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Doha Round in the Doldrums

Anwarul Hoda¹

Stocktaking

Since July 2008 when the meeting among ministers of the WTO members ended with a standoff on key issues in agriculture, there has been a virtual pause in substantive negotiations under the Doha Round. Senior officials convened a series of meetings in the last quarter of 2009 but these proved to be of no avail. Hopes were pinned on the outcome of a stocktaking meeting at the vice-ministerial level scheduled for March 22-26 2010, which was also to take a view on whether it was feasible to conclude the negotiations during the year.

As things turned out, the issue of feasibility of concluding the negotiations by the end of year was not addressed at all. The idea of a deadline was simply dropped. No new target date was fixed and no plan announced for meetings of ministers or senior officials. With anti-trade attitudes hardening in the United States, the writing was on the wall already. Public opinion in that country is falling prey to the idea that a new model of trade pacts is needed as the WTO and NAFTA agreements has resulted in large trade deficits and massive job losses in manufacturing in the United States. Such sentiments are likely to prevail in the country until the high levels of unemployment come down substantially. The question that needs to be addressed is what date can now be a realistic target for bringing the trade talks to a successful end. As economic recovery in the developed economies is expected to be slow, some believe that the earliest opportunity might come at the end of 2011. However, others reckon that full recovery may take the better part of next year to happen and the year 2011 also may be lost. Since 2012 is ruled out because of the Presidential elections at the end of that year, the worst case scenario is that the conclusion of the Round could drag on to 2013.

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The ICRIER Trade Policy and WTO newsletter will keep track of national, regional and global trade and investment policy developments and offer critical insights. Each issue will also contain feature articles on various aspects of these developments as well as on WTO issues.

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The stocktaking meeting did result in a review of the gaps in the positions of members that needed to be closed before the trade talks could be brought to a conclusion. The reports made by the chairpersons during the stocktaking meeting bring out these gaps and the important ones are described briefly in the paragraphs that follow.

Gaps in Market Access Negotiations in Doha Round

In agriculture, there are five issues on top of the agenda on which the battle lines remain drawn. These are: (i) cotton (deeper reduction of domestic support by the USA in order to respond to the interests of particularly poor cotton-growing countries of West Africa), (ii) sensitive products (additional flexibility for Canada and Japan to designate sensitive products over 4 per cent of tariff lines), (iii) tariff caps (whether there should be an exception allowing tariffs in excess of the ceiling of 100 per cent over and above the sensitive products), (iv) tariff simplification (the extent to which tariffs should be expressed only in simple ad valorem terms, and (v) special safeguard mechanism (what would be the trigger, how it would affect seasonal and perishable products, for how long it would apply and whether it can be renewed).

In non-agricultural market access, the most important outstanding issue is whether key emerging country members (Brazil, China and India) should make additional contributions, bilaterally or by mandatory participation, in the sectoral negotiations as demanded by the United States. The US demand for additional concessions is for redressing a perceived imbalance in the contribution of the emerging countries arising out of the application of the modalities proposed by the Chair. The US has not demonstrated, in accordance with any recognised criteria of reciprocity, that any imbalance exists in reality. The response of the emerging countries is of resolute opposition on the ground that the modalities proposed by the chair have already stretched their ability to reduce tariffs.

There is no simple way of measuring the gaps in the area of market access in services in which modality of request-offer (bilateral and plurilateral) has been adopted. However, the Chairman of the Negotiating Group on Agriculture reported that there were significant gaps between offers and requests and between offers and applied regimes. On domestic regulations, members are still at the basic level of highlighting the importance of striking a balance between imposing strong disciplines and preserving members' regulatory rights. On GATS Rules, consensus has not been reached as yet on whether there is even a need for rules on subsidies and emergency safeguard action or whether market access commitments on government procurement are warranted.

Gaps in Other Important Areas of Negotiations

In intellectual property, there are three separate issues on the agenda of the Round. In respect of the multilateral system of notification and registration of geographical indications for wines and spirits, there is disagreement on whether members' participation should be mandatory or

voluntary. On the legal effects and consequences, some members propose that there should be a commitment to consult the register when taking a decision on registration and protection of trade marks and geographical indications, while others propose that registration should give rise to a rebuttable presumption on such matters as ownership and protection in the country of origin.

There are two other intellectual property issues being discussed: extension of the higher level of protection for geographical indication beyond wines and spirits and amendment in the TRIPS Agreement requiring disclosure by patent applicants not only of the country providing the genetic resources and the related traditional knowledge, but also of evidence of prior informed consent and of agreed benefit sharing arrangement. In respect of these two issues, differences continue on whether they come within the scope of the agreed Doha Round agenda. There are differences on substance as well. Members disagree on whether extension of higher levels of protection to other products for geographical indications would be useful. As for genetic resources, there is resistance to proposals for amendment of the TRIPS Agreement and suggestions have been made to consider alternatives such as amending the regulations of WIPO'S Patent Co-operation Treaty to provide that domestic laws may ask inventors to make these disclosures.

Negotiations in the area of rules encompass anti-dumping, subsidies and countervailing measures, fishery subsidies and the provisions applying to regional trade agreements. On anti-dumping, the divergences on 11 important issues are so great that the chairman has not considered it possible to propose texts for the consideration of members. These include zeroing, public interest and lesser duty rule and sunset reviews. Zeroing refers to the practice in the United States of excluding from the calculations of overall dumping margin those instances in which the US prices are found to be higher than the normal value, a practice that results in the systematic over-estimation of the dumping margin. The WTO Appellate Body has already ruled that the practice is inconsistent with the WTO Agreement on anti-dumping and many members want it prohibited. But, there are others who want zeroing to be specifically authorised. There are sharp disagreements over whether procedures should be stipulated for taking into account the representations of domestic interest groups while deciding on the imposition of a duty and over a mandatory requirement for imposition of duty equal to injury margin rather than dumping margin. On sunset, the chairman's text mentions two extreme positions, one that favours automatic termination after five years without the possibility of extension and the other that is not willing to accept automatic termination at all. The number of contentious issues in respect of the Agreement on Subsidies and Countervailing Measures is only four (financing by loss-making enterprises, export competitiveness, market benchmarks in export credits and changes in international undertakings on official export credit) but here too, there is such little convergence that the Chairperson has only highlighted the issue without proposing a text.

In fishery subsidies, there is little sense of progress as the architecture proposed by the chairperson in November 2007 around the prohibition of certain subsidies considered to be giving rise to overcapacity or over-fishing has not found acceptability. New proposals have been made that seek to discipline these subsidies on an amber box approach, based on adverse effect on fisheries. On systemic issues relating to regional trade agreements, there has not been any progress after the establishment of the transparency mechanism not because of any gaps in the positions of delegations but because of the singular absence of text-based proposals submitted by participants.

In trade and environment, the first issue is the relationship between the existing WTO rules and specific trade obligations set out in the Multilateral Environment Agreements (MEAs). There has not been enough progress on this issue for the chairperson to be able to propose a text for negotiations. On the procedure for exchange of information between the MEAs secretariats and the relevant WTO Committee and the criteria for grant of observer status, some progress has been made and elements drafted. Members have spent a great deal of energy in addressing the third issue of reduction/elimination of tariff and non-tariff barriers to environmental goods and services. There is no agreement as yet on what belongs to the universe of environmental goods and disparate lists have been submitted by members. Similarly, different ideas are on the table on the modalities (including special and differential treatment) to reduce/eliminate tariff and non-tariff barriers on environmental goods.

