

July 2010

Concluding Multilateral Trade Talks-Urgency Diminishes at Summit level

Anwarul Hoda¹

The last time the multilateral trade talks made headlines was when the Ministers met at Geneva in July 2008 and famously differed on the issue of special safeguard mechanisms in the modalities for the negotiations in agriculture. Since then, the talks have received scant attention at international economic meets. The urgency of concluding the talks has also progressively diminished. At Pittsburgh, the G20 Summit had reaffirmed the leaders' resolve to 'seek an ambitious and balanced conclusion to the Doha Development Round in 2010' and directed the ministers to take stock of the situation no later than early 2010 and seek progress on all the issues.

As it turned out, the stock taking at Geneva in March was not held at the ministers' level and no progress was made in closing the gaps. It became quite clear at the meeting that the conclusion of the Round was not in sight. The Toronto Summit communiqué has dropped the reference to the year 2010 and replaced it with the phrase 'as soon as possible'.

The Toronto Summit has effectively confirmed that the multilateral trade talks will be on the back-burner for some time. We look at the causes, consequences and cures for remedying the situation.

Causes

The most important cause for the existing state of affairs is that the attention of leaders has been focussed on the economic crisis that has bedevilled the world economy since September 2008. By the autumn of 2009, it looked as if the winter of deep recession was over, but the European debt crisis has rekindled fears of a double dip recession and the leaders are deeply worried. Persisting high levels of unemployment are

In This Issue

Concluding Multilateral Trade Talks-Urgency Diminishes at Summit level

Anwarul Hoda

Whither the Indo - Thai FTA

Shravani Prakash

Increase in anti-dumping investigations: Is India turning protectionist?

Swapna Nair

Period of Investigation in Safeguards and the Need for Objectivity

Akshay Kolse-Patil

Completing Regulatory Reforms in the Telecom Sector

Rajat Kathuria

¹ The author is chair professor of ICRIER's Trade Policy and WTO Research Programme

another cause for concern. The present preoccupations are achieving fiscal consolidation without endangering economic recovery, cutting deficits and reducing debt-to-GDP ratios without undermining confidence and hampering growth. The substantial reform agenda for building a more resilient financial system that importantly limits the build up of systemic risks has still to be followed through.

Protectionism has been kept at bay. The nine per cent fall in world trade was due to a collapse in demand and trade finance difficulties rather than import barriers raised by countries. Experience over the last two years does not prompt any fears that borders would be closed to foreign goods and services due to the recession. There is no escalation of trade conflict and the number of disputes has not increased in the WTO. Due to a rise in the international prices of agricultural commodities in general, no complaint is being heard that efficient producers and exporters are being displaced with the aid of subsidies. Trade liberalisation and strengthening of rules can, therefore, wait.

These are the deeper reasons for the apathy towards trade talks. There is also a reason related more directly to the trade talks. There is a seemingly unbreakable impasse in the market access component of negotiations on agriculture and non-agricultural products. One major player, the United States, demands additional concessions from the advanced developing countries in order to correct a perceived imbalance in the concessions to be made by them under the proposed modalities. The exhortation is not based on the traditional principle of reciprocity observed in past negotiations and is a far cry from the concept of less than full reciprocity on which the Doha Ministerial Declaration stresses. In fact the countries in question claim that the application of currently proposed modalities would lead to a reciprocity deficit for them. What is even less acceptable is that the USA is not willing to give credit for taking commitments to bind autonomous measures (taken by India, for instance, after the launching of the Doha Round) and demands new measures that are meaningful in commercial terms. The lack of rationality in this will be manifest if we extend the logic of the US approach to the areas of multi-brand retail and Direct-To-Home telecast service providers, in respect of which the Government of India is currently considering liberalisation of foreign equity ceilings. If the decisions in this regard were to be taken now, well before the conclusion of the trade talks, the USA could well pocket these and ask for more by way of commercially meaningful concessions at the time the Doha Round is about to end.

But the US arguments are couched in political terms: Brazil, China and India must give more because they are key emerging markets that are fast growing economies and important markets for the future. The balance that the US seeks is a political, not a technical, one. Those developing countries that have become economic and political heavyweights must be seen to be doing more. The developing countries concerned are not persuaded.

Consequences

One consequence of the deadlock in the multilateral trade talks could be an intensification of negotiations for regional, sub-regional or bilateral FTA agreements. The main motivation for such arrangements is undoubtedly geo-political and such arrangements can be expected to proliferate in any case. However, when there is stasis in the multilateral forum, trade policy officials have more time to devote to regional talks. Major players such as the EU, Japan and India are now engaged in talks for a number of regional arrangements, either for initiating new agreements or deepening or expanding existing ones. In the United States, there is also a sense that bilateral or regional arrangements may bring surer and quicker results but, paradoxically, the Congress is not considering ratification of FTA Agreements that the previous administration has signed with Korea, Colombia and Panama. What has proved puzzling to many observers is that the US is taking extraordinary interest in the Trans-Pacific Partnership negotiations. The President's 2010 Trade Policy Agenda has this to say on the subject:

"After a careful analysis and extensive consultation with Congress and with stakeholders, the United States announced in December 2009 that it intends to enter into negotiations of a regional, Asia-Pacific trade agreement, known as the Trans-Pacific Partnership (TPP) agreement with Australia, Brunei, Chile, New Zealand, Peru, Singapore and Vietnam. The Administration believes that the TPP is the strongest vehicle for achieving economic integration across the Asia-Pacific region and advancing US economic interests with the fastest growing economies in the world. Building on the most forward-looking aspects of existing Free Trade Agreements (FTAs) and on the emerging special opportunities and challenges characterising the Asia-Pacific market, the United States intends to shape a broad, deep, and high quality 21st century regional trade agreement. We believe that the dynamic economies of the countries involved in the negotiations, and its strong policy ambitions will lead other countries to seek to join the undertaking."

One consequence of the stagnation of multilateral trade talks is clearly that more regional agreements would come into existence and more quickly. But what is not well known is that the lack of progress in the multilateral trade talks might give rise to negotiations of WTO-plus plurilateral agreements among a small number of, mainly OECD, countries. One such agreement is already in the making: the Anti-Counterfeiting Trade Agreement. Australia, Canada, the European Union and its 27 member states, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea, Switzerland and the USA have been engaged for about two years in the negotiation of a TRIPS plus agreement on the enforcement of IPRs. The participating countries are major OECD countries and countries which have an FTA Agreement with the US and thus are already party to similar TRIPS plus IPR enforcement provisions. The April draft of the agreement was placed on the website of the USTR. The draft does not contain, as many feared it would, any draconian provision, such as requiring

Internet Service Providers (ISP) on a mandatory basis to terminate an internet connection on repeated allegation of copyright infringement (the 'Three Strikes' rule). However, the proposals are considerably more stringent than the TRIPS provisions on border and domestic enforcement against counterfeit goods (that infringe trade marks) and pirated goods (that infringe copyrights). Although the rights of non-participating WTO members would be prejudiced to some extent, the WTO Agreement does not enable them to put a brake on these negotiations. In the absence of a functioning multilateral forum like the WTO bearing fruit with new agreements on liberalisation of trade and trade disciplines, we might expect more of such plurilateral agreements.

