these countries in attaining their trade and development objectives, the development of technology suited to the productive structures of developing countries and measures to accelerate the development of indigenous technology".[63]

In 1974, the UN General Assembly recognised the growing inequities between developed and developing counties and called for the adoption of the New International Economic Order to bridge the development gaps. Resolution # 3201 adopted in this regard, raised the issue of the gulf between the two groups of countries, and spoke of the importance of transfer of technology: "Giving to the developing countries access to the achievements of modern science and technology, and promoting the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies".[64]

UNCTAD's efforts in highlighting the importance of transfer of technology as an essential development instrument for the developing countries was recognised by the UN General Assembly in 1975 through the resolution on "Development and international economic co-operation" (Resolution # 3362). The Resolution called all States to "co-operate in evolving an International Code of Conduct for the Transfer of Technology, corresponding, in particular, to the special needs of the developing countries" and entrusted the UNCTAD to conduct this work.[65]

63. UNGA. 1970; paragraph 64.
64. UNGA. 1974; paragraph 4(p).
65. It should be mentioned here that almost simultaneously, the United Nations Centre on Transnational Corporations began negotiations a Code of Conduct on Transnational Corporations, which included the issue of transfer of technology.

The Code of Conduct negotiations were conducted to respond to the Resolutions adopted by the UN General Assembly that emphasised the need to make technologies available to the developing countries. The Code, which was to be adopted as a binding instrument, was designed to facilitate adequate transfer and development of technology so as to strengthen the scientific and technological capabilities of developing countries. The developing countries, presented the following as their main arguments in support of the Code: (i) to establish general equitable rules for the international transfer of technology, taking into consideration particularly the need of developing countries and the legitimate interests of technology suppliers and technology recipients; (ii) to facilitate and increase the international flow of proprietary and non-proprietary technology under fair and reasonable terms and conditions to all countries particularly to and from the developing countries, and (iii) to increase the contributions of technology to the identification and solution of specific problems of all countries, particularly the special problems of developing countries. These arguments have remained as the basis for the subsequent interventions by the developing countries in support of transfer of technology.[66]

Central to the arguments made in the context of the Code negotiations was the piquant issue of costs of technology transfer. This issue has been extensively discussed and several studies have given us ample evidence as to what the costs would look like.

5.3 Costs of Technology Transfer

One of the early indications of the costs that technology transfer could entail was given by Kenneth Arrow while commenting on two case studies on innovations in the American aluminium industry and product and process innovations of the American chemical giant, Du Pont. Arrow argued on the basis of the findings of the case studies that the cost of transfer of technology (which he termed as "diffusion of information") could be considerable, although the price paid for information, namely, royalties, was relatively low. Appropriation of the results of invention, the main motive for the inventor to invest in the development of new products/processes, was possible, according to Arrow, in one of two ways: "there may be barriers to entry so that the rewards for invention can be appropriated by a firm which is, at least to some extent, in a monopolistic position; or the costs of imitation may be so high, for either technical or legal reasons, that competition cannot erode the profits from invention".[67] Arrow's conclusion was that the owners of proprietary technology were able to obtain sufficient rents by enhancing the costs of transferring such technologies using the monopoly rights over their products/processes. This was the case, even though the royalty payments were relatively low.

Using the framework that Arrow had used to assess the costs of technology transfer to comment on the nature of the costs following the strengthening of the intellectual property regime after the introduction of the TRIPS Agreement, the unambiguous conclusion would be that the costs of transfer have multiplied. The stronger patent monopoly gives the patent holders greater leverage over the technology market, and therefore better opportunities to appropriate the rent. More importantly, the royalties and license fees for using proprietary technology have increased substantially.

