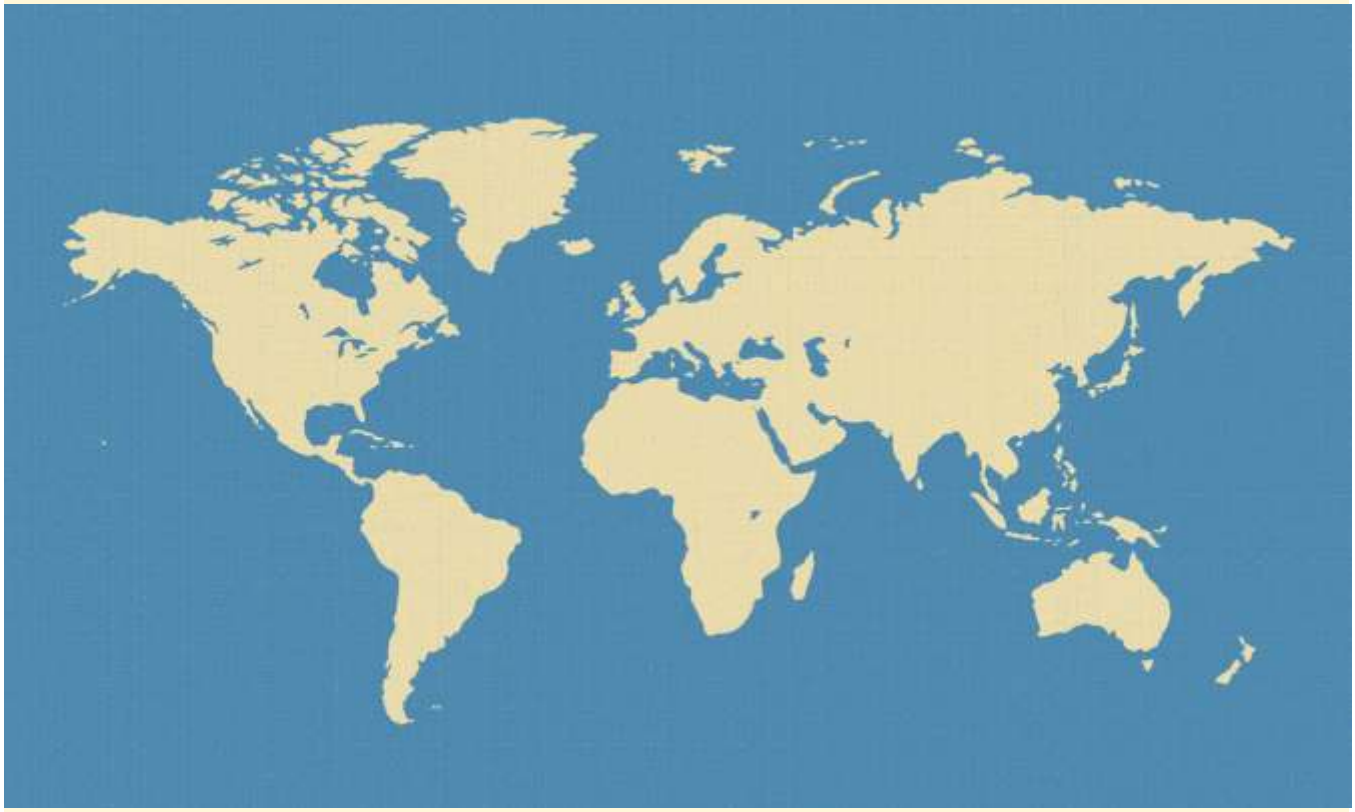
Review of Trade Policies of India's Major Trading Partners

Second Edition



SHASHANK PRIYA • ANIMESH KUMAR

CENTRE FOR WTO STUDIES
Indian Institute of Foreign Trade
New Delhi

Review of Trade Policies of India's Major Trading Partners

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SHASHANK PRIYA
Former Professor with Centre for WTO Studies

ANIMESH KUMAR
Research Fellow, Centre for WTO Studies

Centre for WTO Studies
Indian Institute of Foreign Trade
New Delhi

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Abbreviations

AHTN	ASEAN Harmonized Tariff Nomenclature
ANVISA	Agência Nacional de Vigilância Sanitária (National Health Surveillance Agency Brazil)
APHIS	Animal and Plant Health Inspection Service
AQSIQ	General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China
AVE	Ad Valorem Equivalents
BHC	Bank Holding Company
BNDES	Brazilian National Development Bank
BSE	Bovine Spongiform Encephalopathy
BTA	Bioterrorism Act
CBP	Customs and Border Protection
CCS	Contractual Service Suppliers
CEPC	Carpet Export Promotion Council
CNL	Competitive Needs Limitation
CPF	Cadastrado de Pessoas Físicas
CSA	Canadian standards
CSS	Comprehensive Consolidation Supervision
DFARS	Defense Acquisition Regulation System
EC	European Community
ECJ	European Court of Justice
EFSA	European Food Safety Authority
EFTA	European Free Trade Association
EHIC	European Health Insurance Card
EIC	Export Inspection Council
ENA	Extra Neutral Alcohol

EU ETS	European Union Emission's Trading Scheme
FATF	Financial Action Task Force
FDA	Food and Drug Administration
FDIC	Federal Deposit Insurance Corporation
FMD	Foot and Mouth Diseases
FOPPs	Follow on Protein Products or bio-generics
FSMSC	Food Safety Management System based Certification
FVO	Food and Veterinary Office
GAP	Good Agricultural Practice
GE	Genetically Engineered
GSP	Generalized System Preferences
ICAO	International Civil Aviation Organization
ICTs	Intra-Corporate Transfers
INMETRO	National Institute of Metrology, Standardization and Industrial Quality
IPRs	Intellectual Property Rights
IPs	Independent Professionals
LMO	Labour Market Opinion
MHLW	Ministry of Health Labour and Welfare
MPF	Merchandise Processing Fee
MRAs	Mutually Recognized Agreements
MRL	Maximum Residual Limit
NAFTA	North American Free Trade Agreement
NASSCOM	National Association of Software and Services Companies
NTB	Non Tariff Barriers
NTE	National Trade Estimate

OIE	Office International des Epizooties (World Organization for Animal Health)
PRA	Pest Risk Analysis
RAS	Rapid Alert System
REACH	Registration, Evaluation, Authorisation and Restriction of Chemical substances
RMP	Residue Monitoring Plan
RNE	Registro Nacional de Estrangeiros
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TPR	Trade Policy Reviews
TRQ	Tariff Rate Quota
UL	Underwriters Laboratories
USTR	United States Trade Representative
VMP	Veterinary Medical Products
VOC	Volatile Organic Compounds

Preface

Traditionally, international trade was regulated by tariffs imposed by countries on trade in goods. Hence trade liberalization hinged on reduction of tariffs. This was achieved through arduous-negotiations in GATT and thereafter in certain sectors in the World Trade Organization (WTO). FTAs have further deepened tariff liberalization. However, reduction in tariff has not addressed other barriers to international trade. Non-tariff barriers are an equally significant area requiring close attention to ensure seamless international trade. Developing, including least developed countries, are often found to be at the receiving end of NTBs.

India is extremely concerned at a large number of Non Tariff Barriers (NTBs) facing its exports. These NTBs include export and import restrictions or licensing, tariff quotas, standards, technical regulations and conformity assessment procedures etc. Many of NTBs are thinly disguised trade restrictions with protectionist intent. There is a disproportionate increase in the number of such NTBs especially by developed countries which adversely affect exports of developing countries.

At the WTO there is very little outcome on such matters. The negative consequences of these NTBs have prompted India and other developing countries to focus more closely on this issue. This compilation brought out by the Centre for WTO Studies provides a bird's eye view of the NTB's faced by India's exporters. This publication has used both published and unpublished information from various sources. Large part of the information was gathered from various stakeholders including Government Departments, export promotion bodies and industry. The report covers 33 economies including European Union which contributed to 68.38% of India's total export in 2012. It is anticipated that eliminating these trade barriers would result in substantial gains for India as well as other countries.

Abhijit Das
Head & Professor
Centre for WTO Studies, New Delhi

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In addition, the authors have greatly benefitted from the inputs provided by various Export Promotion Bodies and the other Departments of the Government of India, and in particular the Department of Commerce, the Permanent Mission of India, Geneva, and the other Indian Missions abroad. We also gained from our interactions with researchers and faculty members of the Centre for WTO Studies.

Needless to say, we are solely responsible for all the errors and shortcomings that might have crept into the work.

Shashank Priya
Animesh Kumar

Introduction

India's share of the world merchandise trade was 1.6% and Services trade was 3.2% in 2012[1] (measured by export). In merchandise trade, India's target is to reach 5 % of the world trade by 2020. Along with improving export competitiveness, it is also important to improve information base regarding trade policy regime of India's main trading partners and to identify areas which impede market access of Indian goods and services. The present report is an endeavour in this direction to capture the market access barriers faced by Indian exporters among its major trading partners and other select countries, 33 in all. The main export markets of India as reflected in the share of India's exports are indicated in Annexure I of this book.

This book is compiled on the basis of information obtained from five sources: (1) questions raised by India during the Trade Policy Review of its trading partners, (2) inputs provided by Department of Commerce, Government of India, (3) information obtained through media reports and industry sources, (4) concerns raised by the USTR and the EC on market access barriers in the markets of its trading partners, and (5) inputs received from various export promotion bodies and industrial houses including responses from other departments of Government of India.

The market access barriers have been broadly classified into eight categories for organizing this report: SPS-TBT issues, labeling issues, tariff issues, customs procedures, issues in services, intellectual property rights (IPRs), requirement of local content and other barriers. Market access barriers in India's major trading partners have been organized in a thematic manner.

[1] Source: International Trade Statistics 2013

1. United States of America

Several issues of India's concern emerged during US Trade Policy Review (TPR) in WTO in 2008[2], 2010[3] and 2013[4]. Certain other issues have been identified through various sources, including the Department of Commerce, Government of India, trade bodies and media reports. The response of the US government to the issues raised during the TPR of US is also incorporated.

1.1. SPS - TBT Issues

SPS Issues

In the agricultural area, a number of Sanitary and Phytosanitary (SPS) issues remain a source of difficulty. For example, the US requires that Pest Risk Analysis (PRA) be carried out for new agricultural products before the import conditions are fulfilled. The time between applying for and inclusion of the list of approved products can be long as in the case of pomegranates from India.

US responded that in July 2007, the Government issued a procedure for issuing new and revised phytosanitary import measures. As an alternative to undergoing the formal rule making-based process, the eligible imports can now be approved through a notice-based process. As with the rule-making-based process, a pest-risk analysis must first be conducted for new fruits or vegetables considered for importation. However, if the risk analysis shows that the commodity's risk can be sufficiently mitigated by one or more of the five designated phytosanitary measures, a notice announcing the availability of the pest-risk analysis can be published in the Federal Register inviting public commenting within 60 days. Barring the substantive comments that disprove the findings of the pest-risk analysis, a notice is then published in the Federal

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[2] The full text of questions raised by India and the answers by the US are available on WTO website under document symbols WT/TPR/M/200/Add.1 (2008) and WT/TPR/M/200/Add.2 (2008)

[3] The full text of questions raised by India and the answers by the US are available on WTO website under document symbols WT/TPR/M/235/Add.1 (Nov. 2010)

[4] The full text of questions raised by India and the answers by the US are available on WTO website under document symbols WT/TPR/M/275/Add.1 (May 2013)

Register to announce that the US Government will begin issuing import permits for the commodity.

The US further observed that Animal and Plant Health Inspection Service (APHIS) estimates that it takes a minimum of 18 months to evaluate and approve new import requests under the rule-making system. However, the process can take 2 to 3 years and even longer in some cases. The notices that were published and finalized since the August 16, 2007 implementation date were completed in significantly shorter time periods.

The time frame indicated for granting approval for import of new agricultural products is rather long and tantamounts to a significant market access barrier.

Standard Related Issues

The US has a relatively low level of implementation and use of international standards set by international standardization bodies. Many Indian exporters to the US market face regulatory barriers as products are increasingly being required to conform to multiple technical regulations regarding consumer protection in respect of health and safety and environment. The Introduction of New Limits of lead content in Children's Shoes is one of the examples of such cases. The USA vide the Consumer Product Safety Improvement Act has with effect from Feb.10, 2009, set new limits on lead content in various children's products as defined in the Act. Therefore, from Feb.10, 2009 onwards, any children's product that contains more than 600 parts per million (ppm) of Lead in any part that is accessible will be treated as a banned hazardous product. The sudden introduction of this Consumer Product Safety Act for immediate enforcement in relation to lead content in any product shipped for use by children below the age of 12 appears too harsh on a product like Footwear. It is the view of the private sectors that children would neither chew nor swallow footwear and thus cannot be subject to the ill-effects of Lead. Further, it is apprehended that there is going to be a greater stringency so to say that the current acceptable level of 600 ppm was reduced to a maximum of 100 ppm of Lead on 14/08/2009. This raising of the bar is so sudden and drastic that it poses a barrier to trade in this segment[5].

[5] This information has been obtained from Council for Leather Exports (CLE), India

Handmade Carpet Industry[6] faces non-trade barriers like:

a) Finalizing the list of products requiring Federal Contractor certification on forced or indentured child labour pursuant to the Executive Order 13126.

b) Third party testing requirements pursuant to the notice of the Federal US Government by the Consumer Product Safety Commission.

The US Consumer Product Safety improvement Act[7] (HR 4040) seeks to reduce the lead content from 600 ppb to 100 ppb in 3 years for all Children's Products Containing Lead. This legislation incorporates regulatory tools and enforcement mechanism. Standard for the Flammability of Clothing Textiles[8] is also found to be restrictive. Rules pertaining to the control of volatile organic compounds (VOC) from consumer products[9] which limit the VOC content of 102 categories of consumer products are also reported to be restrictive[10].

The WTO Secretariat Report[11] of 2010 states that SPS requirements applied to import of plants, animals, and their products have been prescribed on the basis of the risk posed to human, animal or plant life or health or environment arising from the imports. According to the authorities, SPS measures are based on international standards and guidelines "where they exist and as appropriate". India asked US for the reasons for applying higher measures in terms of MRLs/ PPM when it applies SPS measures.

The US explained that the WTO SPS Agreement explicitly recognizes the rights of governments to apply more stringent requirements than international

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6 This information has been obtained from Carpet Export Promotion Council (CEPC), India

7 Detailed information can be found on the WTO website under document symbol G/ TBT/N/USA/447/Add.1

8 Detailed information can be found on the WTO website under document symbol G/ TBT/N/USA/241/Add.1

9 Detailed information can be found on the WTO website under document symbol G/ TBT/N/USA/453/Add.1

10 This information has been obtained from Ministry of Micro, Small and Medium Enterprises (MSME), GoI

11 The full text of WTO Secretariat report is available in WT/TPR/S/235 (2010)

standards to protect human, animal and plant life or health, as long as these are based on science, and are necessary for the protection of life or health, and do not unjustifiably discriminate among foreign sources of supply. The SPS Agreement recognizes the right of the United States to adopt a more protective standard, as long as this country can provide justification based on an analysis of scientific evidence and the risks involved[12].

EEPC[13] India (Formerly Engineering Export Promotion Council) has reported trade barriers laid down by Defense Acquisition Regulation System (DFARS) which develops and maintains rule for acquisition and guidance to facilitate the acquisition of goods and services in USA. DFARS invokes Berry Amendment Act. DFARS, Preference for Domestic Specialty Metals, has the following basic requirements: "Specialty metals must be melted in the United States or a qualifying country[14], or they can be melted anywhere but must be "incorporated in an article manufactured in a qualifying country". The clause allows a qualifying country to manufacture parts from metal that was melted anywhere, provided it meets specifications. However, a United States company can only use metal that was melted in the United States or a qualifying country. As India is not a DFARS complaint country, Indian exporters are precluded from participating in this business.

In North America, marking like UL is mandatory for the US and the CSA for Canada for items such as Electrical Heating and Tracing Cables for Domestic, Commercial and Industrial Heating Applications. It is mostly observed that the charges of these labs are very high and each product certification takes anywhere between 6 and 12 months at the least which results in a major obstruction to trade. Test results from any of the reputed labs in India are not acceptable and this denial creates unnecessary burden for Indian Exporters.

Multiple Regulators of Technical Regulations

Most of the States of America have enacted their own administrative procedures

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[12] The full text of question and answer is available in WT/TPR/M/235/Add.1 (2010)

[13] This information has been obtained from EEPC India

[14] As of the date, the qualifying countries are Australia, Belgium, Canada, Denmark, Egypt, Germany, France, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom and Northern Ireland

which govern development and adoption of technical regulations and conformity assessment procedures by the state agencies. Observing it as a trade barrier, India requested the US to explain how these would not impact the process of harmonisation efforts directed under Articles 2 and 3 of the TBT Agreement and Article 3 of SPS Agreements[15].

The US responded that many Members have federal structures and sometimes they regulate at the sub-federal level. Therefore they have in place administrative procedures at the sub-federal level that govern the adoption of state-level measures, including technical regulations and conformity assessment procedures. In the United States of America, most States have an administrative procedure act similar to the federal Administrative Procedure Act (APA). Such laws allow any stakeholder, foreign or domestic, to provide comments on the proposed regulations without discrimination. The United States also notifies the proposed sub-federal technical regulations and conformity assessment procedures to the WTO for comments. Those comments could include information on how the United States federal government as well as other Members, are regulating in the same area and what voluntary consensus standards, including international standards where relevant, effective, and appropriate, are available for use. In addition, some States have adopted regulatory review processes similar to that of OMB, and there has been a marked increase in the use of other review tools over the past decade. In 1999, 27 States incorporated economic impact statements during their regulatory review process. In 2009, 48 out of 50 States utilized them at differing stages in their regulatory process. Approximately 30 States utilize these statements to measure regulatory impact on small businesses, while other States measure impacts on the State economy or secondary issues like public health or environment. Some States require that these statements be published for public comment, while others only require that these statements are included in any final published rule. The United States believes that the use of "good regulatory practice" (GRP), including robust notice and comment procedures, play an important role in promoting harmonization since the use of GRP principles in rule making fosters better decision-making, and coordination among regulators, and accountability, all of which support harmonization efforts, where feasible and appropriate.

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[15] WT/TPR/M/235/Add.1 (2010)

The complex nature of the US' regulatory systems can represent an important structural barrier to market access.

Other obstacles for Indian exporters include, for example, a burdensome pharmaceutical approval system, documentary and labeling requirements for textiles, etc. It is quite common for the equipment used in the workplace to be subjected to a number of different standardizing bodies including the US' Department of Labor certification, country's authority dealing with electrical equipment standards, product safety requirements as determined by insurance companies as well as specific regulations imposed by large municipalities. India felt that a more integrated, transparent and streamlined regulatory environment would significantly assist domestic consumers and importers as well as exporters to the US.

The US responded during the TPR that it does not agree with the assumptions underlying India's observations. Without specific information from India regarding the alleged problems that its exporters are encountering, the US expressed its inabiliy to respond to the question as posed.

Registration of tea consignments under FDA Rules[16]

Registration is required under Bio Terrorism Act of USA. While India does not seek any relaxation of FDA rules for Indian tea consignments, FDA import procedure needs to be relaxed for trade samples of tea required by the potential importers in the USA.

Regulation of Biogenerics

The US lacks a transparent framework for regulation of Biogenerics or Follow on Protein Products (FOPPs). The US Public Health Service has no provision for regulation of FOPPs. While the Food Drugs and Cosmetics Act (USFDA) was amended in 1984 to open ways for some generic drugs like Human Growth Hormone and insulin that are not regulated by Public Health Service, the US government needs to create a generic pathway for all biotech drugs. There is a

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[16] This information has been obtained through Department of Commerce, Government of India

need to lay down the scientific requirements that future generics would need to meet.

The US responded that the Food and Drug Administration (FDA) supports the goal of making safe and effective drugs available and affordable for American consumers and supports legislation to create such a pathway to allow for the approval of follow-on biologic products through a robust scientific, regulatory, and legal discussion. Any such legislation must, as a first priority, ensure patient safety. Furthermore, it should also include adequate intellectual property protection in order to maintain the research enterprise that has generated life-saving medications.

1.2. Labelling

Product Description Requirements

It is reported that extensive product description requirements complicate exports to the US and result in additional costs. Rules for marking and labelling of retail packages are burdensome. They require details regarding the country of origin, ultimate purchaser in the US and the name of the country in which the article was manufactured or produced. Furthermore, there are requirements relating to the typology/physical characteristic of the clothing labels (given size, font used, etc). These standards imply that special labels are needed for the US market. Such mandatory requirements as country of Origin Labelling[17] of Beef, Lamb, Pork, Perishable Agricultural Commodities, and Peanuts are also reported to be burdensome.

The US responded that it is committed to conclusion of a successful Doha Round so that it achieves a new market access for agricultural and industrial products, including textiles and apparel, and services both in developed and emerging market economies. They are committed to the agreement that the Members made in the Doha Round that non-tariff barriers are an integral and equally important part of the negotiations and will identify and work to reduce non-tariff barriers in the next phase of negotiations. As part of this effort, on October

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[17] Detailed information can be found on the WTO website under document symbol G/TBT/N/USA/25, G/TBT/N/USA/83 and Corr.1 G/TBT/N/USA/281

26, 2007, the US and the European Community (EC) jointly tabled in the WTO Negotiating Group on Market Access a negotiating text on reducing non-tariff barriers to trade related to labelling of textiles, apparel, footwear, and travel goods[18].

According to the Secretariat Report[19] of 2013, specific labelling requirements, outside of section 304, include the American Automobile Labeling Act, the Fur Products Labelling Act, the Omnibus Trade and Competitiveness Act for Native American style jewellery, and various other Acts or Codes relating to agricultural products such as meat, eggs, mushrooms, etc. In addition to product specific marking requirements, different marking requirements exist, outside section 304, for products subject to FTAs such as NAFTA. In India's view, such different rules of origin for different purposes create a complex trading environment. Accordingly India asked[20] the US to inform whether it proposes to simplify and reduce its various labelling provisions. The US responded that it does not have any plans at this time to change the current labeling requirements.

1.3. Customs procedures

Sampling and Inspection Procedures

A variety of agricultural exports from India to the US have encountered problems due to delays in the US customs sampling and inspection procedures, resulting in damage to the goods and subsequent commercial losses for the exporters, especially in the case of mangoes and egg products.

The US responded that it is committed to ensuring that its measures are in compliance with the WTO SPS Agreement and that they are not aware of any delays in their inspection procedures.

Burdensome Customs Formalities

Customs formalities for imports of textiles, clothing and footwear to the US require supply of particularly detailed and voluminous information, which leads

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[18] This information has been obtained from Ministry of Micro, Small and Medium Enterprises (MSME), GoI

[19] WT/TPR/S/275 (2013)

[20] WT/TPR/M/275/Add.1 (2013)

to additional costs, and, in some cases, includes disclosure of confidential information such as the processing methods (type of finishing, of dyeing, etc). Much of this information seems to be irrelevant for customs or statistical purposes. The extension of the liquidation period up to 210 days also functions as an important trade barrier. The retailer or the importer is often not in a position to re-deliver the goods upon Customs and Border Protection (CBP) request, in which case CBP imposes a high penalty of 100% of the value of the goods. These delays are particularly damaging for seasonal products or for fashionable products having short life-span. The trade has reported that these formalities are highly trade restrictive.

The US responded that in 2007, CBP exercising its responsibilities to enforce US trade laws, processed 9.7 million import transactions involving textiles and apparel. Out of these, approximately 959 were detained for additional information to support the country of origin declared to CBP. The information requires that the documents should show that the goods were produced in the country declared to CBP. The request for such documents is made to the importer, but the manufacturer may submit the documents directly to CBP if there is a concern about confidentiality. All CBP officials are required to comply with the Trade Secrets Act that preserves the confidentiality of business/ corporate information. All of CBP's work regarding imports of textile and apparel products is risk-based. Because of the amount of illegal transshipment, origin fraud, smuggling, misdescription and undervaluation of merchandise to evade applicable quantitative restrictions and payment of duties, CBP has focused on textile imports as a high-risk import commodity. CBP does extensive analysis to identify actual transactions that are in violation of the US laws. When goods enter in circumvention of absolute quotas these may become inadmissible, and CBP has the legal authority to have goods redelivered if information regarding the country of origin is incorrect. In 2007, CBP ordered redelivery 43 times and issued penalties to companies totaling $2.9 million. Every importer has extensive access to procedures under the law and can protest against the amount of the penalty by providing further information regarding the level of reasonable care that was taken regarding the transaction.

According to the WTO secretariat report[21], release of merchandise is not contingent upon the completion of all import formalities, including payment of duties. In general, importers must file CBP form 3461 (entry/immediate delivery) within 15 calendar days of a shipment's arrival at a US port. CBP has five working days from the filing date to release or detain the merchandise. CBP form 7501 (entry summary), with estimated duties attached, must be filed no later than ten working days after the merchandise has entered the United States. Duties may be paid electronically if both forms are filed through a CBP-approved electronic data interchange (EDI) system, rather than in paper format. A customs bond must be posted for each importation of merchandise. India noted that these procedures were administratively burdensome and it added to paper work. India asked clarification about the necessity for taking a bond when an importer had complied with all import formalities, including payment of duties.

The US responded that CBP requires a bond for all commercial cargo imported into the United States, as commercial cargo is released prior to the payment of any duties, taxes or fees. The vast majority of cargo is secured by a continuous bond which is filed prior to any cargo being imported and remains in effect indefinitely as long as the importer (principal) and the surety do not terminate the bond. A once-filed valid sufficient continuous bond will remain in effect for many years.

Other Customs Impediments

The US Public Health Security and Bioterrorism Preparedness and Response Act was formulated to address security risk surrounding the supply of foodstuffs. The implementation of the so-called Bioterrorism Act (BTA) necessitates the registration of all foreign facilities that supply food to the US, prior notification of all shipments to the US, record-keeping by foreign enterprises to allow traceability of foods, and procedures for the administrative detention of suspect foods. These measures cover all the main food exports to the US, such as beverages (including wines and spirits), processed foods, dairy products, and fruit and vegetables. Deliveries made through international mail by private individuals are exempted, but foreign mail order companies are still

[21] WT/TPR/S/235 (2010)

subject to such burden. This additional red-tape resulting from the implementation of the BTA affects Indian agri- food businesses, in particular small and medium enterprises.

The US responded that the four food-related regulations related to the BTA (i.e., recordkeeping, administrative detention, registration, and prior notice) are not intended to have a trade inhibiting effect. The record keeping requirement does not generally apply to foreign entities since foreign persons are excluded from the rule, except for foreign persons who transport food in the US. The administrative detention provision imposes no requirements on importers; rather, this BTA provision authorizes FDA to detain an article of food, if there is credible evidence or information that indicates that the article presents a threat of serious adverse health consequences or death to humans or animals. The administrative detention final rule describes the procedures that FDA uses to institute an administrative detention order. With respect to the registration and prior notice requirements, FDA is not aware of continuing problems associated with the registration and prior notice requirements. FDA believes that the graduated enforcement process coupled with the vigorous education and outreach efforts by both the government and the industry have supported a relatively smooth transition to the new procedures and have improved compliance with the new requirements.

Indian exporters face a number of additional customs impediments, such as import user fees and excessive invoicing requirements on importers, which add to costs in a similar way to tariffs. The most significant user fee is the Merchandise Processing Fee (MPF), which is levied on all imported merchandise except for products from the least developed countries, from eligible countries under the Caribbean Basin Recovery Act, the Andean Trade Preference Act, US FTA partners, or from US Offshore possessions. Fixed previously at 0.17% of the value of the imported goods, the MPF rose to 0.19% in 1992 and amounts to 0.21% ad valorem on formal entries with a maximum of $485 as from 1 January 1995. At the request of Canada and the European Union, the GATT Council instituted a Panel in November 1987 that held the view that the US Customs user fees for merchandise processing were not in conformity with the General Agreement. The Panel ruled that customs user fees should reflect the approximate cost of customs processing for the individual entry in question. This principle was not met by an ad valorem system such as the one that was

used by the US. The GATT Council adopted the Panel report in February 1988. The present customs user fee structure is somewhat more equitable, since the fixing of a ceiling makes it less onerous for high-value consignments. However, the fee is still likely to exceed the cost of the service since it is still based on the value of the imported goods. Whilst the MPF was to last until 30 September 1990 when established, it was recently extended (as part of the American Jobs Creation Act of 2004) until 30 September 2014.

The US explained that its MPF with a cap of $485 is limited in amount to the approximate cost of services rendered and is completely consistent with the US' WTO obligations.

1.4 Issues in Services

Banking Services

There are different kinds of access barriers that Indian banks face in the United States. Once a bank obtains a branch license in the United States, the activities of the foreign parent bank in that country, known as Bank Holding Company (BHC), are restricted to only closely related banking activities and several financial activities such as selling of insurance, Mutual funds, etc. are excluded. There is no such restriction in many developing countries including India. This severely restricts the opportunities for the foreign banks.

The United States explained that Title 12 of the Code of Federal Regulations, Chapter 11, which regulates the acquisition of control of banks and BHCs by companies and individuals, defines and regulates the nonbanking activities in which BHCs (including financial holding companies) and foreign banking organizations with the US operations may engage, and also establishes the minimum ratios of capital to assets that bank holding companies must maintain.

The Indian banks also face some other operational barriers. For instance, a foreign bank's branch is governed by the BHC regulations, which prohibit the bank from undertaking insurance and underwriting business in the US, as well as restrict the parent bank's equity ownership in non-banking businesses that have operations in the US. These are permitted under the financial holding company regulations; however, transition from BHC to financial holding

company status again takes time and is subject to approval of the Federal Reserve, including determination of comprehensive consolidated supervision in the home country. Because of the above reasons, an Indian bank currently cannot have a banking presence and undertake underwriting and insurance business at the same time in the US.

The US responded that the requirements for establishing a BHC and financial holding company are prudential in nature.

Another problem facing the Indian banks is the long time taken for clearing applications. Indian banks have been raising the issue that the US is taking considerable time in clearing the applications for setting up branches in that country.

The US informed that information on application requirements and procedures can be found at the site http://www.federalreserve.gov/generalinfo/applications/afi/intfilings.htm.

Minimum Amount for Foreign Bank Retail Depositors[22]

Branches are allowed all activities permissible for other national banks in the US, but excluding the acceptance of initial retail deposits less than $100,000. Foreign bank branches cannot take deposits below $100,000 since the Federal Deposit Insurance Corporation (FDIC) does not insure deposits of foreign bank branches. Only Deposits of subsidiaries are insured by FDIC. Hence retail deposits can be accepted by only foreign banks established as subsidiaries.

Non Banking Finance Companies[23]

Functions of an 'Agency' in the US are limited to asset related businesses, with no deposits (exceptions in some States) and no interface with retail customer.

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[22] This information has been obtained from Department of Commerce, Government of India sources

[23] This information has been obtained from Department of Commerce, Government of India sources

Other Issues faced in Banking Services[24]

For a foreign bank to operate in the US, there is a complex and long-winding process known as the Comprehensive Consolidation Supervision (CCS). The matter is then referred to a number of other regulators such as the Office of the Comptroller and the relevant State. The process takes about 5 years or even more.

The Federal Reserve requires the determination of CCS status for establishment of branches/subsidiaries. India is categorized as – 'Actively working towards CCS' and not 'fully CCS'. This position is alright for establishment of branches, but not to establish a subsidiary for which 'fully CCS' is required. India has enacted comprehensive legislation and adopted regulations to deter money laundering. Banks follow the 'Know Your Customers guidelines-Anti Money Laundering Standards' issued by the Reserve Bank of India. All these are in line with the Financial Action Task Force (FATF) recommendations. Despite this, the FATF evaluation on India is not favorable and its evaluation states that Indian banks do not meet all its recommendations.

In the US, foreign investment banks, at the national level, must be subject to surveillance procedures not applicable to national institutions (according to the Investment Advisers Act of 1940). There are other discriminatory measures at the State level, which violate National Treatment. Other national treatment restrictions include: a) foreign banks being subject to the requirements of the Community Reinvestment Act (to invest part of the federally insured deposits on community projects), even if its deposits are not insured by the Federal Government; and b) there is a legal possibility (not used until now) that the FED can charge examination fees to audit foreign banks only.

Insurance[25]

The following barriers are identified:

- Reinsurers are obliged to lodge trust funds in the US, effectively requiring

[24] This information has been obtained from Department of Commerce, Government of India sources

[25] This information has been obtained from Department of Commerce, Government of India sources

them to fully collateralize their exposures. The sums involved are of a significant size, and thus constitute a significant impediment to trade in such services. In calculating the level of these trust funds, no credit is given for any retrocession that takes place in the US, nor is any account taken of the supervision that takes place in the home jurisdiction of the foreign reinsurer

- Due to fragmentation of the market into different states jurisdictions, with different licensing, solvency and operating requirements, each state has its own insurance regulatory structure and, in contrast to banking, federal law does not provide for the establishment of federally licensed or regulated insurance companies

- The decentralized US regulatory/supervisory structure entails heavy compliance costs for foreign companies in each of the state jurisdictions

- Under Mode 1 and Mode 3 the life, non-life and reinsurance services are not allowed for government owned or government controlled companies to conduct business. This has serious market restriction for the major Indian insurance companies.

- There are restrictions like the requirement of US citizens to be member and in the Board of Directors of insurance companies.

- Auxiliary services to insurance, brokerage licenses and agency licenses are issued to non-residents only for few insurance products under Mode 1 and Mode 3.

- Federal excise tax is imposed on all life insurance premium and non-life insurance premium on companies not incorporated under the US laws. This puts such companies in an unfavourable position *vis-à-vis* domestic companies.

American Insurance Group (AIG) owed the US Government on June 30, 2010, an outstanding debt and equity balance of USD101.2 billion out of which USD74.7 billion was the equity part.[26] Thus, the US Government owns majority of equity interest in AIG. India observed that some states[27] which did not allow government owned insurance companies to transact business, did not prohibit AIG from conducting business on the ground of being government owned. India asked for the reasons for exempting AIG from the prohibition on government owned insurance companies in these states[28].