Cures

As mentioned earlier, at the Toronto Summit, the leaders have agreed to discuss the status of the negotiations and the way forward at Seoul. By the time the Seoul summit is held, there is little chance that confidence in the economic recovery would have returned and the dangers emanating from the Euro crisis would have dissipated. The leaders may have to wait for a more opportune moment for a renewed initiative on the Doha talks. Whenever that moment arrives, two possible courses of action would seem to merit consideration in parallel by the leaders.

The first would be joint action for the enhancement of the liberalisation package. It is widely believed that the public opinion in the USA will not permit the Congress to approve the package that is at present on the table at Geneva and agreement on substantial additional liberalisation would be needed. In this context, a number of well-known economists, lawyers and trade policy practitioners, meeting in mid-May at the Yale Centre for the Study of Globalisation at New Haven, Connecticut, USA, recommended that the only way to prevent the demise of the Doha round was for the participants to enhance the liberalisation package. To achieve this objective, they called upon the USA to lead by example and make additional offers, while calling upon other major players to match them. The US offers would have to be dramatic to produce results. They might include reducing its agricultural support measures further than what the application of modalities currently on the table will entail, reducing Mode 4 barriers, and abandoning its zeroing practice in calculating anti-dumping duties. If the US can make the offers on a conditional basis, there is more than a fair chance that other major players, including the emerging countries, would respond adequately. In that eventuality, we could see the commencement of the endgame for bringing the trade talks to a close.

The second would be trimming the multilateral agenda. During the four and a half years since the Hong Kong Ministerial, market access has been the focus of negotiations. What has been hidden from public view is that the WTO members are poles apart on all other issues except trade facilitation. At some stage, the members would have to reconcile themselves to a curtailed multilateral agenda, notwithstanding the single undertaking commitment, if they

have to seek an early conclusion of the Round. In the Uruguay Round, there was a result on every subject but in earlier rounds, it was quite common to drop subjects on which there could be no meeting of minds. A plurilateral solution could also present itself as the way out in some areas. It would be a pity, however, if meaningful multilateral results are not obtained in areas such as liberalisation of trade restrictions on environmental goods and services and improving WTO disciplines on fisheries subsidies. Results in these areas are sorely needed for the continued credibility of the WTO framework in the prevailing mood and spirit of the times.

Whither the Indo - Thai FTA

Shravani Prakash¹

In his recent visit to India in May, Thai Deputy Minister of Commerce Alongkorn Ponlabhoo showed keenness to revive talks on a bilateral Free Trade Agreement (FTA) that have remained in suspension for six years. Last October, Thai Deputy PM Korbsak Sabhavafu had also expressed the need to seal a comprehensive bilateral agreement to “push-up” bilateral trade. The question that arises is how worthwhile it would be for India to respond positively to these overtures.

The Framework Thailand-India Free Trade Agreement (TIFTA) was signed in October, 2003, envisaging negotiations covering goods, services and investment be concluded by 2010. In the first phase, agreement was reached on the Early Harvest Scheme (EHS) for the elimination of duty on a limited common list of products, which was implemented in 2004. The second phase of the FTA negotiations did not take off because of disagreements on the sensitive lists and rules of origin as well as political instability in Thailand.

The EHS included 82 products at the 6-digit level of HS classification and entailed tariff phasing out over a three year period – duties cut by 50 per cent on September 1, 2004, 75 per cent on September 1, 2005 and eliminated entirely on September 1, 2006. The list of 82 products included fruits, fishery products, plastics, electrical appliances (air-conditioners, colour TVs), automotive parts, precious metal and jewellery, chemicals etc.

Trade patterns after the implementation of EHS

Trade statistics show a significant deterioration in India’s merchandise trade balance after the implementation of the EHS in 2004. India’s exports to Thailand undoubtedly grew at a faster rate after that year but India’s imports from Thailand grew even more rapidly, not only in relation to the previous period but also relative to global imports. Table 1 shows that much of this was due to the trade patterns in the EHS products.

The bilateral trade balance has swung from being positive in India’s favour in the period 2000-01 to 2003-04 to being hugely negative during the period 2004-2005 to 2008-2009, principally on account of trade in EHS products.

¹ The author is a researcher at ICRIER

Table 1 - India's Trade with Thailand

		All Products		82 EHS Products	
		2000-01 to 2003-04	2004-05 to 2008-9	2000-01 to 2003-04	2004-05 to 2008-9
% RoG in exports	to Thailand	16	23	24	20
	Global	13	23	28	19
% RoG in Imports	from Thailand	6	35	20	38
	Global	10	30	11	31
Trade Balance with Thailand (US\$ mn)		957	-1659	-46	-1,290

Assessing the EHS

The EHS was biased against India from the outset. The 82 commodities comprised only 5 per cent of India's total exports to Thailand but 18 per cent of total imports from Thailand in 2004. India already faced a trade deficit in these 82 products at the time of the commencement of the FTA (Table1).

The customs duty elimination under the EHS had a skewed impact on India's trade with Thailand. Exports from India of the 82 items increased by 20 per cent between 2004 and 2009, while imports increased by nearly 40 per cent (Table 1). India showed positive net exports only in 28 out of the 82 items exported to Thailand since 2004-05. There was a deficit in 50 commodities and no trade in four products.

India has a significant positive trade balance with Thailand only in gearboxes. India consistently exported more than US\$30 million worth of gearboxes in each of the last 6 years, compared to less than US\$ 1 million in 2003-04. Gearboxes apart, there has been a surge in all other auto component imports (that were on the EHS list) from Thailand to India and the trade balance in this sector is negative. India's exports of helical springs, pumps, ball bearings and lighting equipment to Thailand witnessed a sharp decline over the years.