Improvements in the dispute settlement procedures are also on the Doha Round agenda, albeit outside the single undertaking commitment. The general feeling is that these procedures are working well but proposals have been made to improve them further. Unlike in the other areas, the Chairman of the Negotiating Group on Dispute Settlement has not listed the gaps and the draft text proposed by him is not in the public domain. However, it is known that there are divergences galore in this area too. The main ones are around three themes. Should there be greater member control of the process or should the system take further strides forward toward judicialisation, such as by adopting a roster of permanent panelists? Should we continue with the closed system with no public observation of hearings or advance towards transparency and general acceptance of amicus curiae briefs? How far can we provide for special treatment of developing countries including the establishment of a legal defence fund?

A number of developing country members have attached great importance to proposals for improving special and differential (S&D) treatment that have been made by them. A total of 88 agreement-specific proposals were tabled by them initially, of which 38 were referred to other negotiating groups and WTO bodies for consideration. Of the remaining proposals, agreement in principle was reached on 28 as far back as in 2003. Members have been considering these proposals in Special Sessions of the Committee on Trade and Development and the Chairperson reported to the Trade Negotiations Committee (TNC) in March 2010

that progress had been made on six of these. The rest of the proposals do not look promising as the Chairman has suggested in his report that 'it would be best to continue to keep them aside'.

There is a great amount of optimism surrounding the discussions on trade facilitation, especially after the Chairman submitted in December 2009 a text for the consideration of participants. Although the chairman has not highlighted in his report to the Trade Negotiations Committee the gaps in the positions of participants, the large numbers of square brackets in the latest version make it evident that there are differences, which would need to be resolved. Some of the major sticking points are believed to be in regard to prohibition of consular transaction requirement, including any related fee in connection with importation, elimination of pre-shipment inspection, and separation of release of consignment from final determination and payment of customs duty.

Assessment of the Gaps

The gaps as delineated in the reports of the chairpersons of various negotiating groups look very daunting and it is not easy to reconcile the situation with the WTO Director General's assessment that there is agreement on 80 per cent of the issues. However, it cannot be denied that market access issues constitute the core agenda of the trade talks and on these, great strides have been made toward an agreement. Once the modalities of agriculture and non-agricultural market access are settled, the participants would have to move to agree on a package on market access in services before the end game can begin. It is during this stage that participants will have to take a decision on areas in which they can strike compromises and those in which they have just to give up and continue to live with the status quo, whether in the rules or the levels of liberalisation.

Insights into India - Korea CEPA

Sanjana Joshi¹

The Comprehensive Economic Partnership Agreement (CEPA) between India and South Korea entered into force on New Year's Day this year. South Korea has already concluded agreements with the U.S. and EU and these are awaiting ratification. This article offers insights into the Indo-Korea Agreement by making a preliminary comparative analysis of the main features of these three FTA agreements. The focus is on the basic features - coverage including exemptions, time frame, safeguards and non-trade issues.

The South Korean economy is currently the third largest in Asia and the 13th in the world. Since 2004, South Korea has been implementing trade liberalisation under FTAs with many countries by "pushing forward synchronised multiple FTAs". Estimates suggest that if all FTAs that are currently being discussed by South Korea are concluded approximately 88 per cent of South Korea's foreign trade will be part of the FTA system. These countries represent S. Korea's chief interests in FTAs: allies and major economic partners, comprehensive coverage, and political significance.

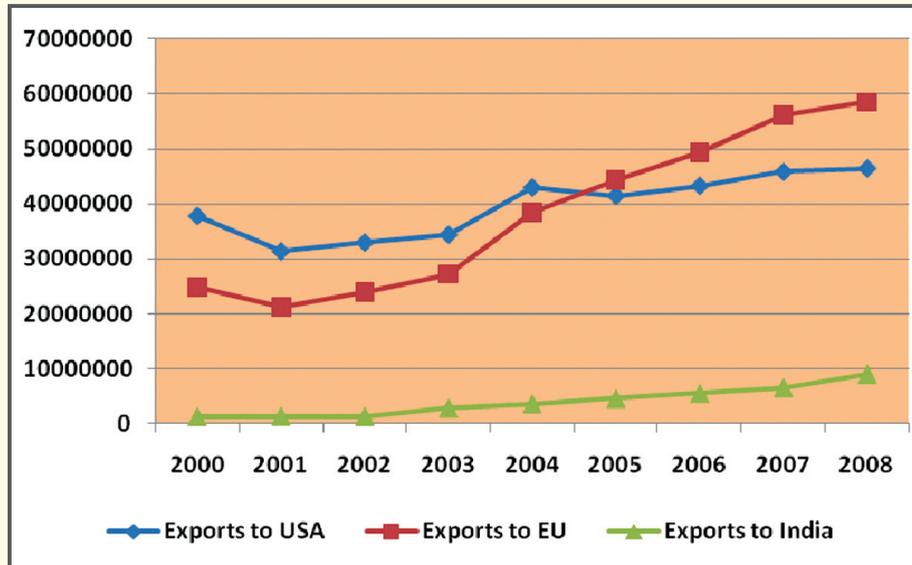
South Korea's FTAs

Status	Country/Bloc
In effect	Chile, Singapore, EFTA (comprising Iceland, Norway, Switzerland and Liechtenstein), ASEAN, India
Concluded	United States, EU
Under negotiation	Canada, Mexico, GCC, Australia, New Zealand, Peru, Colombia, Turkey
Under consideration	Japan, China, MERCOSUR, Russia, Israel, SACU

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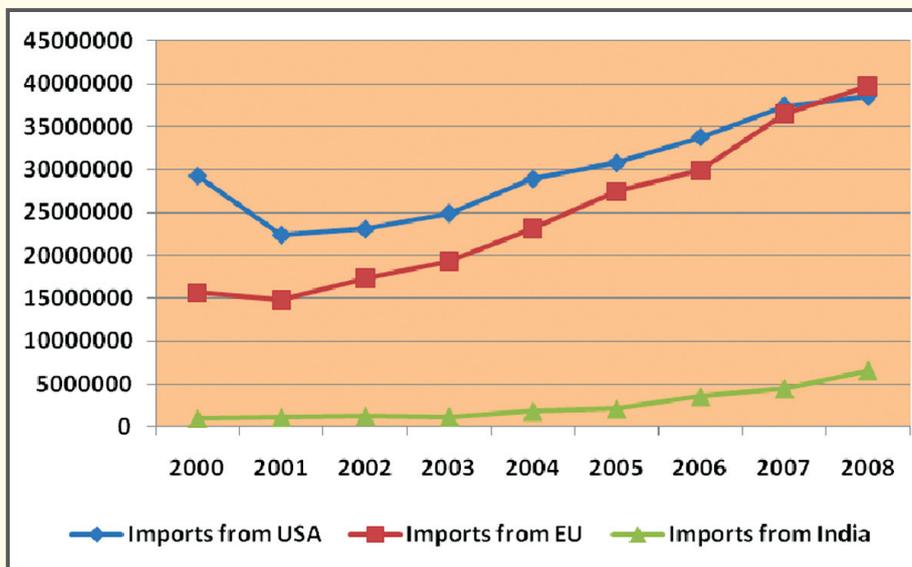
South Korea's Trade with the U.S., EU and India

US\$ million



Source: UN Comtrade database

US\$ million



Source: UN Comtrade database

South Korea - India CEPA

India is S. Korea's 19th trading partner with two-way merchandise trade in 2008 reaching US\$15.5 billion, a 35 per cent increase over the previous year. The Comprehensive Economic Partnership Agreement (CEPA) between the two countries was signed on August 7, 2009 and came into effect on January 1, 2010.

The Korea Institute for International Economic Policy expects the agreement to boost bilateral trade by up to US\$3.3 billion. For India, FICCI projects a doubling of trade between India and South Korea within the next five years, facilitated by the CEPA agreement.

The India-South Korea CEPA is similar to a free trade agreement and covers trade in goods and services along with chapters on investment and dispute settlement. Under the agreement, tariffs will be eliminated or reduced on 93 per cent of S. Korea's tariff lines and on 84 per cent of India's tariff lines over the next eight years.