The US replied that in 2010, Trade Task Force of the National Association of Insurance Commissioners undertook to review the remaining limitations set out in the United States GATS schedule in the light of regulatory modernization efforts in several states in this area. This review is ongoing.

Telecom Services[29]

There are limitations to National Treatment principle in the telecom sector. For basic Telecommunications Services, ownership of a common carrier radio license (via direct investment) may not be granted to or held by a foreign government or its representative; non-US citizen or the representative of any non-US citizen; any corporation not organized under the laws of the United States or the US corporation of which more than 20% of the capital stock is owned or voted by a foreign government or its representative, non-US citizens or their representatives or a corporation not organized under the laws of the United States. For other communication services, Radio and television broadcast licenses may not be held by a foreign government; a corporation chartered under the law of a foreign country or of which more than 20 per cent of the capital stock is owned or voted by non-US citizens; a corporation chartered under the laws of the United States

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[26] Source : AIG Website dated 08.09.10.

[27] Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Montana, Nevada, New York (non-life companies are authorized; life and health companies are not), North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Washington, West Virginia, Wyoming.

[28] WT/TPR/M/235/Add.1 (2010)

[29] This information has been obtained from Department of Commerce, Government of India sources

that is directly or indirectly controlled by a corporation more than 25 per cent of whose capital stock is owned by non US citizens or a foreign government.

Security Issues in Services

Apart from visas, security-related restrictions on federal and state businesses are coming in the way of Indian IT companies doing business in the US. The uncertainty about whether they would be eligible to bid makes business decisions difficult.

The US responded that the tender documentation specifies the security requirements for a particular procurement. Security requirements vary depending on the nature of the good or service being procured. For example, specifications may require personal identity verifications for access to Federal facilities or security clearances for access to classified information (FAR subparts 4.4 and 4.13).

Social Security Totalization[30]

Presently, an employer who sends employees to the US for short term assignments ends up paying double taxes on social security as they have to pay the tax both in India and in the US. If a company relocates an employee to the US for carrying out some on-site works, which are very common in IT industry, both the employer and employee have to pay the social security tax in the US and India, leading to the situation of double taxation. According to NASSCOM sources, each year Indian IT professionals alone contribute more than $1 billion to the US social security system and they do not get any benefit out of it.

Issues related to Mode 3

India observed that the guidelines for the Capital Purchase Program and the summary of terms for the Troubled Assets Relief Program (TARP) Legacy Loans Program as detailed in the Secretariat Report[31] were discriminatory against the foreign service suppliers who had incorporated subsidiaries under the US law.

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[30] This information has been obtained from NASSCOM sources

[31] WT/TPR/S/235 (2010)

According to the application guidelines for the Capital Purchase Program, the largest single program under TARP, and the TARP Capital Assistance Program, "applicants must be established and operating in the United States and may not be controlled by a foreign bank or company".[32] Similarly, according to the "summary of terms" for the TARP Legacy Loans Program, banks or savings associations owned or controlled by a foreign bank or company are not eligible to participate in this programme. During the US TPR of 2010, India requested the US to explain how this policy could be reconciled with the US commitment for national treatment for Mode 3 for financial services[33].

In response the US clarified that the measures taken in response to the crisis were neither designed to discriminate nor implemented in a way that discriminates against foreign service suppliers. While there may be differential treatment of certain classes of suppliers, including foreign suppliers, different treatment is not in and of itself indicative of discrimination. There were many programs under the broad authority of the Emergency Economic Stabilization Act often with different criteria for eligibility. The legacy loan program was never implemented. As envisaged, banks or savings associations owned or controlled by a foreign bank or company were not eligible for the legacy loan program. Eligible banks include any insured US bank or US savings association, where "US bank" and "US savings association" means a bank or savings association organized under the laws of the United States or any State of the United States, the District of Columbia, any territory or possession of the United States, Puerto Rico, Northern Mariana Islands, Guam, American Samoa, or the Virgin Island; irrespective of nationality of ownership.

Mode 4 service liberalisation

In the US TPR of 2010, India noted with concern that the USA had not undertaken any improvement in its Mode 4 offer in Services over its Uruguay Round commitments. This remained a continuous source of disappointment to many other developing countries, who have export interest in Mode 4, because of

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[32] Application Guidelines for TARP Capital Purchase Program. Viewed at: http://www.financialstability.gov/docs/CPP/application-guidelines.pdf; and Application Guidelines for Capital Assistance Program. Viewed at: http://www.financialstability.gov/docs/CAP_App-Guidelines.pdf.

[33] WT/TPR/M/235/Add.1 (2010)

their comparative advantage. Responding to this, the US suggested that since TPR is not a negotiating forum, requests made in the context of the DDA services negotiations should be taken up in that forum.

Visa Issues[34]

NASSCOM has pointed out the visa issues faced by Indian IT professionals, particularly in the US and EU. Most countries across the world do not have short term work visa that Indian IT industry needs. In these times of economic downturn, most countries are tightening the norms further by;

a) Either limiting the number of visas that they grant to skilled foreign workers;
b) Coming up with shortage lists and keeping IT jobs out of those lists;
c) Putting more stringent criteria so as to avoid people coming into host countries;
d) Forcing companies by making amendments in their laws so that they are not able to hire any foreign workers. e.g. the US companies receiving TARP funding are not allowed to hire H-1B workers.

In the US TPR[35] of 2010, India expressed its concern that certain developments in the USA had made supply of services through Mode 4 more difficult and costly. Hike in fee for H1B/L visa application through HR 6060 Act was one such example. In addition, India requested the USA to address the following concerns.

The steep hike in visa fee would make it much more difficult for service suppliers to enter the USA to supply services despite qualifying otherwise. This might impair the benefits accruing to them under the terms of the Uruguay Round commitments. Under the GATS, every country had the right to "regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders". However, this right was qualified by the principle that such measures should not be applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment. India was concered that the USA measure under

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[34] This information has been obtained from NASSCOM sources
[35] WT/TPR/M/235/Add.1 (2010)

H.R. 6080 could lead to nullification and impairment of the benefits accruing under the terms of the specific commitments, as it eroded the cost competitiveness of services supplied through Mode 4.

India noted that the fee hike was supposed to fund increased border security measures and did not have any immediate connection to the cost of processing of applications for visas. While India appreciated USA's concern in strengthening its border security measures, it was not clear to India as to why should visa applicants for H1B and L visa be singled out for meeting most of the cost of the increased security measures.

India further observed that this visa fee hike measure in effect discriminated against Foreign Service suppliers as compared to domestic companies since the increased fee would apply to those companies who have more than 50 employees and 50% of their employees on non immigrant H1 B/L visa. Most of such companies covered by the increased visa fee, would be foreign as the US domestic companies would have majority of their employees as US citizens. To that extent, the foreign services suppliers would face discrimination *vis-à-vis* the domestic service suppliers.

The US clarified that the purpose of this new legislation is to provide immediate enhanced security on their southern border and the increased fees related to the H-1B and L-1 programs are designed to offset some of the cost. The fee increase is temporary (limited to a period of 3 years) and applies to all companies, domestic or foreign, that make heavy use of these programs. The US does not believe that the new fee structure is inconsistent with its GATS obligations.

According to a report by the WTO Secretariat, in the recent years, the demand for H1 B visas has been strong and the caps were reached shortly after the application process was opened on 1 April each year. India has raised the point that, in such circumstances, the ceiling on H1 B visa has the effect of restricting trade in Mode 4. The USA itself demands from other countries the removal of equity ceilings and other numerical limitations in other Modes, especially Mode 3. India requested explanation for numerical ceiling for grant of H1 B visa. Further, India also wanted to know the rationale for freezing a figure of 65,000 annually for H 1 B visa, given the fact that in most of the years the demand had been much higher.

The US replied that the temporary entry regime is very open and its Mode 4 commitments remain the best among the WTO Members. It also explained that in recent years, demand for the H-1B program has decreased substantially. The annual cap of 65,000 has been reached only late in the fiscal year, indicating that at present the numerical limitation does not appear to be far from actual demand. However, it is not unusual for some type of numerical limitation to be applied to certain categories of foreign workers. In addition, most H-1B workers are not subject to the 65,000 cap, so in practice the United States admits far more than 65,000 each year.

Medical Services

In the US TPR of 2011, India raised its concern regarding barriers related to Mode 2 for hospital services. Federal or state government reimbursement of medical expenses is limited to licensed, certified facilities in the United States or in a specific US state. This limitation discourages trade in Mode 2 in hospital services[36].

In response the US explained that whether a member wishes to allow access to government funding is entirely up to that member. Only licensed, certified facilities in the United States are entitled to federal or state reimbursement of medical expenses, such as Medicare or Medicaid (insurance programs for elderly, disabled or low-income individuals).

1.5. Requirement of Local Content

Export of Automobiles

The Indian trade sources have reported that the American Automobile Labelling Act promotes the use of US and Canadian parts, which make entry of small cars made in India into the US market difficult.

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[36] WT/TPR/M/235/Add.1 (2010)

The US clarified that the Congress passed the American Automobile Labeling Act in 1992 to help consumers in the selection of new vehicles by providing information about the country of origin of vehicles and their parts. Passenger vehicles manufactured after October 1, 1994 must have labels specifying their percentage value of US/Canadian parts content, the country of assembly, and countries of origin of the engine and transmission. The requirements are solely informational, and apply in the same way and to the same extent regardless of where a vehicle is manufactured. While there are costs associated with calculating country-of-origin information, the National Highway Traffic Safety Administration, in implementing the American Automobile Labelling Act, has sought to minimize cost impacts to the extent consistent with ensuring that consumers are provided with the information required by the Congress. The US further clarified that it does not believe that the American Automobile Labelling Act has made the entry of cars into the US market any more difficult, and they also do not believe that these informational requirements are burdensome.

Export of Indian Steel

Under the US Steel First Act passed in April, 2008 by the Congress, for all Government funded infrastructure projects, steel has to be domestically produced. This has raised fears that it will impact market access for Indian steel exports.

The US responded that on April 30, 2008, HR 5935, the "American Steel First Act of 2008," a bill to amend US government procurement provisions vis-à-vis iron and steel products used in public building and works projects, was introduced in the US House of Representatives. The draft legislation has not been voted on by the House of Representatives and has not become US law yet.

It is noted that that American Steel First Act of 2008 has lapsed but American Steel First Act of 2013 was assigned to a congressional committee on April 26, 2013. Hence the concerns mentioned above continue to exist.

1.6. Tariff Issues

Tobacco Exports

India's tobacco exports to the US are low and stand at US$3 million. This is only about 0.3% of the US total tobacco imports. One of the major reasons for the poor off-take of Indian tobacco by the US is the Tariff Rate Quota (TRQ) regime prevailing in that country. Tobacco imports into the US come under the purview of the TRQ, which was established in September 1995 for all cigarette type tobaccos. The USA had imposed TRQ on import of tobacco from 1995 onwards and allocated a quota of 150 million Kgs per year for import at preferential tariff rates. Thus market opportunities for export of Indian tobacco to the USA which is the 2nd largest importer in the world, are restricted. Under the TRQ, a tariff rate equal to the concessional rate (40.9 cents per kg) is applied to tobacco imports until the in-quota quantity is filled, after which a tariff rate of 350% *advalorem* is applied. The TRQ is sub-divided into specific allocation for nine countries and a general allocation for other countries. Under the North American Free Trade Agreement (NAFTA), Canada and Mexico are excluded from TRQ import duties. India does not have any specific TRQ and is clubbed under 'Others' with an allocation of only 3000 tons. This limits growth of Indian tobacco exports to the US. This system of quotas needs to be reviewed so as to allow for greater market access for Indian tobacco in the US. The out of quota tariff of 350% acts as a barrier to Indian exports. India has made a point that the quotas should be on MFN basis and not country specific.

The US has responded that the terms of market access for tobacco are being negotiated in the Doha Development Agenda.

However, there is a scope to undertake autonomous tariff liberalization keeping in view the extremely high tariff rates currently existing on Tobacco.

According to the secretariat report[37], the United States maintains TRQs on 200 tariff lines of agricultural products. These include beef, dairy, sugar, cotton, tobacco, and peanuts. In the TPR[38] of 2013 India asked the US whether it was

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[37] WT/TPR/S/275 (2013)

[38] WT/TPR/M/275/Add.1 (2013)

considering any revision in its policy towards the TRQs that it maintains on various tariff lines. Also India wanted details of the TRQ regime for Tobacco; its basis and view of US on whether it is not discriminatory in denying market access to some of trading partners of the U.S.

The US responded that the government does not currently have plans to change its TRQs. The United States regularly provides information about the TRQ for tobacco and that the TRQ for tobacco is consistent with US WTO obligations.

The Secretariat's report[39] also refers to the U.S. tariff rates and mentions tariff peaks for several products. India asked[40] regarding the US plan to reduce its tariff peaks on the product categories listed in the Secretariat's report.

The US responded that the U.S. duty structure is a result of several successive rounds of multilateral trade negotiations. The international tariff peaks (defined as any tariff rate at or above 15 per cent) in the U.S. schedule have declined from 6.6 per cent in 2002 to 5.0 per cent in 2012. As is the case with other Members, the incidence of tariff peaks in the U.S. tariff schedule would be further reduced through balanced, ambitious multilateral trade liberalization.

Leather[41]

Leather industry faced tariff barries in the USA. Import duty for the items under Chapter 42 ranges between 8% and 20% and for some products under Chapter 64, import duties are very high and goes upto 48%. As footwear is the largest sourcing product in USA, this results in considerable impact on India's exports.

Other Fees and Taxes

The Secretariat report of 2013[42] mentioned that that the US charges Merchandise Processing Fees and Harbour Maintenance Tax on ad valorem basis. The ad

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39 WT/TPR/S/275 (2013)
40 WT/TPR/M/275/Add.1 (2013)
41 This information has been obtained from Council for Leather Exports (CLE)
42 WT/TPR/S/275 (2013)

valorem levies appear to be in violation of the US commitments under GATT Article VIII which provides that all fees and charges of whatever character imposed on or in connection with importation or exportation shall be limited to the approximate cost of services rendered. Noting this India requested[43] the US to justify continuance of such levies on ad valorem basis.

The US responded that the Merchandise Processing Fee which is subject to a cap of $485 is limited in amount to the approximate costs of services rendered and is consistent with the US WTO obligations.

1.7. Other Issues

Foreign Manufacturers Legal Accountability Act of 2013 (FMLAA)

India had raised a number of concerns[44] over the draft legislation called Foreign Manufacturers Legal Accountability Act of 2010 (FMLAA). While FMLAA 2010 was not passed FMLAA 2013 has been introduced and referred to a committee of the US House of Representatives on May 09, 2013. Hence the concerns highlighted with respect to FMLAA Bill 2010 are relevant and highlighted below:

a) The proposed law subjects foreign manufacturers or producers to the personal jurisdiction of the State and Federal Courts of the US for any civil or regulatory proceeding. For India this appears to be a jurisdictional over reach of the US law as it subjects the nationals across the world, who have a trade linkage with US to the US municipal laws. India sought justification behind subjecting foreign nationals to its regulatory and product liability laws, which normally have a territorial application to the nationals of that country.

b) The proposed legislation seems to impose a prohibition on import by means other than duties and taxes as it lays down in Section 4 that "a person may not import into the US a covered product (or component part that will be used in the United States to manufacture a covered product) if such product

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[43] WT/TPR/M/275/Add.1(2013)

[44] WT/TPR/M/235/Add.1(2010) and WT/TPR/M/275/Add.1(2013)

(or component part) was manufactured or produced outside the United States by a manufacturer or producer who does not have a registered agent …". India asked the US that the legislation being in the nature of import prohibition, does it not violate the principle enshrined under GATT Article XI of no prohibition or restriction on imports except through duties of customs.

c) Section 2 of the draft law defines the term "commerce" as "trade, traffic, commerce or transportation between a place in a State and any place outside thereof …" This definition can technically also apply to goods in transit; as 'traffic' or 'transportation' can be from the territorial waters or from bonded areas of the customs territory of a US State to a place outside thereof, which can also imply a foreign territory. By taking this interpretation, it appears that even for transit of goods from the US customs territory, there will be a legal requirement to have a registered agent. India feels that, in such case it violates the principles of freedom of transit enshrined under GATT Article V.

d) The US had earlier replied that the proposed Foreign Manufacturers Legal Accountability Act, as reflected in bills pending before the US Congress, reflects a desire to ensure that consumers in the United States can be confident that the products they buy are safe and that there are procedures available under US law to address effectively any product liability issues they may engender. The United States believes these goals can be accomplished without imposing undue burdens on foreign manufacturers.

Buy American Act (Make it in America)

The US has undertaken certain protectionist measures to protect domestic industry and jobs of locals. These measures are in violation of national treatment principle of the WTO. The stimulus packages contain a controversial provision that expands the provisions of the "Buy American Act" enacted during the Great Depression, and which would require all stimulus-funded projects, including major public works projects, to use equipment and goods made in the US. Restrictions on outsourcing are also in place for those companies

benefiting from the bailout package. Emphasis on the 'Use American' provisions and restrictions on outsourcing are of major concern to India[45].

India has raised concern with US[46] over the fact that domestic preferences were incorporated into the US$787 billion fiscal stimulus package of early 2009 to ensure that the manufacture of iron, steel, and manufactured goods used as construction materials in public projects funded with stimulus dollars is performed in the United States. These domestic preferences, which must be applied in accordance with the US international commitments, were more restrictive than long-standing domestic preferences used in federal procurement under the Buy American Act of 1933.

The US responded that the "buy American" requirement in Section 1605 of the American Recovery and Reinvestment Act of 2009 (ARRA) only applies to public projects funded by ARRA. When those projects are completed, the ARRA "buy American" requirement will no longer apply. ARRA generally requires that the funds for public projects be obligated or under contract by the end of September 2010. Section 604 of ARRA applies only to Department of Homeland Security (DHS) procurements of certain textile products utilizing any funds (ARRA or other) provided to DHS on or before February 17, 2009. Both Sections 604 and 1605 are implemented consistent with the US obligation under international agreements.

India raised this issue again in the US TPR of 2013[47]. According to American Recovery and Reinvestment Act (ARRA) of 2009 funding under Buy American provision is contingent on the use of the U.S. manufactured goods. India requested the US to explain whether this violated Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures (ASCM), which prohibits any subsidies that are contingent on use of domestic goods.

The US responded that the "buy American" requirement of the American Recovery and Reinvestment Act of 2009 (ARRA) does not apply to covered

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45 This issue has been sourced from media reports

46 WT/TPR/M/235/Add.1(2010)

47 The full text of questions raised by India and the answers by the US are available on WTO website under document symbols WT/TPR/M/275/Add.1 (May 2013)

procurement from suppliers in WTO GPA parties or US FTA partners. Thus, a significant amount of competition results from both the US and foreign suppliers. Consequently, the prices paid for government procurement undertaken in pursuant to the ARRA are market prices.

Non implementation of the Decisions of WTO Dispute Settlement Body's (DSB)

In the WTO Secretariat Report[48] it is indicted that the United States has not yet implemented the WTO Dispute Settlement Body's (DSB) recommendations and rulings relating to: Section 110(5) of the US Copyright Act; some aspects of the US anti-dumping investigation of certain hot rolled steel products from Japan; and Section 211 of the Omnibus Appropriations Act of 1998. The implementation of the recommendations and rulings in disputes on Section 211 and hot rolled steel has been outstanding for 88 months, and the Copyright Act dispute for 63 months (March 2010). India requested the US to indicate the likely time frame within which these rulings would be implemented.

In response the US has clarified that it has come into compliance, fully and promptly, in the vast majority of its disputes. As for the remaining few instances, the United States has been working actively towards compliance in furtherance of the purpose of the dispute settlement system. The US Administration will continue to work with the US Congress to fully implement the recommendations and rulings of the Dispute Settlement Body in these disputes.

In Several Panel and Appellate Bodies Decisions (such as Softwood Lumber V; US – Shrimp ; EC – Bed Linen; US – Zeroing ; US- Polytethylene carrier bags, etc), it has been held that the methodology of zeroing used by the USDOC in the calculation of the margin of dumping is inconsistent with the provisions of Anti-Dumping Agreement. India enquired about the US intentions to review its practice of 'zeroing' in anti-dumping investigations in near future.

The US responded that it had stopped applying the zeroing methodology in investigations effective from February 22, 2007, though the United States has applied zeroing in some administrative reviews after that date. The Appellate

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[48] WT/TPR/M/235/Add.1(2010)

Body reports on zeroing raise serious systemic concerns for the US that go beyond the issue of zeroing. The United States believes that the Appellate Body reports create new obligations to limit the use of antidumping measures when such obligations were never agreed to by the WTO Members. Nevertheless, the United States takes its WTO obligations very seriously, and they have stated publicly that they intend to comply with the WTO rulings in all of the zeroing disputes. They are very actively engaged in a serious effort with their domestic stakeholders and their Congress to find an acceptable solution.

Issues related to notifications

In the WTO Secretariat Report[49] it is revealed that the average period for comments specified in the US notifications is around 40 days, but close to 30% of notifications have no specific "final date for comments", most such notifications being by sub-federal entities. India noted that it may result in the inconvenience to Exporters and asked for clarification as to how the US planned to address this phenomenon.

In response the US said that they are reviewing the matter but believe that the 40-day figure may be misleading. The United States often notifies measures that do not need to be notified for purposes of greater transparency (e.g., certain voluntary measures, requests for information in advance of a rule making, proposed measures based on relevant international standards), as well as measures to address urgent circumstances (e.g., certain interim final rules, rules taken to comply with a court order).

The issue again came up in the TPR of 2013[50]. The Secretariat report[51] stated that some changes or updates to the US trade laws or procedures would require updated or amended WTO notifications. In particular, new notifications are necessary in the areas of rectifications and modifications of schedules, preferential rules of origin, quantitative restrictions, and with respect to preference programmes like the GSP. Accordingly, India requested the US to provide plans and timeframes with regard to the submission of full and up-to-

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49 WT/TPR/G/235 (2010)
50 WT/TPR/M/275/Add.1 (2013)
51 WT/TPR/G/275 (2013)

date notifications in several important areas, including modifications of schedules, preferential rules of origin, quantitative restrictions, and of preference programmes like the GSP. The United States responded that it had submitted its notification on the U.S. preferential rules of origin to the WTO Secretariat on December 13, 2012.

State Aid and Subsidy

The WTO Secretariat report[52] shows that the USA is providing export subsidy through many programmes like the Dairy Export Incentive Program (DEIP), Export Credit Guarantee Program (GSM-102) etc. India observed that these programmes act as barriers to export and were not consistent with WTO provisions and asked the USA to explain the impact of these programmes on international prices of the agricultural products covered under these programmes[53].

The US responded that the DEIP program has been used in consistent with the US export subsidy commitments. WTO dispute settlement proceedings resulted in a determination that the Commodity Credit Corporation export credit guarantee program (GSM-102) conferred an export subsidy with respect to specific agricultural goods during the fiscal year 2006 of the United States Government.

With respect to any potential impact on international prices, the US did not use DEIP between 2004 and 2007, and only 20,025 metric tons of nonfat dry milk (skim milk powder) were subsidized in 2008, amounting to less than 2 percent of world exports. The limited use of the program for cheese and butter was for trivial quantities. The use of the program for such small quantities would have negligible, if any, impact on world prices.

With respect to the GSM 102 program, in fiscal year 2008 about $3.2 billion in the US exports was financed under the program, accounting for less than 3 percent of the US agricultural exports. In fiscal 2009, about $5.3 billion in US exports was financed under GSM 102, accounting for 5.5 percent of the US

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52 WT/TPR/G/235 (2010)

53 WT/TPR/M/235/Add.1 (2010)

agricultural exports. The program applies to such a wide range of commodities, that only a very small share of the US exports of any one commodity was financed by the program. Such small values of exports financed by the program would have negligible, if any, impact on world prices.

According to the same WTO Secretariat report, for the support to agriculture under the Farm Act of 2008, the direct payments are not totally decoupled from the current production and prices. It is recognized that as and when the historical planting and yields data are updated, these payments have an impact on the current production through wealth and risk effect. India asked the US to explain if such decoupling has been made.

In response, the US said that it believes that the payments meet the criteria for the decoupled income support in paragraph 6 as well as paragraph 1 of Annex 2 of the Agreement on Agriculture. The TPR report accurately describes the nature of the Direct Payment program when it states in paragraph 8 that Direct Payments "are decoupled from current production and prices". Direct Payments have no relation to current production or prices. In fact, production is not even required under the program.

The same WTO Secretariat report also mentions the programme on counter-cyclical payments as based on historical production and the difference between a target price and the current prices. India observed that these payments are trade distorting as these payments impact decision-making of farming community to cultivate a particular crop. India asked explanation on how these payments are dealt under WTO provisions (amber, blue or green box) and whether it seeks to go for box shifting (from one box to other) in future.

In response the US cited paragraph 10, page 82 of the WTO secretariat report which reflects the nature of the CCP program, pointing out that "although payments are based on prices", they do not affect current production. That is, current production on land which is eligible for CCP payments is not tied to the program nor is even required, and the size of the payment is not affected by current production of any crop. Furthermore, payments are based in part on historical yield and historical bases – again, not tied or coupled to current production. Notwithstanding, the United States does not classify CCP as decoupled green box payments within the meaning of AoA Annex 2 criteria as

payments are also based in part on price. They are currently notified as amber box payments.

WTO secretariat Report[54] of 2013 stated that the Counter-Cyclical Payments (CCPs) programme provides support to some specific crops like rice, cotton, corn etc. The USA notified CCPs as non-product specific support. However, CCPs are product-specific as there are specific target price for crops covered. Noting this, India requested[55] the US to explain the reasons for treating CCPs as non-product specific support rather than product-specific support.

The US responded that Countercyclical payments (CCPs) are reported as non-product specific because payments are based on fixed historical area and yields (i.e., production), and not on current production. Countercyclical payments do not require production of any specific crop, nor any production at all, for a recipient to receive a payment.

Denial of GSP Benefits

In 2005 the US government removed Indian Gems & Jewellery from receiving the benefits of GSP. In the Annual review 2006, the US Administration decided not to renew the Competitive Needs Limitation (CNL) Waiver for gold jewellery and brass lamps from India, thereby ending the Generalised System of Preferences (GSP) for these products. The decision of the US Government to end the GSP for gold jewellery and brass lamps from India will lead to a large number of jobs being lost in these sectors.

The US administration replied that in December 2006, when Congress extended the GSP program through December 31, 2008, the Congress also amended the GSP statute to direct that by July 1 of each year, the President should revoke any CNL waiver that had been in effect for at least five years if a beneficiary developing country exported to the US, during the preceding calendar year, a quantity of the article that had a trade value in excess of 1.5 times the annual CNL ($130 million in 2007) or exceeded 75 percent of total US imports (the "super-competitive" thresholds). The waivers for competitive need limitations

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54 WT/TPR/S/275 (2013)

55 WT/TPR/M/275/Add.1 (2013)

that were revoked for the eight products, as of July 1, 2007, terminated the GSP benefits for those products. This was done after a thorough review of the pertinent statutory considerations.

Another connected issue is that the US-GSP benefit was available to Indian Gold Jewellery Sector till 30th June 2007. As per the data, the exports of Gold Jewellery from India to US, during July '07 to March '08 (after the withdrawal of US-GSP benefit from Indian Gold Jewelry) at US$1.35 billion has shown a major decline by 30% as compared to US$1.95 billion during July '06 to March '07. In this light, India requested the US Administration to consider the restoration of GSP benefits to this sector as it supports livelihood of thousands of Indian workers/craftspersons.

The US responded that GSP benefits for gold jewellery from India may only be restored to if import levels in a calendar year fall below the competitive need limitation (CNL) thresholds for that year. In 2007, the US imports of gold jewellery from India ($1.9 billion) exceeded the CNL threshold of $130 million for that year.

Non-inclusion of most leather sector products in the US Generalized System of Preferences (GSP) is another issue of concern to India. The USA offers Generalized System of Preferences (GSP) to India in respect of certain leather and leather products on account of which these products enjoy either zero import duty or lesser import duty. The US GSP benefit is currently provided only to certain categories of leather and leather products and footwear components falling under Chapters 41, 42, 43 and 64 to the Beneficiary Developing Countries (BDCs) under which India is classified. However, certain articles are prohibited by US Legislation (19 USC 2463) from receiving GSP treatment. Articles that are not eligible for GSP include most textiles, watches, footwear, handbags, luggage, flat goods, work gloves and other leather apparel. Thus certain categories of leather goods including industrial gloves and leather apparel and all categories of footwear (except disposable footwear falling under HS Code 64059020) exported from India to the USA, are not eligible for GSP benefit as per US legislation. Hence market access is not facilitated for many leather sector products as many of them fall in the 'GSP Ineligible' category.

It is important to note that GSP is an important market access tool which has immediate and visible impact towards reduction of poverty and improvement of living conditions of the people, particularly of artisans, small entrepreneurs etc. Studies have shown that denial of GSP window considerably affects India's export interests. The US GSP scheme can provide boost to Indian exports if the US revisits the issues regarding CNL.

The Secretariat's report[56] refers to the Congressional process in reforming or changing the United States preferential programmes including GSP and ATPA. Noting this India requested[57] the US government to comment on approaches being considered by the US Administration to reform the GSP programme, including its eligibility criteria, etc.

The US responded that it is not yet clear whether possible reforms to the GSP program will be on the Congressional agenda in 2013, and the Administration is not in a position to speculate on what specific reforms Congress might consider. For its part, the Obama Administration believes it is important that any prospective reform of the GSP program should take into account both the needs of the world's poorest countries and the fact that many emerging market countries may no longer need preferential access to compete in the U.S. market in some product sectors.

1.8 European Commission on Market Access barriers in the US

Trade and investment Reports of European Commission pointed out some trade barriers which are of relevance to India as well. The issues are discussed below:

a) Low level of openness of the US government procurement markets to EU bidders is of concern. It is claimed that this results partly from the limited scope of the GPA commitments made by the US, which cover only 3.2% of the US public procurement market (worth a total of €34 billion). The Buy American initiative has limited even more the effective access to US public procurement markets in areas not covered by US GPA commitments through new discriminatory provisions included in the American Economic

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[56] WT/TPR/S/275 (2013)

[57] WT/TPR/M/275/Add.1 (2013)

Recovery and Reinvestment Act and similar legislation. These provisions created additional uncertainty for foreign operators in the US market and effectively excluded them from certain tenders, mainly in the construction sector and have had a very unfortunate knock on effect for similar measures in other countries. Another example of harming practices is the prohibition of the US government purchases from so-called inverted companies, which are originally the US companies that have changed tax jurisdiction and inverted to another country's tax system[58]. According to the recent report of the European Union (2013)[59], there had been some success with regard to the "Buy American" legislation.

b) Another horizontal barrier, potentially having a significant economic and practical impact on exports to the US are the '100% scanning' provisions. This US legislation that aims to enhance security by countering potential terrorist threats to the international maritime container trade system, foresees the 100% scanning (pre-scanning of containers before arrival in US ports) of all US-bound containers by 1 July 2012. While progress has recently been achieved in the context of discussions in the Transatlantic Economic Council towards the recognition by the US of the concept of "authorized economic operator", the EU will have to continue to monitor very closely further developments on this barrier[60]. In the latest report (2013) it is indicated that progress had been achieved as regards the "100% scanning" legislation. As a result of a number of actions, including from the EU, the US Department of Homeland Security delayed the requirements for 100% container scanning that were scheduled to take effect in July 2012, for two years. In their trade policy review, the US confirmed that the deadline for 100% scanning will not go into effect until 1 July 2014. The statutory requirement still applies but the deadline for implementation has been changed. The Secretary of Homeland Security has the authority to extend it again at that time but no decision on such a further extension has been reached yet[61].

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58 Trade and investment Reports of European Commission (2011)
59 Trade and investment Reports of European Commission (2013)
60 Trade and investment Reports of European Commission (2011)
61 Trade and investment Reports of European Commission (2013)

c) An increasing tendency of relatively low level of implementation and use of international standards set by the international standardization bodies. All parties to the Technical Barriers to Trade (TBT) Committee are committed to the wider use of international standards as the basis for their regulation[62].

d) Products are increasingly being required to conform to multiple technical regulations regarding consumer protection (including health and safety) and environmental protection. Although in general not de jure discriminatory, the complexity of the US regulatory systems can represent an important structural impediment to market access. Like the obstacles Indian exporters are facing, obstacles for European exporters include a burdensome pharmaceutical approval system, the American Automobile Labelling Act and documentary and labelling requirements for textiles, among others[63].

e) Despite the substantial tariff reduction and elimination agreed in the Uruguay Round, the US retains a number of significant duties and tariff peaks in various sectors including food products, textiles, footwear, leather goods, ceramics, glass, and railway cars[64].

f) Imposing trade restrictions on beef, pork and poultry products from a region which is affected by disease outbreaks is a quick, administrative process - and rightly so. However, the lifting of these trade restrictions should be equally fast and pragmatic once the disease has been eradicated. In many cases the US administration has used complex and lengthy rulemaking procedures to restore trade, which can take several years longer than the re-acquaintance of an official disease-free status under the global rules of the Office International des Epizooties (OIE)[65].

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62 The European Commission Report (2008) on US Barriers to Trade and Investment
63 The European Commission Report (2008) on US Barriers to Trade and Investment
64 The European Commission Report (2008) on US Barriers to Trade and Investment
65 The European Commission Report (2008) on US Barriers to Trade and Investment

2. European Union

Several issues have emerged to be of India's concern during Trade Policy Review (TPR) of EC in 2009[66], 2011[67] and 2013[68]. EU's responses to India's concern raised during the TPRs have also been incorporated. Other sources used for identifying trade barriers include Department of Commerce, Government of India, media reports, Trade and Export promotion bodies and United State Trade Representative Report (2013) on EU.

2.1. SPS - TBT Issues

Various Indian export bodies report that more stringent standards and conformity assessment procedures are acting as barriers to exports in EU. This is affecting the exports of developing countries of products like textiles, leather etc. With the introduction of Environmental Management Certification, ISO 9000, ISO 14000, Social Accountability requirement, Occupational Health & Safety Measures being imposed, the exports of developing countries are being adversely affected.