Imports of colour picture tubes from Thailand grew from near zero to US\$28 million in 2006-07 before falling to US\$18 million in 2007-08. Imports of colour TVs from Thailand increased from just US\$0.3 million in 2003-04 to US\$102 million in 2006-07 before similarly moderating

to US\$85 million in 2007-08. At its peak, Thailand's shares in India's imports of colour picture tubes and televisions were 27 and 50 per cent respectively.

Inverted duty structure

A major reason behind the surge in imports of EHS items from Thailand has been the creation of an inverted duty structure, whereby MFN tariffs imposed on imported raw-materials and intermediate products, used for domestic production, are higher than the duty-free finished products imported from Thailand. For instance, while colour picture tubes are imported duty free, the intermediate product - glass parts for cathode ray tubes - attracts an import duty of 10 per cent, making it cheaper to just import picture tubes from Thailand rather than produce them in India. Similarly, import duty is zero on certain auto components imported from Thailand like engine parts, ball bearings, transmission shafts, pumps and helical springs. However, some alloy steel and aluminium alloy used as raw material attract 5-10 per cent tariff. Again, air conditioners imported from Thailand pay no basic customs duty while an important part, compressors; attracts a duty of 7.5 per cent.

TIFTA and the AIFTA

Consequent upon the ASEAN-India Free Trade Agreement (AIFTA) that has entered into force on January 1, 2010, several items, which were not on the list of the India-Thailand FTA EHS, have been granted zero duty access into the both markets. A separate FTA between India and Thailand would now make sense only if both countries offer more than what has been agreed under the India-ASEAN FTA.

One of the problems that the second phase of the FTA negotiations had faced was that Thailand demanded a heavy reduction in the thousand items on India's sensitive list. Given that under the AIFTA, India has a long list of sensitive, highly sensitive and special products; it is unlikely that India would be willing to trim the sensitive list as demanded by Thailand in the context of the bilateral agreement.

An analysis of India's AIFTA exclusion list shows that products like colour TVs, picture tubes have not been excluded from zero duty. However, a number of auto parts and components falling in HS Chapters 85 and 87 have been kept in the exclusion list for ASEAN. Also, tariffs on items like glass parts used in picture tubes will now be phased out to 0 (by 2016), implying the inverted duty structure will be automatically addressed.

Way forward

It is clear that Thailand has benefitted much more than India with respect to the TIFTA-EHS.

Given that the major incentive for countries to get into FTAs is to obtain meaningful market access into the partner country, the EHS has failed in its purpose for India.

The problem was seemingly in defining a list common 82 products, which were not necessarily major products of mutual export interest to both countries. The share of the 82 products in India's imports from Thailand was almost three times that of its exports to Thailand, indicating that the list was already biased in favour of Thailand. This made little sense since the most alluring feature of a bilateral FTA over multilateral or even regional agreements is that there is an opportunity to tailor the agreement to the members' individual interests.

As a matter of fact, the wisdom of reducing/eliminating duty on a common list of items is itself questionable, especially since India has suffered in the past from similar preferential arrangements. In 1992 India withdrew from the Trade Expansion and Economic Co-operation Agreement (between India, UAE and Yugoslavia) after it became apparent that the preferences based on a common list, envisaged in that agreement, were hurting its trade interests. Elimination of duty on a limited list of products is also fraught with the risk of creating an inverted duty structure, which has deleterious consequences for domestic industry. Further, with the entry into force of a much wider pact with the ASEAN countries, an FTA with one of these countries would seem to have lost its meaning. In the context of a large number of exceptions in the AIFTA, broadening TIFTA would make sense only if it becomes an AIFTA plus agreement. We have argued that that is unlikely.

Increase in anti-dumping investigations: Is India turning protectionist?

*Swapna Nair*¹

Introduction

The recent WTO review (June 2010) on trade related developments reports that direct trade policy instruments restricting trade have not dominated the policy response to the recent economic crisis. However, information collected by the report does reveal that many countries have taken measures that could indirectly affect trade. Among these actions, trade remedy measures (anti-dumping, countervailing and subsidies) seem to be the most common.

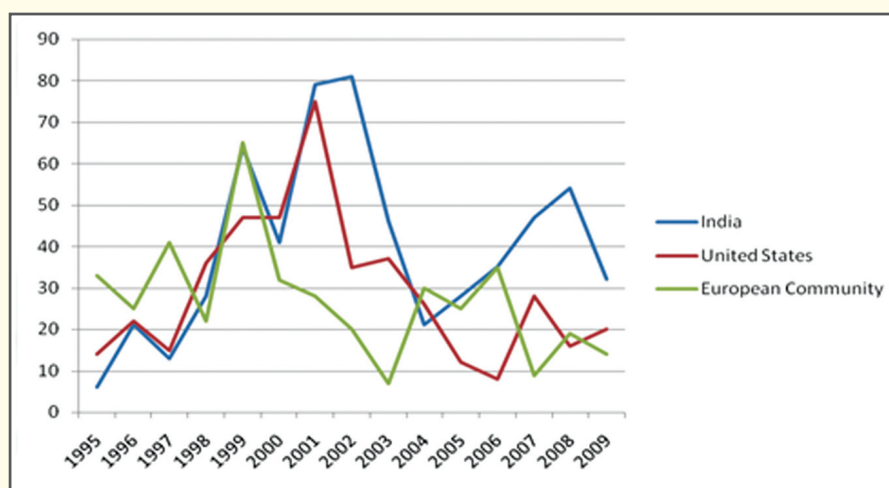
Among the different trade remedy measures, anti-dumping investigations are the most frequently used. A significant global trend is that developing countries have emerged as the dominant users of anti-dumping measures after the establishment of the WTO in 1995. And India is now the foremost user.

The number of investigations initiated by India has increased from six in 1995 to 32 in 2009. Does this imply that protectionism is taking hold in India? We examine relevant factors to enable us to find an answer.

Trends for India

The figure below shows the anti dumping investigations by India, EU and US from 1995-2010.

