Brigham Young University International Law & Management Review

Volume 7 | Issue 1 Article 2

12-20-2010

Constraints of the Agreement on South Asian Free Trade Area and SAARC Agreement on Trade in Services Militating Against Sub-Regional Trade Proliferation in South Asia

Rizwanul Islam

CONSTRAINTS OF THE AGREEMENT ON SOUTH ASIAN FREE TRADE AREA AND SAARC AGREEMENT ON TRADE IN SERVICES MILITATING AGAINST SUB-REGIONAL TRADE PROLIFERATION IN SOUTH ASIA

Md. Rizwanul Islam[*]

ABSTRACT

Although the Agreement on South Asian Free Trade Area (SAFTA) was signed in January 2004, it has not substantially contributed to the expansion of regional trade among its contracting states. This article shows how a number of bilateral preferential trade agreements (PTAs) between SAFTA parties act as formidable stumbling blocks against the expansion of intra-SAFTA trade and must be abolished. It critically analyzes SAFTA's constraints, including areas that SAFTA over- and under-regulates, that militate against the expansion of intra-SAFTA trade. Finally, it advocates that SAFTA must be more ambitious in its scope by adding provisions that will help attract foreign direct investment (FDI) and build coalitions for World Trade Organization (WTO) negotiations.

[*] PhD candidate, Macquarie Law School, Macquarie University, Lecturer (on Study leave) Northern University Bangladesh. This paper is an adapted version of a chapter of the author's doctoral dissertation in progress and he would like to thank his supervisor, Professor M. Rafiqul Islam and associate supervisor, Dr. Shawkat Alam for their useful comments on that chapter; any errors or inadequacies are, of course, the author's alone. The author acknowledges the financial support of the Macquarie University Research Excellence Scholarship. The author may be contacted at rizwanuli@alumni.nus.edu.sg.

I. INTRODUCTION

In 2004, the member states of the South Asian Association for Regional Cooperation (SAARC)[1] agreed to establish a South Asian Free Trade Area (SAFTA).[2] However, this agreement has not substantially contributed to the expansion of regional trade among its contracting states. First, this article critically assesses how individual trade agreements between two countries, known as bilateral preferential trade agreements (PTAs), undermine SAFTA's trade liberalization initiative. Second, it identifies SAFTA's textual limitations and suggests several amendments that would address those limitations. Third, it recommends ways for the contracting parties to attract Foreign Direct Investment (FDI) and take up concerted positions in World Trade Organization (WTO) negotiations to elicit better results for the region. Fourth, it analyzes the prospect of trade proliferation among the member countries in trade services. Finally, this article discusses SAFTA's implications to trade between SAFTA members and third parties.

II. THE BILATERAL PTA QUANDARY BETWEEN SAFTA CONTRACTING PARTIES

Bilateral PTAs create major obstacles to trade proliferation between SAFTA contracting parties under the auspices of the SAARC. Like SAFTA, these bilateral PTAs are authorized under the Enabling Clause of the WTO.[3] Though the liberalization schemes of these PTAs are not as comprehensive as many of those created by economically advanced countries, they do offer certain trade benefits that SAFTA does not. The tariff liberalization schemes in many of these bilateral agreements are more ambitious than in SAFTA, so there is a tendency for countries to trade under bilateral PTAs instead of using SAFTA to increase trade.

For relatively small countries, the incentive to support SAFTA drastically diminishes when they receive preferential access to India's market through a bilateral PTA. Indeed, any business that gains from

[1] The current SAARC member states are: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. SAARC, http://www.saarc-sec.org (last visited Oct. 26, 2010).

[2] Agreement on South Asian Free Trade Area (SAFTA), Jan. 6, 2004, art. 2, *available at* http://www.saarc-sec.org/userfiles/saftaagreement.pdf (SAARC) [hereinafter SAFTA]. Afghanistan became a party to SAFTA in 2007. Declaration of the Fourteenth SAARC Summit, Apr. 3-4, 2007, ¶ 2, *available at* http://www.saarc-sec.org/userfiles/Summit Declarations/14 - New Delhi, 14th Summit 3-4 April 2007.pdf.

[3] World Trade Organization Decision, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, ¶ 1, L/4903 (Nov. 28, 1979), *available at* http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf.

preferential access under a bilateral PTA to a substantial market in another member country is likely to lobby its government against trade liberalization under SAFTA. When liberalization occurs under SAFTA, competition from producers of other SAFTA contracting parties inexorably follows. As such, bilateral PTAs create an incentive for businesses that works against trade liberalization under SAFTA. To what extent their mercantilist interests constrain SAFTA depends on their political clout and lobbying capacities, but as a group they are a stumbling force against SAFTA. The fact that some goods featured on the concessions list of bilateral PTAs are also featured on the sensitive list under SAFTA bolsters the conjecture that their purpose on the sensitive list is protectionist.

Bilateral PTAs provide many benefits to South Asian countries that SAFTA currently does not, such as: 1) better market access, 2) faster tariff reduction schedules, 3) discrimination benefits, 4) restricted non-tariff barriers, and 5) more liberal rules of origin. This section examines each of these five benefits for the purpose of illustrating the need for SAFTA to include similar benefits to attract more support from its members.

A. Bilateral PTAs Offer Better Market Access

Compared to SAFTA, bilateral PTAs between SAFTA contracting parties offer better market access opportunities. This is in part because individual countries' sensitive or negative lists of products in PTAs are generally much shorter than the same ones in SAFTA. For example, under the Free Trade Agreement between the Islamic Republic of Pakistan and the Democratic Socialist Republic of Sri Lanka (Pakistan-Sri Lanka PTA) Pakistan's sensitive list of products contains 540 tariff lines,[4] which is meager compared to its revised sensitive list under SAFTA, which contains 1169 tariff lines.[5] Under this same PTA, Sri Lanka's sensitive list contains 697 tariff lines,[6] whereas its revised list under SAFTA contains 1065 tariff lines.[7] Similarly, the India-Sri Lanka PTA has a shorter sensitive list than SAFTA has. Under the India-Sri

[4] Pakistan Sri Lanka Free Trade Agreement, Pak.-Sri Lanka, Aug. 1, 2002, SRI LANKA DEP'T OF COMMERCE, *available at* http://www.doc.gov.lk/web/pakissrilanka_freetrade.php (follow "Duty Concessions" hyperlink then under "(Annex A)" follow "Attachment I" hyperlink) [hereinafter Pakistan-Sri Lanka PTA].

[5] Revised Sensitive Lists Under SAFTA, SAARC SECRETARIAT, http://www.saarc-sec.org/main.php?t=2.1.6 (last visited Oct. 28, 2010); Government of Bangladesh, Ministry of Commerce, Bangladesh *Regional and Bilateral Trade* http://www.mincom.gov.bd/reg_bil_trade.php (last visited Nov. 28, 2010).

[6] Pakistan-Sri Lanka PTA, *supra* note 4 (follow "Duty Concessions" hyperlink then under "(Annex B)" follow "Attachment I" hyperlink).

[7] Revised Sensitive Lists Under SAFTA, *supra* note 5.

Lanka PTA, India has a sensitive list of 431 tariff lines[8] compared to 863 tariff lines for developing countries and 480 tariff lines for Least Developed Countries (LDCs)[9] under SAFTA.

Noticeably, the discriminatory aspect of these two bilateral PTAs is not limited to SAFTA's developing contracting parties but also extends to the LDC contracting parties. This ends up benefiting the bilateral PTA contracting parties at the expense of SAFTA's LDC contracting parties. Conversely, under SAFTA, contracting parties have undertaken to grant special treatment to the LDC contracting parties.[10] Under SAFTA, LDC contracting parties are also accorded a wider time frame to liberalize their tariffs. However, under the Pakistan-Sri Lanka PTA each country immediately benefits by providing a shorter sensitive list of products, granting each other better market access than they grant their LDC counterparts under SAFTA. Similarly, under the India-Sri Lanka PTA, India offers Sri Lanka better market access to a developing SAFTA contracting party than it offers to LDC contracting parties under SAFTA. SAFTA Article 13 plainly provides that its provisions will not apply to any preference that the contracting parties have granted or may grant to each other or any third parties outside of the SAFTA framework. Hence, more favorable treatment to developing contracting parties under these bilateral PTAs would not amount to de jure violation of any obligations under SAFTA. Nonetheless, these dealings vitiate SAFTA's fundamental principle of special treatment of LDC contracting parties.

Even when a bilateral PTA between SAFTA contracting parties has low trade coverage in terms of number of tariff lines, the products that are covered are likely to have considerable negative practical implications for other contracting parties. For example, in the India-Afghanistan PTA, Afghanistan offers India concessions only on eight goods and receives reciprocal concessions on thirty-eight goods.[11] However, two of the eight products on which Afghanistan offers

[8] Indo Sri Lanka Free Trade Agreement, India-Sri Lanka, Dec. 28, 1998, SRI LANKA DEP'T OF COMMERCE, http://www.doc.gov.lk/web/indusrilanka_freetrade.php (follow "Duty Concessions" hyperlink then under "Annex A" follow "01 Annex D(I)" hyperlink) [hereinafter India-Sri Lanka PTA].

[9] SAARC LDCs include Afghanistan, Bangladesh, Bhutan, Maldives, and Nepal. *See* United Nations Least Developed Country List, http://www.unohrlls.org/en/ldc/related/62/ (last visited Oct. 26, 2010).

[10] SAFTA, *supra* note 2, art. 11.

[11] Preferential Trade Agreement between the Republic of India and the Transitional Islamic State of Afghanistan, India-Afg., Mar. 6, 2003, Annexures A & B, INDIA DEP'T OF COMMERCE, http://commerce.nic.in/trade/international_ta_indafg.asp [hereinafter India-Afghanistan PTA].

concessions are on Afghanistan's SAFTA sensitive list of goods.[12] Items such as apples, caraway seeds, dried apricots, grapes, linseed, sesame seeds, shelled walnuts, unshelled walnuts, plums and mulberries, and watermelons are items on which India offers concessions to Afghanistan. However, all of these goods are on India's sensitive list for LDCs under SAFTA.[13]

The divergence in the sensitive list of the India-Afghanistan PTA and SAFTA may be explained in one of two ways: either concessions were not requested by other contracting parties or they were placed on the sensitive list for protectionist purposes. As tariff concessions are outcomes of negotiations, it may be that the other SAFTA contracting parties do not have any significant export interests in these products in the Indian or Afghan markets. Therefore, no demand for concessions may have been placed on them by the remaining SAFTA contracting parties. However, a PTA's sensitive list generally denotes the presence of a domestic industry and competitive exporters in partner countries. Therefore, a more plausible explanation is that these items are placed on the sensitive list for the protectionist purpose of restraining imports from the remaining contracting parties.