66. UNCTAD. 1978; Chapter I.
67. Arrow. 1962; 354.

A 1975 report of the UNCTAD estimated the direct costs of technology transfer for developing countries (other than those of southern Europe) and found that this was about 5% of their exports and 8% of their imports of machinery, equipment, and chemicals. Another study by Teece estimated that the transfer costs can comprise between 20 to 60% of total project cost. The costs of transfer rise with "technological distance" or differences in technological specialization, corporate tradition, skill levels and the like. This distance also varies within similar countries, leading to different transfer costs. When countries have very different levels of technological capabilities, the costs of transfer are much larger.[68]

Over the past three decades, the technologically dependent developing countries have had to pay increasingly larger amounts for the proprietary technologies that they have used. Table below provides the figures for the developing countries as a whole.

Table 11: Charges for the Use of Intellectual Property of Developing Countries ($ billion)

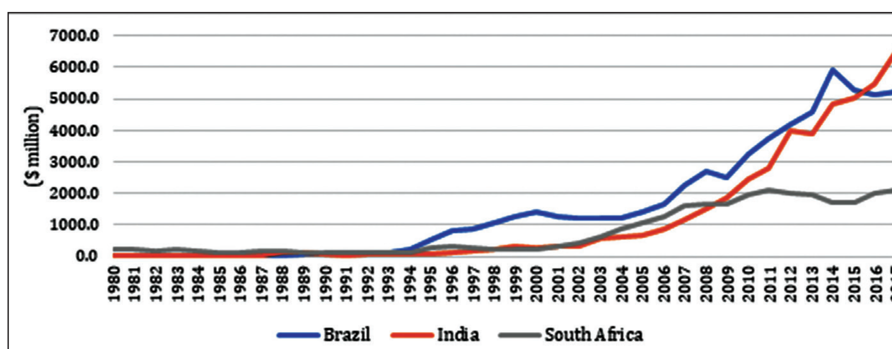
Years	Payments	Receipts	Balance
1980	0.7	0.1	0.6
1985	0.5	0.1	0.4
1990	1.0	0.2	0.8
1995	2.7	0.3	2.4
2000	7.3	0.7	6.6
2005	18.9	1.7	17.2
2010	37.4	2.8	34.5
2015	55.2	4.0	51.2
2016	57.2	4.0	53.2
2017	64.5	8.1	56.4

Source: World Development Indicators, World Bank

Payments by the developing countries for the use of intellectual property registered were below $ 1 billion during the 1980s, which endorses the point Arrow had made in the early 1960s that the royalty payments, or the "price for information", as he put it, was relatively small. The owners of intellectual property began extracting substantial amount of rent on their intellectual property only after the Agreement on TRIPS was implemented. Developing countries began implementing the Agreement from the year 2000, and this period coincides with the steep increase in payments for intellectual property. From about $7 billion in 2000, this figure increased to $ 64.5 billion in 2017. The burden imposed by the owners of intellectual property, thus, increased manifold, as can be seen from the payments made by Brazil, India and South Africa.

68. UNCTAD. 1999; 203.

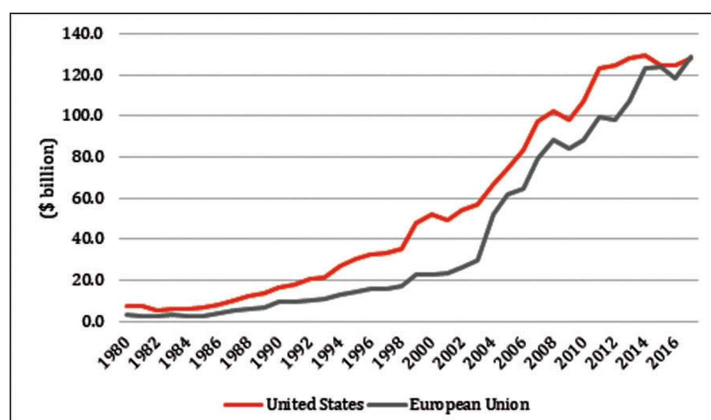
Chart 2: Charges for the Use of Intellectual Property, Payments



Source: World Development Indicators, World Bank.