Figure 1: Anti-dumping initiations by India, EU and US



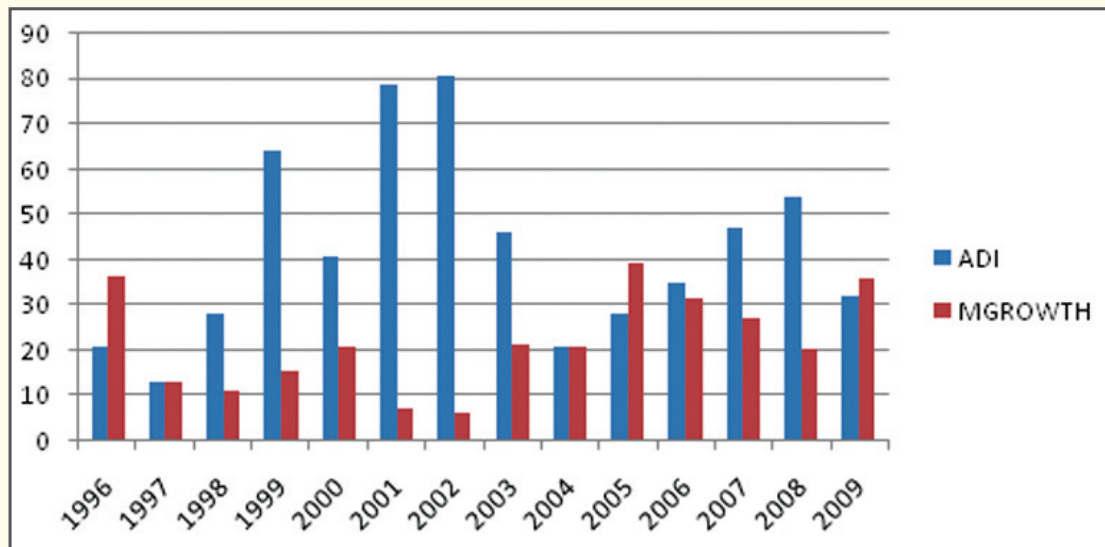
Source: WTO

A couple of observations can be made from this graph. It can be seen that there is a long-term trend of increase in anti-dumping investigations by India. In fact, India's usage of anti-dumping investigations has outstripped the EU and the US since 2001. The trend line also reveals that

¹ The author is the coordinator of ICRIER's Trade Policy and WTO Research Programme.

the worldwide economic cycle might have an influence on India's usage since the increase of anti-dumping investigations seems to coincide with periods of slump. In fact this is even more evident from the following figure where we plot India's anti-dumping investigations against the global growth rate of exports.

Figure 2: AD Initiations by India plotted against global growth rate of exports



Source: WTO, Global anti-dumping database(World Bank), Comtrade

However, in making an assessment whether the upward trend in anti-dumping investigations in India reflects an increase in protectionist tendencies, we have to look at the picture holistically. For this, we look at what have been the trends in India's trade policies following the the period that followed the establishment of the WTO.

Tariff Liberalisation and anti-dumping

The Indian economy, until the early 1990's, was a closed one with a wide array of controls on trade and investment. It is from 1991 onwards that India embarked on a series of reforms that liberalised the investment regime and started a phasing out restrictions on trade, be it by removing quantitative restrictions or progressive reductions in tariffs and non-tariff barriers.

India has been one of the few economies that have unilaterally liberalised tariffs to such an extent. From an applied simple average rate of above 80 per cent in 1990, India has, over the years, reduced the applied tariff rate. The current average applied rate is 12.5 per cent. Comparing across agricultural and industrial goods, it can be seen that the liberalisation in industrial goods has been more than that in agricultural commodities. The simple average applied tariffs in industrial goods have been reduced from around 80 per cent in 1990 to 9.4 per cent in 2009 while in agricultural goods the reduction has been much lower from above 80 per cent in 1990 to 32 per cent in 2009. (Source for tariff data is the UN Trains database)

The table below depicts the liberalisation in tariffs in different agricultural and non agricultural product categories over the years. It can be seen from this table that the extent of tariff reduction has been higher in the non-agricultural product categories such as chemicals, manufactured goods, machinery and transport equipment and so on. The extent of liberalisation in agricultural product categories is much lower.

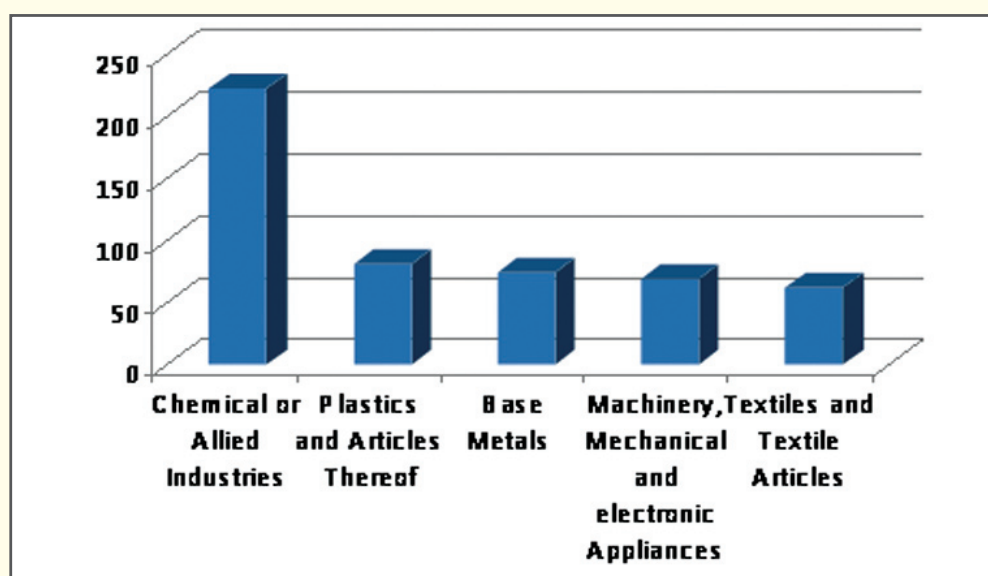
Table 1: Simple Average Applied Level of Tariffs by Product Category

	Exports	1992	1999	2004	2008
0	Food and live animals	36.19	28.16	34.30	31.97
1	Beverages and tobacco	170.42	104.64	88.00	91.48
2	Crude materials, inedible, except fuels	45.86	22.83	21.72	10.97
3	Mineral fuels, lubricants and related materials	41.82	22.42	19.72	7.91
4	Animal and vegetable oils and fats	61.77	33.51	64.79	25.74
5	Chemicals	61.81	34.57	29.41	8.51
6	Manufact goods classified chiefly by material	62.21	36.16	28.92	8.47
7	Machinery and transport equipment	50.85	28.75	26.50	8.93
8	Miscellaneous manufactured articles	60.59	35.47	28.25	9.40
9	Commod. & transacts. not class. accord. to kind	59.17	36.67	28.70	16.82

Source: UNCTAD TRAINS database (SITC Classification)

To understand whether there has been any relation between the tariff liberalisation and anti-dumping patterns we analyse the anti-dumping initiatives at a product level. The WTO provides a breakup of anti-dumping (AD) investigations only at a broad sectoral level cumulatively for the period 1995-2008. From this, it is revealed that the the maximum number of investigations by India during this period are in the following sectors: chemicals, plastics, machinery, electronics and textiles.

