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Centre for the Analysis of Regional Integration at Sussex

Qualitative analysis of a potential Free Trade Agreement between the European Union and India

Annex 4:
EU-India FTA - Implementation Issues

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1. INTRODUCTION

This Annex deals with a range of implementation issues, which are particularly pertinent when considering deep integration. Some of these such as competition policy, investment policy, trade facilitation and government procurement are issues that that have been discussed as issues for inclusion at the World Trade Organisation (WTO) but it was decided in Cancun not to proceed with substantive negotiations. Indeed India was not always been comfortable with some of the proposals / issues being discussed at the WTO. This, however, does not necessarily mean that India will be equally uncomfortable with these issues in the context of a bilateral FTA, for example, with the EU. This is because the expected costs and benefits on these issues arising from a bilateral FTA may be different from those in multilateral agreements.

The first step in carrying out the analyses was to identify the scope and content on issues that might potentially be included in the proposed FTA. Given that there is no concrete proposal on the table for the EU-India agreement, the expected provisions regarding these issues have been tentatively identified on the basis of similar agreements that the concerned parties have signed or are in the process of negotiating. India is yet to sign a deep integration FTA in its true sense, though the India-Singapore FTA is reasonably broad, as it gives quite comprehensive treatment to investment issues. However, the EU has already signed a few such agreements and is negotiating several others. The agreements that it has signed with Mexico and South Africa will be particularly relevant in this context. The EU is also negotiating deep integration FTAs with Mercosur, ASEAN and the ACP countries, among others. In the context of government procurement, the existing plurilateral agreement on it at the WTO was also consulted.

On the other hand, India is unlikely to be the demandeur of including these deep integration issues in a possible EU-India FTA. The only trade agreement entered into by India where there are provisions on competition policy is SAFTA (South Asian Free Trade Agreement), though commitment is not mandatory. India is also negotiating with ASEAN (Association of South East Asian Nations) where there might be voluntary commitments on competition policy.

On investment, Indian approaches were gauged from the bilateral investment treaties and its discussions in the context of India-Singapore Agreement and the proposed comprehensive economic partnership agreement with Sri Lanka. There are some trade facilitation provisions in various trade agreements signed by India, notably SAFTA, BIMSTEC (Bay of Bengal Initiative for Multi Sectoral Technical and Economic Cooperation involving Bangladesh, India, Myanmar, Sri Lanka, Thailand) and its bilateral agreement with Sri Lanka. However, India has not dealt with the government procurement issue in any of its trade agreements.

Since it is difficult to ascertain the expected position of India on these issues in the context of a bilateral FTA with the EU, it was extremely crucial to get feedback from different stakeholders. The next step was to assess the existing situation in India in relation to these regulatory and institutional arrangements and their gaps from the proposed benchmarks. Based on these, an assessment is made on the required legislative and institutional changes in India and the related expected benefits and costs of these regulatory and institutional reforms.

To date, bilateral Mediterranean Association Agreements (MED agreements) have been concluded with seven countries: Tunisia (1995), Israel (1995), Morocco (1996), Jordan (1997), the Palestinian Authority (1997), Algeria (2001) and Lebanon (2002).

The Trade, Development and Cooperation Agreement (TDCA) between the EU and South Africa was signed on 11 October 1999 and has been in force provisionally and partially, since January 2000, and fully since May 2004.

The Economic Partnership, Political Coordination and Cooperation Agreement, also known as the Global Agreement, between the EU and Mexico was signed on 8 December 1997 and came into force in October 2000. The liberalisation of the trade in goods and services was established by Decisions 2/2000 and 2/2001 of the EU-Mexico Joint Council, and came into force in July 2000 and March 2001 respectively.

The most recent FTA concluded by the EU is the one with Chile, signed in November 2002 and provisionally in effect since February 2003. In addition to the provisions on political dialogue and cooperation issues, it is the trade chapter in the Association Agreement that stands out as the most far-reaching in EU agreements so far.

The EU-Mercosur Agreement is yet to be finalised though it has been under negotiation since 1999. Both Mercosur and the EU envision the formation of a common market, deepening of political cooperation and the achievement of a prominent international role through regional integration policies, all of which lie beyond the scope of a mere FTA. The Inter-regional Association Agreement is expected to be an instrument suited for the worldwide diffusion of a model of deep regional integration that may lay the foundations of a multi-polar global governance system.

These are, by and large, the EU agreements that have provided inspiration for the issues examined in this section.

Our analyses have shown that though India will incur great costs by entering into a free trade agreement with the European Union, there will be numerous benefits as well. And if one takes into account several positive externalities resulting from trade liberalisation and associated reforms, the benefits will surely outweigh the costs. According to an estimate by IndusView (a consultancy firm on mergers and acquisitions), by the year 2010, bilateral trade between EU and India will reach US$100bn.[1] This growth in trade between EU and India will be fuelled by Indian companies acquiring businesses in EU countries and vice-versa. This requires that a rules-based and predictable trading system is in place and a possible EU-India FTA as per the "deep integration" framework is a necessary condition. However, in order to achieve this growth and more, a possible EU-India FTA may not be sufficient. While considering this free trade agreement with EU (and other such trade initiatives,

[1] Business Standard, New Delhi, 12th January 2007

including at the multilateral level), Indian trade policy-makers must emphasise two very important systemic issues.

First, India being a federal country, state governments should be fully taken into confidence while initiating trade liberalisation and reforms. As our analyses have shown, in many respects India's inability to fully integrate with the new and emerging international trade regime lies in the differences between the centre and the states and among states in terms of policies and procedures. There are institutions in place, which are to be activated for this purpose. For instance, there exists Inter-State Trade Council under the Department of Commerce, Government of India but it is to be fully operationalised.[2] On their part, state governments are responsible too. In most of the Indian states, there exists WTO Cell but there are institutional constraints such as lack of human and financial resources for making their operations effective.

Secondly, there should be sustainability impact analysis (*ex-ante* as well as *ex-post*) of all trade agreements that India enters into. Such analysis should look into economic, social and political sustainability of trade agreements in terms of their impact on the economy as a whole as well as on specific sectors. Both business and public interests are to be taken into consideration while doing this analysis. This will ensure a better political buy-in while adopting new policies and introducing reforms while integrating with the outside through international trade. This is the only way through which India (for that matter any country) can mainstream international trade into its national development strategy.

Besides taking into account the above-stated systemic issues, our analyses have shown that there are a few contentious issues, which are required to be bridged during the negotiations on a possible EU-India FTA under a "deep integration" framework. While political decisions in this regard are to be taken during negotiators, both parties could also consider adopting a Track 2 process of resolving such contentious issues. In other words, researchers from EU countries and India could come together to conduct action-research (that is by involving relevant practitioners and stakeholders) on such contentious issues and results of this exercise could not only provide negotiators with practical inputs but would also create a better environment for getting these two region/country closer as far as trade and economic cooperation is concerned and this would have political dividends too.

[2] India could consider taking lessons from the functioning of the EU 133 Committee, which is a representative body of EU Member States dealing with trade issues.

2. GOVERNMENT PROCUREMENT

2.1 An Overview of Issues

With regard to government procurement, it is important to distinguish between central government procurement policies and state/local policies. In India it appears that central government procurement policies and practices for goods are broadly compatible (particularly with regard to transparency requirements) with the procurement rules that might be agreed upon in an FTA. However, problems of compatibility arise with state, municipal, and local government procurement, as well as with the procurement of services at all levels. There is no systematic body of knowledge on the procurement policies and practices of state/local government entities; therefore, further politically difficult reforms would be needed before policies and practices consistent with those at the central government level could be implemented, as many state governments and their agencies are known to discriminate even among national firms.

The provisions on government procurement in a trade agreement typically establish a framework of rights and obligations between the parties with respect to their national laws, regulations, procedures and practices. Parties to an agreement are usually required to give the products, services and suppliers of any other party treatment "no less favourable" than that they give their domestic products, services and suppliers and not to discriminate among goods, services and suppliers of other parties. In order to ensure that the basic principle of non-discrimination is followed and that access to procurement is available to foreign products, services and suppliers, an agreement emphasises transparency of laws, regulations, procedures and practices regarding government procurement, and include obligations and provisions relating to: scope of commitments, non-discriminatory treatment, transparency of laws, regulations and notices of procurement, open and fair procurement procedures and due process.

In FTAs that the EU has entered into, particularly the Mediterranean Agreements, there is comparatively little attention given to government procurement. For example, the agreements typically mention that “the Parties shall set as their objective a reciprocal and gradual liberalisation of public procurement contracts”, and that “the Association Council shall take the steps necessary to implement’ this objective. However, the language of the agreements indicates that they are essentially best-endeavour clauses and there is no guaranteed market access. Even the South African Agreement is no stronger in this regard as it states, “The Parties agree to cooperate to ensure that access to the Parties' procurement contracts is governed by a system which is fair, equitable and transparent; and that the Cooperation Council shall periodically review the progress made in this matter”. Though it talks about “access” that is fair, equitable and transparent, it stops short of providing national treatment.

The EU-Mexico Agreement and the EU-Chile Agreement are unique in that they give comprehensive treatment to the issue of government procurement. These agreements are broadly similar in scope and are largely modelled on the existing plurilateral agreement at the WTO. For example, as far as non-discriminator treatment is concerned, the related provisions in both the Mexico and Chile agreements are quite similar. Each Party is obliged to ensure that the procurement of its entities covered by this agreement takes place in a transparent, reasonable and non-discriminatory manner, treating any supplier of either Party equally and ensuring the principle of open and effective competition.

Scope of commitments
In the EU-Chile Agreement government procurement has been defined as any type of procurement of goods, services or a combination thereof, including works carried out by public entities of the Parties for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale, unless otherwise specified. It includes procurement by such methods as purchase or lease, or rental or hire purchase, with or without an option to buy. Here "entities" means the public entities of the Parties, such as central, sub-central or local government entities, municipalities, public undertakings and all other similar entities.

In such Agreements, each party has its own separate schedules of commitments in goods, services and construction services. However, contracts estimated to be equal to or greater than a certain threshold only come under these provisions, and different thresholds are set out for different types of contracts. There are also different types of exemptions, varying in scope and coverage, such as:

- An international agreement and intended for the joint implementation or exploitation of a project by the contracting Parties
- An international agreement relating to the stationing of troops; and the particular procedure of an international organisation
- Non-contractual agreements or any form of government assistance and procurement made in the framework of assistance or cooperation programmes
- The acquisition or rental of land, existing buildings, or other immobile property or concerning rights thereon
- The acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time
- Arbitration and conciliation services
- Employment contracts; and research and development services other than those where the benefits accrue exclusively to the entity for its use in the conduct of its own affairs, on condition that the service is wholly remunerated by the entity

Extending government procurement rules to both the central and the state/local level in India is likely to be problematic. One way in which this issue could perhaps be resolved is by setting minimum thresholds for the application of any government procurement provisions. If the minimum threshold is set at a sufficiently high enough level, than this could automatically exclude all or the majority of non-central government purchases. Such minimum threshold levels were agreed upon in the EU-Chile agreement.

Non-discriminatory treatment
The provisions in both the agreements with Mexico and Chile are similar. Each Party is obliged to ensure that the procurement of its entities covered by this agreement takes place in a transparent, reasonable and non-discriminatory manner, treating any supplier of either Party equally and ensuring the principle of open and effective competition.

In India the rules governing government procurement are set out in the General Financial Rules (GFR), which were revised in 2005. Rule 142 (Registration of Suppliers) is consistent with the Agreement on Government Procurement in the WTO standard of Qualification of Suppliers Article VIII (although India is not a signatory).

In India's submission to the WTO "Response to the Questionnaire on Government Procurement of Services" (1997), India's response to Question 9: "What laws, regulations, procedures or practices accord domestic services and/or suppliers treatment more favourable than that accorded to foreign services and/or suppliers, or accord services and/or suppliers of a Member more favourable treatment than those of another Member? Please specify how, if at all, more favourable treatment is accorded. Please also specify the working definition of "domestic" in relation to domestic services and suppliers", was as follows: "The domestic bidders are treated at par with the foreign bidders and the ultimate price available to the user department is the determining criteria."

When it comes to the GFR, however, the only mention of foreign suppliers comes under Rule 150 in the context of Advertised Tender Enquiry, under paragraphs iv and v:

> *iv) Where the Ministry or Department feels that the goods of the required quality, specifications etc., may not be available in the country and it is necessary to also look for suitable competitive offers from abroad, the Ministry or Department may send copies of the tender notice to the Indian embassies abroad as well as to the foreign embassies in India. The selection of the embassies will depend on the possibility of availability of the required goods in such countries.*
>
> *v) Ordinarily, the minimum time to be allowed for submission of bids* could *be three weeks from the date of publication of the tender notice or availability of the bidding document for sale, whichever is later. Where the department also contemplates obtaining bids from abroad, the minimum period should be kept as four weeks for both domestic and foreign bidders.*

Hence the only time that government procurement tenders are published internationally is when the goods of the required quality, etc are not available in the country. When such goods are available in the country there is no international advertisement. It is worth noting that this could violate the GPA rules depending on the relevant thresholds, and whether it pertains to previously agreed upon excluded sectors or not.

It is also worth noting that Rule 144 (Reserved Items) of the GFR 2005 states that the central government has reserved all items of hand spun and hand-woven textiles for exclusive purchase from Khadi Village Industries Commission, and other small-scale industrial units. While this could be seen as discriminatory such provisions are in fact allowable under the WTO Agreement on Government Procurement Article V: Special and Differential Treatment.

Transparency of laws, regulations and notices of procurement
The GFR do not meet the requirements of Article XVIII of the WTO GPA "Information and Review as regards Obligations of Entities". The major requirements of this provision are as follows:

Entities shall publish a notice in the appropriate publication … no later than 72 days after the award of each contract. These notices shall contain:

- The nature and quantity of products or services in the contract award
- The name and address of the entity awarding the contract
- The date of award
- The name and address of winning tenderer
- The value of the winning award or the highest and lowest offer taken into account in the award of the contract

As stated in India's submission to the WTO "Response to the Questionnaire on Government Procurement of Services" (1997) as a response to question 8b "Are entities required to publish details of the contracts awarded and/or notify unsuccessful tenderers?", India responded: "At present, there is no requirement to publish details of the contracts awarded." However, under the GFR 2005 (Rule 160 (xv)) the name of the successful bidder to whom the contract is awarded needs to be mentioned on the Ministries or Departments notice board, bulletin or web site.

The provision of information is also set out in the EU Mexico FTA. However, here the requirements are than in the WTO GPA. Article 31(3) (EC Mexico Council Decision No.2, 2000) states that:

"A Party may seek such additional information on the award of the contract as may be necessary to determine whether the procurement was made fairly and impartially, in particular with respect to unsuccessful tenders. To this end, the Party of the procuring entity shall provide information on the characteristics and relative advantages of the winning tender and the contract price. Where release of this information would prejudice competition in future tenders, the information shall not be released by the requesting Party, except after consultation with, and agreement of, the Party that provided the information."

It is likely that India could commit to such a provision on the basis of the GFR 2005.

Open and fair procurement procedures and due process
The existing Agreements with Mexico and Chile contain a number of detailed procedural obligations, which the procuring entities have to fulfil to ensure the effective application of its basic principles. The purpose of these procedural requirements is to ensure that access to covered procurement is effectively open and an equal opportunity is given to foreign supplies and suppliers while competing for government contracts. These agreements allow the use of open, selective and limited tendering procedures, provided they are consistent with the provisions.

Here it is worth first outlining some key general principles with regard to procurement methods.

A procurement system is considered to be transparent if:

- the terms upon which the procurement processes are to be conducted and the criteria upon which any decisions are to be made are properly documented and made widely available;
- the eventual procurement award decision, and where appropriate, any intermediate decisions, is made publicly available as are the reasons given for these decisions; and
- it is possible to verify that the documented procedures and criteria were indeed applied.

A transparent procurement system is, thus, characterised by the documentation of clear rules and the means to verify that those rules are followed. A transparent procurement system allows challenges to be made and ruled on through an adjudication procedure, which, if upheld, can be readily translated into compensation in the form of reasonable costs associated with the preparation and submission of a tender.

There are then several approaches, which are not mutually exclusive, available to countries to regulate their procurement systems. They may be broadly categorised as:

- Centralised approach, in which central tender boards or similar organisations oversee the process, evaluate tenders and awards contracts.
- Prescriptive approach, in which legislation and associated regulations detail procedures to be followed on a decentralised basis.
- Financial instructions, which establish minimum requirements relating to expenditure and auditing but provide no specific instructions regarding the manner in which institutions are to conduct their procurement.
- Framework approach, in which legislation establishes high-level requirements and leaves it to institutions to provide the detail.

Regardless of the approach followed, it is crucial that there be transparency in the different stages of the procurement process, raising the following concerns:

- What is the flow and series of processes involved in procurement?
- How does an agency establish the need for procurement?
- When does posting the call for bids for a particular tender take place?

- What is the process for the short-listing of the selected vendors?
- What are the decision-making criteria for those vendors?
- How does the agency go about awarding the contract?
- What are the terms of maintaining the relationship with that vendor?[3]

The Indian procurement system follows a combination of all the above approaches. As detailed in Annex 3, the general principles governing procurement by the central government are laid down in the 'GFR' of the Ministry of Finance and the purchase procedures followed by various government departments have evolved in line with these general principles. It is the Directorate General of Supplies and Disposal (DGS&D) under the aegis of the Department of Supply which is the central purchasing organisation of the Government of India."[4] While some State governments follow similar rules it is also the case that there is wide variation in the standard of government procurement procedure (of the state governments).

In addition to the centralized approach, the financial instructions approach is also followed in India. For instance, central government procurement up to Rs. 15,000 per transaction can be made without inviting bids or quotations. In the case of railways, the method of procurement is through limited or selective tendering for contract values up to Rs. 500,000. In the case of procurement by the state governments, limited tenders are invited for meeting urgent requirements and can be invited only for indents of less than Rs. 10,000.[5]

2.2 Proposed Possible Changes

As discussed above, as well as in Annex 3, there appear to be three key issues which emerge with respect to government procurement and possible changes in policies / procedures which could be foreseen under the auspices of an FTA with the EU:

- National treatment requirement
- Definition and scope of government procurement
- Issues of procurement methods

National Treatment

With respect to the issue of national treatment, India's response to the 1997 WTO questionnaire indicated that there was no discrimination between domestic and foreign bidders. This statement should not be confused with the government's policy of applying preferences at various levels in line with the use of public procurement as an instrument for directing investment to desirable sectors. There are no price preferences in this procurement at the central government level, only purchase preferences accorded to both SMEs and PSEs. Price preferences though exist for state level procurement and for purchases made by Indian Railways. In the sense that these preferences act equally against "unreserved" domestic and foreign suppliers, the latter are both equally discriminated against and there is "national treatment." These

[3] *Op. Cit.* – Page 77

[4] Except in case of procurement by the railways department – only four percent of the procurement of this department is undertaken by the DGS&D.

[5] See Annex 3 for details of these and other such examples

reservations for non-economic reasons are likely to continue in a possible agreement but these would have to be in the form of negotiable derogations and exceptions.

Moreover, in practice, a very high proportion of contracts are awarded to domestic bidders, publication of tenders is in most cases done only domestically, and there is also little ex post communication of decisions made. Hence there is clearly scope for improvement here, both with regard to the publication of tenders, and to the subsequent provision of information about tender awards and tender decisions. These issues are unlikely to be problematic from the Indian perspective.

Scope of Government Procurement

The second issue, the definition and scope of government procurement, is clearly an important one in the Indian federal context. As discussed earlier, there are multiple levels of governance. Besides the central government, state governments and other sub-national entities have significant share in the government procurement market. Furthermore, there are public enterprises (having significant control by government and/or government bodies) with a substantial share in the market for government procurement.[6] Given its quasi-federal nature, India would like to limit any agreement on government procurement to purchases by the central government. The issue of procurement by sub-federal entities and those operating in the utilities sectors is a complex one and merits further study.

Procurement Methods

As discussed in Annex 3, India's position is that "procuring methods have no bearing on transparency and there should be no restriction on the choice of the procurement method other than those placed by domestic legislation".[7] Despite this position it is nevertheless likely that methods of procurement do impact on transparency, and that there is scope within the Indian context for improvements to be made.

In general, transparency in procurement can be improved upon through:

- the capturing of key information in an electronic database and the use of web-based information technology to publish information on procurement opportunities and awards of contracts;
- the harmonizing of procurement processes, procedures and methods within a country;
- standardisation of procurement documentation; and
- the introduction of challenge procedures in the form of adjudication where procurement processes, procedures and methods are comprehensively documented.

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[6] As mentioned in Annex 3, in the year 2000-01, the share of public sector enterprises in total government procurement was 72.39 percent. That of state government's was 8.97 percent. Procurement by the central government, railways and telecom department accounted for 18.73 percent of the total market. Both railways and telecom departments come under the central government.

[7] See Annex 3 (India's Position vis-à-vis an Agreement on Government Procurement)

Each of the above are, therefore, areas where one could envisage improvements. In the first instance, it is useful to ensure that the procurement objectives are clearly defined and benchmarked and thus transparent. Take for example, South Africa's procurement objectives, which are clearly outlined it its constitution:

- *Primary objective:* procurement system is to be fair, equitable, transparent, competitive and cost effective.
- *Secondary objective:* procurement policy may provide for:
  - ✓ Categories of preferences in the allocation of contracts; and
  - ✓ The protection and advancement of persons, or categories of persons, disadvantaged by unfair discrimination.[8]

Our analysis of India's government procurement indicates that the Indian system, by and large, adheres to these objectives. It is 'fair' in the sense that both domestic and foreign suppliers are similarly discriminated in the case of certain procurements from certain groups (for instance women's organisations, small-scale sector) and categories of preferences are clearly defined (thus, secondary objectives are also met). The ground for rewarding (or not rewarding) a contract is defined in the procurement processes and thus, the system is equitable. The system is fairly competitive, as per the "benchmarks for international competitive bidding". Cost-effectiveness is closely linked to the preceding points – hence a system, which lack transparency and clear rules is unlikely to be cost effective.

While it is the case that "by and large" procurement methods in India are consistent with the objectives suggested earlier, there is clearly scope for improvement, and therefore also for improving the cost-effectiveness of public procurement. In turn a procurement system is likely to be "cost effective" provided it is "standardised as far as possible and provided with sufficient flexibility to facilitate the attainment of best value procurement outcomes in terms of quality, timing and price, using the least amount of resources necessary to effectively manage and control the procurement process".[9] Possible ways forward for India therefore include:

- Establishing a central body overseeing government procurements in India.