India has thus excluded a larger number of products from the purview of liberalisation under the agreement. There is also a big difference between the partners in the phasing of elimination/reduction of duties. In the case of S. Korea duties have been eliminated immediately on January 1, 2010 in respect of 61 per cent of the tariff lines. In the case of India immediate elimination is only on about 4 per cent of the tariff lines. Over the next eight years tariffs would be phased out in respect of 62 per cent of the tariff lines.

Recently released trade data from S. Korea shows that in the first two months of 2010 the Korean exports to India rose by 66 per cent and its imports from India by 176.1 per cent as compared to the same two month period in 2009. While much of the rise can be attributed to the economic recovery after the global recession the greater dynamism of imports into S. Korea also reflects the higher degree of liberalisation step taken by S. Korea under the CEPA.

India's Tariff Concession		South Korea's Tariff Concession	
Tariff Concession	No. of Items based on HS 8 codes	Tariff Concession	No. of Items based on HS 8 codes
Immediately	464	Immediately	6819
Within 5 years	448	Within 5 years	2310
Within 8 years	7248	Within 8 years	850
Exception	1895	Exception	765
Reduction by Stage by 1-5%	941	Reduction by Stage by 1-5%	34
Reduction by Stage by 50%	704	Reduction by Stage by 50%	478
Total	11700	Total	11256

Source: ICRIER Estimates

India has excluded 16 per cent of the tariff lines from tariff elimination/reduction and the exclusions are heavily concentrated in the areas of agriculture, textiles and apparel and completely assembled small vehicles. S. Korea's exemptions are almost entirely in agriculture (92 per cent of eliminated lines

Of significance is the treatment of auto and auto products on the Indian side. Tariffs on auto parts, S. Korea's biggest export item to India, are to be reduced to 1 to 5 per cent over an eight-year period from the current average of 12.5 per cent. A notable feature of the CEPA is that goods made at the Gaeseong industrial complex, an inter-Korean economic joint venture in North Korea, will be regarded as made in South Korea.

The agreement specifies that if there is a significant import surge during the transition period, either country has the right to -

- suspend further reduction in customs duty, or
- increase the customs duty up to the level of the MFN applied rate immediately preceding the date of entry into force of this Agreement

In services, India has made commitments in sub-sectors like business services, communication services, infrastructure services, audio-visual services, advertising services and financial services. However the level of bilateral commitments is below the liberalisation levels already available on MFN basis to all foreign service enterprises. The only significant gain made by India is in respect of the temporary movement of professional workers. Under the CEPA contractual service suppliers or independent professionals in 163 categories would be allowed access to the S. Korean services market. This is the first time that South Korea has agreed to such a commitment in its bilateral free trade agreement.

South Korea - United States FTA

The United States was S. Korea's fourth largest goods trading partner in 2008, with two-way goods trade close to US\$85 billion. The U.S.-South Korea FTA (KORUS) was concluded in April 2007 but is still pending ratification by both countries' legislatures. The U.S. International Trade Commission estimates that the reduction of S. Korean tariffs and tariff-rate quotas on goods alone would add US\$10 billion to US\$12 billion to annual U.S. gross domestic product and around US\$10 billion to annual merchandise exports to S. Korea.

As the so called "sandwich economy" caught between China's cost competitiveness and Japan's technological know-how, South Korea expects that the KORUS FTA will strengthen the export competitiveness of S. Korea's technology and capital intensive industries such as IT, automobile, steel, and machinery.. It also expects that lower tariffs would bolster industries, such as apparel and footwear, that face price competitiveness in the U.S. market.

Under the KORUS FTA, 94.5 per cent of bilateral trade between the U.S. and S. Korea in consumer and industrial products would become duty free within 3 years of the date the FTA enters into force, and most remaining tariffs would be eliminated within 10 years. The KORUS FTA contains specific provisions to ensure that remanufactured goods qualify as originating goods.

In particular, the S. Korean eight per cent auto tariff will be eliminated immediately upon entry into force. KORUS has a specific safeguard mechanism to “snap back” U.S. tariffs on S. Korean cars if S. Korea takes measures that impair the agreement’s expected benefits. S. Korea is also committed to eliminate many aspects of the discriminatory effect of its current automotive tax system. Further, the United States obtains an exemption that allows each U.S. automaker to sell up to 6,500 vehicles a year in S. Korea built to U.S. safety standards.

The textile industry was one of the key areas of interest for the S. Korean negotiators and 52 per cent of S. Korea’s exports in textiles and apparel would become duty-free immediately, 21 per cent over 5 years and remaining 27 per cent over 10 years. The agreement contains a “yarn forward rule,” which stipulates that the fabric utilised must be from the country of origin to receive the duty free benefit.

For agricultural products, almost two-thirds (by value) of S. Korea’s agriculture imports from the United States become duty free once the agreement comes into force. These products include wheat, corn for feed, soybeans for crushing, and cotton, plus a broad range of high value agricultural products such as almonds, pistachios, bourbon whiskey, wine, raisins, grape juice, orange juice, frozen french fries, and pet food.

U.S. farm products benefiting from expanded market opportunities with a two-year tariff phase-out include avocados, lemons, dried prunes, and sunflower seeds. In addition, U.S. farm products benefiting from expanded market opportunities with five-year tariff phase-outs include chocolate and chocolate confectionary, sweet corn, sauces and preparations, breads and pastry, grapefruit, and dried mushrooms.

Tariffs and import quotas on most other agricultural goods will be phased out in 10 years. Much effort went into negotiating provisions in three agricultural commodities of export interest for the United States – rice, beef and oranges.

In the end, the KORUS FTA does not give U.S. rice and rice products any preferential access to the S. Korean market. South Korea has agreed to eliminate its 40 per cent tariff on beef muscle meats imported from the U.S. over a 15-year period. However, it has the right to impose safeguard tariffs on a temporary basis in response to any potential surge in imports from the U.S. above specified levels. Further, agreement is yet to be reached on S. Korean health concerns, arising from the 2003 discovery of mad cow disease in cattle herds in the United States. Further, with S. Korea protecting its orange sector with a 50 per cent tariff, a small duty-free quota has been created that would grow slowly in perpetuity.

For services, the negative list approach has been agreed upon. In addition, new services emerging in the U.S. or S. Korea are automatically covered by the FTA. The two countries have also agreed to form a professional services working group to develop methods to recognise mutual standards and criteria for the licensing of professional service providers. Specifically, U.S. financial, express delivery providers, legal consultants, researchers, accountants, educators, health and environmental service, and telecom service providers are benefited. For example, in the KORUS FTA, S. Korea would allow U.S. law firms to establish representative offices in S. Korea within two years of the FTA coming into effect, establish co-operative operations with a S. Korean firm within five years and establish joint ventures with S. Korean firms.

The KORUS FTA will also provide U.S. suppliers with greater access to the S. Korean government procurement market by adding nine more S. Korean agencies to the list to which the WTO Government Procurement Agreement (GPA) currently applies.

The KORUS FTA would require each country to adopt and maintain five internationally accepted labour rights that are contained in the ILO Declaration on Fundamental Principles and Rights at Work. Significantly, under the KORUS FTA, labour obligations are subject to the same dispute settlement procedures and enforcement mechanisms as commercial obligations. Under the KORUS FTA, the two countries are to form a Labour Council to which the parties concerned may take disputes regarding labour matters. The KORUS FTA also calls for the establishment of a labour co-operation mechanism whereby the two countries would develop and work in areas pertaining to labour rights in each country.

The KORUS FTA also requires adherence to seven major multilateral environmental agreements and for this commitment to be enforceable under the FTA. The agreement establishes an environmental affairs council to oversee the implementation under this chapter and all are subject to the same dispute settlement procedures and enforcement mechanisms as commercial obligations.