The increase in the receipts on account of charges for the use of intellectual property that countries, which are home to an overwhelming majority of the patent holders, have enjoyed over the past quarter of a century, also testifies the highly iniquitous situation that the TRIPS Agreement has introduced. For instance, the receipts of the US, whose residents hold the largest share of the granted patents[69], increased from $7 billion in 1980 to over $126 billion in 2017 (Chart 3). Similar increase was seen in case of the EU member states.

Chart 3: Charges for the Use of Intellectual Property, Receipts



Source: World Development Indicators, World Bank.

Chart 3 corroborates the point made earlier that the increase in receipts for the use of their intellectual property assets for the developed countries increased significantly after the TRIPS Agreement was implemented by all WTO members.

Mirroring the above-mentioned trend was the steep increase in developing countries' liabilities for using proprietary technology after they accepted the stringent norms and standards of intellectual property protection imposed by the TRIPS Agreement. While in the year 2000, when these countries began implementing the Agreement, they had a deficit of only $2.4 billion on account of the charges for intellectual property, by 2017, this figure had increased to $56.4 billion. There is therefore this indisputable evidence that the technological dependence of the developing countries went up dramatically since the beginning of the millennium. This evidence is completely at variance

69. Share of the US residents in the total patents granted worldwide was over 31% in 2017 (Source: WIPO Intellectual Property Statistics Data Center).

with the initial assessments of the TRIPS Agreement, including one by the UNCTAD, which foresaw "some social benefits by way of improving technological capabilities in developing countries".[70]

The above evidences on developing countries' use of proprietary technology provide important counter-point to the position taken by the EU (and also the US) that their companies are faced with the phenomenon of "forced technology transfer". We showed that the commitment made by the advanced countries in multilateral forums to support flow of technology to the developing countries was never fulfilled. The latter took the initiative to establish a Code of Conduct for Transfer of Technology, a mechanism to ensure North-South technology transfer on equitable terms. but the Code negotiations were effectively stalled by the mid-1980s when the intellectual property rights became a subject matter of the Uruguay Round negotiations.

We also provided evidence to show that the TRIPS Agreement resulting from the Uruguay Round negotiations have substantially increased the developing country liabilities for using intellectual property. In other words, the user countries are being "forced" to meet the ever-increasing demands made by the owners of proprietary technologies. Based on the above-mentioned, we would argue that the real issue is the increasing inequities in the market for technology, which have resulted from present regime of intellectual property protection, which is excessively skewed in favour of the technology owners.

The relevant agenda should therefore be to comprehensively revise the regulatory framework on technology, which is essential for developing countries to gain access to the relevant technologies on terms that they can afford. Perpetuation and further strengthening of monopolies in the critical market for technology has deepened the cleavage between the developed and developing countries, an outcome that militates against the development consensus that lies at the heart of the post-War global economic governance.

6. New Approach to Flexibilities in the Context of Development Objectives

EU, along with the US, have strongly argued against retaining the existing system of special and differential treatment (S&DT) in favour of developing countries. S&DT was intended to give these countries sufficient flexibilities to adjust to the rigours of trade liberalisation, and to also adjust to the rules governing cross-border trade.

The EU has put forth the view that the distinction between developed and developing countries being currently made in the WTO does not reflect the reality as several developing countries have established themselves as top trading nations. According to the EU, several developing countries have grown impressively since the establishment of the WTO and have now reached a level of development that is better than those of the developed country members of the organization. As a result, these relatively developed among the developing countries have significant differences with the more typical developing countries. Therefore, the criteria for designating developing countries, which has always been on the basis of "self-declaration", needs to be re-worked, argues the EU.

Before we comment on the veracity of EU's position on S&DT, we must understand the reasons why

70. UNCTAD 1994; 196. See also Mazzoleni and Nelson 1998.

the S&DT was introduced in the multilateral trading system. This will provide us with a benchmark against which the present realities facing the developing countries can be measured.

