

CARIS

Centre for the Analysis of
Regional Integration at Sussex

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

Annex 3: Regulatory Issues

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	5
INTRODUCTION.....	7
1 GOVERNMENT PROCUREMENT	8
1.1 BACKGROUND.....	8
1.1.1 <i>Divergence of the Indian system from WTO disciplines on procurement.....</i>	8
1.1.2 <i>Specific procurement-related issues in India.....</i>	9
1.2 ESTIMATES OF GOVERNMENT PROCUREMENT IN INDIA	9
1.2.1 <i>Literature review</i>	9
1.2.2 <i>Estimates for this study.....</i>	10
1.3 GOVERNMENT PROCUREMENT PROCEDURES AND PRACTICES IN INDIA	13
1.3.1 <i>Procurement System for the Central Government</i>	14
1.3.1.a Tendering procedures.....	14
1.3.1.b Criteria for award.....	14
1.3.1.c Preferences.....	15
1.3.1.d Dispute Settlement.....	16
1.3.2 <i>State level procurement (broadly similar for all states except Bihar).....</i>	16
1.3.2.a Case study of Himachal Pradesh.....	16
1.3.2.b Preferential Treatment.....	17
1.3.2.c Tendering Procedures.....	17
1.3.2.d Dispute Settlement Mechanism.....	17
1.3.3 <i>Indian Railways</i>	17
1.3.3.a Procurement policy and procedures	18
1.3.3.b Preferential Treatment.....	18
1.4 INDIA'S POSITION VIS-A-VIS AN AGREEMENT ON GOVERNMENT PROCUREMENT	19
2 SERVICES	20
2.1 BACKGROUND.....	20
2.1.1 <i>Multilateral disciplines in services and provisions for RTA.....</i>	20
2.1.2 <i>EU-India interests in services.....</i>	21
2.2 INDIA'S REVISED OFFER IN SERVICES	21
2.2.1 <i>India's GATS Commitments and Revised Offers in terms of Article V of the GATS.....</i>	22
2.2.1.a Methodology.....	24
2.3 HOW IS POLICY MADE ON SERVICES?	25
2.4 EUROPEAN INTERESTS IN INDIA'S SERVICES AND HORIZONTAL BARRIERS.....	28
2.4.1 <i>Regulatory weaknesses</i>	28
2.4.2 <i>Barriers to European service providers in India: Sector-specific constraints</i>	29
2.4.2.a Significantly liberalized sectors	30
2.4.2.a.1 Computer and related services ("CRS").....	30
2.4.2.a.2 Telecom	31
2.4.2.b Moderately liberalized sectors with a few explicit barriers.....	31
2.4.2.b.1 Construction.....	31
2.4.2.b.2 Health	33
2.4.2.b.3 Banking & other financial services.....	34
2.4.2.b.4 Insurance.....	35
2.4.2.b.5 Distribution.....	36
2.4.2.b.6 Education.....	36
2.4.2.c Closed sectors	37
2.4.2.c.1 Legal.....	37
2.4.2.c.2 Accountancy	38
2.5 INDIA'S INTERESTS IN SERVICES AND ASSOCIATED BARRIERS	40
2.5.1 <i>Mode 1.....</i>	40
2.5.2 <i>Mode 4.....</i>	41
2.5.3 <i>Mode 2.....</i>	42

2.5.4	<i>Mode 3</i>	42
2.5.5	<i>Impact of domestic regulations in the EU</i>	43
3	INVESTMENT	44
3.1	BACKGROUND.....	44
3.1.1	<i>What are WTO rules that an RTA takes as departure?</i>	44
3.1.2	<i>What issues have surfaced in EU-India relations?</i>	44
3.2	DATA.....	45
3.2.1	<i>FDI Trends</i>	45
3.3	PROCEDURES AND PROCESSES IN INDIA.....	47
3.3.1	<i>Issues Related to the Indian FDI Regime</i>	47
3.3.1.a	Policies.....	47
3.3.1.b	Procedures.....	49
3.3.2	<i>Investment Attractiveness of Indian States</i>	52
3.3.2.a	Perceptions.....	55
3.3.3	<i>India's Bilateral Investment Treaties</i>	55
3.4	THE WAY FORWARD.....	57
4	TRADE FACILITATION	59
4.1	BACKGROUND.....	59
4.1.1	<i>Multilateral rules on trade facilitation</i>	59
4.1.2	<i>Key issues of concern to the EU in trade facilitation in India</i>	60
4.2	DATA.....	60
4.3	CUSTOMS PROCEDURES.....	61
4.4	THE WAY FORWARD.....	62
5	TRADE DEFENCE	64
5.1	BACKGROUND.....	64
5.1.1	<i>Multilateral rules on trade remedies</i>	64
5.1.2	<i>Trade defence issues in EU-India relations</i>	64
5.2	ANTI-DUMPING IN ACTION.....	65
5.3	FRAMEWORK FOR ANTI-DUMPING AND COUNTERVAILING MEASURES.....	68
5.3.1	<i>National Law</i>	68
5.3.2	<i>Designated Authority</i>	68
5.3.2.a	DGAD.....	68
5.3.3	<i>Import data in trade defence investigations:</i>	69
5.3.4	<i>Dissemination of information on trade defence laws and procedures</i>	69
5.4	SUBSIDIES AND CVD.....	69
5.5	THE WAY FORWARD.....	71
6	STANDARDS	72
6.1	BACKGROUND.....	72
6.1.1	<i>What are WTO rules that an RTA takes as departure?</i>	72
6.1.2	<i>What issues have surfaced in EU-India relations?</i>	72
6.2	DATA.....	73
6.3	PROCEDURES AND PROCESSES IN INDIA.....	73
6.3.1	<i>Work on Standards in India</i>	73
6.3.1.a	Domestic Standards.....	74
6.3.1.a.1	Agencies Responsible for Standards.....	74
6.3.1.b	Standard for Food.....	81
6.3.1.c	Exports Regime.....	82
6.3.1.d	Imports Regime.....	85
6.4	THE WAY FORWARD.....	93
7	INTELLECTUAL PROPERTY RIGHTS	94
7.1	BACKGROUND.....	94
7.1.1	<i>What are WTO rules that an RTA takes as departure?</i>	94