South Korea - European Union FTA

The European Union was S. Korea's second largest goods trading partner in 2008, with total two-way merchandise trade reaching US\$98.4 billion. The EU has also been the single largest foreign investor in South Korea since 1962. The EU-South Korea FTA was initialled on October 15, 2009 and it is expected to be formally signed in May 2010. The Korea Institute for International Economic Policy has estimated the pact will boost South Korea's exports by US\$11 billion and GDP by 3.08 per cent.

Since the EU-S. Korea industrial structure is similar to the mutually supplementary structure between S. Korea and the U.S. and the KORUS FTA is bogged down in the ratification process, the EU expects to secure an advantageous position against the U.S. in the S. Korean market. In

addition, EU legal, financial, communication, distribution, education, and healthcare service companies would be able to apply their standards to the S. Korean market, strengthening their competitive advantage over U.S. firms in the services market.

As per the EU-S. Korean agreement, practically all customs duties on industrial goods will be removed fully in year five of the tariff elimination schedule. By year seven, both sides would have achieved, in overall terms, 98 per cent duty elimination in terms of tariff lines. Sticking points during lengthy negotiations were differences on duty drawback – which allows manufacturers to reclaim tariffs paid on imported materials that are used to make products for export – and rules of origin. In the FTA agreement, the two sides have agreed on the level of allowable foreign content at 45 per cent. A special safeguard clause on duty drawback has a cap on the refundable duties if the trade figures show that there was a notable increase in foreign sourcing by S. Korean manufacturers.

In the automotive sector, tariffs will be eliminated in 3-5 years. Although EU and S. Korean carmakers currently hold a similar share in each others' market of around 3 per cent, the EU market is much larger. In order to allay European fears that they may be swamped by cheaper Korean cars, the FTA contains a safeguard clause, allowing MFN duties to be re-introduced for up to four years in case of a sudden surge in imports.

The EU-S. Korea FTA is the first FTA to include specific sectoral disciplines on NTBs to trade. Four sector-specific annexes are included in this FTA: consumer electronics, automotive products, pharmaceuticals and chemicals. For example, the FTA addresses non-tariff barriers in the auto sector and commits S. Korea to recognising the standards set by the United Nations Economic Commission for Europe (UN-ECE) as equivalent to S. Korean standards for core safety standards and to harmonise regulations pertaining to an additional 29 standards with UN-ECE regulations within five years.

The FTA will fully liberalise tariff on nearly all of EU's agricultural exports to S. Korea but excludes rice. Currently, only two per cent of EU agricultural exports enter S. Korea duty free. The S. Korean tariff on pork (currently more than 20 per cent) will be lifted over 10 years and the tariff on cheese (currently 36 per cent) will be lifted only over 15 years. The FTA will also offer a TRIPS plus level of protection in geographical indications of both partners. A feature of the agreement on geographical indications is that a higher level of protection has been given to agricultural products and food stuffs originating in both EU (cheese, ham, olive oil etc) and Korea (tea, rice, spices etc).

In services, the positive list approach has been agreed upon and the scope of the FTA covers diverse services sectors as maritime transport, telecommunications, finance, legal services, environmental services, and construction. Audiovisual services are excluded from the chapter. Overall, the liberalisation scope and schedule is the same as in the KORUS FTA with some increase.

With regard to labour and environment, the S. Korea-EU FTA stresses that environmental and labour standards should not be used for protectionist trade purposes. At the same time, the FTA establishes the Committee on Trade and Sustainable Development for reviewing, monitoring and assessing the impact of the implementation of this agreement on sustainable development. However, unlike the KORUS FTA, these issues are not covered by the agreement's dispute settlement mechanism.

Concluding Remarks

The S. Korean FTAs with the U.S. and EU promote deep integration while the India-S. Korea CEPA has a more strategic focus. For South Korea, this agreement with India is its first with the BRIC group and for India, it is its first deal with an OECD member.

In the India-S. Korea CEPA the proportion of tariff elimination is lower, with many more exceptions, and the liberalisation time frame is higher in comparison to the South Korean agreements with the U.S. and EU. The India- Korea CEPA also does not envisage liberalisation in the area of government procurement whereas the other two agreements seek to open up trade in government procurement. Further, non-trade related aspects, particularly with regard to labour and environment, are significant components of the S. Korean agreements with the U.S. and EU.

Developments in India's Trade and Investment Policies

Swapna Nair¹

Overview

Indian trade and investment policy remained largely unchanged during the first quarter of the financial year 2009-10. However, the budget proposals for 2010-11 marked the beginning of the withdrawal of stimulus measures including export incentives introduced during the worldwide recession that followed the financial crisis.

Export incentives granted by India to textiles and apparel products have come under challenge in the WTO following the increase in the country's share of world exports.

An initiative of importance during this period was the release of a consolidated manual on FDI policies. This aims to promote foreign direct investment through a policy framework, which is transparent, predictable, simple and clear.

Import and Export Policy

In terms of import policies, most of the notifications have been either of a clarificatory nature or of minimal impact. There is a modicum of liberalisation in the notification regarding import policy for new vehicles whereby Chennai and Mumbai airports and the Pune ICD have been added to the list of ports through which imports can be made.

Export control has continued on essential foodstuffs in the context of concern about rising food prices. The ban on exports of oilseeds had already been extended in September 2009 and a similar ban on exports of pulses was extended for a year in March 2010. The ban on non-basmati rice continues with minor exceptions that exist under the food aid programme. and exceptions to export certain limited quantities to Sri Lanka (20,000 MT) and Nepal (25,000 MT) and exports of organic non- basmati rice up to 10000 MT. The ban on export of wheat and Meslin also continues with minor exceptions on exports of organic wheat (up to 10,000 MT), exports to Nepal (50,000 MT) and exports to Maldives.

Import tariffs

In terms of import tariffs, no major structural changes have been announced in the 2010-2011 budget. There have been a few changes on specific items though.

1. The government had provided full exemption from basic customs duty to crude petroleum and proportionately reduced the basic duty on refined petroleum products in June 2008. The levies have been restored to the basic duty of 5% on crude petroleum, 7.5% on diesel and petrol and 10% on other refined products. .

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2. In order to support agriculture and related sectors, the government has provided project import status with concessional import duties for setting up warehouses for food grains, setting up of cold storage and specified agricultural machinery not manufactured in India.
3. In order to help replace manually operated rickshaws by solar charged battery-operated 'soleckshaws' which have been developed by CSIR, government has proposed to exempt from customs duties, key parts and components used in its manufacture. Further, to encourage the use of biodegradable material, the import of compostable polymer has also been exempted from basic customs duty.
4. Full exemption from import duty has also been provided to specified inputs required for the manufacture of sports goods.
5. The basic customs duty on magnetrons, which is a component in the domestic production of microwave ovens, has also been reduced from 10 per cent to 5 per cent.
6. Customs duty on long pepper has been reduced from 70 per cent to 30 per cent and on asafoetida from 30 per cent to 20 per cent.

Anti-dumping and Safeguard measures

The usage of trade defence measures is clearly declining. Against 55 anti-dumping investigations initiated in 2008 and 29 in 2009, only four new ones have been initiated in 2010.

No new safeguard investigations have begun in 2010 against 10 initiated in 2009. However, a review of safeguard action taken in 2009 was started in February 2010 on caustic soda to determine whether the measure should be continued.

Export Incentives

India's merchandise exports had registered a steep decline since the global crisis but over the past few months, there has been a positive growth in exports. In fact, in February 2010, India's exports were valued at US\$16091 million (Rs. 74547 crore) which was 34.8 per cent higher in dollar terms (26.7 per cent in rupee terms) than the level of US\$11941 million (Rs.58822 crore) during February, 2009.

