

The WTO's Special Safeguard Mechanism: An Indian Perspective on the Present Paradox

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ABSTRACT: While liberalisation of trade and the progressive reduction of tariffs have led to significant welfare gains, these may be unfeasible for developing countries where a surge in imports could potentially be detrimental to realising the objective of food security through food self-sufficiency. Developing country members of the World Trade Organization (W.T.O.) have thus been proposing a 'special safeguard mechanism' (S.S.M.). This would permit them to impose measures in circumstances wherein there has been a surge or a decline in prices of agricultural imports, so as to negatively affect the livelihood and food security interests of these nations. These deliberations have gained momentum against the backdrop of the W.T.O.'s Agreement on Agriculture (A.o.A.), which came into force in the Uruguay Round negotiations. Consequently, the W.T.O.'s Sixth Ministerial Conference held in Hong Kong in 2005, endowed developing country members with the right to recourse to S.S.M.'s on account of import surges that could potentially expose its agricultural sector to increased shocks. Nonetheless, the lack of consensus as regards the precise modalities, particularly between the United States and India, resulted in a deadlock. Consequently, during the recent Nairobi Ministerial Conference in 2016, India vehemently opposed to proceeding with any further negotiations, and in particular, as regards the Agreement on Trade Facilitation (T.F.A.). India insisted that its internal mechanisms to support food security and public stockholding - being an issue of policy space should be left unhampered despite the present stipulations of the A.o.A., which pegs the same at 10% of the value of production. Accordingly, the mandate of S.S.Ms. assumed more significance in the Nairobi Ministerial Conference insofar as modalities on these would plausibly permit developing countries to increase tariffs on account of import surges on agricultural products - and thus safeguard their food security and livelihood concerns. S.S.Ms. negotiations have been particularly important for India in its endeavour to insulate its agricultural sector from import deluges that debilitate its livelihood and food security. Its success, however, depends on the ability of the W.T.O. Members to finally negotiate the modalities of this right, in the absence of which, it continues to remain a 'lip service'. This paper, therefore, attempts to explore India's motivation in digging its heels on the S.S.M. issue, appreciating that the country's stand at the W.T.O. appears to be of vital importance to developing country Members with similar anxieties as regards the protection of livelihood and food security. It delineates parameters in these respects which could be workable keeping in mind the agricultural scenario in India.

KEYWORDS: *World Trade Organization; Agreement on Agriculture; Special Safeguard Mechanism; India; Food Security; Public Stockholding; Targeted Public Distribution System; Minimum Price Support*

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1. INTRODUCTION

Trade policy cannot quintessentially be considered to be an appropriate instrument for the purpose of achieving food security, insofar as the former principally pertains to generating foreign exchange. Nonetheless, it has significant implications on the ability of a country to achieve food security, especially in instances where unilateral liberalisation of agriculture in countries like India have in the past led to humongous world price swings and import deluges, to the disadvantage of local farmers.¹ The World Health Organization (hereinafter W.H.O.) has defined 'food security' as the 'ability of all people, at all times to have physical and economic access to basic food that they require'.² There has since been an increasing trend on the part of nations to consider this duty towards its citizens, as intertwined with food self-sufficiency.³ Although the importation of food grains can assist in achieving food security, domestic production needs to be increased to operationalise self-sufficiency in this aspect. Thus, food security which is a sovereign right insofar as it permits each nation to maintain its capacity to produce food⁴ becomes contingent on livelihood security, which in turn connotes the ability of a person or household to be able to make a living, over time.

Even though the liberalization of trade and the successive reduction of tariffs have led to significant welfare gains, these may be unfeasible for developing countries, where a surge in imports⁵ could potentially be

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¹ See Ashok Gulati & Sudha Narayan, *Managing Import Competition when Developing Countries Liberalize Trade*, in REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES: KEY ISSUES FOR A PRO-DEVELOPEMENT OUTCOME OF THE DOHA ROUND NEGOTIATIONS 220, 221 (Alex F. McCalla & John Nash eds, 2007).

² World Health Organization, *Trade, Foreign Policy, Diplomacy and Health* (Feb. 23, 2016).

³ See OLIVIER DE SCHUTTER, *THE WORLD TRADE ORGANIZATION AND THE POST-GLOBAL FOOD CRISIS AGENDA PUTTING FOOD SECURITY FIRST IN THE INTERNATIONAL TRADE SYSTEM: ACTIVITY REPORT* (Nov. 2011), https://www.wto.org/english/news_e/news11_e/deschutter_2011_e.pdf. See also Food and Agriculture Organization (hereinafter F.A.O.), *Implications of Economic Policy for Food Security: A Training Manual*, <http://www.fao.org/docrep/004/x3936e/x3936e03.html> (last visited Feb. 26, 2017).

⁴ See *The Doha is Dead! Time for Food Sovereignty*, LA VIA CAMPESINA STATEMENT, INT'L PEASANT'S MOVEMENT (July 28, 2006), <https://viacampesina.org/en/the-doha-round-is-dead-time-for-food-sovereignty/>.

⁵ Note that there is no agreed definition of 'import surge', except that these are determined on the basis of the historical data of the country's imports, and the assessment of injury caused, thereof. It is hence, a sudden and short-lived deluge in imports. Art. 2.1 of the W.T.O.'s Agreement on Safeguards (A.S.G.), however, introduces criteria for the identification of import surges. See

detrimental to realising the objective of food security through food self-sufficiency. Developing country members of the World Trade Organization (hereinafter W.T.O.)⁶ have thus been proposing a 'special safeguard mechanism' (hereinafter S.S.M.), which would permit them to impose measures in circumstances wherein there has been a surge or a decline in prices of agricultural imports, insofar as such situations could potentially be detrimental to the livelihood and food security interests of these nations. These deliberations have notably been gaining momentum against the backdrop of the W.T.O.'s Agreement on Agriculture (hereinafter A.o.A.), which came into force under the Uruguay Round negotiations.⁷ Although the A.o.A. currently recognises the significance of food security and the subsequent right to impose safeguard measures in the event of a sudden deluge or a price decline caused by imports, there have been increasing concerns of it being tilted for developed countries.⁸ The inability of the Uruguay Round to adequately address these issues therefore became one of the prime agendas of the Doha Development Agenda (hereinafter D.D.A.), with the negotiations on S.S.Ms. indicating the negative effects of international trade on the agricultural sector of developing countries. However, these negotiations failed to reach their logical conclusion in the D.D.A., due to the lack of consensus between the developed and the developing world, and in particular between the United States on the one hand, and India and China, on the other.⁹ Since then, the matter of S.S.M.'s has continued to influence negotiations in the W.T.O. context to a great extent.

In the recent Nairobi Ministerial Conference, held in December 2015, India vehemently opposed to proceeding on any further negotiations, and in particular, the Agreement on Trade Facilitation (T.F.A.). India insisted that its internal mechanisms to support food security and public stockholding – being

Agreement of Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 154 [A.S.G.]. See generally Manitra A. Rakotoarisoa, Ramesh P. Sharma and David Hallam (Eds), *Agricultural import surges in developing countries: Analytical framework and insights from case studies, chapter 2: Identification of import surges*, F.A.O. Job N. I1952, Rome 2011.

⁶ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

⁷ See Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1867 U.N.T.S. 410 [hereinafter A.o.A.].

⁸ A.o.A. art. 5.