7.1.2	<i>What issues have surfaced in EU-India relations?</i>	94
7.2	DATA	94
7.3	PROCEDURES AND PROCESSES IN INDIA	96
7.3.1	<i>Legislation</i>	96
7.3.2	<i>Implementation</i>	97
7.3.2.a	Indian Pharmaceutical Companies and Patents	97
7.3.2.b	Compulsory Licensing	98
7.3.2.c	Data Protection and Data Exclusivity	99
7.3.2.d	Pre-grant Opposition	100
7.3.2.e	Copyrights and Piracy	100
7.3.2.f	Geographical Indications.....	101
7.3.2.g	Traditional Knowledge, TRIPS and Conventions of Biodiversity (CBD).....	101
7.4	THE WAY FORWARD	101
8	COMPETITION POLICY.....	102
8.1	BACKGROUND.....	102
8.2	PROCEDURES AND PROCESS IN INDIA	102
8.3	ISSUES FOR POSSIBLE NEGOTIATION	104
9	REFERENCES.....	105
10	APPENDIX.....	109

LIST OF TABLES

Table 1.1: Estimates of government procurement in India.....	10
Table 1.2: Estimates of government procurement in India subject to international competitive bidding	10
Table 1.3: Estimates of government procurement in India from UNSNA subject to international competitive bidding	12
Table 2.1: Analysis of India’s GATS commitments, Revised Conditional Offer and Autonomous Liberalization	23
Table 2.2: India’s autonomous policy on services.....	26
Table 2.3: Snapshot of regulatory requirements	29
Table 3.1: FDI Inflows between January 2000 and July 2006, and share of countries from the EU in Top Ten (US\$ Million).....	45
Table 3.2: Region-wise Breakdown of FDI Inflows between January 2000 and July 2006	46
Table 3.3: Foreign Direct Investment Approvals and Inflows in India (1991-1992 to 2004-2005).....	47
Table 3.4: FDI Procedures and Agencies Involved at State Level	51
Table 3.5: India’s Bilateral Investment Treaties.....	57
Table 4.1: Snapshot of customs procedures.....	61
Table 5.1: Analysis of anti-dumping investigations	65
Table 5.2: Analysis of anti-dumping duties imposed by product.....	66
Table 5.3: ADD imposed overtime – EU and Total	66
Table 6.1: The Coverage of the BIS on Standards Setting	75
Table 6.2: Management Systems Certification Operated by the BIS:.....	76
Table 6.3: Accreditation Bodies under the Quality Council of India	78
Table 6.4: Important Ministries and Laws on Standards and Quality in India	80
Table 6.5: Certification by the EIC for exports	83
Table 6.6: Import of Products Banned to Prevent Avian Flu	92
Table 7.1: Comparative Trend of IPRs Granted	95
Table 7.2: Yearly Trend in Patent Applications	95
Table 7.3: Patent Filings by Residents, Levels and Growth 1995 and 2004	96
Table 10.1: FDI Limits and Conditions in Particular Manufacturing and Infrastructure Sectors.....	109

LIST OF ABBREVIATIONS

ADD	Anti-dumping Duty
AICTE	All India Council of Technical Education
B2B	Business to Business
BCI	Bar Council of India
BPO	Business Process Outsourcing
CECA	Comprehensive Economic Cooperation Agreement
CEO	Chief Executive Officer
CII	Confederation of Indian Industries
CPC	Central Product Classification
CRS	Computer and Related Services
CVD	Countervailing Duty
DGAD	Directorate General of Anti-dumping and Allied Duties
DGCI&S	Directorate General of Commercial Intelligence & Statistics
DGS&D	Directorate General of Supplies and Disposal
EDI	Electronic Data Interchange
EEA	European Economic Area
EU	European Union
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act
FII	Foreign Institutional Investment
FIPB	Foreign Investment Promotion Board
FSP	Foreign Service Provider
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GFCE	Gross Fixed Consumption Expenditure
GFR	General Financial Rules
GICI	General Insurance Corporation of India
GPA	Agreement on Government Procurement
HP	Himachal Pradesh
ICAI	Institute of Chartered Accountants of India
ICB	International Competitive Bidding
ICWAI	Institute of Chartered and Work Accountants of India
IMF	International Monetary Fund
IRDA	Insurance Regulatory and Development Authority
IT	Information Technology
ITES	IT-enabled services
JV	Joint Venture
LICI	Life Insurance Corporation of India
MA	Market Access
MFN	Most Favoured Nation
MRA	Mutual Recognition Agreement
NASSCOM	National Association of Software and Service Companies

NIC	National Informatics Centre
NPA	Non-performing Assets
NSIC	National Small Industries Corporation
OBS	Other Business Services
OECD	Organization of Economic Cooperation and Development
PCY	Per Capita Income
PMO	Prime Minister's Office
PSE	Public Sector Enterprise
QAG	Quality Assurance Group
RBI	Reserve Bank of India
RC	Rate Contract
RDSO	Research Design & Standards Organization
RITES	Rail India Technical & Economic Services
RMS	Risk Management System
RTA	Regional Trade Agreement
RTI	Right to Information Act
SAR	South Asia Region
SEBI	Securities and Exchange Board of India
SME	Small and Medium Enterprise
SSI	Small Scale Industry
TRAI	Telecom Regulatory Authority of India
TUPE	Transfer of Undertakings and Protection of Employees
UGC	University Grants Commission
UK	United Kingdom
ULCRA	Urban Land (Ceiling & Regulation) Act
UN	United Nations
UNCTAD	United Nations Conference on Trade & Development
US	United States
USD	United States Dollar
USO	Universal Service Obligations
USTR	United States Trade Representative
WB	World Bank
WHO	World Health Organization
WTO	World Trade Organization