With this upturn of the economy, the 2010-11 budget has set the rollback of stimulus measures and export incentives in motion, albeit slowly. Some of the main export policies and export incentive measures announced in the budget and elsewhere are as follows.

1. With a view to insulating employment-oriented sectors from the global meltdown, the government had introduced in 2008 an interest subvention of 2 per cent on pre-shipment credit for seven sectors (textiles including handlooms, handicrafts, carpets, leather, gems and jewellery, marine products and small and medium enterprises). In the 2009-10 budget, this had been extended until March 2010. In the current budget, this interest subvention has been extended but only for exports of handicrafts, carpets, handlooms and of small and medium
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enterprises. As an attempt to phase out slowly the stimulus measures, export of apparel, leather, marine products, gems and jewellery have been excluded from this extension.

2. In the budget, there is also no mention of an extension of the STPI scheme, which is scheduled to end in March 2011.

While the general direction of policy in this quarter has been to roll back export incentives, there have been instances of measures to expand such incentives too. For instance, under the existing focus product scheme, 112 new products have been made eligible for benefits at 2 per cent of the value of exports and 113 new products for benefits at 5 per cent of export value. Under the market linked focus product scheme, 1837 new products and two major markets, China and Japan, have been added.

Review in WTO of export incentives in India on textiles and apparel

The news from Geneva is that the United States has made a request in the WTO for the Secretariat to evaluate whether India is entitled to continue its export subsidies of textiles and apparel products.

Export subsidies on non-agricultural products are prohibited as a general rule in the WTO Agreement on Subsidies and Countervailing Measures. However, the least developed countries and developing countries listed in Annexure VII of the Agreement (which includes India) have been granted an exemption from the prohibition. The exemption would apply to them until their GNP per capita has reached \$ 1,000. The Agreement also provides that a developing country Member which has reached export competitiveness in one or more products would have to phase out export subsidies on the products gradually over a period of eight years. Export competitiveness in a product is deemed to exist if a developing country's share has been at least 3.25 per cent in world trade of that product for two consecutive calendar years.

A product is defined as a 'section heading' of the Harmonized System Nomenclature. In the Harmonized System the product categories are divided into Sections, Chapters (2 digit), Headings (4 digit) and Sub-Headings (6 digit). A Section comprises a number of chapters and each chapter is subdivided into a number of Headings and Sub-Headings. Thus the term section heading cannot make sense in this context and it has to be either section or heading. The term 'section heading' appears to be an error which went undetected during the legal drafting exercise carried out before the signing of the Marrakesh Agreement. When the competitiveness of India's textile exports in terms of this provision was last raised in 2003 views differed among Members on whether the trade shares of the whole Section XI or of individual Headings had to be taken into consideration.

In this background the WTO Secretariat has submitted the study, which gives the shares of the section as a whole as well as those of the various Headings. Based on the United Nation's COMTRADE database India's share has been computed at 3.4 and 3.6 percent of the total world textile and clothing exports. The WTO study also finds the share to be more than 3.25 percent in respect of a large number of headings, rising to 30.3 and 28.8 percent in respect of home furnishing articles.

It has become clear that India would have to phase out the export incentives on textile and clothing products. Concessional export credit, Duty Exemption Pass Book Scheme (DEPB), Export Promotion Capital Goods (EPCG) are some incentives that would qualify as export subsidies as they are contingent on exports. The Textile Upgradation Fund Scheme (TUFS) would not be affected as it does not constitute an export subsidy.

India would also need to take a view on whether export competitiveness should be deemed to have been determined on the entire textile and clothing sector or only in respect of specific Headings.

Recent Developments in FDI Policy

The main development in FDI policy is the release of the final version of the consolidated FDI Policy document, which has become effective since April 1, 2010. This document consolidates all the prior policies/regulations on FDI that are contained in FEMA, 1999, RBI Regulations under FEMA, 1999 and Press Notes/Press Releases/Clarifications issued by DIPP and reflects the current 'policy framework' on FDI. This document, which will be released every six months, is a compilation and comprehensive listing of most matters on FDI and is not intended to make changes in the extant regulations. This consolidation, which has been introduced as an investment friendly measure, is aimed at reducing the regulatory burden and promoting foreign direct investment through a policy framework that is transparent, predictable, simple and clear.

The FDI policy document does not bring further clarity on the press notes 2, 3 and 4 that was released last year. Press Note 2 had provided a framework for the calculation of total foreign investment in a company and included FDI, investment by FIIs, NRIs, ADRs, GDRs, foreign currency convertible bonds (FCCB) and convertible preference shares convertible currency debentures. Under this, an Indian company would be one in which the extent of foreign investment does not exceed 49 per cent. This had led to the inadvertent classification of ICICI Bank and HDFC Ltd as "foreign-owned" since their combined FII and FDI investment was more than 49 per cent. Further, under this press note, any downstream investment made by an Indian company whose foreign investment does not exceed 49 per cent would not be subject to the sectoral caps on foreign investment. This had raised concerns since as per this an Indian company having foreign investment not exceeding 49 per cent might be allowed to invest in downstream investment where FDI caps exist or is restricted without violating any norms. Press notes 3 and 4 had supported press note 2. The objective of these press notes was to simplify the calculation of total foreign investment and downstream investment procedures. However, these have led to a few complications by introducing possible inconsistencies in computing the sectoral caps in downstream investments. There is no further clarification on these press notes in the combined FDI policy document.

Apart from this, only one press note has been released by the Department of Industrial Policy and Promotion in the first three months of 2010. This press note (press note 1(2010)) concerns review of cases which require prior approval of the government of India for making foreign investment by the FIPB.

Enforcing WTO Rights and Obligations--India in the WTO Disputes

Anwarul Hoda

The WTO has been getting a bad name for over 10 years now over the lack of progress in the negotiations for further trade liberalisation. Dramatic collapses of trade talks at Seattle (1999) and Cancun (2003) had heightened the concern over the health of the multilateral trading system as embodied in the WTO Agreement. There was considerable progress thereafter and a large number of issues relating to the negotiations on agriculture and non-agricultural market access were seemingly resolved. However, in July 2008, disagreements led to an impasse once again. Since then, there has been an undeclared pause in the negotiations.

During all these years, the WTO framework has been held aloft by the success in dispute settlement. A few cases have dragged on for many years and in others complaints have persisted of less than full compliance. Full compliance in contested cases has not come without recourse to Article 21.5, which provides for procedures for resolving disputes regarding compliance. But members have been generally satisfied with the results of efforts to enforce their rights. In many cases, they have succeeded in obtaining redress without the need of going through the full length of procedures.

What has been India's experience with dispute settlement in the WTO both as respondent and complainant? This article addresses the issue.

Disputes raised against India

So far India's trading partners have filed 20 complaints against India, 13 of which (in four groups) resulted in major policy corrections in India. In the initial years of the WTO, there were three high profile cases relating to patent laws (*India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*), quantitative restrictions on imports maintained for balance-of payments reasons (*India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*) and trade related investment measures (*India – Measures Affecting Trade and Investment in the Motor Vehicles Sector*) on which so much blood had been spilled during the Uruguay Round. More recently, a dispute in respect of internal taxes on wines and spirits has gone against India (*India – Additional and Extra-additional Duties on Imports from the United States*). A brief description of each of these groups of cases is given below.

India was one of the countries availing of the transition period of 10 years given to the developing countries to make patents available for pharmaceutical and agricultural chemical products. But under Article 70.8 (a) of the TRIPS Agreement, there is a requirement that notwithstanding the transitional period availed of by members should provide a means (mail box) by which applications for patent protection of inventions in respect of pharmaceutical and agricultural products may be filed. Indian laws did not originally have the provision for mail box and it was only after the USA and the EC obtained the ruling from the appellate body (AB) that the shortcoming was rectified.