6.1 Genesis of S&DT in the GATT

S&DT was not part of the GATT rule-book when the Agreement became operational in 1948; all contracting parties were considered equal, irrespective of their levels of development. This sentiment was reflected in the preamble of the Agreement, which stated that the objectives of the Agreement were to be realised "through reciprocal and mutually advantageous arrangements ...".[71]

From the early years of the GATT, it became obvious that the developing countries did not have the requisite capabilities to implement the trade liberalisation agenda put forth in the agreement. Therefore, since the mid-1950s, global trade rules have gradually adopted a distinct pro-development flavour through the grant of special concessions to the developing countries. This approach was triggered by the Review Working Party on Tariffs, Schedules and Customs Administration. During 1954-55, the Working Party proposed a new article on tariff negotiations which with two distinct features: (i) "the article would impose no new obligations on contracting parties, and (ii) "each contracting party would retain the right to decide whether or not to engage in negotiations or to participate in a tariff conference".[72]

The import of these proposed features became clear when the article was formally added to the GATT. Article XXVIII *bis,* while providing additional disciplines on tariff negotiations, mentioned that the negotiations would have to be conducted on a basis which affords adequate opportunity to take into account: (i) needs of individual contracting parties and individual industries; and (ii) needs of less-developed countries for a more flexible use of tariff protection to assist their economic development; (iii) the special needs of these countries to maintain tariffs for revenue purposes, and (iv) all other relevant circumstances, including the fiscal, developmental, strategic and other needs of the contracting parties concerned. Introduction of these conditions in the tariff negotiations meant that developing countries could maintain higher levels of import protection as compared to the developed countries.

Article XXVIII *bis* was truly pathbreaking; it altered one of the fundamental tenets of the GATT that then existed, namely, Contracting Parties would exchange concessions based on the principles of reciprocity.[73] A formal departure from the strict principles of reciprocity came a decade later, when in 1965, Part IV on Trade and Development was added to the GATT.

6.2 Part IV of the GATT

The Part IV of the GATT was the direct outcome of the Report of the Panel of Experts (better known as the Haberler Committee, after the Chairman of the Panel, Godfrey Haberler). One of the main conclusions of the Haberler Committee was as follows: "many of the primary producing countries are of the opinion that the rules and conventions which are at present applied to commercial

71. United Nations Economic and Social Council. 1947; 1.
72. GATT. 1955; paragraph # 38.
73. These principles were, in fact, originated in the Reciprocal Trade Agreements Act (RTAA) that the US Congress had enacted in 1934 to undo the damages caused by the trade war launched by the US, using the Smoot-Hawley Tariffs Act.

policy and international trade show a lack of balance unfavourable to their interest".[74] Part IV was contextualised by the Chairman of the Second Special Session of the Contracting Parties while presenting for approval the Protocol Introducing Part IV: The "new Part showed clearly that the promotion of the trade of less-developed countries and the provision of increased access for their products in world markets, were among the primary objectives of the Contracting Parties".[75]

Accordingly, Articles XXXVI, XXXVII and XXVIII, spelt out the mechanisms that could help developing countries increase their presence in the global markets, while, at the same time, improving their overall economic conditions. These included specific measures that the developed countries agreed to take for facilitating the implementation of Part IV. The more important among these measures were the following: (i) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to developing countries; (ii) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to developing countries; and (iii) acceptance of non-reciprocity as the underlying principle for reducing or removing tariffs.[76]

The basic framework for extending S&DT to developing countries was, thus, established within the GATT. The motivations behind the inclusion of Part IV were four-fold: (i) "rapid and sustained expansion of the export earnings" of developing countries; (ii) ensure that developing countries "secure a share in the growth in international trade commensurate with the needs of their economic development"; (iii) rapid expansion of the economies of developing countries facilitated by a diversification of the structure of their economies and the avoidance of an excessive dependence on the export of primary products; and (iv) increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to developing countries.[77]

6.3 Extensions of the S&DT

S&DT was fully extended to the developing countries in the covered agreements of the WTO. There were two main forms in which S&DT was made available. The first was to provide developing countries longer time periods for implementing the agreements, and the second was to impose relatively lesser degree of commitments under various covered agreements. For instance, in the Agreements on Agriculture and Trade Related Aspects of Intellectual Property Rights, developing countries were given longer periods for implementing their commitments. Further, in the AoA, developing countries are allowed to maintain higher levels of "trade distorting subsidies" as compared to the developed countries.