- Developing a national standard (to be followed by the central government, all state governments, other sub-national governments and public sector enterprises) as per the Annex 3 of the WTO Agreement on Technical Barriers to Trade. This could be developed in a transparent manner by involving buyers as well as suppliers of goods and services to governments (central and state, including public sector enterprises).[10]

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[8] "Unpacking Transparency in Government Procurement", CUTS International (2004) – Page 22

[9] *Op. Cit.* – Page 20

[10] Annex 3 of the WTO Agreement on Technical Barriers to Trade talks about a "code of good practice, for the preparation, adoption and application of standards". Two key elements of such a 'code' are: a) harmonizing standards as wide a basis as possible, and b) creating of a central standardising body (a focal point).

- *Changing the system of bidding*: India currently follows a two-envelope system under which bidders submit all administrative, qualification-related and technical information in one envelope and the price in another envelope. The purpose of following this procedure is to avoid pressure to consider non-performing attractive bids (in terms of price quotation). In theory, it is perfect. In practice, it delays processing of bids (longer the delay less is the perceived integrity) and encourages under-bidding, bid rigging and corruption. More often than not price envelopes are open first and a set of lowest bidders are selected. Following that, technical bids are open and even if a bidders technical bid (including administration- and qualification-related issues) is not good, it might get selected on account of low price quotation. According to a World Bank/CII (Confederation of Indian Industries) survey of 210 private sector firms in 1999, a bribe of two to 25 percent of the price is necessary to secure government contracts.[11] The process of bid opening could be reversed. First technical bids are to be open, followed by financial bids.

- *Introducing a standard tender document*: In India, there is no standardised tender document. Different ministries, agencies follow their own tender document. According to one estimate, there are more than 150 different contract formats used by the government and its agencies.[12] For instance, for the construction of a road the tender document of the government public works department is different from the tender document of say a municipal corporation. This creates confusion and corruption. All basic features of a standard tender document (such as qualification requirements, selection criteria, terms of payments, dispute settlement mechanism) are different in different tender documents. There could be a standard tender document based on the Standard Bidding Document of the World Bank.

- *Removing the process of negotiation*: A practice in the Indian procurement system is to ask the bidder to reduce the quoted price without any changes in other conditions of the bid. Instructions regarding negotiation of price with the lowest or with others as well are confusing. Many ministries and agencies issue them.[13] Negotiations need to be permitted only in exceptional cases (and after the appraisal of technical bids) and to be done by a committee of experts, including having those from other ministries and agencies (other than the concerned ministry/agency).

- *Introducing a functioning dispute settlement mechanism*: Disputes relating to procurement by the central government to be settled by the Directorate General of Supplies and Disposal (DGS&D) by following a clear process of arbitration unless a dispute is settled through counseling.

In order to introduce the above-stated changes/reforms, the DGS&D could be made the focal point on all issues relating to procurement by the central government. Similar counterparts could be created at the state level and these bodies could

[11] India: Country Procurement Assessment Report, The World Bank (2003)
[12] *Op. Cit.*
[13] Public Procurement Review of the Government of Andhra Pradesh, Department for International Development, UK (2002)

coordinate with the DGS&D. The Central Vigilance Commission could be empowered to monitor the cost effectiveness of a standardised system of government procurement.

In addition to the above there are also clear advantages – both with regard to transparency and cost-effectiveness through the more widespread introduction of e-procurement.[14] This can decrease the cost of procurement, reduce procurement cycle time, and encourage more vendors to compete, and drive transparency and enable centralised management of information systems.

2.3 Possible Benefits and Costs

Besides introducing competition in the system, reducing delays, etc, standardisation of the government procurement system, and the introduction of e-procurement is likely to enable:

- Those engaged in procurement activities to perform their duties, within the confines of their organisation's procurement policy, in a uniform and generic manner.
- Procurement documents to be readily complied in a uniform and generic manner.
- Curricula can be developed to capacitate those engaged in a range of procurement activities.[15]

In this context, it is interesting to note the following statement by the Government of Andhra Pradesh:

> *"Reducing our costs by 10 percent with our Windows-based eProcurement solutions provides us with an annual savings of more than US$250mn, compared to our old manual process. Savings compared to the old system are expected to be US$400mn when fully deployed in April 2006, based on total procurements of US$3bn."*[16]

In the year 2000, in Andhra Pradesh the total market for government procurement was US$250mn and the savings through limited introduction of e-procurement was US$50mn – 20 percent of the value of government procurement in this state. In that year, in India the size of the government procurement market was US$31.4bn (see

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[14] To attain the vision of being a developed nation by the year 2020, the Government of India has initiated reforms in several areas. One of the reform activities undertaken by the Government is a project entitled National E-governance Plan 2003-07. Several projects are undertaken. E-procurement is identified as one of the seven Integrated Services project. Since the year 2000, a few state governments and public sector enterprises have self-initiated and implemented e-procurement. However, there is a lack of coordinated efforts to implement e-procurement at the national level. The Central Vigilance Commission pointed out the lack of uniform policy regarding the implementation of e-procurement/e-auction. *Source: www.unescap.org*

[15] "Unpacking Transparency in Government Procurement", CUTS International (2004) – Page 19

[16] www.eprocurement.gov.in

Table 1.3 in Annex 3). If we extrapolate the same level of savings (20 percent of the total value of government procurement), an estimate of he possible benefits on account of introduction of e-procurement alone in India would be US$6.28bn. This accounts for 1.38 percent of the gross domestic product of India.[17]

In 2006, the total market for government procurement in Andhra Pradesh was estimated as US$3bn – a 12-fold increase as compared to the size of the market in the year 2000. If we take this increase as an estimated figure for the size of market for government procurement in India in 2006 it could have been approximately US$400bn. This figure may appear to be an exaggeration but could be true given that during 2000-06, the average annual growth of the Indian economy was approximately six percent. This growth rate would itself have had significant implications on the size of the market for government procurement. Furthermore, during this period India introduced several new and large-scale initiatives (such as the National Highway Development Programme), which increased the size of the government procurement market considerably. Even if there were ten percent savings (as against 20 percent of savings – the figure considered from Andhra experience and applied in other exercises in this sub-section) on account of the introduction of e-procurement at all levels of government procurement, the amount of savings could be as high as US$40bn.

There is therefore clear evidence that there is the potential for considerable benefits to India for introducing a standardised system of government procurement, and through the applications of information technology at all levels of this market. Nevertheless there would be costs as well, though there are no ready estimates on the costs that would be incurred. The implementation of National E-governance Plan 2003-07 is estimated to cost US$3bn. Twenty-five projects are being implemented under this Plan. Out of these 25 projects, there are seven initiatives on Integrated Services and e-procurement is one of them.

3. Services

3.1 An Overview of Issues

The services sector is a key area of offensive interest for both India and the EU. India, which has experienced a robust growth in the services sector in the recent years, particularly in the export sector, is hoping to make some real gains by negotiating a Free Trade Agreement (FTA) with EU. The EU, on its part, is keen to see India further liberalising its foreign direct investment (FDI) regime including raising the equity caps in some sectors and opening up closed sectors such as legal services and accountancy.

There are clearly therefore barriers to market access for European Service providers, and this is an important area of concern. In addition to this there is inadequate regulation in India and this was discussed in more detail in Annex 3. Whereas

[17] In 2000, share of government procurement in gross domestic product of India was 6.9 percent. This figure of saving (1.38 percent of gross domestic product) is thus extrapolated on the basis of this share (6.9 percent).

financial services, telecommunications, and the insurance sector, appear to have an adequate regulatory framework, a number of other sectors appear to be either under or over regulated. In particular, for a large number of professional services there is no independent sectoral regulator. This not only causes problems for domestic consumers and professionals but also often creates barriers for foreign service providers.

In Annex 3 or the report India's services sectors were grouped into three categories: (i) sectors that have seen substantial liberalization and face no explicit barriers; (ii) sectors that are moderately liberalised with a few explicit barriers; and (iii), those that remain largely closed to foreigners. Within these, we look at India's GATS commitments and revised offers in each sector, India's autonomous FDI policy and other requirements, assess the most important barriers that exist and the ease of negotiating a change in the policy environment through regional trade agreements, and in particular, through an EU-India FTA.

3.2 Significantly Liberalised Sectors

<u>Computer and related services</u>

There is no real issue here except for the need for an independent regulator and protection of intellectual property. Given the pro-active nature of the IT sector, any positive change in the policy environment would therefore be more possible here than in any other sector.

<u>Telecom</u>

There is a need to relax licensing restrictions on service providers and remove policy-uncertainty on tariff and inter-connect regimes and also need to replace the old laws governing the sector – the Indian Telegraph Act, 1885 and the Indian Wireless Act, 1933 – with new forward-looking legislation that incorporates cyber laws and new licensing conditions.

With the government's decision to increase the FDI limit in the telecommunications sector to 74 per cent, with the aim of mobilising the substantial investment required, the main issue that remains concerns relaxing the licensing requirement. Politically, this has previously been a sensitive issue on the grounds of there being a potential threat to national security from an increase in FDI in this sector, as it was argued that this could compromise intelligence gathering within the country. A second political concern is that of bridging the telecom divide between the rich and the poor and the urban and rural areas.

Given the recent advancements in this sector and the state of play amongst the domestic telecom operators, these are changes which are more likely to happen given time than otherwise, even though infrastructure investment would remain a challenge in itself that would need to be addressed first.

3.3 Moderately Liberalised Sectors with A Few Explicit Barriers

Construction

FDI is already allowed in this sector up to 100%, but the institutional problems that emanate from the use of the Urban Land Ceiling and Regulation Act (ULCRA) in states that have not repealed it yet need to be addressed at the state level. Given the pressure that already exists for repealing this Act in states that have not done so already, this is a demand, which could be negotiated. There is also a need for greater transparency and providing for a level playing field in the award of government construction contracts and this is something, which could be jointly addressed in an agreement on government procurement.

The major effect of ULCRA has been the freezing of large areas of land in legal disputes. These areas are not available for development or redevelopment. An additional negative impact of this Act was to prevent private developers from assembling land for subsequent development. This Act gives a *de facto* monopoly on land development to government developers such as housing boards or development authorities.

The Constitution of India has assigned subjects pertaining to urban areas to state legislatures. In so far as the urban issues are concerned, the legislative powers of the Union are limited only to the following subject/areas:

- Delhi and other Union Territories
- Property of the Union
- A subject of the state list which two or more state legislatures authorise the Union Parliament to legislate

In exercising these legislative powers, the Parliament of India has enacted legislations, which are administered by the Ministry of Urban Development & Poverty Alleviation.

The Urban Land Ceiling and Regulation Act, 1976 came into force on 17.02.1976. Following its enactment, several states of India have adopted this Act. The Act was applicable to urban agglomeration having a population of more than two hundred thousand. As per the 1971 Census, there were 64 such urban agglomerations existing at that time.

The Urban Land Ceiling and Regulation Act, 1976 has been repealed by the Urban Land Ceiling and Regulation Repeal Act, 1999. The Repeal Act was notified on 23.3.99. Initially the Repeal Act was applicable in Haryana, Punjab and all the Union Territories. Subsequently, the state governments of Uttar Pradesh, Gujarat, Karnataka, Madhya Pradesh, Rajasthan and Orissa have adopted this Act. The state governments of Andhra Pradesh, Assam, Bihar, Maharashtra and West Bengal have not adopted this Act so far.

The Associated Chambers of Commerce and Industry (Assocham), one of India's leading business chambers, has called for the repeal of the existing Urban Land Ceiling Act and rationalisation of property tax across the country. The argument was that these would not only facilitate forays of big companies into the retail sector but also create a multiplier effect on agriculture, manufacturing and food processing sectors.

Health

There is a need for a standardized accreditation system for healthcare professionals and an independent regulator. There is also the need for streamlining regulations in this sector as well as liberalizing life-insurance services.

The private health sector in India has made some impressive strides but has done so at the cost of the public sector. To regulate it may be, however, just another opportunity for bureaucratic delays and corruption. A better solution might be to impose greater social accountability on private providers, making a certain proportion of private services available to the poor.

Accreditation in some countries has begun to be used by the government as a way of raising standards. Several routes are available. One is to use compulsory licensing as a basic requirement for practice while accreditation is used to qualify a sub-set of providers to receive government funding. A second, an integrated approach, is to combine these functions through formation of a joint government and professional committee. In Mumbai this second route was chosen with the formation of the Forum for Healthcare Standards (FHS) in 1999. This consists of representatives of consumers, providers, non-government and government agencies following wide consultations on the state of the healthcare sector. The committee sets voluntary standards for smaller hospitals, not as an alternative to a licensing system, but as a supplementary way of raising standards.

Article 246 of the Constitution of India deals with the subject matter of laws made by the parliament and legislatures of states. The seventh schedule of the constitution contains three lists: List I - Union List deals with the subject matters within the purview of the parliament. List II - State List deals with the subject matters within the purview of the State. List III - Concurrent List deals with the subject matters, which are common, both to the parliament and to the state legislatures.

It is to be noted that insurance falls under the union list (Item No. 47). Public health and sanitation, hospitals and dispensaries fall under the state list (Item No. 6). Medical professions fall under the concurrent list (Item No. 26). Drugs (pharmaceuticals) fall under the concurrent list (Item No. 19).

Thus, the healthcare sector in India is fragmented between the centre and the states and the overall legal framework relating to the regulation of healthcare is not simple. Though the Government of India was a party to the 1978 WHO declaration (Alma Ata Declaration) and commitment of "Health for all by 2000 AD," precious little was attained by the target date.

Medical professionals under the allopathic stream are registered by state units of the Medical Council of India (MCI). It is a one-time registration and no renewal is required. The MCI has the powers to de-register medical professionals. The MCI has recently announced detailed regulations relating to professional conduct, etiquette and ethics for medical practitioners. Some experts have, however, raised doubts on the efficacy of the guidelines and the ability of the MCI to implement them.

Government hospitals and clinics come within the purview of the Directorate of Health Services, which is the regulator for these establishments, through their state units. Private hospitals and clinics come under the purview of Shop and Establishments Act of respective states. In Maharashtra, there is a Bombay Nursing Home Registration Act, 1949.

The law courts, particularly consumer courts, have dealt with a variety of medical issues like medical negligence, hospital records, wrong diagnosis, quackery, medical ethics, hospital facilities, jurisdiction etc. Issues of delay and denial of claims, related to health insurance, have also been dealt with by consumer courts and ombudsman. With an increase in consumer activism in India, the role of courts will be more pronounced in the coming years.

In a large, diverse and complex country like India, no single health insurance model can be successfully implemented. We have to also address community-based small hospital managed organisations (HMOs), but without the burdensome minimum capital requirement currently in force by regulators. There may also be need for regulation for the self-funded health plans by major employers who may not find insurance as a cost effective alternative.

It is not an easy task to regulate health insurance. Some countries including the US have had to launch war-like operations to unearth large-scale frauds. Malpractices in health insurance range from excessive billing to exaggerating the severity of hospital patient conditions.

Paradoxically, medical professionals are resisting standardisation in treatment coding known as ICD and cost cutting measures for making medical treatment affordable to the ailing. They tend to forget that the future growth of healthcare in a country like India would depend upon the development of the health insurance model. The need for support from the health domain members/players and the ministry of health both at the centre and the state cannot be over-emphasised.

However, given the state of affairs of regulations in the healthcare sector in India, it is doubtful whether full-fledged insurance companies would like to take big strides into health insurance. The health sector needs to be regulated and reformed to make healthcare risks manageable so that insurers may find it worthwhile to move into the sector in a big way.

Banking and other financial services

There could be a replication of the treatment of banking services as in the India-Singapore CECA, thus, allocate more branch licenses and have fewer restrictions on select European banks.

Under the India-Singapore Comprehensive Economic Cooperation Agreement, three Singaporean banks' operating conditions in India saw significant improvement. However, a similar arrangement with the EU may not find support from domestic Indian banks. According to an annual survey on "Indian Banking System: The Current State and Road Ahead" conducted by the Federation of Indian Chambers of Commerce and Industry (FICCI), an overwhelming majority of Indian banks is against the government granting "full domestic" status to banks from the EU, as has been given to banks from Singapore. The survey results showed that 85 percent of domestic banks emphasised that India should not give full domestic status to the EU-based banks under the proposed EU-India FTA. The banks' opposition to EU banks being treated on par with them is because the European banks are among the most globally competitive financial services providers and also because Indian banks have not been given similar treatment in European markets.

Insurance

There is a need for raising the cap on FDI allowed in this sector. The United Progressive Alliance Government, which came to power in 2004 in its first Budget had indicted that FDI cap in the insurance sector would be hiked to 49 percent along with similar liberalisation moves for the aviation and telecom sectors. However, the government could not affect this policy change even after three budget presentations because of strong opposition from Left political parties. But this is one area where both domestic and foreign players have been vigorously pursuing their long-pending demand for increasing the FDI limit from 26 per cent to 49 per cent. This yielded result when in December 2006 the Government sent the Comprehensive Insurance Bill to the Group of Ministers for consideration amid strong reservation from Left parties. The Bill is likely to be taken up in the Budget session of the Parliament in the beginning of 2007. The proposed change in FDI cap is part of the comprehensive amendments to insurance laws -- The Insurance Act of 1999, Life Insurance Corporation (LIC) Act, 1956 and Insurance Regulatory and Development Authority (IRDA) Act, 1999.

In insurance, a large number of companies, mostly nationalised banks (about 14) like the Bank of India and Punjab National Bank, have announced plans to enter the insurance sector and some of them have also formed Joint Ventures.[18] At present, particularly in health insurance, the current minimum capital requirement of $22million (Rs. 100 crore) is also a major barrier.

Distribution

Foreign firms could be allowed to enter the retail segment and streamlining multiple laws and regulations. Need for an independent regulator and developing appropriate legislation on E-Commerce.

At present, India's retail sector is largely unorganized, with an estimated 15 million tiny outlets catering to individual needs and employing the second-largest number of people after agriculture. What they lack is the complete "shopping experience". The

[18] See http://www.hindu.com/thehindu/holnus/001200612290324.htm

retail giants are targeting the 300 million strong "middle classes" in urban India and an additional 200 million in rural areas, who form a consumer market worth more than $100 billion.

Leftist parties and right-wing traders, however, have stymied moves to open the sector further, which they fear would kill the local *kirana* (roadside mom & pop stores). Their opposition to FDI in retail rests on several planks. One, the entry of large global retailers would kill local shops and millions of jobs. Small retail stores are an important source of jobs, providing about 7 percent of total employment in India. Two, the global retailers would collude and exercise monopolistic power to raise prices and monopsonistic (big buying) power to reduce the prices received by the suppliers. Hence, both consumers and suppliers would lose, while the profit margins of such retail chains would go up. Three, it would lead to lopsided growth in cities, causing discontent and social tension elsewhere.[19]

India is yet to open the retail sector fully because of lack of a political consensus (and some resistance by domestic players who fear being swamped by foreign outfits), but it allows 51% foreign investment in single-brand retail with prior government permission. FDI is also allowed in the wholesale business.

Single-brand retailers such as Nokia, Adidas, Reebok, Calvin Klein, Tommy Hilfiger, Versace, Chanel, Nina Ricci, Hugo Boss, Louis Vuitton, Aigner, LG, Sony and Samsung can now operate on their own. However, major international retailers that sell everything from food to automobiles under the same roof have to seek an Indian partner. Some (including Wal-Mart) have been waiting for more changes in the FDI regime, but are choosing to take the Indian plunge now to establish a foothold in the vast market.

It must be highlighted here that those who are opposing FDI in retail sector, are not against all kinds of FDI in retail. They do favour selective FDI in food, dairy and grocery segments of retail trade. In other areas such as readymade garments and various industrial consumer goods, it would allow only big domestic retailers to compete with small local *kiranas*. Even when FDI is to be allowed in retail food and grocery sectors, it would like to put a cap on foreign ownership.

In other words, foreign players – if they want to enter – will have to take local partners to start with. They will be allowed to set up 100 percent foreign-owned retail chains only after the local players are able to muster enough capital, experience and expertise to compete with established global giants.[20]

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[19] "FDI in retail: More benefits than costs", published in The Hindu Business Line, 9th November 2005,
http://www.thehindubusinessline.com/2005/11/09/stories/2005110900931000.htm

[20] India has taken a similar approach while opening the insurance sector. Foreign players are allowed to enter into joint ventures with Indian companies. Initially, foreign ownership in such ventures was restricted to 26 percent and now it will be increased to 49 percent. Several such alliances have been formed – such as Bajaj-Allianz, Birla-Sun Life, Prudential-ICICI. The result was a challenge to the monopoly being enjoyed by the Life Insurance Corporation of India (LICI) – in last few years, LICI has come out with several new and more affordable insurance schemes.

What may be appropriate for India may be to follow the Chinese model. China first allowed FDI in retail in 1992. The initial FDI cap was 26 percent. It took China 10 years to raise the limit to 49 percent. The 100 percent foreign-owned retail stores were allowed only from 2004.

Furthermore, in China foreign chains were initially permitted to set up stores only in a few select cities. Local retailers were officially encouraged to become big by mergers and acquisitions so that they would be in a position to compete with big global players. In other words, China provided infant industry protection to domestic retailers, which was gradually reduced as the local players gathered strength.

Contrary to this, the supporters of FDI in retail see many advantages. The biggest benefit, according to them, would flow from higher exports. They too point to the Chinese experience. The global retailers taken together buy about $60 billion of goods each year from China for exports. Contrast this with India, where less than $1 billion of exports are accounted for by global retailers (mostly metro dairy farm). Clearly, the scope of exports through the global retailers is enormous.

The supply chain and infrastructure, which global retailers would develop for their local stores, would yield significant cost economies when it is also used to procure supplies for their global needs. That is why Wal-Mart sources some $18 billion of goods from China for their global operations. But this happened only after it was allowed a substantial presence in the Chinese local retail market.

According to Mukesh Ambani, the chairman of India's largest business group, one of the biggest opportunities from retail was that it would create purchasing power, even at the bottom of the pyramid. As many as 10 million to 15 million jobs would also be generated over the next three to five years due to the explosion in the retail sector.

Entry of sophisticated branded products is expected to affect the unbranded mass market only marginally in a vast country such as India. Moreover, in malls where the large retail chains set up their stores, typically, there will also be many small shops, which will attract people. Further, the street-corner shops will have some advantages over big stores located miles away in shopping plazas. In India, transportation and parking are big problems for people who want to visit shopping malls. For them, it is more convenient and cost-effective to purchase many of their daily requirements from the neighbourhood stores, especially as these establishments stock goods that are in particular demand in a locality. Hence, the pop-and-mom street corner shops can very well survive.