Complaints were filed against India in 1997 by the USA, Australia, Canada, New Zealand, Switzerland and the EC on the quantitative restrictions maintained for balance-of-payments reasons on the ground that the level of monetary reserves did not justify these restrictions. India reached agreement with five of the complainants to phase out the restrictions by March 2003, but the USA pursued the complaint up to the APB and finally obtained a ruling in its favour. India had to phase out the quantitative restrictions maintained for balance-of-payments reasons by 1 April 2001.

The third group of complaints filed again by the USA and the EC related to India's policy for indigenisation of automobile manufacturing through local content and export balancing requirements. Here too, following the APB finding, India had to withdraw all measures on indigenisation and trade balancing requirements.

In recent years, India has come under some heat in the fourth group of disputes on the border and internal taxes imposed by the central and state governments on wines and spirits. Regulatory control of internal distribution by the state governments of these products is also an issue. The first complaint by the EC in November 2006 was that the additional duty and extra additional duty levied in India raised the total levy on wines and spirits above 150 per cent ad valorem, which was the bound rate of duty. However, in July 2007, work in the panel was suspended at the request of EC as India made some adjustments in the applied rates of duty. Subsequently, in March 2007 the USA, supported by Australia, the EC, Japan, Chile and Viet Nam again sought consultations and a panel was established in July 2007 on basically the same issues relating to additional and extra additional duties on wines and spirits (*India – Additional and Extra- additional Duties on Imports from the United States*). In this dispute, the AB held in November 2008 that both the additional duty and extra additional duty were WTO inconsistent as they imposed higher levels of duties than the corresponding sales tax, excise or value added taxes imposed on domestically produced products.

In September 2008, the EC again sought consultations on discriminatory taxes imposed on imported wines and spirits in the states of Maharashtra and Goa and constraints on retail sale on these products in Tamil Nadu. Subsequently, the EC extended the complaint to discriminatory taxes in Karnataka but it has not taken the next step of asking for the establishment of a panel.

Six of the complaints, of which five were by the EC and one by the Chinese Taipei, were not pursued. Neither was a panel established nor a settlement notified. EC's complaints related to export restrictions on raw hides and skins, import restrictions (two), special customs duty and special additional customs duty, and anti-dumping measures, and the one by Chinese Taipei was on anti-dumping measures. In another complaint made in 2004 by Bangladesh against anti-dumping duties imposed on lead acid batteries from Bangladesh, mutual settlement was reached and the measure terminated.

Disputes raised by India

Out of 18 disputes raised, India did not pursue six and no panel was established or a settlement notified in any of them. In two cases, mutually acceptable solutions were reached. The first WTO complaint raised by India in 1995 was against Poland and related to the duty free quota for the EC envisaged in the Interim Agreement on Trade Related Matters between the two WTO members. India settled this complaint on the basis of the introduction by Poland of a tariff quota for developing countries under the GSP scheme and the two sides notified a mutually agreement in 1996. The other instance of a mutually agreed solution was with the EC on anti dumping duties on certain flat rolled iron and non-alloy steel products from India. This case was initiated in July 2004 but the agreement was notified in October 2004 stating that the EC had agreed to terminate the measure. Thus, only 10 of the complaints made by India resulted in the establishment of a panel.

Three of these 10 cases related to access for textiles and clothing, on which India had fought so hard during the Uruguay Round. India was successful in all three: in the first, India requested termination of the case as the USA withdrew the transitional safeguard measure soon after the

panel was established; in the second, although the dispute proceeded to the full length, the USA had already withdrawn the transitional safeguard measure even before the panel had completed its work; in the third, the quantitative restrictions imposed by Turkey upon the formation of the customs union with the EC were found to be inconsistent with the WTO Agreement. The two sides entered into an agreement on implementation whereby Turkey eliminated the restrictions on two of the textile categories and made compensatory reduction of tariff in respect of 19 other categories in which it did not eliminate the restrictions within the time allowed. The tariff reduction was to continue until the restrictions on all categories had been eliminated.

India was successful also in three other cases in which it was a complainant, *EC – Anti-Dumping Duties on Cotton Type Bed Linen*, *US – Anti-Dumping Duties on Carbon Steel Plates*, and *US – Customs Bond Directive for Merchandise Subject to Anti-Dumping and Countervailing Duties*. Compliance became an issue only in the bed linen case and was obtained only after the appellate body gave its ruling in the Article 21.5 proceedings that there were some lacunae in implementation that needed to be addressed.

India was either the sole or joint complainant in three celebrated cases, viz. *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp Turtle case)*, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (Discrimination in Tariff Preference case)* and *United States – Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment)*. In two of the cases, the Shrimp Turtle case and the Discrimination in Tariff Preference case, the verdicts went in favour of India but the measures complained against were retained or substantively restored by the Respondent Members after the removal of essentially procedural deficiencies due to which they had been found to be inconsistent with the WTO provisions.

In the shrimp-turtle case, in which India, Malaysia, Pakistan and Thailand were joint complainants, the measure at issue was the US import prohibition of shrimp and shrimp products from countries that did not use nets equipped with a turtle excluder device. In a far-reaching pronouncement, the Appellate Body held that the US measure qualified for being treated as an exception under Article XX (g) of GATT 1994, as animal species under threat of extinction could be regarded as exhaustible natural resources. However, the measure did not meet the requirements of the chapeau of that article that such measures should not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, as no effort had been made with the complainant countries for agreeing to appropriate environmental practices as had been done with some countries in the American region. Once the US had made serious good faith efforts to reach a multilateral agreement on the environmental measure at issue, the appellate body held that the requirement of the chapeau had been fulfilled.

In the discrimination in tariff preference case, the issue was the WTO consistency of the special arrangement under the ECGSP scheme to combat drug production and trafficking which discriminated in favour of 12 listed countries, seemingly at variance with the requirement in the enabling clause that the preferences be non-discriminatory among developing countries. In this case, the appellate body held that granting different tariff preferences to products originating in different GSP beneficiaries was allowed, notwithstanding the provision in the enabling clause that they be non-discriminatory, provided that the relevant tariff preferences respond positively to the particular development, financial and trade needs and are made available on the basis of an objective standard to all beneficiaries that share the need. The special treatment of 12 beneficiary countries in the EC GSP scheme was found to be inconsistent with the Enabling Clause because the scheme did not set out objective criteria that if

met would make it possible for other developing countries that were similarly affected to be included as beneficiaries under the scheme. The EC withdrew the then extant scheme, reported compliance, and then proceeded to reintroduce it after making good the shortcoming. In the revised scheme it did make a concession in that it excluded the tariff lines of the greatest relevance to India.

In the Byrd Amendment case, India was one of the complainants along with eight others (Australia, Brazil, Chile, European Communities, Indonesia, Japan, Korea and Thailand). Canada and Mexico were active third parties. The measure at issue was the provision in the Act for the anti-dumping and countervailing duties assessed after October 1, 2000 to be distributed among the affected domestic producers. The case went in favour of the complainants and the Byrd Amendment was found to be WTO inconsistent. Since the US did not withdraw the measure within the time allowed, eight members, including India, obtained authorisation to suspend concessions or other obligations and Canada, the EC, Japan and Mexico went ahead with suspension of concessions.

This case took more than three years from the time the panel was established (July 2001) to the time retaliation was authorised (August 2004). In February 2006, the US repealed the legislation, but the WTO inconsistency has not been fully eliminated as the US has continued to distribute the duties already collected before the repeal of the legislation.