Introduction

In this annex we elaborate in more detail the cases examined in part 3 of the main report. In each section we review the background, including WTO disciplines already in place and the scope for preferential arrangements, and we discuss bilateral issues that have arisen between the EU and India. Our main focus however is not to enumerate differences of position but rather to provide an analytical account of the rules and processes that give rise to Indian policy and practices in each area. We conclude with a discussion of possible areas for negotiation. The intention is to avoid speculating on the feasibility of this, as this aspect is covered in part 4 of the report and then in detail in Annex 4.

1 Government procurement

1.1 Background

Public procurement policies refer to the government's purchasing of goods and services through spending taxpayers' money. They need to be designed in such a way that this money is spent transparently, efficiently and equitably. Given its significance, countries have attempted to formulate international disciplines on public procurement in the past and continue to do so today. These measures include efforts undertaken by the EC as a part of its internal market reform and deregulation programmes, disciplines already present and those being negotiated in various regional trade agreements amongst trading partners, and the non-binding proposals of the APEC and the UNCITRAL Model Law (United Nations Commission on International Trade Law). Arguably, the most important of such initiatives has been the WTO's plurilateral Agreement on Government Procurement ("the GPA")¹.

1.1.1 Divergence of the Indian system from WTO disciplines on procurement

The major differences in India's procurement policy *vis-à-vis* the GPA are those with respect to national treatment, transparency, and challenge and review provisions. With a number of preferences still in place, India's policies are at odds with the requirements of Article III of the GPA, which basically calls for national treatment in the award of contracts. Although Article V provides some flexibility to developing countries, and exclusions are possible, the long-term objective of the GPA is to do away with any kind of preferential treatment in purchases. To promote greater transparency in transactions, Article XVIII requires that information on winning contracts be made public. It also makes it mandatory for each entity, on request, to provide pertinent information concerning the reasons for rejection and the characteristics and relative advantages of the successful bidder. This is a major problem area because India's procurement policies do not have any such provision, though the over-arching Right to Information Act² has just been put in place. Furthermore, the GPA lays down a detailed bid challenge procedure in Article XX, which has no parallel in the existing rules and procedures in India, as there is no independent adjudicating authority, and the concerned department generally deals with the disputes itself. Of course, an aggrieved party always has access to a regular court of law but legal justice is not easy to come by.

1 The key provisions of the GPA are available at http://www.wto.org/english/tratop_e/gproc_e/over_e.htm.

2 The Right to Information Act 2005 is a law enacted by the Parliament of India giving Indians access to government records. Under the terms of the Act, any person may request information from a "public authority" (a body of government or instrumentality of State) which is expected to reply expeditiously or within thirty days. The Act also requires every public authority to computerise their records for wide dissemination and to proactively publish certain categories of information so that the citizens need minimum recourse to request for information formally. This law was passed by Parliament on June 15, 2005 and came into force on October 13, 2005. Information disclosure in India was hitherto restricted by the Official Secrets Act, 1923 and various other special laws, which the new RTI Act now overrides.

1.1.2 Specific procurement-related issues in India

Unlike the EU, however, India is not a signatory to the WTO's Agreement on Government Procurement and is thus not subject to the latter's disciplines. "*Indian government procurement practices and procedures are non-transparent. Foreign firms rarely win Indian government contracts due to the preference afforded to state-owned enterprises in the award of government contracts and the prevalence of such enterprises.*" (USTR Trade Barriers Report with respect to India, 2006, p.6). As learnt from our comprehensive database on non-tariff barriers, non-transparency and burdensome bidding procedures, lack of national treatment and the absence of a formal bid challenge procedure are the main issues that have affected European bidders in the award of government contracts in India, especially in the cases of energy, environmental and dredging services for shipping.

1.2 Estimates of Government Procurement in India

1.2.1 Literature review

There is no documented evidence of foreign involvement in government procurement in India. Moreover, few estimates are available for the total value of government procurement in India and these involve different methodologies and sets of data, which explains the discrepancies in them. According to Srivastava (2003), total value of purchases by the central and state governments and public enterprises, which could in principle be subject to international competitive bidding, varies between 3.4 and 5.7% of GDP. Such procurement practices could result in cost savings in central government purchases to the tune of about US \$ 1.7 billion (0.36 percent of GDP). The figure would increase to US \$ 2.2 billion (0.48 percent of GDP) if state governments were included and close to US \$ 8.2 billion (1.76 percent of GDP) if all public enterprises were included. Khurana (2001) estimates that government procurement would be 3.85% of GDP at current prices for 2002-2003. India's Trade Policy Review (June 2002), done by the WTO Secretariat, states "In 2000/01 the estimated value of purchases by the central government procurement agency, the Directorate General of Supplies and Disposals (DGS&D) was Rs. 32.8 billion (around US\$0.8 billion); additional procurement by ministries of central and state governments as well as public sector enterprises was estimated at around Rs. 23.1 billion (approximately US\$0.6 billion) for the year 2000/01." These amounts were 0.2 and 0.1%, respectively, of India's GDP in current USD in 2001.