One can argue that in some cases exclusive concessions in a bilateral PTA between two SAFTA contracting parties will not impair other SAFTA contracting parties' trading interests because there may be no other SAFTA producers of like goods among SAFTA contracting parties. However, when a product subject to preferential treatment in a bilateral PTA is placed on SAFTA's sensitive list of goods this possibility is very slim. Because bilateral PTAs have better overall market access than SAFTA, bilateral PTAs will continue to impede SAFTA's implementation.

B. Bilateral PTAs Provide Faster Tariff Reduction Schedules

Bilateral PTAs cover not only a wider variety of products than those under SAFTA, but in some cases they also have a shorter tariff liberalization schedule.[14] Under SAFTA, tariffs will be reduced to between zero and five percent by 2016.[15] However, when this is compared to the Pakistan-Sri Lanka PTA, the PTA has the advantage.

[12] *Id.* Annexure A (the two products are cement clinkers and white cement); E-mail Attachment from Subash C. Sharma, SAARC Econ., Trade, Fin. & Transp. Div., to editor (Oct. 24, 2010, 22:00 MDT) (on file with publisher).

[13] India-Afghanistan PTA, *supra* note 12, Annexure B; Revised Sensitive Lists Under SAFTA, *supra* note 5.

[14] A tariff liberalization schedule is the schedule by which tariffs are reduced over time as agreed upon by the Contracting Parties. *See* SAFTA, *supra* note 2, art. 7.

[15] SAFTA, *supra* note 2, art. 7(1)(d).

Pakistan has eliminated tariffs altogether on 206 tariff lines for imports from Sri Lanka and Sri Lanka has eliminated tariffs on 102 tariff lines for imports from Pakistan.[16] The India-Sri Lanka PTA also has more accelerated targets for tariff elimination than SAFTA has. Under their PTA, India has offered Sri Lankan producers duty-free access in 4233 tariff lines and Sri Lanka has offered Indian producers free access in 4024 tariff lines.[17] Shorter lists of sensitive products and shorter tariff liberalization schedules offer countries better market access opportunities through current bilateral PTAs than those offered through SAFTA.

C. Bilateral PTAs Create Discrimination Through Reverse Market Access

Not only are tariff reductions and product coverage under SAFTA less generous than some bilateral PTAs among contracting parties, but PTAs also give extensive benefits in other forms. The India-Maldives PTA, for instance, does not provide for any preferential access in terms of tariff cuts but does allow the Maldives to import products like river sand, eggs, potatoes, and onions that are subject to export bans in India.[18] This appears to be a measure to boost India's agricultural export to the Maldives, but it does not give Indian producers any preference to the market of the Maldives. Therefore, it may seem that other SAFTA members do not stand to lose economically since they are not ipso facto subject to any market-entry barriers in the Maldives. However, the Maldives is being given an option of a steady source of needed supplies that otherwise would be unavailable to it from India. India aside, every member of SAFTA is a net food-importing country.[19] Hence, as net food-importing countries, a firm and steady option for importing these food products from India may be welfare enhancing for them, at least in the short or medium term until their own domestic agricultural production increases to meet local demands. Thus, bilateral PTAs also give

[16] Pakistan-Sri Lanka PTA, *supra* note 4 (follow "Duty Concessions" hyperlink then under "(Annex A)" follow "Attachment II" hyperlink, and under "(Annex B)" follow "Attachment II" hyperlink).

[17] India-Sri Lanka PTA, *supra* note 8 (follow "Duty Concessions" hyperlink then under "Annex A" follow "02 Annex E" hyperlink and under "Annex B" follow "02 Annex F1" and "03 Annex FII" hyperlinks).

[18] Trade Agreement Between the Gov't of the Republic of India and the Gov't of the Republic of Maldives, India-Maldives, art. VIII – IX, Mar. 31, 1981, INDIA DEP'T OF COMMERCE, http://www.commerce.nic.in/trade/maldives.pdf.

[19] Comm. on Agric., *WTO List of Net Food-Importing Developing Countries for the Purposes of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the REFORM Programme on Least-Developed and Net Food-Importing Developing Countries*, G/AG/5/Rev.8 (Mar. 22, 2005).

extensive benefits in other forms such as the creation of discrimination through reverse market access commitments, which significantly benefit some parties.

D. Bilateral PTAs Restrict Non-tariff Barriers

Whereas SAFTA does not have a binding provision for eliminating or reducing non-tariff barriers, bilateral PTAs have specific provisions in place. For example, the India-Nepal PTA provides that, subject to few exceptions, all goods of Indian or Nepalese origin are free from any quantitative, licensing, or permit restrictions by either of the contracting parties.[20] This gives Nepalese producers an edge over their competitors from other SAFTA contracting parties.

E. Bilateral PTAs Provide More Liberal Rules of Origin

Another difference between a PTA and SAFTA is that the rules of origin in bilateral PTAs are more liberal than the rules of origin of SAFTA. Under the India-Sri Lanka PTA, a product not wholly produced in one of the two countries is eligible for preferential tariff treatment, provided that the inputs from third parties or of undetermined origin do not exceed sixty-five percent of the final product and that final processing occurs in the exporting contracting party's territory.[21] It also requires that the final product be in a different tariff line than any of the inputs from third parties.[22] This change in tariff line requirement in SAFTA is identical, but in the case of developing countries SAFTA rules of origin permit only sixty percent of third party inputs.[23] Therefore, the producers of India or Sri Lanka who use third party inputs between sixty to sixty-five percent would have to resort to the India-Sri Lanka PTA if they want to enjoy the preferential tariff rate. The same scenario would apply to trade between Pakistan and Sri Lanka because the Pakistan-Sri Lanka PTA rules of origin also allow up to sixty-five percent third party inputs and require change in tariff line.[24]

Notably, bilateral PTA rule of origin cumulative provisions have different standards than SAFTA. The Pakistan-Sri Lanka PTA's cumulative rule of origin provides that the exporting country's value

---

[20] Revised Indo-Nepal Treaty of Trade, India-Nepal, art. II, Oct. 27, 2009, INDIA DEP'T OF COMMERCE, http://www.commerce.nic.in/trade/nepal.pdf [hereinafter India-Nepal PTA].

[21] India-Sri Lanka PTA, *supra* note 8, r.7(a) (follow "Rules of Origin Requirements (Annex C)" hyperlink).

[22] *Id.* r.7(a)-(b).

[23] Revised Sensitive Lists Under SAFTA, *supra* note 5, Annex IV, r.8(a)(ii) (follow "Rules of Origin" hyperlink).

[24] Pakistan-Sri Lanka PTA, *supra* note 4, r.8(a)-(b) (follow "Rules of Origin Requirements (Annex C)" hyperlink then "View Full Text").

addition must not be less than twenty-five percent of the final product, and that the value addition from the other contracting party be at least ten percent. In addition, the change in tariff line rule applies.[25] The cumulative rule of origin of the India-Sri Lanka PTA has identical rules on this point.[26] Although SAFTA's cumulative rules of origin only require twenty percent domestic value addition, they have a thirty percent value addition requirement from other contracting parties.[27] Hence, producers in India, Pakistan, and Sri Lanka who want to benefit from a preferential tariff will source inputs under their bilateral PTA, rather than SAFTA, since it requires less value addition from other countries to meet the threshold. This hurts the trading interests of the remaining SAFTA contracting parties.

III. SAFTA'S STRUCTURAL CONSTRAINTS

SAFTA suffers from many areas of over- or under-regulation. Many of these structural constraints are impeding the member countries from trading with each other. These include: 1) too many items are included on the sensitive products list, 2) the rules restraining trade remedy measures are too minimal, 3) there is insufficient regulation on non-tariff barriers, 4) there is an absence of tangible measures for trade facilitation, 5) measures need to be taken to increase human capital among LDC contracting parties, and 6) no current regulation covers export control. Additionally, SAFTA should be amended to reduce anti-dumping measures and discourage anti-dumping investigation to increase regional trade among contracting states. This section will examine these impediments and suggest some possible resolutions.

A. Matters That SAFTA Over-Regulates

1) SAFTA's sensitive goods lists are too extensive

Under SAFTA, the lists of sensitive goods of individual contracting parties are over-inclusive and include important items that have potential for sub-regional trade. Most of the main export items of the LDC contracting parties are included in the sensitive list of products of their partner countries. Afghanistan's primary exports are dried fruits, carpets,

[25] *Id.* r.8(b), 9 (follow "Rules of Origin Requirements (Annex C)" hyperlink then "View Full Text").

[26] India-Sri Lanka PTA, *supra* note 8, r.7(b), 8 (follow "Rules of Origin Requirements (Annex C)" hyperlink).

[27] Revised Sensitive Lists Under SAFTA, *supra* note 5, Annex IV, r.9(b) (follow "Rules of Origin" hyperlink).

fresh fruits, wool, cotton, and vegetables.[28] Among the main exports from Bangladesh are woven garments, handicrafts, jute, pharmaceuticals, tea, ceramic products, and finished vessels.[29] Bhutan's main exports are chemical products, metal, wood, processed food, mineral products, textiles, stones, cement, and asbestos products.[30] Marine fisheries, particularly tuna, and clothing items are the Maldives' only notable merchandise exports.[31] Nepal's primary merchandise exports are carpets, clothing, grain, herbal treatments and oils, readymade garments, and jute goods.[32] Because these countries have limited export baskets, SAFTA grants them only limited market access benefits.

Goods with trade potential on sensitive lists also hinder trade by SAFTA's developing contracting parties. For example, there is a possibility for welfare-improving trade creation between India and Pakistan in wheat.[33] There is also potential for poultry and other livestock exports from Pakistan to India.[34] However, many of these products with natural trade prospects between contracting parties are included in other countries' sensitive lists. Because of this, SAFTA's sensitive list of goods is inhibiting the natural proliferation of trade among its members.

2) Impact of over-inclusive sensitive lists

The long list of sensitive products is an attempt to insulate domestic markets from sub-regional competition. However, official trade barriers between SAFTA contracting parties do not always succeed in preventing movement of goods across borders. Instead, they merely encourage a shift in the modes of border crossing from legal channels to illegal smuggling. For example, if Bangladesh lowered its tariff under SAFTA, the comparative benefit of smuggling sugar from India into Bangladesh

[28] Afg. Chamber of Commerce, *Exports*, http://www.afghanchamber.com/about/Exports.htm (last visited Oct. 26, 2010).

[29] Trade Policy Review Body, *Trade Policy Review of Bangladesh: Report by the Secretariat,* ¶¶ 7, 26, WT/TPR/S/168/Rev.1 (Nov. 15, 2006); Md. Joynal Abedin, *Regional Trade and Economic Cooperation in South Asia*, THE DAILY STAR, Oct. 8, 2009, *available at* http://www.thedailystar.net/newDesign/news-details.php?nid=108709.