To the extent large retailers establish a direct linkage with farmers by cutting out many layers of middlemen, develop the processing facilities and export products to meet their global requirements, farmers would get better prices and bigger markets while consumers would benefit in terms of lower prices, better quality and greater variety. The resultant rural prosperity may open up markets for other industrial goods and help a more balanced regional development as well as job creation in other sectors.

Similar gains would flow from higher exports when the global chains are allowed in other sectors such as readymade garments. As for monopolistic pricing practices, the best safeguard would be in permitting all global chains to set up shops. Competition among them (as has happened in the automobile industry) would ensure better prices for consumers and suppliers alike.

Thus, the benefits from higher exports are likely to offset any direct job loss in local *kiranas* as a result of competition from big global retailers. Anyway, if big domestic players are allowed to operate, the problem of job loss in small shops would remain, while benefits from larger exports would not be there. So, clearly, if big players are to be permitted in retail, this must be extended to foreign players (through FDI). Otherwise, the full range of benefits will not be realised.

Of course, some lead-time can be provided to local players to consolidate their position before they face full-fledged competition from established global players. But, then, temporary protection needs to be really temporary. The government must make a clear commitment to a time frame over which protection from foreign competition would be removed gradually.

Education

There could be formal recognition from All India Council for Technical Education (AICTE) without impeding the autonomous functioning of foreign institutes by making required changes in the University Grants Commission (UGC) Act of 1956 and in the Foreign Educational Institutions Bill of 2005.

On the issue of FDI in education, the Indian Commerce Ministry and Human Resources Development Ministry are at loggerheads. Opening up the education sector to foreign investment has been a contentious issue with the HRD Ministry opposing the Commerce Ministry's proposal to do away with restrictions on issues like fee structure, number and pay-scale of the faculty, or course content. HRD Ministry also wants quotas to be implemented if the government allows foreign universities into India. The Commerce Ministry has recommended that the government should approve FDI in education. Already, a number of foreign universities and companies that operate in the education sector have shown keen interest to enter India.

Explaining the need for foreign investment in education, the Commerce Ministry argues that every year the outgo from India on account of getting education in foreign countries is more than $4 billion (about Rs 18,350 crore). If foreign universities are allowed to be set up in India, a large part of this amount may be saved. The Prime Minister too supports this argument.

The Commerce Ministry has in fact submitted a discussion paper on FDI in education to the HRD ministry and the Prime Minister's Office. Some of its key arguments are:[21]

[21] A Consultation Paper on Higher Education in India and GATS: An Opportunity, In Preparation for the on-going Services negotiations at the WTO, Prepared by Trade Policy Division, Department of Commerce, Government of India

- India spends just $406 (about Rs 18,600) per student on higher education. That is just a fraction of countries like China ($2,728 or Rs 125,000), Brazil ($3,986 or Rs 182,000) and Malaysia ($11,790 or Rs 540,000) spend.
- Public expenditure on education is only about 3 percent of the Gross National Product and only 0.37 percent of Gross Domestic product is spent on higher education in the country.
- There are only 10.5 million students enrolled in all higher education institutions in India -- that is just 11 percent of the relevant age group (17 to 23) population. Even South-east Asian countries show much higher enrollment: Philippines (31 percent), Thailand (19 percent), Malaysia (27 percent) and China (13 percent).

The HRD ministry has recommended a 'cautious approach' to FDI in education considering that many other developing countries are of the opinion that they would not open their education sector as doing so would affect local political and cultural sensitivities.

Those who favour opening up of the education sector to foreign universities feel that this would make foreign education/certification more accessible to Indian students.. Experts are optimistic that it will improve quality, efficiency and accountability in Indian educational institutions. It will not just facilitate the building of structures but also help in paying internationally competitive salaries and packages to teachers.

The opponents of FDI in education fear that no university of excellence like Harvard, Cambridge, Oxford or Princeton is likely to set up shop in India. India may be loaded with 'B' and 'C' grade universities.

<u>Postal and courier services</u>

In courier services 100% FDI is allowed for carrying packages, parcels to distribution of letters, and other items, which do not come within the ambit of the Indian Post Office Act, 1898. The entry route is through Foreign Investment Promotion Board (FIPB). FDI in this sector would be permissible with prior Government approval. This is also subject to existing laws and exclusion of activity relating to distribution of letters, which is exclusively reserved for the State.

Recently, the Government of India has initiated a move to amend the Indian Post Office Act 1898 by introducing an Indian Post office (Amendment) Bill in the Parliament. The government through the proposed Bill *inter alia* aims to expand its monopoly provisions, regulating courier and express service operators, levying courier and express operators to fund the Universal Service Obligation of the Department of Post (DoP).

The Bill centres on letters weighing less than 500 grams. It grants an exclusive privilege to the DoP to distribute letters up to 500 grams by post from one place to another and all incidental services of receiving, collecting, sending, dispatching and delivering all such letters. This move by the government was termed as a retrograde step by Express Industry Council and various consumer organisations.

3.4 Closed Sectors

Legal practices

Relevant changes are to be made in the Advocates Act and the Bar Council of India Rules to enable foreign service providers to practice in India.

Unlike education, in the legal sector, the Government of India seems to be on a smoother path on its way to opening up of this sector for foreign professionals and FDI. In a signal that the government intends to move forward on opening up the legal services sector, the Minister for Commerce has already constituted a panel of lawyers under the UK-India Joint Economic and Trade Committee (JETCO) to work with a similar group in the UK and deliberate on opening up the legal services sector.

The protagonists of legal sector reforms argue that opening up of the sector will result in additional business opportunity worth $20 billion annually for legal professionals and firms in India. However, due to the objections raised by the Bar Council of India (BCI) and a majority of lawyers, the government has not taken any stance on this issue. Due to the same reason, the government has also not permitted FDI in the sector. Many expect that the BCI's plans to join the discussion with the UK on this issue, is significant, but it could be a slow process.

The objective of forming the two groups was to ensure that the lawyers themselves participate in those talks and thrash out the problems and find out areas of convergence before a final call can be made by the government on opening up of this sector.

Accountancy

This is an area where India sees more opportunities for her professionals if there is a Mutual Recognition Agreement of qualifications with its trading partners. The President of NASSCOM (the IT industry body) too, is of the opinion that opening up of the accountancy services will open up lot of opportunities for Indian chartered accountants. He feels that while there may be a transition period of a year or two, with its talent base, India would ultimately take over the world in the accountancy sector just as in IT. He said that the accountancy services sector need not be defensive but should face the challenges of globalisation.

Organisations of accountancy professionals such as the Institute of Chartered Accountants of India (ICAI) and the Institute of Cost and Work Accounts of India (ICWAI) are not averse to opening up of this sector. However, it need not be unilateral but on a reciprocal basis. These professional organisations are already in discussion with accounting bodies in Singapore, Australia and the UK in this regard.

India's main concern is Mutual Recognition Agreements (MRAs) with professional associations of its trading partners. This will give an opportunity to see that qualified professionals are able to deliver necessary services under temporary movement of professionals, as contract service suppliers or as independent professionals. Another area of opportunity for professionals like chartered accountants would be cross-border supply of services through electronic means, without actual physical movement.

What India fears is a lack of genuine reciprocity from other countries affecting the chartered accountancy profession in India. The ICAI has therefore impressed upon the Commerce Ministry the urgent need to initiate dialogue with its trading partners for striking MRAs. Stressing on the need for practical implementation of reciprocity by other nations, Kamlesh Vikamsey, President of ICAI said, “this is our most genuine concern as we are opening out. We cannot afford to allow chartered accountant firms from other countries to operate here freely when in their countries our people continue to face indirect impediments.”

4. INVESTMENT

4.1 An Overview of Issues

The investment-related provisions of free trade agreements (FTAs) concluded by the European Union (EU) are generally not as comprehensive as those of traditional Bilateral Investment Treaties (BITs). Disagreement between EU Member States and the European Commission over their respective competences has so far prevented the latter from negotiating FTAs that cover all issues recurring in bilateral agreements.

Except for some loose provisions concerning capital market liberalisation, the agreements with the Mediterranean (MED) countries and South Africa merely emphasise the parties' commitments in international agreements, as well as assistance and cooperation in investment issues. All EU FTAs stop short of including protection provisions such as expropriation and compensation clauses. These issues are left to bilateral agreements concluded by trading parties with individual Member States. Another important difference is that none of the agreements provide for a separate investor-to-state dispute settlement procedure for conflicts about investment issues. Hence, any dispute that might arise under the FTAs discussed has to be resolved by consultation or by applying the generic dispute settlement provisions.

In the context of the EU-India FTA, the following issues are potentially of relevance:

- Investment promotion/technical assistance
  - Harmonisation and simplification
  - Co-investment machinery
- Investment protection/double taxation
- Current payments and capital movements
  - Standstill on new restrictions
  - Progressive liberalisation of restrictions
  - Exemption for balance of payments or monetary policy difficulties
  - Repatriation/liquidations of investment
- Market access
- Post-admission national treatment
- Performance requirements
  - Quantitative restrictions on suppliers, transactions, operations or personnel
  - Legal entity requirements (e.g. joint ventures)
  - Limits on the proportion of foreign ownership (with exceptions)
- Dispute settlement

Investment promotion/technical assistance

Most agreements include provisions on means to stimulate reciprocal investment flows include harmonising and simplifying procedures, examining the creation of joint ventures, establishing co-investment machineries, and providing technical assistance. They also have generic provisions like: information mechanisms on legislation and investment opportunities, progress towards uniform and simplified procedures, and investment promotion targeting small and medium-sized enterprises as instruments for stimulating reciprocal investment. They are, however, more of expression of intent rather than hard commitments.

A few agreements (i.e. those with Algeria, Lebanon, and South Africa) specify particular industries (e.g. tourism and mining), which are to be targeted by such promotion measures, though no detailed commitments are made.

Investment protection/double taxation

Most of the agreements also mention investment protection in the articles dealing with investment promotion. However, these are not covered in any substance, as they refer to the possibility of including protection provisions (and often double taxation) in BITs with EU Member States. It is unlikely that India will have any problems with such an approach.

Current payments and capital movements

The only provisions that effectively cover investment protection are those dealing with current payments and FDI-related capital flows. All the agreements state that current payments and transactions shall be free of restrictions (e.g. Art. 32 of EU-Lebanon) or allowed in a freely convertible currency (e.g. Art. 38 of EU-Algeria). This basically reiterates the parties' international (IMF) commitments. Exceptions are made for serious balance-of-payments difficulties. The provisions on the free movement of capital relating to direct investments often contain quite strong language in some of the earlier agreements, but are weaker in later agreements.

The agreements with Algeria, Morocco, South Africa and Tunisia state that the parties 'shall ensure' both the free movement of capital relating to direct investment and the liquidation/repatriation of investments (or the resulting profits) from the host country. However, the wording subsequently becomes looser: the Trade, Development and Cooperation Agreement (TDCA) states that the parties 'shall consult each other with a view to facilitating and eventually achieving full liberalisation of the movement of capital' (i.e. including capital not relating to FDI) between the parties. The agreements with Tunisia and Morocco mention full liberalisation 'when the time is right', and the agreement with Jordan refers to the prospect of full liberalisation 'as soon as conditions are met'. None of the agreements, however, defines a time frame or a specific set of conditions under which full liberalisation is to be achieved.

The agreements with Israel, Jordan and Lebanon are even less forceful, as they merely boil down to a standstill in restrictions. Though it is stated that there shall be no restrictions on the movement of capital, the parties are free to maintain any restriction that existed before the agreement came into force, involving direct investment, establishment, the provision of financial services or access to capital markets.

Like the other agreements, the EU-Mexico Agreement also seeks to liberalise investment-related payments and capital movements. However, this agreement is the only EU FTA reviewed here that explicitly defines these payments and capital movements as being related to 'direct investment, investment in real estate and the purchase and sale of any kind of securities, as defined in the Organisation for Economic Cooperation and Development (OECD) Codes of Liberalisation'.

The Agreement states that restrictions on payments shall be progressively eliminated and introduces a standstill on any new restrictions. Exemptions are still made for situations where serious difficulties exist with exchange rate or monetary policies or with the balance of payments (Art. 31). In such cases, the party concerned is required to inform the other party forthwith, and the measures taken needs to be equitable, in accordance with international obligations and of a limited duration.

Market access

The EU-Mexico Agreement states that investments by foreign service suppliers that seek market access in the other party's territory need not be constrained by pre-admission requirements. Articles 4 (on services) and 12 (on financial services) state that no party may impose quantitative limits on the number of (foreign) (financial) service suppliers in a country. They are also not allowed to limit the number of transactions or operations performed by these service suppliers, or the size of their workforces. Similarly, measures that seek to cap the amount of foreign capital invested in domestic firms, or to limit individual or aggregate foreign investment, are forbidden.

Moreover, foreign firms cannot be required to engage in specific legal entities such as joint ventures, except in the financial services sector. All these requirements reflect the parties' specific commitments at the multilateral level, as agreed in GATS Article XVI.2. Both parties merely agree to 'recall their international commitments with regard to investment', a reference to the OECD Domestic Treatment Instrument (Article 34). Article 35 commits both parties to review, within three years, the legal framework for investment, the investment climate and the flows of investment between them, so as to ensure that these are consistent with their commitments under international investment agreements.

India's approach has been quite conservative as far as market access is concerned. So far, the India-Singapore Agreement is the most comprehensive and even there market access commitments are quite narrow in scope. From India's side this is also the only agreement (except of course GATS) where market access commitment has been undertaken including in some manufacturing sectors. However, going as far as the India-Singapore Agreement in this context would be difficult for India. Many of the sectors within manufacturing offered by India are of theoretical interest only as Singapore has no capabilities in most of these sectors and FDI from Singapore is not expected in these sectors. This is true for many of the services sectors as well, and Singapore is interested only in a few services sectors. However, the situation would be quite different vis-à-vis the EU, which has capabilities in almost all these sectors.

Post-admission treatment

As for post-admission issues, the EU-South Africa and most MED agreements do not include provisions of this kind. An exception is the EU-Jordan Agreement, which entails a commitment to national treatment in the services sector, albeit with a long list of sectoral exemptions. The EU-Mexico agreement, however, has explicit provisions on this. Apart from the specific chapters on services or financial services that are mainly based on GATS commitments, the EU-Mexico agreement does not contain more general pre-admission or post-admission investment commitments. Once an investment is made and a foreign service supplier is established, the MFN principle (similar to GATS Article II) commits both parties to treating each other's (financial) service suppliers in a manner that is 'no less favourable than that accorded to like service suppliers of any third country'. However, the Agreement makes a reservation for treatment to third parties with whom a separate agreement has been made (which is notified under GATS Article V).

India being a party to GATS, it would not have any problem is accepting GATS-type commitments. However, at this stage, India may not be willing to put a wide range of services in its schedules. The sectors that might be particularly difficult for India are postal and courier services and retail services.

Performance requirements
The provisions related to performance requirements and similar provisions could be found in EU-Mexico Agreement. They include a ban on quantitative restrictions on suppliers, transactions, operations or personnel; legal entity requirements (e.g., joint ventures); and limits on the proportion of foreign ownership (with exceptions). India, despite substantial liberalization of its investment regime, still maintains some forms of such restrictions. Particularly important in this context is the issue of proportion of foreign ownership. Hence, it would be difficult for India to accept such commitments.

Dispute settlement
There is no special dispute settlement procedure for investment-related disputes in these Agreements. However, where disputes concern financial services, the Agreement states that the panel arbitrators shall have the necessary expertise relevant to the specific financial service that is in dispute. However in some cases they stipulate that the panel should be appointed before a dispute arise (i.e. within six months after the agreement's entry into force). The EU-Mexico Agreement is the only EU FTA that explicitly defines the payments and capital movements as being related to 'direct investment, investment in real estate and the purchase and sale of any kind of securities, as defined in the OECD Codes of Liberalisation' This provision, however, is among the few articles that are excluded from the agreement's dispute settlement mechanism. Thus, the EU agreements are different from US agreements where there are provisions for state-investor dispute settlement, which have often been criticised. This kind of approach may go well with India.

4.2 Proposed Possible Changes

In Annex 3 of our study and in previous the Section, a detailed analysis on issues on investment in non-service sectors has been done. It is stated that though India has been liberalising its economy since 1991 but the amount of investment that it has been able to capture was much less than that by other countries such as China. The reasons lie in its complex web of rules and procedures, and their implementation.

The main issues, which emerged from Annex 3 and from the previous Section, are as follows:

- An investment agreement between EU and India may remove some of the problems and make the process of investing much smoother.
- The barriers faced by foreign investors in India are related to policies and procedures (implementation issues).

- The perception that there may be some pre-entry conditions on foreign firms entering India such as local content, export conditions, employment, etc and questions relating to the dispute settlement system.

Investment regimes outside services are not covered by specific WTO disciplines and therefore, any agreement on investment in goods would be treated as a bilateral agreement.

So far as policies and procedures relating to FDI (foreign direct investment) is concerned, the Indian government has been liberalising the country's investment regime since 1991 and in fact many areas which were thought that would not to be opened (in 1991) have not only been opened but the FDI cap has been raised gradually from 24 percent to 49 percent and then to 76 percent and even 100 percent. However, actual realisation of FDI as against approvals has remained less than 50 percent. The main reason behind this lies in the system of economic governance in India - these issues are handled at procedural and implementation levels.

At present, India is engaged with a number of bilateral and regional initiatives to further liberalise its trade and investment regime. In order to realise its full potentiality in international trade and for further integration with the outside markets, India needs substantial amounts of foreign investment inflows so as to improve its infrastructure and other related facilities, to further expand production of goods and services, as well as to benefit from the pro-competitive and technology transfer benefits derived from FDI. The central government and various state governments are reforming their policies and providing concessions to attract domestic and foreign investment. At the same time, the process of decision-making is not clear. Division of powers and sectors between the centre and states poses some problems in implementing policies., as well as the absence of a single information window.

Though the government at the central level has initiated administrative reforms to enhance efficiency at the higher levels of administration it is taking considerable time for such changes to percolate down to lower levels. Unfortunately there are fairly minimal efforts made at the state level in this respect. The required change in the administrative machinery is an essential ingredient for making any policy reform effective and successful. In other words, the significant gap between approval and actual materialisation of FDI proposals is related to the problems of governance, which will take some time to overcome.

Though FDI flow into India has been very low (more so from EU), if we look at the sectors and states where reforms are faster it is clear that they have been able to attract relatively more FDI. A consequence of this is that this has led to uneven growth across sectors and states.

In India, there are mainly two types of barriers faced by foreign investors and they are policy-related and procedural.

The majority of policies governing FDI have been reformed. In principle the policy is that when hurdles are identified steps are taken to remove them. This may happen gradually and typically also take into account national interests. The government is very open to any suggestions to enhance foreign investment and lately there is not much opposition to more foreign investment. Over the last decade and half a political consensus has largely emerged in this regard. The major political parties are not generally opposed to foreign direct investment though there are concerns with respect to its ability to generate new employment and to attract new technologies, as opposed to substituting existing industries. There also remains some opposition in retail, insurance and legal services.

The policy for reservation to small-scale industries (SSI) was based on protecting numerous small-scale domestic producers and also on employment considerations. The government has, since the initiation of liberalisation in 1991, recognised the need for de-reservation of such industries on the grounds of efficiency and scale economies and also to open up for foreign competition. The issue of reservation/dereservation of product is examined on a regular basis by an advisory committee on reservation constituted under I (D&R) Act 1951. As a consequence the number of products under reservation has fallen gradually from 836 in 1989 to 298 (as on 16 May 2006). The speed of dereservation has, since 2004, accelerated. In 2004 85 products were dereserved; in 2005 108 products and in 2006 180 products. This shows the commitment on the part of the Government of India to follow a pragmatic policy towards the SSI reservation.

Policy hurdles related to Press Note 18 (1998) has largely been removed through the issuance of subsequent Press Note 1 in 2005. The Ministry of Commerce and Industry is vigilant, pro-active and open to any modifications/changes on any issue (subject to negotiation) that may create hurdle in the path of FDI to the country. Moreover, no legislation is required for bringing any reform in policies relating to foreign investment and that can be achieved through public notice, which does not involve any substantial costs, thus benefits are more than costs.

Recently, the Department of Commerce of the Ministry of Commerce and Industry of Government of India has undertaken a comprehensively policy to promote special economic zones (SEZs) in the country. This policy does not make any differentiation between a domestic firm and a foreign firm. Since the policy and associated tax and other incentives and concessions for investing in SEZ would be uniformly applied across the country and industries there is transparency in this policy and in its implementation. In a country like India, which is on the verge of another round of industrialisation, there can be no *a priori* imposition of restrictions on the number of applicants applying for SEZ. However, experience suggests that actual materialisation may not be more than 50 percent of applications.

Another important policy-related issue vis-à-vis FDI in India is its taxation system. The Constitution of India has very categorically divided powers between the centre and the states to raise revenue through various taxes. As per the recommendations made by the Tax Reforms Committee (1991) tax regime both at the Centre and at the states has been undergoing major revamp and restructuring. There is unanimity between all states and the centre to have a comprehensive, transparent and efficient tax regime. A major issue is sales tax levied at the state level, but this has been largely replaced by the value added tax regime being followed by all states, except Uttar Pradesh. The central sales tax (a major issue of conflict between the centre and states, not on its removal but on the time frame of its removal as well as the compensation package to be given to states by the centre) is being discussed by the Empowered

Committee on Taxation, which has decided to phase it out from April 2007 and also working out an acceptable formula for the compensation package for states.

It is being increasingly recognised by the Government of India that administrative procedures and rules/laws relating to implementation of policies relating to investment (particularly FDI) are out-dated, cumbersome and non-transparent, which often result in delays, corruption and inefficiency. Although the Pay Commission is not itself responsible for the administrative procedures governing FDI, The Sixth Pay Commission (recently set up by the Government of India) has been asked to give its recommendations. The Commission is expected to submit its report by the end of this year. Similarly the Government of India has set up the Second Administrative Reforms Commission in 2005 to suggest measures for improving administrative system and governance, this needs to be in confirmation with the needs of liberalisation and globalisation. So far the Commission has submitted two reports to the government.

As implementation of most of the policies and procedures for attracting investment in most of the industries fall under states, the political and administrative efficiency at the state level has a bearing on its performance. Land acquisition and land allotment is a very tricky issue and has great political consequence. An absence of a comprehensive and transparent rehabilitation and resettlement (R&R) policy further complicates the issue of transforming land use pattern from agricultural purpose to that for industries. Given that recently there are protests against the acquisition of agricultural land for SEZ and other industries, the Government of India (in consultation with the states) is contemplating coming out with a comprehensive policy on land use, including rehabilitation and resettlement of displaced people, based on detailed social impact analysis of investment projects (particularly for those projects, which will heavily use natural resources). Furthermore, the Government is considering amending the Land Acquisition Act of 1894.