Figure 3: Break up of India's anti-dumping investigations: 1995-2008



Source: WTO

For a detailed analysis, we use the World Bank's Global anti-dumping database which provides a detailed 6 digit HS code wise breakup of the AD initiations. An analysis of this data reveals that majority of the AD initiations are on intermediate products rather than final commodities. Further, from the period 1995 to 2009, there are not many products which are subject to repeated investigations except for a few such as acrylic fibre, thermal sensitive paper, PVC paste resin.

Interestingly most of the anti dumping initiations have been in those product categories where the highest amount of tariff liberalisation has occurred such as chemicals, manufacturing articles, machinery and electrical equipment. There are hardly any anti-dumping measures in the area of agricultural products where the tariffs are quite high.

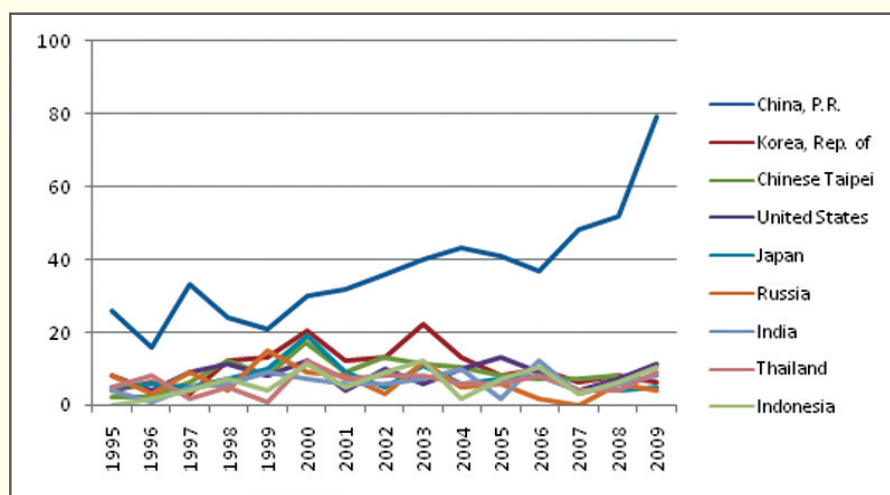
Putting together all these facts, it is evident that India has over the years reduced the level of protection to its industry and opened it to external competition. Very few other economies have unilaterally liberalised to this extent. India's anti-dumping usage trends reveal that in a period of crisis, the number of anti-dumping usage does increase (as depicted in figure 2). But this is a temporary measure that is being used and, as is evident from the decline in AD investigations in 2009/2010, as soon as the economy picks up, the extent of the usage of the measure has been falling.

The China factor

Yet another aspect which seems to have a role in the increase in AD investigations is the overwhelming growth of China. And this seems to have an impact not just on India but most other WTO members as well.

Among the total AD initiations during the period 1995-2009, the maximum number of initiations are against China. From the graph below, it can be seen that particularly since 1999 the number of AD initiations against China has far outrun those against others. Nearly a third of the anti-dumping investigations by India in 2009 (11 out of 32) has been against China. The same is true of anti-dumping cases initiated by the US and EU – six of the 18 cases of anti-dumping initiated by the EU and 12 of 20 cases initiated by the US were against China.

Figure 4: Anti-dumping Initiations against Members



Source: WTO, Global anti-dumping database (World Bank)

China's share in global trade has increased at such a fast pace and in such a short time that it makes most of the other economies vulnerable to the large influx of exports from China, particularly in sectors such as manufacturing and iron and steel. The table below shows the share of India and China in global trade of manufacturing, chemicals, iron & steel and pharmaceuticals. From a global share of 3 per cent of manufacturing in 1996, China has in a short period of 12 years captured around 12.7 per cent of the global share while India has in the same period increased its share from 0.63 per cent to 1.07 per cent. Similarly in the case of iron and steel, while India has increased its share from 0.69 to 1.9 per cent of world trade, China's growth has been from 2.5 per cent to 12.09 per cent of global trade.

Table 2: Share of India and China in Global Trade

	1996	2000	2005	2008
Manufacturing				
India	0.63	0.70	0.96	1.07
China	3.30	4.68	9.59	12.71
Chemicals				
India	0.61	0.74	1.03	1.19
China	1.80	2.07	3.25	4.65
Iron and steel				
India	0.69	0.92	1.63	1.91
China	2.56	3.07	6.07	12.09
Pharmaceuticals				
India		1.05	0.99	1.35
China		1.65	1.38	1.89

Source: Comtrade

For an economy such as India which, as we have seen above, has engaged in a progressive pace of liberalisation in tariffs, the extent of vulnerability is much larger than that of other economies and this could be yet another reason why anti-dumping initiatives could be increasing at times of crisis.

Conclusion

Undoubtedly, India has been using anti-dumping investigations over the years to protect domestic industry in times of economic crisis. But the argument that India is using this as a protectionist measure is not as simple as it seems. India has unilaterally liberalised industrial tariffs and reduced the level of protection to the economy at a very fast pace. This is not often recognised when accusations are made in the global fora on India being protectionist. If India was indeed being protectionist, unilateral tariff liberalisation would not have happened to the extent it has. But having engaged in such liberalisation, when faced with extraordinary circumstances such as the global economic recession and the almost overpowering growth of China, anti-dumping seems to be one of the ways in which India has been trying to protect domestic industry from almost unfair competition.

It is difficult to strike the right balance between liberalising the domestic economy on the one hand by reducing tariffs and providing the protection required in times of crisis on the other by trade remedy measures. India should be careful not to tip the balance by over using anti-dumping measures and investigations because this would have negative consequences in the global realm and in trade negotiations. Further if the number of anti dumping measures do not reduce, India might not even get due recognition for the unilateral liberalisation that it has done.

Period of Investigation in Safeguards and the Need for Objectivity

*Akshay Kolse-Patil*¹

Introduction

“Safeguard measures” or “safeguards” refer to emergency import restrictions applied under the WTO Agreement on Safeguards (*SG Agreement*) and GATT Article XIX. A WTO member may restrict imports of a product temporarily if its domestic industry is injured or threatened with injury caused by a surge in imports. The *SG Agreement* contains detailed provisions on the application of such emergency action. These provisions are enforced in India through the Customs Tariff Act, 1975 (CTA).