Table 1.1: Estimates of government procurement in India

Purchase of goods and services (Rs. bn) by:	1998-99	1999-00	2000-01
Central government	140.8	128.2	186.4
Railways	n.a.	113.7	133.3
Telecom	81.2	100.0	124.8
State government	159.8	195.4	210.5
PSEs	1369.3	1533.7	1717.5
Total	1751.2	2071.0	2372.5
Share of GDP (%)	10.0	11.9	13.6

Source: Srivastava (2003)

Table 1.2: Estimates of government procurement in India subject to international competitive bidding

Consolidated GP estimates s.t. ICB (Rs. bn)	1998-99	1998-99	1999-00	1999-00	2000-01	2000-01
	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
Central government	42.3	70.4	38.5	64.1	55.9	93.2
Railways	36.4	72.7	37.9	75.8	44.4	88.9
Telecom	27.1	54.1	33.4	66.7	41.6	83.2
State government	32.0	63.9	39.1	78.2	42.1	84.2
PSEs	431.1	664.4	482.8	744.1	545.3	828.8
Total	610.0	1003.9	676.3	1114.3	784.5	1283.1
Share of GDP (%)	3.5	5.7	3.5	5.7	3.6	5.9

Source: Srivastava (2003)

1.2.2 Estimates for this study

Information on the size of public procurement in developing countries like India can be gleaned from government expenditure figures for them, available from the national budget documents. Such data is also tabulated by the IMF's Government Finance Statistics, the OECD and the UN's Standard National Accounts. All these provide data on government consumption and investment expenditures, which can be processed to yield some estimates of public procurement in these markets and the amount that could be subject to GPA rules, and hence to international competition.

This has been attempted in this section using the UN Standard National Accounts and the data therein from 1992 to 2003. Total government expenditure that includes government's consumption expenses as well as investment or gross capital formation provides an upper bound of government expenditure on goods and services. This amount is then adjusted to exclude estimates of defence expenditure, compensation of employees, expenses on items like interest payments, subsidies, debt write-offs, welfare payments, grants and loans and payments to international organizations like the IMF.

It is important to note that this entire amount is not directly translatable into an estimate of the procurement market that could be opened up to international competition. To begin

with, the entire amount would not be subject to the rules of the GPA; in addition not all government contracts are above GPA-specified thresholds.

In view of the above, a range of estimates is provided for government procurement that could be opened up to international competitive bidding. The first of these is at the historical 5% share of total government expenditure for developed countries during 1983-92 as demonstrated by Bernard Hoekman (1997)³ in his study of these economies during this time period. The second simulation is 15% of total government expenditure that corresponds to the figure for Japan, Norway and the US during 1996-2002 as found out by Evenett and Shingal (2006)⁴ in their study of Japanese procurement patterns and by Shingal (2005)⁵ in his work on public procurement of services. Finally, there is an upper bound of 20% derived from a theoretical maximum that governments can spend on average.

³ Hoekman, Bernard (1997). 'Operation of the Agreement on Government Procurement, 1983-92' in Bernard Hoekman & Petros Mavroidis ed. 'Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement,' University of Michigan Press.

⁴ Evenett, Simon & Shingal, Anirudh (2006). 'Monitoring Implementation: Japan and the WTO Agreement on Government Procurement,' in *Economic Development & Multilateral Trade Cooperation*, The World Bank.

⁵ Shingal, Anirudh (2005). 'Services under the WTO's Agreement on Government Procurement.' ESRC Workshop on Trade in Services, University of Sussex.

Table 1.3: Estimates of government procurement in India from UNSNA subject to international competitive bidding

Value of govt. expd. In India (100s of mn of Rs.)	1992	1993	1994	1995	1996	1997	1998	1999	2000
A. General GFCE	6490.5	7665.9	8514	10059.6	11333.8	13355.5	16793.1	19980.8	21021.9
B. Defence	2103.2	2539.5	2700.5	3104.6	3448.9	4162.1	4941.6	5582	6239.8
C. Social protection	218.1	279.2	324.1	359.1	405.7	472.3	587.5	692.1	692.7
GP estimate [A – (B + C)]	4169.2	4847.2	5489.4	6595.9	7479.2	8721.1	11264	13706.7	14089.4
Value of GP market in India (USD bn)	16.1	15.9	17.5	20.3	21.1	24.0	27.3	31.8	31.4
Share of GDP (%)	6.6	5.8	5.4	5.7	5.5	5.9	6.6	7.1	6.9
Value for ICB (USD bn): Historical share for developed countries (1983-92) @ 5%	0.8	0.8	0.9	1.0	1.1	1.2	1.4	1.6	1.6
Value for ICB (USD bn): Historical share for Japan, Norway and the US (1996-2002) @ 15%	2.4	2.4	2.6	3.1	3.2	3.6	4.1	4.8	4.7
Value for ICB (USD bn): Upper bound @ 20%	3.2	3.2	3.5	4.1	4.2	4.8	5.5	6.4	6.3

Source: UN Standard National Accounts; Own calculations

1.3 Government Procurement Procedures and Practices in India

In principle, the government procurement system in India is set up to ensure the purchase of good-quality products in the most economic and efficient manner. The procurement policy is expected to allow the maximum level of competition among bidders and to make the processes of bidding and decision-making transparent, competitive and fair to secure the best value for money. However, as learned from interviews with EU Member delegations conducted in New Delhi, government purchases are often the subject of controversies.

Procurement occurs at various levels of government in India which include the central government, the state governments, and the three tiers of local government-village, intermediate, and districts. Additionally, there are the centrally and state-owned enterprises. There is, however, no single uniform law governing procurement by all of these government entities and even where laws are identical, systemic procedures differ making way for discretion in the award of contracts.