Environmental issues on any industrial project are highly sensitive and require careful scrutiny both by the central and state governments. Both the central and state governments have enacted laws relating to environmental protection, which have made environmental clearance of industrial projects mandatory. Due to inefficiency, etc such clearance takes much longer time than necessary.

Thus, in order to avoid delays, etc it is essential that a “single window” system for information about different states regarding their rules/procedures/application forms/requirements of different documents, etc for investment purpose be in place. Every state has set up industrial promotion department, which regularly updates all kinds of information regarding various schemes, incentives/concessions, and also special policy packages that it offers to prospective entrepreneurs.

4.3 Possible Benefits and Costs

India may be ready to go forward beyond a conventional FTA to have a CECA (Comprehensive Economic Cooperation Agreement) type agreement (elements of deep integration) with the EU and therefore, there may not be any difficulty to include some Singapore-style provisions in the agreement.

In terms of market access, the EC, with the endorsement of the investment template, may push for merging investment and Mode 3 negotiations. This is subject to negotiations under the proposed EU-India FTA. India, in fact, is gradually opening up the Mode 3 services related sectors. However, the pace and extent of openness depends to a great extent on domestic employment considerations and political sensitivities.

Such provisions in a bilateral investment treaty would give protection to investment from both directions and once an agreement is signed between EU and India then it would be the responsibility of both the Government of India and the European Commission that they abide by those provisions. India would be benefited enormously by such an agreement and there are no or very little costs involved.

There would not be any difficulty in setting-up of a single window information system in India. This would greatly reduce time and ease the decision-making process on the part of investors. Benefits of having such a system would be more as against little costs – all that is required is to gather data and information in one place and update them on a regular basis.

In regard to provisions related to imposition of performance requirements such as local content, export conditions and employment, India may need such provisions. The current position of India does indicate to that end but may not enter as a pre-condition for the entry. By looking at the present stage of economic development in India and given the enormity of unemployment and unbalanced regional development, benefits of having such requirements would benefit more than the costs.

Regarding provisions related to state subjects such as land and labour policies, it may not be possible for India to include them in the agreement, as they have political consequences and constitutional bindings as well. The costs (including social and political costs) of doing so would be huge and may not be compensated by the benefits that may accrue.

A dispute settlement system to protect investment has to be negotiated. However, there may not be any problem for India to have a dispute settlement system on the pattern of India-Singapore CECA. Indeed there will be some costs to implement such a system but there will be benefits too, as it would greatly reduce uncertainty and other hazards relating to investment.

5. TRADE FACILITATION

5.1 An Overview of Issues

With regard to trade facilitation, the EU's FTAs with developing countries are of various degrees of depth and scope (see Table 5.1). The EU-Mediterranean Agreement and the EU-South Africa Agreement discuss only about the framework of customs cooperation with a view to ensuring "fair trade and compliance with trade rules". In terms of depths and specific provisions these agreements are shallow, although they are accompanied by detailed protocols dealing with the provision of mutual assistance by the administrative authorities of the contracting parties. However, the EU's FTA with Mexico includes a considerable amount of details as to the TF measures that the contacting parties are required to implement and these depend on the extent of trade liberalisation in place in Mexico. The fact that the TF provisions (such as in the EU-Mexico agreement) are more detailed than those in the earlier EU FTAs may also suggest a trend towards deeper TF provisions in light of the importance now generally attached to the simplification of trade and customs procedures.

As for the EU, its position is clear: the exponential growth in world trade must be matched by strong and effective TF measures. In good part this position is based on clear evidence of the impact of trade facilitation on trade flows. The EU, however, recognises the need for special and differential treatment for developing countries in this respect. In particular, it has proposed an asymmetrical arrangement, which allows for differentiation in commitments as well as for longer transitional periods. The EU has argued, for instance, that certain TF commitments might not apply until such time as some developing countries are in a position to implement them.

In the area of TF, though India is negotiating at the WTO its achievements so far are typically behind the standards that might be agreed at the WTO or in an FTA with the EU. However, some of the issues being discussed at the WTO, like regional transport network, right to transit, or facilities at inland custom stations may not be relevant in the EU-India FTA context. To that extent, India's implementation costs on TF obligations in an FTA with the EU may be lower than those in a WTO agreement.

India has embarked on a series of TF measures since 1998 when a Vision Document published by the Central Board of Excise and Customs (CBEC) puts the same thrust to TF along with revenue collection and combating duty evasion. In the following year, a project on the Alignment of Trade Documents and Procedures in India, Nepal and Pakistan was initiated by United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) with financial support from Japan but without much progress.[22]

[22] UNESCAP, 'Alignment of Trade Documents and Procedures of India, Nepal and Pakistan', (www.unescap.org/tid/MTG/SAARCDOC.PDF)

Table 5.1: Trade Facilitation in EU FTAs

	MED Association Agreements	EU-South Africa TDCA	EU- Mexico Global Agreement	EU-Chile Association Agreement
Technical assistance & exchange of information	✓	✓	✓	✓
Standardisation and Simplification				
Introduction of Single administrative document (SAD)	✓		✓	✓
Single window approach & use of Single border agency				✓
The computerisation and automation of customs	✓		A	✓
Risk management, pre arrival processing and post clearance audit			A	✓
Customs related judicial or administrative measures			A	✓

A No explicit provisions; however, the special committee may propose any provisions to improve working methods and ensure efficiency of operations

India has introduced customs EDI system, which is now operational in 35 major customs locations handling over 80 percent of international trade of the country. However, this system is at variance with the system introduced in major ports and air cargo complexes.[23] Moreover, there is a complete lack of EDI expertise to manage a comprehensive solution. As a result, when new procedures come into effect, systems personnel from the customs department are unable to modify the software accordingly. To realise the full benefit, the automation needs to be carried out in a systematic and comprehensive manner, which needs significant administrative and financial support.[24]

For certain export items the scale of examination has been reduced as well as the procedure for examination has been simplified. Fast track clearance system has also been introduced under which certain categories of importers are allowed to pay duty and clear their imported goods on the basis of self-assessment of duty. The government is also working on to simplify and modernise customs procedures by adopting Accelerated Customs Clearance Procedure (ACCP) based on self-assessment principle and post-clearance audit, which is available to eligible traders subject to

23 While the ports are using the United Nations Electronic Data Interchange for Administration, Commerce and Transport (EDIFACT), the software used by the Customs has been developed by the National Informatics Centre.

24 Vijay Kelkar, 'Final Report on Indirect Taxes, 2002', cited in Nirmal Sengupta and Moana Bhagabati, 'Trade Facilitation', in K. Parikh and R. Radhakrishna (eds.) India Development Report 2004, (New Delhi: Oxford University Press 2005), 154-170

certain conditions.[25] Physical inspection of imported goods is done by using risk assessment and management techniques on a computer-based system rather than on the order of customs staff.

The EU-Chile Agreement is the most comprehensive, in terms of TF provisions, in all bilateral agreements to date that EU has entered into. Most of the positions taken by the EU in its various submissions to the WTO on TF are reflected in this agreement. It includes provisions like:

- Simplification requirements and formalities in respect of the releases and clearance of goods, including to the extent possible, collaboration on the development of procedures enabling the submission of import/export data to a single agency.
- Coordination between customs and other control agencies so as to enable officials controls upon import/export to be carried out as per as possible by the single agency.
- Article 79.2 emphasises the need to improve working methods and to ensure the transparency and efficiency of customs operations.
- Subsection 2(b) of Article 79 provides for the reduction, simplification and standardisation of data in the documentation required by customs, and provides that the parties shall take steps to ensure the use of single customs entry document or data message and a single customs exit document or data message, based on international standard.
- Other specific provisions include the computerisation of customs procedures and the possible establishment of common standards (Article 79(e));
- The application of modern customs techniques, including risk assessment, simplified procedures for entry and release of goods, post release controls, and company audit methods (Article 79.3(c)). These are some of the substantive elements of the revised Kyoto Convention on the simplification and harmonisation of customs procedures.
- The parties agree that their restrictive trade and customs provisions and procedures will be based upon, among other things rules that ensure that any penalties imposed for minor breaches of the customs regulations will be based upon, among other things, rules that ensure that any penalties imposed for minor breaches of customs regulations or procedural requirements are proportionate and, in their application, do not give rise to undue delays in customs clearance (Article 79.3(i)).
- The establishment of common positions in international organisations in the field of customs such as the WTO, the World Customs Organisation (WCO), the UN and the UNCTAD (Article 79.2 (g)).
- With respect to questions of judicial or administrative measures, the agreement requires the parties to provide effective and prompt procedures enabling the right of appeal against customs and other agency and other agency administrative actions, rulings and decisions affecting imports/exports of goods (Article 79.2(h)).
- Article 79.4 states that the parties agree to establish appropriate consultation mechanisms between their administrations and economic operators so as to

25 Sengupta, Nirmal and Moana Bhagabati, *op. cit.*, 161

ensure timely consultation with the operators on substantial matters concerning legislative proposals and general procedures relating to customs.

- Public availability of general information of interest to economic operators, such as the hours of operations for customs offices, including those at ports and border crossing points, and the points of contact for information enquiries' (Article 79.4(b)). New legislations and general procedures related to customs, as well as any modifications, are to be published and publicised no later than the entry of force of such legislation and procedures.
- The Agreement also provides for the establishment of a Special Committee on Customs Cooperation and Rules of Origin (RoO) to, among other things, monitor the implementation and administration of Articles 79 and 80 (dealing with customs valuation) and 'any other customs matters related to market access' (Article 81.2). Equally provided for the Agreement is the provision of mutual assistance between the two administrative authorities under the Protocol of 13/June 2001 on mutual assistance in customs matters.

On the other hand, under Title VI (on Cooperation), Article 19, the EU-Mexico Agreement deals specifically with the issue of customs cooperation. This article provides for cooperation in the following areas:

- The exchange of information
- The development of new training techniques and coordination of activities
- Exchanges of officials and senior personnel from the customs and tax administrations
- The simplification of customs procedures for the clearance of goods
- Technical assistance, where necessary

The Article 7 of the draft EU-Mercosur Agreement, which deals with provisions on customs cooperation, includes issues like:

- The Parties shall promote cooperation in customs matters in order to improve and consolidate the legal framework for trade relations between them. Cooperation in customs matters may also seek to strengthen the customs infrastructure of the Parties and improve their operation within the framework of inter institutional cooperation.
- Cooperation may be translated into action by measures including:
  (a) exchanges of information;
  (b) the development of new training techniques and coordination of activities in the relevant international organizations;
  (c) exchanges of officials and senior personnel from customs and tax departments;
  (d) simplification of customs procedures; and
  (e) technical assistance.
- The Parties hereby signal their interest in giving future consideration, within the institutional framework established by this Agreement, to the conclusion of a Customs Cooperation Protocol.

Based on above analysis, the issues on TF that might be important in the context of the proposed EU-India FTA are identified as follows.

Provisions to reduce documentation requirements

At present India does not have a single administrative data set for export and import, or single one-time-presentation to one agency. The most important step that has been taken in India is harmonisation of the customs code and reduction of documents through that. From February 2003, classification codes at the eight digit level as used by the Central board of Excise and Customs (CBEC) (for purpose of tariff calculation), the Directorate General of Foreign Trade (for purposes of determining importability/exportability) and the Directorate General of Commercial Intelligence & statistics (DGCI&S) (for statistical purposes) have been unified to evolve a Combined Nomenclature based on the Harmonised System (HS) of classification.

Cargo dwell time and port/Airport logistics

The current performance of Indian ports and airports are far below global norms, and are creating impediments to India for greater integration with the world economy. Table 5.2 shows that premier Indian entry points i.e. Delhi and Mumbai perform far below than international norms, and thus reforms are urgently needed.

Table 5.2: Typical Cargo Dwell Time

Transaction	Location	Norm
Air Freight	Delhi Airport	
Export	2.5 days	Less than 12 hours
Import	15 days	Less than 12 hours
Containerized Sea Freight	Mumbai	
Ship Waiting Time	3-5 days	Less than 6 hours
Export Dwell Time	3-5 days	Less than 18 hours
Import Dwell Time	7-14 days	Less than 24 hours

Source: Roy, Jayanta (2004), Potential Consequences and Benefits of Implementing a Multilateral Approach to TF, Paper presented at the seminar 'Trade Facilitation in South Asia' organised by EU-World Bank
http://siteresources.worldbank.org/INTBANGLADESH/Trade-Facilitation-Seminar/20211885/JayantaRoyPotentialConsequences.pdf

Standard processing time

It may be noted that India operates several customs stations, and the same level of infrastructure may not be guaranteed. Consequently, uniform standard processing times for all customs stations may not be ensured. If India decides to maintain fewer custom stations to maintain uniform standard then that may cause disadvantage to traders. Hence, ensuring standard processing time will require substantial investment, including in the provisions of physical infrastructure and training for personnel.

Electronic data interchange

The government has taken initiatives to implement an Electronic Data Interchange (EDI) facility so that importers/exporters require single submission to any of the regulating/ facilitating agencies and so that there can be internetworking of all community partners for electronic document exchange. List of organisations selected for EC/EDI implementation are: Customs, DGFT, Port Trusts, Airports, Container Corporation, Banks, Reserve Bank of India (RBI), Airlines, Indian Railways, Apparel/Textile Export Promotion Councils, Other Export Promotion Organisations, DG Commercial Intelligence/Statistics and Inland Container Depots/Container Freight Stations.

India has 35 major customs facilities connected with the EDI system, which covers over 80 percent of the country's international trade. According to official sources, over 98 percent of all export documents and 95 percent of import documents are processed on EDI.[26] Indian Customs has also put in place the facility of enabling traders to file their documents electronically through ICEGATE (Indian Customs and Excise Gateway). According to the data provided by CBEC more than 4mn documents are being processed annually on this system, which constitutes almost 86 to 89 percent of total trade transactions. This ICEGATE facility is functional at 23 Customs locations. Along with facilitating massage exchange with agencies, it also facilitates remote filing of import and export declarations by an importer/exporter. Customs house agents have also started working at 17 of these 24 locations. On an average about 8000 import/export declarations is being filed daily using the ICEGATE facility. The facility will be extended to other customs houses in phases.

To ensure privacy, authenticity, integrity and reliability of the transactions the CBEC has also introduced the Public Key Infrastructure (PKI) technology popularly called digital signature. The Licensed Certified Authority (ICert), established by CBEC makes availability of PKI to its trading partners and departmental staff. ICert has five regional offices in Bangalore, Chennai, Delhi, Kolkata and Mumbai. In order to meet international standards as set by the revised Kyoto Convention, India needs to upgrade the existing EDI system to move towards a totally paperless mechanism for declaration. Thus, electronic submission of declarations/information by traders is possible only in a limited way due to lack of proper automation, which requires substantial resources. Without such comprehensive automation it would not be possible for India to reduce documentation requirements substantially or move to a fully operational EDI regime.

Risk Management

An important component of international standards is the use of risk assessment and management techniques where physical inspection of imported goods is done on a computer-based system rather than on the order of customs staff. India is in the process of adopting such a system though its full-scale implementation will take time. A codified risk management module has been tested in 2003 for import consignment at ICD Tughlakabad. The computerised module assesses import consignments through 21 risk factors and analyses 11,640 items, identifying sensitive consignments and indicating the rest for immediate release. The model will be gradually applied to all customs houses.

[26] Chaturvedi, Sachin (2006). Trade Facilitation Priorities in India and Commitments at WTO: An Overview of Current Trends, Discussion Paper-109, Research and Information System for Developing Countries, New Delhi
http://www.ris.org.in/dp109_pap.pdf

Advance rulings
India has set up the Authority for Advance Rulings by the Finance Act 1999. The scheme of advance rulings has become fully operational from February 2004. The rulings by the authority can be on classification, valuation and applicability of duty exemption in respect of export, import, production and manufacturing. However, the scope for advance rulings has been limited, as only foreign firms which want to invest in India through joint ventures or wholly owned subsidiaries, or Indians who are getting into joint ventures with foreign firms can ask for such advance rulings. Though this provision provides a good business environment to foreign investors in India it does not address the concerns of Indian-owned companies, which are small to medium scale players and who undertake most of India's imports. Small and medium scale companies are far more susceptible to high transaction costs than larger players. Expanding the scope of advance ruling, though will involve some costs, could be possible.

Availability of information and use of electronic media
All trade related information as is required by the exporters/importers is published by the relevant official authorities, the key institutions involved are The Central Board of Excise and Customs (CBEC), The DGFT under the Ministry of Commerce and the Reserve Bank of India. The CBEC publishes all customs related rules, relevant acts, tariffs, forms, notifications and circulars relating to customs, central excise and service tax both in the print form and media as well.

CBEC also maintains an exhaustive website, which contains all the relevant and necessary information along with latest updates. It includes detailed information on all the acts, rules, regulations, circulars and CBEC notifications. There is also a search facility for extracting relevant information, which has been made available now. CBEC has started the practice of keeping some of the proposed amendments on its website for comments from domestic industry. The CBEC also interacts from time to time with trade and industry organisations to streamline its working.

The DGFT and the RBI also use the electronic media very widely for dissemination of information. The Foreign Trade (Development and Regulation) Act, 1992 and Foreign Trade (Regulation) Rules 1993 are the other major legal instruments to disseminate information to streamline trade in the post-reforms era. The private publishers also publish judicial decisions. Several private agencies and legal publishing houses are into the business of selling relevant publications on customs procedures apart from maintaining their own websites.

Enquiry point
Suggestions on the issue of suitable enquiry point(s) include the establishment of enquiry points/trade disks or a single national focal point for providing trade related information, particularly on customs procedures, importation and exportation. As of now there is no officially designated enquiry point for traders.27 Establishment of such enquiry points will require full automation of the system so that all relevant information can be accessed in no time. This will obviously require substantial resources.

[27] Wickramasinghe, Upali (2004) A Multilateral Approach to Trade Facilitation in South Asia, SAWTEE, Kathmandu

Consultative mechanism

A consultative mechanism could be proposed to ensure that all stakeholders/interested parties, including government and private sector bodies including importers, exporters, carriers, chambers of commerce get an opportunity to comment on prospective rules and procedures before they are implemented. At present, there is no formal mechanism for consultation between interested groups. However, business associations are often consulted though not on a regular basis. The Kelkar Committee has recommended the formation of a Standing Committee on Procedures to identify and resolve the problem areas in the present procedures and evolve new need-based procedures. Establishment of such a mechanism is possible but will involve some costs as people from several places within the country need to be consulted.

Appeals

India appears to have a good appeal mechanism enabling recourse against the decision of, for example, the authorities dealing with customs and related assessment problems. The mechanism allows appeals at various levels up to the Supreme Court. The right to make appeals is under the provision of Customs Act of 1962. Any party can make appeal first before the Commissioner of Appeals. Appeals against Commissioner's orders go to the Appellate Tribunal (CEGAT), which is constituted of judicial and technical members. An appeal in the Supreme Court can be filled (Section 130F, Customs Act 1962) against the orders passed by CEGAT on matters relating, among other things, to the rate of duty or to the value of goods for purposes of assessment.

However it is worth mentioning that transaction costs (including the cost of 'time element' – see Table 5.3) in legal disputes in India are substantial and sometimes beyond small and medium players. Therefore, we would recommend that steps could be taken to develop a mechanism whereby most minor disputes in terms of valuation and assessment could be dealt with expeditiously and at lower cost.

The Customs Excise and Services Tax Appellate Tribunal (CESTAT) was created to provide an independent forum to hear appeals against orders and decisions passed by the Commissioners of Customs and Excise under the Customs Act, 1962. The tribunal is empowered to hear appeals against orders passed by the designated authority with regard to antidumping duties under the Customs Tariff Act, 1975 and matters relating to Service Tax.

Table 5.3: Cases Pending before Settlement Commissions (1999-2005)

	Principal Bench	Kolkata	Mumbai	Chennai	Total
Cases Received	377	47	661	465	1550
Cases Pending	79	24	149	38	390
Duty realised in respect of settled cases (Rs. Crore)	1572.30	27.90	1949.30	982.00	4531.50

Source: SCF (2005)

Training provided to customs staff
The CBEC has initiated several measures to train the officers engaged in the work of assessment examination, etc so that they can deal with emerging situations due to the ongoing reform programmes. Efforts are also made for quick training programmes to reduce the information gap, which can arise due to a very hierarchical structure.

The National Academy of Customs, Excise and Narcotics (NACEN), Faridabad has several regional institutes, which conduct training on a regular basis for staff who are posted for the first time and a refresher course for existing staff is in place to acquaint them with ongoing reforms. The participants are informed of all the legal/ procedural changes brought about by any instructions/circulars/ notifications, etc. Nevertheless, these efforts are too inadequate. Proper training arrangements will require substantial financial resources.

5.2 Proposed Possible Changes in India

In order to facilitate trade, basic infrastructure like roadways, railways and ports need to be developed further to ensure faster movement of cargoes among the states and also to ensure reduction of transaction costs through reduction of time and expenses related to the transport of goods.

The tax structure among the states needs to be simplified, rationalised and streamlined to a large extent so that inter-state differences are minimised. Ideally the states need to adhere to the VAT system (allowing a common tax rate in all the states) so that differences in sales tax rates in different states do not prohibit trade and commerce. It is also important that a single enquiry point for information on all taxes and duties in the states is established, so that information on these issues could be made easily available. State legislations also need to be streamlined and coherence needs to be brought about between the legislations among different states. Besides, greater interaction, cooperation and communication among the states would help to stabilise the tax system in the country. Over time, instead of several taxes, India could move towards a uniform “goods and services tax” (GST).

The customs development programme needs to be accelerated further so that all customs offices in the country could be connected by the EDI system and all customs activities take place in an automated manner. To meet international standards, as set by the revised Kyoto Convention, India also needs to upgrade the existing EDI system to move towards a totally paperless mechanism for declaration. Without such comprehensive automation it would not be possible for India to substantially reduce documentation requirements and move towards a fully compliant EDI regime.[28]

Respective export/import authorities also need to revise their manual and supplementary instructions and notifications on an annual basis to facilitate exporters and importers. Better communication among the export/import facilitating bodies

[28] Roy, Jayanta (2004). Potential Consequences and Benefits of Implementing a Multilateral Approach to TF, Paper presented at the seminar 'Trade Facilitation in South Asia' Organised by EU-World Bank
http://siteresources.worldbank.org/INTBANGLADESH/Trade-Facilitation-Seminar/
20211885/JayantaRoyPotentialConsequences.pdf

needs to be enhanced further to avoid discrepancies. Risk management tools need to be in place in all customs stations so that the system is more transparent and faster.