In India, the Director General of Safeguards (Director General) bears the responsibility to investigate and recommend whether or not to impose these extraordinary measures. Article 2.1 of the *SG Agreement* and section 8B of the CTA² provide that to make this recommendation, the Director General has to determine, first, and foremost, whether there have been increased imports, absolute or relative to domestic production, of the product into India and second, whether imports have increased under such conditions, so as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. Further, as per Article 4.2(a) and (b) of the *SG Agreement*, the Director General has to take into consideration all relevant factors and evidence of an *objective* nature in making his recommendation.³ Selection of the period of investigation plays a crucial role in determining whether the data used by the Director General is of an objective nature.

However, in recent investigations, the Director General has exercised his responsibility of defining the period of investigation in a manner that could expose the Director General’s findings to WTO challenges.

What is period of Investigation

The term “period of investigation” does not appear in the text of the *SG Agreement*, CTA and the Rules. It appears to be a term of art invented by investigating authorities worldwide to aid in the conduct of safeguards investigations. It is usually a fixed period, “three years or more preceding the investigation”⁴, used by investigating authorities to collect data for examining whether there have been increased imports and to assess the impact of the imports on domestic industry. In safeguards investigations, unlike anti-dumping, the period of investigation for

¹ The author is a practicing lawyer in the Bombay High Court

² Section 8C of the CTA deals with China specific safeguards measures.

³ The Annexure to Safeguard Duty Rules under the Customs Tariff Act, 1975 and the Customs Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002 (collectively “the Rules”).

⁴ Yong-Shik Lee, “Safeguard Measures in World Trade: The Legal Analysis”, (Kluwer Law International, 1st ed. 2003, 2d ed. 2005), pg 84

increased imports and injury tends to be the same.⁵ Since the term “period of investigation” has not been defined in the *SG Agreement*, CTA or the Rules, the Director General has complete discretion in defining the period of investigation.⁶

Director General's Discretion

The Director General, in the past, has exercised this discretion to limit the period of investigation to a period of around 3 years ending just before the initiation of the investigation. However, recently in investigations relating to soda ash, caustic soda, front axle beam, steering knuckles and crankshaft and oxo-alcohols, the Director General has held, based on its interpretation of the Appellate Body's findings in “*Argentina-Footwear Safeguard*”⁷ that “the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past” that “the period after filing of the application cannot be ignored in safeguard investigation.”⁸

Thus, for example, in the investigation relating to imports of soda ash from China, in the notice of initiation,⁹ the Director General referred to import data from the period extending from April 2005 to December 2008 and thereafter, in the preliminary findings,¹⁰ provided data for injury factors for the period extending from April 2005 to 14 January 2009. In the final findings,¹¹ however, the Director General referred to import data for the period from April 2005 to June 2009 and injury data up to August 2009.

Past Practice and Practice in Foreign Jurisdictions

The Director General's approach to expand the period of investigation post initiation is contrary to established/past practice of the Director General itself. Past practice indicates that the period of investigation should be frozen at the time just before the initiation of the investigation. In carbon black,¹² the investigation had been initiated on February 5, 1998 and the petitioners had submitted data up to September 1997. Thus, when the petitioners tried to introduce new evidence of recent events, the Director General refused to accept the data because such a change would not be fair as various interested parties responded with reference to the facts available during this period.¹³

⁵ Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/, DSR 2002:IV, 1473, para. 7.209.

⁶ *Ibid.*, para. 7.196

⁷ Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, fn. 130.

⁸ Final finding, *Safeguard Duty investigation against imports of Caustic Soda in to India –Final Findings*, 9 April 2010, para 332, available at http://dgsafeguards.gov.in/nonconfidential_causticfinal_for%20press.doc. (emphasis supplied)

⁹ Notice of Initiation, *Safeguard Investigation concerning imports of Soda Ash into India from the People's Republic of China*, 16 January 2009, available at <http://dgsafeguards.gov.in/Soda%20Ash%20Notice.html>.

¹⁰ Preliminary findings, *Safeguard Investigation concerning imports of Soda Ash into India from the People's Republic of China*, 30 January 2009, available at <http://dgsafeguards.gov.in/Soda%20Ash%20pr.%20findings.html>.

¹¹ Final finding, *Safeguard Investigation concerning imports of Soda Ash into India from the People's Republic of China*, 6 October 2009, available at http://dgsafeguards.gov.in/Final_soda_ash.pdf.

¹² Final findings, *Safeguard investigation concerning imports of Carbon Black*, available at http://dgsafeguards.gov.in/final_findings/Carbon%20Black.pdf.

¹³ *Ibid*

In the case of flexible slabstock polyol, the Director General held that the framework of reference, i.e. the period of investigation, needs to be fixed so that all parties may make effective representations.¹⁴ The Director General held that “increased imports” were a condition precedent or coexisting with the occurrence of serious injury or threat thereof. Therefore, there should have been increased imports at the very initiation of the investigation. The Director General further observed that the finding of serious injury needs to be based on an *objective* analysis of various parameters and interested parties need to be given the fullest opportunity to present their case and to rebut evidence and arguments submitted by others.

Similarly, in foreign jurisdictions as diverse as the European Community, Philippines and the United States, the authorities limit the period of investigation to a time just before the initiation of the investigation. In the Philippines, the safeguard rules mandate that import data covering the last five years preceding an application for safeguard measures should be evaluated for purposes of substantiating claims of a surge in imports.¹⁵ Similarly, the USITC¹⁶ and EC authorities, as practice, restrict the period of investigation to the last five years preceding the initiation of the investigation.

Need for Objectivity

The Director General’s current practice may be a violation of India’s WTO obligation, especially that of Article 4.2 of the *SG Agreement*. Although the Director General must take into consideration a period of investigation that should have ended in the recent past so that data is not outdated, the same should have expired at a date just before the initiation of the investigation because the initiation of the investigation may alter the behaviour of the exporters/importers. The panel in *US – Line Pipes* has explained the meaning of “recent”, in this context, as a form of retrospective analysis that does not imply an analysis of the conditions immediately preceding the authority’s decision.¹⁷ In the case of safeguards, data obtained from after initiation is not likely to be objective as there are no retrospective duties and even the remote possibility of safeguard duties may result in an artificial surge in imports as the importers may seek to import goods before the imposition of safeguard duty; this artificial surge may form the very basis for imposition of safeguard duties.

¹⁴ Final findings, *Safeguard investigation concerning import of Flexible Slabstock Polyol of molecular weight 3000-4000 used in the manufacture of Slabstock Foams and Polyurethane Foam mattresses*, available at http://dgsafeguards.gov.in/final_findings/Flexible%20Slabstock%20Polyol.pdf. Also see Final finding, *Safeguard investigation concerning imports of Propylene Glycol into India*, available at http://dgsafeguards.gov.in/final_findings/Propylene%20Glycol.pdf.