[30] Bhutan Gov't, *Foreign Relation and Trade*, http://www.bhutan.gov.bt/government/abt_foreign.php (last visited Oct. 26, 2010).

[31] *See* Ministry of Econ. Dev., Maldives, *International Trade: Regional*, http://www.trade.gov.mv/?lid=23 (last visited Oct. 26, 2010); Trade Policy Review Body, *Trade Policy Review of Maldives: Report by the Secretariat*, ¶ 12, WT/TPR/S/221/Rev.1 (Nov. 5, 2009).

[32] Working Party on the Accession of Nepal, May 22, 2000, Sept. 12, 2002, Aug. 15, 2003, ¶ 85, WT/ACC/NPL/16 (Aug. 28, 2003); Nepal Exports, http://www.nepal.com/exports/ (last visited Oct. 26, 2010).

[33] Garry Pursell et al., *Asia*, *in* DISTORTIONS TO AGRICULTURAL INCENTIVES IN ASIA 339, 349 (Kym Anderson & Will Martin eds., 2009).

[34] *Id.*

would likely decrease and more would be imported legally.[35] While the price of sugar paid by Bangladeshi consumers may not change, the government would benefit from the potentially increased tariff revenue. If the tariff were removed altogether, the government's revenue would disappear; but consumers would benefit from lower-priced sugar. As such, continuing to maintain high trade barriers in these sectors does not appear to be economically justifiable even from a mercantilist point of view.

In response to consumer demand, similar illegal trade occurs between India and Pakistan which cannot be prevented by an over-inclusive SAFTA's sensitive goods list. Alternatively, goods shipped by legal means are sometimes routed through third-party countries to circumvent trade restrictions. These goods have a value of around half a billion per annum and include cloth, textiles, pharmaceuticals, machinery, cosmetics, jewelry, and tires.[36] Due to the increased cost of transportation and customs duties paid to government authorities in third-party countries, this shipping process increases the prices of goods that consumers have to pay. Reducing the number of items on the sensitive list to reduce these practices promotes welfare and trade within SAFTA without hurting legitimate trading interests of third parties.

B. Matters That SAFTA Under-Regulates

1) SAFTA provides minimal trade remedy measure restrictions

SAFTA does very little to address the adoption of trade remedy measures. Any time there is a significant volume of exports from a SAFTA member, it is possible for the importing country to lobby its government for a suspension of preferential concessions on that good. SAFTA does nothing to constrain adoption of anti-dumping[37] or countervailing measures[38] other than a largely ineffectual clause

[35] *See generally* Garry Pursell, *Smuggling and the Economic Welfare Consequences of an FTA: A Case Study of India- Bangladesh Trade in Sugar* (Austl. S. Asia Res. Ctr., Austl. Nat'l Univ., ASARC Working Paper No. 2007/5, 2007), *available at* http://rspas.anu.edu.au/papers/asarc/WP2007_05.pdf (arguing, inter alia, that the smuggling of goods between Bangladesh and India has economic consequences that "can be analyzed following normal principles").

[36] Trade Policy Review Body, *Trade Policy Review of Pakistan, Report by the Secretariat*, at 49, WT/TPR/S/193/Rev.1 (May 20, 2008).

[37] "If a company exports a product at a price lower than the price it normally charges on its own home market, it is said to be 'dumping' the product." WTO, *Anti-dumping*, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (last visited Oct. 26, 2010).

[38] Countervailing measures may lead to an "extra duty ('countervailing duty') on subsidized imports that are found to be hurting domestic producers." WTO, *Subsidies and Countervailing Measures*, http://www.wto.org/english/tratop_e/scm_e/scm_e.htm (last visited Oct. 26, 2010).

requiring contracting parties to pay special regard to LDCs and to consider accepting price undertakings offered by LDC exporters.[39] If an investigation for anti-dumping is commenced, in the absence of an express obligation to accept a price undertaking from LDC exporters, this soft rule is unlikely to have any effect.

Among SAFTA contracting parties, India is a frequent user of anti-dumping measures.[40] According to its reports to the WTO, India initiated 596 anti-dumping investigations and imposed anti-dumping measures in 419 of those cases from January 1995 through December 2009.[41] Pakistan also occasionally resorts to anti-dumping measures; over the same period it initiated fifty-three investigations and imposed measures in twenty-four cases.[42] It has imposed anti-dumping measures on Bangladeshi and Nepalese exporters but not to Sri Lankan exporters.[43] With regard to exporters from its SAFTA partners, Pakistan only once initiated an investigation against Indian exporters—and it imposed anti-dumping measures on that occasion.[44]

During that same period there were no reported investigations initiated and no countervailing measures taken in all intra-SAFTA trade.[45] This is consistent with the current global trend. The reports to the WTO during the above period show that there were only 245 countervailing investigations initiated and 139 countervailing measures taken by the WTO member states.[46] These are paltry figures compared to

---

[39] *See* SAFTA, *supra* note 2, art. 11(a).

[40] *See* Ctr. for the Analysis of Reg'l Integration at Sussex, *Qualitative Analysis of a Potential Free Trade Agreement Between the European Union and India: Annex 1: Analysis of Trade Production Structures and Implications for Non-Tariff Barriers, Services and Regulatory Parts of an FTA*, at 11, http://trade.ec.europa.eu/doclib/docs/2007/july/tradoc_135346.pdf (last visited Oct. 26, 2010).

[41] *See* WTO, *Anti-dumping Initiations: By Reporting Member from 01/01/95 to 31/12/09,* http://www.wto.org/english/tratop_e/adp_e/ad_init_rep_member_e.pdf (last visited Oct. 26, 2010) [hereinafter *Anti-dumping Initiations*]; WTO, *Anti-dumping Measures: By Reporting Member from 01/01/95 to 31/12/09*, http://www.wto.org/english/tratop_e/adp_e/ad_meas_rep_member_e.pdf (last visited Oct. 26, 2010) [hereinafter *Anti-dumping Measures*] (these include anti-dumping investigations against Bangladeshi, Nepalese, and Sri Lankan exporters and show India imposed anti-dumping measures against exporters from Bangladesh and Nepal).

[42] *Anti-dumping Initiations*, *supra* note 41; *Anti-dumping Measures*, *supra* note 41.

[43] WTO, *AD Initiations: Reporting Member vs Exporting Country from 01/01/95 to: 31/12/08*, http://www.wto.org/english/tratop_e/adp_e/ad_init_rep_exp_e.pdf (last visited Mar. 12, 2010); WTO, *AD Measures: Reporting Member vs Exporting Country from 01/01/95 to31/12/08,* http://www.wto.org/english/tratop_e/adp_e/ad_meas_rep_exp_e.pdf (last visited 12 Mar. 12, 2010).

[44] *See* Pakistan Nat'l Tariff Comm'n, *Anti-dumping Investigations*, http://www.ntc.gov.pk/adint.asp (last visited Oct. 26, 2010).

[45] *See* WTO, *Countervailing Initiations: Reporting Member vs Exporting Country 01/01/1995 - 31/12/2009*, http://www.wto.org/english/tratop_e/scm_e/cvd_init_rep_exp_e.pdf [hereinafter *Countervailing Initiations*]; WTO, *Countervailing Measures: Reporting Member vs Exporting Country 01/01/95 - 31/12/09*, http://www.wto.org/english/tratop_e/scm_e/cvd_meas_rep_exp_e.pdf [hereinafter *Countervailing Measures*].

[46] *Countervailing Initiations*, *supra* note 45; *Countervailing Measures*, *supra* note 45.

the 3675 anti-dumping investigations initiated and 2374 anti-dumping measures taken during the period of January 1995 through December 2009.[47]

The prevailing low incidence of countervailing measures in intra-SAARC trade might partially be explained by the limited economic capacity of governments of the contracting parties to subsidize exports. However, the generally low incidence of anti-dumping measures in intra-SAFTA trade may not be a good indicator of what may occur over time as internal trade increases. Arguably, the low incidence of anti-dumping measures is more a reflection of the low export volume of SAFTA contracting parties to the Indian market than an illustration of India's firm commitment to refrain from anti-dumping measures against its partner countries. Since anti-dumping measures generally target the most competitive producers, the relative lack of anti-dumping or countervailing duties may be explicable by the relatively low volume of intra-regional trade.

The adoption of anti-dumping duties between SAFTA members once led to the invoking of the WTO Dispute Settlement procedure.[48] On January 28, 2004, Bangladesh requested consultations with India regarding an anti-dumping measure imposed by India on imports of lead acid batteries from Bangladesh.[49] Bangladesh claimed, inter alia, that the anti-dumping investigation by Indian authorities was initiated even though the applicant did not establish that it represented the domestic industry. The investigation proceeded against the Bangladeshi exporters even though the value of the exports was negligible.[50] The authorities of the two countries reached a mutually acceptable solution as India withdrew the anti-dumping measure.[51] However, this case clearly shows that anti-dumping actions are an important issue in intra-SAFTA trade. Most likely, the dispute in this case was settled before proceeding to a panel because of the public attention it received. It was the first and only case thus far to have an LDC member country of the WTO invoke the Dispute Settlement Body. Future cases may not be settled so easily.

The vast scope of trade remedy measures in internal trade is a troublesome problem that SAFTA fails to adequately address. If the contracting parties continue to use the flexibility of trade remedy

[47] *Countervailing Initiations*, *supra* note 45; *Countervailing Measures*, *supra* note 45.

[48] *See* WTO, *India—Anti-dumping Measure on Batteries from Bangladesh*, WT/DS306/1 (Feb. 2, 2004), *available at* http://www.wtocenter.org.tw/SmartKMS/fileviewer?id=41409 [hereinafter *India—Anti-dumping]*.

[49] *Id.*

[50] *Id.*

[51] *Id.*

measures in intra-SAFTA trade, it will effectively nullify the tariff concessions under SAFTA. Assuming the contracting parties cannot agree to dispense with these measures in their internal trade, they should nonetheless take measures such as applying a different threshold for using anti-dumping rules. This would provide some relief to intra-SAFTA exporters in cases where anti-dumping investigations would be conducted against third parties, thereby ensuring that any trade concessions offered under SAFTA would not easily succumb to protectionist impulses.