According to Secretariat Report[69] the EU considers that, of the 35 notified measures for which there was a relevant international standard, 27 conformed to the international standard. India requested EU to explain as to why international standards were not adopted while applying SPS measures[70].

EU replied that its measures, where possible, are based on relevant international standards. However, in some cases there are no such standards and the EU has

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66 The full text of questions and answers are available in document WT/TPR/M/214/Add.1 (2009)

67 The full text of questions and answers are available in document WT/TPR/M/248/Add.1 (2011)

68 The full text of questions and answers are available in document WT/TPR/M/284/Add.1/Rev.1 (2013)

69 The full text of WTO Secretariat report is available under document symbol WT/TPR/S/248 (2011)

70 WT/TPR/M/248/Add.1 (2011)

therefore to rely on standards developed at the Union level. These are applied both to trade within the EU and to imports from third countries in a non-discriminatory manner[71]. It has further stated that the EU is the only WTO member which has published such a complete review of its deviations of the international standards, given a full explanation of the scientific reasoning behind the decision.

Market Access Problem of Leather Products

REACH, a European Community Regulation on chemicals and their safe use, deals with the Registration, Evaluation, Authorization and Restriction of Chemical Substances. It makes mandatory all chemical imports above one ton to be subject to registration, testing and certification, which leads to additional cost for the exporters. The high cost of registration makes it unaffordable for SMEs to register for chemicals. This regulation is reported to be a major trade barrier facing the Indian leather export industry. REACH regulates the presence of chemicals in all products placed in the EU market. Hence, leather sector exports to the EU are also impacted. This assumes great significance as 66% of India's leather sector export is to the EU market. REACH affects product manufacturers, distributors, retailers, importers and all others who place products in the EU market.[72]

Leather sector Products are impacted by the REACH regulations as per the 'Substance in Article' clause of REACH regulation. As per this, if any article contains a substance of very high concern (SVHC), a Notification has to be submitted to ECHA (European Chemical Agency) of the EU provided if both the following conditions are met - (a) The substance is present in those articles in quantities totaling over one ton per producer or importer per year and; (b) The substance is present in those articles above a concentration of 0.1 % weight by weight (w/w).

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[71] As reported by EU, Full study on the few EU SPS measures not in compliance with CODEX standards, is available in the communication G/SPS/GEN/1044 (8 October 2010) "EU Notification Authority and Enquiry Point for the SPS Agreement: Experience after the revision of the Transparency Guidelines of December 2008: Workshop on the Transparency Provisions of the SPS Agreement - Geneva, 19 and 22 October 2010 - Reflection Note", Annex II, page 7

[72] This information has been obtained from Council for Leather Exports (CLE), India

The testing for presence of the 'SVHC' in the article itself poses problems. Further many components are outsourced and keeping track of a long and complex supply chain towards ascertaining the presence of SVHCs in any of the outsourced components also poses considerable difficulty. Several countries particularly developing countries have voiced concerns about the procedural bottlenecks/complexities involved in REACH.

EU also has a high MFN applied rate of 17% for the products under Chapter 6404 (Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials Footwear with outer soles of rubber or plastics) and 6405 (Other footwear). A reduction in the applied import duty rates would also help in greater market access for Indian exporters.

Market Access Problems of Fishery Products

Consignments of fishery products have been rejected by Italy and Ireland on the ground of presence of cadmium above the prescribed limits. However, it has been observed that the sampling followed by these countries is not in line with the Commission Directive 2001/22/EC of 8th March 2001, which prescribes drawal of two samples and results reported as mean of the two, whereas in the above cited case, it was reported that only one sample was tested. In view of this recurring problem, India requested the European Commission to issue instructions to Member States that they should follow the Commission Directive 2001/22/EC of 8th March 2001 for sampling of consignments (for heavy metal). EC replied that the application of EC law is the responsibility of the EC Member States. The European Commission has no evidence of incorrect application by Italy or Ireland of EC law concerning products under HS heading 03 (Fish and crustaceans, molluscs and other aquatic invertebrates). EC further observed that global imports from India by EC-25 of products falling under HS 03 passed from 67.646 tons in the year 2000 to 116.213 in 2005; this is an increase of 70 %. In value, the imports of 2005 could be estimated above 300 million Euros. These import figures confirm that a high level of protection of the European Consumer health is compatible with a satisfactory evolution of the economic exchanges with its trade partners.

The Indian exporters have also reported difficulties in export of frozen octopus because of requirements of Arsenic level.

For example, the EC raised the Alert Notification No. 2012.1130 dated 6th August 2012, concerning presence of Arsenic in frozen octopus. The consignment was first cleared in Greece. The Greek importer had sent a part of it to Cyprus where arsenic was detected and the consignment was rejected. The alert notification was raised on this basis. It was mentioned in the notification that Cypriot authorities, on the basis of their National Legislation No. 303/83, had detected the presence of arsenic at 16.7±1.8 mg/kg in the product whereas the permitted level of arsenic in Cyprus was 1 mg/kg. Subsequently, the EC has confirmed that for arsenic in fishery products, no maximum level has been established at an EU level and therefore, Member States may maintain their own national maximum level. The EC has further stated in an official communication that they do not maintain a comprehensive list of these national standards[73].

Meat & Meat Products

EU does not allow import of Indian buffalo meat due to prevalence of foot and mouth disease (FMD) in Indian cattle. Like the Codex standards for food products, OIE guidelines are taken as international standards for trade in animal and animal products. According to article 2.1.1.22 of the OIE Terrestrial Animal Health code, fresh meat could be exported from an FMD infected country provided the veterinary requirements as stipulated in the OIE code are followed. Following OIE guidelines, India exports deboned and deglanded frozen boneless meat. The carcasses are compulsorily chilled at 2-4^{0}C for 24 hours resulting in a pH value of less than 6, which guarantees availability of safe and risk free product for export. Scientifically, it has been proved that deboned and deglanded boneless meat having pH below 6 is a risk free product wherein no harmful virus including FMD virus can survive. OIE experts on FMD have opined that if the recommendations of OIE international animal health code are followed, it would be sufficient to prevent transmission of FMD and rinderpest from one country to another. FMD is not transmissible to humans and pose no public health hazards. The EU does not agree to India's suggestion that they should be guided by the OIE stipulations for trade in livestock products and are adopting higher and more stringent standards than the International Standards. The European Commission is, apparently, taking recourse to the "precautionary principle" in spite of the fact that the Codex Alimentarius

[73] WT/TPR/M/284/Add.1/Rev.1 (2013)

Commission, at its 24th session held at Geneva in 2001 had agreed to as follows:*"When there is evidence that a risk to human health exists but scientific data are insufficient or incomplete, the Commission should not proceed to elaborate a standard but should consider elaborating a related text, such as a code of practice, provided that such a text would be supported by the available scientific evidence."*

EC responded that the four Member States hit by the FMD epidemic in 2001 spent a total of 12 billion Euros on eradication measures. To preserve these huge investments, the protective measures applied by the EC follow strictly the scientific advice provided by the European Food Safety Authority (EFSA) and that this measure complies with OIE and WTO law.

Egg Products[74]

India is on the list of authorized third countries from which member states of the EU can import egg products (Commission Decision No.94/278/EEC). Therefore, India can export egg products to member states on the basis of bilateral agreements. Presently Belgium, Germany, Austria and Denmark are importing egg products from India on bilateral basis.

However, some of the EIC approved establishments have expressed difficulties in exporting their products to some of the European member states like Germany and Denmark in light of the EC Regulation 853/2004, and Decision 2006/696/EC dated 28-8-2006. The Indian authorities have taken up the matter with the German authorities. The German authorities have also been informed that official veterinarians who are authorized by the German Federal Ministry of Food, Agriculture and Consumer Protection may inspect Indian egg establishments for conformity. For exports to Denmark, it is informed that Danish authorities are insisting on a different type of Health certificate in which both Health aspects and veterinary aspects are addressed. Presently EIAs are issuing health certificates for EC as per Directive 89/437/EEC dated 20/06/1989. Meanwhile, Articles 25 and 26 of the Commission Decision 2006/696/EC dated 28/08/2006 provide for transitional period which is six months after the day following that of its publication in the official Journal of the European Union. i.e. upto 28 February 2007. The Danish Authorities need to accept the present

[74] This issue has been raised again in the TPR of EU in 2009

form of Health Certificate i.e. as given in the earlier EU directive, which is presently in force, till the new Commission Decision 2006/696/EC becomes effective. During the visit of the FVO mission team to India to evaluate control of residues in live animal products, including controls on veterinary medicinal products in line with Council directive 96/23/EC, the residue monitoring system for egg was assessed, and the conclusion reached was that there were comprehensive residue control plans in place for egg products. In view of the fact that different countries are addressing import of egg products differently and also the need to negotiate bilateral agreements with countries separately, it is essential that EC notifies a 3rd country list for import into all EC member states which would also help in facilitating trade.

The EC responded that the requirements for the production and placing on the market of egg products are harmonised at EC level. The general hygiene requirements for food processing establishments are laid down in Regulation 852/2004, the specific requirements for egg product establishments are laid down in Regulation 853/2004. At the moment there is no harmonised list of third countries egg product establishments from which import is allowed into the Member States at Community level. The import of egg products into the EU is allowed from third country establishments agreed by Member States on a bilateral basis. The EC further observed that it has no evidence of incorrect application by Germany or Denmark of EC law concerning products under HS heading 0408.

Notwithstanding the above explanation, it is gathered from the Indian authorities[75] that since no harmonized third country list has been notified by the EC, this is a barrier and restricts free movement of goods within EU. This is a long pending issue. EC has also not notified the list of Indian units to all Member States (harmonized list). As a result, the competent Indian authority is having arrangements with only a few EU Member States for export of egg products.

As per EUROSTAT, in 2012, the EU import of egg products from extra-EU countries was valued at Euro 33.6 million (India's share being Euro 4.6 million), while the intra-EU trade was valued at Euro 662 million. This indicates that

[75] Inputs received from Department of Commerce, Government of India

only 5% of the EU requirement was met out of imports and this to some extent reflects a protectionist pattern of EU.

Differing Norms for Microbial standards

The EC has not harmonized norms for microbial standards as well as methods of inspection, sampling and test. Member countries are, therefore, having their own norms. Examples of such cases are from Spain, Italy and France where many consignments have been rejected due to detection of *Vibrio parahaemolyticus* and *Vibrio cholerae* in consignments. Based on information collected from other countries, it is observed that none of the importing countries have specified limits for *Vibrio parahaemolyticus* in raw products. Standards for this micro-organism have been laid only in 'ready to eat cooked products' or 'seafoods for raw consumption' and here again, limits have been specified at level ranging from 1,000 to 10,000 per gram. One of the key elements of the Agreement on SPS is 'harmonization' in which member countries are expected to base their SPS measures on international standards. It also means that within the EU member states, there should be common norms followed, and in case of different norms, these should be justified through risk analysis. Further while processing, an exporter may at times not be clear about the specific country of destination within the EU countries. As a result, while certifying the consignments of marine products for export to the countries of EU, it becomes difficult for EIC of India to decide against which norms to certify, which may in effect lead to rejection of the product. In view of this it is important that EC initiates steps for harmonization of microbiological requirements within the EU[76].

EC responded that the Commission Regulation (EC) No 2073/2005 on microbiological criteria for food stuffs notified in G/SPS/N/EEC/263 (19 July 2005) harmonizes the situation for the EC. The Regulation came into application on 11 January 2006. Member States may not, thereafter, use national criteria to sample product from outside their territory. Nevertheless, Member States may, under Article 14 (food safety requirements) of the general food law, Regulation (EC) No 178/2002, impose appropriate restrictions if the food is unsafe. EC Member States have especially in the field of food safety still a large responsibility

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[76] WT/TPR/M/177/Add.1 (2007)

due to subsidiarity. The European Commission has no evidence of incorrect application by Spain, Italy and France of EC law concerning imported products. It is reported that this issue has been a persistent trade barrier for the Indian exporters. In 2010, a consignment of frozen shrimps exported by M/s Capithan Exporting Company was rejected by the Danish authorities due to presence of Vibrio Alginolyticus (RASFF Notification No. 2010.AKZ dt. 11.3.2010). Though the EC Regulation No. 2073/2005 does not contain the microbiological standards for any of the Vibrio species, the presence of Vibrio Alginolyticus in ready to eat food was considered to be hazardous to public health by the Danish authorities and accordingly the consignment was rejected[77].

Differential Norms for Pesticide Residue

An important problem being faced by Indian exporters of grapes, gherkins etc., is the differential pesticide residue levels followed by different member states of the EU, in spite of the fact that there are EU wide harmonized levels prescribed by the EC as well as Codex. Such variation in the residue levels pose difficulties for intra-EU trade for products exported by India. This is resulting in a situation that the Indian exporters are able to trade with only some of the EU countries. This problem is being faced in a number of products and India is expected to have bilateral agreements with the member states for export of various items. It is reported that most of the time, the maximum residue levels of pesticides and antibiotics are introduced without any scientific justification. For instance, it is reported that, in Germany Grapes, gherkins etc face market access problem on account of differential norms for maximum pesticide residue levels (MRLs) followed by different member states of the EU, and the frequent reduction in MRLs of pesticides and antibiotics without giving adequate notice[78]. This is done on arbitrary basis taking recourse to "precautionary principle". This principle is being followed in spite of the fact that the Codex Alimentarius Commission, at its 24th session held at Geneva in 2001 had agreed to as follows: *"When there is evidence that a risk to human health exists but scientific data are insufficient or incomplete, the Commission should not proceed to elaborate a standard but should consider elaborating a related text, such as a code of practice, provided that such a text would be supported by the available scientific evidence."* The EC also

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[77] Inputs received from Department of Commerce, Government of India

[78] Information has been obtained from Ministry of External Affairs, Government of India

keeps reducing the maximum residue levels of pesticides and antibiotics very frequently and without giving adequate notice. It becomes difficult for developing countries like India to keep pace with the ever changing Maximum Residual Limits (MRLs)[79].

EC responded that the difference in maximum authorized pesticide residue levels existing in different Member States of the EC is not in breach of the SPS Agreement. These reflect the situation existing before the harmonization work started and the diverging consumption habits leading to divergent MRL on products-pesticide combinations. It is totally incorrect that "*Most of time, the maximum residue levels of pesticides and antibiotics are introduced without any scientific justification*". The procedure to establish MRLs has been clearly explained several times to India and is also available on the internet site of the Directorate General for Health and Consumer Protection. With the aim to facilitate trade within the internal market and with third countries by overhauling and streamlining the legislation on pesticides while ensuring a consistent level of protection for products which are intended for human consumption and animal nutrition in the European Union, a new frame was established by Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC, notified in G/SPS/N/EEC/196 (11 April 2003). This regulation stipulates that maximum residue levels will always be set at Community level and defines the role of the EFSA, which will be responsible for performing risk assessments on the basis of reports from the Member States. It is gathered[80] that under EU Regulation No. 396/2005 on Maximum Residue Levels (MRLs) for pesticides in or on food and feed of plant and animal origin, a default level of 0.01 mg/kg has been applied on many chemicals because "the EC has not made a specific determination that it is safe". It is claimed that the MRLs have been set at the Level of Determination (LOD). Contemporaneous validation data for the chemicals that set the MRL at the LOD at the time of passing of the legislation is not available.

Scientific evidence to justify the setting of the MRL at LOD and risk assessments has not been provided despite substantially higher levels for the same chemicals

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[79] WT/TPR/M/177/Add.1 (2007)

[80] WT/TPR/M/284/Add.1/Rev.1 (2013)

prescribed by other countries. For certain products within the EU, for the same chemical there are different standards eg. MRLs set for Carbendazim. As per information available, the EU produces over 114 million tons of Wheat and 11 million tons of Oats compared to 2.6 million tons of Rice. The MRL of Carbendazim on wheat is 10 times that set for Rice and on Oats it is 200 times that set for Rice. Further, the EU does not follow Codex levels where applicable. e.g. Codex has a MRL for rice at 2 ppm while the EU stipulates a default level of 0.01 mg/kg.

During EU's TPR of 2013, India sought clarification regarding the basis for setting the MRLs for product – chemical combinations at the default level and the scientific justification for the MRLs specified under Regulation No. 396/2005. India also asked for clarification as to why the EU was not accepting the Codex level for Carbendazim in Rice. India also sought to know from the EU the number of occasions when the MRL was changed for a chemical-product combination, based on third-country request and details of such requests that were acted upon by the EU. India also enquired as to why an exporting country be burdened with the onus of compiling scientific data or dossiers.

EU clarified that the maximum residue levels (MRLs) of pesticide residues, including import tolerances, continue to be set under Regulation (EC) No 396/2005. Any expected modifications to the current MRLs would continue to be notified to trading partners under the WTO SPS Agreement, inviting trading partners to provide comments. It further clarified that setting of pesticide MRLs in the EU was based on a scientific opinion of the European Food Safety Authority (EFSA). If there were no authorised uses for a particular pesticide in the European Union, then the MRLs were fixed at a low level taking into account the routine analytical methods available. This was done as a trade facilitating measure to give traders a form of legal certainty. If exporting countries used a particular pesticide in a particular food commodity for which the exporting country would like to have an MRL different from the MRL set under EU legislation, the exporting country could provide the necessary information and follow the procedure for setting an 'import tolerance'. This approval procedure was laid down in Regulation (EC) No 396/2005. Also in this case, evaluations were carried out by EFSA based on the data provided. An import tolerance might be granted by the EU under the condition that there was no health risk for consumers and that the requested MRL was not higher than the one

established in the third country. As regards carbendazim in rice, EU clarified that in April 2012, the Federation of European Rice Millers (FERM) submitted an application for an import tolerance. A full review of all MRLs for carbendazim was being carried out under Art. 12 of Regulation (EC) No 396/2005 and that the relevant Codex MRLs would also be considered in this context.

All relevant recent legislation, including the granting of import tolerances is accessible to the public at http://ec.europa.eu/food/plant/pesticides/legislation/max_residue_levels_en.htm. All scientific information related to the setting of maximum residue levels by substance is available on the webpage of the European Food Safety Authority (EFSA): http://www.efsa.europa.eu/en/pesticides/mrls.htm.

There is a continuing concern regarding the lack of accurate number of products that are not subject to non-harmonised rules. EC has clarified that Regulation (EC) No 764/2008 requires the Commission to publish a non-exhaustive list of products which are not subject to EU harmonisation legislation. The database containing the non-exhaustive list of products which are not subject to EU harmonisation legislation is available online at: http://ec.europa.eu/enterprise/intsub/a12/. EC further observed that it is not always possible or even necessary to adopt harmonized EU legislation for all goods. In the non-harmonized area, the free movement of goods is guaranteed by the application of the general Treaty provisions and the operation of the mutual recognition principle as defined in the case-law of the Court of Justice of the European Union. When differences in justified requirements of Member States impede the functioning of the internal market, the EU would assess if the requirements need to be harmonized and if EU legislation needs to be adopted.[81]

Harmonization of health related standards within EC

The European Union (EU) has harmonized its pesticides residue level framework under Regulation No. 396/2005 on Maximum Residue Levels (MRLs) for pesticides in or on food and feed of plant and animal origin. A default level of 0.01 has been applied on many chemicals because "the EC has not made a specific determination that it is safe". It is claimed that the MRLs

[81] WT/TPR/M/284/Add.1/Rev.1 (2013)

have been set at the Level of Determination (LOD). Contemporaneous validation data for the chemicals that set the MRL at the LOD at the time of the passing of the legislation are not available. Neither the Standard Operating Procedure, (SOP) for the test that has been pre validated to SANCO 10684 and associated OECD and ISO documents nor any Proficiency tests as demanded by SANCO 10684 have been conducted. Scientific evidence to justify the setting of the MRL at LOD and risk assessments has not been provided despite substantially higher levels for the same chemicals prescribed by other countries. In case of Isoprothiolane (IPT) in rice, scientific data from Japan have clearly established that there is no risk to human health even at an MRL of 2 ppm. Further, for other products within the EU for the same chemical there are different standards e.g. MRLs set for Carbendazim. As per information available, the MRL of Carbendazim on wheat is 10 times that set for Rice and on Oats it is 200 times that set for Rice[82]. On account of these considerations, India requested the EU to explain the scientific evidence for raising MRLs.

EU responded that it incorporates Codex MRLs in its legislation whenever possible. The EU may also ask its own scientific body, i.e. the European Food Safety Authority (EFSA), to review Joint FAO/WHO Meetings on Pesticide Residues (JMPR) risk assessments to consider conditions of use and consumption pattern in Europe. Resulting MRLs deviating from Codex MRLs would thus be in line with Article 3.3 of the SPS Agreement. If no Codex MRLs or EU MRLs have been set for a substance, the EU applies a default level of 0.01 mg/kg which is based on consideration of general toxicology and detection limits. The EU considers the availability of an analytical method and its limits of detection as other legitimate factor. The procedure is thus in line with Article 2 and Article 3 of the SPS agreement. Any country that would like to use substances for which no Codex MRLs have been set and as a result want to export products containing residue higher than 0.01 mg/kg of that substance to the EU, has the option to either apply for a JMPR evaluation and thus a Codex MRL or an EU import tolerance for a combination(s) pesticide/crop in accordance with Article 6 of Reg. (EC) No 396/2005. In the latter situation the procedure required by international standard would be to apply for a JMPR evaluation. This implies that the supporting studies have to be presented to JMPR. This requirement to present supporting studies can be addressed as 'burden of proof". In EU's

[82] WT/TPR/M/248/Add.1 (2011)

consideration, under SPS rules, the "burden of proof" that the substance used is safe lies with the exporting country[83].

Impractical Approaches to Product Testing[84]

There are impractical approaches to product testing in the European Union. Taking the example of aflatoxin in spices, processed food, groundnuts, cereals, etc., there is a requirement of meeting MRL of aflatoxin in these products. The sampling procedure for testing purposes is extremely complex and expensive, which makes it technically and economically unfeasible for developing countries like India. Moreover, it is expected that MRL should be measured on arrival of the consignment at the port of the importing countries (e.g. EU ports). This is impractical because aflatoxins can come up at any stage after drawal of samples for testing. The voyage provides an optimum environment for growth of aflatoxins. No exporting country can absolutely guarantee this, not even the most developed countries.

The EC responded that the maximum levels of aflatoxin in peanuts for further processing are equivalent to the levels agreed in Codex Alimentarius. For the other commodities and for aflatoxin B1, Codex has not yet set a maximum level. Also the sampling provisions in the EC for peanuts for further processing are equivalent to the sampling plan agreed in Codex. Hygiene regulations provide that the peanuts should be transported in good hygienic conditions preventing any further formation of fungi and aflatoxins. As for technical assistance, both the EC and its Member States are funding a wide variety of TBT-related technical assistance programs for the developing and the least developed countries.

There is continuing concern that the MRLs set by EU for Aflatoxin in peanuts meant for direct human consumption or for further processing are unjustifiably low in relation to consumer exposure to Aflatoxins and the potential risk[85].

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83 WT/TPR/M/248/Add.1(2011)

84 This issue has been raised by Government of India in the Trade Policy Review of EC held in 2009

85 Inputs from Depatment of Commerce, Government of India (2013)

Non recognition of Indian Whisky[86]

India has been consistently requesting European Commission for recognition of Indian whisky as a "whisky" in the EU market to ensure a level playing field. The EC has so far not responded positively. As per the Commodity Nomenclature Code, an alcoholic beverage can be called a whisky only if it is produced exclusively from cereals by distillation and is matured for a period of three years. The EC authorities have informed that there is no scope for change of definition of whisky by them. They suggested that India should come up with some creative solution that could be considered but the use of term 'whisky' may not be possible. The EC has also suggested that in case India can give detailed clarification on technical aspects, their customs experts could consider the issue for tariff concessions. The technical experts from the All India Distillers' Association are of the view that the extra neutral alcohol (ENA) produced from molasses and used as a base for production of Indian whisky is as good as the ENA produced from cereals/ grains. In the EU countries, whisky has been traditionally produced from cereals because they do not produce sugarcane. Even in the USA, no one has ever challenged whisky produced from molasses. It is also pertinent to mention here that while EU are reluctant to import Indian whisky as "whisky", at the same time they insist that their whisky should be allowed to be imported into India under the 'national treatment clause'. The Indian side has informed about the difficulties faced by the Indian spirit industry in getting their trademarks registered in the EU.

EC responded that the Indian questions in relation to whisky call for a number of clarifications. First, under EC law the CN code does not play any role for the denomination ("whisky") under which spirits drinks may be sold on the EC market. The rules on sales denominations are laid down in Council Regulation (EEC) No 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks, Article 1(4)(b). According to this Regulation, a spirits drink may be sold under the denomination "whisky" only if it meets certain requirements. Those requirements apply to spirits drinks irrespective of whether they are produced in the EC or imported from WTO Members, and they are in line with requirements imposed by a number of other WTO members. Indian spirits drinks based on molasses, rather than on grain

[86] This issue has been raised again in the TPR of EU in 2009

spirits, do not meet those requirements, and may therefore not be sold under the denomination "whisky" in the EC. However, such spirit drinks may be sold in the EC under other denominations, in accordance with Council Regulation (EEC) No 1576/89. As regards the issue of tariff concessions, whiskies from all destinations already enter the EC duty free, as do most other categories of spirits drinks. Therefore, all (Indian) spirits can be freely sold in the EC, under the correct sales denomination as defined by Council Regulation (EEC) No 1576/89, and benefit from duty-free importation (except products classified as rum under CN code 2208.40 which pay duties at levels which are much lower than those applied by India to imported spirits).

Herbal Products[87]

The EU regulations specify inclusion of only herbal products and the stipulation that they should have a proven use of 30 years, out of which 15 years should be in the EU, which hinders market access for Indian Ayurvedic products. India had expressed its concerns on the scientific basis on which such criteria had been developed and mandated by the EU.

EC replied that its legislation was developed to create uniform marketing conditions avoiding differences between national laws that could hinder the free movement of foodstuffs. Article 3 of this regulation provides that foods and food ingredients falling within its scope must not present a danger or mislead the consumer. They also must be clearly defined so that clear direction can be given to consumers if these are requested. India will appreciate that the food control authorities, when authorizing the selling of whatever food, must be sure that its normal consumption would not be disadvantageous for consumer either due to the composition of the food itself or because sufficient cultural knowledge is required on how to handle it.

The Indian Pharmaceutical companies have not been able to register the Ayurvedic products in the EU. As per the EC Directive on Traditional Herbal Medicinal Products (THMPD) which came into force on 1 May 2011, no Ayurvedic products can be sold in the EU market unless they meet the

[87] This issue has been raised by Government of India in the Trade Policy Review of EC held in 2009

requirements of the Directive which provides for import of herbal medicines only when there is a proven use of these herbal medicines for 30 years out of which 15 years should be in the EU countries. Moreover the regulation also requires the Industry to submit onerous test reports supporting the efficacy of the products which are very expensive[88]. India argued that the 15 years of traditional use in the EU is not scientifically justified. India wanted to know the rationale for this criterion and the parameters on the basis of which a relaxation/ waiver would be granted.

EU responded that the long tradition of the medicinal product makes it possible to reduce the need for tests and trials that can be replaced by documentation which indicates that the product is not harmful in specified conditions of use and that its efficacy is plausible on the basis of long-standing use and experience. In any case, where 30 years traditional use cannot be proven, the applicant may apply for a marketing authorisation as established in Directive 2001/83/EC. The 15 years use in the EU allows having sufficient monitoring of the side effects increasing confidence on the safety of the product in the absence of test and trials. For those medicinal products where 15 years use in the EU cannot be demonstrated but are otherwise eligible for the simplified procedure, the Directive 2004/24/EC allows to prove the safety of the product by other means which are to be assessed by the Committee for Herbal Medicinal Products of the European Medicines Agency.

Indian authorities have mentioned that there are enormous costs involved in getting marketing authorization which makes this procedure unviable.[89]

Capping the Greenhouse Gas Emissions of Airlines[90]

The EU has introduced a mechanism to cap the greenhouse gas emissions of airlines by including civil aviation under the purview of its emission trading scheme from 1.1.2012. The implementation of the scheme is currently under 3rd phase (2013-2020). The scheme would adversely affect operators of Indian

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88 WT/TPR/M/248/Add.1(2011)

89 Inputs from Department of Commerce, Government of India (2013)

90 This issue has been raised by Government of India in the Trade Policy Review of EC held in 2009

airlines operating in Europe. India wanted to know the time period for placing such a proposed regime in to effect and for compliance by foreign airlines.

The EC responded that in order to prevent the most dangerous effects of the climate change, significant reductions in greenhouse gas emissions are necessary and that it has adopted a comprehensive approach and ambitious targets to reduce emissions across the whole economy including aviation. It is further added that the EU emission's trading scheme (EU ETS) is an important mechanism by which emission reductions will be achieved. In their view, aviation inclusion in an open emission trading system is a very cost effective means of mitigating emissions.

It was further clarified that the EU included the aviation sector in the EU ETS after the failure of International Civil Aviation Organization (ICAO) to deliver concrete measures to reduce greenhouse gas emissions from aviation. According to EU, the inclusion of aviation in the EU ETS has been implemented in such a way that it respects the ICAO principle of non-discrimination between aircraft operators on the grounds of nationality. It applies to all flights that arrive at or depart from EU airports. This prevents competitive distortions between aircraft operators. Furthermore, their analysis has shown that over two-thirds of the emissions covered by the scheme can be attributed to aircraft carriers based in the EU. The proportion attributable to carriers based in India or other Non-EU countries is very small.

The legislation including aviation into the EU ETS recognizes that the scope of the scheme should be adjusted to take account of equivalent measures to mitigate aviation emissions taken by other states. If India were to adopt measures to reduce the climate change impact of flights departing from its airports, the EU legislation envisages options to provide for optimal interaction between the EU scheme and India's measures, in particular by excluding from the EU scheme of flights arriving from India.

The EU sees inclusion of aviation in the EU ETS as a first step towards the ultimate goal of achieving a global solution to address the climate change impacts of international aviation. It also considers that the EU ETS may serve as a model for the use of emissions trading worldwide. Indeed, the legislation commits the EU to continue to seek an arrangement on global measures to reduce

greenhouse gas emissions from aviation. In the light of any such agreement, the EC shall consider whether amendments to the EU ETS legislation are necessary.

Notwithstanding the above, the Indian authorities remain concerned about this measure. According to them, the measure has been adopted by the EU and applied to third countries without consultations, without factoring in the level of development and without considering the quantum/contribution of different countries that have already contributed to the greenhouse gases. In such a background, a uniform levy is not justifiable.[91]

Tea[92]

Rapid Alert System

The RAS for food and feed in the EU is issued by any country of the EU and is applied to all other countries of EU on automatic basis. But in the case of lifting of such alert in the present system, there is a need for clearance of at least 10 import consignments by the concerned state. Import of Indian tea in different EU states varies between less than two consignments in some EU states to more than 10 consignments in few other states in a year. The requirement of clearance of at least 10 consignments for the lifting of RAS acts as a barrier for tea exports to those countries where consignments per year is very few. Since RAS issued by one country applies to all the countries of EU on automatic basis, clearance of such alert by one country should also be applied automatically to all the countries within the EU.

India also raised this issue during the TPR of EU in 2009. India pointed out that issues like the threat of destruction of rejected consignments, member states taking unilateral decisions for lifting of alerts, lack of appeal mechanism, etc. are still to be addressed.

It is gathered that since 2012, the EU has harmonized the system of lifting rapid alerts after clearance of 10 consignments in any EU Member State. However,

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[91] Input from Department of Commerce, Government of India (2013)

[92] Information on market access barriers for tea are provided by the Department of Commerce, Government of India

the third countries have not yet been given access to the EU's TRACES (Trade Control and Expert System) website where the details of exporters whose consignments are rejected are displayed. Access to this website would facilitate monitoring the status of each exporter whose name is appearing in the system.[93]

Registration, Evaluation and Authorization of chemicals (REACH)[94]

European Union has enacted legislation on REACH (Registration, Evaluation and Authorization of chemicals) with a view to ensure high level of protection for human health and environment which has come into force w.e.f. June 2007. Under this Act. traders and manufacturers situated in EU were required to pre-register their chemicals with European Chemicals Agency (ECHA) which started from June 2008 and closed by December, 2008.

Import of chemicals of more than one tonne is required to register their products with European Chemicals Agency. The registration deadline for substances placed in the market in quantities over 1000 TPA or substances of very high concern was 1st December, 2010.

The exporters of chemicals are required to submit chemicals safety dossiers for their chemicals for registration with ECHA. The chemical safety dossiers contain results of various tests such as toxicity, bio-toxicity, lethal dose effects, half life cycle, etc. These tests need to be necessarily generated by OECD accredited GLP labs. To create data, animal testings need to be avoided and IT tools such as QSAR need to be used. After submission of the safety report within the time limit, the safety reports will be evaluated by the EU authorities. EU has formed numerous SIEFs for the purpose of cost sharing. Most of the test data are already generated by the EU companies and the small players will be compelled to accept their terms and conditions in order to register their products in EU.

The requirement that the substances are to be registered through Only Representative (OR) involves extra cost for export to EU. Indian manufacturers/ exporters are paying the following fees to OR. Annual Maintenance fee of

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93 Inputs received from Department of Commerce, Government of India (2013)

94 This information has been obtained from Department of Chemicals & Petrochemicals and WT/TPR/M/248/Add.1

Rs. 7100/- per substance per year and Fee of Rs. 21300/- per substance are to be paid during the year when the actual registration takes place. This is particularly onerous for SME sector and as a large number of Indian exporters come from this sector, the effect on Indian exports is particularly harmful. Apart from costs, ORs also have implications on confidential information of non-EU exporters. EU will use OECD test standards except in exceptional circumstances. It is however not clarified what these exceptional circumstances might be and whether they will be published.

For registration, non-EU companies are required to provide data to SIEFs through ORs. Since only EU-based companies are able to join SIEFs, this causes an unfair and potentially prejudicial one-way flow of information that could disadvantage non-EU companies, as they are unable to directly participate in SIEFs.