Greater integration of the banking and insurance sectors and the overall financial system for facilitating trade activities in another important step for making easy availability of loans and other financial support to promote trade.

5.3 Possible Benefits and Costs

Single window facility and web portal facility would help exporters and importers to easily access information. Establishment of national focal point and state-based enquiry points will require full automation of the system and online connectivity of all inter-related departments/bodies for TF.

This will obviously require substantial investment. The time required for initiating such changes however may not be high.

Establishment of a simple mechanism for appeal on customs-related issues, as suggested by the Kelkar Committee[29] would lead to speedy redressal of disputes arising out of exports and imports. However, it would involve some costs – both in terms of time and financial resources – as people from several places within the country need to be consulted and more and more people involved in the work needs to be trained for proper handling of the issues.

New developments in inter-state transportation (roads and railways) will substantially reduce direct and indirect costs associated with movement of goods and thereby, increasing trade competitiveness. It has also been estimated that infrastructure gap is costing India between 1.5 and 2 percent of GDP (gross domestic product) growth every year[30].

However, building road and rail infrastructure incurs huge investment and time. Investment in developing basic infrastructure through the private-public partnership (PPP) model or through full private (domestic and/or international) participation in built-own-transfer (BOT) or built-own-operate-transfer (BOOT) model will help expediting the process. The National Highway Development Programme (NHDP) approved by the Committee on Infrastructure (a group of concerned ministers of the central government) is estimated to require a total investment of Rs.220, 000 crore (US$49.7bn).[31] The Government of India and state governments are taking several steps in this regard.

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[29] Taneja, Nisha (2004), Trade Facilitation in the WTO: Implications for India; Working Paper No-128;Indian Council for Research on International Economic Relations, New Delhi http://www.icrier.org/pdf/wp128.pdf

[30] 'Clear infrastructure gap in this country: FM';India Infoline News Service; May 22,2006 http://indiainfoline.com/news/innernews.asp? storyId=18334&lmn=1

[31] Towards Faster and More Inclusive Growth-An Approach to the 11th Five Year Plan, Box 2, Page 31
http://www.indianngos.com/government/fiveyearplans/11_draft.pdf

Simplification of state level taxes, formation of single enquiry point in the states, and coherence in the state level legislations would impart more transparency and predictability in the system of TF. This will lead to increase in revenue generation, as tax evasion could be minimised and other discrepancies in the tax system can also be addressed. Furthermore, with a simplified and transparent system in place it is expected that disputes will be less.

Coherence in the state level legislations and rationalisation of tax structure require substantial time and resources. It also potentially involves substantial costs, as financial and other provisions need to be made available at the state level to calculate the loss that may arise or faced by the people involved in the system from the restructuring of tax structure and legislative structure. High automation cost is also involved in implementing such measures in the states. Cost related to human resource development is also there, as people needs to be trained to tune them with the new system.

However, expected benefits from streamlining the system of customs procedure are also very high. Streamlining of information would help ensure the use of single-entry customs document or data message and a single customs exit document or data message, based on international standard. To realise the full benefit, automation is to be carried out in a systematic and comprehensive manner, which needs significant administrative and financial support.[32] If the resource requirement for implementing the customs measures were fulfilled, then the time required for such programme would not be high.

Development of port facilities would help in handling increased cargoes and the trans-shipment time of vessels will be reduced. This would increase the efficiency of the system, minimise additional cost associated with the functioning of ports and also bring down the operation cost and time of ports in India. However, for achieving this, huge costs are involved, as implementation of port modernisation programme in all major ports (more than 180 seaports are there in India) requires huge investment. It has been estimated that modernisation of airports would require Rs 40,000 Crore by the year 2010 and that for seaports would require Rs 50,000 Crore by the year 2012.[33]

Table 5.4 summarises time and cost required for introducing several trade facilitation measures as explained in this and previous sections.

[32] Kelkar, Vijay, 'Final Report on Indirect Taxes, 2002', cited in Nirmal Sengupta and Moana Bhagabati, 'Trade Facilitation', in K. Parikh and R. Radhakrishna (eds.) *India Development Report* 2004, (New Delhi: Oxford University Press 2005), 154-170

[33] Indian Port Association,http://www.ipa.nic.in/deve1.htm

Table 5.4: Time-Cost Matrix of Trade Facilitation Measures

TIME		**High**	**Low**
COST	**High**	Improvement of port logistics Development of customs procedures Rationalisation of tax structure Facilitation of inter-state commerce Automation in customs procedure Public-private partnership Internal transit procedure	Development of e-business facility Formation of single enquiry point Formation of e-business infrastructure
	Low	Transparency in the management system	MRA on standards Liberalised visa regime Linking the financial system to trade

6. Trade Defence

6.1 An Overview of Issues

In Annex 3, we have explained that India is now the world's top user of anti-dumping duties and it is now the second most active user against the EU and the EU is the number two target for India, even though the actual totals are modest and have been declining overtime[34]. (About 30% of Indian measures in force in 2005 being against the EU and about 15% of total measures against the EU being by India[35]).

Countervailing measures can be imposed against exports from a country if "subsidised products cause material injury to domestic industries in importing countries where the subsidies provided are specific". It is being observed that many Indian exports are increasingly being subjected to countervailing measures in different importing countries, including in EU. As mentioned in Annex 3, in India there exists a number of export promotion schemes under the aegis of Ministry of Commerce and Ministry of Finance. Table 6.1 describes the amount of subsidies provided through different schemes in the year 2003-04.

Table 6.1: Export Promotion Schemes and Outlays

Scheme	Outlay (in Rs. Crore)
DEPB	11,535
Advance License	10,135
EOU/EHTP/STP	9,422
EPCG	3,399
Drawback	3,216
Total	39,704

Source: Department of Revenue, Ministry of Finance
Notes – DEPB: Duty Entitlement Passbook Scheme and this data pertains for those availed by SEZ (Special Economic Zone) unites; EOU: Export Oriented Unit; EHTP: Electronic Hardware Technology Park; STP: Software Technology Park; EPCG: Export Promotion Capital Goods Scheme

In this respect (that is subsidies for export promotion), as mentioned in Annex 3, India is protected by Annex VII of the WTO Agreement on Subsidies and Countervailing Measures, because its per capita gross national product is less than US$ 1,000. However, this provision does not provide blanket immunity to Indian exports from countervailing actions by other countries. If such exports cause material injury to domestic industries in importing countries, then they can be subjected to countervailing actions. Thus, India's concern in this regard is not so much about the amount of subsidies for export promotion but on the issue of "manner of calculating subsidies (by the importing countries) while imposing countervailing measures".

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[34] 'Overview of the Third Country Trade Defence Actions against the Community,' Annual Report, DG Trade B.2, November 2006, p. 11.
[35] 'Overview of the Third Country Trade Defence Actions against the Community,' Annual Report, DG Trade B.2, November 2006, p. 5.

Among all these export promotion schemes, the most controversial one is the duty entitlement passbook scheme. Approximately 52 percent of Indian exports (in terms of their value) enjoy some kind of subsidies on account of this scheme. In order to avail benefits under this scheme, an exporter does not necessarily have to establish a direct connection between imported inputs and what is consumed in the production process. The Indian government is considering a replacement of this scheme with a suitable alternative.

On the other hand, despite being one of the largest users of anti-dumping actions, India is yet to impose countervailing measures against imports from other countries. Countervailing measures are usually demanded by industries and this shows that there is a lack of capacity on the part of Indian industries (as well as the designated authority) in dealing with such measures. The European Commission has so far imposed eleven countervailing measures against Indian exports out of a total of 25.

The third type of trade defence measure is called safeguards. These measures are more comprehensive than anti-dumping measures as they target all imports of a particular commodity unlike anti-dumping investigations, which target only source-specific imports. Since 1997 India has initiated only 12 cases on safeguards and global trend shows that safeguard measures are less used as compared to anti-dumping. The reasons are as follows:

- Recommendation to impose a safeguard duty is subject to domestic industry improving itself and becoming competitive.
- Countries imposing safeguard duties or other safeguard measures are obliged to offer compensation in terms of tariff concessions on other items of export interest to countries whose exports will be affected by safeguard duties. However, this obligation concerning tariff concession applies only when safeguard measures are imposed for more than three years.
- The degree of injury to be proved for the imposition of a safeguard measure is more stringent than that required for the imposition of anti-dumping duties.[36]

In view of the above, there is room for improvement while dealing with these trade defence measures and in the following section, we analyse them under the following sub-heads:

- issues for institutional development, and
- issues for negotiations.

6.2 Proposed Possible Changes

As analysed in Annex 3, India has a number of laws and rules for dealing with trade defence measures. The Directorate General of Anti-dumping and Allied Duties is the designated authority dealing with these measures. This body comes under the jurisdiction of the Department of Commerce in the Ministry of Commerce and Industry. Since these issues (including subsidies provided for export promotions) have significant implications for revenue generation and expenditure in the country, the Ministry of Finance also plays a crucial role.

[36] Mitra, N. L. (2004) Protection and Trade Remedial Measures, CUTS International

Furthermore, in India, trade data is maintained by the Directorate General of Commercial Intelligence and Statistics and this body plays an important role with respect to trade defence measures, as timely availability of good quality data is required for taking such measures. The other major players in this respect are domestic industries and consumers. Besides end-users, a large number of domestic industries are dependent on imports for producing their products for domestic as well as foreign markets and thus, in a sense, they are consumers of intermediate commodities. Competitiveness of some of these industries dependent on large-scale import of intermediaries (particularly small industries) is significantly affected on account of the imposition of anti-dumping measures in recent years.[37]

Therefore, for effective use of trade defence measures cooperation and coordination of these various bodies and players is necessary. In this respect, there is a lack of institutionalised effort. It is true that various designated authorities of the Government of India are doing their best to consult with industries before imposing a trade defence measure; information of anti-dumping actions and countervailing measures are readily available electronically; the quality of data has improved over the years. At the same time, there is room for improvement in three respects:

- Industry bodies could develop their in-house capacity to take more effective part in discussions and deliberations on trade defence measures with government bodies and other players, including their counterparts in other countries.
- Consumer organisations could be taken into confidence before taking any trade defence measures. There is the need to develop the capacity of Indian consumer organisations in this respect.
- The capacity for conducting research on trade law is to be developed. In India, there is a serious shortage of trade researchers and research on issues relating to trade law is in a nascent stage.[38]

In Annex 3 and in previous analysis of this Section, it has been mentioned that the only serious issue that India has with the EU vis-à-vis trade defence measures is about the method of calculating subsidies for export promotion. India wants that countervailable calculations should be based only on "excess remission/refund of duties". EU and India could explore the possibility of introducing certain WTO+ elements in their bilateral FTA, such as mandatory lesser duty rule and public interest test:

Mandatory use of lesser-duty rule: Lesser duty is a duty, which is not higher than that necessary to offset any injury being suffered by the domestic industry. Both EC and India practice the application of "lesser-duty". The Directorate General of Antidumping has always considered this rule as mandatory. However, some AD practitioners in India claim that the Indian antidumping law, as amended in 1995, may

[37] It is evident from Annex 3 (in the Section on Trade Defence) that many of the products (such as yarn) on which anti-dumping actions were initiated by India was intermediaries.

[38] In India, macro economists mostly do research on trade issues. The best of Indian universities teach international economics and international trade is a part of such courses while more emphasis is placed on "open economy macro economics". WTO issues are a part of the curriculum of some universities but not as a specialised subject. Similarly, in Indian law universities trade law is taught but there are a few trade law specialists in India.

be interpreted to read it as otherwise, even though independent research seems to suggest that the mandatory lesser-duty rule is binding.[39]

Introduction of public interest criterion: Investigating authorities must consider public interest before imposing anti-dumping and other trade defence measures. This is necessary because many of these trade defence measures tend to be continued for too long. Consumers must not be asked to pay the price for the lack of commitment on the part of domestic producers to take care of their interest. However, public interest is not consumer interest alone. A mandatory public interest test (in terms of an examination of the impact on economic operators) would ensure that the investigating authority gives due cognisance to the concerns expressed by various interested parties including exporters, importers, consumer organisations, user industry, etc.

In addition, there are several other important issues which EU and India could discuss outside the scope of the FTA and that will benefit both.[40]

Following Lucenti and Bhansali (2003), a brief account of such issues is given below:[41]

Calculation of dumping margin and determination of normal value: The difference between the normal value and the export price is referred to as the "margin of dumping". While this concept seems simple, there are several areas of discretion and anomalies that need to be addressed carefully in the context of normal value, export price and the comparison between the two.

Procedural improvements involving transactions between related parties: While calculating normal value it has to be seen that the transactions are in the ordinary course of trade. Transactions made between related or affiliated parties need to be treated differently from transactions between unrelated and independent parties. The concept of "related parties" is to be defined clearly.

Comparison between normal value and export price: While making comparisons between normal value and the export price, the investigating authority could make adjustments for all the factors that affect the price comparability.

Zeroing in method: For all transactions where the dumping margin is negative, the same must be accounted for in calculating the weighted average dumping margin.

Mandatory analysis of all injury parameters: An investigating authority is required to consider all 15 factors mentioned in the WTO Agreement on Anti-dumping while calculating injury to a domestic industry. There could be a guideline in this respect

[39] Kommerskollegium/National Board of Trade, Sweden: Report (2005-02-10) *The Use of Antidumping in Brazil, China, India and South Africa*, p43.
[40] These issues are general in nature and some of them are being discussed at the WTO with the objective of imparting more discipline in respect to trade defence measures. EC and India can together take a lead in reforming this regime.
[41] Lucenti, Krista and Sharad Bhansali (2003) The Use and Reform of Anti-dumping Measures in L. Alan Winters and Pradeep S. Mehta (ed) Bridging the Differences: Analyses of Five Issues of the WTO Agenda, CUTS International

and injury assessment needs to be restricted to the product under consideration and not to the performance of the business enterprise as a whole.

Issue of causal link: While determining the causal link, it would be useful to provide for an analysis with reference to the most efficient producer of the domestic industry. Such an approach can eliminate the scope for manipulation by the complainant domestic industry to project the injury on the least efficient producer.

6.3 Possible Benefits and Costs

Domestic industry is the major beneficiary of trade defence measures. However, for ensuring effective benefits of these instruments, institutional capacity of industries (including industry bodies) are to be developed, including ensuring cooperation and coordination between different institutions involved in the process of determining and imposing trade defence measures.

From an economic perspective, certain amendments in the existing practice of applying anti-dumping and other trade defence measures could prevent their gross misuse. From a legal perspective, these amendments would reduce ambiguities and thus, the cost of possible disputes. EC and India would do well to negotiate some WTO plus provisions with regard to the application of trade defence measures, such as mandatory lesser duty rule and public interest test. Such an amended template on anti-dumping and other trade defence measures could then be taken forward to the multilateral level.

7. Standards

7.1 An Overview of Issues

Sanitary and Phytosanitary Standards (SPS) and Technical Barriers to Trade (TBT) are increasingly being discussed in terms of their impact on international trade. In principle such measures are largely adopted and strictly enforced in order to ensure that imports do not undermine national health and safety of the importing country. However, such restrictions that are intended to uphold domestic safety standards can also be used as disguised form of protectionism.

The free trade agreements (FTAs) recently concluded by the EU do not grant SPS concessions analogous to quantitative tariff reductions. A common characteristic of all EU FTAs is that their emphasis is on facilitating the application of the WTO SPS provisions. Only very rarely do the agreements contain individual provisions that go beyond WTO SPS commitments. For instance, there are limited product-specific provisions in the agreement with Israel and there is the inclusion of animal welfare as an objective in the agreement with Chile. Their main aim is to mitigate the costs of complying with SPS regulations and providing more security for exporters.

The explicit confirmation of the WTO commitments regarding SPS measures is not only a formal element, but it also increases flexibility of the parties in case of disagreements. The parties have the opportunity to settle disputes either according to the dispute procedures of the specific FTA or to the WTO dispute settlement procedures.

India has only one percent share in the world trade of processed food items though the country has a substantial export potential. One main reason for this small share in the global processed food industry appears to be the rejection of food product exports on the ground of consumer health and safety. As is common in many developing countries, there is a wide disparity amid the food quality standards that Indian firms need to meet in domestic markets as well as those they have to meet in attempting to access foreign markets.

While most developed countries have adopted a high level of food safety standards taking into consideration the health and hygiene factors of their citizens, India is yet to adopt such stringent standards. This is either due to lack of financial resources and lack of technical expertise. Even if such standards are adopted, most of the producers and exporters being the small and medium enterprises (SMEs) fail to incorporate such standards in their production process due to their limited financial capacity and expertise thus ending up losing on export orders. For instance, establishing a moderate sized laboratory for testing and analysing samples of spices costs approximately 4 million rupees in India (US$88,000).

At present, India is largely passively adopting the standards developed by other countries. The country being a member of the Codex Alimentarius Commission has adopted the Codex standards and it has a more limited process for developing internal standards, although a National Codex Committee and a Central Committee for Food Standards exist. This slowness in adopting high standards has resulted in losing out on export opportunities, as domestic producers are unable to meet the requirements of the international market, largely governed by the WTO Agreement on SPS Measures.[42]

The present situation is not satisfactory due to overburdening of limited resources and lack of general concerns about domestic as well as the international SPS measures. For example, the 'Immigration Declaration Form' at the Indian ports of entry does not have any clause for declaring plant parts or food products of plant and/or animal origin being carried by the passengers. At the arrival lounge, there is no proper space and trained personnel to meet the functional needs of plant quarantine. Similarly, the mechanism of issuing SPS certificates for the export of meat and fish products in various parts of the country requires harmonisation, and the laboratories accredited to test the products meant for export should have adequate infrastructure to meet international standards. In principle, safety measures and SPS standards must be based on scientific judgements and evidence. India therefore needs to develop the capability and required institutions to engage in SPS measures on such a basis.

The legislative and institutional framework relating to enforcement of standards in India is complex. There are a vast number of legislations and regulating agencies. In fact, this multiplicity of regulating agencies is one of the problems of implementation. The producers are not sure which institute is to be approached for guidelines, and which institute has the authority to conduct inspection. A repetition of the process by more than one agency often results in waste of time and resources.

Institutional and legal framework for trade in India

Ministry of Agriculture

- Insecticide Act
- Milk and Milk Product Control Order
- Meat Food Product Order

Ministry of Rural Development: Directorate of Marketing and Inspection (DMI)

- Agriculture Produce (Grading and Marking Act)

Ministry of Health and Family Welfare

- Prevention of Food Adulteration Act

Ministry of Food Processing Industries

- Food Safety and Standards Act
- Essential Commodities Act
    - ✓ Fruit Products Order (FPO)
    - ✓ Meat Food Products Order (MFPO)
    - ✓ Milk & Milk Products Order (MMPO)

42 SPS pact requirements loom over food sector exports, The Hindu Business Line, 9th September, 2005

Ministry of Commerce

- Export (Quality Control and Inspection) Act

Ministry of Civil Supplies, Consumer Affairs and Public Distribution

- Standards of Weights and Measures Act
- Standards of Weights and Measures (Enforcement) Act
- Solvent Extracted Oils, De-oiled Meal and Edible Flour Control Order
- Vegetables Product Control Order
- Bureau of Indian Standards Act

Ministry of Environment and Forests

- Aquaculture Authority Notification 1997 and 2002
- Environment Protection Act
- Environment Protection (Third) Amendment Rule
- Coastal Regulation Zone – Notification 2002

Some important agencies involved in quality regulations are:

- Directorate General of Health Services
- Ministry of Food Processing Industry
- Department of Consumer Affairs
- Directorate of Marketing and Inspection
- Department of Agriculture & Cooperation
- Department of Animal Husbandry and Dairying
- Department of Legal Metrology
- Bureau of Energy Efficiency
- Chief Controller of Explosives
- Directorate General of Mines Safety
- Department of Road Transport and Highways
- Central Pollution Control Board

The regulators for foreign trade are:

- For Imports:
  - ✓ Directorate General of Foreign Trade (DGFT)
  - ✓ Relevant Regulatory Agency
  - ✓ BIS for 109 products

- For Exports:
  - ✓ Export Inspection Council for about 1000 notified products (Food, footwear, chemicals, engineering, leather, jute etc.)

In addition to the above-mentioned legislations/institutions, there are others concentrating their efforts towards formulation and implementation of SPS/TBT standards as discussed below.

Bureau of Indian Standards (BIS): This is the key organisation for setting standards. So far it has set more than 18,114 standards[43], out of which 150 are mandatory, while others are voluntary. The procedure adopted by BIS is quite complicated and costly. All BIS standards are voluntary, unless specified otherwise by the government.

The BIS rules are extremely complex, time consuming and costly. The initial validity period of the licence granted by the BIS is one year, which can be renewed for a further period of one/two years, subject to satisfactory operation of licence as observed during periodic inspections, factory & independent testing of samples drawn from factory and market. The licencee needs to apply to the BIS on the prescribed Renewal Form along with renewal application fee of Rs. 500 (US$11.28) and annual licence fee of Rs. 1000 (US$22.56).

Below given are the details of the fee collected by BIS for grant of licence:[44]

- Application fee of Rs. 1000 (US$22.56) (to be submitted with the filled-up application)
- Charges for verification visit at Rs. 4000 (US$90.27) per man day for first day and Rs.3000 for subsequent days (to be submitted with the application, if verification is to be done by the BIS)
- Advance annual minimum marking fee (as prescribed by the BIS and different for different products, details available on the BIS website, to be deposited at the time of grant of licence and submission of renewal application, and annual licence fee of Rs.1000 (US$ 22.56) is also to be paid at the time of grant of licence)
- Renewal application Fee of Rs. 500 (US$11.28) and Annual licence fee of Rs. 1000 (US$22.56) (to be submitted at the time of renewal along with duly filled-in prescribed Renewal Form)
- The testing charges of the sample(s) drawn during verification visit (if verification is done by the BIS) shall be paid by the applicant along with the application or during verification visit which shall be adjusted in marking fee to be paid by the applicant at the time of grant of licence
- Special visit(s), if required, for example for inclusion of varieties, resumption of marking etc. at Rs. 3000 (US$67.7) per man-day (after grant of licence).
- Applicable government taxes

Moreover, the process through which the BIS sets standards desires a closer look.[45] Normally, the BIS constitutes a Committee of experts to set standards while it acts as a facilitator. Such experts are invited from well-known institutions, industry and consumer groups. However, the Bureau is known for its inclination for maximum representation from government organisations. This often leads to the setting of standards on the principle of 'desirability', which can be quite arbitrary and not a pragmatic approach based upon the principle of 'feasibility'.