¹⁵ Rule 7.2.a of the IRRs of R.A. 8800, which provides that import data covering the last five (5) years preceding an application for safeguard measure should be evaluated for purposes of substantiating claims of a surge in imports. See, *Formal Investigation Report, Ceramic Tiles Industry: Safeguard Action Against Imports*, (SG Investigation No. 01 - 02) (26 March 2002), 30.

¹⁶ A recent investigation was initiated on April 24, 2009 and set a period on investigation extending from 2004 to 2008. See *Certain Passenger Vehicle and Light Truck Tires from China*, Investigation No. TA-421-7, USITC Pub. 4085 (July 2009).

¹⁷ Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/, DSR 2002:IV, 1473, para. 7.204.

Therefore, any data, especially import data, collected after the initiation will not constitute objective evidence as the behaviour of the exporters/importers, and hence data, will be heavily influenced by the investigation. The panel's observations in "EC – Tube or Pipe Fittings"¹⁸, though made in the context of anti-dumping, shed light on the issue. The panel observed that there are practical reasons for using an investigation period, the termination date of which precedes the date of initiation of the investigation. This ensures that the data that will form the basis for the eventual determination are not affected in any way by the initiation of the investigation and any subsequent actions of exporters/importers. Thus, the data would be unaffected by the process of the investigation and could be basis for an objective and unbiased determination by the investigating authority. goods before the imposition of safeguard duty; this artificial surge may form the very basis for imposition of safeguard duties.

Therefore, any data, especially import data, collected after the initiation will not constitute objective evidence as the behaviour of the exporters/importers, and hence data, will be heavily influenced by the investigation. The panel's observations in "EC – Tube or Pipe Fittings", though made in the context of anti-dumping, shed light on the issue. The panel observed that there are practical reasons for using an investigation period, the termination date of which precedes the date of initiation of the investigation. This ensures that the data that will form the basis for the eventual determination are not affected in any way by the initiation of the investigation and any subsequent actions of exporters/importers. Thus, the data would be unaffected by the process of the investigation and could be basis for an objective and unbiased determination by the investigating authority.

Conclusion

The current practice of the Director General to extend the period of investigation beyond the date of initiation appears to be based on a misunderstanding of the Appellate Body's use of the word "recent" in the *Argentina-Footwear Safeguard* case. Therefore, the Director General's decision to include data from after the date of initiation of the investigation may have vitiated all recent safeguard investigations and made them susceptible to a challenge at the WTO for failing the basic test of objectivity of evidence.

¹⁸ Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, 2701, para. 7.101.

Completing Regulatory Reforms in the Telecom Sector

Rajat Kathuria¹

While services play an increasingly leading role in the global economy, trade in services is a relatively recent development. The General Agreement on Trade in Services (GATS) established rules and disciplines governing trade in services and aims at progressive liberalisation through successive rounds of negotiations. Since 1997, when negotiations on basic telecommunications concluded, the market for telecommunications has witnessed enormous transformation in structure and regulatory oversight. Government monopoly has been replaced by unbridled competition with little or no public ownership in telecommunications networks. Fixed line services have been overtaken by mobile phones in all countries and internet and broadband services are changing the way in which business and people interact with one another. Only 14 countries had separate regulatory bodies in 1990; the number exceeds 150 today. In addition, over 100 WTO members have WTO commitments that allow new entrants to compete on even terms with entrenched players in most or all segments of the market. The willingness of governments to submit the telecom sector to trade obligations is recognition of the dual role of telecommunications – one, as a distinct sector of economic activity and, the other, as the underlying transport means for other economic activity.

Liberalisation of India's telecom sector began in the early 1990s and significant advances have been made in the institutional and regulatory architecture since the first national telecom policy was unveiled in 1994. When compared to other liberalising infrastructure sectors such as electricity, telecom reform in India has been hailed as a success. The success has been characterised by increasing teledensity, declining prices, and elimination of waiting lists. In 1994, fewer than 1 in 100 Indians owned a phone. A little more than 15 years on, teledensity has increased to about 50 per cent and subscriber numbers are growing at a rate of about 15 million per month. Voice calls in India are amongst the cheapest in the world. The government's target of 250 million phones by the end of 2007 was achieved ahead of schedule.

At the same time, India offers significant investment opportunities in the telecommunications sector because there have been a series of reforms in the past decade and GDP is growing at a fast pace. Sizeable numbers of India's huge rural population are not covered by telephones and India's teledensity is low when compared to developed countries. The potential, especially in rural India, is therefore immense and there are indications that service providers are turning their attention to the underserved rural areas. With urban markets reaching saturation and USO (Universal Services Obligation) funding now accessible for mobile services in rural areas, the gap between urban and rural teledensity can be expected to narrow over time. The 3G auctions held recently generated unprecedented interest, reinforcing the immense potential of the market. The interest is conspicuous in other measures as well, such as greater FDI, entry of

¹ The author is a professor at ICRIER

new players and the massive growth in related businesses such as infrastructure providers on the one hand and content providers on the other.

To many observers of the Indian telecom market, the level of interest especially by foreign players may appear to be paradoxical, since India has scheduled meagre commitments under GATS in telecommunications. Moreover, India has not endorsed many of the disciplines of the Reference Paper (RP) on Telecommunications, which has become the touchstone for telecommunications negotiations under GATS. A deeper and more nuanced analysis however reveals a different story. The applicable regime in India is far more liberal than the scheduled commitments and India is almost fully compliant with the core disciplines of the RP (See Table). In addition, in certain agreements such as the Indo-Singapore CECA, the principles adopted in telecommunications by India go beyond the RP itself.