6.4 Implications of EU's Proposal to Limit the Beneficiaries of S&DT

The EU has proposed that the rules on S&DT need to be re-worked, but has not provided the details of its proposals. But, if the US' position on the same issue is considered, it would appear that the developed countries would like the S&DT withdrawn for the relatively advanced among the developing counties.

74. GATT. 1958; 13.
75. GATT. 1965; paragraph # 1.
76. GATT. 1994.
77. These objectives formed part of Article XXXVI of the GATT.

The implications of the EU's proposal to limit the beneficiaries of S&DT can be far reaching for most developing countries. A joint submission in the WTO by 10 developing countries summed up the importance of S&DT for these countries, given the range of development deficits that these countries face at the present juncture. The key messages from these countries were the following: (i) developing countries continue to suffer from multiple structural deficiencies because of which many countries continue to show high incidences of poverty and undernourishment; (ii) agriculture is the mainstay of most economies, but this sector continues to remain underdeveloped in these countries.[78] The submission by the developing countries also spoke of their existing inequities vis-à-vis developed countries, including the digital divide, which was manifest in terms of the vastly inadequate digital infrastructure between the two groups of countries.

The EU has been pointing out that several developing economies, especially the emerging economies, were growing at rapidly and that they were considerably more robust as compared to their developed country counterparts. These facts, the EU argues, are sufficient for withdrawing the benefits S&DT from these countries. In other words, the EU's position is that these countries are now capable of bridging the development gaps with the advanced economies by taking the full burden of commitments in the WTO.

These arguments by the EU that it has used to bolster it arguments against continuance of S&DT for most developing countries, are quite fallacious, in our view. These fallacies can be understood in two ways; first by looking at the a few indicators that can measure the development gaps between the developing and the developed countries, and secondly by assessing how the two sets of countries are placed vis-à-vis compliance of rules in some of the covered agreements in the WTO.

6.4.1 Development Gaps between the Developing and the Developed Countries

We will use several indicators to make the point that the development gaps between the developing and the developed remain unacceptably high even after three decades of market-based reforms implemented by the former set of countries.

We will first compare the average per capita GDP of developing countries with the corresponding figure for OECD countries (Table 12).

Table 12: Per Capita GDP of Developing Country Groups as a Percentage of Per Capita GDP of OECD Member Countries

Country Groups	1990	1995	2000	2005	2010	2015	2017
Low income	2	1	1	1	2	2	2
Lower middle income	3	2	2	3	5	6	6
Upper middle income	7	7	8	10	18	22	22

Source: World Development Indicators, World Bank

78. WTO. 2019b; paragraph 5.13.

The above table shows that gaps between the developing and developed countries have not declined by much. For instance, the average per capita of the lower middle-income countries, which also includes India, was just 6% of the average for OECD countries in 2017, rising from 3% in 1990.

Most developing countries have high degrees of poverty and inequality and therefore the income gaps shown in Table 12 which are based on average incomes, do not reflect the true extent of income inequalities between the developed and the developing countries. The disparities existing in developing countries can be understood better by considering the much-discussed estimates of multidimensional poverty produced by the Oxford Poverty and Human Development Initiative. From the most recent estimates provided by the Initiative, the top 10 countries in terms of multidimensional poverty are given in Table 13.