The only case India lost as a complainant was about the rules of origin applied by the USA and used in the administration of the quota regime maintained by it under the WTO Agreement on Textiles and Clothing. In this complaint, India had argued that the complex rules of origin introduced by the US for textile and apparel products, whereby the criteria that confer origin vary between similar products and processing operations, served trade policy purposes, contrary to the requirements of Articles 2 (b) and (c) of the WTO Agreement on Rules of Origin. The panel held that India had not been able to establish that the relevant provisions of the US law were inconsistent with the requirements of these articles of the WTO Agreement. India did not file any appeal against the panel report.

Concluding Remarks

India has used the dispute settlement understanding (DSU) to challenge the trade policies of the developed countries in a number of cases and in all but one, it has been successful. In a few cases, it has not even had to go through the full length of procedures before obtaining relief as the measure complained of has been withdrawn or a compromise reached. In the contested cases, the quality of compliance has not always been without blemish. In the Turkey case, many of the restrictions on textiles and clothing items remained intact and India was given compensatory reductions of tariff. In the Byrd Amendment, the WTO inconsistent law was repealed by the USA but the inconsistent measure was continued on a transitional basis for some time. Even so, India's experience as a complainant can be said to be satisfactory on the whole. The success of the developed countries in getting India to make corrections in WTO inconsistent policies has been more complete because the measure complained against has been withdrawn or its inconsistency with WTO rules eliminated. In all cases in which India was a respondent, it reached agreement in the reasonable time needed for implementation and the quality of compliance was not an issue. On the other hand, in some cases in which India was a complainant, compliance has been subject to Article 21.5 procedures. In one case, Article 22 procedures were also needed to obtain authorisation for suspension of concession or other obligations because of non-compliance. It is another matter that India did not actually proceed to implement the retaliatory measure.

Revisiting Institutional Issues in the WTO

Anwarul Hoda

On October 15, 2009 Australia, Brazil, Canada, China, Hong Kong China, the European Communities, India, Japan, Korea, Malaysia, Mauritius, Mexico, Norway, South Africa, Switzerland, Turkey, the United States and Uruguay submitted a proposal for the establishment of 'an appropriate deliberative process to review the organisation's functioning, efficiency and transparency and consider possible improvements' for being included in the Chairman's summary to be issued at the conclusion of the Seventh Ministerial Conference of the WTO, which was to be held at Geneva from November 30 to December 2, 2009.

The proposal was not approved finally during the ministerial conference as some members wanted further discussion and reflection. However, having regard to its sponsorship and support by a cross-section of the WTO membership, it is apparent that this is a serious initiative and institutional issues will soon be revisited. This piece seeks to identify the main institutional issues that are likely to figure in future WTO deliberations and raise some of the questions that would need to be addressed.

In seeking to identify these issues, the proposals made in the Uruguay Round Negotiating Group on Functioning of the GATT System (FOGS) serve as a suitable starting point. The report of the Consultative Board of eminent persons established by Director General of the WTO under the chairmanship of Peter Sutherland submitted in January 2005 is another important source of information on the subject. This board was set up specifically for addressing the procedural and institutional inadequacies that had stymied progress during the ministerial meetings at Seattle and Cancun. The Report of the Warwick Commission under the chairmanship of the former trade minister of Canada, Pierre S. Pettigrew, submitted in December 2007, also made an important contribution on the subject. A number of authors including some old GATT/WTO hands have written extensively and participated in the debate on WTO reform.

The proposal of October 15, 2009 mentions the aspects of 'functioning, efficiency and transparency'. The precise agenda of future deliberations will unfold gradually during the 'deliberative process' once it is set in motion. However, the following topics that have figured in past debates and reports could merit consideration by the members.

Decision making by consensus

The WTO Agreement stipulates a unique decision making procedure for dispute settlement. Whether it is the establishment of a panel, the adoption of panel or Appellate Body report or the grant of a request for authorisation to suspend concessions in the event of non-compliance, the rule is that the requests must be granted or the reports adopted unless the Dispute Settlement Body decides by consensus not to take the step. On these matters, decision-making is virtually automatic and the role of individual members is reduced to insignificance.

However, the general rule in the WTO Agreement is decision making by consensus. Consensus is deemed to exist on a matter submitted for a body's consideration 'if no member, present at the meeting when the decision is taken, formally objects to the proposed decision.' If a decision cannot be arrived at by consensus, there is provision for voting, with each member having one vote. The general rule is for the decision to be taken by simple majority of votes cast, but specific matters require approval by a qualified majority. Interpretations of a multilateral agreement require a three-fourths majority, as do waivers from an obligation granted to a member. The terms of accession by new members have to be approved by a two-thirds majority of the WTO members. The rules regarding amendments are more complex. A decision is first to be taken (by consensus or by a two-thirds majority in the absence of consensus) to submit a proposal for acceptance by members. The amendment can take effect only on the acceptance by all members in the case of a few specified provisions (such as the MFN clauses of GATT 1994 and GATS) or, more generally, by the acceptance of two-thirds of members.

While the rules do provide for voting in the event that decisions cannot be taken by consensus, in practice WTO bodies have shunned this step. During the days of GATT 1947, such matters as accession of new contracting parties used to be submitted routinely for voting and the accession became effective only upon approval by two-thirds of the contracting parties. However, in the WTO, decision making by consensus has solidified into practice even for approval of terms of accession.

The requirement for consensus for decision-making has been the focus of past debates on functioning and efficiency. This requirement has resulted in a stalemate all too frequently because of strongly held positions and resistance to compromise. During the run up to the launch of the Doha Round, and even after its commencement, progress in the trade talks was held up by the lack of consensus on the expansion of the scope of the WTO Agreement to investment, competition policy, transparency in government procurement and trade facilitation. In 1999, there was a prolonged impasse on the appointment of a Director General for the WTO and the post was left vacant for a few months before an uneasy compromise was found.

In the context of these experiences, it has been suggested that a decision could be taken on the basis of agreement among members representing a critical mass. Decisions on this basis are not recognised formally in any WTO rule but do have precedence in practice. For instance, a major initiative at the first Ministerial Session held at Singapore in 1996 was signing of the Information Technology Agreement (ITA) by 28 members in December 1996. This agreement stipulated that it would come into effect after participants representing a critical mass (defined as approximately 90 per cent of world trade in information technology products) had notified acceptance of the agreement. It has been suggested that on the same principle, decisions could be taken on such matters as the expansion of the scope of the WTO Agreement. The critical mass could be in terms of trade share or the proportion of the consenting members to the total membership.

One of the proposals made by the US in the FOGS group was the establishment of a GATT Management Board. The proposal was for the establishment of a compact body comprising 18

contracting parties, some permanent on the basis of trade share and others temporary, holding seats on a rotational basis, the idea being to improve the overall effectiveness and decision making in the organisation. The proposal was for the body to be at the ministerial level, to be assigned both consultative and executive roles, including the development of agenda for ministerial meetings, initiation of new rounds and nomination of Director General and Deputy Director Generals. It was modelled on the executive board originally proposed in the Havana Charter for an International Trade Organisation. At the root of the proposal for the management board arrangement was the dissatisfaction among major trading nations with the virtual veto that the consensus rule gave to even the smallest trading country. As was to be expected, the proposal was vigorously opposed by all developing country participants on the ground that it would have created an instrument for the continued domination of the industrialised countries in the future trade organisation.

Can agreement among a critical mass of the membership become the basis for decision making on substantive questions like the scope of negotiations in the WTO? Is a management board conceivable at least for decisions on administrative issues?