⁹ See Int'l Centre for Trade and Sustainable Development [ICTSD], *G-7 Talks on Special Safeguard Mechanism Inconclusive as Blame Game Heats Up*, Bridges Daily Update No. 9 (29 Jul. 2008), <http://www.ictsd.org/bridges-news/bridges/news/bridges-daily-update-9-g-7-talks-on-special-safeguard-mechanism>.

an issue of policy space should be left unhampered irrespective of the present stipulations of the A.o.A. which pegs the same at 10% of the value of production. Accordingly, the mandate of S.S.Ms. became even more significant in the Nairobi Ministerial Conference insofar as modalities on these would plausibly permit developing countries to increase tariffs on account of import surges on agricultural products – and thus safeguard their food security and livelihood concerns.

This paper, therefore, attempts to explore India's motivation in digging its heels on the S.S.M. issue and discusses whether it is indeed time to provide teeth to this right. India's stand at the W.T.O. appears to be of vital importance to developing country Members with similar anxieties as to the protection of food security. The second part of this paper accordingly analyses the present status of S.S.M. negotiations under the aegis of the W.T.O. The third part of the paper analyses the present policies in the domestic realm in India to safeguard its food security interests. Against this backdrop, it further explores the plausible reasons as regards the country's interest and deep involvement with S.S.M. negotiations in the W.T.O. Appreciating that the deadlock in the context of S.S.M. negotiations primarily pertains to the delineation of precise modalities, *viz.*, the products that would be covered, the level beyond which the tariffs can be raised in the event of a surge and the remedies applicable, the author accordingly accentuates the factors that must be taken into consideration whilst operationalizing this right. The fourth part provides the concluding remarks.

2. SPECIAL SAFEGUARD MECHANISMS AND THE WTO

Negotiations on an S.S.M. have mainly reflected the imbalances between developed and developing country Members created by the current trade regime, which have to a large extent been felt in the agricultural sector. The concept of S.S.Ms. first appeared in the context of the D.D.A., albeit in a very narrow sense. Consequently, Article 20 of the A.o.A. underscored the significance of “substantial progressive reductions in support and protection”

while at the same time, taking into account, inter alia, non-trade concerns and the need to provide special and differential (hereinafter S&D) treatment to developing countries. Furthermore, the D.D.A. also stressed 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 development¹⁰

Interestingly, even while the D.D.A. made no express mention of establishing an S.S.M. for developing countries, it was perceived as a starting point for formal negotiations in this regard.¹¹ Besides, even the W.T.O.'s 'Development Box' (hereinafter D.B.), contained proposals by developing countries as regards the urgent need for protection from the detrimental impact of trade liberalisation on their livelihood and food security concerns.¹² In particular, the D.B. operationalized the S&D treatment underscored in the D.D.A.,¹³ and built upon the three pillars of the A.o.A., viz., market access, domestic support and export competition.

Moreover, the issue of S.S.Ms. had been gaining increasing importance because the existing rules stipulated under the Uruguay Round's A.o.A.

¹⁰ World Trade Organization, Doha Ministerial Declaration of 20 November 2001, WTO Doc. WT/MIN(01)/DEC/1 (2001).

¹¹ Post the Doha Round held in 2000, it was the Harbinson text (W.T.O. Committee on Agriculture, TN/AG/6 (Dec. 18, 2002); and later, by means of its two drafts: W.T.O. Committee on Agriculture, TN/AG/W/1 (February 17, 2003); and W.T.O. Committee on Agriculture, TN/AG/W/1/Rev. 1 (March 18, 2003)), which first postulated the establishment of an S.S.M. For this purpose, as part of its draft modalities, it suggested that an S.S.M. may be created for Special Products (S.Ps.), which would be based on the provisions of Article 5, and applicable to all products, which have the symbol 'S.S.M.' designated next to them. This right would thus apply to developing countries for them to effectively take into account their development needs, such as food security. Thereafter, the Draft Cancun Ministerial Text (also known as the Pérez del Castillo Text) (W.T.O. Committee on Agriculture, JOB(03)/150 (August 24, 2003)), the Revised Draft Cancun Ministerial Text (also known as the Derbex Text) (W.T.O. Committee on Agriculture, JOB(03)/150/Rev.2 (Sept. 13, 2003)), and the July Framework Agreement (W.T.O. Committee on Agriculture, WT/L/589 (August 1, 2004)) specified that an S.S.M. would be established for use by developing countries. See P. PAL & D. WADHWA, *An Analysis of the Special Safeguard Mechanisms in the Doha Round of Negotiations: A Proposed Price-Trigger based Safeguard Mechanism* (Indian Council for Research in Int'l Econ. Relations, Working Paper No. 189, 2006), 33.

¹² See W.T.O. Committee on Agriculture, G/AG/NG/W/13 (June 23, 2000) presented by Cuba, Dominican Rep, El Salvador, Honduras, Kenya, Nigeria, Pakistan, Sri Lanka and Zimbabwe (23rd June 2000). Cf, World Commission on the Social Dimension of Globalization, *Food Security Box in the WTO*, (which imbibes upon the proposal made by India in this regard).

¹³ See *supra* note 11.

permitted only a limited number of W.T.O. members to adopt measures to tackle import surges, in the name of 'special agricultural safeguards' (hereinafter S.S.G.). Article 5 of the A.o.A., which conferred this right¹⁴ was applicable to those countries that agreed to undertake 'tariffication' by converting existing non-tariff barriers in the form of *quota* into 'bound' tariffs, at the time of its negotiation.¹⁵ The remaining W.T.O. members who had instead been maintaining significant gaps between their bound and applied tariff rates were not beneficiaries of the S.S.G. provision under Article 5 of the A.o.A.¹⁶ As a result, Members whose agricultural products benefited from the S.S.G. provision were permitted to temporarily raise the level of existing tariffs on those (agricultural) products that underwent tariffication if there was a surge of imports. In such cases, eligible Members would not need to prove that these circumstances were causing an injury to the covered products. On the other hand, Members who maintained bound tariffs on their agricultural products were instead only permitted to so raise their tariffs within the precepts of either W.T.O.'s Agreement on Safeguards (hereinafter A.S.G.),¹⁷ the Agreement on Subsidies and Countervailing Measures (hereinafter S.C.M.A.),¹⁸ or the Anti-Dumping Agreement (hereinafter A.D.A.)¹⁹; thereby having to prove that agricultural imports have been causing an injury to the domestic market.

Appreciating that the principal beneficiaries of the S.S.G. were developed countries, developing countries began to demand a similar right to insulate their agricultural sector from price volatility in international commodity

¹⁴ Art. 5 of the A.o.A. confers the right of S.S.G., by which, countries eligible to this right may increase their tariffs, beyond the bound rates, in the event of a surge in the volume of imports above a specified threshold, or a decline in the price of these below a reference price. Products, which are eligible for this tariff hike, shall have the symbol 'S.S.G.' designated next to them.

¹⁵ *Id.* art. 4.2.

¹⁶ See W.T.O., *Market Access: Special Agricultural Safeguards*, https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd11_ssg_e.htm (last visited Feb. 20, 2017), (for a list of countries and the number of products in each of these countries, that were eligible to apply an S.S.G.).

¹⁷ Arts. 2.1 and 4.2(a) of the A.S.G.

¹⁸ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 [S.C.M.A.]. In particular, S.C.M.A. art. 17 permits the imposition of a countervailing duty to offset the amount of subsidisation.