The general principles governing procurement by the central government are laid down in the General Financial Rules (“GFRs”) of the Ministry of Finance⁶ and the purchase procedures followed by various government departments have evolved in line with these general principles. The Directorate General of Supplies and Disposal (“DGS&D”) under the aegis of the Department of Supply is the central purchasing organization of the Government of India. Decentralization in the 1970s restricted the role of the DGS&D to finalizing rate contracts for “common use” items. Since then, the role of the DGS&D has declined gradually and, even in nominal terms, purchases by the directorate have fallen over time. Moreover, other ministries and departments and departmental undertakings have been delegated powers enabling them to make their own purchases. Analogously, the procedures followed by state governments are based on the states' financial rules and a number of states have the equivalent of a central-stores purchasing organization.

The GFR has been revised recently in 2005 and restrictions on imported goods and inviting bids from abroad have been removed. The bidding system has now been laid down clearly and is in line with the World Bank-ADB rules on procurement⁷. The Right to Information Act (RTI) has also been passed. Each state has procurement rules based on the GFR (1961) and in that they are broadly the same, though as in the case of investment, the procedures may differ. Only Bihar has changed its procurement rules in

⁶ GFR (2005)

⁷ The World Bank works to ensure that procurement in projects financed by the International Bank for Reconstruction and Development (IBRD) and/or the International Development Association (IDA) is conducted in accordance with its Articles of Agreement. These Articles require the Bank to make arrangements to ensure that loan proceeds are used only for the purposes for which the loan was granted. They also require proper attention to be paid to economy and efficiency. Political and other non-economic influences or considerations must not influence procurement in Bank projects. Detailed procurement guidelines are available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement-May-2004.pdf>. The procurement guidelines of the ADB can be accessed at <http://www.adb.org/Documents/Guidelines/Procurement/guidelines-April-2006.pdf>.

line with GFR (2005) and the rest of the states have yet to follow suit. Interviews with procurement officials have revealed that negotiations between the procuring entity and the bidder are not allowed under GFR, 2005. State procurement rules have minor changes but by and large these are the same as those at the Centre.

1.3.1 Procurement System for the Central Government

1.3.1.a Tendering procedures

A tender can be invited in different ways - based on advertisements (open tender), direct invitation to a limited number of firms (limited tender), invitation to one firm only (single tender), and negotiation with one or more firms. Tender notices are publicized through the *Indian Trade Journal*, a monthly bulletin issued by the DGS&D, and are also available on the NIC-NET of the National Informatics Centre (NIC). For global tenders, notices are also published or disseminated through Indian embassies or foreign embassies in India. In the case of the railways, all tenders above a value of Rs. 0.5 million are invited by open advertisements in national newspapers.

Purchase of goods up to Rs. 15,000 in value on each occasion can be made without inviting bids or quotations. For purchases between Rs. 15,000 and Rs. 100,000, recommendations of a duly constituted Local Purchase Committee, comprising three members of an appropriate level decided by the Head of the concerned Department, are needed. The minimum threshold for an open tender is Rs. 2,500,000 and the time allowed for response is 3 weeks from the date of publication of the tender notice and 4 weeks for both domestic and foreign bidders, when bids are expected from abroad. Limited tender enquiry is adopted for purchases less than Rs. 2,500,000 in value. The number of firms in this bid should be more than 3, the limited tender should be publicized on the web and efforts should be made to identify a higher number of approved suppliers to obtain more responsive bids on a competitive basis. Limited tendering may be solicited even for purchases exceeding Rs. 2,500,000 in cases of urgent demand, where sources of supply are definite and known, and when an advertised bid is not in the public interest. High value purchases of plants and machinery warrant both a technical and a financial bid. Single tendering is allowed in the event of an emergency, for standardization of machinery or spare parts and when only a particular firm can manufacture the goods required.

1.3.1.b Criteria for award

Procurement specifications are comprehensive and drafted on the basis of national/international standard specifications. There is a well-defined registration procedure to establish "reliable and regular sources" of supply for government purchases. The DGS&D registers firms interested in government purchases as approved contractors for supply of stores of various descriptions in what are called Rate Contracts ("RC"). Such registered suppliers are *prima facie* eligible for consideration for procurement of goods through Limited Tender and are ordinarily exempted from bid security requirements. This registration is for a fixed period that varies between 1 and 3 years, depending on the nature of the good. A fresh application is required at the end of this

period. Performance and conduct of every registered supplier is monitored by the concerned Ministry/Department and they can be removed from the registered list for failure to abide by terms and conditions, for delay in supplying goods/for supplying sub-standard goods or for making false declarations not in public interest. Even Indian agents who desire to quote on behalf of their foreign principals need to enlist themselves with the DGS&D. Similarly, the National Small Industries Corporation (“NSIC”) registers interested firms in the small-scale sector, and the Indian Railways also has an analogous registration procedure.

Private sector firms thus need to be registered with DGSD, NSIC, Indian Railways or the Ministry of Defence (depending on the procuring entity) before they can be considered for Rate Contracts (“RC”)⁸. Public Sector Enterprises (“PSEs”) do not, however, need to be registered to be in contention for RC. The Quality Assurance Group (“QAG”) within DGSD ascertains the technical feasibility and the quality of products manufactured before considering firms’ eligibility. DGS&D determines the market prices of the goods that need to be procured and once the bids are made, if the price quotations fall within the determined range of market prices, then the corresponding firms are awarded the RC. Once the RC price has been fixed, if prices for the products are found fluctuating, then an automatic upward or downward re-adjustment clause is built into the contract. The primary motivation for procurement undertaken by DGS&D is to promote the diversification of suppliers and give an opportunity to new suppliers. Cost is a secondary concern, provided the price quote falls within the range of market prices. Defence, food and services procurement are **not covered** by DGS&D; the concerned ministries and departments are directly responsible for their procurement. Once firms have been awarded the RC, the actual procurement is the responsibility of the government official in the concerned department and this paves the way for discretion, even though criteria like location of the firm, timely delivery of product, etc. are always important.