At present, India is having provisional membership of OECD for the purpose of GLP. EU does not recognize data generated by Indian GLP laboratories. Much of the exports – particularly from SMEs – takes place through merchant exporters. However, whereas EU traders can register under REACH, non-EU traders/merchant exporters cannot register affecting the exports. Polymers are exempted but monomers are to be registered. So EU manufacturers of polymers shall prefer to procure their requirement of monomers from EU countries.

In view of the above, EU legislation on REACH adversely affects the export of chemicals from India to EU countries and acts as a trade barrier.

During the registration many companies have found this law to be discriminatory between EU and non-EU industry. Additionally, the registration under this law involves huge costs and requires generation of lot of data on chemicals to be provided to the EU to ascertain safety for animal, plant and human life. And to organize, coordinate and file this data for the European Chemical Agency in Helsinki, an exporter has to be a member of a body called Substance Information Exchange Forum[95]. The definition of SMEs in the EU for the purposes of lower registration costs does not account for labour intensive industries in developing Members like India. With the use of both the criteria

[95] WT/TPR/M/248/Add.1(2011)

of annual turnover and the number of employees it would render many of the Indian SMEs as large enterprises resulting in an unfair treatment for these enterprises. Noting this India asked the EU whether it would consider an appropriate mechanism for lowering the registration costs for SMEs that do not meet the criteria of number of employees.

EU replied that in order to apply reduced fees and charges, the European Chemicals Agency (ECHA) can only refer to a definition of SME as set out in Article 2(1) of the "Fee Regulation" (Commission Regulation (EC) No 340/2008). The Fee Regulation defines SMEs within the meaning of Recommendation 2003/361/EC. The EU definition of SMEs applies not only to REACH but also to all EU policies applied within the European Economic Area in favor of SMEs. Any change in the SME definition is impossible as it would have a horizontal impact on the European functioning. It is also impossible to apply a definition of SMEs in the EU and a different one for enterprises in third countries. This would necessarily lead to discrimination between EU and non-EU operators and even between operators coming from different third countries.

2.2. Intellectual Property Rights

Seizure of Goods

An important barrier that the Indian pharma exporters face in EU relates to their transit to third countries. Transit shipments are seized on the grounds of alleged violation of patent rights. Indian shipments of medicaments were seized by Dutch customs authorities while they were shipped through Netherlands en route to Brazil, Peru and Columbia, alleging violation of patent rights. Dr. Reddy's consignment of Losartan was alleged to be infringing the patent rights of Merck-DuPond on this drug in Netherlands. But Losartan has no patents either in the originating country, India, or in the destination country, Brazil. Article 51 of TRIPS provides for adopting procedures to enable a right holder, who has valid grounds for suspecting that the importation of goods involving infringement of IPRs to lodge an application in writing with competent authorities for suspension by customs authorities of the release into free circulation of such goods. Article 52 of TRIPS clarifies that any right holder initiating procedures under Article 51 will have to provide adequate evidence to prove that there is prima facie an infringement under the laws of the country

of importation. In the recent incidents of Dutch seizures, neither India nor the importing countries had patent rights over the concerned medicines and the Dutch had no right to interfere in the legitimate trade between India and its importers. Article 41.1 of TRIPS requires that enforcement procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. The export of approved generic drugs that are not covered by patents in either the country of export or the country of import will qualify as legitimate trade[96].

The Council of the European Union vide council regulation (EC) No. 1383/ 2003 of 22 July 2003 covers customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights. This is having regard to the treaty establishing the European Community, and in particular Article 133 thereof. Customs authority is limited to Trade Mark Violation and to prove that goods are counterfeit which is certified by the test report. Articles 41.1 and 41.2 of TRIPS provide enforcement procedure for fair transit, avoid creation of barriers, and safeguard against abuse of law.

The basis of seizure of consignment is either counterfeit or a blatant case of IP infringement, whereas issue of counterfeit is related to quality and misbranding and even in such cases it is for the importing country to accept or reject the goods. Transit is only facilitating to reach the goods at its legitimate destination. The European Government has passed directives by which EU is accepting applications from IP holders and notify the granted form of copyright, trademark and design and also patents. By virtue of these directives, the EU Custom Authorities on payment of a fee for the purpose of recovering costs towards storage when consignments are seized are registering IP holders. All big companies around EU have made their registration with EU custom authorities which have been empowered to keep watch on the consignments and seize them in case it is violating any form of IP of those countries which are registered with even if it does not violate the IP rules of the importing country. Many companies are compelled to change their transit route which has added to the cost of the product[97].

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[96] Issues in this section are drawn from media reports

[97] This information has been obtained from Indian Drugs Manufacturers Association, New Delhi

Parallel Import which is available in the patent law of most of the countries and India and which permits it under section 107A (b), is not acceptable to EU. Many pharmaceutical consignments exported by Indian companies to Africa and Latin America and in transit through the EU territory were seized at various Customs ports in Europe in the years 2008 and 2009. The EU's directive 1383/2003 has been called to question for its ability to strike at goods in transit for IP violations[98]. 3.5% of the cases applied to such goods were not destined for the EU.

In May 2010, Brazil and India both requested consultations with the EU and the Netherlands regarding the Customs treatment of goods in Transit through EU ports, produced in India and destined for developing countries. Individual consignments of pharmaceutical products declared to be in transit were temporarily detained by certain EU member states' Customs authorities on grounds of alleged infringement of intellectual property rights, as provided for under Council Regulation (EC) No. 1383/2003 and the national law of the member States concerned. Following an understanding reached with the Government of India in June 2011, the European Commission, in February 2012, issued "Guidelines concerning the enforcement by the EU Custom's authorities of IPRs with regard to goods, in particular medicines, in transit through the EU". These guidelines clarified the application of Council regulation No. 1383 and took account of the findings in a European Court of Justice judgment of 1st December 2011. In particular, the guidelines laid down that the understanding that the mere fact that medicines are transiting through the EU territory and are subject to a patent rights in the EU "does not in itself constitute enough grounds for customs authorities to suspect that those medicines are infringing patent rights." However, a substantial likelihood of diversion of such medicines onto the EU market "may constitute enough grounds for customs authorities to suspect that the medicines at stake infringe patent rights" and justify their detention. Council regulation (EC) No. 1383/2003 has been modified in order to further clarify the procedures so that additional certainty is provided to operators and legitimate trade preserved[99].

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98 WT/TPR/S/248 (2011)

99 The information has been obtained from WTO secretariat report, 2013 (WT/TPR/S/284)

2.3. Issues in Services[100]

Obstacles in Accessing Service Market

There are significant administrative and regulatory barriers affecting trade in services. Para 55 of EC Trade Policy Review (2009) states "…*significant efforts have been underway to remove the remaining regulatory and administrative obstacles to trade in services between Member States within the framework provided by the Directive on Services in the Internal Market (the "Services Directive" No. 2006/123/EC) adopted in December 2006 and other sector-specific legislation and initiatives.*" Thus, the EC acknowledges that there are obstacles in accessing its services markets. India wanted to know, in the light of the above, whether the EC proposed to remove obstacles to trade in services for its WTO trading partners.

The EC replied that the integration of the European market is progressive and existing obstacles are removed step by step. EU legislation intends to facilitate the provision of services between different Member States of the Community, and, to that extent, benefit also WTO trading partners since it increases the economic value of commitments under mode 3, as non-EU companies established in the EU will fully benefit from the Services Directive just like EU companies.

In the TPR of EU of 2011[101] India highlighted the following issues and concerns related to trade in Services:

a) There are a number of Mode 4 restrictions in the EC such as the requirement for 3-6 years of professional experience for contractual suppliers and independent professionals. Some European countries are tweaking their business visa rules also and allot such visas after tedious processes and for very short durations. Moreover, there are delays in awarding visas and differing regulations governing professional qualifications prevail across Member States. For instance, it was observed that work visa for foreign employees takes a long time in Greece[102]. In Germany, difficulties in

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[100] These issues have been raised by Government of India in the Trade Policy Review of EC held in 2009

[101] WT/TPR/M/248/Add.1 (2011)

[102] Information has been obtained from Ministry of External Affairs, Government of India

obtaining work permits for Indian companies' employees, especially in the IT sector, and visas for spouses were pointed out. Issuance of visas and processing of work permits for software professionals takes a long time in Sweden[103].

b) Local service providers get a more favourable tax treatment than Foreign Service providers in EU. For example, in some Member States the costs of professional training are tax-deductible only if the courses take place within the Member State. Similarly, life insurance and additional insurance policies, pension fund and investment fund contracts can be offset against tax, only if concluded with local insurance companies.

c) Quantitative restrictions on access to service activities (e.g. quotas or rules governing the number of service providers, rules on maximum surface area, or geographic distance limits between service providers), can place established national operators at an advantage over new entrants.

d) Nationality requirements exist in several Member States with respect to shareholders, management and staff of service enterprises, and with respect to some regulated professions. Similarly these are residence requirements, particularly those relating to managers of service enterprises.

EU responded that the existing limitations on professional experience, all nationality and residence requirements as well as ENTs are clearly inscribed in the EU schedule. They stressed that those conditions are subject to negotiations in the framework of both the DDA or bilateral negotiations. As regards Visa procedures, they noted that the Member States of the EU, like all other countries of the world, follow a security based application of visa rules, in full awareness of their obligation not to nullify or impair the benefits accruing to any WTO Member under the terms of a specific commitment. Otherwise, any measure regulating the entry and stay into Member States' territory, such as visa policies, are outside of the scope of the GATS. They also observed that, as regards the issue of a lack of full harmonisation of the recognition of professional qualifications, the EU Treaty provides that the EU adopts rules on the recognition of professional qualifications to facilitate the free movement of persons.

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[103] Information has been obtained from Ministry of External Affairs, Government of India

Accordingly, the EU legislation was introduced to ensure the mutual recognition of qualifications in regulated professions. However, those directives on mutual recognition of qualification only apply to EU nationals and the right to practise a regulated professional service in one Member State does not grant the right to practise in another Member State. Member States are however free to apply the directive also to third country nationals. Yet, in order for third-country nationals to obtain an EU-wide recognition of their qualification, it is necessary that a Mutual Recognition Agreement is negotiated; an option to which the EU is always open should the professional bodies show a real interest and need for it.

Anomalies Prevailing in the EC in Services Sector

Para 108 part IV (page 132) of the Secretariat report[104] states "*The low level of intra-trade in services can be partly explained by the remaining barriers, such as monopolies that prevent the establishment of service providers from other Member States (e.g. postal services or energy utilities), and differences in regulation across Member States*." The footnote 148 to the Para talks about, "*..... SMEs normally cannot afford the extra costs of engaging in cross-border activities.*" These statements are a clear evidence of anomalies prevailing in the EC in services sector in which India has major interest. India raised a question as to how the EC proposes to ensure that cross-border trade of SMEs from other WTO Members is enhanced.

EC responded that cross-border trade of SMEs from other WTO Members will be enhanced both by the progressive integration of the European market and by the completion of the Doha development agenda, which would provide for an enhanced access to the European market since the EU has presented a comprehensive offer in the services area.

Benefits to Legal Persons and Physical Persons

The EU Services Directive will benefit any non-EC entity that becomes an EC juridical person by virtue of establishment. However, non-EC nationals cannot enjoy benefits of free movement under this Directive since it is limited to EC

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[104] The full text of WTO secretariat report is available under document symbol WT/TPR/S/214/Rev.1 (2009)

nationals. Thus, the foreign entity established in one of the EC member states does not benefit movement of its personnel across other EC member states even after establishing in the EC. India pointed out that this would be a violation of national treatment principle.

The EC replied that as regards legal persons, entities established in the EC will fully benefit from Directive 2006/123/EC (Services Directive) as stated above. As regards physical persons, individuals not having the nationality of an EU Member State are not covered by the concept of service provider in the Services Directive. It must be stressed that free movement of services is a concept that applies within the EU and the scope of such freedom is not comparable with that of mode 4. Hence the application of the national treatment principle is not relevant.

Construction Sector[105]

Ownership of real estate is of importance to the construction sector, but several market access and national treatment limitations are imposed in different EC member states as per the EC revised offer. India enquired about the reasons for the national treatment restrictions and if the EC proposed to remove these restrictions in order to allow market access in the construction service sector.

The EC responded that national treatment restrictions and limitations on real estate exist in a few number of Member States. Such limitations are common to many WTO Members. They can be justified on public policy grounds, such as the objective to avoid scarcity or excessive prices of land or real estate in areas where the needs of national for agriculture or housing are important.

Different Tax Regimes for Foreign and Domestic Service Providers[106]

Local service providers get a more favourable tax treatment than foreign service providers in EU. For example, in some Member States, the costs of professional training are tax-deductible only if the courses take place within the Member State. Similarly, life insurance and additional insurance policies, pension fund

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[105] WT/TPR/M/214/Add.1 (2009)
[106] WT/TPR/M/214/Add.1 (2009)

and investment fund contracts can be offset against tax, only if concluded with local insurance companies. Authorization for the reimbursement of medical costs incurred in another Member State is only granted by national authorities under certain conditions, and this may discourage persons insured under social security scheme from turning to service providers established in another Member State. It was also reported that Swedish social security taxes act as an important trade barrier, especially for IT sector Indian companies[107].

EC responded that while in the absence of harmonizing measures at Community level, direct taxation falls essentially within the competence of Member States, in the exercise of this competence, Member States must observe their EC Treaty obligations. Hence, they must not discriminate on the basis of nationality or apply unjustified discriminatory rules imposing restrictions on the exercise of the EC Treaty freedoms (including, the free provision of services). Thus for instance, and as confirmed by the European Court of Justice (ECJ) on numerous occasions, in objectively comparable situations, Member States may not apply more burdensome rules to services furnished by service providers of other Member States than to services provided by domestic undertakings. In this regard the EC, by way of example, would like to draw India's attention to the following ECJ decisions: Case C-136/00, *Danner*, of 3 October 2002; C-422/01, *Skandia/Ramstedt*, of 26 June 2003; C-150/04, *Commission V. Denmark*, of 30 January 2007; and C-552/04, *Commission V. Belgium*, of 5 July 2007 (Pension insurance contributions). EC law takes precedence over conflicting national rules, and as provided for in Article 226 EC the European Commission has a very specific role in enforcing the provisions of the EC Treaty. Where the Commission becomes aware of an infringement of the ET Treaty freedoms by a Member State, it will request that Member State to bring its national legislation into line with its Community law obligations and if necessary will bring the matter before ECJ.

As regards access to medical treatment abroad, Community legislation in the field of social security does not harmonize the national social security schemes of the Member States but aims at coordinating these schemes in order to avoid that migrant workers loose their social security protection.

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[107] Information has been obtained from Ministry of External Affairs, Government of India

These coordination provisions are contained in Regulation (EEC) No 1408/71 and its implementing regulation (EEC) No 574/72. Persons who are subject or have been subject to a legal social security scheme of a member State are covered by these provisions. Regulation (EC) No 859/2003 extended the personal scope of these regulations to nationals of their countries who are legally residing in the EU and who are in a cross-border situation.

As regards access to health care in a Member State other than the competent one, Article 22 of Regulation provides for two situations:

1) A person who is covered by a legal sickness insurance scheme of a Member State is entitled during his temporary stay in another Member State, to health treatment which becomes necessary during his stay. In this situation the health treatment is provided in accordance with the legislation of the Member State of stay but will be reimbursed by the competent Member State. The European Health Insurance Card (EHIC) certifies this entitlement. EHIC can be used for temporary stays abroad for private and professional reason or when studying in another Member State. In this situation, no prior authorization from the competent institution is required.

2) The second situation concerns the one where a person covered by a legal sickness insurance scheme of a Member State is going to another member State in order to obtain medical treatment. The coordination provisions require in such a situation that the person concerned obtains a prior authorization from the competent sickness insurance institution. It is up to the sickness insurance institution to decide whether or not it will grant the prior authorization. The coordination provisions, however, stipulate in which cases such a prior authorization cannot be refused, namely when the treatment requested is among the benefits provided by its legislation but is not available within a time normally necessary with regard to the current medical state of the person concerned.

If such a prior arrangement (form E-112) has been given, the treatment will be reimbursed by the competent institution in accordance with the tariffs applicable in the Member State where the treatment has been given. However, according to recent case-law of the Court of Justice (Vanbraekel, C-386/98), if the tariffs in the competent Member State are more favourable, the person concerned can

apply for a supplementary reimbursement, which cannot be higher than the costs he actually paid.

It should be mentioned that the court of justice stated that this system of prior authorization is contrary to the principle of freedom of services and goods as regards to non-hospital care. When non-hospital care treatment is given without prior authorization, the competent institution must reimburse the costs of this treatment according to its own tariffs.

MRAs: Need to Apply National Treatment[108]

Lack of Mutually Recognized Agreements (MRAs) is a major impediment to trade, particularly in a number of professional services. Current EU Law on the matter stems from the EC Treaty of 1957. Article 47 provides for adoption of measures to ensure MRAs within EC members. In 2005, EU adopted a new directive (2005/36) on recognition to be adopted by all Members by October 2007. While this directive applies only to EC nationals, there are implications for non-EU Members. For instance, an EU national who has obtained qualifications from a non-EU state, would be allowed to practice in the EU subject to the EU Members' regulations. Where the EU national has got his qualifications and training from a non-EU state, he would be allowed to work in any EU Member if the main portion of the training is undertaken in the EC.

Further, if an EU national has acquired qualifications and training in a third country, and has practised the profession for three years in a Member state that recognises the qualification, he becomes automatically eligible to benefit from the Directive. At the moment, non-EU nationals are not only excluded from the benefits of the Directive, but also third country national family members of migrant EU nationals who are beyond the scope of the Directive. Hence, if an Indian and French couple obtain an Architecture degree from India, the French spouse can work as an architect anywhere in the EC provided he/ she has worked three years in France and France recognises the diploma. This is not possible for the Indian spouse. Even worse, the situation is the same even if both got their degree from France. Hence, if a qualification from a third country

[108] This information has been received from Department of Commerce, Government of India sources

is recognized for a EU national by the EC, the same recognition should extend to a non-EU national as well. Not doing so would violate National Treatment.

EU law on Service Provision[109]

EU law distinguishes between service provision (Article 49) and establishment (Article 43). While service provision is temporary and occasional, establishment is more permanent. The difference between the two is based on three parameters: frequency, regularity and continuity. The conditions of entry for a service provider are much more stringent in the case of service provision. There is also the EU services directive and the country of origin principle, which was ultimately diluted. The country of origin principle was replaced by the country of provision regulation. This implied that the regulatory law of the country in which the service is provided would apply and not that of the country of origin of the service provider. However, it is agreed by the EC that restrictive conditions cannot be applied on nationals of third countries, if they are lawfully employed by a service provider established in another Member state. However, discrimination against third country Members continues.

The ECJ has also interpreted the provisions for movement of people in a liberal manner. While it has accepted that Members have the right to regulate so as to minimize the risk arising from non-EC nationals seeking access to the labour markets through service provision and the risk of exploitation of non-EC nationals who come to the EC, it has observed that the entry restrictions such as Visa and residence requirements are disproportionately excessive.

Long Term resident third country nationals (Directive 2003/109)[110]

If a non-EU national has resided legally in the EC for five years, he/she is entitled to long term resident status. This entitles the resident to security of residence and the right to move and carry out economic activities in all Member states. This includes the recognition of professional diplomas, certificates and other

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[109] This information has been received from Department of Commerce, Government of India sources

[110] This information has been received from Department of Commerce, Government of India sources

qualifications in accordance with relevant national procedures. However, the recognition procedures are onerous since a move from one Member State to another is treated as 'establishment' rather than service provision. Second, if the non-EU national moves for a short period from one EU member to another, this would be treated as service provision, but no residence permit will be given. Without a residence permit, the right to non-discrimination cannot be enjoyed. Article 101 of the Treaty on the Functioning of the European Union (TFEU) is stated as non-applicable on the insurance sector and the motor vehicle business[111]. India requestd EU to explain the rationale behind not covering the insurance sector and the motor vehicle business under the provisions of Article 101 of the TFEU.

The EU responded[112] that, in general, Art 101 TFEU equally applies to the insurance sector and to the automobile sector. However, the prohibition of anticompetitive arrangements set forth in Article 101(1) TFEU is declared inapplicable to certain specific categories of agreements between companies. For the insurance sector such block exemption is granted for the joint realization of compilations, tables and studies and co-(re)insurance pools. Such a block exemption regulation for the insurance sector had already been adopted in 1992 and was replaced in 2003. A new block exemption regulation (Regulation 267/2010) which came into force on 1 April 2010 extends, with some amendments, the exemption granted to forms of specific cooperation which the Commission considers indispensable in order for the insurance sector to carry out its business, including certain forms of exchange of information between insurers. The motor vehicle block exemption also provides such a necessary safe harbour by exempting a whole category of motor vehicle distribution and repair agreements from the prohibition laid down in Article 101(1). For both block exemption regulations, several conditions have to be complied with in order to apply the new regulation to such agreements, the most important being that Agreements can only benefit from the block exemption so long as they do not contain any serious restrictions of competition and meet the other conditions laid down by the Regulation.

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[111] WT/TPR/S/248 (2011)
[112] WT/TPR/M/248/Add.1 (2011)

Services Issues under Doha Development Agenda[113]

India is in the process of a dialogue with EC on market access in services. Most of the issues are negotiated multilaterally, but some are conducted bilaterally as well. The broad range of market access issues which India faces in EC is listed below.

- In Professional Services like Accounting, Auditing and Book keeping services, Architectural Services, Engineering Services and Integrated Engineering Services, the various restrictions in various Member States like conditions of nationality and citizenship, requirement of commercial presence for Mode 1 in some cases etc. are barriers to market access.

- The EC schedule has numerous restrictions in various sectors, where the EC itself is a demander. These sectors are:

    - Financial services (high capital requirements in the UK and Mode 1 restrictions in Insurance and Banking in Germany, Denmark, France, Italy and Finland)

    - Telecom Services (Mode 3 restrictions in Finland, France, Poland and Slovenia. FDI of 20% in France and 49% in Poland)

    - Retailing (economic needs tests in France and many other countries)

    - Energy (monopolistic dominance in many countries such as France and Germany)

- Insurance sector

    - Under mode 1, there is market access restriction on compulsory international aviation insurance in Austria, Denmark, Germany and Portugal. Portugal does not permit international marine insurance under mode 1, either. Denmark only permits indirect international marine

[113] This information has been received from Department of Commerce, Government of India sources

insurance under mode 1. Finland only permits insurers with their head office in the EC or their branch in Finland to provide cross-border marine, aviation and transport insurances covering goods and vehicle. Austria maintains national treatment limitation in the form of discriminatory premium taxation under mode 1. Spain and Italy offer "unbound" for actuarial professions.

- Under mode 2, Austria, Denmark, Germany and Portugal maintain similar restrictions to those under mode 1 while Finland, Spain, and Italy maintain different types of limitations.

- Under mode 3, nine Member States maintain market access restrictions, typically on the form of legal entities. For example, in Finland foreign branches cannot do statutory pension insurance. In Sweden, insurance broking undertakings not incorporated in Sweden may establish a commercial presence only through a branch. With respect to national treatment, Spain and Portugal impose discriminatory prior operational experience requirements on foreign branches. Greece requires that a majority of the board directors shall be nationals of the EC.

- Under mode 4, the categories of Contractual Services Suppliers (CSS) and independent professionals (IPs) are not offered.

- In banking and other financial services, there are restrictions ranging from residency requirements, form of establishment restrictions to scope of business restrictions and selling techniques restrictions.

- Three MFN exemptions are still maintained in the financial sector.

- EC had already made some improvements in its initial offer on Mode 4 relating to CSS and independent professionals. With respect to IPs, there is not much improvement in the revised offer as the duration of entry remains six months (India had requested for at least 12 months), the coverage of sectors has only been improved to a very limited extent (not covering accountancy, medical and dental services, tourism services, and the whole range of computer and related services requested for by India), the period of professional experience set at six years continues in spite of India's request

for reducing this period. The commitments continue to be subject to the application of a numerical ceiling and the modalities and level of application continues to be unspecified in the revised offer as in the initial offer. This detracts from the value of the offer considerably. Regarding CSS, there are again some minor improvements with respect to the coverage of sectors – book keeping services, environmental services, related scientific and technical consulting services have been added to the list of sectors covered. However, there is no increase in the duration of stay from the six months which was provided in the initial offer. Further, as in IPs these commitments are subject to the application of a numerical ceiling and has the same uncertainty since these are unspecified. There was a requirement of an open-tendering procedure or any other procedure which guarantees the bonafide character of the contract – this particular requirement of open tendering has been removed but the entire limitation has not been completely eliminated as India would have liked.

- There are no commitments in the Medical and Dental Services, Services provided by midwives, nurses, physiotherapists and paramedical personnel. These are sectors of great commercial importance for India in all modes of supply. In the case of Hospital Services, various restrictive conditions relating to nationality etc. continue.

- Large gaps in Cross Border Supply in professional services such as Accounting, Architecture, Engineering and Integrated Engineering, where even the big Members such as France, Italy, Austria, Greece, Portugal and Belgium are restrictive. Further, there are various restrictions in many Member States like conditions of nationality and citizenship, requirement of commercial presence for Mode 1, etc.

- In Maritime services, a plurilateral being cosponsored by the EC, there is a requirement of establishment of a registered company. It also has restrictions on Maritime Auxiliary Services in a number of sub-sectors. Mode 4 is Unbound.

- In Postal and Courier services the EC offer is vaguely worded and its scope and coverage is not clear. There is a requirement that licensing systems may be established for some sub-sectors for which a general Universal Service

Obligation exists. These licences may be subject to particular universal service obligations and/or financial contribution to a compensation fund. This leaves wide room for the EC to put in place any system and thereby restricts market access.

- In Energy services, the EC is the co-ordinator of the plurilateral request and yet has a highly restrictive market in many of the larger Members. In fact, state monopolies in France and Germany ensure that market access is severely restricted. In the Revised offer, there are gaps, both in the sectors covered and the geographical coverage of Members that have offered commitments.

- In Telecom, there are Mode 3 restrictions in Finland, France, Poland and Slovenia. In France, FDI restriction of 20% applies and in Poland the FDI limit is 49%.

- In Financial Services, the EC market is fragmented and many Members have not taken commitments in key financial services. Moreover, the entry barriers in the form of capital adequacy are very high (eg. It is Eur 5 million in the UK and even after that there is no certainty of getting a license to operate as a subsidiary). Similarly in Insurance and Banking, there are a number of restrictions of incorporation for Mode 1 in Members such as Germany, Denmark, France, Italy and Finland. The very purpose of remote supply is defeated if incorporation is required.

2.4. Other Barriers

Trade Remedy Actions[114]

Indian exports are affected by 13 trade remedy actions; out of these 8 are anti-dumping (AD) cases and 5 are anti subsidy (AS) cases. The details are given in Table 1 below.

[114] Inputs from Department of Commerce, Government of India (2013)

Table 1
Details of anti-dumping/Anti-subsidy investigation against Indian Exporters

Type of investigation	Products	Provisional measures in force from	Definitive measures in force from	Expiry date/ Comments
AD	Oxalic Acid	20 October 2011	18 April 2012	18 April 2017
AD	Polyethylene terephthalate (PET)	6 August 2000	1 December 2000	Expiry Review initiated on 24 February 2012 (Ongoing)
AS	Polyethylene terephthalate (PET)	6 August 2000	1 December 2000	Expiry Review initiated on 24 February 2012 (Ongoing)
AD	Fatty Alcohols	16 June 2011	11 November 2011	11 November 2016
AD	Graphite Electrodes	20 May 2004	18 September 2004	17 December 2015
AS	Graphite Electrode Systems	20 May 2004	19 September 2004	16 December 2015
AD	Synthetic Fibre Rope	9 January 1998	24 June 1998	23 December 2013
AD	Sulphanilic Acid	5 April 2002	26 July 2002	17 October 2013
AS	Sulphanilic Acid	5 April 2002	26 July 2002	18 October 2013
AD	Stainless Steel Wires	3 May 2013	Nill	Initiated on 10 August 2012 Investigations ongoing
AS	Stainless Steel Wires	3 May 2013	Nill	Initiated on 10 August 2012 Investigations ongoing
AD	Glass fibres Wire Mesh	Initiated 10 April 2013	Nill	Anti circumvention investigation
AS	Stainless Steel Bars	29 December 2010	28 April 2011	9 August 2012 Initiation of Partial interim review of the countervailing measures concerning Viraj Profiles Ltd

Source: Department of Commerce, Government of India

State Aid and Subsidy

WTO Secretariat Report[115] reveals that EU provides export subsidies on many agricultural products. In January 2009, export subsidy was reintroduced for dairy products in response to low world price which was subsequently removed in October 2009. India showed its concern at the use of export subsidies by EU especially when world prices were low since such subsidies distorted international trade. India wanted to know whether EU intended to apply a self-imposed moratorium on such subsidies in future given the spirit of the Doha negotiations wherein there was an in-principle agreement to eliminate export subsidies. EU responded that the use of export refunds by the EU is in full compliance with its WTO obligations. Their use is very limited and less than 1% and 0.5% of exports of European agricultural products benefited from export refunds in 2009 and 2010 respectively.

The same WTO Secretariat Report also indicated that blue box support had declined since the marketing year 2000/01. However, within blue box, EU was providing significant support to a few crops especially cotton. The value of cotton production in 2005-06 was € 1231.2 million and blue box support to cotton was €255 million. India expressed its concern at the adverse effects of the large quantum of subsidy EU gave to cotton sector on world cotton prices. India noted with concern that developed countries had tended to maintain huge subsidies in favour of their cotton growers which severely affected the livelihood of some of the poorest economies and people of the world. India asked whether EU proposed to revisit its subsidy programme in cotton in order to reduce the distortions being caused in international trade in cotton.

EU responded that it noted India's observation on EU cotton support. The EU's share in world trade in cotton is marginal at approximately 1%. EU clarified that it has already implemented a far-reaching cotton reform since 2006: the most trade-distorting subsidies to cotton production have been fully eliminated, the EU market for cotton is already duty-free and quota-free, and there are no export subsidies for cotton.

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[115] WT/TPR/S/248 (2011)

Farms Subsidies on Unmanufactured tobacco[116]

The European Union has sustained farm support to tobacco in the form of subsidies which violates the spirit of WTO. Out of estimated 40 billion Euros of annual subsidies to farmers in European Union, about one billion Euros is spent on tobacco growers. It is claimed that tobacco production in EU is sustaining on subsidies alone and if these subside are withdrawn, it is likely to result in opening up of opportunities for enhancing exports by India. The subsidies are being discontinued in a phased manner.

Mandatory Standards, Labelling, Testing Requirements in the EU[117]

The EU has laid down different labelling requirements, which are imposed by different EU member countries. These are for finishing, dyeing and sizing of the textile. The amount of hazardous materials used during the production is at the minimum level i.e. below the determined limit values, Label granted to textile products containing organic fibres, Clothing labels must provide the country of origin, cleaning instructions and the percentage of textile material etc. For instance, the Directive 96/73/EC concerns methods for the quantitative analysis of certain binary textile fibre mixtures, including the preparation of test samples and test specimens and Directive 96/74/EU concerns textile names and requires the labelling of the fibre composition of textile products. It stipulates for checks on whether the composition of textile products is in conformity with the information supplied. For instance Indian exports were rejected due to improper labelling and/or presence of chemicals beyond permissible limits in Greece[118].

EEPC India has noted that the third party testing requirement is highly burdensome. While most of the countries recognize CE Conformity under self-declaration, the importers stress for third-party certification or adherence to local or national standards for items such as Electrical Heating and Tracing Cables for Domestic, Commercial and Industrial Heating Applications. Having

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[116] This information has been obtained from Department of Commerce, GoI

[117] This information has been obtained Ministry of Micro, Small and Medium Enterprises, GoI

[118] Information has been obtained from Ministry of External Affairs, Government of India

a library of Standards for specific countries is almost impossible for any Indian manufacturer owing to the high costs involved[119].

Non-Recognition of tea testing laboratories of India

In India there are a few NABL[120] (National Accreditation Board for Testing and Calibration Laboratories) accredited laboratories engaged in testing pesticide residue in respect of tea for exports to different countries. But, EU countries do not accept test reports of these labs because for EU states, it is required that such certificates have to be issued by European laboratories.

Lack of Mutual Recognition for Pharma Exporters to Germany

Indian Pharma exporters reported that they face barriers on account of lack of Agreement on Mutual Recognition of Good Manufacturing Practices (GMP) in Germany[121].

VAT Refund in Germany

No VAT refunds are permitted for payments made while participating at a German Fair by Indian Companies producing items in the category Aluminium tubes and pipes (7608), on the ground of "different practices in different States of India". This is contrary to the practice being followed by several other EU members. Several other countries have entered into reciprocal understanding for refund of VAT. In Europe, the U.K. is also refunding the entire amount of VAT to Indian businessmen for participation in their Trade Fair in the UK[122].

Absence of Time limit for Approval

In addition to being entered in the relevant list, countries seeking to export animals and products of animal origin to the EU must obtain approval for their

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[119] This information has been obtained from EEPC India

[120] NABL is an autonomous body under the Department of Science & Technology, Government of India, and is registered under the Societies Act

[121] Information has been obtained from Ministry of External Affairs, Government of India

[122] This information has been obtained from Engineering Export Promotion Council (EEPC India)

residues monitoring programme[123]. The Commission has published guidance on the criteria for these approvals. However, there are no statutory limitations regarding the duration of the process to approve first-time imports of live animals and products of animal origin. India has noted that absence of statutory time limits in giving approvals to first time imports of live animals can result in long delays in such approvals which will constitute a barrier to trade. It has asked whether EU proposes a statutory time limitation for according approvals to such imports[124].