¹⁹ Agreement on Implementation of Article VI. of The General Agreement On Tariffs And Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 279 [A.D.A.]. Accordingly, Members are permitted to impose an anti-dumping duty when the normal value of the imported product exceeds the price of the 'like' domestic product, within the precepts of (most notably) Arts. 2, 3 and 9.

prices.²⁰ Consequently, the W.T.O.'s Sixth Ministerial Conference held in Hong Kong in 2005 defined the concept of S.S.M. for the purpose of negotiations as “A tool that will allow developing countries to raise tariffs temporarily, to deal with import surges or price falls.”²¹

In general, import surges signify the existence of two types of situations, which may expose domestic agricultural sectors to greater shocks, as a result of increased openness to trade, *viz.*, i) a significant increase in the volume of imports from one year to another (volume-based); or ii) a depression in the domestic market price, which may be a result of increased connectivity to global market prices (price-based).²² According to this right, developing countries would be permitted to raise their existing tariffs on the affected agricultural products, without being required to prove that either volume-based or price-based import surge was causing an injury to their domestic industry. This special treatment would be due to the administrative and financial constraints that these countries encounter.

Several factors have contributed to import surges. Some of these have been the result of situations persisting in the local agricultural sector of the importing country, itself.²³ For instance, volatility in the climatic conditions has caused the world market prices to fluctuate frequently. At the same time, production shortfalls as a result of less-advanced methods in the farming sector, particularly in developing countries, has also aggravated the predicament of import surges – which have occurred to cater to the domestic demands. However, an imposition of an S.S.M. measure in such cases may not always be justified.²⁴ Domestic agricultural policies in third countries

²⁰ See W.T.O. Secretariat background paper, *Special Agricultural Safeguard*, G/AG/NG/S/9/Rev.119 2 (Feb. 19, 2002), (for the list of countries which adopted a price or volume-trigger based S.S.G. during 1995-2001). According to this list, except Costa Rica, Slovak Republic and Korea, almost all other S.S.G. users were developed countries.

²¹ WTO, *Glossary: Special Safeguard Mechanism*, https://www.wto.org/english/thewto_e/glossary_e/ssm_e.htm (last updated Feb. 15, 2017).

²² See Jamie Morrison & George Mermigkas, *Import Surges and the Special Safeguard Mechanism in a Changing Global Market Context*, in *TACKLING AGRICULTURE IN THE POST-BALI CONTEXT – A COLLECTION OF SHORT ESSAYS*, 103, 104 <http://www.ictsd.org/downloads/2014/07/part2-2.pdf>. Cf, M. DE NIGRIS, *Statistical analysis of import surges and production trends* (F.A.O. Imp. Surge, Working Paper No. 2, 2005), (for a discussion on the problems of the quantification of import surges).

²³ See F.A.O. Trade and Market Division, *Agricultural Import Surges in Developing Countries*, Part 1 Chapter 3 (Potential Sources of Import Surges), <http://www.fao.org/docrep/014/i1952e/i1952e03.pdf> (2011) (for a more detailed discussion of the causal factors of import surges).

²⁴ See Alberto Valdés & William Foster, *The New SSM: A Price Floor Mechanism for Developing Countries*,

(exogenous factors) have been another causal factor in the past, resulting in import surges, by contributing to the volatility of international commodity prices. The prevalence of export subsidies, and particularly, in the E.U. and the United States, have been reported to be one of the most impactful exogenous factors insofar as import surges are concerned.²⁵ Even though export subsidies in agricultural products were not prohibited until the negotiation of the A.o.A., the heavy use of these, particularly by the E.U. via its Common Agricultural Policy (C.A.P.),²⁶ led to import surpluses in many countries. Subsequently, E.U.'s conversion of prohibited subsidies to non-prohibited ones (namely subsidy shifting from red box to the green box) continued to contribute to price depression of agricultural products and the consequent displacement of exporters of these products.²⁷ Although such subsidies may not substantially depress world market prices, they do have an adverse impact on the importing market, insofar as they increase the global market share of such products, thereby creating a surge-like situation.²⁸

In particular, developing countries, represented by the G-33 group,²⁹ have been stressing upon the urgent need for W.T.O. rules to shield them from the detrimental impacts of such import surges and the consequent price volatility in the international commodity market.³⁰ Arguments for an S.S.M.

INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (hereinafter I.C.T.S.D.), <https://www.ictsd.org/downloads/2008/08/avaladesfinal.pdf> (last updated Feb. 19, 2016).

²⁵ See FAO, *Potential Sources of Import Surges*, 21-29, , *supra* note 23, at 23-27. See also HOEKMAN & KOSTECKI, *supra* note 1, at 295.

²⁶ See H. GRETHE & S. NOLTE, *Agricultural Import Surges in Developing Countries: Exogenous Factors in their Emergence* (F.A.O. Imp. Surge, Working Paper No. 5, 2005), https://www.agrar.hu-berlin.de/de/institut/departments/daoe/ihe/Veroeff/Import_Surges_Grethe_Nolte.pdf/view.

²⁷ See Andrew Dorward & Jamie Morrison, *Heroes, Villains and Victims: Agricultural Subsidies and Their Impact on Food Security and Poverty Reduction*, in HANDBOOK ON THE GLOBALISATION OF AGRICULTURE (Draft Chapter for Guy Robinson, D Schmallengger & John Cleary eds).

²⁸ See Harald Grethe & Stephan Nolte, *Agricultural Import Surges in Developing Countries: How do they Arise?*, DEUTSCHER TROPENTAG CONFERENCE ON INTERNATIONAL AGRICULTURAL RESEARCH FOR DEVELOPMENT 4 (Oct. 2005), <http://www.tropentag.de/2005/abstracts/full/402.pdf>.

²⁹ The G-33 is a coalition of developing countries, urging for flexibility as regards limited market opening (liberalisation) in agriculture. A list of G-33 countries is available on: W.T.O., https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#GRP017 (last visited Feb. 19, 2017).

³⁰ See generally, Special Session of the Committee on Agriculture, *Refocusing Discussions on The Special Safeguard Mechanism (S.S.M.): Outstanding Issues and Concerns On its Design and Structure Submission by the G-33*, WTO Doc. TN/AG/GEN/30 (Jan. 28, 2010); accord Bridges Weekly, *G-33 Outlines Special Safeguard Mechanism For Developing Countries*, 9 BRIDGES Nov. 2, 2005, at 1; accord TRALAC NEWS, *G-33 Ministerial Communiqué: Nairobi, December 2015*, TRALAC.COM (Feb. 15, 2016), <http://www.tralac.org/news/article/8704-g-33-ministerial-communique-nairobi-december-2015.html> ; and Special Session of the Committee on Agriculture, *S.S.M. and Permanent Solution on*

have moreover been backed by justifications that while large sections of the population in these countries engage in the agricultural sector, price volatility in international commodity prices also increases the vulnerability of consumers who tend to spend more than 75% of their income on food.³¹

The occurrence of a surge, either by an increase in volume or decline in prices of the imported agricultural product, could then have grave consequences on these countries, which endeavour to achieve their food security goals and protect the livelihood concerns of their farmers.