2) SAFTA insufficiently addresses non-tariff barriers

As the role of tariff barriers in protection of domestic industries declines, nontariff barriers are increasingly becoming the tools of choice to serve protectionist obsessions.[52] These nontariff barriers include quality control of the products and the ease with which a product can be transported across country lines.[53] Hence, the proliferation of both tariff barriers and nontariff barriers has endangered the meaningful increase of trade by a PTA. Unless the nontariff barriers are effectively dismantled among contracting parties in a PTA, the benefit derived from tariff reduction schemes will be minimal.[54] Dismayingly, SAFTA provides inadequate regulations of nontariff barriers in intra-SAFTA trade. Under SAFTA Article 7(4), the contracting parties' obligation is limited to notification of their non-tariff and para-tariff barriers to the SAFTA Committee of Experts (COE).[55] The COE can review these notifications, scrutinize their conformity with the relevant WTO provisions, and recommend the abolition of those measures or the execution of those measures in the least trade-restrictive manner possible.

However, even if the COE issues recommendations, SAFTA is conspicuously silent on the contracting parties' obligations with regard to the COE's recommendations. Furthermore, the assessment criteria for the COE are the relevant WTO rules; therefore, SAFTA does not give the contracting parties who are WTO members any additional rights beyond what they already have, such as raising any WTO-inconsistent nontariff barriers to the WTO's dispute settlement system.

---

[52] *See generally* Peace News Team, *SAARC: 'Non-Tariff Barriers Must Go,'* AMAN NEWS, Apr. 4, 2010, http://amannews.com/english/2010/04/saarc-'non-tariff-barriers-must-go'/ (reporting that SAARC has urged its member countries to reduce the amount of nontariff barriers in order to facilitate direct trade).

[53] *See generally* John C. Beghin, *Nontariff Barriers*, (Ctr. for Agric. & Rural Dev., Iowa State Univ., Working Paper No. 06-WP 438, 2006), *available at* http://www.card.iastate.edu/publications/DBS/PDFFiles/06wp438.pdf (describing the general types of nontariff barriers and their economic effects).

[54] *See generally* Peace News Team, *supra* note 52.

[55] SAFTA, *supra* note 2, art. 7(4).

To strengthen intra-SAFTA trade, the contracting parties must tackle nontariff barriers to intra-SAFTA trade more effectively. The national product standards of each country may serve legitimate purposes, such as implementing public policies to ensure product safety, but they also inhibit importation. Disparate product standards among the countries may also significantly restrain the cross-border flow of goods.[56] If the contracting parties can achieve the harmonization of domestic product standards and recognition of reciprocal certifications as expressed in Article 8(a) of SAFTA, intra-SAFTA imports would be processed at a faster pace. By signing the Agreement on the Establishment of South Asian Regional Standards Organization (SARSO) that provides for the establishment of a South Asian Standards Organization (Organization)[57] the contracting parties have taken a step in the right direction.

The main objectives of the Organization are the harmonization of national standards of the SAARC countries to create a freer flow of goods and services in the sub-region, and the persuasion of member countries to use international standards[58] through replicating them as SAARC standards.[59] SARSO, which has yet to take force, does not have rules of procedure and, hence, the extent of its efficacy remains uncertain. However, given that the proposed Organization is granted full legal personality,[60] it may have sufficient jurisdiction to function properly and provide a much needed impetus to the promotion of intra-SAFTA trade. Furthermore, the Organization may help to lessen administrative burdens of national customs and standard testing authorities of the SAARC countries. Therefore, it is evident that increased regulation on non-tariff barriers will be financially beneficial to the contracting parties. While tackling nontariff barriers such as tariff escalation, tariff rate quota, and the abolition of import licensing may be difficult, the formulation of sub-regional product standards may not be so daunting.

3) SAFTA should expand coverage of trade in services

---

[56] *See* John Ravenhill, *Fighting Irrelevance: An Economic Community 'with ASEAN Characteristics'* 12-13 (Austl. Nat'l Univ. Dep't of Int'l Relations, Working Paper No. 2007/3, 2007), *available at* http://ips.cap.anu.edu.au/ir/pubs/work_papers/07-3.pdf.

[57] Agreement on the Establishment of South Asian Regional Standards Organization (SARSO), art. 1(i), Aug. 3, 2008, http://www.saarc-sec.org/userfiles/SARSOAgreement31July2008.doc (SAARC) [hereinafter SARSO].

[58] As published by bodies such as the International Organization for Standardization, the International Electrotechnical Commission, etc.

[59] SARSO*, supra* note 57, art. 2.

[60] *Id*. art. 1(ii).

It is very curious that trade in services was not at all covered by SAFTA until April of this year, when a PTA was signed during a summit of heads of state.[61] Due to the advancement of technology, including transportation and communication systems, cross-border trade in services is rapidly expanding. If trade in services had not been included in the PTA, a substantial percentage of sub-regional trade between the contracting parties would have been left out of its scope. Presently, because of their economic factor endowments, the contracting parties stand a superior chance of enhancing intra-SAFTA trade in services than in goods.[62]

The SATIS contracting parties are endowed with a large number of low skilled or unskilled labor. Therefore, in the WTO negotiations, they strongly advocate for freer movement of natural persons across borders. However, the persuasiveness of their argument for liberalization in the WTO wanes, if the movement of natural persons is not allowed within the sub-regional framework to at least some degree. To benefit from the economies of scale, the contracting parties should make the PTA in services a comprehensive PTA. Furthermore, unlike liberalization in trade in goods, liberalization in trade in services generally does not entail any loss of tariff revenue, which should make it easier to liberalize.

However, in view of the dismal experience of the SAFTA's liberalization in goods, it is difficult to be sanguine about the prospect of the depth of market access in the new PTA in services. But the *a multo fortiori* of expecting the creation of new liberalization is the undertaking that the contracting parties have made in paragraph 7 of Annex I to the SATIS. They have agreed to make liberalization commitments exceeding their multilateral commitments both in terms of the coverage of sectors as well as modal improvement in those sectors.

The opening of the market for services under the SATIS could prove to be crucial as the GATS commitments of the SATIS contracting parties; except in Nepal, where the commitments are very narrow. Therefore, any new liberalization commitment can create trade without raising barriers to third parties. At the WTO, Bangladesh originally made commitments only in the sub-sector of five star hotel and lodging services within the broader tourism and travel related services sector[63]

[61] SAARC Agreement on Trade in Services (SATIS), Apr. 29, 2010, *available at* http://commerce.nic.in/trade/SAARC Agreement on Trade in Services SATS.pdf [hereinafter SATIS].

[62] *See* Douglas Jayasekera, Address at the ARTNeT Consultative Meeting on Bridging the Development Gaps in the GMS: Progress of Liberalization of Trade in Services in SAFTA (June 2, 2009), *available at* http://www.unescap.org/tid/artnet/mtg/bridging_s3douglas.pdf.

[63] WTO General Agreement in Services, *Bangladesh: Schedule of Specific Commitments*, WTO Doc GATS/SC/8 (15 April 1994).

and subsequently made commitments in telecommunications sector.[64] India has made commitments only in around a quarter of the sub-sectors.[65] Even in those sub-sectors which are covered, in most cases, India has made no commitment. In mode 1, 2, and 4 very little commitment has been made by India beyond its horizontal commitments. The Maldives has only made commitments in accounting, auditing and book-keeping services, computer and related services sub-sectors.[66]

Pakistan has made GATS commitments in services incidental to agriculture and forestry, services incidental to mining, engineering services, computer and related services sectors, research and development services in natural sciences, telecommunication services, insurance and insurance related services, banking services, hospital services and medical and dental service, hotels and restaurants, and travel agencies and tour operator services.[67] Sri Lanka initially made commitments only in hotel and lodging services and travel agency and tour operation services sub-sectors of the tourism and travel related services[68] sector and later undertook commitments in telecommunications services and insurance and banking, sub-sectors.[69]

In the business services sector, Nepalese commitments include legal services, accounting, auditing and book-keeping services, architectural services, engineering services, veterinary services, computer and related services, research and development services, rental and leasing services without operators, advertising services, market research service and public opinion polling services, management consulting services,

[64] WTO General Agreement in Services, *Bangladesh: Schedule of Specific Commitments, Supplement 1*, WTO Doc GATS/SC/8/Suppl.1 (11 April 1997).

[65] WTO General Agreement in Services, *India: Schedule of Specific Commitments*, WTO Doc GATS/SC/42 (Apr. 15, 1994); WTO General Agreement in Services, *India: Schedule of Specific Commitments*, *Supplement 1*, WTO Doc GATS/SC/42/Suppl.1 (July 28, 1995); WTO General Agreement in Services, *India: Schedule of Specific Commitments*, *Supplement 2*, WTO Doc GATS/SC/42/Suppl.2 (July 28, 1995).

[66] WTO General Agreement in Services, *Maldives: Schedule of Specific Commitments*, WTO Doc GATS/SC/101 (Aug. 30, 1995).

[67] WTO General Agreement in Services, *Pakistan: Schedule of Specific Commitments*, WTO Doc GATS/SC/67 (Apr. 15, 1994); WTO General Agreement in Services, *Pakistan: Schedule of Specific Commitments*, *Supplement 1*, WTO Doc GATS/SC/67.Suppl.1 (July 28, 1995); WTO General Agreement in Services, *Pakistan: Schedule of Specific Commitments*, *Supplement 2*, WTO Doc GATS/SC/67.Supp2 (Apr. 11, 1997); WTO General Agreement in Services, *Pakistan: Schedule of Specific Commitments*, *Supplement 2*, *Revision,* WTO Doc GATS/SC/67.Suppl.2/Rev.1 (Feb. 16, 1998); WTO General Agreement in Services, *Pakistan: Schedule of Specific Commitments*, *Supplement 3*, WTO Doc GATS/SC/67.Suppl.3 (Feb. 26, 1998).

[68] WTO General Agreement in Services, *Sri Lanka: Schedule of Specific Commitments*, WTO Doc GATS/SC/79 (Apr. 15, 1994).

[69] WTO General Agreement in Services, *Sri Lanka: Schedule of Specific Commitments*, *Supplement 1*, WTO Doc GATS/SC/79/Suupl.1 (Apr. 11, 1997); WTO General Agreement in Services, *Sri Lanka: Schedule of Specific Commitments*, *Supplement 2*, WTO Doc GATS/SC/79/Suupl.1 (Feb. 26, 1998).

technical testing and analysis services.[70] In the communication services sector, it has made commitments in courier services and telecommunications services sub-sectors.[71] It has also made commitments in different sub-sectors of the other nine broad service sectors.[72] Presumably, Nepal has made significantly more commitments in WTO service schedule because of the negotiations as part of its accession in the WTO—an indication of the mercantilist nature of the WTO accession process that requires LDCs to offer more liberalization commitments than average developing countries.[73] Arguably, this is also contrary to the spirit of Article XI:2 of the WTO Agreement, which provides that LDCs would only need to undertake commitments and concessions to the extent commensurate with their development, financial, and trade needs or administrative and institutional capabilities.