The nature of the product that needs to be procured, the extent of domestic competition in it and the value of contract determine if the tender would go global. Foreign firms have, by and large, been excluded from the procurement process so far with the exception of Information Technology contracts. If a foreign firm has a testing facility in India, then the QAG from DGS&D can ascertain the technical feasibility of their products and they can then be in contention for RC. Foreign collaborations and joint ventures (“JVs”) based in India and set-ups with imported products are also included in this process and the RC in this case is determined in the same way as above. A list of such set-ups registered with DGS&D is available from their website <http://www.dgsnd.gov.in/>.

1.3.1.c Preferences

According to the Indian government, "domestic bidders are treated on par with foreign bidders and the ultimate price available to the user department is the determining criterion⁹." However, some preferential treatment is allowed to encourage the small-scale sector, village industries, certain kinds of women's organizations, and public enterprises. In fact, such preferential treatment discriminates against domestic as well as foreign firms

⁸ Source: Interviews conducted with procurement officials in DGS&D.

⁹ Srivastava (2003), op. cit.

not belonging to these categories and, in that sense it does not violate national treatment. There are no price preferences in this procurement, only purchase preferences accorded to both SMEs and PSEs, even as the government intends to eliminate them for PSEs altogether. Certain items, however, are reserved for Small Scale Industries (“SSIs”) such that non-SSIs cannot participate in their procurement and submit bids. Beyond that, however, even within SSIs, the RC is determined by minimum price alone subject to the market price range. Moreover, like the public sector, the small-scale sector is exempted from the payment of earnest money and tender fees. In general, purchases by DGS&D from the small-scale sector are about 8-10 percent of the directorate's total purchases.

1.3.1.d Dispute Settlement

Regular interaction through meetings is maintained with suppliers and bidders to get necessary feedback and also to remove the grievances of the suppliers. The primary objective is to provide "guidelines and counseling" in all procedural and contractual matters pertaining to DGS&D procurement. The grievances relating to delays in action concerning purchases and inspection are resolved. There is also a Standing Review Committee functioning under the DGS&D. Unresolved issues pertaining to contracts are settled through arbitration, which is part of the general conditions of the contract.

Interviews conducted with private sector stakeholders have revealed that dispute resolution assumes much significance in the award of construction sector contracts as there are frequent and long delays in getting justice. Moreover, there is no provision for a bid challenge procedure anywhere in the system, which is a major problem. Recourse to High Courts is provided to the bidder through Article 226 of the Indian Constitution but legal jurisprudence in India is in accordance with “best value for money” rather than the lowest bid and in any case, subject to frequent delays. The Courts intervene only on process and transparency issues and are reluctant to interfere in the award of procurement contracts unless they are convinced of violations of the principles of natural justice. Thus, arbitration procedures would need to be the most clearly defined and laid out in this FTA.

1.3.2 State level procurement (broadly similar for all states except Bihar)

While the rules governing procurement at the state level are broadly similar with the exception of Bihar, there is wide variation in the standard of government procurement procedures. Some of the more advanced states like Karnataka and Tamil Nadu have introduced legislation on transparency, which puts them ahead of the central government. Others like Uttar Pradesh have procurement practices that reflect their generally lower quality of governance.

1.3.2.a Case study of Himachal Pradesh

Government purchases in Himachal Pradesh (“HP”) are governed by the "Procedures and Rules for the Purchase of Stores by all Departments and Offices of the Government of Himachal Pradesh," which are published as an appendix to the HP financial rules. The purchase of stores by all departments is generally made through a central agency called the Himachal-Pradesh Stores Department. As in the case of the DGS&D, the Stores Department enters into rate contracts for articles of common use.

1.3.2.b Preferential Treatment

There is a preference for stores produced and manufactured wholly or partially in India in general and in HP particularly. Up to some pre-determined limit, the rules favor products of cottage and small-scale industries in HP over manufactured goods of large-scale industries of equal standard, even if the price of the former is higher. A 15 percent price preference is given to products of cottage industries and small-scale industrial units located in the state, whereas the corresponding figure for medium- and large-scale industrial units in the state is 3 percent. Items manufactured by government enterprises can be purchased directly by the concerned departments, provided these are not manufactured by any cottage or small-scale industries within HP. In general, a preference is given to HP over other states and to articles of domestic origin over those of foreign origin. Articles manufactured abroad, with a preference to Commonwealth countries, are imported only when suitable Indian products are not available.

1.3.2.c Tendering Procedures

Limited tenders are invited for meeting urgent requirements only. The emergency must be established and certified by the procuring office. These tenders can be invited only for indents of less than Rs. 10,000 and they require submission of tenders by at least six suppliers. For indents greater than Rs. 10,000 in value, tenders are invited through advertisement in local and national newspapers. A period of three weeks from the date of publication is assigned for the receipt of tenders, except in the case of urgent demands when the period may be reduced to two weeks. The single-tender system is used in the case of articles of proprietary nature that are available from only one source. When accepting tenders other than the lowest, approval from higher authorities has to be sought.

1.3.2.d Dispute Settlement Mechanism

There is a provision for a bidder to make an appeal against the award of a rate contract to the Secretary (Industry) or any other authority as notified by the government. After the contract has been awarded, all disputes arising with respect to the contract or the rights and liabilities of the parties involved can be referred for arbitration to an officer appointed by the Government of Himachal Pradesh. The decision of the arbitrator is final and binding on the parties.

In sum, state level procurement broadly differs from that at the Centre in terms of having much lower threshold limits for open tenders and in terms of the system of preferences. Price preferences still exist at the state level for industrial units (both small and large) and for products of the concerned state while these have been done away with completely at the Centre, where only purchase preferences exist and those too only for small-scale units and village enterprises. Dispute settlement bodies are also different in the states even as the procedures are broadly similar.