The EU responded that the time for the approval of first-time imports of live animals and products of animal origin from a certain third country is dependent on the co-operation and performance of the third country concerned. If the information asked for in the General Guidance on EU import and transit rules for live animals and animal products from third countries (see at: http://ec.europa.eu/food/international/trade/guide_thirdcountries2009_en.pdf) is made available rapidly and completed to the Commissions services, the Commission inspection service of the Health and Consumers Directorate General, DG SANCO (FVO - Food and Veterinary Office located in Grange - Ireland) can carry out an inspection in the third country concerned fast. If the information provided is incomplete, the FVO needs to ask for clarification and completion of the information until an inspection can be planned. The outcome of the inspection in the third country concerned can influence the time for listing the relevant third country for a specific commodity as well. This time period would be shorter if no shortcomings are found during the inspection than in a case where shortcomings are found. In addition, the interested third country needs to send its residues control programme to the FVO, which will evaluate the programme and if necessary ask more detailed information or clarifications from the third country concerned.

Stockholm Convention[125]

Europe is increasingly using Stockholm Convention to apply trade restrictive measures on certain high volume low priced generic chemicals manufactured

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123 WT/TPR/S/248 (2011)

124 WT/TPR/M/248/Add.1 (2011)

125 This information has been obtained from Department of Chemicals & Petrochemicals

outside Europe. The EU stopped production of Endosulfan in 2006 due to commercial reasons and immediately in 2007, eliminated production and use of Endosulfan which ranks among the top 10 insecticides used in the world. Even the technical and procedural requirements of Stockholm Convention are being flouted in persistent Organic Pollutant Review Committed (POPRC) decision making meetings. For example, the EU's proposal for Expert Review concerning Endosulfan tabled at POPRC 3 was proposed to be postponed to POPRC4 on the demand of POPRC Members from the EU whereas as per Article 8 of the Stockholm Convention, POPRC can take a decision only for either moving for Annexure-E-review or rejecting the proposal. Even at POPRC 4 and 5, the decisions were taken by voting as against the requirement of decisions to be taken by consensus on all matters of substance as per Rule 45 of the Rules of the procedures applicable to Conference of Parties (COP) and its subsidiary bodies including POPRC. In view of the above, some Indian export bodies report that Stockholm Convention is being used to put non-tariff barriers such as product bands, phase out of import/ export restrictions.

2.5 USTR on Market Access Barriers in EC[126]

The United States Trade Representative Report on SPS and TBT (2013) on EU has a detailed description of market access barriers for its exports in the EU, some of which are relevant for India also. The restrictions on import on the basis of precautionary principle have been a bone of contention between the EU and the US. US alleged that many US exporters view the EU's growing use of the precautionary principle to restrict or prohibit trade in certain products, in the absence of a scientific justification for doing so, as a pretext for market protection. Import of biotechnology products to EC face severe restrictions, which are of concern to India also. The problems faced in this regard by the US are given below:

a) Agricultural Biotechnology: European Union (EU) measures governing the importation and use of Genetically Engineered (GE) products have resulted in substantial barriers to trade. Restrictions on GE products can result in import prohibitions on U.S.-produced commodities and foods, as well as

[126] United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

prohibitions on the cultivation of GE seeds. EU policies restrict the importation and use of U.S. agricultural commodities derived from agricultural biotechnology. These restrictions include but are not limited to:

- Delays in approvals of new GE traits despite positive assessments by the European Food Safety Authority (EFSA);
- Imposing commercially infeasible requirements on GE content in food products under EU Traceability and Labeling (T&L) regulations;
- Prohibitions on importation of GE commodities by certain EU Member States;
- Difficulties in applying for registration of GE commodities in the National Seed Catalog; and
- Application of unnecessary and burdensome coexistence requirements to planting of GE crops alongside non-GE crops by certain EU Member States.

b) Poultry: In 1997, the EU began blocking imports of U.S. poultry products that had been processed with Pathogen Reduction Treatments (PRTs). The EU has further prohibited the marketing of poultry as "poultry meat" if it has been processed with PRTs. In late 2002, the United States requested the EU to approve the use in the processing of poultry intended for the EU market of four PRTs that are approved for use in the United States: chlorine dioxide, acidified sodium chlorite, trisodium phosphate, and peroxyacids. Between 1998 and 2008, various EU agencies issued scientific reports concerning poultry processed with these PRTs. Taken together, the reports conclude that residues of these PRTs do not pose a health risk to consumers. In May 2008, the European Commission, after years of delay, prepared a proposal that approved the use of the four PRTs for processing of poultry, but imposed highly trade restrictive conditions that did not appear to be based on science. EU Member States rejected the Commission's flawed proposal, first at the regulatory committee level and then, in December 2008, at the ministerial level. In January 2009, the United States requested consultations with the EU on whether the EU's failure to approve the four

PRTs was consistent with the EU's commitments under various WTO agreements, including the SPS Agreement. The United States and the EU held those consultations in February 2009 but failed to resolve the matter. In November 2009, the WTO Dispute Settlement Body established a panel to address the matter. That litigation is pending.

c) Labeling: EC Regulation No. 1829/2003 addresses GE crops for food use and for animal feed. The United States, along with other WTO Members, has expressed concerns in TBT Committee meetings, most recently in March 2013, regarding the requirement in Regulation No. 1829/2003 that honey containing pollen derived from GE plants must be labeled as such in accordance with EU regulations. This requirement was the result of the ECJ 2011 decision in Case C-442/09 that interpreted EC Regulation No. 1829/2003. The United States said that they will continue to monitor this issue in 2013. In September 2012, the EU Commission proposed an amendment to Directive 2001/100/EC to clarify that pollen is not an ingredient of honey, but it has not been finalized. In addition, the European Food Safety Authority issued an opinion that pollen from the genetically engineered corn approved for cultivation in the EU was equivalent to pollen from conventionally bred varieties of corn. The United States raised this issue during the March 2013 TBT Committee meeting. In addition, industry has raised concerns on several occasions about the impact the EU's restrictive stance on biotechnology has had on U.S. exports of soy, grains, corn, and other crops. The United States have repeatedly raised concerns and objections with the EU regarding the EU's biotechnology regulations and legislation and their detrimental effect on their exports.

d) REACH Regulation: The EU's REACH regulation imposes extensive registration, testing, and data requirements on tens of thousands of chemicals. REACH also subjects certain chemicals to an authorization process that would prohibit them from being placed on the EU market except for specific uses. The U.S. industry is concerned that REACH requires polymer manufacturers and importers to register reacted monomers in many circumstances. This is problematic because reacted monomers no longer exist as individual substances in polymers and would not create exposure concerns in the EU. In addition, EU polymer manufacturers generally can rely on the registrations of their monomer suppliers and do not need to be

individually registered. Since the US monomer suppliers are generally not located in the EU, the US polymer producers cannot likewise rely on registrations of their monomer suppliers. As a result, the reacted monomer registration requirement provides an incentive for distributors to stop importing polymers and switch to EU polymer suppliers. The United States has pressed the EU to eliminate the registration requirement.

Moreover, REACH contains notification and communication obligations with respect to substances on the Candidate List, a list of substances that may become subject to authorization procedures. Differing interpretations between the Commission and several Member States regarding when these obligations apply has created uncertainty among industry over how to comply. The Commission has indicated that notification and communication obligations apply if a substance on the Candidate List is present in an article in concentrations above 0.1 percent of the article's entire weight. However, Member States have stated that these obligations should apply when a substance on the Candidate List is present in concentrations above 0.1 percent of the weight of the article's components or homogenous parts. In 2010, these Member States pushed the Commission to reverse its position as part of what may have been an effort to seek to protect the EU market from imports. Departure from the Commission's interpretation would present a much more difficult compliance problem for U.S. industry since it would require companies to perform an analysis of individual component concentration levels in their products, which would be extremely time-consuming and burdensome. Given that an alteration of the EU's approach could substantially disrupt U.S. exports, the United States has asked the EU to ensure that all Member States follow the Commission's current interpretation.

Other problematic issues with the EU's REACH regime include inadequate transparency and differing registration requirements for EU and non-EU entities. In general, the European Commission regularly publishes notices of draft EU measures in the Official Journal of the European Union and sends notifications to the WTO Secretariat. However, U.S. and other non-EU interested persons allege such notifications occur far too late in the process for them to familiarize themselves with the new requirements and submit timely comments. In advance of these notifications, European Commission trade and regulatory officials consult primarily with EU stakeholders.

3. Japan

Indian concerns were raised during Japan's TPR in 2009[127], 2011[128] and 2013[129].

3.1 SPS - TBT Issues

General Issues

Indian exports to Japan are affected by a number of issues, which include SPS-TBT measures and high transaction costs. The inspections conducted by the Japanese authorities with regard to the place of origin, labeling in case of fruits, vegetables, fish, meat, etc. is a very strong non-tariff barrier. The rules governing imports of fruits and vegetables into Japan are excessively restrictive and at times stricter than those applicable in other developed nations. In case of processed food items, the presence of additives used for preservation or enhancing the product quality and life and otherwise considered safe are objected to by authorities in Japan. Meat and meat products exports to Japan face difficulties on account of stipulations that ban use of natural and synthetic hormones in livestock production. The distribution channels in Japan are extremely complex and highly regulated. As a result transportation and distribution costs for certain products like rice are excessive and make the same exporting to Japan extremely difficult.

Japan responded that helping developing countries to maintain and expand market access opportunities for their products is indeed one of the key objectives of the Development Initiative for Trade, announced by Japan in December 2005, and Japan will continue to make efforts for the implementation of this initiative. For example, Japan has provided technical assistance through various channels such as contributions to the Global Trust Fund and international organizations.

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[127] The full text of questions and answers are available in WT/TPR/M/211/Add.1 (2009)
[128] The full text of questions and answers are available in WT/TPR/M/243/Add.1 (2011)
[129] The full text of questions and answers are available in WT/TPR/M/276/Add.1 (2013)

The WTO Secretariat report[130] of 2011 states that about 46% of Japanese Industrial Standards (JIS) were aligned to international standards in 2009 (unchanged since 2008)[131]. Although Japan maintains that its SPS measures are based on scientific assessment of risks, it has apparently not conducted cost-benefit analysis in this connection. India raised the issue with Japan in TPR of 2011.

Japan replied that regarding JIS, among those which have corresponding international standards, 48% of them are fully consistent with international standards; another 48% is comparable though partly modified from international standards in order to implement them in Japan by setting more detailed provisions. Consequently, 96% of JIS are equivalent to international standards. With the entry into force of the WTO/TBT Agreement in January 1995, Japan has been taking further steps to reassure consistency with international standards in order to respond to requests in and outside the country and it will continue this policy. Japan further stated that as for the cost-benefit analysis on SPS measures, the Government of Japan understands that quantifying costs and benefits to assess regulatory proposals is generally important, but does not conduct it for the SPS measures. Japan reiterates that the process for approval for importing designated items to be quarantined involves consultations with relevant domestic industries and consumers as well as requesting countries, in order to properly reflect the opinions of stakeholders. Japan takes into consideration cost-benefit analyses conducted by the requesting countries, if they are provided.

Export of Pharmaceuticals

Indian exporters face a number of difficulties while exporting 'generic formulations'. Japan's pharma market is around US$ 60 billion. Out of which around US$ 10 billion is being imported. But for India access to Japans' market is nearly non-existent due to non-tariff barriers. Some items in this category need confirmation at customs as these items come under import surveillance. Further Indian manufacturers reported difficulties in product registration in Japan largely because the product registration guidelines are reported to be available only in Japanese language.

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130 WT/TPR/S/243 (2011)
131 WT/TPR/S/243 (2011)

Japan responded that it is inappropriate to reform this area solely for export facilitation purpose from developing countries, since pharmaceutical regulations are implemented in order to safeguard public health in Japan. In the Pharmaceutical Affairs Act in Japan, marketing approval holders have an obligation to undertake quality control and post-marketing safety management for their products; applications for marketing approval must then be submitted in Japanese. Because the official language to be used in the public administration processes in Japan is Japanese, any official document, including the marketing approval application, must be in Japanese. Likewise, the official text of the guidelines issued from Ministry of Health, Labour and Welfare (MHLW) is in Japanese. Japan also indicated that it might consider translating the guidelines in future as a service for the users.

India again raised this issue in TPR of 2011. Japan responded that Japan participates in the International Conference on the Harmonisation of Technical Requirements for the Registration of Pharmaceuticals for Human Use (ICH) to achieve greater global harmonisation in pharmaceutical regulations. Japan also clarified that the main procedures required to market pharmaceuticals in Japan are as follows: A person who wants to market a drug must obtain a license for marketing business. A person who wants to manufacture a drug must obtain a license for manufacturing drugs (or an accreditation for foreign manufacture if he/she intends to manufacture it in foreign countries). A person intending to market a drug must obtain marketing approval for each product[132].

Another issue facing Indian Pharma exporters is the requirement that the pharmaceutical export companies have to keep an inventory of product for five years which result in huge losses afterwards. More over the exporting companies feel that mandatory bio equivalence testing on the Japanese population for each generic product also increases the cost tremendously. Although Japanese law allows for generic medicine substitution, in practice doctors do not prescribe substitution drugs.

Japan replied that the government plans to expand the share of generic medicine in the pharmaceutical sector up to more than 30% by the year 2012. To reach the 30% target share by 2012, the MHLW has proposed an 'Action Program for

[132] WT/TPR/M/243/Add.1 (2011)

Generic Medicine'. This program is a work plan for both the government and for the industry, one which aims to enable generic medicine to be used by patients and the health care professionals with confidence. Unless the prescription carries a prescriber's signature in a column entitled 'Dispense As Written' the patient, by request, can receive generic medicine as a substitution at a pharmacy. With generic medicine it is necessary to keep an inventory of a product for at least five years in order to maintain a stable supply.

The WTO Secretariat report[133] states that Pharmaceutical firms are required to file all registration documents in Japanese only with Pharmaceuticals and Medical Devices Agency (PMDA) for introduction of product in Japan. This is another difficulty faced by Indian exporters. Replying to query from India regarding this, Japan said that the Government of Japan accepts some dossiers in English for the marketing approval of pharmaceuticals. However, at this point, it is difficult to allow applicants to submit all the dossiers in English because it might lead to prolongations of review time as it would take more time to comprehend the data[134].

It has also been pointed out that market approval regulations for pharmaceutical products in Japan are more stringent than the US FDA regulations. All these factors amount to very low export penetration of Indian generic medicines into Japan.

Exports of agricultural and meat products

Japan is a net food importer. But India's agricultural and meat exports to Japan are very low. This is attributed to various restrictions imposed by Japan. Indian tea, rice and wheat producers say that Japan imposes very strict regulations with regard to pesticide and chemical residues in these items. Similarly, meat and meat products exports to Japan face difficulties on account of stipulations that ban use of natural and synthetic hormones in livestock production**.** It is not clear whether these SPS requirements are science-based and aligned with which specific international standard.

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[133] WT/TPR/S/243 (2011)
[134] WT/TPR/M/243/Add.1 (2011)

Japan replied that its positive list system for regulation of agricultural chemicals (pesticides, veterinary drugs including hormones and feed additives) has been introduced for the protection of consumer health based on scientific and technical considerations. This regulation is equally applied to all food items without distinction between domestic and imported products. MRLs established in the process of implementing the system are based on Codex standards and other legitimate international standards. At each stage of consideration of MRLs, Japan has published draft documents and sought comments from inside and outside the country. Japan notified these documents to WTO as G/SPS/N/JPN/145, in accordance with the WTO/SPS Agreement. Following this procedure, Japan has given detailed explanations about the system to foreign countries before and after implementation of the regulation. Given the scientific validity of the system and international harmonization of Japan's standards, it does not believe that the regulation system has created any trade barriers.

Regarding natural and synthetic hormones, Japan responded that it is not clear what individual substances are being referred to. Japan's regulations allow for residue level occurring in nature for Estradiol 17 B, progesterone and testosterone. For Trenbolone acetate, melengestol acetate and Zeranol, which are synthetic hormones, Japan provides MRLs. If the Indian agricultural industry has any request for addition of MRLs for other substances than these compounds or any other revision of the current standard, they can contact the Ministry of Health, Labour and Welfare (MHLW) of Japan through the Indian Embassy in Tokyo. The MHLW has drawn up a guidance procedure asking for the required data sets.

In TPR of 2013[135], India raised a concern that from 1st August 2012, Japan has introduced a mandatory testing of imports for residue of the pesticide Ethoxyquin in the consignment of shrimp imports. The threshold level prescribed for the residue of the pesticide is 0.01 ppm. India has asked for clarification regarding basis of adopting this standard.

Japan clarified that when it introduced the positive list system for agricultural chemicals in 2003, there was no Codex MRL set for Ethoxyquin in shrimp and major foreign countries did not have national MRLs for this compound in

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[135] WT/TPR/M/276/Add.1 (2013)

shrimp. In addition, no request was made by domestic industries to set a specific MRL for shrimp. This is the reason why there is no MRL for Ethoxyquin in shrimp in Japan. As a result, the uniform level (which India calls the default standard) 0.01 ppm is applied.

The uniform level was set as the amount unlikely to cause damage to human health, based on the acceptable exposure levels evaluated by JECFA (Joint FAO/ WHO Expert Committee on Food Additives) and US FDA (Food and Drug Administration). The level is the same as the EU default level.

In addition, Japan is reviewing the current MRLs for Ethoxyquin in shrimp. Since the Food Safety Commission of Japan (FSC) has raised a concern on potential genotoxicity during the risk assessment, the Ministry of Health, Labour and Welfare (MHLW) is carrying out additional studies to obtain the data on genotoxicity. The FSC intends to proceed with risk assessment based on the study results by the MHLW.

3.2. Tariff Issues

Unbound tariffs

In FY2008, Japan's tariff schedule comprised 8,841 lines at the HS nine-digit level. Japan has bound 98.8% of lines. Unbound lines relate mainly to fisheries (fish, crustaceans, and seaweed), petroleum oils, and wood and articles thereof which constitute important items of India's export basket.

Japan responded that these unbound tariffs are consistent with WTO Agreements and it will continue to engage in discussions in the WTO in a constructive manner and set appropriate types and level of tariffs, while considering the progress and results of DDA negotiations.

High Tariffs

Import of footwear items to Japan face higher level of tariff where India has high export competitiveness. Simple average tariffs are considerably higher for footwear. Leather footwear items are subject to quotas. Under the TRQ (pooled quota) system, an import duty of 17.3% to 24% is levied on import of footwear

within the quota threshold which is calculated on the basis of 12,019,000 pairs[136]. Import exceeding this quota threshold is subject to higher rate of import tariff of 30%. The TRQ system tends to limit the orders of the Japanese buyers and therefore acts as a non tariff barrier (NTB) to the export of footwear to Japan. Japan responded that the TRQ system is consistent with WTO Agreements. With regard to the tariff quotas (TQ) on leather and leather footwear, it said that it has no plan to reform the existing TQs due to historic and social difficulty confronting this sector. Japan's reluctance stems from the fact that Japan's footwear manufacturers are mostly medium and small sized business that lack international competitiveness.

It is gathered that after the entry into force of Indo-Japan Comprehensive Economic Partnership Agreement (CEPA), duties on several leather products have come down significantly. However Indian leather industry has conveyed that there is scope for further reduction particularly for goods like leather garments, leather gloves, leather goods and accessories, footwear and footwear components where Japan is not a major producer but India is.[137]

India has also pointed out that TRQs which apply mainly to agricultural products including rice, milk, dairy products, prepared edible fat, dried leguminous vegetables, wheat, barley, ground nuts, tubers of konnyaku, starches, and silk worm cocoons and raw silk, cover 1.7% of all tariff lines. This also impairs the competitive edge of developing countries like India.

Japan replied to this by stating that its TRQ regime is consistent with WTO Agreements including the GATT 1994. And the TRQ regime do not necessarily disadvantage exporting countries including developing countries.

Tariff Escalation

The data on tariff escalation show no overall consistent pattern other than that the high level of protection granted to agricultural products results in higher overall tariff protection for primary products than for semi-processed products.

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[136] This information has been obtained from Council for Leather Exports (CLE), India.
[137] Inputs from Council for Leather Exports (CLE), India

Tariff escalation from semi- processed to final goods is present in some sectors, notably textiles, petroleum refineries, and non-electrical machinery. In other sectors, such as food products and manufacturing, leather products, wood and paper products, other chemicals, non-metallic mineral products, and metal products, protection for fully processed goods is lower than for semi- processed products, while escalation from primary to semi-processed and final products is evident only for industrial chemicals and rubber. This pattern of tariff escalation is trade distorting for countries like India.

Japan responded that it sets an appropriate level of tariff rate on each product by taking into account the situations of domestic industries. Issues including tariff escalation are one of the elements of agriculture and NAMA negotiations. Japan will consider the result of the DDA negotiations when addressing these issues in the future.

3.3 Issues in Services

Mode 2 and Mode 4 Services

There are barriers to supply Health services in Mode 2 and Mode 4. Given the ageing population of Japan, the demand for medical services is going to put pressure on the existing health infrastructure in the country and this can to some extent be relieved by easing rules for the movement of trained professionals, nurses, physicians etc from India to Japan. India also faces problems in obtaining visas for employees to do on-site work in Japan especially by companies in the IT sector**.**

Japan replied to this by saying that if medical services are not provided appropriately, the public will be exposed to serious and apparent risks for their lives and bodies. Because of the public's high concern in order to assure the confidence of their nationals for medical services, Japan cannot easily accept Mode 4. As for Mode 2, there is no barrier in Japan's belief.

Certain services continue to be subject to, inter alia, licensing and restrictions on foreign investment; as in many other sectors, they are also faced with the generally high cost of doing business in Japan, which has been considered as one of the main deterrents to inward FDI in services and thus competition in

the services sector[138]. India requested Japan to take time-bound steps to remove restrictions on foreign investment in certain services sectors and reduce high cost of doing business in Japan.

Japan responded that according to a survey conducted by the Ministry of Economy, Trade and Industry in FY 2008, the three obstacles to business in Japan generally cited as a major factor by foreign affiliated companies are: the difficulty of hiring eligible employees, the high business cost and the high level of customer demand and market competitiveness. In order to solve these problems, a "program for promoting Japan as an Asian business hub and foreign direct investment into Japan" is being drawn up. This program will include system reforms and other measures to ensure the smooth flow of people, goods and funds with the aim of making Japan's business environment more appealing.

Foreign Direct Investment and Other regulatory Restrictions

According to the WTO secretariat report[139] of 2011, besides the approval (prior notification) requirements under the Foreign Exchange and Foreign Trade Act, various other laws stipulate specific restrictions on inward FDI in certain sectors, including the acquisition of land, mining, oil industry, telecommunications, and transport. As developing mineral resources in Japan are deemed to serve the national interest, mining rights (including those for the oil industry) are granted only to Japanese citizens or juridical persons, in accordance with Article 17 of the Mining Act. In telecommunications, on the grounds of national security, foreign capital participation in NTT Corporation, which holds all the shares of NTT East Corporation is restricted to less than one third; under the Radio Act, foreign ownership in radio stations is limited, in principle, to less than one third of voting rights. Ships not flying the Japanese flag are prohibited from entering Japanese ports that are not open to foreign commerce and from carrying cargoes or passengers between Japanese ports, unless otherwise specified in Japan's laws and regulations, or international agreements to which it is a party. Permission to conduct air transport business as a Japanese air carrier is not granted to a legal person of which more than one third of the members of the

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[138] WT/TPR/S/243 (2011)
[139] WT/TPR/S/243 (2011)

board of directors comprise natural persons or entities that do not have Japanese nationality or to a legal person of which more than one third of the voting rights are held by the foreign persons or entities. In addition, the ratio of shares that can be owned by foreign entities to total shares in certain companies are restricted: less than 20% for TV stations, less than one third for the Nippon Telegraph and Telephone Corporation, and less than one third for companies approved by the Government to conduct aviation and transportation services. Selected products that are deemed convertible to military equipment are included in the list of products subject to approval, as stipulated in the Appendix to the Export Trade Control Order, for reasons of national security[140]. India showed its concern about the policies in TPR of 2011 and asked whether Japan proposed to ease restrictions. Japan responded that it takes into account the fact that the regulations should be more predictable while maintaining national security, public order, and so on and the concerned ministries will continue individual studies on the appropriate form of Foreign Direct Investment regulations as an exception to the principle of non-discrimination between domestic and foreign investors.

Withholding Tax

Withholding tax is a major issue in service exports to Japan. Indian IT service companies have complained about the 15% withholding tax imposed by Japanese authorities on payments from Japanese firms to the Indian IT service companies labeling the same as 'fees for technical consultancy'. This tax is a major non tariff barrier faced by exporters of IT services.

Japan responded that when a Japanese company entrusts software development to an Indian IT service company, according to the provisions concerning royalties and fees for technical services of the tax treaty between India and Japan, fees paid by the Japanese company for the software development may be taxed in Japan, Japan being the source country of the payments. With regard to this provision of the treaty, in the course of negotiations, the Indian delegation strongly insisted on leaving the provision unchanged while the Japanese delegation requested its deletion and as a result it was determined to reduce the tax rate from 20% to 10%. Japan understands that both sides reached a mutual

[140] WT/TPR/S/243

understanding concerning taxation on fees for technical services in the protocol amending the tax treaty.

Difficulty in obtaining visa for employees to do on-site work in Japan

India pointed out that obtaining visas for employees to do on-site work in Japan is a problem faced especially by companies in the IT sector.

Japan replied that the nature of the problem mentioned in the question is not specific but ambiguous. First of all Japan is promoting the acceptance of IT engineers from abroad under the 'e-Japan priority policy program'. The criteria for the Status of Residence of Engineer was partially amended in December 2001 to ease the standards for accepting IT engineers from abroad, namely foreign nationals who have passed foreign examinations or obtained qualifications on information processing skills, which are mutually certified by Japanese IT related examinations or qualifications and are designated by the Minister of Justice in the Official Gazette, may enter Japan irrespective of whether or not they satisfy the criteria for landing permission for engineer, i.e., having graduated from or completed a course at a college or acquired equivalent education or having at least 10 years work experience in the field. The engineer visa may be issued within 5 working days upon bona fide application, in case aforementioned requirements are fulfilled and the foreign IT engineer holds a certificate of eligibility and is employed by an IT company in Japan. In case an IT engineer employed by a foreign based company makes a short term business trip in order to install or maintain machines/systems in Japan, a temporary visitor visa can be issued within 5 working days upon bona fide application. If such an engineer meets certain requirements, multiple entry visa can be issued.

3.4 Other Barriers

Requirement of Local Content

The Indian companies face barriers in sectors like pharmaceuticals in the form of a requirement of partnering with Japanese enterprise/trading houses for local marketing. This escalates costs for the Indian manufacturers as they do not have a product profile at the beginning.

Japan responded that in order to market medical products such as pharmaceuticals and medical devices in Japan, it is necessary to obtain licenses to ensure quality and safety under the Pharmaceutical Affairs Law (PAL). A minimum requirement for the acquisition of such licenses is compliance with the various standards of PAL. It is not possible to mitigate these requirements for a specific exporting country's sake, as they are in place to safeguard the safety of public health.

GSP Scheme

Items such as dairy products, some footwear, leather products[141], textiles, and clothing are not included in the GSP scheme for developing countries and are therefore subject to applied MFN rates of duty. These items are important for the export basket of India.

Japan replied that it grants preferential tariff treatment under its GSP scheme to 141 developing countries and 14 territories for 337 agricultural and fishery products and 3217 industrial products at the nine-digit tariff level. Japan will continue to examine all aspects of the GSP scheme for a possible revision of the scheme.

Government Procurement

The WTO Secretariat Report[142] points out that low level of Japanese procurement is awarded to foreign suppliers due to wide range of barriers including lack of transparency, qualification requirements and the extensive use of single tendering. India asked Japan to explain how Japan proposed to address these issues. In response Japan said that it is conducting its government procurement appropriately based on the principles of national treatment and non-discrimination. Japan considers that the statistics are the result of an appropriate procurement process based on these principles[143].

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[141] WT/TPR/M/243/Add.1
[142] WT/TPR/S/243 (2011)
[143] WT/TPR/M/243/Add.1 (2011)

Third-Party Certification requirement[144]

EEPC India has noted that the third party testing requirement in Japan is highly burdensome. While most of the countries recognize CE Conformity under self-declaration, the importers stress for third-party certification or adherence to local or national standards for items such as Electrical Heating & Tracing Cables for Domestic, Commercial & Industrial Heating Applications. To have a library of Standards for specific countries is almost impossible for any Indian manufacturer owing to the high costs involved.

Anti Counterfeiting Trade Agreement (ACTA)[145]

Through ACTA, developed countries are seeking to ensure higher level of enforcement of IPRs by participating countries than that provided under TRIPS. It defines the meaning of Counterfeit i.e. "any drug which is not originating from the original manufacturer, as the drug as well its history will be rendered counterfeit". Any goods passing through such member countries destined for any country where it does not violate patent will be seized if it violates patent in US or Europe. It is alleged that ACTA is violating WTO provisions but EU testifies it as WTO compliant.

Economies linked to ACTA account for 70% of the global trade. The ACTA negotiations were concluded at the end of November 2010. Nearly 21 countries are members of this agreement. This agreement will come into force after four signatory countries ratify it. At present, Japan is the only country to have ratified it. The EU had initialled the text but subsequently the European Parliament rejected ACTA in July 2012. US and Canada are also working towards its ratification. ACTA is binding only on those countries that sign and ratify it and does not create legal obligations on non-members. However, the ACTA provisions will apply to infringements which take place in the territory of a signatory state even if the infringement is carried out by an infringer originating from a third country not party to ACTA. This will constitute a serious trade barrier.

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144 This information has been obtained from EEPC India

145 This information has been obtained from Indian Drugs Manufacturers Association, New Delhi

State Aid and Subsidy in Agriculture

Labour productivity in agriculture remains much lower than in the rest of the economy, and the Government of Japan has continued to move away from price support toward income support. However the sector continues to receive substantial government support, which involves, inter alia, a relatively higher average applied MFN tariff rate compared with other sectors, tariff quotas, income support, and, in some sub-sectors, production controls.[146] Responding to Indian query in TPR of 2011 about this, Japan said that it has been undertaking certain measures like Farmland consolidation, Infrastructural services and Research and development to increase agricultural productivity[147].

The current total aggregate measurement of support in Japan was ¥517.2 billion in 2006. According to the OECD, "total support estimates" for agriculture for 2006-08 were 1.1% of GDP, only slightly less than the sector's contribution to GDP, which was 1.2% in 2009[148]. India requested Japan to explain how these measures were affecting the market access prospects of agricultural products from developing countries[149]. Japan responded that it is the largest net food-importing country in the world, and depend on imported food for around 60% of their calorie intake. Annual agricultural imports amount to about 55 billion dollars, which shows the high degree of agricultural market that Japan contributes to world trade.

3.5 USTR on Market Access Barriers in Japan[150]

The USTR Report on Japan lists the market access barriers that the US exporters face in Japan. They also, like in the case of Indian exporters, face SPS measures related to meat products and Maximum residual limit. Following are some of the issues highlighted in the USTR report which may be of concern to India also.

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146 WT/TPR/S/243
147 WT/TPR/M/243/Add.1
148 WT/TPR/S/243
149 WT/TPR/M/243/Add.1
150 United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

a) Poultry: U.S. poultry meat and poultry products, including egg products, are currently exported to Japan in accordance with a 2002 animal health protocol purportedly aimed at preventing Avian Influenza (AI). Japan unilaterally implemented the protocol, which limits market access for these U.S. products in a manner that appears to be inconsistent with the OIE guidelines on AI. While the United States and Japan agreed to modifications of the protocol in 2012, which addressed some of the problematic requirements related to HPAI, Japan continues to impose LPAI-related restrictions that do not appear be consistent with OIE recommendations. The United States continues to press Japan to agree to a fully OIE-consistent revised protocol and discontinue LPAI based restrictions on these commodities.

b) Maximum Residue Limits: In July 2009, the United States and Japan concluded an MOU on MRLs that changed the way in which MRL violations are handled by establishing a mechanism under Japan's import and food monitoring policy for shippers to address violations quickly. While there has been progress in how MRL violations are handled, the United States remains concerned that Japan's procedures still require industry-wide enhanced surveillance for a given product after a single violation by a single shipper.

In addition, Japan's slow and burdensome review process for approving pesticides and fungicides and the lack of established MRLs continue to create risk of unnecessary trade disruptions. The United States continues to work closely with Japan on these issues, including through data exchanges aimed at assisting Japan in its approval of new MRLs.

4. China

India raised certain issues of concern during Trade Policy Review of China during its TPR in 2008[151] and 2012[152].

4.1 SPS-TBT Issues

Dairy and Meat Products

Indian exports of dairy and meat products to Chinese market is impeded by lack of clarity in terms of technical standards. For example, bovine meat and meat products from India are not allowed entry into the Chinese market on grounds of concern surrounding FMD in India, even though the disease management of FMD in India is scientific and as per internationally accepted standards. There are areas which are DMB free in India from where such imports should be permitted as is done by many countries importing Indian bovine meat and meat products.

China responded that there is a complete set of rules and procedures for market access of imported meat products in China. These rules and procedures are consistent with rules of WTO and Organization for Animal Health, as well as other international practices. China welcomes the timely application from India and China will initiate the access process whenever appropriate. If more detailed information is needed, competent authority in India can contact AQSIQ.

Regarding the approval of dairy exporters in India, China clarified that it has never adopted an approval system on any foreign dairy companies which export their products to China, but only on their dairy products to China. However, since India is still plagued with FMD and DMB, China has to adopt risk analysis on dairy products imported from India to ensure the sanitary safety of dairy products. So long as the processing technique is consistent with OIE's requirement and the risk is tolerable, the product can be imported.

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[151] The full text of questions and answers are available in document WT/TPR/M/199 Add.1 (2008)

[152] The full text of questions and answers are available in document WT/TPR/M/264/ Add.1 (2012)

China further informed that to facilitate and streamline importation of dairy products, it demanded that the competent authorities from all countries which export dairy products to China to submit sanitation certificate in a format required by China as early as in 2006. However, India did not respond to this requirement while more than 10 countries such as United Kingdom, France, Germany, Australia and New Zealand did. China requested India to give positive response to this certificate issue and submit necessary risk analysis documents to facilitate the risk assessment process in China. So long as the risk is tolerable, dairy products from India will be imported.

4.2 Tariff Issue

Handicrafts and Handlooms[153]

Duty on Textiles and Handicrafts is in the range of 30% and above which makes the selling to end customers in China unattractive. Further in case of paintings and Indian tea some special prior permission for clearance is needed.