Two things stand out from the WTO schedule of services of the SATIS contracting parties. First, there is very little commitment made in mode 4 except for some provision for temporary entry of natural persons, high level executives, and technical professionals. Second, various restrictions, mainly in the form of foreign equity ceilings, apply with respect to foreign investments under mode 3. Hence, the SATIS liberalization in these two areas can create trade without hurting third parties interests. The service schedule of the SATIS contracting parties, of course, cannot capture the actual barrier to market access as can the difference between bound and applied tariffs in goods. Applied laws and regulations in services may well be more liberal than the binding commitments made in the WTO; nonetheless, the WTO service schedule is significant as it shows the extent of binding commitments, and any binding commitments over and above that under the SATIS would give predictability of access to the sub-regional service providers. The scope of backtracking being eliminated, there should be impetus for greater investment that can—in addition to giving consumers more choices—create jobs.

A significant barrier against mode 4 movements of professionals is the necessity of recognition of their professional qualifications. The current provision in the SATIS in this regard is lackluster and worded in terms of aspiration rather than any binding agreement. In this regard, the SATIS may take note of the development in the ASEAN. The ASEAN contracting parties have concluded Mutual Recognition Arrangements

[70] WTO General Agreement in Services, *The Kingdom of Nepal: Schedule of Specific Commitments*, WTO Doc GATS/SC/139 (Aug. 30, 2004).

[71] *Id.*

[72] *Id*.

[73] Kent Jones, *The Political Economy of WTO Accession: The Unfinished Business of Universal Membership*, 8 WORLD TRADE REV. 279, 295-96 (2009).

(MRAs) that allow the qualifications of professional services suppliers of one contracting party to be mutually recognized by all the contracting parties. Currently, they have concluded seven MRAs covering seven professional services, namely: accountancy, architecture, engineering, nursing services, dental practitioners, medical practitioners, and surveying qualifications.[74] Under these Agreements, professionals who fulfill some educational and other minimum requirements in their own country would be eligible for recognition by the other contracting parties. The SATIS contracting parties should provide for such concrete provisions.

4) SAFTA lacks tangible measures for trade facilitation

Tariff and nontariff liberalization needs to be accompanied by measures to facilitate trade in the sub-region. The member countries have set high standards for facilitating internal trade but no real enforcement mechanism has been put in place to achieve it. For example, transit facilities across the contracting party states would greatly enhance a freer flow of goods and certain services, especially for the three landlocked contracting parties of Nepal, Bhutan, and Afghanistan. However, trade facilitation remains an aspiration with no mechanism in place for its realization.[75] The sub-regional transport arrangements are basically bilateral deals. For instance, the India-Bhutan PTA allows imported and exported goods (other than those from India) to and from Bhutan to pass thorough Indian territories without being subjected to any customs duties or trade restrictions.[76] This agreement also designates specific exit and entry points in India through which imports and exports of Bhutan can be

[74] *ASEAN Mutual Recognition Arrangement Framework on Accountancy Services* (Feb. 26, 2009), *available at* http://www.aseansec.org/22225.htm (last visited Sept. 18, 2010); *ASEAN Mutual Recognition Arrangement on Architectural Services* (Nov. 19, 2007), *available at* http://www.aseansec.org/21137.pdf (last visited Sept. 18, 2010); *ASEAN Mutual Recognition Arrangement on Engineering Services* (Dec. 6, 2006), *available at* http://www.aseansec.org/18009.htm (last visited Sept. 18, 2010); *ASEAN Mutual Recognition Arrangement on Nursing Services* (Dec. 8, 2006), *available at* http://www.aseansec.org/19210.htm (last visited Sept. 18, 2010); *ASEAN Mutual Recognition Arrangement on Dental Practitioners* (Feb. 26, 2009), *available at* http://www.aseansec.org/22228.htm (last visited Sept. 18, 2010); *ASEAN Mutual Recognition Arrangement on Medical Practitioners* (Feb. 26, 2009), *available at* http://www.aseansec.org/22231.htm (last visited Sept. 18, 2010); *ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications* (Nov. 19, 2007), *available at* http://www.aseansec.org/21139.pdf (last visited Sept. 18, 2010).

[75] *See* Governor Stresses Need for Trade Facilitation at SAARC Seminar Inaugural, Daijiworld.com, Aug. 5, 2010, http://www.daijiworld.com/news/news_disp.asp?n_id=82686&n_tit=Governor+Stresses+Need+for+Trade+Facilitation+at+SAARC+Seminar+Inaugural++.

[76] *See* Agreement on Trade, Commerce and Transit between the Government of the Republic of India and the Royal Government of Bhutan, India-Bhutan, art. V, July 28, 2006, India Dep't of Commerce, *available at* http://www.commerce.nic.in/trade/bhutan.pdf.

transshipped.[77] In a similar vein, a transit facility is also in place between Nepal and India with designated entry and exit points in Indian territories for goods to move to and from Nepal.[78]

The legal framework for cross-border movement of goods and services can only have a moderate impact on trade flow unless a physical infrastructure to support that trade flow exists—namely, an efficient transportation network capable of facilitating speedy movement. It is crucial that the contracting parties have an efficient network of water, road, railway, and air transportation—all modes of transportation available to assist freer and smoother movement of goods and services throughout the sub-region. The transit framework within the sub-region needs to cover all SAFTA contracting parties and it must be dealt with in the SAARC's institutional framework. Bilateral transit arrangements cannot substitute for a sub-region wide integrated transport framework. Although there is concern about potentially increased movement of terrorists across borders if the sub-regional borders are more open, these concerns seem to exaggerate the threat. It is not clear that a sub-region wide transit network would increase the threat of terrorism. Moreover, protected borders do not appear to have been able to prevent the movement of terrorists in the past.

Relaxing travel and visa restrictions to facilitate movement of natural persons across the sub-region would create more trade in transportation and tourism services. The contracting parties have recognized the importance of the promotion of sub-regional tourism[79] but no measure to facilitate cross-border movement of natural persons has yet been taken. Since trade is not a static phenomenon, there might be unexplored areas of trade and investment between the contracting parties. Relaxing travel restrictions may therefore also encourage business contacts within the sub-region, which in turn could pave the way for the discovery of new areas of trade and exploration of potential industries for joint venture or direct foreign investment flow. To facilitate this, contracting parties ought to take prompt steps to facilitate the creation of business visitor visas for entrepreneurs from the other contracting parties.

5) SAFTA does not address how it will develop capacity building of LDC contracting parties

Annex II of SAFTA provides a detailed list of areas where the developing contracting parties have vowed to assist LDC contracting

[77] *Id.* at 4 (Protocol with Reference to Article V).

[78] India-Nepal PTA, *supra* note 20, Annexure A.

[79] *See* Declaration of the Fifteenth SAARC Summit, Aug. 2-3, ¶ 24, 2008, http://www.saarc-sec.org/SAARC-Summit/7/ (follow "Fifteenth SAARC Summit" hyperlink).

parties in providing technical assistance for building trade capacity. The identified areas include training and human resources development in trade; development of trade-related institutions; development of trade negotiating skills; development of tariff-related laws; customs procedure; trade policy reforms; and assistance in improvement of national capacity building in different WTO agreements and promotion of exports.[80] However, SAFTA is silent as to the mode of implementation of these laudable objectives, as well as the source of the logistics to realize them. Obviously, this is frustrating for LDCs because the existence of these objectives creates legitimate—albeit unfulfilled—expectations of opportunities. If these opportunities are continually hindered, LDCs will feel increasingly disenchanted with SAFTA.

Capacity building in some of the above-mentioned areas does not demand a high degree of capital. India is one of the most vocal developing country members of the WTO and has ample expertise about WTO rules-related issues, having the experience of participating in a significant number of WTO disputes. Since the WTO's inception, India has invoked the WTO's dispute settlement procedure in eighteen cases as complainant and has participated as respondent in twenty cases.[81] Among the other contracting parties, Bangladesh and Sri Lanka have invoked the dispute settlement system as complainant in only one case each, and Pakistan has done so in only three cases as complainant and two cases as respondent.[82] Because of India's experience in WTO dispute settlement and its relatively large pool of specialists, it should assume the lion's share of the burden of increasing the human capital of the LDC contracting parties. The developing contracting parties should apportion their budgetary responsibilities and specify their plans to realize the objectives aimed at trade capacity building of LDC contracting parties as mentioned in SAFTA.

Admittedly, all SAFTA contracting parties can seek legal assistance on WTO rules from the Advisory Centre on WTO Law (ACWL), a Geneva-based intergovernmental organization, either by being a member of the same or through special privileges as LDCs.[83] However, the

[80] Sri Lanka Dep't of Commerce, Areas identified for Technical Assistance to Least Developed Contracting States Under Article 11(d) of SAFTA Agreement, Aug. 31 – Sept. 3, 2005, *available at* http://www.doc.gov.lk/web/southasian_freetrade_technical.php (last visited Oct. 28, 2010).

[81] WTO, Dispute Settlement: Disputes by Country/Territory, http://www.wto.org/english/tratop_E/dispu_e/dispu_by_country_e.htm (last visited Oct. 26, 2010).

[82] *Id.*

[83] For ACWL's mandate and scope, see The Agreement Establishing the Advisory Centre on WTO Law, Nov. 30, 1999, 2299 U.N.T.S. 249; for a list of countries eligible for ACWL assistance , see ACWL: Members, http://www.acwl.ch/e/members/members.html (last visited Oct. 26, 2010).

ACWL charges fees for some of its services.[84] In addition, when both parties to a dispute relating to WTO rules approach the ACWL for advice, to avoid any conflict of interest the ACWL advises only the party that approached it first.[85] This aspect of the ACWL's modus operandi has at times been cleverly used by some member states that have approached the organization simply to deny the opposing party any chance of being served by the ACWL in the same case.[86] More importantly, the mandate of the ACWL is essentially limited to the role of providing assistance regarding WTO rules and procedure. Therefore, the ACWL cannot be a proxy for the trade capacity building of LDC contracting parties of SAFTA, as SAFTA's envisioned scope of capacity building is much more extensive than the ACWL's scope of activities.

6) SAFTA does not regulate export control

SAFTA does not contain any provision relating to the control of exports between the contracting parties. Generally, export prohibitions in PTAs do not attract much attention either in the negotiation for PTAs or in scholarly literature, as they are commonly perceived to hurt the interests of imposing countries more than the countries resorting to them. However, although export control would directly limit the income of the domestic producers, it may also have negative impacts on the potential importing countries. This may happen in a number of ways. The producers of importing countries may rely on imported inputs for use in their production chains. A country may rely on imports simply because its domestic industry may not produce sufficient similar products to meet national demand. Import of technological products may be critical for improving the efficiency of production process.