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43 As on 31st March, 2005

44 Quoted from Bureau of Indian Standards:http://www.bis.org.in/cert/procert.htm

45 Mehta, Pradeep S. (2007) Why was India's Ecomark Scheme Unsuccessful?, Research Report (2006), CUTS International

Currently the BIS have more than 18,114 standards, but according to a top official of the BIS only around 1,300 have gained acceptance among industry. Another possible reason for low acceptance is that some of the Bureau's standards are out-of-date – for example the criteria for ready mixed paint for road making is as old as 1951. This automatically discourages those industries that rely on technological innovations for attaining/retaining market leadership.

Food and Agriculture Department (FAD): It deals with the standardisation in the field of food and agriculture, including processed food, agricultural inputs, agricultural machinery and livestock husbandry. FAD undertakes the following activities:

- Review of an existing standard
- Finalisation of a standard when the procedure is complete
- Recognition of the area where a new standard needs to be set up, as no old standard exists

Ministry of Food Processing Industry (MFP): As the name suggests, this ministry formulates the procedures and standards for the food processing industries. Thus rules are put together regarding the following thrust areas:

- Material to be used for the machine and equipment that touch the food
- Quality of water used for production and for other purposes like washing and cleaning
- Requirements of in-house laboratories
- Assessment of the quality by food technologists
- Standards pertaining to chemical content, physical characteristics, contaminant levels, and additive levels allowed in food

Export Inspection Council (EIC): The Government of India under the Export (Quality Council and Inspection) Act had set up the EIC in 1964, for ensuring sound development of export trade of India through quality control and inspection and for matters connected thereof. This is an apex agency that facilitates exports of SPS compliant commodities. It gives advice to the government regarding measures to be taken for enforcement of quality control an inspection. Furthermore, it also makes arrangement for pre-shipment inspection of commodities to ensure compliance of all specified standards. EIC provides three kinds of inspection and certification:

- Consignment-wise inspection
- In-process quality control
- Food safety management system based certification

There are issues of governance that need to be resolved before further standards are raised, and perhaps the most important relate to the enforcement of laws. It was precisely the enforcement problem that hurt certain chilli exporters recently when their product was denied entry into the EU countries following the discovery of the carcinogenic Sudan1 red dye. The Prevention of Food Adulteration Act strictly prohibits the use of colouring matter in chilli products, and yet it does not prevent manufacturers from using them. Also, though provisions of this legislation mandate fine and imprisonment for violating standards, hardly any case of conviction has been reported.

In addition, under the PFA Act if a consumer complains of contamination, the sample is sent to a state laboratory. If it is found contaminated, the state labs cannot act on it and the samples have to be sent to the Central Food Laboratory (CFL). Similarly, if the report is not in the favour of the accused, it is a long way from the CFL to the courtroom. Enforcing standards remains almost non-existent as a result of this tedious process.

There is an urgent need to establish referral laboratories for developing standards, which would be in the interest of country's agriculture. The key issues are the chemical/pesticides residue limit and detection of food-borne pathogens. There is no comprehensive national policy on pesticides in the country. Moreover, legal loopholes have helped a thriving Rs 1,500 crore (US$33.8 mn) spurious pesticide industry. A World Health Organisation (WHO) study outlines that lack of adequate awareness among stakeholders, laxity on the part of enforcement agencies and long drawn court cases have made it difficult to check this thriving business, causing serious health hazards.

Another related aspect is to closely study the emerging pattern of mutual recognition agreements (MRAs) already underway between some of the OECD countries. The MRAs would start the process of removing duplicative testing and certification requirements in a number of product sectors. Both SPS and TBT Agreements encourage mutual recognition of the inspection and certification systems by the members based on international standards. Equivalence Agreements are absolutely essential to ensure that duplication of inspection, sampling and testing at two levels i.e. at the exporting and importing end is avoided. These also ensure that rejection at the point of entry with the accompanying high costs at the importing country is eliminated.

Talking about the ecolabelling in India, the country launched its own ecolabelling scheme called "Ecomark" in 1991. Although the Ecomark is similar in many ways to ecolabels in other countries, it differs from most in one important aspect, whereas ecolabels in most countries are awarded solely on the basis of environmental considerations. In India it is also linked with the quality of products. However, this Indian Ecomark Scheme has not caught the fancy of the buyer or the industry, even after 15 years in existence. Currently, only 12 manufacturers of various products like paper, pulp, leather and wood particleboard have applied and got the Ecomark licence. But none of these manufacturers find much utility of the '*matka*' (earthen pitcher i.e. the logo of Ecomark in India) coupled with the ISI mark on their package. As there is no consumer demand for the products with an applied Ecomark.

Though BIS is responsible for its implementation, on several occasions members of Technical Committee have questioned the seriousness of the BIS on implementation of the Scheme. For instance, the BIS was unable to undertake promotional campaigns on the Indian Ecomark until recently. This indifference of the BIS as to the implementation of the Scheme could be explained by the lack of pressure from the parent ministry.[46]

Often at the BIS, there has been a transfer of concerned officials and lack of dedicated staff on the Ecomark, which has led to a deficiency in coordination between the Central office and regional/state offices. It seems that the functioning of the BIS also lacks transparency, since there are no ways to identify and resolve the bottlenecks faced in the implementation the Scheme. Currently, the Indian Ecomark Scheme has turned into a stalemate situation with the lack of interest among most of the stakeholders. To a large extent, this is due to the lack of continuity of the concerned governmental staff. Specialists, who remain in the institution till the task is well accomplished, must handle a serious and complex issue such as ecolabelling.

A three-tier system was set up for the implementation of the Ecomark programme. These three tiers were established as follows:

1. An Inter-Ministerial Steering Committee[47], which was constituted in the Ministry of Environment and Forest (MoEF).
2. A Technical Committee[48], which was constituted in the Central Pollution Control Board (CPCB)[49].
3. The BIS, which was designated for the assessment and the certification of the products for the Ecomark against a licence fee. Moreover, the BIS was notified as the implementing authority of the Ecomark Scheme in 1991.

Instead of this existing three-tier system, which has been too bureaucratic, a new, independent board with an advisory structure comprising of the scientific community, consumer, environmental and business groups would be a better option.
There are also similar other constraints within Indian industry leading to safety and standards problems:

- Inadequate farmers-processors linkage
- Non-availability of adequate infrastructural facilities
- Lack of adequate quality control
- Lack of testing infrastructure
- Inefficient supply chain

TBT and SPS enquiry points

The rising incidence of non-tariff barriers, in the form of SPS Measures and TBT has emerged as major trade concern for India and for India's trading partners such as the EU. To ensure compatibility with the transparency provisions, the country through the Department of Commerce, Ministry of Commerce and Industry established in June

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46 Mehta, Pradeep S. (2006) Why was India's Ecomark Scheme Unsuccessful?, Research Report, CUTS International
47 The Steering Committee first met on March 14, 1991, and the tenure of this committee was 3 years until reconstituted.
48 The Technical Committee first met on May 14, 1991 and the tenure of this committee was 3 years until reconstituted.
49 CPCB also became a member of the Global Ecolabelling Network in November 1992.

2005 three SPS-related enquiry points to handle all reasonable queries/comments on our SPS notifications/regulations by other WTO member countries viz. the Department of Agriculture & Cooperation, Ministry of Agriculture for plant health and life, the Ministry of Health & Family Welfare for human health and life, and the Department of Animal Husbandry, Dairying & Fisheries, Ministry of Agriculture for animal health and life. For the TBT-related issues, the BIS has been designated as the National Enquiry Point. The Department of Commerce continues to be the National Notifying Authority for both SPS and TBT-related measures to the WTO.

During the year 2005-06 (April-December), India notified seven SPS-related measures to the WTO. Out of this, five related to food safety, issued by the Ministry of Health & Family Welfare under the PFA Act, and the other two notifications were issued by the Department of Animal Husbandry, Dairying & Fisheries, Ministry of Agriculture; one being an emergency measure banning import of poultry products on account of global outbreak of bird flu (highly pathogenic avian influenza) and the other on regulation on import of pet food.

During the year 2005-06 (April-December), two TBT-related regulations were notified. One was relating to the amendment to the PFA Act, issued by the Ministry of Health & Family Welfare and the other relating to the amendment to the Central Motor Vehicles Rules, issued by the Ministry of Shipping, Road Transport, and Highways. All SPS and TBT-related notifications of India are available on the web site of the Department of Commerce and can be accessed at: <commerce.nic.in/indian_wtopaper.htm>.

As per a 2005 report of UNCTAD, some of the typical issues faced in respect of notifications and adherence to the notification obligations under the TBT transparency provisions are arising from the following[50]:

- Lack of coordination and duplication of functions amongst regulators leads to duplication of technical regulations and obstacles to trade
- No formal mechanism to compel the authorities to publish standards and technical regulations at an early stage
- Regulatory authorities do not make reference to standards
- Difficult to assess and identify the rationale for the development of regulations (e.g. fair competition; protect health and safety; the environment) and make choice of article/agreement (TBT/SPS) under which to notify
- Insufficient capacity to provide justification when there is a need to deviate from international standards

The Department of Commerce has taken a number of steps to deal with such notifications that apparently act as barriers to trade. To enhance awareness among various stakeholders, a number of seminars and workshops were organized in collaboration with the BIS, industry bodies, etc. A workshop was also organized for the officials from other central government departments and state governments,

50 Final Report on Implementation Arrangements for TBT Agreement in India, UNCTAD, 26 December 2005, accessible at <www.unctadindia.org/Publications_TBTIndiaImplementationFinalReportFromCRISI-Dec2005.pdf>

scientists working on setting standards, trade and industry representatives, commodity boards, etc on the transparency issues relating to the WTO.

7.2 Proposed Possible Changes

In spite of weak legislations and enforcement in India, exports of agricultural and processed foods, grew by 15.6 percent in the year ended in March 2005 to Rs 16,559 crore (US$3.5bn) over the previous year's export of Rs 14,324 crore (US$3.09bn), exceeding the target of Rs 16,213 crore (US$3.4bn) set by the Agricultural and Processed Food Export Development Authority (APEDA), Government of India. To maintain this steady growth in export of quality food, international standards and food safety needs to be assured.

The Minister of Commerce and Industry while addressing a press conference underlined the importance of achieving greater standards, recognising the SPS measures.[51] He acknowledged that the country is in need of strengthening its inspection systems and build capacities for pest risk analysis. He also highlighted the urgent need for sanctioning of new laboratories, strengthening of labs in both the government and private sectors and for networking between them. Furthermore, laboratory equipments and lab protocols also need to be upgraded keeping in view the practices in the importing countries. Besides, monitoring residues levels and building the capacity to maintain pest free areas and regions are the other areas of reforms.

In recent times, the country is taking steps to update the quality of the products, right from the selection of raw materials to that of ingredients to the final delivery of final consignments in the export market. Besides this, the industry is increasingly taking care to upgrade hygienic and sanitary conditions of workers, plant and machinery so as to ensure better quality of finished products. More emphasis is now been given to invest in research and development (R&D), including product innovation. The two nodal agencies for the processed food exports in India at the national level are the Agricultural and Processed Food Export Development Authority (APEDA) and the Marine Products Exports Development Authority (MPEDA). While MPEDA is responsible for overseeing all fish and fishery products exports, surveillance of other processed food product exports are the responsibility of APEDA.

The Government of India has enacted a new Act in August 2006 – The Food Safety and Standards Act 2006. It addresses the growing concern of too many existing legislations and institutions addressing issues relating to standards in the country. It consolidates existing laws relating to food safety into a singly legislation. It seeks to set up a single regulator that will put in place food standards, and regulate manufacturing, import, processing, distribution and sale of food products. Called as the Food Safety and Standards Authority of India, this body will consist of members from various ministries, and representatives from state governments, the food industry, consumer organisations and even farmers' organisations. Moreover, scientific committees and panels will assist it in fixing standards, while a Central Advisory Committee will prioritise the work.

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51 Greater Awareness of SPS Standards Needed to Avail of WTO Agri Export Opportunities, available at <http://commerce.nic.in/sep04_release.htm>

The relevance of the Authority as regard to the TBT Agreement is that its role is not only confined to domestically produced food products, but also extends to imports and exports of food products. The Authority is responsible for specifying the procedure for entry and approval of any food article imported into India; as well as for the procedure and the enforcement of quality control and inspection in relation to commodities intended for export.

The Act also has provisions to empower *Panchayats* (local government in villages) and local authorities to enforce food standards: it also provides for the appointment of Commissioners of food safety in every state, apart from food safety officers and analysts, for efficient implementation of food safety and standards. The Act not only incorporates the salient provisions of the PFA Act, but is also based on international legislations, instrumentalities and provisions of the Codex Alimentaries Commission (related to food safety norms). The proposed body under this Act will regulate the limits on the usage of food additives, crop contaminants, pesticide residues, heavy metals, processing aids, myco-toxins, antibiotics and pharmacological active substances.

Also, the Act, apart from formulating mechanisms and guidelines for the accreditation of bodies engaged in the certification of a food safety management system for the food business, will set up food labelling standards, including claims on health, nutrition and special dietary uses. Stringent penalties have also been proposed in the Act and have also mooted the establishment of a Food Safety Appellate Tribunal to hear the appeals of disputed parties.

EU-India trade in agricultural and marine products has been stagnant at between €1.25 and 1.5 billion over the last five years, which is far below its potential. Both sides have now started realising the need to work towards overcoming the outstanding issues in the available institutional framework of Joint Working Work on Agricultural and Marine Products. India has welcomed EC's commitment on greater cooperation, and both India and EC have stressed the need to recognise the need for food safety measures and work towards harmonisation of standards and bringing them at par with Codex/international standards and at a level commensurate with risk assessment. India has recently reciprocated the EC commitment towards facilitating exchange of information on legislation certification, inspection and accreditation procedures with a view to streamline the same and remove any impediments to trade between the two countries.

India, therefore, proposes to achieve greater convergence with EU in resolving the long-standing matters relating to SPS issues. One way of achieving the cooperation could be through agreement for mutual recognition of the accrediting and certifying agencies as well as equivalence of the SPS and technical standards between India and EU. India, in the near future, intends to seek greater technical cooperation from the European Commission U and to seek assistance in upgrading the skills of Indian officials and technicians in understanding and implementing various SPS and TBT-related technical standards. India also welcomes the EC proposal for establishing an EU-India Officials Working Group, which would address all issues relating to both SPS and TBT standards.

7.3 Possible Benefits and Costs

As the demand for high-value food products is growing rapidly, countries that approach standards compliance as part of an overall competitive strategy are likely to thrive. Failure to address SPS and TBT-related problems or concerns may undermine a country's access to remunerative international markets.

The country would profit by viewing strict standards as a stimulus for investments in supply-chain modernisation. All the more, the compliance process can result in new forms of competitive advantage and contribute to more sustainable and profitable trade over the long term.

Other potential benefits include, access to more remunerative markets and supply chains, greater efficiency leading to lower costs, less wastage during production process, reduce incidence of product inspection and detention abroad.

The companies that ensure higher standards would also stands to benefit by the enhancement of product quality in turn leading to improved reputation of firm and the country.

However, to achieve these benefits the country needs to develop/improve:

- R&D and testing facilities
- Simplify procedures for licensing
- Credit facilities
- Easy information availability
- Processing technologies
- Cold chains
- Storage facilities
- Packaging systems

As compliance with higher standards, in particular the EU norms significantly increases the cost of production and entry into the EU markets, it needs huge resources. For instance, it is necessary for each factory involved in sea food export to have a potable water system, continuous power (standby generators), effluent treatment plants, flake ice machines, chill rooms and a laboratory. It is estimated that such upgrading involves an expenditure of about US$250 000 to US$500 000 per unit as fixed cost.

Of the estimated investment of Rs 1,00,000 crore (US$22.5bn) required for the food processing industry till 2015, the Government is looking at investing at least Rs 50,000 crore (US$11.25bn) during the 11th Plan.[52] While the Government will supply 10 percent of the amount, the industry's share will be 40 percent and the banks/ financial institutions will finance the remaining 50 percent. This investment will go towards building backward and forward linkages in the supply chain, testing facilities and setting up of new abattoirs.

52 The Hindu Business Line, 11th October, 2006

Similar such initiatives are taken at the state level as well. For instance, recently the State Bank of Hyderabad has lent Rs. 7.5 crore (US$1.6mn) to a complex of food processing units in Andhra Pradesh. The amount would cover setting up of a common effluent treatment plant, a quality control lab and research station and common facilities centre.[53] An additional amount of Rs. 17.5 crore (US$3.9mn) would be granted by the Bank during a later stage.

53 The Hindu Business Line, 6th March, 2006

8. INTELLECTUAL PROPERTY RIGHTS

8.1 An Overview of Issues

In terms of intellectual property rights, the necessary requirement of the EU as per the current FTAs with Mediterranean countries, South Africa, Mexico and Chile is that the patent regime of the party applies the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) for IPR protection. This does not really mean anything for most of the countries, as they are already members of the WTO.

Nevertheless, some bilateral agreements of the EU go beyond the minimum requirements set out in the WTO TRIPs Agreement. In the EU-Egypt Agreement, it is stated that the parties shall grant and ensure adequate and effective protection of intellectual property rights in accordance with the prevailing international standards, including effective means of enforcing such rights. In other agreements, the parties are to enforce protection of IPRs with ‘the highest international standards’: *“The Parties shall ensure adequate and effective protection of intellectual property rights in conformity with the highest international standards.”*[54] It is uncertain exactly which standards these refer to. It could relate to either WIPO standards, or more restrictive standards within new treaties coming into force. In the EU-Mediterranean Agreements the following multilateral treaties/conventions are also specifically mentioned.

- Paris Convention for the protection of industrial property (Stockholm Act 1967 and amended in 1979)
- Berne Convention for the Protection of Literary and Artistic Works (revised at Paris in 1971 and amended in 1979)
- Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks (Geneva 1977, amended in 1979)
- Patent Cooperation Treaty (Washington, 1970, amended in 1979 and modified in 1984)
- Budapest Treaty on the International Recognition of the Deposit of Micro organisms for the Purposes of Patent Procedure (1977, modified in 1980)
- Protocol to the Madrid Agreement concerning the international registration of marks (Madrid, 1989)
- Trademark Law Treaty (Geneva, 1994)
- International Convention for the Protection of New Varieties of Plants (UPOV) (Geneva Act of 1991)
- Agreement on Trade-related Aspects of Intellectual Property, Annex 1C to the Agreement establishing the World Trade Organisation (TRIPs, Marrakesh 1994)

While some of these instruments are also in conformity with the WTO TRIPs Agreement, some of them impose higher obligations, and not all of these countries are

[54] Agreement on Trade, Development and Cooperation between EC and South Africa (1999), Article 46.1 Economic Partnership, Political Coordination and Cooperation Agreement between EC and Mexico (2000), Article 12.1

party to them. An example is the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1977 modified in 1980).[55] There is no reference to the Budapest Treaty in the TRIPs Agreement, which has 49 members, 47 of which are from the North.

Another major additional obligation is related to the International Convention for the Protection of New Varieties of Plants (UPOV), 1978 and 1991. Interestingly, while the agreements generally refer to the UPOV 1991, or both UPOV 1978 and 1991, in case of South Africa the reference is made to the UPOV 1978 where commitments are lower compared to UPOV 1991. The major flaw in the UPOV 1991, according to many experts, is that there are no provisions for benefit sharing and limited reference to farmers' rights. An interesting provision related to UPOV 1991, found in the EU-Algeria Agreement, is that the accession to this Convention may be replaced by the implementation of an adequate and effective *sui generis* system of protection of plant varieties if both parties agree.

The list of multilateral conventions/instruments mentioned in the EUs agreements has tended to expand over time. Thus, the South African Agreement also finds mention of:

- International Convention for the Protection of Performers, Producers of Phonogram and Broadcasting Organisations (Rome 1961)
- WIPO Copyright Treaty (WCT), 1996

However, the South African Agreement does not mention the Trademark Law Treaty (Geneva, 1994).

The EU-Chile Agreement identifies the following:

- World Intellectual Property Organization Performances and Phonograms Treaty (Geneva, 1996)
- The 1971 Strasbourg Agreement Concerning the International Patent Classification (Strasbourg 1971, amended in 1979)
- Convention for the Protection of Producers of Phonograms against the Unauthorised Reproduction of their Phonograms (Geneva 1971)
- Locarno Agreement establishing an International Classification for Industrial Designs (Locarno Union 1968, amended in 1979)
- The Vienna Agreement establishing an International Classification of Figurative Elements of Marks (Vienna 1973, amended in 1985)

[55] See above Article 46.5(d)

Generally the agreements provide for regular review of the enforcement of IPR. They also mention that if problems in the area of intellectual property affecting trading conditions were to occur, urgent consultations shall be undertaken, at the request of either Party, with a view to reaching mutually satisfactory solutions. Moreover, in order to facilitate the implementation of IPR-related provisions, the EU may provide, on request and on mutually agreed terms and conditions, technical assistance to its partners in, among other things, the preparation of laws and regulations for the protection and enforcement of intellectual property rights, the prevention of the abuse of such rights, the establishment and reinforcement of domestic offices and other agencies involved in enforcement and protection, including the training of personnel.

Among the multilateral instruments mentioned above, the most difficult one for India to accept is UPOV 1991. The Indian Parliament approved the Protection of Plant Varieties and Farmers' Rights Act in 2001. Though the Act follows elements of the 1978 UPOV version and partly the 1991 version, more positively it promotes a balance between the rights of breeders and farmers. It would be extremely difficult for India to accept UPOV 1991 obligations. India is also not a party to the other multilateral conventions listed above except Patent Cooperation Treaty (PCT), Budapest Treaty and of course the WTO TRIPs Agreement. Hence accepting them will involve some costs.

As regarding PCT and Budapest Treaty, India is already a party and hence, in principle, it may not have difficulties in accepting them. However, there are practical difficulties. India is a party to TRIPs and with recent amendments to its Patent Act of 1970, it has a TRIPs-compliant patent system. However, there is scope for improvement in their enforcement. The implementation of India's commitments in view of other multilateral instruments is even weaker. Hence, inclusion of other instruments in a trade agreement would mean India will have to take them more seriously, which will mean even higher implementation costs at a time when the country is already struggling to implement its TRIPs obligations. Hence, the implementation costs for India in this area would depend on additional obligations that might have to be taken. Most of the stakeholders interviewed in India opined against accepting any TRIPs-plus obligations in a possible EU-India FTA. The shortage of patent examiners is also increasing internal inefficiency of the patent offices in India. There are about 3,500 patent examiners in the US, whereas the number in China is about 4,000. India has just 275.