In addition, the Hong Kong Ministerial Decision additionally permitted developing countries to 'self-designate' the number of tariff lines as 'Special Products' (hereinafter S.Ps.), on the basis of the criteria of that set forth in the July Framework Agreement,³² viz. food security, livelihood security and rural development concerns.³³ However, in the absence of a precise definition of the concept of S.Ps., these have been understood according to the context within which they appear.³⁴ S.S.Ms. and S.Ps. would consequently be defensive mechanisms, constituting an integral part of the modalities and the outcome of negotiations in agriculture.³⁵

Given the absence of precise parameters within which the right to impose an S.S.M. would operate, the W.T.O.'s draft modalities of 10th July 2008 subsequently attempted to provide some clarifications. Apropos, it delineated that in the case of volume-based S.S.M., these would be determined by a moving average of the preceding three years (referred to as the base).³⁶ The tariffs would then be permitted to increase above their current level, depending

Public Stockholding for Food Security Purposes for Balanced Nairobi Outcomes: Submission by the G-33, WTO Doc. TN/AG/GEN/40 (Dec. 11, 2015).

³¹ See Thomas W. Hertel, Will Martin, & Amanda M. Leister, *Potential Implications of a Special Safeguard Mechanism in the World Trade Organization: the Case of Wheat*, THE WORLD BANK ECON. REV. ADVANCE ACCESS 2

See also, Andrew Dorward & Jamie Morrison, *supra* note 27, for the 'impact of developed country subsidies on development, food security, and poverty in developing countries.'

³² See, World Trade Organisation, Annex A of the General Council Decision, July Agreement Framework, WTO Doc. WT/GC/W/535, para. 41 (2004).

³³ See World Trade Organization, Hong Kong Ministerial Declaration, WTO Doc. WT/MIN(05)/DEC, (2005).

³⁴ i.e. the products that are vital for developing countries to protect their food security, livelihood security and rural development concerns.

³⁵ W.T.O., Hong Kong Ministerial Declaration, *supra* note 33.

³⁶ See World Trade Organisation, Committee on Agriculture Special Session, Revised Draft Modalities for Agriculture, WTO Doc. TN/AG/W/4/Rev.3, para. 124 (2008).

on the size of the trigger (i.e. the percentage of the base).³⁷ A trigger of 110–115% would accordingly permit a hike in tariffs of either 25% or 25 percentage points. A trigger of 115–135% would allow an increase of 40% or 40 percentage points, and lastly, a trigger of more than 135% of the base would permit an increase in the tariff by 50% or 50 percentage points.³⁸ As regards price-based S.S.Ms., while these would be determined from the monthly average of the imports (calculated by the c.i.f. import price) over the preceding three years, and which would be triggered if the price of a shipment fell below 85% of the reference price.³⁹ Consequently, price-based S.S.Ms. would be evaluated on a shipment-to-shipment basis, permitting the tariff to increase to a level of 85% of the difference between the price of the individual shipment and the trigger price.⁴⁰

While the 10th July Decision of 2008 attempted to delineate the precise modalities within which this right would be operative, the lack of consensus regarding the level beyond which the tariffs could be raised above the pre-Doha Round or the Uruguay Round bound rate, created a deadlock. For most, the frictions caused by India and the US, could be blamed for the major spur that resulted in this logjam.⁴¹ Thus, India demanded that the *trigger* for volume-based S.S.Ms. should be small enough and *the increase in tariff* to offset such surges such be high for it to be able to successfully take into account its livelihood concerns. On the contrary, the United States urged for higher trigger levels together with a lower increase in tariffs to potentially decrease the scope for a plausible misuse of the mechanism.⁴² In an attempt to resolve this deadlock, the 'Lamy Compromise' proposed that in the event a developing country (Member)⁴³ experienced a volume-based surge by 40% of the base, it would be permitted to increase its current bindings on the affected product by

³⁷ *Id.* para. 124.

³⁸ *Id.* para. 124 a-c.

³⁹ *Id.* paras. 126, 127 and 129.

⁴⁰ *Id.* para. 127. *See also*, para. 137, which provides that developing country Members should not usually take recourse to an S.S.M. where the volume of the imports of the concerned products is either manifestly declining, or manifestly negligible.

⁴¹ *See* Amrita Narlikar, *Reforming Institutions, Unreformed India?*, in *RISING STATES, RISING INSTITUTIONS: CHALLENGES FOR GLOBAL GOVERNANCE* 105, 117 (Alan S. Alexandroff & Andrew F. Cooper eds.).

⁴² *See* HOEKMAN & KOSTECKI, *supra* note 1, at 292.

⁴³ Note that the 'Compromise' would only apply to developing country Members and not to L.D.Cs. or S.V.Cs. *See* discussion above.

15% or 15 percentage points.⁴⁴ However, this remedy would only be available to a maximum of 2.5% of the tariff lines, insofar as it would permit the tariffs to be increased beyond the pre-Doha bound rate.⁴⁵ The G-33 rejected the 'Compromise' on two grounds. First, they should instead be allowed to increase the tariffs by 30% or 30 percentage points above the pre-Doha limit if the volume surge was more than 15% more than that of the previous three years. Second, such an increase should instead apply to 7% of the tariff lines.⁴⁶ In particular, India stressed the need for a higher remedy level *viz.*, the increase in the current bound rates by 30% or 30 percentage points, as against that offered by the 'Lamy Compromise' to safeguard the sensitivities in its agricultural sector. Even though India had been maintaining a huge difference between its applied and bound tariffs in most agricultural products, it insisted upon this higher remedy to protect sensitive products, such as rice, where the bound and the applied tariffs are the same because it constituted the principal source of livelihood for its farmers. The failure to resolve these issues consequently resulted in a deadlock of the entire D.D.A.⁴⁷

In the recent Nairobi Ministerial Conference, on December 2015, India insisted upon the fulfilment of the promise offered by the Hong Kong Ministerial Declaration, *viz.*, the right to developing countries to have recourse to an S.S.M. Moreover, the replacement of the 'single undertaking' method by the 'piecemeal' approach introduced by the Director-General, Roberto Azevêdo, further obligated that the outstanding issues of the D.D.A. be agreed.⁴⁸

⁴⁴ *Id.* para. 134-136. Cf, Special Session of the Committee on Agriculture, *Revised Draft Modalities for Agriculture*, WTO Doc. TN/AG/W/7 (Dec. 6, 2008).

⁴⁵ *Id.*

⁴⁶ See Int'l Centre for Trade and Sustainable Development [I.C.T.S.D.], *Agricultural Safeguard Controversy Triggers Breakdown in Doha Round Talks*, BRIDGES WEEKLY, Vol. 12 (Aug. 7, 2008), <http://www.ictsd.org/bridges-news/bridges/news/agricultural-safeguard-controversy-triggers-breakdown-in-doha-round-talks> (last visited Mar. 1, 2017).

⁴⁷ See HOEKMAN & KOSTECKI, *supra* note 1, at 293. The authors underscore five reasons that contributed to the deadlock in the Doha Rounds. First is the issue of coverage, *viz.* the goods that should be covered - all or only a subset of agricultural products. The second one being concerning the type of triggers and the levels that may be used. The third being whether pre-Doha bound rates may be exceeded (this was mainly objected by the United States). The fourth being that, in the event, a country takes recourse to an S.S.M., it must be subjected to some form of 'injury' test, *viz.*, that the import surges were detrimental to the livelihood of its farmers. Finally, S.S.Ms. should also be applicable for a limited time, as in the case of S.S.G.