		Commitment in 1997						Applicable Regime 2010			Revised Offer 2005		
Type of Service	Service Area	No. of Providers	Period of License (yrs)	FDI Limit	No. of Providers	Period of License (years) (yrs)	FDI Limit	No. of Providers	Period of License (yrs)	FDI Limit*	No. of Providers	Period of License (yrs)	FDI Limit
ILD	International	1	10	25%	1	-	49%	Unlimited	20	74%	2	20	49%
NLD	National	1	10	25%	1	-	49%	Unlimited	20	74%	2	20	49%
Cellular Mobile	Circle	2	10	25%	2	10	49%	Unlimited	20	74%	2	-	49%
Fixed	Circle	2	10	25%	2	10	49%	Unlimited	-	74%	2	-	49%
VSAT	National							Unlimited	-	74%	2	-	49%
Internet Service Providers	National, Circle-wise, SSA-wise	2	Unbound	51%	Unlimited	10	49%	Unlimited	15	With gateways 74%; Without gateways-100%	2	10	49%
Reference Paper principle (RP)		Largely non-compliant in respect of core disciplines			Somewhat compliant			Fully compliant			Largely non-compliant in respect of core disciplines		

The Indian experience shows that although it took several years for market opening and related measures to have an impact, in the end, competition-driven network expansion resulted in services being provided to those that had been denied in the public monopoly model. It also shows that even after the monopoly of the government-owned incumbent is broken, policy and regulation can become major barriers to competition. For instance, if policy favours the incumbent by forcing operators to use its network for certain types of calls or if regulation to rationalise high interconnection charges is delayed, the competitive process gets undermined. Policy and regulatory reform, therefore, become necessary in such circumstances to increase the supply of services. Such interventions have been characteristic of the reform process in India and regulatory decisions based on pro-competitive principles gradually left an indelible stamp on the sector. Thus interconnection, so crucial to facilitating competition in the sector, is now provided in a timely fashion on terms and conditions that are transparent, reasonable, non-discriminatory and sufficiently unbundled. In addition, there is growing recognition that

domestic liberalisation has brought in substantial direct and indirect benefits to the country in terms of access as well as availability. Although significant progress has been achieved in establishing pro-competitive regulatory principles, much improvement is needed with regard to institutional processes that, more often than not, get relegated into the background, but are very important in shaping sector outcomes

The core agencies constituting the regulatory framework for telecom are the Department of Telecommunications (DoT), the Telecom Regulatory Authority of India (TRAI) and the Telecom Disputes Settlement Appellate Tribunal (TDSAT). DoT is responsible for policy implementation and licensing while TRAI undertakes routine regulation relating to pricing, interconnection and quality of service. TDSAT is the dispute settlement body while, Telecom Engineering Centre (TEC), Wireless Planning & Coordination (WPC) and Universal Service Obligation Fund (USOF) are attached offices of the DoT responsible for equipment standards, spectrum assignment and universal service respectively. While DoT is part of the Ministry of Communications, TDSAT and TRAI are independent institutions, not accountable to the DoT.

Since telecom is a union subject, rules and regulations are typically made at the central level and applicable across the country. In certain cases, applicable rules are an outcome of a consultative process (for example, merger policy and number portability), while in others these are decided by an internal process in the specific institution (for example, the time frame for processing applications in TEC and DoT). A formal dispute resolution or 'appellate' mechanism exists, but not for every facet of the regulatory regime. While TDSAT hears inter-operator disputes and disputes between the licensor and licensee, the regime with respect to processes within regulatory institutions is relatively unclear. Existing institutional processes do not explicitly provide for time frames for application processing and for a review mechanism. There is a widely held view among service providers that procedures are often cumbersome and reliance on electronic submissions is the exception rather than the rule. Without explicit rule based processes in certain respects, informal arrangements have developed by which applicants obtain information about status, deficiencies and further compliance requirements in respect of their filings.

Telecom reform thus far has focused much more on creating institutions and establishing pro- competitive principles than on processes within institutions. While it may not be difficult to specify such institutional processes, it would require a corresponding enhancement in managerial accountability to implement them. The resistance to such change is likely to come from the institution itself and this could be time consuming. Two specific examples provide reasons to be optimistic in this regard. In the Indo-Singapore CECA, India has committed to make public (a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a license and (b) the terms and conditions of individual licences. In case of denial of licence, the reasons for denial, on applicants' request, shall normally be given within a reasonable period of time.

Another aspect of the regulatory regime that has not received much attention relates to local

government clearances. For example, permission is required from regional and sub-regional bodies to set up mobile towers and to obtain Right of Way (RoW) for deployment of physical infrastructure. As rural roll out gains significance and such deployment intensifies, local procedures will need to be streamlined to ensure that they do not become an impediment for service providers. The prevailing view among operators is that the plethora of requirements at the local level makes tower sitings difficult and that there are significant delays in obtaining such approvals from local authorities. Recent media reports in Delhi provide anecdotal evidence for this.² The approval process varies across states for tower construction. In addition, erection of a telecommunication tower at any location also requires approval from the Standing Advisory Committee on Frequency Allocation (SACFA). This committee clears the height of towers from the point of civil aviation as well. In addition, various government agencies like Airport Authority of India, railways, ISRO, ONGC, AIR, Department of Electronics, navy and defence etc. are part of SACFA often resulting in lengthy approval processes. Recognising this, TRAI has recently initiated the process of consultation with respect to the procedural issues related to mobile towers with the objective to simplify and standardise these procedures to the extent possible.

India's regulatory architecture in telecommunications has evolved into a structure where distinct roles have been assigned to specific institutions. There is now a better understanding and increasing acceptance of these roles. A dispute settlement body is firmly established and some of TDSATs decisions have contributed to the gradual emergence of a customary rule of non-discrimination in telecom services. With respect to allocation and use of scarce resources, the recently concluded 3G auctions are an archetype of how scarce resources should be assigned. Universal service in India is also administered in a transparent and non-discriminatory manner. In addition, all of TRAI's decisions are based on an extensive consultation process. This enables the regulator to collect evidence and take account of the views of those who have an interest in the outcome. Consultation is an essential part of regulatory accountability – and it has now become intrinsic to the regulatory process. As a result of such policy initiatives, India is one of the more liberalised telecommunication economies in the region. Further liberalisation and reform should focus on local issues. There is need to standardise these local procedures to the extent possible and feasible and, as it happens, TRAI is seized of this matter. The more difficult task pertains to restructuring processes in regulatory institutions. Those with knowledge and experience of the system can sometimes overcome inefficiencies but, by their very nature, informal networks render decision making discretionary, thus undermining transparency of the system as a whole. The fact that delays can be reduced due to the existence of informal networks is no reason to perpetuate the status quo. Explicit timelines and review opportunities and non-discriminatory decision making with regard to institutional processes will benefit all, not just the few who are familiar with the system and procedures.

² The main complaint of service providers has been the manner in which the Municipal Corporation of Delhi (MCD) has unilaterally hiked the licence fee for mobile towers by 400 per cent. See <http://www.thehindu.com/2010/05/11/stories/2010051162190400.htm>



Indian Council for Research on International Economic Relations

Core - 6A, 4th Floor, India Habitat Centre

Lodi Road, New Delhi - 110003, INDIA

Tel: 43112400 Fax: 24620180

Website: www.icrier.org

In case of any suggestions/queries please contact Swapna Nair at snair@icrier.res.in