There is also manpower inadequacy, in terms of IPR attorneys with strong background in respective sciences. In an ideal situation, all judges handling IPR-related cases needs to be experts or at least knowledgeable in chemistry, pharmaceutics and biotechnology.[56] However, in practice, this is not possible. To be a patent attorney, a candidate needs to have a degree in science, technology or engineering stream along with a degree in law. These unique requirements add to the issue of scarcity of adequately qualified professionals. India's academic infrastructure is also not adequate to create a huge number of IPR professionals that it requires.

[56] In India, the practice of seeking amicus brief is not practised much. In matters such as this, a court may seek the expertise of a 'friend of the court' (an amicus).

8.2 Proposed Possible Changes

Although intellectual property rights (IPRs) is a seemingly new concept in India, a national legal framework for the protection of IPRs has been in place for more than a century. Patents, trademarks, designs, copyrights – all have been covered by relevant domestic legislation and administrative institutions for a long time and only the legislation on geographical indications is relatively new.

In the last few years, India has enacted fully TRIPs-compliant Patent Act, Trademarks Act, Copyright Act, Designs Registration Act, Geographical Indications Act and Protection of Layouts for Integrated Circuits Act. The Plant Varieties Protection and Farmers' Rights Act 2001 and the Biodiversity Act 2002 are also in place. However, as the country is in the process of entering into new regional/bilateral agreements, it needs to be more cautious and well prepared.

This is necessary because though RTAs[57] generally affirm provisions of the WTO TRIPs Agreement (either by explicit reference or implicitly by echoing at least some of its content), if we look at most of the RTAs they often include one or more provisions going beyond the minimum requirements of the WTO TRIPs Agreement. According to the TRIPs Agreement, the WTO Members may implement more extensive IPR protection in their law than the minimum required under the agreement, provided that this does not contravene the agreement.[58]

Given this proviso, in many bilateral deals the EU has negotiated beyond the requirement of the WTO TRIPs Agreement in order to ensure highest international standards. While many such multilateral treaties/conventions are in conformity with the WTO TRIPs Agreement, some of them impose higher obligations.

Lack of effective IPR enforcement is a major barrier to market access in India and one cause for the relatively low level of FDI inflows. Though India enacted a new patent law in the year 2005, in line with the WTO TRIPs Agreement, there are still some important issues, which are of significant concern for European business. These include inappropriate conditions for the patentability of some types of inventions and the existence of a pre-grant opposition procedure. Initially, the Indian patent law had proviso only for post-grant opposition with a weak pre-grant representation. However, with the latest amendment in 2005, both pre-grant as well as post-grant opposition has been introduced. However, the Government of India has denied that the introduction of such procedures is resulting in unnecessary delays in the issuance of patents, as the amendment has come out with a rationalised timelines (with definite timetable within which each of the stages should take place) the truth is different. Multiple pre-grant oppositions are being filed sequentially by different competitors for the same patent

[57] In the report the term RTA is employed when referring generically to a preferential trading arrangement between countries. The term FTA is used wherever the arrangement under consideration is that of a free trade area.

[58] This is stated in the Uruguay Round Final Act, Annex 1c (TRIPS), Article 1.1 http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

application leading to a delay in issuing a decision and thereby delaying the grant of a patent.[59]

Also India's copyright laws and their enforcement system are weak. The establishment of Copyright Enforcement Advisory Council for strengthening the enforcement of copyrights, as well as the initiation of a programme for training police officers and prosecutors concerned with enforcement of copyright laws, has not been vigorously pursued. According to media reports (The Hindu Business Line, May 05, 2006), some 30 million cases (both civil and criminal) are pending in courts all over India, and there is a shortage of 3,000 judges. Due to these backlogs in the court system with added documentary and other procedural requirements, few cases related to IPR protection are being taken up annually.

Table 8.1: Time Taken for the Grant of IPRs in India

IPRs	Time Taken for the Grant	Validity Period	Renewal Period
Patent	2-3 yrs	20 yrs	Annual
Trademark	1-2 yrs	Perpetual on renewal and the use of mark while trading	10 yrs
Geographical Indications		Perpetual on renewal	10 yrs
Copyright	1-12 moths	Life time of author +60 yrs after his death from its publication date	--

Source: Fundamentals of IPR in India,
http://www.indiabrands.org/download/Ready_Reckoner_For_IPR_in_India.pdf

In spite of adequate legislative provisions, piracy of copyrighted materials remains widespread, particularly in software, films, popular fiction works, textbooks, and cable signals. Moreover, under the Indian copyright law, a few exceptions apply that shall not constitute an infringement of copyright[60], allowing for free use of copyrighted works in educational and religious institutions, in journalism, public libraries, among others. Both foreign and Indian industries report that piracy levels in all sectors remain high.

For instance, one such major sector is the cable television network. Widespread use of pirated products under this sector is posing a huge problem, particularly with an estimated more than 40,000 illegal systems in operation in India. This huge amount of proliferation of unregulated cable TV operators has led to pervasive cable piracy. Copyrighted product is transmitted over this medium without authorisation, often exploiting pirated videocassettes, video compact discs (VCDs), or DVDs as source materials. This has had a significant detrimental effect on all motion picture market segments in India – theatrical, home video and television. For instance, pirated videos can already be available in major cities before their local theatrical release.

[59] "Sequential' opposition delaying drug patents", The Hindu, Business Line, 3rd April, 2006
[60] Section 52, Copyright Act 1957

The existing trademark laws in India are territorial in nature and have no international application. Unlike the Indian patent laws, which provide for international filing of patents under Patent Co-operation Treaty (PCT), registration of international trademark is not possible under the current trademark laws in India. Moreover, the Indian trademark practice of filing applications in each country for registration and tracing them simultaneously is time-consuming and expensive. However, India is realising the advantages of becoming a member of the Madrid System, which *inter alia* enables an applicant company/entity seeking international registration to file only one application and pay only one fee in local currency.

Though India's main shortcoming is the lack of timely implementation of IPRs provisions, from recent experiences it is clear that India's legal enforcement communities are showing a willingness to take the necessary steps to protect IPRs, as they are key to attract foreign investment into the country and for the overall growth of the economy.

Regarding data protection, Indian government is under pressure to enact data protection laws to protect the Indian business process outsourcing (BPO) industry. This pressure, though existed for a long time, became more severe after the recent theft of Citibank customer data by workers at an Indian call centre. The Information Technology Act of 2000 defines 'data' but remains silent on data protection. Though enacting data protection law is a TRIPs Plus provision for India, India is planning to introduce a data protection law, which is currently at the drafting stage.

This step is largely taken because India firmly believes that countries with better IPR regime stand better chances of progress. The only laws on personal data that currently protect businesses in India are those data privacy laws from foreign jurisdictions, including EU and US that apply overseas. The lack of legislation in India is creating barriers for businesses from EU Member States, as a 1995 Directive (directive 95/46/EC) on Data Privacy obliges Member States to create a legal framework that protects personal data used outside of the State, meaning that personal data cannot be transferred to third countries that do not provide "adequate protection". However, Not all EU member countries necessarily support the need for data protection as there is an argument that this could be against access to medicine as data protection in India would affect the Indian generic industry adversely. Refer to the discussion in 8.3.2.c

Regarding copyright protection in this digital era, India is regularly encouraged by EU, US and other developed countries to sign and implement the WIPO Internet Treaties, which will strengthen protection for digital works and modernise India's copyright laws. India also lacks an optical disc law to address optical media piracy. In 2005, the Ministry of Information and Broadcasting tasked the Federation of Indian Chamber of Commerce and Industry (FICCI) with the drafting of an optical disc law and within a few months a new optical disc law will be ready.

It is very likely that India may soon become a member of the Madrid System. This System enables the protection of a trademark in several countries by securing a global registration that has impact in each of the contracting parties that is selected. (The Hindu, Business Line, May 23, 2006)

The Government of India has taken up comprehensive modernisation of intellectual property administration to complement legislative matters. During the 9th Five Year Plan, expenditure on modernisation of patent offices (including design offices) was Rs. 21.60 Crore and in the 10th Plan (2002-07) allocation on this account was increased to Rs. 92.55 Crore. In the 11th Plan, it is expected that allocation will be increased further.[61]

It was also recently reported (The Economic Times, January 12, 2007) that India can look forward to better IPRs protection, as the government is apparently planning to turn the country into a hub for IPRs. Setting up of a top notch think-tank for research & development on IPR issues is on the cards in order to strengthen India's position in negotiating global treaties on key aspects of protecting patents, trademarks, copyrights and geographical indications (GIs).

The government is also in the process of networking patents and trademarks offices in the four metro cities (Mumbai, Delhi, Chennai and Kolkata). This initiative is being piloted by the Department of Industrial Policy & Promotion (DIPP), Ministry of Commerce and Industry. The government has tied up with Max Plank Institute in Munich and the Australian Patent Institute for developing a management institute on IPRs. This proposed institute would work as an institution for research and development, and as a policy think-tank. These current efforts on the part of the government would give India a totally different image from the days when foreign companies used to express concern over IPR protection in the country. This would help Indian companies engaged in R&D, apart from encouraging trans-nationals to invest (including in research and development, as India has a huge talent pool).

As earlier stated, with huge backlog of cases in ordinary courts hardly a few IPR-related cases being decided annually the country is badly in need of separate fast-track courts to deal with issues connected with patents and protection of other intellectual property rights. In fact, there is pressure from the business community on the government on the need to focus on training of a good number of judges in IP-related issues and set up special courts, manned by specialised judges, to deal with them.[62]

8.3 Possible Benefits and Costs

IPR is playing an increasingly important role and if India is able to guarantee the international community a strong and predictable IP protection regime on the basis of a set of enforceable criteria then the benefits that the country would gain is extremely high. Empirical evidence around the world shows positive correlation between a strong IP regime culminating in stronger inflows of foreign direct investment. Absence of the same may lead to lack of stabilisation of industrial development and a fall in investment in businesses and industries.

Moreover, stronger IPRs in India will greatly benefit software companies across sectors, and will encourage greater product development in India. At present the

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[61] Source: www.tech2transfer.com/pdf/IPR.pdf

[62] *Nasscom pushes for special IPR courts,* Cyber Media News, Friday, 01 October 2004, *Call for special courts on IPR issues*, The Hindu, Business Line, 16 October 2003
Special courts for IPRs urged, The Hindu, 23rd January, 2005

Indian software industry employs over 500,000 software engineers, and software services in India have gained a worldwide reputation. A growing desire for strong levels of protection for intellectual properties have encouraged foreign investment in India, with many companies choosing to either set up their own facilities in India or to outsource a large part of their business. However, in order to keep up with the pace of development in IT enabled services (particularly for leapfrogging in the IT value chain – from business processing to knowledge processing) India is to steadily build up its IP-related environment. In view of the advancement in technology and innovation a re-look at India's existing legislations considering new and emerging issues such as Internet piracy and circumvention of technological measures is required.

It is estimated by a IDC-BSA study[63] that a 10-point reduction in the current 74 percent piracy rate would have a tremendous impact on the domestic front, enabling the IT sector (excluding software and services exports) to grow from US$7.4bn to US$19.5bn. On top of an already impressive growth rate, it will add 115,000 jobs, contribute US$5.9bn to gross domestic product, add US$386mn in taxes and US$8.2bn in revenues to local vendors. The BSA-IDC study also found that the global IT sector, currently projected to grow by 33 percent between 2004 and 2009, could instead grow by 45 percent over the same period with a 10-point reduction in software piracy. Thus, the importance of protection of IPRs for the growth and development of industrial sector (not just the IT sector) cannot be understated.

An adequate and effective IPR regime in the country can creates jobs, provides taxable income to the government, and at the same time attract foreign investment by assuring protection for investors' intellectual property. All these developments would thus create a spillover that would, in turn, lead to greater domestic growth. More importantly if the country sticks to its weak implementation regime then it provides almost no incentive to people to be creative and innovative, nor do they attract new investment (including new technologies).

In view of all these likely developments in coming years, technical and financial assistance that India might receive from the European Commission would contribute to a large extent to effectively enforce India's current obligations and be prepared for a stronger and more predictable IPR regime. However, accepting additional commitments for the protection of IPRs might nevertheless be politically difficult at this stage for India and would require huge will and resources.

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[63] BSA study press release available at <http://www.bsa.org/india/press/newsreleases/IDC-study.cfm>

9. COMPETITION POLICY

9.1 An Overview of Issues

Free trade agreements and competition policy

All recent bilateral free trade agreements (FTAs) concluded by the European Union (EU) have included provisions on competition issues, albeit to very different degrees of detail. The EU is also seeking provisions on competition issues in the proposed agreements that it is negotiating. The precise content of competition provisions in the agreements seems closely related to the degree to which the EU's trading partners had domestic competition legislation in place when the FTAs were signed. However, another trend can be delineated, i.e. that provisions on competition issues are becoming more elaborate with time.

In light of our analyses in Annex 3, the following issues seem relevant for a discussion on competition policy and law in the context of the proposed EU-India FTA:

- Issues relating to Indian Competition Law (its provisions and implementation)
- The link between the Indian government's policies and practices with respect to international trade and competition

In the case of issues relating to Indian Competition Law, Annex 3 of our analysis has mentioned doubts relating to the effectiveness of competition law enforcement and brings out concerns relating to the likely misuse of extra-territorial provisions in the Competition Act, particularly those relating to predatory pricing. There is also mention of cooperation and information exchange to address competition issues.

In case of government policies and practices, our analysis in Annex 3 does not see any significant business concerns linked to operation of competition policy in India. Nevertheless, there are certain issues that need to be discussed, as done below.
Effectiveness of India's competition law

India has had a competition law, the Monopolies & Restrictive Trade Practices (MRTP) Act, since 1969. The Act was enacted to prevent concentration of economic power, control monopolies, and prohibit monopolistic and restrictive trade practices. Unfair trade practices, a consumer protection provision covering deception, misleading claims and advertising etc, was brought in through an amendment in 1984.

Despite its laudable goals, the MRTP Act did not deliver as expected. This was partly because the Act was created at a time when all the process attributes of competition such as entry, price, scale, location, etc were regulated. The MRTP Commission (MRTPC) had no influence over these attributes of competition, as these were part of a separate set of policies.[64]

[64] Mehta, Pradeep S., Competition Law Regime in India: Evolution, Experience and Challenges, Horizons, Concurrences No 1, 2006

Another reason for MRTPC's inadequacy in dealing with anti-competitive practices was the absence of proper definitions in the Act. A perusal of the MRTP Act shows that there is no definition or even a mention of certain offending trade practices, which are restrictive in character. Some of the anti-competitive practices such as abuse of dominance, cartels, predatory pricing and bid rigging were not specifically mentioned in the Act. The MRTP Commission was unable to take any action against any of the international cartels that attracted the attention of other competition authorities.[65]

The MRTP Commission was poorly resourced, which further constrained its functioning. CUTS[66] had carried out a comparative analysis of nine countries, including India in terms of budget of the Competition Authority as a percentage of the total Government budget. It observed that all other countries had a larger proportion than India. The inadequacy of budget allocation was compounded by the need for the MRTP Commission to seek government permission to incur expenditure beyond certain limits. This severely curtailed its independent functioning. The independence of the MRTP Commission got further impaired due to the discretionary power of the government to appoint senior level officers.

Therefore, weaknesses in the structures of the MRTP Act and the composition of the MRTP Commission were among the key reasons for ineffectiveness of the MRTP Act.

It was in 1991 that widespread economic reforms were undertaken and consequently the march from "command-and-control" to a regime based more on free market principles commenced. The economic reforms undertaken since the early 1990s significantly changed the economic environment in the country. Major amendments were made to the MRTP Act in 1991 but even these were considered inadequate to deal with the emerging economic order. In view of this, India adopted a new competition law, the Competition Act, 2002 to replace the MRTP Act. The Competition Commission of India (CCI) was established in October 2003 to implement the provisions of the Act.

The Competition Act, 2002[67] seeks to prevent practices having adverse effect on competition; promote and sustain competition in markets; protect the interest of consumers; and ensure freedom of trade carried on by other participants in markets in India. The new law provides for a modern framework of competition and focuses on four core areas: Anti-competitive agreements; Abuse of dominant position; Combinations (i.e. M&As) regulation; and Competition advocacy.

Explicit definitions and criteria have been specified in the Competition Act (as against the MRTP Act, also see Table 9.1) to assess whether a practice has an appreciable adverse effect on competition. One distinguishing feature of the new law is that it

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[65] *ibid*

[66] Pulling Up Our Socks - A Study of Competition Regimes of Seven Developing Countries of Africa and Asia: The 7-Up Project, CUTS, Jaipur, 2003.

[67] Government of India, Ministry of Law and Justice, "The Competition Act, 2002", *The Gazette of India*, No.12, January 14, 2003.

emphasises behavioural approach to examining competition in the market, as against the structural approach followed by the MRTP Act. Importantly, the CCI has been given a competition advocacy role, which would help in creating a culture of competition. Merger regulation has returned to the scope of the Indian competition law, after being removed from the MRTP Act, during the 1991 amendments. The new law has extraterritorial reach and the provision is based on the *'effects doctrine'*.

Table 9.1: MRTP Act vs Competition Act[68]

S. No.	MRTP ACT, 1969	COMPETITION ACT, 2002
1.	Based on pre-reforms command and control regime	Based on post-reforms liberalised regime
2.	Based on size/structure as factor	Based on conduct as a factor
3.	Competition offences implicit and not defined	Competition offences explicit and defined
4.	Frowns upon dominance	Frowns upon abuse of dominance
5.	No combinations regulations (post-1991 amendment)	Combination regulations beyond a high threshold limit
6.	No competition advocacy role for the MRTPC	CCI has competition advocacy role
7.	No penalties for offences	Penalties for offences
8.	Reactive and rigid	Proactive and flexible
9.	Unfair trade practices covered	Unfair trade practices omitted (Consumer Protection Act, 1986 will deal with them)
10.	Rule of law approach	Rule of reason approach
11.	Blanket exclusion of intellectual property rights	Exclusion of intellectual property rights, but unreasonable restrictions covered

Another important distinction is that the new law no longer covers unfair trade practices (UTPs), and all pending cases are to be transferred to the Consumer Protection Act, 1986 (COPRA), which covers UTPs.[69]

The Competition Act, however, faced a challenge even before becoming fully operational. Writ petition was filed before the Supreme Court (India's apex court), challenging the constitutional validity of the Act, and the appointment of a bureaucrat to head the Commission. Pursuant to the litigation, which was decided on 20 Janaury 2005, the Government has proposed to amend the Competition Act, 2002. A draft amendment bill *inter alia* proposing splitting the authority into two: a) Competition Commission of India (to be headed by an expert), and b) Competition Appellate Tribunal (to be headed by a judge). A Parliamentary Standing Committee examined the amendment bill and has submitted its recommendations to the Government in December, 2006. The Government proposes to table a revised draft bill soon in the Indian Parliament. It is hoped that the amendment bill will be passed this summer[70].

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[68] Chakravarthy, S., "Competition Act 2002: The Approach", in Pradeep S Mehta edited, *Towards a Functional Competition Policy for India*, CUTS and Academic Foundation, 2006

[69] *Op. Cit.*, Horizons, Concurrences No 1, 2006

[70] The Competition (Amendment) Bill 2006

Despite the amendments proposed, concerns with respect to its effective enforcement still remain[71]. While the current law is not without controversy and certain limitations, no competition law is ever perfect, and the law evolves through time, experience, and development of the case law[72]. At this stage, therefore, it would be naïve to comment upon the enforcement of the new law, since it is yet to be implemented.

Substantive provisions in competition law and FTA provisions

In all of the bilateral trade agreements entered into by the EU, the parties agree that concerted practices as well as the abuse of a dominant position, whenever they affect trade between the parties, are incompatible with the agreement. Another important area of competition law, namely, review of mergers and acquisitions is covered only in the EU-Mexico Agreement. Indian competition law adopted in 2002 has all these substantive provisions and hence would not have any problems in accepting such commitments.

Mutual recognition of legislation

In case anti-competitive practices occur and domestic authorities do not act upon them, the agreements entered into by the EU stipulate that the Party concerned may take appropriate measures consistent with its own laws, after appropriate consultation (within the cooperation council or among competition authorities), or after 30 working days following referral for such consultation. Hence, these agreements also recognise the competency of both competition authorities, but prescribe consultation before any further action is undertaken. In this context, while the Parties concerned recognize each other's competition laws when the EU partner has competition law, but when the partner does not have a competition law, the agreement says that any anti-competitive practices affecting trade shall be assessed by the EU competition laws, particularly on the basis of EC Treaty Articles 81, 82 and 87.

Such arrangements may not be unacceptable to India. Both the EU and Indian competition laws provide for extra-territorial jurisdiction. Hence mutual recognition may just be complementary to that. In fact India may want to cover all three areas of competition law, concerted practices, abuse of dominance and merger review.

Non-discrimination

Any bilateral FTA that covers competition issues will expect that competition authorities of the Parties function in a non-discriminatory manner. Though the Indian competition law does not specifically mention terms like non-discrimination or national treatment, the law explicitly provides for equal access to foreign natural and legal persons. Since equality before the law is a basic legal principle in India (unless otherwise specified), and foreigners have equal access, and the competition law does not provide for any discrimination on any ground, the law may be considered to be non-discriminatory. However, discriminatory outcomes may come due to the fact that the law enforcement is also to take account of public interest and development

[71] Bhattacharjea, A., "Amending India's Competition Act" (Commentary), Economic and Political Weekly, October 14, 2006
[72] *Op. Cit.*, Horizons, Concurrences No 1, 2006

concerns, or policy directives of the central government that the competition authority is follow.

So far, there has not been expressed any concern of misuse of such gateways in India. Hence, going by the experience of the Indian judiciary, such things are extremely unlikely to happen. Moreover, bilateral FTAs also provide for exemptions on public policy grounds. Hence, the Indian law seems to comply with what the EU may ask for in this regard.

Extra-territorial provisions and predatory pricing vs anti-dumping

With respect to application of extra-territorial provisions, concerns have been expressed in Annex 3 that the new law allows authorities to use accusations of predatory pricing too freely where dumping is suspected. These concerns require some analysis. It is important to understand why a competition law has extra-territorial provisions, and what is required to make these provisions effective.

As countries integrate more and more into the global economy, they become more prone to the anti-competitive practices operating on a global scale or originating elsewhere in the world. India is no exception to this.

According to one estimate[73], the vitamins cartel alone cost India about US$25mn in the 1990s due to overcharging. Some other important cartels that hit India very hard are those in heavy electrical equipments and flat rolled steel products. Almost all these cartels are constituted by producers in developed countries, and as per research evidence[74] they have attempted to penalise rivals in developing countries by launching anti-dumping actions against their exports and restricting their access to technology.