⁴⁸ See William A. Kerr, *The WTO and Food Aid: Food Security and Surplus Disposal in the 2015 Ministerial Decision on Export Competition*, 17 THE ESTEY J. INT'L L. AND TRADE POL'Y 1, 2 (2016).

Appreciating that the frictions caused due to the disagreement as to the modalities on an S.S.M. prompted the major split between the developing and developing country Members, consequently made it important to reach an agreement on this contentious issue. According to these factors, the Nairobi Ministerial Declaration adopted its decision on an S.S.M. for the purpose of which it provides, inter alia, that “In the context of addressing outstanding agricultural issues . . . the developing country Members will have the right to have recourse to a special safeguard (SSM) as envisaged under paragraph 7 of the Hong Kong Ministerial Declaration”⁴⁹

Despite the fact that the inclusion of ‘S.S.Ms.’ into the Nairobi Ministerial Agenda can be inferred to be mainly due to Indian efforts, there seems to be no progressive outcome beyond that which was offered in the Hong Kong Ministerial Decision. The issue of S.S.Ms. has thus proved to be merely a ‘lip service’ for reasons that even the Nairobi Ministerial Decision only reinforced developing countries’ right to this mechanism, leaving the responsibility to further negotiate in this regard, with its Committee on Agriculture in Special Session (C.o.A.S.S.).⁵⁰

Even though the G-33 group of countries has been pushing for an S.S.M., one can say that India has been the most pro-active in articulating its concerns as to the efficacy of the W.T.O.’s current trade regime to adequately respect its food security concerns. Against this backdrop, the next section analyses India’s stake in the S.S.M. negotiations since its inception to explore whether and how an S.S.M. can potentially contribute to food security in India.

3. EVALUATING INDIA’S STAKE IN SSM NEGOTIATIONS

In the Indian context, while it has been justifying its need for an S.S.M. as a means of operationalizing its food and livelihood security concerns, research accentuates that the country has indeed been experiencing the greatest amount

⁴⁹ World Trade Organization, Ministerial Decision of 19 Dec 2015, Special Safeguard Mechanism for Developing Country Members, WT/MIN(15)/43 WT/L/978 (2015).

⁵⁰ *Id.* paras. 2-3.

of import surges, on all food commodities.⁵¹ This, therefore, mandates a “closer investigation of the domestic and national factors responsible for these occurrences.”⁵²

India's involvement as regards a viable S.S.M. has much to do with the detrimental impact of trade liberalisation on its domestic economy. Thus, India's concerns revolve around achieving food security and rural livelihood, for the purpose of which, it considers it necessary to insulate its agricultural sector from import dumping.⁵³

In the past, India's experience with reducing tariffs in the agricultural sector has been quite grim. For instance, in the case of edible oils, while India progressively slashed its import duties on these from 65 to 15% in the period between 1994 to 1999, it experienced a surge in the import of these products, reaching five million and four million tonnes respectively, in the years 1999 and 2000.⁵⁴ Thereby, while such import deluges may potentially contribute to declining prices to the benefit of consumers, its debilitating impact on food self-sufficiency objectives has, in turn, prompted policy-makers to hike tariffs to achieve these mandates.⁵⁵ Moreover, appreciating that the agricultural sector is the most vulnerable sector in India, constituting about 56% of the total employment,⁵⁶ itself explains the country's defensive interests in this regard – namely to protect the livelihood concerns of the people reliant on this sector. However, the nebulousness as regards the manner in which this ‘right’ has been delineated, has amplified the controversy regarding the nature of products that should benefit from this provision. In this regard, even though the Nairobi Ministerial Decision underscores India's triumph in ascertaining its rights in the W.T.O., it continues to remain ambiguous as to the basic

⁵¹ See BRIEF FACTS ON IMPORT SURGES, *What Is Their Frequency and Which Are the Countries and Commodities Most Affected* (F.A.O. Imp. Surge, Working Paper No. 2, 2006), which identifies an import surge by a 30% deviation from a three-year moving average. On this basis, it finds India to have experienced import surges in between 100-130 times, on all food commodities, in the period between 1982-2003.

⁵² *Id.*

⁵³ Amrita Narlikar, *supra* note 41, at 116-119.

⁵⁴ The reduction of tariffs also resulted in deluges in the case of palm olein or palm oil, soya bean oil, rapeseed oil and sunflower oil. See *supra* note 41, at 229.

⁵⁵ Cf, Bipul Chatterjee & Sophia Murphy, *Trade and Food Security: Strengthening the Global Trade and Investment System for Sustainable Development*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT AND WORLD ECONOMIC FORUM PUBLICATIONS 5, (Dec. 2013).

⁵⁶ See, Trade Policy Review Body, *Report by the Secretariat, Trade Policy Review: India*, WTO Doc. WT/TPR/S/313/Rev.1 98 (Sept. 14, 2015).

parameters concerning the framework within which, this right must be effected. Working out any form of modalities as regards the price and the trigger would correspondingly mandate an a priori analysis of the 'use' of an S.S.M. The delineation of the parameters as regards the product coverage of an S.S.M. involves an analysis of complex factors. Nevertheless, identifying the immediate beneficiaries to this right forms an essential basis, and could thus be the first step in resolving controversies in this regard.

India's interest in the S.S.M. negotiations primarily concerns the provision of domestic support to its agricultural sector for which, it has been adopting certain internal measures that endeavour to ensure the stability of the supply of food and consequently income, for the population that relies on agriculture as a means of livelihood. In this context, India's main contentions have been that the absence of an S.S.M. to actually tackle import surges would render its domestic support schemes futile.

Internal measures for the purpose of agricultural growth and food self-sufficiency in India are two-fold. Thus, apart from providing income support for farmers, they also endeavour to provide adequate quantities of food to the poor at affordable prices. Towards this end, the country's food security initiatives presently comprise of a complex range of measures,⁵⁷ and are explained by the fact that despite a significant percentage of the population is engaged in the agricultural sector, its contribution towards G.D.P. has been merely 20%.⁵⁸ However, central to its food security initiative,⁵⁹ have been its minimum support price (hereinafter M.S.P.) scheme coupled with its targeted public food distribution scheme (hereinafter T.P.D.S.).

According to the stipulations contained in Article 6 read along with Annex 3.8 of the A.o.A., India's M.S.P. scheme has been classified as an 'Amber Box Measure', with the caveat that government assistance provided in this regard does not exceed 10% – which is the maximum limit for developing countries.⁶⁰

⁵⁷ *Id.* at 100–01, which provides a list of domestic support measures notified by India.

⁵⁸ See Trade Policy Review Body, *Trade Policy Review: Report by India*, WTO Doc. WT/TPR/G/313 9–10 (Apr. 28, 2015).

⁵⁹ Refer to W.T.O. Report by the Secretariat, *Trade Policy Review: India*, *supra* note 56, for other domestic support measures for the purpose of food security.

⁶⁰ For a detailed discussion on India's food security initiatives, refer to the author's publication, Saloni Khanderia-Yadav, *Ramifications of the Bali Ministerial Conference on Food Security and Public Distribution Schemes: Is India Skating on Thin Ice?* 11 MANCHESTER J. INT'L ECON. L. 201, 207–10 (2014).