Leather Goods[154]

India is competitive in export of leather goods. However high tariffs on import of leather products in China is impeding market access of Indian goods. Import duty for items falling under chapters 42 and 64 is given below in Table 2.

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[153] This information has been obtained from the Handicrafts and Handlooms Exports Corporation of India Ltd (HHEC)

[154] Inputs from Council for Leather Exports (CLE), India

Table 2
China's import duty on selected leather goods

Description	HS Code	Customs duty rate
Saddlery and harness items	4201	0 – 20%
Trunks, suitcases etc,	4202	10% to 20%
Articles of apparel made of leather, gloves made of leather etc.,	4203	10% to 20%
Other articles of leather	4205	12%
Footwear	Chapter 64	10% to 24%
Footwear Components	Chapter 64	15%

Source: Council for Leather Exports (CLE), India

4.3 Other Issues

Diamond

India has expressed concern that loose diamonds are quarantined in China for 3 to 4 days before getting released in the market[155]. China explained that Chinese authorities issue license for imported diamond according to the requirement of Kimberley Process which takes time. Indian traders have also reported that it is beneficial for the diamond traders to import the diamonds into China via Hong Kong, China than directly into China, which would be on account of certain NTBs. However, China claimed that it has eliminated all the NTBs in compliance with their WTO accession commitment in 2005 and Chinese quarantine authorities issue license for imported diamonds according to the requirement of Kimberley Process.

State Aid and Subsidy

The WTO secretariat report[156] of 2012 stated that China's central government provides lump sum grants to consumers who buy new energy-saving or new-

[155] WT/TPR/M/264/Add.1 (2012)
[156] WT/TPR/S/264 (2012)

energy cars listed in a promotion catalogue. India asked for the details of assistance provided to the automotive sector, especially in relation to new energy-saving or new-energy cars, both at the central and sub-central government level. In response China stated that since June 2010, the National Development and Reform Commission, the Ministry of Industry and Information Technology and the Ministry of Finance have publicized seven promoting Catalogues of the fuel efficient cars in the category of the Benefiting People Project (1.6 liters and below passenger cars). The central government will give each consumer a subsidy of 3000 yuan who buys fuel efficient cars mentioned above. The payment will be made in the sale to consumers by the manufacturers. India further requested China to provide the list of companies that have benefited under these schemes. In response China referred to the website of National Development and Reform Commission (NDRC)[157]. However the English version of the website does not contain all the relevant details.

India finds it difficult to assess subsidy programme of China as details are mostly provided in Chinese. For instance, the WTO Secretariat report[158] states that China provides different forms of assistance to qualified projects under its torch programme at the central as well as sub-central level. However its details are not available in English.

It is also stated in the Secretariat report that China provides different forms of assistance to its renewable energy sector. India requested China to provide details of benefits provided under the National Medium-and-Long-term Development Plan for Renewable Energy, 2007 and the Golden Sun Demonstration Project to developers/manufacturers/distributors or any other key participants in the renewable energy sector; viz grants, rebates, local component requirement, complementary assistance etc.

China responded that Golden Sun Demonstration Project is a program under Renewable Energy Fund, which contained sub-arrangements and involved also transfer payment to provincial governments. Therefore, it was too complicated to be incorporated in China's submitted subsidy notification. China will work on notification of this fund in the course of extending the notification to local subsidy programs.

[157] http://www.sdpc.gov.cn/zcfb/zcfbgg/default.htm
[158] WT/TPR/S/264 (2012)

According to the same Secretariat report[159], input prices (such as energy, water, and land) have also been regulated and kept low. Noting this, India wanted to know whether each input is made available at the same regulated price to all enterprises across the board.

China clarified that input prices have not been regulated and kept low as described in the Secretariat Report. China further claimed that more than 95% prices of goods and services have been liberalized and fixed by the market, including the vast majority of means of production such as coal and metal ores. As for the very limited number of resource products that implement the government pricing or government guidance prices, their prices basically reflect the domestic cost of production and market supply and demand situation. With regard to the input products that implement the government pricing or government guidance pricing, China implement a uniform pricing policy to all enterprises in the industry, regardless of their ownership or scale.

In the TPR of China of 2012, India asked with regard to provision of accounting and architectural services whether it is mandatory to maintain all accounts in Chinese language / use only Chinese characters in architectural drawings. China responded that for the language requirement of accounting services, Article 22 of Accounting Law explicitly stipulated that, in China, accounting records should be recorded in Chinese. In a national minority autonomous region, the commonly used local national minority language may be used simultaneously. One additional foreign language may be used in the accounting records of foreign invested enterprises, foreign enterprises and other foreign organizations in China. For the language requirement of architectural drawing, according to the requirement of Provisional Administrative Rules on the Foreign Enterprises Engaging in Construction Project Design Activities in China, the Chinese-foreign cooperative design documents submitted to relevant administrations should be recorded in Chinese. According to the requirements of the Interim Provisions on the Administration of Foreign Enterprises Engaging in Construction Project Designing Activities within the People's Republic of China (Jianshi [2004] No.78), the Chinese-foreign cooperative design documents subject to the review of the Chinese government shall be provided in Chinese version.

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[159] WT/TPR/S/264 (2012)

4.4 USTR on Market Access Barriers in China[160]

The description of trade barriers in China by its major trading partners such as the US shows that these countries are also facing the kind of barriers Indian exporters are facing in China and suggests that probably India needs to examine further on these issues. In the latest USTR (2013), US concern about issues of Agricultural biotechnology, Food safety and animal health regulations (pork, live cattle, Beef products, Poultry and meat). Other than above mentioned SPS issues, it has also pointed TBT issues related to following. i) Food Additive-Formula Disclosure Requirements ii) China Compulsory Certification requirements- Conformity Assessment procedures iii) Mobile devices – WAPI Encryption standard iv) Mobile Devices – Draft Regulatory Framework v) 4G Telecommunications – ZUC Encryption Algorithm Standard vi) IT products – Multi-level Protection Scheme vii) Medical Devices – Conformity Assessment Procedures vii) Imaging and Diagnostic Medical Equipment – Classification viii) Patent used in Chinese National standard ix) Electronic Information Products – Certification of Pollution Control x) Cosmetics – Approval Procedures and labeling Requirements. From these issues raised by the USTR report, some points of concern that emerge for Indian exporters, which can be further examined are:

a) Agricultural Biotechnology: Under Chinese regulations, an agricultural biotechnology product developed in a foreign country must first be approved for use in that country before Chinese authorities will begin to consider approving the product for use in China. The United States is concerned that such a practice creates significant and unwarranted delays in China's approval of agricultural biotechnology products, which could result in substantial disruptions in exports of certain U.S. agricultural products.

b) Meat and Poultry: China has imposed a zero tolerance limit for the presence of Salmonella, Listeria, and other pathogens in imported raw meat and poultry. Such a standard is unwarranted, because it is generally accepted by food safety experts and scientists that pathogens cannot be entirely eliminated from raw meat and poultry, and that proper storage, handling,

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[160] United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

and cooking of raw meat and poultry reduce significantly the risk of a number of food-borne diseases caused by these microbes. In 2009, China's regulatory authorities assured the United States that they were in the process of revising China's standards for Salmonella in poultry, but they have yet to do so. The United States continues to engage China on this issue.

c) Food Additives – Formula Disclosure Requirements: In April, 2011, China's General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) released its "Specification for Import and Export of Food Additives Inspection, Quarantine and Supervision (2011 No. 52)" ("Specification") The Specification, effective July 1, 2011, appears to require the U.S. and other foreign food producers to disclose their proprietary food additive formulas by mandating that food product labels list the precise percentage of each food additive. As a result of this requirement, a competitor would have access to information that it can use to replicate proprietary formulas and compromise an innovator's legitimate commercial interests. The requirement to disclose product formulas appears to apply only to imported food additives.

In addition, China developed and implemented the Specification without notifying the TBT or SPS Committees in advance. As a result, neither the United States nor U.S. industry stakeholders were aware of, or provided the opportunity to comment on, the proposed Specification before AQSIQ issued it. Finally, the measure appears to have taken effect less than six weeks after AQSIQ announced it, which did not provide suppliers with adequate time to comply.

In a May 31, 2012 letter to China, the United States raised concerns regarding the serious impact on legitimate commercial interests caused by the required disclosure of formulas on labels and the apparent application of the Specification only to imported products. The United States observed that the Specification requirements appeared to diverge from the applicable standards in the Codex Alimentarius Commission. The United States also noted that the Specification appeared to conflict with China's own National Food Safety Standard for the Labeling of Prepackaged Foods, which China notified to the WTO in April 2010. China's labeling measure requires only the listing of all ingredients in descending order of in-going weight, and

provides that ingredients used in small amounts for the purpose of flavoring need not be declared on the label. The United States emphasized that the regulatory incoherence raised by the Specification created uncertainty in the trading community. The United States continues to urge China to revise its rules governing food additive disclosures to better align with international standards and to harmonize its food labeling requirements.

d) China Compulsory Certification (CCC) Requirements – Conformity Assessment Procedures: China's CNCA requires a single safety mark 'the CCC mark' to be used for both Chinese and foreign products. The U.S. companies continue to report, however, that China is applying the CCC mark requirements inconsistently and that many Chinese-produced goods continue to be sold without the mark. In addition, the U.S. companies in some sectors continue to express concerns about duplication of safety certification requirements, particularly for radio and telecommunications equipment, medical equipment, and automobiles.

To date, China has authorized 153 Chinese facilities to perform safety tests and accredited 14 Chinese firms to certify products as qualifying for the CCC mark, as reported in the 2012 USTR Report to Congress on China. When it joined the WTO, China had committed itself to provide nondiscriminatory treatment to majority foreign-owned conformity assessment bodies seeking to operate in China. Despite this commitment, China so far has accredited only six foreign invested conformity assessment bodies. It is not clear whether these six bodies play any appreciable role in testing or certifying products sold in China. China rejected suggestions that it recognize laboratories that have been accredited by ILAC MRA signatories or develop other procedures to recognize foreign conformity assessment bodies. It insists that it will accept conformity assessment bodies domiciled abroad only if the governments of ILAC MRA signatories negotiate MRAs with China. Moreover, China has not developed any alternative, less trade-restrictive approaches to third-party certification, such as recognition of a supplier's self-certification.

Because China requires testing for a wide range of products, and all such testing for the CCC mark must be conducted in China, U.S. exporters are often required to submit their products to Chinese laboratories for tests that may be unwarranted or have already been performed abroad. This results in greater

expense and a longer time to market. One U.S.-based conformity assessment body entered into a Memorandum of Understanding (MOU) with China allowing it to conduct follow-up inspections (but not primary inspections) of U.S. manufacturing facilities that make products for export to China requiring the CCC mark. However, China has refused to grant similar rights to other U.S.-based conformity assessment bodies, on grounds that it is prepared to conclude only one MOU per country. Reportedly, both Japan and Germany have concluded MOUs with China that allow two c
onformity assessment bodies in each country to conduct follow-up inspections.

5. Canada

India raised certain issues during TPR of Canada in 2007[161] and 2011[162].

5.1 Labelling

Spice Exports

Indian exporters of spices to Canada have reported that the labeling requirements in respect of spices are not standardized and therefore it creates complications at the time of import clearance and sale in the domestic market. Canada replied that its labelling requirements for food products including spices are extensive. There are regulations prescribing the common name that must be used, the manner and format how ingredients must be declared and many other mandatory labelling information. Chapter 2 from the Guide to Food Labelling & Advertising is a plain English guide on the labelling requirements for food products, which includes spices. It can be found at the following web sites:
http://www.inspection.gc.ca/english/fssa/labeti/guide/ch2e.shtml
http://www.inspection.gc.ca/english/fssa/labeti/guide/ch2ae.shtml
http://www.inspection.gc.ca/english/fssa/labeti/guide/ch2-1e.shtml

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[161] The full text of the questions and answers is contained in WT/TPR/M/179/Add.1
[162] The full text of the questions and answers is contained in WT/TPR/M/246/Add.1

Currently the Food and Drug Regulations have prescribed standards of composition for 39 spices. However, just because a spice does not have a prescribed standard of composition, it does not mean it cannot be sold as a spice. The Food and Drug Regulations defined the common name to be the name prescribed by the Food and Drug Regulations or other federal regulations and if it is not prescribed by regulations, it is the name by which the product is generally known. Spices with no prescribed standardized common name in Canada would be required to use the common name by which it is generally known as in the Canadian marketplace. If it is not a commonly used spice in Canada, the English and French common names used for the spice in the international market can be considered.

India raised the issue again in TPR of 2011[163]. It said that Indian spice exporters find it difficult to comply with Canadian Labelling requirement as products often include very long lists of ingredients and requested Canada to look into the possibility of having an exemption by allowing for inclusion of a leaflet inside the packaging as an alternative. In response Canada stated that all pre-packaged foods must meet certain minimum requirements listed under the Food and Drugs Act and Regulations and the Consumer Packaging and Labelling Act and Regulations. All in-going ingredients on multi-ingredient foods must be declared and must appear on the outside of the package on the label. The list of ingredients declaration may appear on any label panel, except the bottom of the package. When spices are sold singly, they must be declared by their specific common name. While it could not allow for an exemption to these requirements, there are certain ingredients that may be listed under class names when in a multi-ingredient food in order to simplify the list. This includes spices, seasonings or herbs. In the list of ingredients, where the class name 'spice' is used, a component list of the spices in the product is not required to be shown, with the exception of some components such as salt, monosodium glutamate, hydrolyzed plant protein, flavor enhancers, peanuts or their derivatives, priority food allergens, such as sesame seeds, and any ingredient that has a functional effect on the final food. For example, a curry powder made of many spices, flour as a thickener and salt, may have the following ingredients declaration, Ingredients: spices, wheat flour, salt. When spices are sold in a

[163] The full text of questions and answers are available in document WT WT/TPR/M/246/Add.1 (2011)

blend, such as spice blends, spice and herb blends or seasoning blends, it is permissible to use the class name option of spices, herbs or seasoning in the list of ingredients[164].

As per information received from Indian MSME, Canada has Proposed Amendment to the Textile Labelling and Advertising Regulations (G/TBT/N/CAN/259 of 23/03/2009) – The Textile Labelling Act (TLA) and the Textile Labelling and Advertising Regulations (TLAR) are intended to protect consumers against misrepresentation in the labelling and advertising of textile products as well as to ensure that consumers may choose textiles on the basis of fibre content.

The TLAR requires that the fibre content be disclosed by generic name, and section 26 of the TLAR prescribes the generic fibre names that may be used in Canada to indicate the fibre content of a consumer textile article.

5.2 Issues in Services

Visas

The Canadian government from 1st October 2011 ended the National Pilot Program under which skilled IT professionals from India have been getting a special category visa for short duration of work on legitimate business projects at a pre-set salary range to work in Canada. It has been reported that from 1st January 2011 Canada insists on Labour Market Opinion (LMO) visa category salary requirement for all ICT category visa for Indian professional to work in Canada. The process of obtaining Labour Market Opinion is cumbersome and time consuming. India requested to restore the IT category visa and to allow free movement of specialized knowledge/managerial category people through a liberal interpretation of eligibility criteria.[165]

Canada responded that it views this question to have two distinct elements, which deal with two separate processes. 1) With respect to India's question regarding "IT category visas," labour market conditions in the 1990s prompted

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[164] WT WT/TPR/M/246/Add.1 (2011)
[165] WT/TPR/M/246/Add.1 (2011)

the development, on a pilot basis in 1997, of a procedure that provided for a determination at the national level that there were no likely negative impacts associated with the entry of temporary foreign workers in the seven information technology specialities. Therefore, employers wanting to hire foreign workers were deemed to have an implied positive labour market opinion. Applying a labour market opinion to all applications for foreign information technology workers does not constitute the imposition of a new restriction. It is a procedural change applicable to occupations that have always been subject to a labour market test. 2) With respect to India's question regarding "specialized knowledge/managerial category" Canada already has robust commitments on intra-corporate transferees, which have similar eligibility requirements as India's for intra-corporate transferees. Canada continues to reference the salary as one of several indicators of specialized knowledge.

It is reported[166] that import of short-term labour in Canada has become tougher and economically less attractive due to a series of changes in Canadian laws in 2013.

Effective from April 29, 2013, the Canadian government announced the following major changes to its Temporary Foreign Workers Programme (TFWP):

i. Employers must pay temporary foreign workers at the prevailing wage, rather than up to 15 per cent less than the average for the same job;

ii. The "accelerated labour market opinion" (ALMO) process, introduced in 2012 which fast-tracked the ability of some companies to bring in workers from outside Canada, has been temporarily suspended;

iii. The government has more authority to suspend and revoke work permits and labour market opinions (LMOs) if the program is being abused;

iv. Specific questions will be asked of employers who are applying for LMOs to ensure the program is not being used to facilitate outsourcing;

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[166] Input from Department of Commerce, Government of India and National Association of Software and Services Companies (NASSCOM)

v. Requires employers who rely on temporary foreign workers to have a "firm plan" in place to transition to a Canadian work force over time;

vi. Introducing new fees for employers for LMOs, and increasing the existing fees for work permits;

vii. Allowing only English and French as languages that can be used as a job requirement.

The agricultural branch of the program is, however, exempt from the main changes as government has said that farm owners genuinely cannot find Canadians to perform farm labour.

The above changes were followed by introduction of a new "Additional Employer Information" for ongoing LMO applications. The details sought in the form include a summary of contractual agreements between the employer and the company receiving goods and/or services, requirement of details of how Canadian/permanent residents within company receiving goods/services will be positively and/or negatively affected over the next two years by such hiring of foreign workers, employers being asked to account for the hiring of any foreign worker through work permit exempt or LMO-Exempt processing streams, etc.

On June 11, 2013, the Canadian government issued further new rules under which Federal officials will have the right to walk into Canadian workplaces without a warrant as part of audit and inspection of foreign temporary workers. These rules give Human Resources and Skills Development Canada officials or Citizenship and Immigration Canada officers the right to walk in on businesses as part of a random audit or because they suspect fraud. Upon entering a property, officials will have wide powers of investigation. They will be able to "examine anything on the premises," question employers and staff, request documents, use photocopiers to copy records, and take photographs or make video and audio recordings. Immigration officers will be able to ask employers at any time during a foreign worker's employment, and for up to six years after the relevant worker's work permit expires, to demonstrate that they are meeting or have met their conditions for employing temporary foreign workers.

Canadian Government has introduced, effective from July 31, 2013, the following further changes to Temporary Foreign Worker Programme (TFWP) to implement a user fee for employers applying for labour market opinions along with new language and advertising requirements for the TFWP:

i. A new $275 processing fee for each temporary foreign worker position that an employer requests through a Labour Market Opinion (LMO).

ii. English and French are the only languages that can be identified as a job requirement in advertisements and LMO applications by employers intending to hire temporary foreign workers. Exceptions will be made in rare and specialized circumstances only when the employer can demonstrate that another language is essential for the job, such as for a tour guide or translator.

iii. Employers will now need to make greater efforts to hire Canadians before they will be eligible to apply to hire temporary foreign workers. New advertising requirements essentially double the length and reach of employers' advertising efforts.

iv. Additional questions have been added to all LMO applications to ensure that the TFWP is not used to facilitate the outsourcing of Canadian jobs.

These changes announced by the Canadian government are a cause of serious concern to Indian IT-ITeS industry. Accelerated Labour Market Opinion (ALMO), which was introduced last year, was important for India as the established and bigger Indian IT companies present in Canada were using this process to speed up the issue of work permits to better meet labour market demand in high skill fields. India's National Association of Software and Services Companies (NASSCOM) was appreciative of ALMO and was demanding extension of ALMO process for smaller companies as well. Suspension of ALMO and introduction of several other burdensome restrictive conditions will take Indian companies back to the situation created after withdrawal, in September 2010, of special category visa used by and for Canada based Indian IT companies. The post 2010 system was found, by Indian IT companies, to be opaque, cumbersome, time consuming and costly. Now, the suspension of ALMO and introduction of other tightening measures will make it even more

difficult for Industry to access the Canadian market and serve legitimate business contracts.

The details sought in the "Additional Employer Information' are highly intrusive and impose extremely restrictive barriers to Indian industries interest in Canada. Additionally, most of these legitimate business contracts are subject to confidentiality agreements and employer (s) will not be in the position to provide such information on behalf of clients. As regards audit and inspection of businesses employing temporary foreign workers, the private sector fears that it can be misused by the Government machinery to undermine the employers bringing foreign workers especially with the ones working on customer sites. The assessment of the Indian industry is that the overall impact of these changes will be to restrict IT and IT Services contracts with India.

5.3 Other Barriers

Provincial Government's requirements

India observed that the SPS-related import requirements are not uniform in Canada, as certain subject matters are listed in the Provincial government's jurisdiction. Hence the standards laid down are different. The obligations required under the SPS Agreement are such that the measures so enacted shall not be an unnecessary obstacle to international trade. The SPS requirements which are different for different states may be trade restrictive owing to the long procedural and differential standards requirements. It further requested Canada to provide reasons why some states maintained different and additional SPS measures in relation to food products[167].

In response Canada claimed that the specific examples of provincial measures listed in this paragraph of the Secretariat's report are not examples of SPS measures. The Federal government has jurisdiction with regard to international and inter-provincial trade for SPS issues. As stated in the WTO Secretariat's report, the Government of Canada is not aware of any SPS measures adopted by sub-federal authorities that have a trade impact.

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[167] WT/TPR/M/246/Add.1 (2011)

Local Content Requirements[168]

Ontario's feed-in-tariff system – established in 2009 – set lucrative fixed prices for electricity generated by renewable projects such as wind turbines and solar panels. The legislation had required participating electricity generators to source from 50 to 60 per cent of their equipment in Ontario if they wanted to be eligible for generous subsidies.

This measure was a potential market access barrier for Indian firms dealing in renewable power projects. This measure also became a subject of dispute in WTO. Japan first complained to the WTO in 2010, arguing that the part of the province's program requiring made-in-Ontario parts for wind and solar farms breached the disciplines concerning local content requirement. Japan and the European Union argued that Ontario's incentives for green energy were illegal because they discriminated against foreign firms, a complaint that was upheld by a WTO panel in December 2012. Canada appealed in February 2013 but the Appellate Body in WTO upheld the Panel's finding in April 2013.

As a result, the Canadian province of Ontario will change its domestic content requirements for the feed-in-tariff program for wind and solar projects which is expected to address the problem of discrimination faced by Indian companies in this sector.

Tariff and Quota Barrier

There is a good degree of tariff escalation from tanned leather to value added products which ranges from 0 to 19%. Canada offers 4-5% rebate on duties to Australia and New Zealand, while for US and Mexico, it is either duty free or very negligible tariff. This keeps India in a disadvantageous position in Canada's global trade.[169]

As per feedback received from EEPC India, India faces higher tariff in many engineering tariff lines (from chapters 73 and 82) where GPT (General Preferential Treatment) has not been granted but tariff preference was, however,

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[168] Input from Department of Commerce, Government of India

[169] This information has been obtained from Council for Leather Exports (CLE India)

being granted, to other competing developing and even developed countries under various Preferential Trade Agreements. This erodes India's competitiveness vis-à-vis other exporting countries. These need to be made at par with the benefits given to other countries enjoying preferential tariff access.[170]

The Secretariat report[171] indicates that the dairy sector in Canada is protected through various measures like tariff quotas, prohibitive out-of-quota tariffs, support prices (butter and skimmed milk powder), production quotas (milk), and export subsidies. Milk receives a high level of commodity-specific support (about Can$3.4 billion in 2009). The applied MFN tariffs on dairy products, which averaged 237.3% in 2010, are the highest among all major product groups. India noted that such high level of subsidies and tariff severely affects the access of dairy products from developing countries to Canadian market and requested Canada to indicate whether it has any plans to reduce such tariffs and subsidies in future and the timeframe if any for the same[172]. Canada responded that it is a strong supporter of an ambitious outcome of the agricultural negotiations under the Doha Development Agenda. Supply management is a system that ensures a stable supply of dairy, poultry and eggs to Canadian consumers and the agri-food industry. It also promotes stable farm incomes. The supply management system has served Canada well for many years, and Canada has no plans to alter the system.

Denial of GSP[173]

India is a beneficiary country of the General Preferential Tariff (GPT) treatment scheme of Canada. There are indications that India may lose its GPT status from January 1, 2015 on the ground that its share of exports is equal to or greater than 1% for consecutive years. Indian exporters feel that share of world trade is not a true index of India's level of development. There are several highly under developed regions in India where trade can be a medium for poverty alleviation. Denying preferential tariff access will be detrimental to the development of

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[170] This information has been obtained from Engineering Export Promotion Council (EEPC India)

[171] WT/TPR/S/246 (2011)

[172] WT/TPR/M/246/Add.1 (2011)

[173] Inputs from Council for Leather Exports (CLE), India

such regions, particularly when India's competitors like Pakistan and Bangladesh will continue to enjoy the GPT status in Canada. As can be seen from Table 3 below, there is a substantial difference between MFN rates and preferential duty rates and this justifies the apprehensions expressed by the Indian exporters.

Table 3
Difference between MFN and GSP rates for select items in Canada

Product description and HS Code	HS Code	MFN Duty in Canada	Concessional Duty under GPT
Footwear incorporating a protective metal toe-cap - Riding boots solely of rubber	6401.10.11.00	20%	Free
Other footwear: Covering the ankle but not covering the knee - of rubber	6401.92.11.00	20%	Free
Sandals solely of rubber	6401.92.30.00	20%	Free
Downhill ski-boots	6402.12.10	Free	Free
Soccer, other football, baseball or bowling footwear	6402.19.10.10	17.5%	17.5%
Other	6402.19.10.90	17.5%	17.5%
Men's or boys' training, including track or running	6402.19.90.10	17.5%	17.5%
Women's or girls' training, including track or running	6402.19.90.20	17.5%	17.5%
Sandals solely or rubber	6402.20.11.00	16%	Free
Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather:	6403 (Except 64031210, 6403191000, 64035910, 6403991000)	11% - 18%	11% - 18%
Footwear with outer soles solely of rubber and uppers of canvas - Hiking footwear	6404.11.11.00	16%	13%

Product description and HS Code	HS Code	MFN Duty in Canada	Concessional Duty under GPT
Other	6404.11.19	16%	13%
For clerical or ecclesiastical use	6404.19.20.00	7.5%	6.5%
Women's, girls' or children's	6404.19.30.10	16%	13%
Men's or boys'	6404.11.99.21	18%	18%
Women's, girls' or children's	6404.19.90.12	18%	18%
Other	6405.10.90.00	18%	18%
Other footwear with outer soles and uppers of wool felt	6405.20.20.00	18%	18%
Of leather or imitation leather, or combinations thereof,	6406.10.91.00	8%	5%
Saddlery & Harness	4201	5-7%	3-5%
Trunks, Suitcases, vanity-cases, executive cases, brief cases, school satchels and similar containers - With outer surface of leather or of composition leather	4202.11.00.00	11%	7%
Handbags, whether or not with shoulder strap, including those without handle - with outer surface of leather or of composition leather	4202.21.00.00	10%	7%
Articles of a kind normally carried in pocket or in the handbag – with outer surface of leather or of composition leather	4202.31.00.10	8.5%	5%
Tool bags, haversacks, knapsacks, packsacks and rucksacks	4202.91.20.00	11%	7%
Articles of apparels	4203.10.00.11	13%	8%
Other Gloves	4203.29.90.10	15.5%	10%
Belts and bandoliers	4203.30.00.00	9.5%	6%

Source: Council for Leather Exports (CLE), India

FDI[174]

The Investment Canada Act gives wide discretionary power to the Minister to approve Foreign Direct Investment. Any foreign investment is cleared only after the Minister is satisfied that such investment will provide "net benefit" to Canada. Moreover, the criteria for 'net benefit' are loosely defined.

The following new unfavourable development has taken place regarding Foreign Direct Investment in Canada.[175]

In December 2012, the Government of Canada announced new policy on how it will review investments by State Owned Enterprises (SOEs). The new guidelines introduced following changes in the approach to be taken by the Minister of Industry in assessing future investments in Canada by SOEs.

i. Investments by foreign SOEs to acquire control in Canadian oil sands business will be found to be of "net benefit" only in exceptional circumstances

ii. In other sectors of the Canadian economy, the Minister of Industry will closely examine

    a. the degree of control or influence a SOE would likely exert on the Canadian business that is being acquired;

    b. the degree of control or influence a SOE would likely exert on the industry in which the Canadian business operates; and

    c. the extent to which a foreign state is likely to exercise control or influence over the SOE acquiring the Canadian business.

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[174] This information has been obtained from Department of Commerce, Government of India sources

[175] Input from Department of Commerce, Government of India and India's High Commission, Canada

iii. Free enterprise principles and industrial efficiency are additional criteria that will be used during assessment where investor is owned, control or influenced – directly or indirectly – by a foreign state

iv. The review threshold will be increased to $ 1 billion over a four-year period. However, the threshold for SOE investment remains at $ 344 million (plus inflation index)

Any FDI inflow, therefore, by a foreign state owned enterprise (SOE), above the value of $ 344 m (plus inflation index), will have to pass the net benefit test under the federal Investment Canada Act, irrespective of whether the transaction is for a controlling stake or minority stake in the Canadian business, and investments by foreign SOEs to acquire control in Canadian oil sands business will be found to be of "net benefit" only in exceptional circumstances. It is reported that this has major implications for the current and future plans by Indian Public Sector Undertakings (PSUs) seeking equity in Canadian businesses, particularly in natural resources sector.

National Treatment Limitations[176]

- The acquisition of control of a Canadian business by a non Canadian is subject to approval for all direct acquisitions of Canadian businesses with assets not less than a monetary amount established and published in January of each year in the Canada Gazette.

- There is a National Treatment limitation for all subsidies within the public sector, subsidies for R&D, subsidies for income security or insurance, social security or insurance, social welfare, public education, training, health and child care.

- There is a National Treatment limitation on all taxation measures

- There is a National Treatment limitation for all measures for the welfare of aborigines.

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[176] This information has been obtained from Department of Commerce, Government of India sources

- The acquisition of control of a Canadian business, or establishment of a new business related to Canada's cultural heritage or national identity, by a non Canadian is subject to approval.

- Limitations maintained by individual states are essentially geographical restrictions, which increase the business cost of foreign services suppliers. While some restrictions have been removed in some states, there are many that still continue and even new restrictions have been introduced. For example, a residency requirement has been introduced in Nova Scotia for Auditing Services.

- In Tourism Services, there is a requirement of citizenship or permanent residency for license to serve liquor.

- In Telecommunication Services, foreign investment in facilities-based telecommunications service suppliers is permitted up to a cumulative total of 46.7% of voting shares, based on 20% direct investment and 33-1/3% indirect investment. Such suppliers must be controlled by Canadians. In addition, services regulated under the Broadcasting Act and measures affecting such services are excluded. Further, telecommunications services supplied for the transmission of services regulated under the Broadcasting Act where such services are intended for direct reception by the public are also excluded. The Act imposes a Canadian owned and controlled system of broadcasting, and includes provisions regarding Canadian content in programming and production. It encourages the development of Canadian expression, and the use of Canadian talent and creative resources. There is also a specific emphasis on reflecting Canada's cultural diversity. Finally, the offer limits competition in inter-exchange voice services and local wireline telephone services. In short, the footnote and the restrictions take away much of the commercial value of the commitment and leaves a lot of discretion with Canadian authorities.

6. Brazil

The following concerns on market access barriers have been sourced from the Department of Commerce, Government of India and Indian concerns raised during Brazil's TPR in 2009[177] and 2013[178].

6.1 SPS-TBT Issues

Cumbersome process of registration of pharma and Agro-Chemical products

The procedure of registration and issue of product license by Brazilian Agency for Indian pharmaceutical companies for exports of their products to Brazil is cumbersome and time consuming. As a result, Indian pharmaceutical companies are facing difficulty in accessing Brazilian market. Several firms like Zydus, Unique pharma, Cipla operate in Brazil. Pharma companies operating in Brazil require registration with national Health Surveillance Agency (ANVISA). Indian companies also require a product license from ANVISA to export their products to Brazil. ANVISA annually inspects the manufacturing plants and renews the license of the importers. The inspection procedure turns out to be complicated with delay in inspection by the ANVISA team and the consequent delay in renewal of the license, pending which the goods of the company cannot enter Brazil. India raised the issue in TPR of 2009[179]. In response Brazil said that regarding procedures for inspection of manufacturing plants, Brazil adopts the "date of request" criteria and, in cases of emergency, urgency or public health needs, a priorization system is adopted. In addition to its current actions, ANVISA is studying new methods to accelerate the required inspections.[180]

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[177] The full text of questions and answers are available in document WT/TPR/M/212/Add. 1 (2009)

[178] The full text of questions and answers are available in document WT/TPR/M/283/Add. 1 (2013)

[179] WT/TPR/M/212/Add.1 (2009)

[180] It is reported that ANVISA publishes a timeline of the future inspections in its home page http://www.anvisa.gov.br/ inspecao/cronograma/index.htm

It is also reported[181] that it takes a long time to register agro chemical products in Brazil.

INMETRO Certification Requirements[182]

Brazilian Government has introduced INMETRO (National Institute of Metrology, Standardization and Industrial Quality) certification for almost all the engineering goods being imported to Brazil requiring the exporting companies to be certified by INMETRO. It is reported that INMETRO certification is very costly. In addition, the certification process is done in Brazil only and is very slow resulting in loss of business for the exporters. Moreover, it requires separate documentation and packaging so that the shipment can be identified upon arrival at Brazilian port. It adds further to the cost of exporter. The law is found to be highly restrictive by Indian exporters.

6.2 Issues in Services

Delay in issuance of business visa

Indian businessmen and employees face the problem of delay in issuance of visas by the Brazilian Embassy in New Delhi. The pharma and IT companies which have operations in Brazil have reported delay in issuance of work visas for their Indian based operations in Brazil for their employees to be stationed in Brazil.

India raised the issue in TPR of 2009 and the Brazilian government responded that it has no notice of delay in issuance of business visas for Indian citizens. Brazil said that according to its consular section in New Delhi, a business visa is granted in less than a week, if the proper documentation is presented.