Table 13: Top 10 Countries Having the Largest Multidimensional Poverty

Countries	People Living in Multidimensional Poverty (in thousands)	Share in total Population (%)
India (2015-16)	3,64,225	27.5
Nigeria (2016-17)	99,166	52.0
Ethiopia (2016)	85,834	83.8
Pakistan (2012-13)	79,731	43.9
Bangladesh (2014)	65,460	41.1
China (2014)	55,825	4.0
DR Congo (2013-14)	53,417	72.5
Tanzania (2015-16)	30,915	55.6
Uganda (2016)	23,549	56.8
Myanmar (2015-16)	20,280	38.3

Source: Oxford Poverty and Human Development Initiative.2018, Global MPI Data Tables for 2018, Table 1.1

The extent of poverty in the developing world can be easily gauged from the above table. India may be the world fastest growing economy, but the country is also the home to the largest numbers suffering from multidimensional poverty.[79] The more disquieting aspect of poverty in the developing world is that it is declining at a painfully slow pace. It is, therefore, unlikely that countries facing the worst forms of poverty will be able to meet the targets set in the Goal 1 of the Sustainable Development Goals.

A third indicator that is useful to gauge the situation in developing countries is their ability to attract foreign direct investment (FDI). Table 14 compares the inflows in the developing countries with those in the developed countries.

79. The global multidimensional poverty index (MPI) comprises of three dimensions (health, education, and living standards) and has 10 indicators. Oxford Poverty and Human Development Initiative.2018; 5.

Table 14: FDI Inflows in Developing Country Groups as a Percentage of FDI Inflows in OECD Member Countries

Country Groups	1990	1995	2000	2005	2010	2015	2017
Low income	0.2	0.3	0.2	0.3	1.5	1.1	1.3
Lower middle income	2.5	7.1	0.9	4.2	9.4	9.6	11.1
Upper middle income	8.4	30.7	10.0	21.1	50.9	32.4	34.5

Source: World Development Indicators, World Bank

Over the past three decades, sweeping changes in the regulatory environment were brought by these countries, especially in their foreign investment regime. Almost all countries use very few restrictions on the entry of foreign investors, especially FDI. And yet the ability of developing countries to attract FDI is hardly comparable to those of the OECD member countries. This implies that while the former set of countries has taken significant policy reforms to attract foreign investors, including by giving the investors plethora of rights under the investor protection agreements, foreign investors have remained committed to investing in the OECD member countries, or in China (both mainland and in Hong Kong, China). With investments not forthcoming, and consequently growth prospects remaining stymied, the only option left for developing countries is to reduce the cost of adjustment to an open trading regime. This can only be achieved by extending S&DT, instead of withdrawing them.

7. Concluding Remarks

Over the past few years, demands for "reforming" the WTO have come, essentially through the initiatives taken by the erstwhile QUAD (the US, the EU, Japan and Canada). While two members of the QUAD, namely, the EU and Canada (along with a group of countries that includes the EU and Japan), have articulated their demands, the EU has made a substantive intervention spelling out the specific changes that it wishes to see in the WTO-rule book. These demands have effectively suppressed the demands made by the developing countries for making the WTO more development-oriented, which were partly taken note of in the Doha Development Agenda.

In this paper, we analysed the EU proposal on "WTO modernisation" by focusing on three key areas: the existing issue of subsidies and the two proposed areas of investment and "forced technology" transfer. Our approach in this paper was to first critically analyse EU's proposals in each of the three areas, and to then provide an alternative perspective which is in keeping with the imperatives of development and equity that are the core principles of the WTO.

We argued that the rules on subsidies laid down by the WTO need to be completely recast in several areas, most importantly in the area of agriculture where they are the most regressive. The subsidies regime provided by the Agreement on Agriculture is so structured that agricultural producers in developed countries can enjoy larger doses of subsidies as compared to their counterparts in the developing world. This implies that developed countries enjoy preferential treatment, a contradiction of WTO rules under which the developing countries should receive such treatment. Further, developed countries use their subsidies for keeping their producers in firm control over the global agricultural markets. In sharp contrast, most developing country subsidies are granted to meet the objectives of food security and for providing livelihood security to the small and marginal farmers, the largest segment of the farming community. Our suggestion is that the WTO rules of agricultural subsidies need to change; they must help in promoting

vital non-trade concerns like food security and rural livelihoods and to prevent large agri-business from using subsidies to dominate the global agricultural markets.