Accordingly, this 10% is calculated by the difference between the M.S.P. and an external reference price (presently being the rates of the given commodity during the base year, viz. 1986–88), which is then multiplied by the total quantity of agricultural produce qualified to receive such governmental assistance. The result of this formula is referred to as the 'Aggregate Measure of Support' (hereinafter A.M.S.). A.M.S. is, therefore, a calculation of the total trade-distorting support categories (amber-box subsidies). The external reference price for India has been fixed at Rs. 3220/-, Rs. 3540/-, and Rs. 156.16 for rice, wheat and sugar, respectively. That being said, the M.S.P. scheme is presently extended to twenty-five major commodities,⁶¹ and is aimed to protect farmers growing staple food crops, from volatilities in the market conditions.⁶² It is consequently complemented with the Government's price support scheme (P.S.S.), which authorises the government-designated agencies to purchase these commodities (i.e., the staple crops), at M.S.P., if the prices fall below the M.S.P.⁶³

Interestingly, even though India has been able to produce enough quantities of agricultural products, like crops, to be able to export these, it continues to face high levels of malnutrition.⁶⁴ In order to address this issue, the National Food Security Act, 2013, (hereinafter N.F.S.A.) aims to ensure food security by means of a public distribution system. This public distribution system is a 'Green box subsidy' to the extent that it relates to the Government's purchase of M.S.P. products and the stockholding of these,⁶⁵ for

⁶¹ See Directorate of Economics and Statistics, (for the list of the twenty-five commodities for 2010 – 2015).

⁶² Article 6.2 of the A.o.A. read along with Annex 3.8 and 3.9, which recognises the significance of food. See WTO, Revised Draft Modalities for Agriculture, *supra* note 36; and DTB Associates LLP, *Agricultural Subsidies in Key Developing Countries: November 2014 Update*, 30–36 <http://dtbassociates.com/docs/DomesticSupportStudy11-2014.pdf>.

Cf. Shri Anand Sharma, Union Minister of Commerce and Indus., Address at the Plenary Session of the 9th Ministerial Conference of the W.T.O. at Bali (Dec. 4, 2013), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=101013> (updated Mar. 31, 2014); World Trade Organization, Bali Ministerial Decision on Public Stockholding for Food Security Purposes, WTO Doc. WT/MIN(13)/38 (Nov. 27, 2013); World Trade Organization, Nairobi Ministerial Decision on Public Stockholding for Food Security Purposes, WTO Doc. WT/MIN(14)/44 (Dec. 19, 2015); and Khanderia-Yadav, *supra* note 60.

⁶³ See *supra* note 56, for the prevailing M.S.P. rates on the 25 commodities.

⁶⁴ See Chatterjee & Murphy, *supra* note 55, at 238, which states that although the government of India holds large stocks of foods (sixty million tonnes as of 2002), millions of Indians continue to suffer from poverty and malnutrition.

⁶⁵ Cf. Annex 2.3 of the A.o.A. See generally, F.A.O., I.F.A.D., I.M.F., O.E.C.D., U.N.C.T.A.D., W.T.F., World Bank, W.T.O., I.F.P.R.I. and the U.N. H.L.T.F., *Policy Report, Price Volatility in Food and Agricultural Markets: Policy Responses*, at 28–30 (June 2, 2011), (for a discussion on national buffer

subsequent sales to 'targeted' low-income consumers. The Planning Commission of India consequently determines the population in urban and rural areas that are eligible for receiving food grains (wheat, rice or coarse grains) at subsidised rates. Accordingly, the N.F.S.A. entitles this 'targeted' population to receive five kg of the grains as mentioned above at Rs. 2, 3, and 1 per kg, respectively. The T.P.D.S., however, entitles the eligible households to receive fifteen kg of each of these grains, per month. In this context, commodities covered by the M.S.P. scheme are those that are most susceptible to market conditions, while N.F.S.A. includes products that constitute a staple diet, for the purpose of ensuring food security.

3.1. WORKING OUT THE COMPLEMENTARITIES

3.1.1. THE PRODUCT COVERAGE

Appreciating that the S.S.M. intends to secure the livelihood concerns of local farmers from volume *and* price-based import surges, it consequently renders it significant to *at least* extend the S.S.M. provision to those twenty-five agricultural commodities, which are benefitting from the M.S.P. scheme in India. These justifications stem from the fact that these products have already been recognised at the domestic level as those, which are concomitant in providing income support and ensuring stability in food supply by being highly susceptible to market volatilities. Likewise, appreciating that the right to recourse to an S.S.M. derives its normative value in W.T.O. negotiations from, inter alia, the 'D.B.' – which entails to improve domestic food production and safeguard livelihood concerns – ⁶⁶ itself supports the view that the S.S.M. provision must be extended to commodities covered under the M.S.P. scheme.

Appreciating that S.S.M. measures endeavour to enable developing country Members to raise tariffs *in the event of import surges*, by itself substantiates the idea that all products that are currently receiving some level of domestic support for a similar purpose should benefit from such a provision.

stocks and emergency food reserves as a domestic policy option to cope with price volatility, particularly for the most vulnerable).

⁶⁶ In particular, the emphasis of the D.B. is to protect the interests of low-income farmers and additionally secure the supply of staple foods, for the purpose of which, it considers the possibility of employing higher tariffs for these purposes.

It is in a related vein that the present author proposes the extension of S.S.M. *vis-à-vis* its product coverage to all agricultural commodities that are categorised as ‘S.Ps.’⁶⁷ given the interrelationship between the issues that concern these.⁶⁸ Even though it has been contended that the prime agenda of the S.S.M. is to exclusively enable developing country members to raise tariffs in the wake of an import surge of a given commodity, as against mainly addressing livelihood security – an objective dealt with by the W.T.O. negotiations on S.Ps.,⁶⁹ one cannot repudiate the chilling effects that such deluges have on livelihood concerns. Moreover, the linkages between S.Ps. and S.S.Ms. can be evidenced by the similarity in the context in which the negotiations commenced, viz. in the interest of S&D treatment for developing countries.⁷⁰ Therefore, the product coverage for an S.S.M. should rather be the prerogative of each developing country by self-designation wherein they can select the products that are most susceptible to import surges.

Accordingly, although the protection of commodities designated as S.Ps. is a long-term measure, whereas, on the contrary, an S.S.M. is a short-term measure,⁷¹ the need to extend S.S.Ms. to all S.Ps. is validated by the G-33's position that links the role of both these provisions to the realisation of the goals of food security, livelihood security and rural development.⁷² Apropos, if an individual commodity contributes to achieving any of these goals, it must automatically be designated as an S.P., consequently permitting the developing country Member engaged in the production of this (commodity) to temporarily raise tariffs, in the event of an import surge.

⁶⁷ Cf. Chatterjee & Murphy, *supra* note 55, at 5, which in regards to the contention whether an S.S.M. should be restricted to crops relating to food security, or should it simply include those for the purpose of livelihood security, opines that “ensuring livelihood security would support the extension of the SSM to both essential food crops and those crops that are important for the income stability of farmers and farm workers”.

⁶⁸ See discussion above.

⁶⁹ See, HOEKMAN & KOSTECKI, *supra* note 1, at 292.

⁷⁰ Refer to WTO, Revised Draft Modalities for Agriculture, *supra* note 36, at 23–29, which categorises S.P. and S.S.M. under the heading ‘Special and Differential Treatment’.

⁷¹ According to para. 140 of the 10th July 2008 modalities, in the case of volume surges, developing countries would be permitted to maintain an S.S.M. for a maximum period of twelve months from the initial invocation of the measure; unless the product involved is a seasonal product, in which case, the S.S.M. can only apply for a maximum period of six months, or to cover the period of actual seasonality: whichever is longer.