Variable Geometry

A related issue has been that of allowing variable geometry, which implies permitting individual members to opt out of any future agreement if it is not ready to undertake the additional obligations envisaged in it. If negotiations are initiated on a new subject on the basis of less than consensus, it follows that those members not party to the decision would not be expected to participate. However, even where comprehensive negotiations are launched on the basis of consensus, should it be made compulsory for all members to agree on the full package of results? That was not the case in the Tokyo Round and only the developed countries and a few emerging economies accepted the non-tariff measure (NTM) agreements, while a large majority of developing countries stayed away. This led to the criticism by scholars of the balkanisation of the trading system and a view emerged that in future, the option should not be given to opt out of a part of the negotiated package. As a result the Punta del Este Ministerial Declaration provided for the negotiations in the Uruguay Round to be a single undertaking, whereby participating countries cannot pick and choose among individual agreements resulting from the negotiations but have to accept all of them. The Doha Ministerial Declaration similarly provides that with the exception of the improvements and clarifications of the Dispute Settlement Understanding, 'the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking'.

With the WTO membership growing to 153 and the existing differences in their economic situations and interests, a view has been growing that variable geometry may not be a bad idea for the future.

Internal Transparency

The most important issue on internal transparency is related to the general demand that all WTO Members should be kept informed and involved in the WTO deliberations. There has been much criticism of the 'green room' process of consulting in small groups, which has been used by successive

Directors General to facilitate negotiations. The representatives who are not invited to the smaller gatherings resent being left out of the process when important decisions are taken. On the other hand, the point has been made that the representatives of all 153 members cannot possibly participate efficiently and meaningfully in trade negotiations. Despite objections to the 'green room', process the practice has been built of negotiating in concentric circles, and once agreement is reached in a smaller group, the matter is taken successively to the next level and in the end to the full membership. Usually there is very little time given for consideration of the matter by the body in which the full membership is represented and dissatisfaction at the lack of involvement remains among members who participate in the last phase.

Can the arrangement for internal transparency be improved upon in the WTO so that members outside the innermost concentric circle do not feel left out?

External Transparency

The role of civil society in governance has been growing in recent decades, at both national and international levels. Recognising this and in accordance with what has been done by other intergovernmental organisations, the Marrakesh Agreement establishing the World Trade Organisation mandates the General Council to 'make appropriate arrangements for consultation and co-operation with non-governmental organisations concerned with matters related to those of the WTO'. Pursuant to this, the Director General and staff of the WTO secretariat hold regular briefing meetings to acquaint non-governmental organisations with developments in meetings of WTO Committees and Councils. In addition, annual public symposia have been organised since 2002 on specific issues and there has been good participation by civil society. They are also entitled to attend the public plenary sessions of ministerial meetings. Nevertheless, the NGOs aspire for even closer involvement in the WTO deliberations and wish to be given an opportunity to contribute to decision making. In their quest for greater transparency in negotiations, they want to be kept informed more closely of every move made by participating countries. While there is a general willingness to accept greater involvement of civil society in the deliberations of WTO bodies, there is very little acceptance of the need to give them a role in decision-making. In the past, questions have been asked about the representational character of NGOs. Developing countries have also made the point that there is asymmetry of resources, power and influence between NGOs from the North and those from the South. The general approach has been that the national level is where civil society can have a role in decision-making and it is not possible to provide them with an opportunity to contribute in an intergovernmental organisation.

Is it possible to envisage a closer involvement of the civil society in the deliberations of the WTO?

Role of the Director General and Secretariat

The role of the Director General has evolved considerably since the early days of GATT 1947. There was a time when the representatives looked up to the Director General for guidance and even asked him for a ruling on a matter on which the rights and obligations of contracting parties were not

clear. During the Tokyo Round, not only did the Director General chair the meetings of the Trade Negotiations Committee (TNC) but the deputies also chaired meetings of subsidiary bodies. Even during the Uruguay Round, the chairmanship of the TNC remained with the Director General and he and his deputies regularly convened 'green room' and other smaller consultations to address differences on individual issues and work out solutions. Peter Sutherland played a major role in getting the delegations to sink their differences on some difficult issues and in bringing the Uruguay Round to a conclusion. However, there was a decline in the importance of the role played by the Director General thereafter, as representatives began putting emphasis on the WTO being a member-driven organisation. It started looking as if the Director General and his staff were being expected to do no more than convene meetings and arrange for the recording, interpretation and translation of statements made by representatives. The secretariat was discouraged even from undertaking economic research on trade issues and the view prevailed that this function could be left to the OECD and the international financial institutions. At any rate, the funds available for research were curtailed so much that not much was possible by way of research.

Despite the trend toward cutting down the role of the Director General, there has been an undercurrent of thinking that the Director General should be given a greater role in WTO affairs. When representatives of members are unable to provide leadership, the vacuum should be filled by allowing the Director General to fulfil this role, especially during times of crisis. It is being increasingly recognised that institutional memory allows the secretariat to play a significant role at all times as the guardian of the system and protector of its coherence. Of late, there have been signs that members want to depend more on the secretariat. At their meeting in London on April 2, 2009, the G20 made a request that the WTO secretariat, in collaboration with the OECD and the UNCTAD, 'monitor and report publicly on G20 adherence to their undertakings on resisting protectionism and promoting global trade and investment'.

Can the Director General of the WTO be given greater room for playing a leadership role in driving the multilateral process further?

Proliferation of preferential agreements

At a different level of importance from procedural and institutional questions is the systemic concern relating to the proliferation of regional, sub-regional and bilateral FTAs. This too could figure in the deliberative process envisaged in the proposal of 15 October 2009.

The MFN clause, embodying the principle of equality of treatment, was the most important provision in the General Agreement on Tariffs and Trade (GATT 1947). Although customs unions and free trade areas were permitted as an exception in GATT 1947, strict conditions were imposed including the requirement that duties and other restrictive regulations of commerce should be eliminated with respect to 'substantially all' the trade among the constituent territories. The expectation was that there would be only a few of them motivated mainly by geo-political considerations. However, actual experience has surpassed all expectations and an overwhelming majority of WTO members

are now parties to one or more preferential agreements. It is estimated that more than half of international trade flows are accounted for by preferential trade agreements. Although geopolitical considerations have indeed been the main driving force, there are a number of preferential agreements that are bilateral and interregional in character. It is generally believed that the failure to make progress in the Doha Round has provided additional incentive to policy makers to engage in negotiations for bilateral and regional trade agreements. What is noteworthy is also that only a few of these agreements are customs unions in which there is a common external trade regime and most are free trade areas in which individual governments retain their trade regimes vis-à-vis third country trading partners.

While liberalisation within free trade areas enjoys considerable political support in partner countries, discomfort has also been growing among policy makers and governments at some of the economic disadvantages of these agreements. The most important of these is trade diversion, which occurs when there is a shift from a lower cost, third country source to a higher cost, partner source. The rules relating to regional trade agreements, therefore, put on the agenda of the Uruguay Round and have again figured in the Doha Development Agenda. However, no substantive change was agreed to in the Uruguay Round and so far in the Doha Round, the only result has been the establishment of a transparency mechanism.

The question that arises is whether WTO members can muster the political will to address the systemic concern and take steps that would curb the present trend away from multilateralism.

Location of the 'deliberative process'

Another question that arises is the choice of forum within the WTO structure for the proposed deliberations. The sensitivities that have surrounded agenda setting within the single undertaking of the Doha Round make it difficult to cover institutional issues in these trade talks. Quite apart from this, it would not seem to be opportune to create a new dimension to the trade talks at a time when they are stuck in a prolonged impasse. There are also good reasons for keeping institutional issues at a distance from the process of lowering of trade barriers, which inevitably involves reciprocal trade-offs. It was for this reason that the WTO dispute settlement procedures were excluded from the purview of a single undertaking in the Doha Round. In the light of these considerations, the most suitable framework for 'an appropriate deliberative process' for considering systemic improvements must be found in the normal institutional machinery of the WTO. The format of informal sittings of the General Council would seem to suggest itself as the location for 'an appropriate deliberative process'.

ICRIER proposes to put institutional issues on its research agenda for 2010-11.



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