Some advanced economies may employ export control more often for strategic rather than trade-related purposes, as these states have an interest in limiting access to technologies that are potentially compromising to their national security.[87] It is understandable that by

[84] Mgmt. Board of the Advisory Ctr. on WTO Law, *Billing Policy and Revised Time Budget*, ACWL/MB/D/2004/3 (Mar. 26, 2004), *available at* http://www.acwl.ch/e/documents/time_budget_e.pdf.

[85] Frieder Roessler, Exec. Dir., Advisory Ctr. on WTO Law, Lecture at the Sydney Law School: Developing Countries in WTO Dispute Settlement (Mar. 23, 2010).

[86] *Id.*

[87] *See* Mitchel B. Wallerstein, *Losing Controls- How U.S. Export Restrictions Jeopardize National Security and Harm Competitiveness*, 88 FOREIGN AFF. 11, 12 (2009) (discussing recent export control policy in the United States and arguing for controls to be used more discriminately); Joanna Bonarriva, Michelle Koscielski & Edward Wilson, Export Controls: An Overview of Their Use, Economic Effects, and Treatment in the Global Trading System 3-5 (Aug. 2009) (U.S. Int'l Trade Comm'n, Working Paper No. ID-23, 2009), *available at* http://www.usitc.gov/publications/332/working_papers/ID-23.pdf (outlining the general types of export controls and their economic and noneconomic effects).

agreeing to a PTA, SAFTA contracting parties would not be prepared to compromise their right to impose export control that they may think jeopardize national security.

However, this issue of export control may have the economic implication of inhibiting internal trade between the parties, because the contracting parties—particularly India—typically resort to export bans to counter temporary surges in the prices of essential foodstuffs.[88] However, the economic rationale of temporary bans on exports to lower the prices in a domestic market is dubious, as passing on the benefit of supposedly lower costs to consumers remains a difficult exercise.[89] In recognition of the necessity of cooperation among member countries in this regard, SAARC member countries have signed an agreement providing for the establishment of a SAARC Food Bank to serve as a sub-regional food security stock for the member countries.[90] It would be wise if they adopted rules proscribing total ban or excessive export taxes for foodstuffs destined for other contracting parties.

C. SAFTA and Anti-dumping Measures

1) Increased anti-dumping measures may impede regional trade

Once trade between the contracting parties expands in volume, it is likely that anti-dumping measures will consistently target sub-regional producers. Hence, the current low prevalence of trade remedy measures in intra-SAFTA trade is not a reliable indication of what may happen in the medium or long term. Furthermore, conducting anti-dumping investigations requires formal expertise in trade administration matters, as can be inferred from the anti-dumping statistics. Since the formation of the WTO, no LDC thus far has initiated any anti-dumping investigations or adopted any anti-dumping measures.[91] It is the member countries of the Organisation for Economic Co-Operation and Development[92] and large developing countries like Brazil, China, Egypt,

[88] M. Rafiqul Islam & Md. Rizwanul Islam, *The Global Food Crisis and Lacklustre Agricultural Trade Liberalisation: Demystifying their Nexus Underpinning Reform*, 10 J. WORLD INVESTMENT & TRADE 679, 684 (2009).

[89] Bonarriva et al., *supra* note 87, at 4-5.

[90] Agreement on Establishing the SAARC Food Bank, pmbl., art. II, Apr. 3, 2007, *available at* http://www.saarc-sec.org/userfiles/FoodBank.doc.

[91] *See Anti-dumping Initiations*, *supra* note 41; *Anti-dumping Measures*, *supra* note 41. *See generally* WTO Comm. on Anti-dumping Practices, *Reports under Article 16.4 of the Agreement: Note by the Secretariat*, G/ADP/N/182- G/ADP/N/198 (Feb. 19, 2009 - Mar. 15, 2010) (monthly WTO anti-dumping reports).

[92] The Organisation for Economic Co-operation and Development currently has 33 member countries including Australia, France, Germany, Japan, South Korea, Turkey, the United Kingdom, and the United States. For a full list, see Org. for Econ. Co-operation and Dev., *Member Countries*,

India, and South Africa that are the frequent users of anti-dumping measures.[93] However, these statistics do not capture the use of anti-dumping measures in proportion to the volume of total imports. In other words, developed countries and large developing countries may have resorted to anti-dumping measures more than LDCs because they engage in more trade. However, given that a corporation must have significant market power to engage in dumping, it is likely that producers in the economically advanced countries are better positioned to engage in dumping. It is also probable that LDCs are prevented from resorting to anti-dumping measures because of their lack of institutional capacity and sufficient market power. Therefore, it appears likely that if the national trade expertise base matures, and the market power of corporations in LDCs increases, the LDCs will resort to anti-dumping measures in intra-PTA trade.

While trade remedy measures such as anti-dumping and countervailing duties are supposed reactions to the unfair trade practices of exporters, in practice they are often protectionist devices. The danger of their pervasive usage is aggravated in tough financial times, as governments often bow to the protectionist demands of their domestic industries. For instance, during the recent financial crisis—from July to December 2008—the WTO Secretariat noted that its member states initiated seventeen percent more anti-dumping investigations than during the same period in the previous year.[94] Doctrinally, when governments pursue a PTA they express a desire to expand intra-regional trade, and trade remedy measures against PTA partners are antithetical to the commitment of the internal trade liberalization.[95] Hence, it would be ideal if SAFTA abolished all forms of anti-dumping measures in intra-SAFTA trade. However, in view of the current prevalence of anti-dumping measures in SAFTA, this does not seem likely. But even if the contracting parties fall short of agreeing on total elimination of anti-dumping measures in intra-SAFTA trade, there might still be a number of ways for them to curb the scope of such measures.

---

http://www.oecd.org/countrieslist/0,3351,en_33873108_33844430_1_1_1_1_1,00.html (last visited Oct. 26, 2010).

[93] *Anti-dumping Measures*, *supra* note 41.

[94] Press Release, WTO, Anti-dumping: WTO Secretariat Reports Increase in New Anti-dumping Investigations (May 7, 2009), *available at* http://www.wto.org/english/news_e/pres09_e/pr556_e.htm.

[95] *See* Comm. on Reg'l Trade Agreements, *Synopsis of "Systemic" Issues Related to Regional Trade Agreements*, ¶ 58(a), WT/REG/W/37 (Mar. 2, 2000); Comm. on Reg'l Trade Agreements, *Note on the Meetings of 27 Nov. and 4-5 Dec. 1997*, ¶ 26, WT/REG/M/15 (Jan. 13, 1998); Comm. on Reg'l Trade Agreements, *Communication from Australia*, ¶ 21, WT/REG/W/18, (Nov. 17, 1997).

2) Increasing the dumping margin threshold to discourage anti-dumping investigation

If the dumping margin threshold were increased it would discourage anti-dumping investigations. The WTO's anti-dumping agreement—the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)—provides that if the investigating authorities find that the margin of dumping is less than two percent of the export price, the investigation will not proceed.[96] If SAFTA provides a higher threshold of dumping margin for exports from one contracting party to another, sub-regional exporters will benefit. Article 5.8 of Anti-Dumping Agreement also provides that anti-dumping investigations should cease with respect to a particular country if its dumped imports comprise less than three percent of the importing member's like-product imports.[97] Any higher threshold for imports from SAFTA would exempt their exporters from anti-dumping investigations. This would ensure that importers from the contracting parties with nominal market share will not have to bear the costs of defending anti-dumping investigations.

Article 8 of the Anti-Dumping Agreement further provides that if an exporter under investigation for anti-dumping activities submits an assurance that export prices will be increased to wipe out the alleged dumping, the investigations may be discontinued.[98] Currently, however, the importing member is not obliged to accept the price assurance. By incorporating a provision for the mandatory acceptance of price undertaking by SAFTA exporters, SAFTA would assist the exporters as well as save the time and resources of the anti-dumping investigation authority.

Finally, Article 11.3 of the Anti-Dumping Agreement requires that any anti-dumping duty must not be maintained for more than five years from the imposition or five years after the most recent review, unless the relevant authorities determine that termination of the duty would likely cause recurrence of the dumping.[99] SAFTA members may provide that an anti-dumping duty imposed against any other SAFTA member must be terminated within a shorter period. The contracting parties of some

[96] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 5.8, Apr. 15, 1994, WTO, *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf [hereinafter Anti-Dumping Argeement].

[97] The exception to this is when countries whose dumped imports individually account for less than three percent of an importing Member's like-product imports, but collectively account for more than seven percent. *See id.*

[98] *Id.* art. 8.1.

[99] *Id.* art. 11.3.

PTAs among developing countries—namely the Andean Community, the Caribbean Community, the Central American Common Market, the Common Market of the Southern Cone, and the *Union Économique et Monétaire Ouest-Africaine*—have taken one or more of the above steps in this direction to provide momentum to the expansion of intra-regional trade.[100] Admittedly, these PTAs are customs unions and SAFTA at this stage is merely a free trade agreement under the Enabling Clause. However, SAFTA contracting parties have the goal of progressively integrating into an economic union.[101] Hence, they should either eliminate anti-dumping duties in their internal trade or make special concessions for anti-dumping measures as have the above-mentioned PTAs.

3) Do special rules for anti-dumping measures against PTA partners have the potential to violate the Most Favored Nation rule?

Theoretically, it is possible to argue that providing for any of these special provisions for limiting anti-dumping duties in intra-SAFTA trade would constitute special favors and violate the Most Favored Nation rule. However, the textual basis for such an argument appears to be rather fragile. This is because anti-dumping duties are inherently discriminatory. A country chooses to proceed with investigations against exporters based upon the reported complaints of their unfair trading practices. Whereas Article XXIV of GATT does not authorize WTO members to give any special concession in anti-dumping investigations, it also does not contain any proscription against doing so.[102]

Again, there is nothing in the Anti-Dumping Agreement that can be construed to impose such a non-discriminatory obligation on PTA parties.[103] Rather, the language of Article 9.2 of the Anti-Dumping Agreement suggests that a country adopting anti-dumping duties does in fact possess some discretionary powers.[104] This article requires that if an anti-dumping duty is imposed, it will have to be collected on a non-discriminatory basis from the imports of all sources that are found to have dumped, except from imports of those sources from which price

[100] Robert Teh et al., *Trade Remedy Provisions in Regional Trade Agreements*, *in* REGIONAL RULES IN THE GLOBAL TRADING SYSTEM (Antoni Estevadeordal, Kati Suominen, & Robert Teh eds., 2009).