⁷² See W.T.O. Committee on Agriculture Special Session, *Proposal on Indicators: Submission by the G-33* (Oct. 12, 2005).

Drawing from India's example, even while there may be an overall need to protect all commodities covered by the M.S.P. for the purpose of S.S.M. negotiations, the ones benefitting from the T.P.D.S. (namely rice, wheat and sugar),⁷³ being of a 'special' character,⁷⁴ certainly demand recourse to the right in question, in the event of an import surge. It would assist in putting to rest contentions as to whether an S.S.M. must exclusively focus on safeguarding livelihood concerns of farmers that have been affected by an import surge, or if such a right should rather *additionally* extend to commodities requisite for food security purposes that have also been 'hit' by a deluge. In other words, over and above the goods covered by the M.S.P. scheme, those other products that are considered 'special' from the perspective of food security in India, and in particular under the T.D.P.S., should be eligible for an S.S.M. treatment. The interrelationship between livelihood security and food security can, for instance, be better understood with the help of India's present domestic support scheme, in this regard. Consequently, insofar as the three commodities, namely rice, wheat, and sugar, have been covered by the country's T.P.D.S., this would in itself substantiate and in turn entail that these being for the purpose of food security, should thus additionally have access to an S.S.M.⁷⁵ Consequently, indicators that conceptualise the mandate of S.Ps. would apply *mutatis mutandis* while deliberating upon the product coverage of an S.S.M. insofar as the former are essential for the rural economy and thus require protection from import competition.

Towards this end, any consensus *vis-à-vis* the 'product coverage' for an S.S.M. should pay utmost regard to the necessity to protect the importing economy from cheap, dumped imports. Doing the same would only make it discernible to encompass those products in which imports account for a significant portion of the domestic consumption. Needless to say then, of course, the right should only be warranted if the importing country not merely produces the concerned commodity, but does so in substantial quantities.

⁷³ Note that: 'rice' does not benefit, at present, from the M.S.P. scheme, and neither does 'sugar'. However, 'sugarcane' is covered by the above-mentioned scheme.

⁷⁴ Cf. WTO, Revised Draft Modalities for Agriculture, *supra* note 36, at 55 – 56, and Luisa E. Bernal, *Guidelines for Approaching the Designation of Special Products and SSM Products in Developing Countries*, Paper Prepared for the I.C.T.S.D. Informal Consultation entitled Special Products and Special Safeguard Mechanism after July Framework: How do we Move Forward? 16-18 (Sep. 30, 2004), (for an indicative list of indicators for the designation of S.P).

⁷⁵ Cf. Bernal, *supra* n. 74, at 19.

Additionally, the product should also be 'sensitive' from the perspective of the importing country.⁷⁶

3.1.2. TRIGGER LEVELS

As aforementioned, contentions as to the trigger levels for an S.S.M. mainly revolve around the *extent to which*, members should be able to exceed their pre-Doha bound rates. In this regard, because S.S.M. is a short-term measure which entails protecting small farmers from import surges, the trigger levels for this right should apropos employ tariff rates that are not disguised restrictions on international trade, so as to impede long-term competitiveness in any given agricultural commodity. In a related context, the extent to which developing countries should be permitted to exceed the pre-Doha bound rates should be the prerogative of such countries, as long as they take into account the parameters as mentioned earlier, *viz.*, that long-term competitiveness in the covered products is not being debilitated.

In this regard, questions have often been raised as to the need for India to urge for such a demand, given that it already maintains huge gaps between its bound and applied tariffs.⁷⁷ Accordingly, an S.S.M. would be of little value to India, since it could easily increase its applied tariffs on those products affected by a surge, without as such exceeding its bound tariffs. Nevertheless, India's pro-activeness in insulating its agricultural sector can be demonstrated by the consistent increase in the imports of some of the agricultural commodities, such as, for instance, rice, wheat, cereals, fruits, pulses, jute, dairy products and oilseeds.⁷⁸ In 2014 alone, the imports for rice grew by 18.45%, wheat by 109.58%, cereal by 346.28%, pulses by 29.30%, jute by 140.30%, milk and cream by 49.19%, fruit and nuts by 23.84%, and oilseeds by

⁷⁶ Cf. South Centre, *WTO's MC10: Agriculture Negotiations – Special Safeguard in Agriculture for Developing Countries*, Analytical Note, SC/TDP/AN/MC10/2, at 10 (Dec., 2015) , http://www.southcentre.int/wp-content/uploads/2015/12/AN_MC10_2_Special-Safeguard-in-Agriculture.pdf.

⁷⁷ See, e.g., Int'l Centre for Trade and Sustainable Development [ICTSD], *Reconsider Farm Safeguard Focus, India's Chief Economist Urges*, BRIDGES WEEKLY, (Mar. 3, 2016), <http://www.ictsd.org/bridges-news/bridges/news/reconsider-farm-safeguard-focus-india%E2%80%99s-chief-economist-urges> (last visited Mar. 15, 2017).

⁷⁸ For a detailed list of imports of agricultural commodities to India, for preceding years, see DEPARTMENT OF COMMERCE, *Import of Principle Commodity Groups, System on Foreign Trade Performance Analysis (F.T.P.A.)*, <http://commerce.nic.in/ftpa/default.asp>.

140.30%. In this context, certain products, and in particular, wheat; pulses such as arhar, moong, masur, soybean and urad; cereals such as maize, barley, jowar, bajra, ragi; oilseeds such as safflower seed, sunflower seed, rapeseed, sesame seed and niger seed; and jute have been designated for protection under India's M.S.P. scheme. While imports can be controlled in the case of most of these commodities through the 'water in the tariffs'⁷⁹ between the bound and applied rates,⁸⁰ an S.S.M. would play a significant role in tackling import deluges for commodities such as corn and oilseeds such as rapeseed and soybean, where these gaps are virtually non-existent or very small.⁸¹ In this regard, India's fixation with the S.S.M. issue appears justified predominantly⁸² for the protection of commodities such as corn (cereal), rapeseed and soybean.⁸³ These products are delineated as vulnerable at the domestic level⁸⁴ and have been experiencing high levels of import penetration, which at present cannot be sufficiently protected otherwise, given the 'shallow waters' in its bound versus applied tariffs. In the context of rice, the present author opines that the commodity may not benefit from an S.S.M. necessarily because India's exportation outweighs the imports. Apropos, its rice exports grew by 71.65 and 39.07%, in 2013 and 2014 respectively, while imports of this product merely increased by 32.53 and 18.45%, during the same years. This, in turn, implies that, in the case of rice, India does not at present, experience any threat to its livelihood concerns or food security. As regards dairy products and fruits – which have also, in the past experienced import surges, these have not been commodities which are vulnerable at the domestic level, and hence do not encumber livelihood concerns. Although an S.S.M. could be beneficial for the protection of these sectors, insofar as the gaps between the bound and applied

⁷⁹ Narlikar, *supra* note 41, at 113. See also C. STEVENS, *The need for Special Products and Special Safeguard Measures for Agriculture in the WTO: A Situational Analysis* (Inst. of Dev. Studies, Paper, 2004), <http://www.eldis.org/vfile/upload/1/document/0708/DOC16764.pdf>.

⁸⁰ See Pal & Wadhwa, *supra* note 11, at 25.