1.3.3 Indian Railways

Due to its large procurement operations (as evident from Section 2 above), the Ministry of Railways has always functioned independently of the Department of Supply. Barring rails and rail fittings, the procurement of which is handled by its Civil Engineering Department, the Stores Department within the Ministry of Railways is responsible for

procurement of all goods. The Civil Engineering Department also handles the procurement of civil engineering works; the responsibility for electrical works lies with the Electrical Engineering Department and the Signal and Telecommunications Department handles signalling and telecommunications works. Purchases are made through competitive bidding and procurement has largely been delegated to the field units. Different contract systems include rate contract, running contracts and spot purchases. High value tenders are awarded through competitive bidding. Every tender is now published on the website. There are well laid-out payment procedures. Procurement is in compliance with the guidelines of the Central Vigilance Commission.

1.3.3.a Procurement policy and procedures

As claimed by procurement officials in the Ministry of Railways, their procurement policy is characterized by transparency, fair play, quality procurement and competition, and equal opportunity to all eligible vendors. Indian railways have budgetary and financial autonomy in India. More than 95% of all purchases are from indigenous suppliers and the rest is imports. A **global bid** is one in which payments are made in foreign currency. All global bids are advertised and such procurement takes place through open tendering. All other purchases are made in domestic currency irrespective of the nationality of the supplier. 34% of all purchases are made from PSEs, 60% from large private industry and the rest from the small scale and rural sector. In terms of the buyers, Zonal Railways and the 25 procurement units make 66% of all purchases, the Railway Board's contribution is 30% and the remaining 4% (which includes general office equipment, not just railway-specific procurement) is undertaken by DGS&D.

Since the provision for e-procurement was implemented, 500 contracts have been procured so far. Vendor approvals are based on Capacity Assessment coupled with Quality Assurance Plan and there are centralised vendor approvals for safety, critical and vital items. Assessment of vendor performance is integrated with procurement.

The method of procurement is through limited or selective tendering for contract value up to Rs. 500,000 and through open tendering for values beyond that. This holds for all domestic bids. Global bids are solicited through open tendering only.

RDSO (Research Design and Standards Organisation)/RITES (Rail India Technical and Economic Services) are the pre-despatch inspection agencies. There is also the system of charging bid and contract security. Bank guarantees as warranty obligations for plant and machinery are also required as an integral part of the contract.

1.3.3.b Preferential Treatment

Foreign bidders are to be treated at par with domestic bidders. Purchase preference is accorded to the public sector for purchases between Rs. 50 mn and Rs. 1 bn. SMEs registered with the National Small Industries Corporation (NSIC) are allowed price preference up to 15%. They are also exempted from the payment of earnest money tender fees.

1.4 India's Position vis-à-vis an Agreement on Government Procurement

Like most other developing countries, India is not a signatory to the current GPA. India, however, is not opposed to an agreement on transparency in government procurement. India's biggest problem with any government procurement agreement is with the "national treatment" requirement. This emanates from the preferences applicable in public procurement at various levels of government in line with the use of government procurement as an instrument for directing investment to "desirable" sectors, less privileged social groups, and underdeveloped regions of the country. In view of this, the Indian government is only willing to go along with a suitable transparency agreement that steers clear of market-access issues. Two other important areas of concern for India are the definition and scope of government procurement and the issue of procurement methods. With regard to the former, it is felt that a broad definition that includes government entities at the sub-central level and other public entities would be difficult for a quasi-federal state like India with multiple levels of government and with a large number of public sector enterprises. India would thus want any agreement to be restricted to the central government. Further, it is believed that the methods of procurement have no bearing on transparency, and that there should be no restriction on the choice of the procurement method other than those placed by domestic legislation. In addition, it is felt that existing domestic review and appeal procedures are available and should not be a part of any transparency agreement. India may thus not be ready to negotiate any agreement that goes beyond transparency in government procurement and that too, covering central government purchases only.

- **WAY FORWARD:** Need for ensuring transparency in procurement with respect to tender documentation specifying criteria for awarding contract, disallowing negotiations with the lowest bidder, requiring debriefing of the unsuccessful bidder and the publication of contract awards. Most importantly, clearly defined arbitration, formal appeal or bid challenge procedures are needed.

2 Services

2.1 Background

The analysis in Part I of this Report has indicated the importance of the services sector for the two trading partners, the advantages that India possesses in this sector and the importance of the EU as a trading partner in services trade. From the perspective of this FTA, a substantial coverage of services a la GATS Article V could help deliver improved access to mutual markets and more rapid liberalization of India's services than can be accomplished unilaterally. The challenge for the FTA is not only to accelerate liberalization in India's services sectors (which is continuing, albeit slowly at times and at a varied pace across sub-sectors), but also to facilitate the implementation of a range of complementary reforms designed to improve the quality of regulation. Externally, India faces contrasting challenges in securing access to European markets in its areas of comparative advantage. The entry of Indian service providers into European markets is impeded by a range of barriers and the objective would be to carve out of highly restrictive immigration regimes greater scope for service delivery per se. As far as Mode 1 is concerned, the challenge is to pre-empt potential protectionism – which the dramatic expansion of Indian exports is provoking - and lock-in current and potential market access.