[101] Declaration of the Eleventh SAARC Summit, ¶ 1, Jan. 4-6, 2002; Declaration of the Twelfth SAARC Summit, ¶ 3, Jan. 4-6, 2004; Declaration of the Thirteenth SAARC Summit, ¶ 14, Nov. 13, 2005, Declaration of the Fourteenth SAARC Summit, ¶ 18, Apr. 3-4, 2007; *all available at* http://www.saarc-sec.org/SAARC-Summit/7/ (follow hyperlinks to respective declaration).

[102] *See Anti-Dumping Agreement*, *supra* note 96.

[103] *See id.*

[104] *Id.* art. 9.2.

undertakings have been accepted. Thus, a WTO member state cannot levy disparate anti-dumping duties, but even during the investigation stage it may exempt any exporter by accepting the party's price undertaking. This shows, *a fortiori*, the scope of discretion that a WTO member may exercise in conducting anti-dumping investigations. Therefore, it does not appear that special anti-dumping rules for intra-SAFTA trade, such as those suggested here, would violate any rules of the WTO.

D. The Benefits of Tackling Subsidies in a PTA Are Difficult to Determine

Some recent PTAs have attempted to restrict the use of subsidies in intra-PTA trade by providing that parties will eliminate—and will not re-introduce—export subsidies on products destined for other partner countries.[105] However, some types of subsidies cannot always be selectively applied. For instance, if a domestic industry is provided with input subsidies at the time of production with the aim of boosting that export, it would hurt competing industries in all other trading partners. It is difficult to conceive how such subsidies would not apply to exports sent to PTA partners. Hence, in the absence of multilateral rules, there appears to be very little that SAFTA contracting parties can do to eliminate subsidies in intra-SAFTA trade other than to require goods destined for other contracting parties to not be eligible for any form of express export subsidies. Any SAFTA disciplines on countervailing duties may not be feasible.

In these ways, one can see that the over- and under-regulation of many areas of trade law by SAFTA leaves its own parties much less likely to take full advantage of the natural trade potential.

IV. THE NECESSITY OF MOVING BEYOND DIRECT TRADE MEASURES

To make SAFTA more effective, contracting parties must move beyond direct trading measures and make fundamental changes to SAFTA. These changes should include attracting Foreign Direct Investment (FDI) to industrialize their economies, inserting a dispute

[105] *See, e.g.*, Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ch. 2, art. 3, Feb. 27, 2009, AUSTRALIA DEP'T OF FOREIGN AFFAIRS AND TRADE, *available at* http://www.dfat.gov.au/trade/fta/asean/aanzfta/contents.html; Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China, China-N.Z., ch. 6, art. 63, Apr. 7, 2008, *available at* http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php.

settlement clause, creating a sub-regional competition policy framework, and marshaling trade-negotiating resources by establishing a permanent body of trade negotiation experts.

A. SAARC Should Use SAFTA to Attract Foreign Direct Investment (FDI)

Expert opinion on the ability of FDI to influence economic development varies sharply. Many arguments against FDI are principally arguments against employing lax regulations to attract FDI, not against the desirability of attracting FDI per se. Skepticism has been voiced that stiff competition among developing countries may spur a race to the bottom; that is, countries with lax environmental regulations might attract more FDI.[106] However, it is undeniable that increased flow of FDI creates jobs and may increase trade performance.[107] With chronic shortages of domestic capital, SAFTA contracting parties need to attract FDI to industrialize their economies.

SAFTA contracting parties should formulate sub-regional rules to protect FDI for progressive economic integration. Although the impact of setting up a legal framework to protect FDI in a PTA is mixed and complex,[108] a comprehensive sub-regional framework would not likely harm the SAARC sub-region's standing as a favorable host of FDI. Such an initiative would also help to materialize SAARC's aspired goal of eliminating barriers to intra-SAARC investments.[109]

A primary concern for developing countries and LDCs is that being an agenda of capital-exporting countries, any such agreement promotes their own interests to the detriment of the host countries.[110] However, SAFTA contracting parties are not capital-exporting countries, so this concern should not be an element in their sub-regional forums. Additionally, if any dispute arises relating to FDI from an investor of another SAFTA contracting party, it should be subject to SAFTA's dispute settlement procedures. The contracting parties may formulate

---

[106] *See generally* H. JEFFREY LEONARD, POLLUTION AND THE STRUGGLE FOR THE WORLD PRODUCT: MULTINATIONAL CORPORATIONS, ENVIRONMENT, AND INTERNATIONAL COMPARATIVE ADVANTAGE (1988) (arguing that the strictness of environmental regulations in developed countries such as the United States has incentivized many industries to relocate their operations to less developed countries with fewer regulations).

[107] *See* M. RAFIQUL ISLAM, INTERNATIONAL TRADE LAW OF THE WTO 500 (2006).

[108] *See generally* United Nations Conference on Trade and Development, 2009, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, art. III, U.N. Doc. UNCTAD/DIAE/IA/2009/5 (describing how preferential trade and investment agreements affect the flow of FDI into developing countries).

[109] SAFTA, *supra* note 2, art. 8(h).

[110] JOSEPH E. STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL**:** HOW TRADE CAN PROMOTE DEVELOPMENT 150 (2005); *see* ISLAM, *supra* note 107, at 498-99.

rules on settling FDI-related disputes, limiting them to the investors within the sub-region.

It may be argued that once an agreement is in place to protect sub-regional investors, SAFTA contracting parties may be pressed by big businesses from third-party countries to extend similar treatment to them. However, that line of argument does not appear to be persuasive based on the abundance of agreement templates already in place for protecting FDI. Indeed, all but two SAFTA contracting parties are parties to at least one bilateral investment treaty.[111] Afghanistan has signed bilateral investment treaties with three countries, Bangladesh with twenty-eight countries, India with seventy-eight countries, Nepal with four countries, Pakistan with forty-seven countries, and Sri Lanka with twenty-seven countries.[112] Though only four of these bilateral investment treaties are between SAFTA contracting parties,[113] the remaining bilateral investment treaties involve countries of varying economic power from LDCs to developed countries. More significantly, a study by the United Nations Conference on Trade and Development shows that in 2009 at least four SAFTA contracting parties[114] were subjected to state versus investor dispute settlement claims.[115] This implies that they may be willing to embrace a binding sub-regional investment mechanism providing for state versus investor dispute settlement.

B. SAFTA Should Include an FDI Settlement Dispute Clause

To ease concerns, promote confidence among investors, and avoid diplomatic tussle among SAFTA contracting parties, a SAFTA provision should be drafted whereby any individual investor from the sub-region can bring a claim against a contracting party in a sub-regional dispute settlement forum. The provision can be modeled after NAFTA's Chapter 11. Such a provision would help to de-politicize the process of dispute settlement and tone down any potential diplomatic rows that often

[111] The two exceptions are Bhutan and the Maldives. *See* U.N. CONF. ON TRADE AND DEV. (UNCTAD), *Country-specific Lists of BITs*, June 1, 2010, http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1 (follow "select one country" drop-down menu).

[112] *Id.*

[113] *Id.* (agreements between Bangladesh and India; Bangladesh and Pakistan; India and Sri Lanka; and Pakistan and Sri Lanka).

[114] Bangladesh, India, Pakistan, and Sri Lanka. *See* United Nations Conference on Trade and Development, Latest Developments in Investor–State Dispute Settlement: IIA Issues Note No. 1 (2010): International Investment Agreements, 13, U.N. Doc. UNCTAD/WEB/DIAE/IA/2010/3, *available at* http://www.unctad.org/en/docs/webdiaeia20103_en.pdf.

[115] *Id.*

surface in state-versus-state dispute settlement.[116] However, unlike the NAFTA model, SAFTA should not provide for ad hoc arbitration panels to settle investment disputes. Dispute settlements by ad hoc panels are fraught with the peril of breeding uncertain rulings. The ad hoc panels should be replaced with a permanent panel of arbiters that will specialize in investment disputes, thus giving more stability to the arbitration process.

SAFTA contracting parties have signed the Agreement for Establishment of SAARC Arbitration Council (SAC Agreement) to set up an arbitration council (Council),[117] but it is unclear whether, under this agreement, a third-party investor can directly bring a claim against a SAFTA member. The SAC Agreement is ambiguous and has yet to take force. It appears that the application of the SAC Agreement will be limited to the investors of the contracting parties, since the preamble notes that the contracting parties are "[d]esirous of creating conditions favourable for fostering greater investment by investors of one Member State in the territory of another Member State" (emphasis omitted).[118]

However, there is nothing in the SAC Agreement to imply that non-SAFTA investors would be able to invoke any of its provisions. The proposed Council, headed by the Director-General, is entrusted with the responsibility of maintaining a list of those who may act as arbitrators for settling investment disputes.[119] The SAC Agreement in its current form does not contain any provision as to whether a foreign investor can directly bring a claim against a contracting party.

SAFTA is also unclear about whether a corporate entity can bring a claim against a SAFTA country. Because the details still need to be solidified, it is anticipated that strong opposition may be voiced by some domestic interest groups or courts against giving an investor the right to bring a claim against a member country, as that would mean that a corporate entity could bring a claim directly against a SAFTA contracting party. However, in the domestic legal setting, individuals and corporate actors can litigate against the government, and some of the contracting parties have provided for similar rights for foreign investors. Since this is not a novel idea, the state versus investor dispute settlement may not appear to be such an odd thing.

---

[116] *See* Michael Ewing-Chow, *Investor Protection in Free Trade Agreements: Lessons from North America*, 5 SING. J. INT'L & COMP. L. 748, 767 (2001).

[117] Agreement for Establishment of SAARC Arbitration Council, Nov. 13, 2005, *available at* http://www.saarc-sec.org/userfiles/AgreementforestablishmentofSAARCArbitrationCouncil.doc.

[118] *Id.* pmbl.

[119] *Id.* art. II-III.

For example, Mexico agreed to a state versus state dispute settlement procedure. Mexico had a long-standing history of investment disputes with the United States and so it incorporated the Calvo Doctrine, essentially demanding that aliens engaged in commercial activities in the territory of another country rely on the rules of that country for all commercial matters and not involve their native country in espousing claims on behalf of its citizens.[120] Nonetheless, neither the long history of disputes nor the dogmatic adherence to the Calvo Doctrine stood in the way of agreeing to a common set of investment rules in NAFTA. Rather, Mexico wanted to project itself as a secure destination for foreign investors.[121] Likewise, SAFTA contracting parties, by establishing a state versus investor dispute settlement rule, may create a good impression that may counteract—albeit to a limited extent—the sub-region's bad name for political upheavals.

C. SAFTA Should Include a Competition Policy

To ensure countries will benefit from free trade, SAFTA should include a competition policy to prevent the rise of anti-competitive practices. One of the basic objectives of trade liberalization is to increase the choices of goods and services and decrease consumer prices by increasing competition among businesses. However, the anti-competitive practices of businesses may nullify or circumscribe the benefits of free trade that consumers could otherwise enjoy.[122] By engaging in monopolistic and oligopolistic practices, big businesses with disproportionate market share may abuse their market power and capture the benefits of trade liberalization—rather than the consumers who are the intended beneficiaries.[123] Competition policies complement the trade liberalization's objective of maintaining an efficient market that benefits consumers.