⁸¹ India's applied and bound tariffs, in agricultural products http://agricoop.nic.in/sites/default/files/Agriculture_Trade_Policy_Status_Under_FTA.pdf.

⁸² For a discussion on the contribution of 'rice' towards rural development, in India, see Concepción Calpe & Adam Prakash, *Sensitive and Special Products – A Rice Perspective*, at 55, http://www.fao.org/fileadmin/templates/est/COMM_MARKETS_MONITORING/Rice/Documents/SpecialPerspective.pdf.

⁸³ See, Department of Commerce, *supra* note 78, with particular reference to import penetration in cereals.

⁸⁴ The vulnerability of these commodities can be implied from the fact that these have been included in the Government (of India's) list of commodities, which will benefit from the M.S.P. scheme.

tariffs are low, it (an S.S.M.) is not, in the opinion of the present author, a matter of urgency. In particular, corn/maize is a commodity that currently benefits from the M.S.P. scheme, and being a cereal, it would benefit from the 'S.S.M.' protection, especially because import penetration in cereals is high. At the same time, while the bound tariff on corn is seventy, the applied rate fluctuates between fifty (in the years 2006, 2009, 2010) and seventy (in 2007). Consequently, the Indian Government may want to resort to an S.S.M. if the difference between bound and applied tariff is the same, or small *and* the criteria for imposition of an S.S.M. has been satisfied. In a related vein, rapeseed and soybean face similar problems as regards high import levels coupled with high-applied rates (i.e. low gaps between the bound and applied tariffs).

Considering that India's M.S.P. scheme is to safeguard the stability of income for farmers, price-based remedies, as against volume-based remedies would be more feasible, if the imported agricultural commodity in question is depressing the price of the products benefitting from the said scheme. Therefore, the contours for price depression could be analysed *mutatis mutandis* to those employed in anti-dumping investigations, appreciating that an S.S.M. is nothing but a short-term response to deal with agricultural dumping.⁸⁵ Likewise, price-based remedies could also be more beneficial in the Indian scenario, where the whole aim is to safeguard the livelihood security and consequently achieve food security, insofar as these can be triggered *as soon as* international prices drop,⁸⁶ without being detrimental to the abovementioned pursuits (*viz.* livelihood security and food security).⁸⁷ Volume-based remedies, on the contrary, would require a certain amount of a given agricultural commodity to be imported before the S.S.M. can be imposed.⁸⁸ Consequently, the affected developing country Member *must first experience*

⁸⁵ Cf. Arts. 3.1 and 3.2 of the A.D.A. Price depression is analysed in the context of anti-dumping investigations, to adjudge the determination of the imports on injury and *per se*, whether these imports are having a detrimental impact on the prices on the 'like' domestic products. Accordingly, for the purpose of imposing an S.S.M., Arts. 3.1 and 3.2 of the A.D.A. could influence the working of price triggers for an S.S.M., insofar as these would be based on whether the imports are causing an injury to the 'like' domestic agricultural commodity and thus resulting in price depression.

⁸⁶ Which implies that price-based triggers can be invoked without there being a need for actual importation of the agricultural commodity.

⁸⁷ Pal & Wadhwa, *supra* note 11, at 39.

⁸⁸ Pal & Wadhwa, *supra* note 11, at 39.

some injury towards its domestic industry, by such a surge, irrespective of the fact that S.S.M.-rules do render the proof of such an injury a pre-requisite.

Appreciating that price-based remedies would best achieve the purposes of an S.S.M. for all developing country Members striving to safeguard the livelihood concerns of their farmers, suggests that remedies for this should similarly focus on the *objective* of the trigger, *viz.*, to insulate these countries from the negative impact of agricultural dumping. The July 2008 modalities as regards price-based remedies, permitting a tariff increase of merely 85% of the gap between the shipment and trigger price, appears to be utterly arbitrary. From this perspective, the G-33's demand that the tariff increase in the wake of price triggers should cover 100% of the gap between the shipment and the trigger price seems more appropriate.⁸⁹ This position would be comparable to the A.D.A., which in itself authorises the imposition of an anti-dumping duty, to *completely* negate the difference between the price of the imported product and the (like) domestic product.⁹⁰

While in the case of price triggers, the imposition of a duty to completely offset the injury to the concerned product(s) according to the parameters set forth above seems more appropriate; developed and developing country Members could meet halfway for volume-triggered additional duties.⁹¹ Thus, a remedy of 20% or 20 percentage points of the current bound rates added to the pre-Doha level seems workable,⁹² especially where otherwise it seems that there would continue to be no consensus whether the Doha-bound rates should be respected.

⁸⁹ Cf. the discussion above, which mentions the 10th July modalities as regards price-triggers, and states that the proposed remedy would permit only a tariff increase of 85% of the gap between the shipment and trigger price.

⁹⁰ Cf. Arts. 9.3 and 2.1 of the A.D.A., which permits the imposition of an anti-dumping duty to offset the dumping. Dumping is calculated by the difference between the normal value and the export price.

⁹¹ *I.e.*, the level beyond which the pre-Doha binding can be exceeded.

⁹² The calculation of a 'halfway solution', *viz.*, 20% or 20 percentage points is on the basis of that suggested by the 'Lamy Compromise', *viz.*, 15% or 15 percentage points of the current bound rate, *added to the pre-Doha bound rate*, and that stipulated by the G-33, *viz.*, 30% or 30 percentage points of the current bound rate, *added to the current applied rate*.

4. CONCLUSION

The fact that the D.D.A. failed to reach its logical conclusion exclusively because of a lack of consensus on the S.S.M. issue underscores the significance of this issue in the W.T.O., and in particular to developing country Members. Apropos, despite the recent Nairobi Ministerial Decision on S.S.M., which mainly reflects India's dominance in influencing the direction of W.T.O. negotiations,⁹³ its success is nevertheless contingent on the ability of W.T.O. Members to negotiate upon the modalities of this right – which continues to lack any teeth.

In particular, India's pro-activeness in articulating its concerns for an S.S.M. has much to do with ensuring the efficient functioning of its domestic support schemes, which endeavour to safeguard the livelihood and food security concerns that the country has been facing. Understanding that this Decision is important for India in the context of its agricultural domestic support schemes, any delineation of parameters to operationalise the S.S.M., must necessarily take into account the products benefiting from these. At the same time, any negotiations as regard the trigger levels must employ tariffs that do not operate as disguised restrictions on trade to debilitate long-term competitiveness in any agricultural commodity. In India's situation, even though most agricultural commodities are protected by sufficient 'water in the tariffs' between the bound and applied rates, the insistence for an S.S.M. appears justified for commodities such as maize/corn, oilseeds and rice, which are not only significant sources of livelihood, at the domestic front, but which also face high levels of import penetration. Price-based remedies could thus be more beneficial in the Indian scenario, insofar as these can be triggered without any injury being caused to the domestic industry in any of the covered products, but on the contrary, as soon as international prices drop. However, considering that an S.S.M. is a remedy that tackles agricultural dumping, price-based remedies must completely offset the decline in prices, resulting out of the import surge.

⁹³ In the Bali Ministerial Conference, India asserted its demand for a consensus on food security and public stockholding, which consequently led to a Decision, in this regard. See, S. A. Sharma, Union Minister of Commerce and Indus., Address at the Plenary Session of the 9th Ministerial Conference of the W.T.O. at Bali (Dec. 4, 2013), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=101013>(updated March. 31st, 2014).