The EU's proposal to develop comprehensive investment rules within the framework of the WTO is yet another attempt to introduce one of the more controversial issues. Immediately after the WTO starting functioning, the EU had proposed inclusion of an investment agreement. The negotiations for such an agreement was facilitated by the Organization of Economic Cooperation and Development. However, OECD's Multilateral Agreement on Investment could not find support even within the rich-men's club. The WTO discussed the investment issue after being mandated by the Doha Ministerial Conference, and yet again, negotiations for an investment agreement were discontinued in the middle of the 2000s after developing countries argued against such an agreement.

We explored the reasons that contributed to the failure of the above-mentioned initiatives to introduce multilateral rules on investment. Existing investment laws that are part of the bilateral investment treaties that have been endorsed by most developing countries, are also been given a hard look given that developing countries have had to pay a high price for protecting investor rights. Cases of investor-state disputes have registered steep increase, especially over the past few years, and the compensation sought by the investors have been substantial.

We dealt in this paper the so-called "forced technology transfer", the term popularised by the Trump Administration that is now being supported by the EU. We have argued that EU's proposal to introduce new WTO rules in this area deals a serious blow to the possibilities of North-South technology transfer; one of the main elements of the post-War consensus on development and equity. In our analysis we tried to show that numerous attempts made by the developing countries to ensure that technology transfer becomes a reality, have not been successful. At the same time, the developed countries have successfully prevented transfer of technology to developing countries on reasonable terms; the evidence of which is the steep increase in the payments made by the developing countries for proprietary technologies, which are largely held by intellectual property owners in the developed countries.

The final issue we discussed in the paper was S&DT, which we consider as most critical for the successful implementation of the multilateral trade rules. Multilateral trading system was based on the principles of development and equity, and it was intended to create a framework of rules to enable the lesser developed countries to increase their shares in global markets. This view was shared even by the developed countries in the early years of the GATT. These countries agreed to re-define the rules of the institution and make them consistent with the needs of the developing countries. However, since the establishment of the WTO, the EU and the US have made systematic efforts to curb the development space that was once allowed. This is the essence of the EU proposals on limiting the beneficiaries of S&DT.

The key message from our discussion is that the functioning of the economic governance institutions in general, and the WTO in particular, need be closely scrutinised, for their core principles are now being challenged by the major economies. Developing countries need to engage effectively with their developed country partners to initiate reforms of multilateral institutions like the WTO, so that these institutions work towards narrowing the development deficits between countries.

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In June 2018, the Council of the European Union gave the European Commission a mandate "to pursue WTO modernisation in pursuit of the objectives of making the WTO more relevant and adaptive to a changing world, and strengthening the WTO's effectiveness". A few months later, a group of 13 countries, which also included the EU, unveiled a process for WTO reform for "developing 21st century trade rules at the WTO". Couched under these broad-brush objectives lay the intent to alter the focus of the WTO fundamentally, to make the multilateral trading system represented by the organisation respond essentially to the market forces. The reform proposals are making it clear that the openness of economies would be pitchforked as the ultimate objective of the multilateral trading system. This is a far cry from the way in which the multilateral trading system was envisioned. The founders of the GATT and the WTO were unequivocal in demanding that the multilateral trading system must be development-oriented, rather than market-oriented, and that as long as development deficits remain, as they do at the present juncture, trade must be the handmaiden of development.

This briefing paper provides an overview of proposed reforms of the WTO in the light of the objectives of the organization. It critically analyses the EU's proposal on WTO modernisation by focusing on three thematic areas: disciplining subsidies, comprehensive rules on investment, and the so-called "forced technology" transfer. After analyzing the ramifications of these proposed reforms, the paper provides an alternative perspective which is in keeping with the imperatives of development and equity. Developing countries need to engage effectively with their developed country partners to initiate reforms of multilateral institutions like the WTO, so that these institutions work towards narrowing the development deficits between countries, argues the paper.