This issue seems to be a persistent problem. It is reported[183] that obtaining Business Visas for Brazil at times takes more than 3 weeks. Likewise, long term,

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[181] Inputs from Department of Commerce, Government of India (2013)

[182] This information has been obtained from Engineering Export Promotion Council (EEPC India)

[183] Inputs from Department of Commerce, Government of India (2013)

multiple visit visas are difficult to get. Similarly, obtaining Work Permits at times takes more than six months.

These act as major non-tariff barriers in promoting trade and investment. In the absence of work permit / Permanent Visas, the cost of operation of the company goes up during the initial phase of operations.

Banking Operations[184]

The Indian companies face difficulty in their operations due to difficulties in operating with the Brazilian banks. It is reported that the Indian banks despite being willing to issue bank guarantee through the Brazilian Bradesco bank, are unable to do so in time due to insistence of Bradesco bank to conform to certain additional clauses added by it. This causes problems/delays in issuing the bank guarantee in time. Commissions and other charges are also much higher. The interest on Working Capital is also on a very high side.

Difficulty in obtaining concessional finance[185]

Brazilian National Development Bank (BNDES) offers cane producers a R$ 4 billion credit line through a program called Prorenova by which the government expects to spur the development of 1 million hectares of new cane plantation. BNDES expects to increase total ethanol production by 2 to 4 billion litres in 2013/14, a gain of at least 10 percent.

According to BNDES, the financing facility would be available to both millers and farmers but this facility is available only to firms operating in Brazil. However, currently the intermediary banks are not disbursing loans under Prorenova scheme to foreign owned Brazilian companies by citing lack of clarity from BNDES regarding eligibility criteria of such companies for loans.

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[184] Inputs from Department of Commerce, Government of India (2013)
[185] Inputs from Department of Commerce, Government of India (2013)

Big manufacturing firms located in Brazil have also reported difficulty in getting preferential finance from BNDES on ground that it is not using 60% local content in weight and value.

Barriers to Setting-up and running a New Company[186]

Some big Indian companies have reported that they found some unique procedures for setting up and running a new foreign company which are highly cumbersome. These relate to cumbersome requirements for formation of a foreign company and the requirements regarding gradual scaling up of its trading operations.

It is reported that the formation of a Company involves a long-drawn procedure of having at least two quota holders (Foreign Companies) forming the Company in Brazil. The process of drafting the elaborate and Articles of Associations, incorporating the quota holders as the investing companies, and registration of the Articles of Association , takes over 6 months. The process is also very expensive since reputable Law Firms have to be appointed to guide through the complex regulatory process.

It is also reported that Brazil has a unique regulation that a company even before being formed must appoint a "Legal Representative" or an ' Attorney in Fact ", responsible for the Company. This "Legal Representative" has to be a Local Brazilian with RNE (Registro Nacional de Estrangeiros) and CPF (Cadastrado de Pessoas Físicas) . Therefore, even before the company is formed, one has to first identify a "reliable and a Reputable" person, who will represent the Company. This individual can be replaced by a Company's own representative after the entire process of company formation is over and the foreigner gets a Permanent visa. This is also an expensive process, first to identify such an individual, and then for such an individual to undertake the responsibility on behalf of the foreign entity.

Another cumbersome requirement is that of additional infusion of capital if the Newly Formed Company wants to have a foreigner as the Company's ' Administrator/Legal Representative'. For this a minimum of R$ 600,000 has to

[186] Input from Industry Sources

be infused into the Company. This capital infusion has to be done by the two quota holders (i.e. the investing Companies) and this capital has to be registered with the Brazilian Central Bank. This process takes several months. Only after the capital is registered, can the company apply for the Visa for the foreign Manager to come in as the company's 'Administrator/Legal representative.' This takes further several months.

In case another Manager from India has to be brought to support the 'Administrator', the Quota Holders have to infuse a further R$ 300,000. Subsequently, for every foreigner that the Company appoints/employs, R$ 300,000 will have to be infused each time. This is reported to be a huge deterrent to bringing talent from overseas.

It is further reported that after the formation of the local Brazilian company and irrespective of the size and operation of the overseas parent company, the locally incorporated company, before starting import and export business, has to apply and procure a Licence to Conduct Trading Business. This Licence is called RADAR and has, again, a very unique regulatory process. RADAR is issued for a certain value of business only. This value can only be gradually increased as the company proves at each stage that it is conducting business appropriately and successfully for the value for which the RADAR is granted. In other words, even if a company is globally USD 100 Billion Group, it cannot get RADAR for more than a few Million US dollars to start with, gradually ramping up the value of business.

High tariff on services imports[187]

It is reported that there is high tariff on services imports which makes off-shoring from India to local Brazilian market non-competitive. It is reported that cost to customer increases by up-to 40% and on this account, there is reluctance to offshore IT work to India.

[187] Based on feedback from Indian Industry

Revalidation of Foreign Diploma

In the TPR of 2013[188] India stated that the procedures for revalidation of foreign diplomas are complex and time consuming. India requested Brazil to provide information about the steps involved in revalidation of foreign diplomas and also clarify time taken generally in getting such revalidation.

Brazil responded that according to Law 9.394/1996, foreign degrees must be revalidated by a Brazilian public university that offers an equivalent degree recognized by the Brazilian government. The following requirements are necessary: i) consular legalization of documents related to the degree; ii) application for revalidation in a Brazilian public university; iii) copies of the degree and related documents translated into Portuguese; and iv) payment of administrative fees. In case of doubt as to the equivalence of the degree, the evaluation committee may require additional exams, which shall have to be performed in Portuguese. The applicant may also be required to perform additional studies, if minimum conditions are not met. Since the revalidation process is decentralized, it is not possible to provide an average time-frame for its conclusion.

6.3 Other Barriers

Tariff Barrier[189]

Some products of export interest of India face high tariff barrier in Brazil. In textile sector, the tariff on Man Made Fibres is 2.26% and Apparels is 25%. Requirement to obtain Non Automatic Import License for textiles before being shipped from the country of origin has further restrictive effect. Pharmaceutical products face a high import duty of 16%. In leather sector, MFN rate of duty rate is 20% for most of the items falling under Chapter 42. For instance the rate of duty for Saddlery and Harness items (HS Code 4201), trunks, suitcases, vanity cases and other containers (HS Code 4202), articles of apparel and clothing accessories, of leather or composition leather (HS Code 4203), articles of leather

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[188] The full text of questions and answers are available in document WT/TPR/M/283/Add. 1 (2013)

[189] Based on feedback from Indian Industry, Council for Leather Exports (CLE) and Department of Commerce, Government of India

or composition leather (HS Code 4205) are 20%. Customs duty on footwear falling under chapter 64 is also very high ranging from 20% to 35%.

In Sep 2012 Brazil announced import tariff increases for around 100 key products - an increase of up to 25% in some cases—from the end of September 2012. Although products from Mercosur countries were exempted from the increase in import tariffs, the list covered some 4% of Brazil's total imports. Affected goods range from pharmaceutical chemicals to potatoes, plastics, mining and industrial equipment, tyres, vehicle parts and components. Plastics and plastic materials were the items most heavily affected by the tariff increase, encompassing some 20 different products. The new tariffs on these goods ranged from 14% to 25%, up from 2% and 16%, respectively.

Detainment of glass consignment of Indian company

Due to modification in Brazilian import regulations with effect from July 29 2008, prior licensing has been made mandatory for exports of glass containers to Brazil. This has led to additional transaction costs for exporters.

Agriculture Support

India raised its concern in the TPR of 2009[190] about the value of assistance to agriculture in the form of interventions in both the credit and agricultural domestic markets which are considered to be distorting forms of support. India observed that as Brazil was one of the world's largest exporters of agricultural products, its support to agriculture could affect global markets.

Brazil responded that credit-related support increased in the last few years, with the exception of 2007, mainly due to debt rescheduling. That support accounts for about half of the total support granted, and benefited mainly medium size farmers. Major producers of export goods count essentially on private credit sources and are subject to much higher interest rates than in the world market. In addition, the benefit appropriated by medium size producers from the credit policy based on a concessional interest rate is lower than the credit subsidy awarded. This is due to the fact that the financial cost faced by

[190] WT/TPR/M/212/Add.1 (2009)

producers is highly inflated by conditionalities. Distortion caused by credit-related support was negligible. Furthermore, the financing of agriculture at concessional interest rates corresponds only to 25% of rural credit.

The issue of policy of Guaranteed Minimum Prices (PGPM) and Federal Government Acquisition Programme (AGF) was raised in TPR of 2013[191]. India requested Brazil to clarify whether total production of a particular crop is eligible for procurement or whether government sets a target for the procurement and how this policy is treated in WTO's notification on domestic support.

Brazil responded that after consulting other areas of the government, MAPA assigns budgetary allocations according to the current needs and conditions of each commodity market. The access to different "Policy of Guaranteed Minimum Prices" (PGPM) programs is decided according to the available budgetary allocations and the specific conditions of the market.

In order to make use of any PGPM program, at least two conditions apply: i) the market price should be noticeably below the minimum price; and ii) there are available budgetary allocations. It is not unusual that the market price is below the minimum price in some parts of the country, but no supporting program is used. Depending on each specific situation, one or more of the programs available is implemented, and the basis for the notification varies accordingly.

In the case of the procurement program, the eligible production notified is the quantity actually benefited by the measure. This is the case for the Federal Government Acquisition Program (AGF) and the Public Contract Options. Regarding the programs based on direct payments, the budgetary outlays are the notified figures.

Tax/Social Security related issues[192]

As per the provisions of the Brazilian Federal Income Tax Regulations, payment of fees for technical services is subject to withholding of 15 % of the amount. On

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[191] WT/TPR/M/283/Add. 1 (2013)

[192] Inputs from Department of Commerce, Government of India (2013)

the other hand, as per the provisions of the Indian Income Tax regulations, Royalty and fees for technical services paid to a non-resident are subject to withholding of 10 % basic tax rate.

Indian Companies, deputing their employees to their Brazilian associate/ affiliate companies, as well as the deputed employees, face high financial burden because of the requirement to pay high social security contributions, namely, Employee Contribution: 7.65 % to 11% of Gross wages, Employer Contribution: 36.3 % of Gross wages.

Operational issues for foreign companies[193]

It is reported that registration procedure for setting up a new company is very slow and time taking. It is also reported that the requirement that the cheque signatory, i.e. Administrator of a company must be a resident of Brazil creates functional difficulties. Added to this is the difficulty of long waiting period at government and administrative offices, banks and other services.

Customs procedures

India has observed[194] that there is very high port fee, taxation and other charges in Brazil. Technical barriers to new entry exist because of shift in implementation of Euro norms to 2012. These customs procedures result in delays and penalties.

Brazil responded that resolution no. 16 of 20 March 2008 created the Technical Group of Trade Facilitation (TGTF). Since then, the Brazilian Government adopted the following Trade Facilitation measures: a) Conclusion of the draft legislation submitted to Congress to ratify the Istanbul Protocol (Ata Carnet); b) Elimination of licensing requirements for importing airplanes and airplane parts; c) Reduction in the number of products subjected to inspection for internal transit by ANVISA and IBAMA; d) Comprehensive review of legislation and licensing requirements for each non-tariff control agency with a view to reduce duplication and increase efficiency; e) improvements to SISCOMEX in order to allow agencies to automatically approve less risky operations; f) Incorporation

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[193] Inputs from Department of Commerce, Government of India (2013)
[194] WT/TPR/M/212/Add.1 (2009)

of new software to SISCOMEX to allow the attachment of electronic documents to the system; and g) Nationwide evaluation of the available workforce of all Brazilian government agencies operating at borders, in order to provide adequate personnel to deal with increased trade flows. Additionally, the TGTF has been working on the following actions: (i) Definition, development of criteria, and introduction of risk management tools for non-tariff control agencies into SISCOMEX; and (ii) Implementation of more efficient rules for inspections of wood products and containers consisting of wood, including acceptance of a certification issued by exporters or importers that the wood has been treated.

Trade Samples[195]

Heavy machinery etc that Indian companies want to bring for trade fairs faces cumbersome delay in clearance. It is reported that at times goods get cleared after the Exhibition is over. After conclusion of the Exhibiton, it is reported that the exhibitor is anxious, to sell the exhibits, if possible, after payment of customs duty to avoid spending time and energy in shipping the heavy exhibit back to India. However, Brazilian rules and procedures prevent the same and as a result, the exhibitor is forced to re-export the goods to India.

Pharmaceuticals[196]

In addition to problems highlighted with regard to registration and issuance of products license and high import tariff, several other barriers also reported which affect exports of Indian pharmaceuticals. Pre-authorization is required in the form of Import Licenses for specific molecules. Customs Clearance by Brazilian agencies like the National Health Surveillance Agency (ANVISA), Receita Federal takes as long as 15-20 days.

While Pre-authorization (Import License-IL) is applicable to part of consignments (controlled products only), post-authorization is required for 100% of commercial and non-commercial consignments, including those ones previously authorized and even to repeated products/Drug Formulations (DF)/ Samples being imported into the country.

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[195] Based on feedback from Indian Industry
[196] Based on feedback from Indian Industry

The average time for a previous Import License (IL) is about 10 days based on actual data, but it can even take about 30 days, depending on how the analysis is done. Sometimes, queries are made by ANVISA about many non-applicable details, depleting product shelf life, with back and forth communications to clarify "non applicability". Post-authorization is required for physical checking by ANVISA and can take from 2 to 10 days, depending on the season.

Further, on arrival of consignment in Brazil, ANVISA-document verification at airport/port takes an average of 10 days, followed by clearance from Receita Federal. Thus, it takes 15 to 20 days for the consignment to be released from the airport/port. Sometimes, clearance of consignments is delayed simply because the information in the integrated Anvisa system (called Datavisa) has not been updated.

About 50% market for the hospital products is reserved for the locally manufactured goods and therefore products manufactured from India do not qualify for supply through certain government and other public tenders. Only locally manufactured medicines are allowed in such tenders.
Also, there are certain tenders having approx. 15-20% of the market share where apart from the local manufacturers, products from the NAFTA treaty countries are allowed to participate.

Handlooms[197]

a) ***Minimum Import Price:*** In the case of some products (such as Textile and Garments), Brazilian foreign trade Ministry has fixed minimum price to prevent under invoicing by importers. But the Ministry does not publish these figures. They simply refuse import clearance when the prices are lower than the minimum prices. India raised the issue in TPR of 2009[198].

   Replying to this, Brazil clarified that it uses the transaction value as the valuation method of 99% of its imports. If it is not possible to apply the transaction value, Brazilian authorities resort to the substitute methods provided for in the Customs Valuation Agreement. There are no minimum

[197] This information has been obtained from Handloom Export Promotion Council
[198] Full text available in WT/TPR/M/212/Add.1

import prices as such, whereas parameters for risk analyses cannot be published in order not to defeat their own purpose.

b) ***Import License:*** It is understood that for some of the textile items, the import license is required.

c) ***L/C Condition:*** The credit condition for the importers at Brazil is not conducive. The importers and businessmen in Brazil borrow from banks at high interest rates between 3% and 7% a month. The importers are, therefore, interested to get credit of more than 360 days from the supplier. Credit term under less than 360 days is useless to them since they are obliged to make full payment to the local bank at the time of clearance of goods, as per the regulation introduced in March'97. This regulation is a problem for the importers.

Good Maufacturing Practices (GMP) Certification[199]

GMP (Good Manufacturing Practices) Certification creates obstacles due to excessive regulatory controls imposed by Brazil's regulatory authority ANVISA (AgênciaNacional de Vigilância Sanitária) and cumbersome procedures laid down in Resolution 11 (published in March 2009).

Local Value Addition requirements[200]

Local Value Addition norms require at least 60% value localization of goods by value and weight, in order to be eligible for preferential finance from financial institutions. It is reported that specifically for new ventures, it is not easy to achieve this localization norm and hence this becomes a deterrent for investment.

Buy Brazil Decree[201]

In July 2010, Brazilian government passed a decree altering the rules for government procurement. As per the new rules, Brazilian government would

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[199] Based on feedback from Indian Industry
[200] Based on feedback from Indian Industry
[201] Inputs from Department of Commerce, Government of India (2013)

give preference to the Brazilian suppliers over foreign firms even if their prices are up to 25% higher. The government may also set higher margins for the purchase of domestic products and services developed through national technology. Earlier the main criterion for the winning bid was the lowest price. The margin of preference will be defined taking into account factors such as potential for generating employment and income, effect on tax collection and development and technological innovation. In addition, the decree states that the government may define as "strategic", the goods and services in the areas of information technology and communications and require that suppliers use technology developed within Brazil. Stimulus measure to boost domestic production introduced in 2012 extended the buy Brazil element to construction equipment particularly those used in large infrastructure projects.

Trade Remedy Action[202]

Anti dumping duties have been imposed against the export of Jute bags, Jute fibers, polyester films and Viscose yarn from India. Countervailing duty also has been imposed on export of Polyester films. Brazil is conducting anti dumping investigations against the export of Nitrile Rubber and Stainless steel cooking utensils from India. The very fact that the questionnaire for exporters is only in Portuguese and has to be answered in the same language is a major hurdle to comply with information requirements during the investigation. It is further reported that the deadline for answering the questionnaire is not extended on request of the Embassy of India. Brazil's DECOM [Department of Commercial Defence] insists that individual importer should make a request for extension of deadline.

India had raised similar issues during the TPR[203] of Brazil in 2009. In response Brazil had explained that Brazilian Law (Article 13 of the Constitution) requires that all official acts and procedures must be published and conducted in Portuguese. Under the WTO agreements, there is no obligation for the Members to provide translations or to maintain records of an investigation procedure in a specific language. Brazil further noted that the Brazilian authority always extends the time period for answering the questionnaires.

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[202] Inputs from Department of Commerce, Government of India (2013)
[203] WT/TPR/M/212/Add.1 (2009)

6.4 USTR on Market Access Barriers in Brazil

The US has raised concern over the issue of onerous and burdensome documentation requirements, which are required before certain types of goods can enter Brazil - even on a temporary basis. For example, the Ministry of Health's regulatory agency, ANVISA (Agência Nacional de Vigilância Sanitária/ National Health Surveillance Agency Brazil) must approve product registrations for imported pharmaceuticals, medical devices, health and fitness equipment, cosmetics, and processed food products. Currently, the registration process at ANVISA takes about 3 months to 6 months for new versions of existing products, but can take over 6 months to register products new to the market. Registration of pharmaceutical products can take over 1 year, since ANVISA requires that a full battery of clinical testing be performed in Brazil, regardless of whether or not the drug already has FDA approval.

In the USTR 2013[204] the US has again pointed out that Brazil bans imports of US live cattle, beef, and beef products following the detection of a BSE-positive animal in the United States in 2003. Also, Brazil only allows imports of the US pork from plants that its inspectors have individually inspected and approved. The US alleged that this approach is burdensome for the industry and significantly limits the market access of companies willing and able to export to Brazil.

The US also noted that, In December 2010, Brazil's Ministry of Agriculture, Livestock and Food Supply (MAPA) published Normative Instruction 36 (Norma 36), a regulation establishing burdensome and extensive treatments and seed testing requirements for the importation of 118 seed species into Brazil. Following coordinated engagement by the US Government, the US seed industry, and other trading partners of Brazil, MAPA amended Norma 36 in February 2011, allowing for inspection of seed fields instead of laboratory testing as originally described in the regulation.

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[204] United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

7. Thailand

Indian concerns on market access barriers were raised during its TPR held in 2012[205].

7.1 Issue in services

Foreign nationals are not allowed representation on the company's board or top level management positions in Thailand. India raised the issue in TPR[206] of 2011. Thailand responded that foreign nationals are allowed to be represented on the board of directors of companies in Thailand up to a specified limit. This also applies to foreign nationals who are Executives, Managers or Specialists to be transferred temporarily for providing the supply of a service in Thailand under Intra-Corporate Transferees (ICT) requirements as specified in Thailand's WTO commitments.

India also requested information about the various discriminatory national treatment related to restrictions prevailing as per laws, regulations or government orders in Thailand under professional services (legal services; architecture, engineering and integrated engineering services; accounting, auditing and bookkeeping services; medical, dental and nursing services). Thailand clarified that for legal service, foreign services providers are not allowed to engage in arbitration proceedings with relation to Thai Laws, but may do so if arbitration proceedings are based on foreign law. Foreign civil engineers are prohibited from working in Thailand. Medical, dental and nursing services are not included in Thailand's WTO schedule of commitments.

7.2 Other Barriers

Import licensing and prohibitions

The importation of marble (HS. 25.15 except HS. 2515.12.10), marble, travertine, alabaster (HS. 6802.21.00), Granite (HS. 6802.23.00) and other building stone

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[205] The full text of questions and answers are contained in document WT/TPR/M/255/Add.1

[206] WT/TPR/M/255/Add.1 (2012)

(HS. 6802.29.00) is required to apply for a non-automatic import license from the Department of Foreign Trade in order to administer the import and the use of marble and building stone. India requested Thailand to justify whether these actions are not in violation of Article XI of GATT 1994 and Agreement on Import Licensing Procedures.

Thailand responded that according to Section 5 of the Export and Import of Goods Act, B.E. 2522 (1979), the Minister of commerce with the approval of the Cabinet has an authority to publish the notification in the Government Gazette to ban, to require for the permission, to prescribe any categories / kinds / qualities / standards / quantities / brands / origins / special fees, etc., of any import and export goods in any cases where it is necessary for economic stability, public health, national security, peace and order, good morals of any other interests of the state. Thailand further claimed that these actions are not in violation of Article XI of GATT 1994 and Agreement on Import Licensing Procedures.

Competition policy

The WTO Secretariat Report[207] had indicated that Thailand indicated that for regulating competition it had passed Competition Act 1999. However, the Secretariat report had indicated that the Competition Act does not apply to central provincial or local administration state trading enterprises co-operatives or corporative societies. Further, the Act provides wide ranging power to the Ministerial Regulations to specify the exemptions. India requested for justification for the above measures.

Responding to this Thailand said that the competition law does not apply to central provincial or local administration state trading enterprise cooperatives or cooperative societies because it is government administration that does not have the objective to make profits. Regarding the Ministerial Regulations for specific exemptions, it was clarified that such specific exemptions had not been issued since law was introduced[208].

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[207] The full text of WTO secretariat report is available in WT/TPR/S/255/Rev.1(2012)
[208] WT/TPR/M/255/Add.1 (2012)

Transparency Issue

The Department of Foreign Trade is required to inform petitioners, plus exporters and importers of the product, or their representatives, of the initiation of an Anti Dumping investigation. During the investigation, foreign producers/ exporters are required to fill in pre-questionnaires or full-questionnaires and submit them by a certain deadline. However, not all documents provided by the Department are in English, such as petitioner's complaints, which have created a hindrance to producers/exporters being able to respond in time. Also, the Thai Government Procurement website gives access to the e-Auction system and provides information on selection criteria, the results of auctions and details of the decisions in Thai only which adds to cost of traders[209].

In the TPR[210] of 2012 India requested Thai authorities to indicate whether all the notifications, relating to the implementation of the FTAs, are issued in English language and placed in public domain. Thailand responded that such information can be found in the relevant agencies' websites such as that of the Ministry of Finance. However lack of availability of full information in English is still being reported by many stakeholders.

Customs Related Issues [211]

The market potential for Air Coolers is quite huge in Thailand. For export to Thailand, they require TISI approval (e.g. ISI standard in India). EEPC India has informed that it had sent all their certifications with regard to quality approvals e.g. CE, ETL, UL, SASO etc., which show that they are an appliance brand with all the required approvals for various countries that they export to. TISI is reluctant to issue the approval for import of Air coolers to Thailand which is proving to ba a market access barrier.

Following further barriers are also experienced in Thailand by Indian Exporters:

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[209] WT/TPR/S/255/Rev.1(2012)

[210] WT/TPR/M/255/Add.1 (2012)

[211] This information has been obtained from Engineering Export Promotion Council (EEPC India)

a) Import guidelines are not provided. A lot depends on interpretation of the rules by the local custom officer.

b) Rules of temporary import of vehicles are open to the Custom Officer's interpretation.

c) Bank guarantee required for temporary import procedure is required in local Thai language and English is not acceptable. This results in additional cost and delays.

d) Certificate of origin is not issued promptly.

7.3 USTR[212] on Market Access Barrier in Thailand

Some of the issues brought out in the report which may be of concern to India are:

a) High duties on agriculture and food products in addition to arbitrary management of import licenses and SPS measures remain the primary impediments to exports of high value fresh and processed foods.

b) Import licenses are required for import of many items, including many raw materials.

c) In the USTR (2013) report it is mentioned that Thailand imposes food safety inspection fees in the form of import permit fees on all shipments of uncooked meat. Current fees are $160 per ton for red meat (beef, buffalo, goat, lamb, and pork) and offals, and $320 per ton for poultry meat. Fees for domestic meat inspections, however, are significantly lower at $5 per ton for beef, $21 per ton for poultry, $16 per ton for pork, and zero for offals. The domestic fees are levied in the form of slaughtering or slaughterhouse fees.

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[212] United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

8. Republic of Korea

Some sources indicate that Korea maintains certain standards, technical regulations, and conformity assessment procedures that are burdensome and appear to have a disproportionate effect on imports. Some issues were raised in TPR of 2012[213].

a) Republic of Korea intends to help local car makers produce 1.2 million 'green cars' and export 0.9 million units by 2015. The Ministry of Knowledge Economy (MKE) also plans to select at least one project every year out of the 'industrial sources projects' in support of R&D and provide financial support of up to 1 billion KRW (south Korean won) over three years. Noting this, India requested Republic of Korea to provide details of the "support" offered to the Republic of Korean automobile firms to secure 10% of the global electric car market by 2015 and to also confirm if there is a domestic content requirement imposed to benefit from the government support[214].

   Korea responded that it applies price-based measures such as temporary tax reductions/exemptions for the customers of green cars, and direct subsidies for public use regardless of the use of local contents. The continuation of such measures will be reviewed at a later date. Details of support are the following:

   - Tax reduction/exemption: Max 4.2M won ($3,500) for EV and max 3.1M won ($2,500) for HEV in Individual consumption tax, Acquisition tax and Government bonds

   - Direct subsidy: Max 17M won ($14,000), or 50% of the difference between gasoline vehicle cost and EV cost.

b) According to the WTO secretariat report[215] of 2012, Republic of Korea has multiplicity of rates in the form of 84 ad valorem and 46 other duties. India

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[213] The full text of questions and answers are available in WT/TPR/M/268/Add.1 (2012)

[214] WT/TPR/M/268/Add.1 (2012)

[215] The full secretariat report is available on WTO website under document symbol WT/TPR/S/268 (2012)

requested Korea to provide the details of any plan to reduce the multiplicity of duties.

Korea responded that various measures aimed at mitigating the effects of liberalizing markets for some agricultural products may make Korea's tariff rate system look a little complex. However, it has a structure with a flat 8% tariff rate for manufactured products and a high proportion (99%) of ad valorem tax. The simplification of the border taxation system is being discussed in the WTO Doha Development Agenda.

USTR[216] on Market Access in Korea

USTR Report 2013 has raised the following concerns:

a) Chemicals – Act on the Registration and Evaluation of Chemicals (REACH): In February 2011, Korea's Ministry of Environment (MOE) released a draft "Act on the Registration and Evaluation of Chemicals (REACH)" to the National Assembly. As announced, Korea REACH would create a complex registration system for chemical products, perhaps as early as 2014. U.S. industry submitted comments to MOE on Korea's proposal, and the United States raised this issue with Korea bilaterally and in the TBT Committee in June and November 2011. In 2012, Embassy Seoul monitored the draft Act and continued to discuss concerns about the burden and lack of clarity of Korea's proposed Act, in particular the draft law's proposed de minimis level of 0.5 tons (rather than the EU REACH one ton) and duplicative reporting requirements. Many of these concerns, including the de minimis level and reporting requirements, were addressed in the version of the Act that MOE submitted to the National Assembly in September 2012. The Act has not been approved by the National Assembly, and the legislature continues to work with the MOE to refine the legislation; it is unclear whether areas in which MOE reflected industry comments will all be maintained in the final law. The United States seeks to ensure that Korea's final requirements are not unnecessarily trade restrictive.

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[216] United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

b) Cosmetics – Labeling: In August 2012, the National Assembly proposed legislation that would require labeling for all packaging of all cosmetics products despite existing exemptions for small packages under 10 ml or grams. The US companies will potentially encounter a considerable financial burden if the bill is enacted into law. Consequently, the United States will continue to monitor this issue in 2013.

c) Organic Products – Requirements and Conformity Assessment Issues: Korea's Act on Promotion of Eco-Friendly Agriculture and Management of Organic Products (the "Organic Products Act") becomes effective on May 29, 2013. The Organic Products Act clarifies requirements previously adopted in 2008 for organic certification and labeling that mandate certification of processed organic products by a certifier accredited by the Ministry of Food, Agriculture, Fisheries, and Forestry (MIFAFF). Under the new requirements, the US organic products would need to be re-certified to maintain their organic labeling. Many US producers and certifiers are reluctant to seek product re-certification due to the difficulty of ensuring that individual ingredients also meet certification requirements. However, the Organic Products Act permits the conclusion of equivalence agreements, which might alleviate burdens on US products. Nevertheless, the Organic Products Act does not permit equivalence agreements to go into effect until January 2014. The United States, Canada, Australia, New Zealand, and the European Union requested Korea to suspend its new certification and labeling requirements until equivalence agreements can be concluded. On November 13, 2012, Korea agreed to this request and will permit foreign organic products to be labeled as organic in Korea without MIFAFF-accredited certification. The United States seek to initiate discussions/negotiations with Korea on an equivalency agreement in 2013 with the view to concluding an arrangement that will facilitate exports of US organic products.

d) Motor Vehicle Parts - Safety Standards and Certification: In August 2011, Korea published draft regulations for comment, which mandated that specified replacement motor vehicle parts comply with Korea Motor Vehicle Safety Standards (KMVSS) and established a self-certification system for indicating compliance with the safety standards. The final regulation, promulgated in December 2011, reflected some of the comments submitted by the foreign automotive industry but did not reflect important requests

related to the acceptance of parts certified to non-Korean standards. In April 2012, Korea published draft administrative guidelines, which contained implementation details for the new system and which raised additional concerns related to the allowable methods for marking the parts. The United States worked closely with Korea over several months on these proposed measures and the US concerns regarding use of non-KMVSS standards for parts and allowable methods for marking parts were resolved.

e) Agricultural Biotechnology: Korea's regulatory system for agricultural biotechnology has generated concern in recent years with regard to its lack of predictability and transparency. In 2008, Korea implemented the Living Modified Organisms Act (LMO Act), which regulates trade in agricultural biotechnology products, including food and seeds for use as feed or for processing. The United States has raised a number of issues related to the LMO Act and its implementing regulations, including concerns that certain import documentation requirements go beyond the current provisions of the Cartagena Protocol on Biosafety, and that Korea's process for reviewing the product risk assessments may be redundant and lacking scientific justification. The process may also lead to delays in the approval of new products. The United States is also concerned about Korea's narrow scope of definition for "adventitious presence." In addition, the United States is concerned that the LMO Act, while nominally applying to all living modified organisms (i.e. plants and animals), was written solely with living modified plants in mind and thus does not readily apply to the trans-boundary movement of living modified animals. In late 2012, Korea's National Assembly approved revisions to the LMO Act. The implementing regulations to the Act are expected to be revised in 2013 to reflect the recent changes to the Act itself. The United States is in the process of reviewing the revised Act to determine if the revisions address US concerns. Korea completed approvals for five new GE plants in 2012. US concerns continue, however, with regard to the lack of predictability in Korea's agricultural biotechnology review process.

f) Maximum Residue Limits: Korea has a national MRL list and uses a unique and complicated deferral approval process using Codex and other systems when no national MRLs are established. Korea has increased pesticide residue testing on US commodities due to residue violations occurring in

other countries. After a single MRL violation by a US export (including one detected by authorities of another country), Korea imposes restrictive requirements on that product's grower, shipper, and importer, and requires that they must make a certain number of compliant shipments before the sanctions are removed.

9. Malaysia

Some of the concerns raised in Malaysia's TPR[217] in 2010 and in USTR report[218] 2013 which may be of relevance for India are the following:

a) Automobile sector[219]: Malaysia has long protected its automobile manufacturing industry from foreign competition using high tariffs and nontariff trade barriers. Malaysian government policies also distinguish between national cars, i.e., domestic producers Proton and Perodua, and non-national cars, which include most vehicles manufactured in Malaysia by non-Malaysian owned firms. Significant barriers, including highway bans, also exist to the importation, sale, and usage of large motorcycles. Noting this India requested Malaysia to explain whether it proposed to reform and liberalise its automotive sector to attract greater FDI, upgrade technology to meet its domestic demands as well as expand its automotive exports.

   Malaysia responded that, beginning 1 January 2010, under the review of the National Automotive Policy, Malaysia has undertaken several measures to reform and liberalise the automotive sector. Measures that are being implemented include:

   i. Lifting of the freeze on issuance of new Manufacturing License for selected automotive segments with no equity condition imposed:

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[217] The full text of questions and answers are available in WT/TPR/M/225/Add.1 (2010)

[218] United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

[219] WT/TPR/M/225/Add.1 (2010)

- luxury passenger vehicles with engine capacity of 1,800 c.c and above and on the road prices not less than RM150,000;
- pick-up trucks and commercial vehicles;
- hybrid and electric vehicles;
- motorcycles with engine capacity of 200 c.c. and above.

ii. Emphasis on promoting investments in high value-added and high technology activities.

b) Meat and Poultry Products – Halal Standards[220]: Malaysia requires all domestic and imported meat (except pork) to be certified as halal (produced in accordance with Islamic practices) by Malaysian authorities. Malaysian regulations require producers' halal practices to be inspected and approved for compliance with Malaysian standards on a plant-by-plant basis prior to export.