Though the WTO has not been able to implement a competition policy, developing countries are likely to agree to competition rules in PTAs. The issue of incorporating a universal competition agreement in the WTO has been so divisive that the General Council made a decision

---

[120] Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 194 & n.5 (2001).

[121] Frederick M. Abbott, *NAFTA and the Legalization of World Politics: A Case Study*, 54 INT'L ORG. 519, 531-33 (2000).

[122] M. Rafiqul Islam, *A WTO Multilateral Framework for Competition Policy and Trade-Induced Development: Debunking their Complementarity in Developing Countries*, 5 J. WORLD INV. & TRADE 491, 494 (2004).

[123] *See id.* (arguing that multinational corporations have gained power and their monopolistic tendencies may have a negative impact in the marketplace).

that no work towards negotiations on competition policies would occur within the WTO during the Doha Round Negotiations.[124] Many developing countries in the WTO resist the formulation of multilateral competition rules at the WTO but take a markedly different stance when it comes to competition policies in PTAs. A recent survey of sixty-eight PTAs involving developing countries found that fifty of those agreements include a competition policy.[125] This divergence in approach may partially be attributed to the fact that the focus of competition rules within the WTO framework focuses more on ensuring competitive market access (which favors business from developed countries that are operating in developing countries) than on the promotion of fair competition among all businesses.[126] Moreover, the divergence in the economic size of the WTO member states makes it difficult to find common ground in competition matters. However, it may be surmised that SAFTA contracting parties will not have much difficulty incorporating a sub-regional competition policy framework. Indeed, the text of SAFTA expresses an aspiration for promoting competition within the SAARC area.

One of the main objectives of SAFTA is "promoting conditions of fair competition in the free trade area…."[127] However, the agreement includes no specific means for reaching this objective. A sub-regional competition policy framework could be the vehicle to ensure this aim is realized. Though it may not be feasible to immediately frame a supra-national, sub-regional competition authority to regulate and enforce common competition policies formulated within SAARC, a sub-regional body could initially play an advisory role. In this capacity it could formulate a model competition framework for the contracting parties. Additionally, it could assist the contracting parties in investigating alleged cases of anti-competitive practices. A sub-regional competition policy framework would be compatible with the desire to increase trade among SAFTA contracting parties.

D. SAARC Can Use SAFTA for Coalition Building in Global Trade Negotiations

[124] WTO Gen. Council, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, ¶ 1(g), WT/L/579 (Aug. 2, 2004), *available at* http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf.

[125] Robert Teh, *Competition Provisions in Regional Trade Agreements*, *in* REGIONAL RULES IN THE GLOBAL TRADING SYSTEM 418, 472 (Antoni Estevadeordal, Kati Suominen, & Robert Teh, eds., 2009).

[126] STIGLITZ & CHARLTON, *supra* note 110, at 147.

[127] SAFTA, *supra* note 2, at art. 3(b).

Member countries can use SAFTA to promote their interests in global trade negotiations. The trade promotion initiative of a PTA is not necessarily limited to the confines of its parties' internal trade. Recently, PTAs have been used to form coalitions for increasing the leverage of individual member countries in WTO negotiations.[128] Even members of the European Commission, despite being advanced economies, have found it helpful to marshal their trade-negotiating resources and now conduct much of their WTO-related activities by the European Commission rather than by individual countries.[129] When a group of WTO member states takes a concerted position on an issue that other WTO members do not agree with, it becomes difficult for the latter to outright reject the former's voice.[130] Thus, the other members may attenuate their position or give concessions in another area.[131] A group's collective position also improves its chances of representation in those issues where only a few of its parties negotiate. Hence, a coalition of SAFTA contracting parties in the WTO would likely be better positioned in negotiations than each country would be individually. As developing countries and LDCs, there are a number of areas where SAFTA contracting parties' interests converge in WTO negotiations. Admittedly, SAFTA contracting parties compete in areas, like textiles, where they vie for access to third-party markets. However, SAFTA contracting parties must be careful not to allow the few areas of competing interests to undermine their cooperation in areas where their interests converge. SAFTA contracting parties have more or less a common stance on many issues, such as advocating for stronger protection of traditional knowledge, geographical indication on products,[132] and the elimination of agricultural subsidies, as well as fighting for the prevention of new multilateral agreements on investment and competition within the WTO, linkage of trade and non-trade social issues like labor rights, and the involvement of non-governmental organizations in WTO procedures.[133] Additionally, as developing countries and LDCs, SAFTA contracting

[128] Edward D. Mansfield & Eric Reinhardt, *Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements*, 57 INT'L ORG. 829, 838 (2003).

[129] See Gregory Shaffer, The Challenges of WTO Law: Strategies for Developing Country Adaptation, 5 World Trade Rev. 177, 188 (2006).

[130] See Mateo Diego-Fernández, Trade Negotiations Make Strange Bedfellows, 7 World Trade Rev. 423, 435 (2008).

[131] Id. at 436.

[132] Other than wines and spirits. See WTO, Joint Statement by the SAARC Commerce Ministers on the Forthcoming Fourth WTO Ministerial Conference at Doha, ¶ 4.1(d), WT/L/412 (Aug. 23, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/proposals_e/wt_l_412.pdf.

[133] Id.

parties are frequently subjected to excessive quarantines and environmental measures in the markets of developed economies. Proposed carbon tariffs to tackle climate change—as suggested by some from developed countries[134]—could potentially be an issue where all SAFTA contracting parties have a common stand. Because of their limited resources, it is likely that many industries of SAFTA contracting parties would have difficulty in changing production patterns. As exporters they would be disproportionately subjected to such carbon tariffs.

There are other trade issues where the interests of the contracting parties may converge. One example is the proposed Anti-Counterfeiting Trade Agreement that includes very stringent measures to punish infringement of intellectual property rights.[135] While the infringement of intellectual property rights may be sanctioned by tougher international treaty rules, there are apprehensions among some analysts that this agreement may go too far.[136] Of particular concern to them is the prospect that the proposed instrument may negatively impact the legitimate trade of generic drugs.[137] As net-importers of intellectual property products, the contracting parties may take a common position against the Anti-Counterfeiting Trade Agreement.

It is difficult for SAFTA countries—particularly the LDCs—to negotiate individually with developed countries. However, SAFTA contracting parties can collectively set up a sub-regional database of unjustified quarantines and environmental measures that their producers face in developed markets. South Asian industries can submit information to this database about the unjustified barriers they face in their export markets. Based on the analysis of the data collated, SAFTA contracting parties can negotiate with those economies that resort to using unjustified trade barriers. By acting as a single entity in this manner, it is probable that contracting parties would elicit better outcomes than acting individually. But in view of the modest collective clout of the contracting parties in global terms, even their allied stance

[134] See, e.g., Paul Krugman, Op-Ed., Fetishizing Free Trade, N.Y. Times, Sept. 11, 2009, available at http://krugman.blogs.nytimes.com/2009/09/11/fetishizing-free-trade/.

[135] See generally Office of the U.S. Trade Rep., The Anti-Counterfeiting Trade Agreement – Summary of Key Elements under Discussion, http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion (last visited Oct. 26, 2010) (outlining the objective and structure of the Agreement).

[136] See, e.g., Charles R. McManis, The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty, 46 Hous. L. Rev. 1235, 1256 (2009).

[137] See generally 3D, Switzerland: Missing Policy Coherence: Trade Interests Overriding Right to Health?, (Nov. 23-26, 2009), http://www.3dthree.org/pdf_3D/3D_CESCRSwitzerland_Nov2009.pdf (arguing, inter alia, that the adoption of strict intellectual property rules would impede the generic drug trade and thus negatively affect international health).

may not be enough to enable them to reach every outcome to which they might aspire. To achieve their desired goals, they may need to coordinate with other WTO members or groups with similar interests. But even in such cases, concerted action by SAFTA contracting parties is likely to make the coordination easier and more effective than isolated endeavors of individual contracting parties alone.

To effectively negotiate as a group, SAFTA must establish a permanent body of recognized trade negotiation experts to devise common policies for WTO negotiations. If financial resources constrain the establishment of a permanent body, SAFTA may need to initially vest the current COE with this responsibility. However, the COE is a dispute-settlement body and should eventually be composed of independent arbiters. The responsibility of identifying issues of collective interest and drawing up common positions on those issues is essentially a diplomatic task. Therefore, persons with competence in diplomacy and negotiations should be sought. SAFTA should create a common fund that, over time, can bear the expense of establishing a permanent body to direct common policy coordination for the multilateral trade forum.

V. CONCLUSION

The South Asian Free Trade Agreement has tremendous potential to improve the economic and political welfare of its member countries. However, its effectiveness is currently weak due to bilateral PTAs, which bypass its authority, and because SAFTA's under- and over-regulates important issues. By working together, member countries may overcome both of these obstacles and achieve SAFTA's original goals.

To make SAFTA a fully functioning agreement, contracting parties must first terminate existing bilateral PTAs among themselves. However, since these PTAs provide contracting parties with strong financial incentives, this step is implausible until (1) SAFTA is modified to provide the benefits that drove contracting parties to create bilateral PTAs, and (2) SAFTA is strengthened by changing its current terms that are either under- or over-regulative.

One major benefit contracting parties would gain in making these changes would be the reduction in the administrative burden on custom authorities from the plethora of bilateral PTAs. Businesses would also benefit from doing business in a less complex trade regime. While some businesses may fear losing bilateral agreement benefits, their apprehension should be adequately addressed if SAFTA offers identical

market access benefits. Undeniably, some inefficient producers hitherto benefiting from bilateral PTAs might have to re-allocate their resources in view of the competition from other SAFTA producers. Nevertheless, that type of re-allocation of resources is the central point of any trade liberalization scheme. By eliminating bilateral PTAs between contracting parties, discrimination between SAFTA producers would be put to an end. Those businesses that are currently not enjoying benefits of bilateral PTAs should petition their governments to eliminate those treaties.

To increase the movement of goods across borders it is critical that the contracting parties put in place an integrated transport network. Trade co-operation initiatives should not be limited to the confines of their sub-regional forum; the sub-regional market—no matter how expansive and integrated—cannot be a substitute for the global market. The contracting parties would benefit from extending their collective resources to the negotiations of the WTO. A concerted SAFTA trade body would ensure better outcomes for the contracting parties than anything they could attain individually. Taking these vital steps will ensure that SAFTA is both internationally respected and economically effective.