Since the origins of such practices are by and large outside the territorial jurisdiction of a country, it brings forth the issue of jurisdiction. Although there is a general presumption against the extra-territorial application of legislation, a number of countries seek to apply their laws outside their territory in the context of competition law. This is on the basis of the so-called "effects doctrine", according to which governments have assumed jurisdiction over conduct having anti-competitive effects in their territory even if it takes place in another country.

However, apart from limited measures taken by Brazil, Korea and Mexico, no other developing country has made any attempt to take action against international cartels. The Indian MRTP Commission too was unable to take any action against any of the international cartels that attracted the attention of other competition authorities for over-pricing. It did, nonetheless, respond to complaints by two Indian manufacturers' associations against groups of foreign companies who had been selling at low

[73] Clarke, J. L. and S.J. Evenett, "The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel", AEI-Brookings Joint Centre for Regulatory Studies, Working Paper 02-13, 2002, Washington DC.
[74] Levenstein, M., V.Y. Suslow and L.J. Oswald, "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy", NBER Working Paper 9511, (2003).

prices[75], but these orders were set aside by the Supreme Court, and as brought out in Annex 3.

The apex court did not go into the allegations of cartelisation or predatory pricing, but instead held that the wording of the MRTP Act did not give it any extra-territorial operation. Action could be taken only if an anti-competitive agreement involving an Indian party could be proved, and that too only after the goods had been imported into India.

The consequences of this ruling have informed the new Competition Act.

Section 3(5)(ii) of the Competition Act 2002 states that "nothing in this section [on anti-competitive agreements] shall restrict … the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export".

Section 32 states that, notwithstanding any restrictive agreement, any party to such agreement, any enterprise abusing a dominant position, or any combination or party to combination is outside India, the Competition Commission of India (CCI) has the power to inquire into it, if it has an anti-competitive effect within the relevant market in India. This clearly restates the effects doctrine, which should undo the Supreme Court's disabling of the MRTP Commission in that respect, as brought out in Annex 3. The amendments proposed by the government adds a phrase to Section 32, explicitly allowing the CCI to pass orders against acts of firms outside India that adversely affect competition in India. The original phrasing seemed to suggest that the CCI could only inquire into such acts.

Sub-section 33(2) of the Act goes to the other extreme in undoing the effects of the Supreme Court's ruling. It allows the Competition Commission of India to grant a temporary injunction restraining any party from importing goods, if it can be established that such imports would contravene the Act's substantive provisions. The Competition Amendment bill proposes to delete this clause that allows the CCI to issue temporary injunctions to restrain any party from importing goods. The original provision of countering an anti-competitive practice involving imports by shutting out the imports would have been inconsistent with WTO rules.

Annex 3 of our analyses has mentioned concerns relating to use of predatory pricing provisions where dumping is suspected. It is important to bring out the relevant provisions in the Indian Competition Act in this context. The Act defines predatory pricing as the sale of goods or provision of services below the cost of production with a view to reduce competition or eliminate the competitors.

Predatory pricing, strictly speaking, is pricing below costs with the intention of driving out rival producers. Due to some striking similarities, cross-border predatory pricing is very often equated with dumping. However, the principle underlying anti-dumping is different from that underlying competition law in that the former seeks to

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[75] The American Natural Soda Ash Corporation vs Alkali Manufacturers Association of India; Haridas Exports (importer of Indonesian Float Glass) vs All India Float Glass Manufacturers' Association

protect domestic competitors while the latter seeks to protect competition. Low prices could simply reflect the greater efficiency of the foreign firm, and closure of the domestic firms may not be the result of any predatory intention on its part. Predatory pricing can be suspected only if the foreign firm deliberately prices its exports below costs, and is assured of a monopoly if the domestic firm(s) is(are) forced to exit. The latter requires that the alleged predator needs to have a large share of the importing country's market, which should also be characterised by barriers to entry so that the domestic firms or other foreign firms cannot enter. In contrast, dumping is simply pricing exports below "normal value", not below costs, and can in fact be welfare enhancing unless it is predatory. Several competition authorities have evolved tests to detect predation and the CCI is presently seeking to understand how these are applied in various other jurisdictions.

From a competition perspective the application of anti-dumping law has frequently been unhelpful for the Indian economy. In several cases, the DGAAD has accepted an increase in the foreign firms' market share (which was only to be expected in a period of trade liberalisation) as evidence of injury, even though the Indian industry's sales and profits were increasing at the same time. AD duties or price undertakings were imposed so as to ensure a 'non-injurious' import price, which would guarantee a 'reasonable' rate of return to the domestic producers, based on their own cost data. What the DGAAD considers reasonable is entirely subjective and usually not made public, but in a rare case in which the appellate authority set aside its findings, it emerged that it had fixed the AD duty so as to yield a 22 percent rate of return on capital to the Indian polyester industry! It also came to light that during the period of alleged dumping, the domestic industry was operating at full capacity and had in fact raised its prices[76].

Available research evidence[77] suggests that in most cases, AD remedies have been used to protect Indian industries, and not to preserve competition. Even though employees and shareholders of these industries benefited, AD measures inflicted higher import costs on user industries, as it is mainly intermediate goods industries in the chemicals sector that have succeeded in obtaining protection. The latter are almost always highly concentrated and capital-intensive, while production in many of the user industries is predominantly in small-scale, relatively labour-intensive units, which are being increasingly exposed to import competition. The Indian anti-dumping regime is therefore likely to have harmed rather than promoted competition and employment in the aggregate.

Given this large-scale (ab) use of anti-dumping provisions by Indian authorities and the fact that such actions have been taken in industries where there exists high concentration, it would be worthwhile to develop a working relation between the CCI and the Anti-dumping Authority. The Anti-dumping Authority could be asked to seek CCI's views before taking decision in a matter. And CCI could give its opinion under the advocacy provisions of the Competition Act. This interface has been echoed in the report of the High Level Committee on Competition Policy and Law (Raghavan Committee), which recommended, "Anti-dumping measures need to be reckoned in

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[76] Jain, Sunil (2004), "Increase your returns to 22 percent!" *Business Standard*, 5th July

[77] Singh, Samir K., "An Analysis of Antidumping Cases in India", Unpublished M.Phil dissertation, Department of Economics, University of Delhi, 2003.

the Competition Policy/Law with a view to dealing with anti-competition practices"[78]. The capacity of CCI and related government agencies needs to be augmented in order to deal with the issues in an appropriate manner.

The trade aspect of competition principles is presently under consideration as part of the discussions on adopting a National Competition Policy for India. These competition principles seek to bring coherence in various government policies and measures. The National Competition Policy is proposed to be based on following competition principles[79]:

- There could be effective control of anti-competitive conduct that undermines competition in the market within India.
- The Competition Policy could be competitively neutral among all players, whether they are private enterprises, public sector enterprises or government departments engaged in non-sovereign commercial activity.
- The universal and uniformly applied rules of competition could be made applicable across all sectors of the economy.
- There could be institutional separation between policy-making, operations and regulation.
- Where a separate regulatory arrangement is set up, it needs to be consistent with the principles of competition.
- Third party access to essential facilities on fair terms needs to be provided.
- The procedures laid down should be rule bound, transparent, fair and non-discriminatory.
- Any deviation from the principles of competition should be only to meet desirable social or other national objectives, which are clearly defined, transparent, and rule bound.

Abuse of dominant position by domestic incumbent firms

Abuse of dominant position by domestic incumbent firms has been identified as a major competition problem in developing countries. CUTS had undertaken a comprehensive study[80] of the competition scenario in India, which brings out key findings in this respect.

The study examined changes in concentration[81] for select industries grouped under four broad categories: (1) consumer non-durable goods (2) consumer durable goods (3) intermediate goods and (4) capital goods.

The analysis suggests that one or two firms dominate industries that have experienced an increase in concentration levels. Both domestic as well as foreign owned firms have taken dominant positions and this requires an assessment of their market

[78] Report of 'The High Level Committee on Competition Policy and Law', Department of Company Affairs, Government of India, New Delhi, 2000, para 5.4.1
[79] Draft Report of the Working Group on Competition Policy, constituted by the Planning Commission of India in the context of the 11th Five Year Plan.
[80] Towards a Functional Competition Policy for India, CUTS and Academic Foundation, 2006
[81] Measured by Herfindhal-Hirshchman Index (HHI)

behaviour. The Competition Commission of India will have to keep a watch on behaviour of these dominant firms.

In infrastructure sector, the study reviews competition and regulation scenario in energy, telecommunications, and transportation. There has been little competition in the energy sector but somewhat more in transportation, above all in air transport. Telecommunications, especially mobile telephony has seen great benefits from increased competition.

The airline industry, which was thrown open to private operators in 1994, has witnessed a sea change. The domestic sector is now served by Indian Airlines and private operators: Jet Airways, Air Sahara and Kingfisher, besides some low-cost no-frills carriers, which entered the market in recent years. With the entry of private operators, competition has increased, and airlines are cutting fares and offering other freebies to expand their market share. With the entry of no-frills airlines, competition in the civil aviation sector has entered a new phase.

India's telecommunications network has grown to almost ten times its size in the past one decade and is one of the ten largest in the world. In recent years, the sector has seen significant private sector participation after the government's decision to liberalise and review the policy framework and establish a regulatory body. There has been substantial growth and dramatic expansion in the range of services available, as well as a fall in their prices. The growth has been most dramatic for mobile users.

An effective competition regime and the cooperation arrangement could be useful in tackling abuse of dominance exercised by domestic incumbent firms in either markets.

Cooperation and consultation

In order to face cross-border competition challenges, a well-functioning national competition regime may be necessary but not sufficient. Developing country competition authorities, in general, do not have the resources or the experience to tackle international competition challenges. Cartel cases are notoriously difficult to prove, even for the American and European authorities dealing with companies based in their territories. It will therefore be almost impossible for the CCI to carry out the tedious casework, and conduct necessary investigations leading to prosecution. This calls for having proper cooperation arrangement with competition authorities of other countries to obtain evidence.

Countries have entered into bilateral or regional agreements to deal with such problems. The US, the EU and Canada have signed a number of bilateral agreements with other countries to cooperate in the area of competition law. While the US has agreements with Australia, Brazil, Canada, Germany, Israel, Japan and Mexico, the EU has such an agreement with Canada. Similarly, Canada has signed bilateral agreements with Chile and Mexico. It has also entered into a tripartite cooperation agreement with Australia and New Zealand. Competition provisions can be found in many of the bilateral trade agreements.

The agreements entered into by EU provides the possibility for one competition authority to request the other authority to take ‘appropriate remedial action’ in cases where anti-competitive practices in the territory of the latter party have a harmful effect on the former. The authority receiving the request must carefully consider the views and documents provided by its counterpart. However, this does not prejudice the former’s functions, rights, obligations or independence. Such a request will not restrict the requesting authority from taking action even if it desire to do so.

In terms of cooperation between the competition authorities of the two parties, when the enforcement activities of one competition authority are relevant for the other authority, notification is required in the initial phase of the procedure in order to enable the notified competition authority to express its opinion. This notification must be substantially detailed, allowing for a description of the competition-restricting effects, the market concerned and estimated deadlines for resolution of the case. Further, the agreements stress that notification will be undertaken in case of administrative or judicial proceedings and any measures that may ‘enhance competition in specific-regulated sectors’. Subsequently, the notifying authority ‘should give full and sympathetic consideration’ to the views expressed by the notified authority, though this must be without prejudice to any action under the respective competition laws.

Similarly, such consultations can be requested if one party feels it is adversely affected by anti-competitive practices in the territory of the other party. Hence, the agreements commit the competition authorities of both parties to engage in effective communication (or consultation) on those matters where mutual interests are concerned.

The EU-Mexico Agreement’s emphasis on cooperation and coordination is made clear by Article 7, which is particularly aimed at the prevention of conflicts between the competition authorities (see Box 9.1). In order to promote a better mutual understanding of the respective legal frameworks, the Agreement provides for the exchange of information on known anti-competitive activities and the application of competition laws, legal theory and case law. Technical assistance to be provided by both parties includes the training of officials of both parties’ competition authorities and seminars for civil servants.

Box 9.1: Preventing conflict over competition in the EU-Mexico Agreement

1. Each Party shall […] take into consideration the important interests of the other Party in the course of its enforcement activities.

2. If adverse effects for one Party result, […] the competition authorities shall seek a mutually acceptable solution. In this context, the following may be considered:

a) the importance of the measure and the impact which it has on the interests of one Party, by comparing the benefits to be obtained by the other Party;
b) the presence or absence, in the actions of the economic agents concerned, of the intention to affect consumers, suppliers or competitors;
c) the degree of any inconsistencies between the legislation of one Party and the measures to be applied by the other Party;
d) whether the economic agents involved will be subject to incompatible requests by both Parties;
e) the initiation of the procedure or the imposition of penalties or remedies;
f) the location of the assets of the economic agents involved; and
g) the importance of the penalty to be imposed in the territory of the other Party.

Source: Article 7 of Annex XV of the Global EU-Mexico Agreement

The Indian competition law gives CCI the mandate to engage into cooperation arrangement with other countries. However, as of now, the competition authority cannot do it directly but needs to seek approval of the Government (Section 18, Competition Act 2002). Hence, India may not be averse to having such arrangements with the EU.

India is actively seeking technical assistance in implementing its competition law effectively. However, India might have one problem. Given its capabilities and resources, Indian competition authorities may not be able to respond to the demands of the EU competition authority on information and other requirements. Moreover, as the Indian competition authority will be duty-bound to cooperate with the EU authority, this might lead to devoting a disproportionately larger proportion of its resources in cooperating with the EU, adversely affecting its own enforcement activities.

As mentioned in Annex 3, the global community has been discussing the issue of a possible international framework on competition since the days of the Havana Charter in the late 1940s. And till such time a multilateral framework emerges, bilateral agreements and cooperation arrangements would hold the key. But such cooperation is lacking even between the member countries of the OECD, amongst whom a fair amount of communication and institutional convergence has occurred on antitrust matters. A recent official review has expressed disappointment about restrictions imposed by various members on sharing even non-confidential information obtained in the course of an inquiry[82]. The proposed EU-India FTA could work out the details of the cooperation arrangement to allay such concerns.

[82] OECD (2003), Hard Core Cartels: Recent Progress and Challenges Ahead. Paris.

Competition and Market access barriers to Indian exports

In the case of Indian companies access to EU market, there have been some cases of private barriers to market access. Evidence in this area is not well documented. Nevertheless, a couple of examples may be worth mentioning. Indian traders were not allowed to participate in the Dutch Flower Auction.[83] A more striking example is from a non-EU case: a few years ago, the Swiss Watch Manufacturers Association had prevented the Indian watch manufacturer, Titan (Tata group), from exhibiting their products at the Basle Jewellery and Watch Fair in Switzerland, using the pretext of the then prevailing quantitative restrictions in India, which did not allow them to export to India. Similarly, Tackling restrictive business practices could be one of the issues to be addressed.

One rationale for having competition provisions in the trade agreements is to guarantee a level playing field. Indian companies can already complain to the EC Commission when they encounter anti-competitive behaviour in EU market and get the problem addressed. The EU companies should be able to do the same in the Indian market and have their problem appropriately addressed.

Broader Government policies and competition

Coming to Government Policies, the thrust of economic reforms adopted in India since early 1990s has been to allow for more competition and for the government to play the role of a facilitator rather than the controller of economic activity. However, in spite of this rhetoric, a large overhang and backlog, from the past, persist. As policy outcomes are sought to be generated, it is a persistent practice to do so without bearing in mind that policies need to be framed and implemented in sympathy with the market process, and not in a manner so as to stall the process. There are several such examples: policies in relation to the operation of anti-dumping measures, inverted duty structure, etc[84].

Moreover, the reforms so far have been addressed on a sector by sector basis, without the benefit of a broader policy framework underlining the role of competition in the reform process. Besides the risk of inconsistency in this approach, it is a more difficult route, as the policies have to be negotiated afresh in each sector.

Against this background, the Government of India has taken certain initiatives to rationalise its role vis-à-vis market forces. On the advice of the government, the Competition Commission of India (CCI) has constituted an Advisory Committee to prepare a consultation paper for a National Competition Policy. In addition, the Planning Commission of India has established a Working Group on Competition Policy to formulate the approach towards the 11th Five-Year Plan (2007-2012). The Working Group is required to recommend a set of comprehensive policy instruments and strategic interventions to effectively generate a culture of competition in the domestic market with the involvement of all stakeholders. The Group would also

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[83] See Communication from India at the WTO Working Group on the Interaction between Trade and Competition Policy (WT/WGTCP/W/111)

[84] Mehta, Pradeep S. and Manish Agarwal, "Time for a Functional Competition Policy and Law in India", CUTS, January 2006, www.cuts-international.org/pdf/compol.pdf

recommend ways to enhance the role of competition and competitive markets in government policy making at the central and state levels, and to suggest ways to harmonise relations between the competition authority and sector regulators.

Once adopted, the National Competition Policy would promote coherence in the reforms and establish uniform competition principles across different sectors. The proposed EU-India FTA could take note of this development.

State aid

Some of the EU's bilateral agreements explicitly cover state aid. Competition-distorting state aid is deemed to be incompatible with the agreement, except when it concerns certain agricultural products. State aid is considered to be incompatible with the agreement if it favours certain firms or the production of certain goods, which distorts or threatens to distort competition. However, state aid can be exempted from this provision if it supports a specific public policy objective or objectives of either party. In the EU-Mediterranean Agreements, no precise criteria are defined, in particular on the interpretation of 'specific public policy objectives'. This provision, therefore, seems to leave public authorities considerable leeway to grant state aid. In South African Agreement, however, with regard to 'public policy objectives', Annex IV outlines that, as a general rule, employment, environmental protection, rescue and restructuring of firms in difficulty, research and development, support to firms in deprived urban areas, and training can be considered as such public policy objectives; hence, public support in these areas is deemed compatible with the agreement.

In addition, Annex IX states a number of objectives for which public aid can also be considered as compatible with the agreement: 'regional development, industrial restructuring and development, promotion of the micro enterprises and small and medium-sized enterprises, the advancement of previously disadvantaged persons or affirmative action programmes'.

Transparency must be ensured in the area of state aid: each party is required to report annually on the total amount and distribution of state aid, and parties must provide information requested by the other party. There are also provisions for periodic review of state aids. Such exchange of information, however, would take into account the limitations posed by business or professional secrecy requirements The EU-Mexico Agreement is however quite different in this respect as state aid and transparency, provisions are entirely absent.

In India, state aid is not regulated by competition law. There are several government owned companies both at the national and sub-national levels who are loss making and survive on state aid, popularly referred to as 'budgetary support or subsidies'. They may or may not compete with private companies as some of them are operating in sectors where private companies are non-existent or are not prominent. However, even in sectors where private and government-owned companies are competing, private companies have never raised the issue of budgetary support as a competition problem and such things are generally considered as a matter of government policy. Hence it would be extremely difficult for India to accept state aid as a competition policy issue and accept commitments like South Africa.

The present discussion on National Competition Policy includes a provision to screen state subsidies on the basis of competition principles. It has been suggested that any deviation from the principles of competition should be only to meet desirable social or other national objective, and should be clearly spelt out.

One complexity might arise on the issue of agricultural subsidy. In India subsidies to farmers are not given directly to them. As the number of farmers in India is quite huge, it becomes impossible to give the support directly as it would involve huge administrative costs. Hence, the government provides them subsidized inputs, particularly fertilizers and electricity. The EU might consider them as non-agricultural subsidies but India may want them to be treated as agricultural aids

State enterprises

As for discrimination against third parties in favour of state monopolies of a commercial character', most of the EU FTAs stipulate that such discrimination should be eliminated after a transitional period of five years. Within the same timeframe, no measures that disturb trade by granting special or exclusive treatment to (public) enterprises shall be adopted or maintained. As for India, it may be difficult to accept a ban on state monopolies at least for the time being due to political reasons.

Annex 3 mentions the role of State Trading Enterprises as canalizing agencies for certain restricted products. These enterprises operate on the basis of commercial considerations. For instance, the State Trading Corporation of India Ltd. (STC), a premier trading house owned by the Government of India, made a net profit of USD8.8mn on a turnover of USD1608mn in the year 2005-06. In case of edible oils, which are one of the major activities of STC, the corporation invites offers for the indented oils, negotiates the best possible terms and finalises the deal with the consent of the buyers as per their requirement. In an interview to a leading business daily[85], the Chairman-cum-Managing Director of STC, Dr Arvind Pandalai, said, "In the medium- to long-term, with so much competition and the market opening up, the trading scenario is going to change. Unless we prepare ourselves through value-addition in trading operations, nobody is going to come to us".

It may be noted here that such enterprises come under the purview of the Indian Competition Act, 2002. The Act covers state owned enterprises and government departments engaged in non-sovereign commercial activity. It does not include activities carried on by government departments dealing with atomic energy, currency, defence and space.

[85] Srinivasan, G., "State Trading Corporation Set for a Makeover", Business Line, May 16, 2005

9.2 Proposed Possible Changes

The following changes could be made in the Indian competition regime.

- The Indian competition law gives a mandate to engage into cooperation arrangement with other countries. However, as of now, the competition authority cannot do it directly but needs to seek approval of the Government. This seems a restrictive provision. CCI could instead be allowed to enter into cooperation arrangement on its own.
- The signing of an agreement with the EU could provide an opportunity for India to examine the relationship between its competition policy and trade policy.

9.3 Possible Benefits and Costs

A brief analysis of benefits and costs are given below.

Benefits

- Several international anti-competitive practices (e.g. cartels) had an impact on relevant market in India, but the MRTP Commission (the outgoing competition authority) failed to take any action, resulting in huge losses to consumers, business and the economy. An effective cooperation and information exchange arrangement would help the Competition Commission of India (the new competition authority) in taking appropriate action against enterprises engaged in anti-competitive practices with an impact on India.
- An effective competition regime and the cooperation arrangement could be useful in tackling abuse of dominance exercised by incumbent firms.
- Tackling restrictive business practices could be one of the issues to be addressed.

Costs

- Developing country competition authorities, including India, do not have the resources or the experience to tackle international competition challenges. This calls for substantial capacity building efforts, which would require significant resources.
- Given its capabilities and resources, Indian competition authorities may not be able to respond to the demands of the EU competition authority on information and other requirements. Moreover, as the Indian competition authority will be duty-bound to cooperate with the EU authority, this might lead to devoting a disproportionately larger proportion of its resources in cooperating with the EU, adversely affecting its own enforcement activities.
- The capacity of CCI and other government agencies needs to be augmented in order to deal with the issue of predatory pricing in an appropriate manner.

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