In January 2011, Malaysia implemented a food product standard – MS1500: 2009 – that sets out general guidelines on halal food production, preparation, handling, and storage. MS1500: 2009 creates standards that go well beyond the internationally recognized halal standards, which are contained in the Codex Alimentarius. Specifically, the guidelines require slaughter plants to maintain dedicated halal production facilities and ensure segregated storage and transportation facilities for halal and non-halal products. In contrast, the Codex allows for halal food to be prepared, processed, transported, or stored using facilities that have been previously used for non-halal foods, provided that Islamic cleaning procedures have been observed.

In April 2011, Malaysia notified to the WTO its "Draft Malaysian Protocol for the Halal Meat and Poultry Productions." The protocol provides additional information and guidance on complying with MS 1500: 2009. In May 2011, the United States provided comments on the protocol and

[220] United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

subsequently raised concerns regarding the protocol during the June and November 2011 TBT Committee meetings. Following that, Malaysia scheduled mandatory audits for establishments seeking to export to Malaysia. These audits took place in September 2012. The United States recently received notice from Malaysian officials that only one US establishment passed the audit. All the other establishments failed the audits and are accordingly prohibited from exporting to Malaysia.

Additionally, in early 2012, Malaysia changed its pet food requirements such that porcine ingredients are now banned from food for cats, which many Malaysians keep as pets. Malaysia did not notify this change to the WTO, nor has Malaysia produced satisfactory justification for this prohibition, other than to indicate that will help consumers avoid purchasing products with porcine (i.e. non-halal) ingredients. Malaysia has not begun to enforce these requirements yet. The United States has suggested that Malaysia's objectives could also be achieved through alternative measures such as labeling.

c) Tariff Issue[221]: Malaysia's tariff classification systems, for preferential and MFN tariffs, are aligned to the Harmonized System at 9-digit level; preferential tariffs for intra-ASEAN trade remain under the Asean Harmonised Tariff Nomenclature (AHTN) classification system. The current Malaysian customs nomenclature (for MFN duties) is based on the 2007 Harmonized System (HS). The Malaysian tariff comprises 10,389 lines at the 9-digit level. Almost all rates (99.2%) are ad valorem; the remainder are specific, compound, or alternate duties. Malaysia has no plans to convert all of its non-ad valorem duties to ad valorem duties; it continues to maintain non-ad valorem duties for agricultural products to protect small and rural farmers. Given that these duties conceal relatively high AVEs, the level of applied tariff protection could be considerably higher than the simple average of all ad valorem rates of 7.4% in 2009. In 2009, 32 of the top 50 tariffs entailed non-ad valorem rates. In view of transparency, the authorities provided ad valorem equivalents (AVEs) for 46 out of 80 non-ad valorem tariff lines; AVEs for 73 tariff lines are based on import data for 2003-05, and those for 7 lines on data for 2005-07. AVEs were not provided for

[221] WT/TPR/M/225/Add.1 (2010)

alcoholic beverages, possibly indicating the prohibitive nature of tariff rates for these products. If the AVEs provided are included, the simple average MFN applied tariff rate becomes 9.1% (7.4% excluding AVEs), and the simple average MFN applied rate becomes 18.1% for agricultural products (WTO definition) (2.8% excluding AVEs) and 7.9% for non-agricultural products (also 7.9% excluding AVEs). Three tariff lines have AVEs exceeding 1,000%; they involve bananas and tobacco refuse. The simple average of AVEs provided is 392%. India requested for a list of products on which these non ad valorem duties are maintained. Malaysia responded that the non AVE lines covering specific and compound tariffs are Tropical fruits – compound tariffs; Tobacco products–specific and compound tariffs; and Alcoholic beverages – specific tariffs.

d) Local Participation Requirements[222]: As per a pre-qualification requirement in a tender of Malaysia, there is an eligibility clause of local registration or partnership with local firm. Instance of mandatory local involvement requirements was reported in terms of certain items to be open only to local companies (like transformers & switchgear & C/R panels can be quoted only by local companies in Malaysia).

10. South Africa

10.1 Tariff Barrier[223]

South Africa is a potential market for the leather sector especially Footwear. South Africa imposes very high peak tariffs for articles of leather. All items of interest to India are heavily protected. On the other hand, due to Free Trade Agreements some other trading partners get concessional rates e.g. EU gets a 8% rebate and EFTA 4% on goods falling under chapter heading 6403 and 6405. EU gets rebate of 6-12% on goods under chapter heading 6404 while EFTA gets 4% rebate. Under HS code 6406, EU gets 8-10% rebate in some lines while EFTA gets 4 to 8% rebate. SADC enjoys duty free treatment on all lines. Footwear is

[222] This information has been obtained from Bharat Heavy Electricals Ltd (India).
[223] This information has been obtained from Council for Leather Exports (CLE India)

an item of interest to India and the high duty rates poses serious market access barrier.

The very high bound and applied import duty rates for goods falling under HS Chapter 41, 42 and 43 and 64 also pose serious market access barriers.

10.2 Local Workforce Requirement[224]

In order to maximise the benefits on the Project to local communities, the project Company has to ensure that at least 20% of the total workforce required for the on-site construction of the Facility (i.e. all people required to be working on site during construction, which excludes design and component manufacturing) are people from local communities within the province where the Facility is situated.

Following the Commercial Operation Date, general maintenance activities associated with the Site and the Facility (whether or not such activities fall within the scope of the O&M Contract) should be performed by Black Enterprises and/ or Black People from local communities within the province where the Facility is situated. For the avoidance of doubt, these activities exclude the maintenance of the power plant (and associated equipment)which the Project Company shall maintain in a manner that it considers most appropriate to meet its other obligations under the Project Agreements. This Project constitutes the first Greenfield IPP project in South Africa and throughout the Term the DME (Department of Minerals and Energy) believes that there are significant opportunities to achieve skills transfer to Black people.

Bidders are required to submit, as part of their Bids, a skills development plant with measurable targets as part of their response to the RFP in addition to the skills development levy prescribed by the Skills Development Levies Act 1999 (to the extent that this act is applicable to the Project Company).

In one of the IPP Power Generation tender of South Africa, it was mentioned that as required by law of that country, any company executing a project in South Africa shall ensure that at least 20% of the total workforce required for

[224] This information has been obtained from Department of Heavy Industry, GoI

on-site construction are Black people for local communities within the province where the Facility is situated. It is also required that the bidders must achieve the minimum Black Empowerment Entity (BEE) Content[225].

11. Russia

11.1 SPS-TBT Issues[226]

Meat Products

Russian standards for Bovine meat are more stringent than the OIE Terrestrial Animal Health Code. Conformity Certificates issued by EIC are not recognized. All this adds to the transaction cost.

Additional standards and certification requirements

Phytosanitary norms are particularly restrictive. In addition to phytosanitary certificate, certain categories of agricultural products require quality certification which is reported to be restrictive.

There is a third party testing requirement in Russia which is reported to be highly burdensome. While most of the countries recognize CE Conformity under self-declaration, the importers insist on third-party certification or adherence to local or national standards for items such as Electrical Heating & Tracing Cables for Domestic, Commercial & Industrial Heating Applications. Having a library of Standards for specific countries is almost impossible for any Indian manufacturer owing to the high costs involved[227].

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[225] Issue highlighted by Bharat Heavy Electricals Ltd. (BHEL)

[226] The information has been sourced from Department of Commerce, Government of India sources

[227] This information has been obtained from Engineering Export Promotion Council (EEPC India)

Tea[228]

India faces certain market access barriers in tea exports as listed below:

a) Differential rate of import duty on Bulk Tea vis-à-vis Packaged Tea. Import duty on Packaged Tea in Russian Federation is very high (20%) whereas import duty on bulk tea is 0%.

b) Although there is a GSP concession for Indian packaged tea to Russian Federation (which is 75% of MFN duty, i.e. 15%), it is very difficult to avail the same in view of non acceptance of Indian documents by the concerned authority of Russian Federation.

Pharmaceutical Products[229]

There are comprehensive or stringent testing and certification procedures for pharmaceutical products (technical varieties).

Utilisation Fees/Recycling Fee on imported motor vehicles[230]

Russia has imposed recycling fee on imported motor vehicles since October 2013 which is likely to have negative economic impact for exporters of motor vehicles.

Tariff Barrier on Leather Goods[231]

Russia's MFN applied tariff rates for Saddlery and Harness items (HS Code 4201), trunks, suitcases, vanity cases and other containers (HS Code 4202), are high at 20%. The articles of apparel and clothing accessories, of leather or composition leather (HS Code 4203), and articles of leather or composition

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[228] This information has been obtained from Tea Board of India and Department of Commerce, Government of India

[229] Input from Department of Commerce, Government of India

[230] Input from Department of Commerce, Government of India

[231] Inputs from Council for Leather Exports (CLE), India

leather (HS Code 4205) ranges from 5% to 10%. Similarly, the MFN Tariff rates for tanned and dressed furskins under HS Code 4302 ranges between 10% to 20%, for articles of apparel, clothing accessories is 20% and for other articles of furskins (HS Code 4303) ranges between 7.5% and 20%.

11.2 USTR on Market Access Barriers in Russia[232]

USTR 2013 states that there exist barriers to import of Alcoholic Beverages. Russia levies excise taxes on alcohol and enforces these taxes through a system that requires alcohol beverage containers to bear an excise "strip stamp" label. The other issue related to alcoholic beverage highlighted in the report is the Conformity Assessment Procedures, Standards, and labeling and Warehousing Requirements. According to the Report, the EEC "Technical Regulation on Alcoholic Product Safety" also introduces burdensome and unique requirements to label all alcoholic beverages, with an expiration date, or include a label indicating that "the expiry date is unlimited if the storage conditions are observed." The US industry notes that the proposed requirement does not provide accurate or beneficial information for products containing more than 10 percent alcohol, because these products do not expire. Furthermore, the proposed expiration date requirement appears inconsistent with international guidelines – particularly with Article 4.71(vi) of the Codex General Standard for the Labeling of Prepackaged Foods, which exempts beverages containing 10 percent or more by volume of alcohol from such date-marking requirements. These requirements may also result in the trade barrier for other countries.

Another issue relates to Food labeling requirement of Russia. In October 2012 the Eurasian Economic Commission (EEC) of the CU published a revision to the "Technical Regulations on Food Products Labeling." The revision imposes numerous labeling requirements, including with respect to nutritional components, allergens, and GE foods. In addition, the revision requires that products containing sweeteners must carry a warning statement that overuse will cause digestive problems, and those products with food coloring must declare that it affects children's ability to concentrate. Additionally, the United States noted that the requirements for labeling of allergens in food are unclear

[232] United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

and that these claims are not based on the latest scientific research nor do they appear consistent with the Codex. In addition to this the US alleged that its exporters also continue to face systemic issues in Russia related to the certification of agricultural products. In particular, Russia requires export certificates for products for which certifications are unnecessary or are otherwise unwarranted. For example, Russian certifications require phytosanitary attestations for shipments of such processed agricultural products as soybean proteins, corn gluten, and distiller's grains, which, due to the nature of the processing process, do not present a pest risk. Likewise, Russia requests the US exporters to submit certifications stating that the United States is free from various livestock diseases, even where there is no risk of transmission from the product in question. To date, the United States has not received scientific justifications nor risk assessments for many of Russia's SPS requirements.

12. Argentina

The following issues have been sourced from the Department of Commerce, Government of India.

12.1 Issues in Services

Restriction on issue of business visas to Indian business visitors

The process of obtaining Argentine visa by Indian businessmen is cumbersome and complicated. The Embassy of Argentina insists that every business visa applicant should be accompanied with original invitation signed by Argentine company which should be attested by a notary public in Argentina. The Embassy asks for the invitation from the CEOs of the Indian companies who have invested in Argentina.

12.2 USTR[233] on Market Access Barriers in Argentina

The USTR Report (2013) on Argentina has raised the issue of Government of

[233] United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

Argentina not lifting the ban on the import of meat products from the US. It states that Argentina bans imports of all the US live cattle, beef, and beef products due to BSE-related concerns following the detection of a BSE-positive animal in the United States in 2003. In November 2010, Argentina issued a final regulation regarding BSE and the importation of bovine products, but the new regulation did not correct many of the unwarranted restrictions in force previously, nor did it allow for the import of the U.S. live cattle, beef, and beef products. Other than that the US pork does not have access into Argentina.

While the US exporters currently have access to Argentina's market for certain poultry products, including day-old chicks and hatching eggs, Argentina does not allow imports of fresh, frozen, and chilled poultry from the United States due to concerns over AI and Newcastle disease. Argentina indicated previously that it would accept cooked poultry products from the United States, but there is no agreement yet on what the U.S. sanitary certificate will state in the light of Argentina's determination that the U.S. poultry inspection system is not "equivalent" to the Argentine system. The United States has expressed concerns regarding both Argentina's poultry product limitations and failure thus far to grant equivalency to the United States.

Testing of All Graphic Products for Lead: The United States continues to be concerned with Argentina's Resolution 453/2010, which requires all inks, lacquers and varnishes used in producing printed materials, such as package labeling and inserts, to undergo testing for lead content. Prior to adoption of an amendment in March 2012, Resolution 453/2010 required the testing to be conducted in one of the two designated laboratories in Argentina. The United States expressed concern during TBT Committee meetings in November 2011 and March 2012 that this regulation appeared to apply to foreign producers only, and that Argentina's testing capacity was insufficient to perform all the required testing. The United States asserted that the situation, coupled with the inability to test these products in the country of production, would lead to significant delays, cost and burdens for industry. Both the U.S. and the European Union raised this issue during the March and June 2012 TBT Committee meetings. The United States indicated that it continues to question whether mandatory third party certification should be required for these products since they are low risk, and whether it is necessary for the testing to be performed in Argentina itself or by any accredited laboratory.

Electrical and Electronic Products – Conformity Assessment Procedures: Argentina's new requirements for conformity assessment for electrical and electronic products, modifying Resolution 92/98, came into force on January 1, 2013, but have not been notified to the WTO. Resolution 92/98 specifies the process by which foreign manufacturers and importers obtain the S-mark safety certification from local certification bodies. This certification is required to market electrical and electronic products between 50 and 1000 Vac in Argentina. According to the U.S. industry, Resolution 92/98 imposes repetitive testing and associated delays, resulting in costs for U.S. exporters that outweigh the purported safety benefits. In addition, industry reports that the requirements disproportionately impact foreign manufacturers and importers and favor domestic manufacturers. Failure to follow Resolution 92/98 will result in the inability of products to clear customs and enter Argentina's market.

13. Bangladesh

13.1 Insistence on overseas experience/reference in specific countries/ Continent

In many of the tenders, customers not only insist for overseas experience but make it more restrictive by stipulating specific experience of a particular continent/ country grouping e.g. Bidders to have experience outside bidder's continent; Bidders have to supply particular equipment from Western/ Developed countries etc. Such clauses are restrictive in nature and lead to unfair competition. Indian Companies are put to a disadvantage inspite of their having wide domestic experience under different operating conditions.

An illustrative example relates to the case of BHEL[234]. A power plant tender of Bangladesh Power Development Board had specified that the bidder has to possess overseas experience of at least 10 years in the field of supply, erection, installation, testing and commissioning on Turnkey basis of Power plants having capacities equal to or higher than the one offered. Though BHEL has requisite experience of supplying equipment to large power generation projects in India

[234] This information has been obtained from Bharat Heavy Electricals Ltd.

and having an installed base of over 100,000 MW worldwide, this clause restricts participation of the company in a SAARC country.

13.2 Biased qualification Clause[235]

A Technical requirement in one Bangladesh Power Development Board tender was that some specified equipment needs to be supplied from particular companies which include Circuit Breakers from France, Protective Relay and Fibre Optic Multiplexer Equipment from Switzerland and Digital Fault and Disturbance Recorder from Belgium.

14. Uzbekistan

14.1 Customs Issues

Local Customs Charges

In addition to the tariff fixed by the Government on imports, local Customs Department charges 0.7% of total value of the consignment as processing fee which is not a part of tariff.

14.2 Other Barriers

Procedure for registration and certification

Procedure for registration and certification of imported items is cumbersome and takes a considerable time which indirectly discourages import.

Conversion of local currency into hard currency

There is a lengthy procedure for conversion of local currency into hard currency for repatriation as profits or service fees which takes at least 4 to 6 months and is restricted to once or twice a year.

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[235] This information has been obtained from Bharat Heavy Electricals Ltd.

Procurement Policy

Government procurement policy is not transparent unless the funding is from a multilateral agency.

15. Ukraine

15.1 SPS-TBT Issues

Pharmaceutical Products, Cosmetics and Toiletries, etc

The Cabinet of Ministers of Ukraine regulates import licences. Licenses are granted by the Ministry of Economic Relations, or by one of its regional branches. There is a compulsory Certification requirement for several goods imported into Ukraine. Certificates may be one of two types: (a) Certificate of Acceptance of a foreign certification issued by a Ukrainian certifying agency (DerzhStandard), (b) Conformance certificate issued by a Ukrainian agency upon certification of goods.

Certificates issued by foreign certification authorities are to be recognized in Ukraine only to the extent provided in international treaties to which Ukraine is a party. Ukrainian certifying agency DerzhStandard has adopted a national Standard ISO-9000 series for certification of production systems. Based on these standards, Ukrainian certification bodies can evaluate the quality of a production system rather than the quality of a single product. The procedure for issuing ISO Certificate requires a visit by specialists of Ukrainian standards to the importers' production facilities to inspect the system's quality. Adoption of the ISO-9000 series should facilitate the process of certifying goods as system quality certificates are issued for a three year period. According to DerzhStandard, the ISO-9000 standard certificate does not prevent the importer from certifying individual products. However, with the Certificate, only selective goods will be certified according to the procedures described above.

16. Azerbaijan

16.1 SPS-TBT Issues

Following issues are of concern for Indian exporters[236]:

a) Imports into Azerbaijan are controlled through an unwritten monopoly system, whereby a particular item can be imported only in partnership with a particular business group of the country.

b) Visa regime, including for business persons, investors and employment has been tightened and it is increasingly difficult and expensive to obtain such visas.

c) Quality assessment and registration of medicines and pharmaceutical products has also been made fairly restrictive and there is an attempt to control the market share of each country/region through such measures.

Testing/Certification Requirements[237]

Azerbaijan insists on certain type of testing in laboratories outside India. Although independent test laboratories exist in India with world-class facilities where such tests are conducted but are not accepted by Azerbaijan. For example, in the Power Transmission Project in Azerbaijan, there is a requirement for "Short Circuit Test" under the "Special Test category." This test is normally waived if the manufacturer has performed that test on similar equipment earlier. This requirement considerably increases the transaction cost and acts as a barrier to trade.

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[236] This information has been obtained from Ministry of External Affairs, GoI.

[237] This information has been obtained from Department of Heavy Industry, GoI

16.2 Tariff Issues[238]

Hurmat tariff and Non-transparent working of Customs

There is discrimination against imports through the instrument of officially authorized tariff called 'Hurmat'. Import of tea, coffee and marine products is restricted by the control of cartels. The processes for the grant of business licences are non-transparent and subject to 'Hurmat' payment. Although labour laws are uniform for domestic and foreign employers, these are applied discriminately on foreign firms.

17. Kazakhstan

17.1 Tariff Barriers[239]

The import duty on Packaged Tea is high (20%). Packaged Tea exporters from India face difficulties in marketing due to much higher duty structure.

17.2 Issues in Services

Visa[240]

It is reported that Kazakhstan follows a restrictive policy while issuing visas to Indian businessmen which acts as a non-tariff barrier. The visas require clearance from Ministry of Foreign Affairs in Kazakhstan. For obtaining this clearance, the Kazakh company inviting Indian businessman has to apply for his visa clearance at the Ministry of Foreign Affairs of Kazakhstan in Astana or Almaty. Such clearance takes a minimum of seven days. No requests for urgency are entertained. This procedure means that the businessmen or company

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238 The information has been sourced from Department of Commerce, Government of India sources

239 This information has been obtained from Tea Board of India

240 Input from Department of Commerce, Government of India

representatives who have no counterpart or business partner in Kazakhstan to invite them cannot come to explore business in Kazakhstan. Also, no businessman can come to Kazakhstan on a short notice. Embassy of Kazakhstan in New Delhi has no power to issue visas. They do the stamping of visas only after the clearance from Kazakh Foreign Office. Similarly, work permits to work in joint venture companies or representative offices are very difficult and expensive to obtain. There cannot be joint venture in services sector as the local laws do not permit more than 10% foreign experts/workers. It is further gathered that the situation is worse for developing countries like India whose experts and executives are given work permit only for one year after which a Kazakh national has to be employed in the same post.

18. Tajikistan

18.1 SPS-TBT Issues

Pharmaceutical exports[241]

The pharmaceutical market of Tajikistan is estimated at more than $80 million. Largest suppliers of pharmaceutical products to Tajikistan are USA, Turkey, Russia, Hungary, Ukraine and Austria. The drug regulatory authority of Tajikistan (GENSEL) seeks documents on par with the standards of the European standards. Indian firms while complying with CIS standards for drug approvals for exporting to CIS countries, face the problem of meeting another standard for exporting to Tajikistan.

18.2 Customs Procedures[242]

Cumbersome procedures for transit of Trucks/cargo

There are cumbersome procedures for transit of trucks/cargo within the region

[241] This issue has been obtained from media reports

[242] The information has been sourced from Department of Commerce, Government of India sources

particularly through borders with Uzbekistan and Afghanistan. There are regional initiatives under way to sort these out.

18.3 Other Barriers[243]

Difficulties in registration of companies

There is no single window clearance system for the investors and they need to get clearances from all the agencies concerned.

19. Moldova

19.1 SPS-TBT Issues

Licensing of certain types of activity

The law of the Republic of Moldova Nr.451-XV from 30th July 2000 regarding licensing of certain types of activity has been put into effect. The types of activity that have been licensed include those activities whose illegal practice can violate the rights, the legal interests and health of citizens, can pose problems to the environment and state security and whose legalization can be accomplished only through licensing.

20. Iran

20.1 SPS-TBT Issues

Plant Master File Requirement of Ministry of Health[244]

Ministry of Health, Government of Iran has imposed a quality requirement, namely, plant master file requirement which includes GMP and HACCP

[243] The information has been sourced from Department of Commerce, Government of India sources

[244] Information has been obtained from Department of Commerce, Government of India

parameters. Exporters of tea are required to register themselves with Iranian health authorities after filing in designated forms and paying one time registration fee of US$6000.00. Such registration fee and other cost of legislation prior to shipment is acting as a barrier to export of tea to Iran.

Tea[245]

The procedure for custom is lengthy and it takes a long time for customs clearance of shipments in Iran. The average time of clearance is around two to three months. Iran needs GMP Certificate to allow import. The rules and regulations with regard to GMP and lengthy and it takes one year to obtain the GMP certificate. The cost of obtaining GMP Certificate are also high (approximately US$ 8000). The registration is initially given for three years and then to be renewed annually. The Indian Tea Association has conveyed that the system of annual renewal is cumbersome and this should also be done for a period of three years.

21. Ecuador

21.1 SPS-TBT Issue[246]

It is gathered that the Ecuadorian Government requires license for certain products with the aim to protect environment, health and consumers. Those selected products need to meet specific criteria in order to be allowed to enter Ecuador. The products must meet the criteria listed in Ecuadorian form INEN-1 which has to be fulfilled by the importer. The form has to be purchased from the Normalization Ecuadorian Institute (INEN) and its cost starts from US $ 82.

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[245] This information has been obtained from Tea Board of India and Department of Commerce, Government of India

[246] This information has been obtained from Engineering Export Promotion Council (EEPC India)

22. Australia

22.1 SPS issues[247]

It is reported that though tariff on agricultural imports into Australia is low (0% to 5%), market access is severely impeded on account of Bio-security issues. The stringent Sanitary and Phyto-Sanitary (SPS) measures result in long delays for clearance of agricultural items like fruits and vegetables and dairy products from India. It is informed that the Australian Agriculture Department processes import of one agriculture item at a time and takes about three years for each item. Indian authorities have stressed on the desirability of having a Mutual Recognition of standards.

22.2 Pharmaceutical Products[248]

Indian authorities have reported non-tariff barriers in the import of pharmaceutical products from India. They require prior approval from the Therapeutic Goods Administration (TGA) which is reported to be a long drawn out and expensive process. There is no recognition or concession to Indian companies who have US FDA approval or GMP certificate, that allows a faster processing.

22.3 Tariff Barrier[249]

Australia is a significant market for Indian leather and leather products. Leather products under chapter 42 are subject to applied import tariffs in the range of 0 to 10%. Leather apparel and belt and bandoliers are bound at high rates of 37% and 25% and the applied rates are 10% and 5% respectively. Footwear which is an important item of interest is also having a high bound rate of 27% whereas the MFN rate is 0-5%. In view of this, there is significant scope to reduce bound rates during NAMA negotiations under Doha Round.

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[247] Input from Department of Commerce, Government of India

[248] Input from Department of Commerce, Government of India

[249] This information has been obtained from Council for Leather Exports, India

22.4 Mutual Recognition in Services Sector[250]

It is reported that in the education sector, mutual recognition of qualifications and professional licensing is an area of major concern, particularly in professional fields such as legal, engineering, accounting and health. It is mentioned that as the Indian skilled workers represent the second largest skilled migrant pool in Australia, there is an urgent need of mutual recognition of credentials accorded by the relevant bodies.

22.5 USTR on Market Access Barriers in Australia[251]

Australia currently restricts the importation of bovine products from countries that have reported one or more indigenous cases of BSE. On March 1, 2010, Australia modified its food safety import policies to allow imports of beef and beef products from countries that have had BSE cases. Under these requirements, a country interested in exporting beef and beef products to Australia must request Food Standards Australia New Zealand, a regional food safety agency, to conduct an individual country risk assessment. The US has also reported barriers in products of Pork, Poultry, Apples, Stone Fruits and Table Grapes.

23. Armenia

23.1 SPS-TBT Issues[252]

Pharmaceutical Products

Certain import restrictions have been imposed for health, security and environmental reasons. Some of the pharmaceutical products and medicines are subject to import and export permissions, issued by the Ministry of Health of the Republic of Armenia.

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[250] Input from Department of Commerce, Government of India

[251] United States Trade Representative Report on SPS and United States Trade Representative Report on TBT (2013)

[252] The information has been sourced from Department of Commerce, Government of India sources

24. Turkmenistan

24.1 Issues in Services

Visas[253]

It is reported that the Turkmen visa regime is very restrictive. Prior visa clearance from State Migration Service of Turkmenistan is a prerequisite and a local organization in Turkmenistan (or Indian Embassy) has to sponsor the visit. This process is reported to be often time consuming. A stay of more than 72 hours in Turkmenistan by a foreigner requires registration with the State Migration Service of Turkmenistan, by the organization in Turkmenistan (or Indian Embassy) sponsoring the visit. It is reported that there are often cases of visa refusal or non-renewal even for Indian business persons and workers based in Turkmenistan.

25. Colombia

25.1 Customs Issues[254]

Certain customs clearance related issues act as barriers to trade. Pilferage in Customs Warehouses and robberies of trucks on the roads are cause of cencern. The absence of clear procedure to solve the problem of incorrect import documentation also becomes barrier of sorts. Shipments are reported to have been detained for long times by Colombian Customs because of improper tariff schedule classification, use of an improper address, or typing mistakes. When these mistakes are made by the exporter/importer, Customs presumes that it was done in bad faith and there is no clear procedure to correct the problem. The goods are seized, refused entry into Colombia or returned at considerable expense to the exporter or importer. The new Customs Code that came into effect on July, 2000, addresses some of the above problems. According to Article

[253] Input from Department of Commerce, Government of India

[254] This information has been obtained from Handloom Export Promotion Council (HEPC India)

128 of the new Customs Code, if during the Customs inspection of the merchandise (physical and/or documentary), the Customs Officials detect mistakes in the documents, the importer will have 5 days to correct the mistake.

26. Turkey

26.1 Quantitative Quotas[255]

The Turkish Government has introduced Quantitative Restrictions on footwear imports from certain specific countries including India. An annual quota of 801,789 pairs has been imposed on footwear imports from India. This is against the current volume of 163551 pairs of footwear exported from India to Turkey. Also import from countries subject to quotas, would have to be made against a license to be obtained from the Turkish "Importation General Directorate".

27. Iraq

27.1 Customs Issues[256]

Following barriers are faced by tea exporters:

a) The payment pattern is very slow and in effect, money remains blocked.

b) Though it is mentioned in the terms and conditions that the testing information should reach the exporter within seven days, the port authorities take a long time to process the documentation work and it takes several months to confirm whether the goods have been accepted or not.

c) Sometimes, after several months, a rejection letter comes without any reason.

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[255] This information has been obtained from Council for Leather Exports (CLE India)
[256] This information has been obtained from Tea Board of India

d) Difficult to identify and approach the concerned authority of Iraq to resolve problems.

28. Ethiopia

28.1 Insistence on overseas experience/reference in specific countries/ Continent[257]

A tender of Ethiopia Electric Power Corporation (EEPCO) had specified that the bidder needs to submit at least three (3) certificates for three (3) substations at 230 KV voltage level outside their country as one of the conditions. This is restrictive for some large power sector firms which have wide experience of setting up sub-stations in India.

28.2 Biased qualification Clause[258]

In Many cases including those projects which are multilaterally funded, specific technical requirements are stipulated which seem to be biased against some companies in order to restrict competition. One technical requirement mentioned in a tender of Ethiopian Electric Power Corporation (EEPCO) was that all tap changers should be preferably supplied from a specific German Company, which disadvantages Indian companies.

29. Mozambique

29.1 Specific Concerns[259]

a) Delay in Registration of drugs from India causes increase in transaction cost.

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[257] This information has been obtained from Bharat Heavy Electricals Ltd.
[258] This information has been obtained from Bharat Heavy Electricals Ltd.
[259] Information has been obtained from Ministry of External Affairs, Government of India

b) Compulsory pre-shipment inspection regime acts as a barrier to import.

c) Container scanning fee adds to the transaction cost.

30. United Arab Emirates (UAE)

30.1 Biased qualification Clause[260]

A tender of Sharjah Electricity & Water Authority had specified that specific equipment from specific countries/manufacturers will only be accepted. It also states that only renowned brands in industry shall be identified and preferably from Middle East, Europe, UK & USA. This discriminates against vendors from other countries.

30.2 Market access barriers to agrochemicals[261]

It is reported that India is a leading producer of agrochemicals (both Technical Grade Pesticides and Formulations) but it is unable to export or invest in UAE because the Ministry of Environment and Water, UAE does not register agrochemicals manufactured by Indian companies. Presently under its Federal Law Number 41 of 1992, UAE only registers pesticides manufactured in developed countries.

31. Georgia

31.1 Insistence on overseas experience/reference in specific countries/ Continent[262]

In the Enguri Hydropower Rehabilitation Project in Georgia, one of the prequalification criteria states that there should be at least 3 similar projects

[260] This information has been obtained from Bharat Heavy Electricals Ltd.

[261] Input from Department of Commerce, Government of India and Pesticides Manufacturers & Formulators Association of India (PMFAI)

[262] This information has been obtained from Bharat Heavy Electricals Ltd.

executed by the Contractor during the last 10 years and two of them should have been abroad, preferably in East European Countries. This works against the interest of Indian companies.

32. Saudi Arabia

32.1 Local Participation Requirements[263]

The projects undertaken in Saudi Arabia are required to have local participation and its percentage varies from sector to sector. For instance, the heavy industry sector has pointed out that 30% local participation of total project cost is mandatory.

33. Qatar

Import of eggs and egg products from India are banned in Qatar[264].

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[263] This information has been obtained from Department of Commerce, GoI and Bharat Heavy Electricals Ltd.

[264] Information has been obtained from Ministry of External Affairs, Government of India

ANNEXURE 1

Export from India in 2012

S. No.	Country	Export (US $ Mill.)	% Share
1.	EU27 members	48528.61	16.76
2.	United States	37170.69	12.84
3.	United Arab Emirates	35781.39	12.36
4.	China	14729.32	5.09
5.	Saudi Arabia	8546.65	2.95
6.	Japan	6415.55	2.22
7.	Brazil	6162.71	2.13
8.	South Africa	4973.30	1.72
9.	Bangladesh	4936.67	1.70
10.	Korea, Rep.	4076.36	1.41
11.	Malaysia	3791.20	1.31
12.	Turkey	3672.08	1.27
13.	Thailand	3454.13	1.19
14.	Australia	2633.03	0.91
15.	Iran, Islamic Rep.	2572.13	0.89
16.	Russian Federation	2144.77	0.74
17.	Canada	2013.61	0.70
18.	Iraq	1268.38	0.44
19.	Colombia	927.70	0.32
20.	Mozambique	888.37	0.31
21.	Qatar	695.47	0.24
22.	Ethiopia	643.45	0.22
23.	Ukraine	514.84	0.18
24.	Argentina	502.83	0.17
25.	Kazakhstan	262.96	0.09
26.	Ecuador	172.12	0.06
27.	Georgia	117.07	0.04
28.	Uzbekistan	110.16	0.04
29.	Azerbaijan	91.42	0.03
30.	Turkmenistan	70.60	0.02
31.	Armenia	42.11	0.01
32.	Tajikistan	29.05	0.01
33.	Moldova	7.79	0.003
	Total (1-33)	197946.52	68.36
	World	289564.77	100.00

Source : UN COMTRADE

Authors

Shashank Priya earlier worked as Professor at the Centre for WTO Studies. An officer of Indian Revenue Service (Customs and Central Excise), he has 25 years of experience of working on Customs and WTO issues. He is presently working as Commissioner, Central Excise and Service Tax, Patna. He can be contacted at <shashankpriya@hotmail.com>.

Animesh Kumar is a Research Fellow at the Centre for WTO Studies, IIFT, New Delhi. His areas of interest include trade policy issues and the WTO. He holds M.Phil in Economics from the Centre for Economic Studies and Planning, Jawaharlal Nehru University and is currently pursuing his PhD. He also has a diploma in Trade Policy from the World Trade Organisation (WTO), Geneva and the Indian Institute of Foreign Trade, New Delhi. He can be contacted at: <animesh012@gmail.com>.

Centre for WTO Studies
Indian Institute of Foreign Trade
IIFT Bhawan, B-21, Qutab Institutional Area, New Delhi-110016
Tel: +91-11-26564409
Email: cws@iift.ac.in

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