2.1.1 Multilateral disciplines in services and provisions for RTA¹⁰

The GATS is an elaborate set of rules at the multilateral level that governs international trade in services through the four modes of service delivery – cross border, consumption abroad, commercial presence and the movement of natural persons. All service sectors are covered by GATS under Article I. Most-favoured-nation treatment is applicable to all services under Article II of the GATS, except the one-off temporary exemptions. National treatment under Article XVII applies in areas where commitments have been made. The rules under Article III provide for transparency in regulations and the presence of inquiry points. Regulations have to be objective and reasonable under Article VI. Individual countries' commitments on market access are negotiated and bound under Article XVI. There is a provision under Article XIX for progressive liberalization in the GATS through further negotiations. The provisions for RTA in services are laid out in Article V of the GATS. Any RTA on services should have “substantial sectoral coverage,” substantially eliminate discrimination in the sense of national treatment and should not impede trading opportunities in services for non-members relative to the situation prior to the coming into effect of the RTA. Footnote 1 of this Article defines *substantial sectoral coverage* “in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.”

¹⁰ 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.

2.1.2 EU-India interests in services

India has witnessed high export growth in IT & ITES, professional services like medical, dental and engineering services, travel, tourism and some financial services. For the EC, accounting, legal, financial, postal, courier and telecom services are significant from the perspective of this FTA. India's interests are in seeking liberal market access in Modes 1 and 4, disciplining domestic regulations and concluding MRAs, predominantly in professional services. The EU, on the other hand, would like complete liberalization in market access and national treatment in Mode 3 in most services sectors, removal of FIPB approval and allowing wholly-owned subsidiaries in the financial sector. Our comprehensive database on non-tariff barriers indicates that EU has had specific market access/national treatment issues and regulatory impediments with India in the case of satellite services (lack of national treatment), telecom (lack of national treatment and burdensome domestic regulation), private security agencies (limits on FDI), courier (proposed legislation on taxation) and air transport services (tax on business/first class tickets for passengers embarking in India). On the whole, the EU will expect commitments from India in courier, distribution, environment, life insurance, news agency, telecom and maritime services. India, on the other hand, would expect commitments for the EU in computer-related, architecture, engineering, R&D, medical and dental services as well as telephone-based support services.

2.2 India's Revised Offer in Services

India submitted its much improved Revised Conditional Offer under GATS on August 12, 2005, wherein extensive commitments on market access and national treatment have been made in a number of new sectors/sub-sectors of the Central Product Classification – architectural, integrated engineering and urban planning and landscape services; veterinary services; environmental services; distribution services; construction and related engineering services; tourism services; educational services; life insurance services; services auxiliary to insurance; recreational, cultural and sporting services and air-transport services. New commitments have also been offered in Mode 1 in a large range of other business services; professional services; research and development services; rental and leasing services; and real-estate services, amongst others. Improvements, essentially raising limits on FDI, have also been made in existing commitments in engineering services; computer and related services; research and development services; basic telecommunications; value added telecommunications; construction and related engineering services, banking services, asset management services and other non-banking financial services. India had already made a substantial initial offer in Mode 4 by including all categories of natural persons like intra-corporate transferees, business visitors, contractual service suppliers and independent professionals. In the Revised Offer, further improvements have been made in the sectoral coverage of both the contractual service suppliers and independent professionals and the definition and parameters of all these categories have been revised.

2.2.1 India's GATS Commitments and Revised Offers in terms of Article V of the GATS

Table 2.1 below is a rough quantification of India's commitments under GATS, and a comparison thereof with India's Revised Offers in each sector across the three modes of service delivery as well as the autonomous liberalization undertaken by India in Mode 3.

Table 2.1: Analysis of India's GATS commitments, Revised Conditional Offer and Autonomous Liberalization

	GATS	RO	GATS	RO	GATS	RO	Autonomous	GATS	RO
	Mode 1	Mode 1	Mode 2	Mode 2	Mode 3	Mode 3	Mode 3	Mode 4	Mode 4
Professional	18.2%	63.6%	27.3%	72.7%	18.2%	59.1%	0-100% depending on the service	Unbound except as in horizontal commitments	Unbound except as in horizontal commitments + service contract required for accounting, architecture and engineering
Computer	20.0%	100.0%	20.0%	100.0%	20.0%	100.0%	100%	Unbound except as in horizontal commitments	Unbound except as in horizontal commitments + service contract required
R&D	0.0%	40.0%	0.0%	20.0%	25.0%	60.0%		Unbound except as in horizontal commitments	Unbound except as in horizontal commitments + service contract required
Real estate	NS	50.0%	NS	50.0%	NS	37.5%	100%	NS	Unbound except as in horizontal commitments
Rental/leasing	NS	40.0%	NS	40.0%	NS	90.0%		NS	Unbound except as in horizontal commitments
OBS	0.0%	60.0%	0.0%	60.0%	2.5%	57.5%		Unbound except as in horizontal commitments	Unbound except as in horizontal commitments + service contract required for management consultancy
Postal	NS	No offer	NS	No offer	NS	No offer	Nil	NS	No offer
Courier	NS	No offer	NS	No offer	NS	No offer	100%	NS	No offer
Telecom	31.3%	31.3%	0.0%	75.0%	45.3%	50.0%	74-100%	Unbound except as in horizontal commitments	Unbound except as in horizontal commitments
Audiovisual	0.0%	0.0%	0.0%	0.0%	8.3%	8.3%	40-100%	Unbound except as in horizontal commitments	Unbound except as in horizontal commitments
Construction	0.0%	100.0%	0.0%	100.0%	10.0%	100.0%	100%	Unbound except as in horizontal commitments	Unbound except as in horizontal commitments
Distribution	NS	40.0%	NS	40.0%	NS	40.0%	100%	NS	Unbound except as in horizontal commitments
Educational	NS	20.0%	NS	20.0%	NS	20.0%	100%	NS	Unbound except as in horizontal commitments
Environmental	NS	50.0%	NS	50.0%	NS	50.0%	100%	NS	Unbound except as in horizontal commitments
Insurance	12.5%	37.5%	12.5%	12.5%	0.0%	31.3%	26%	Unbound except as in horizontal commitments	Unbound except as in horizontal commitments
Banking	5.9%	5.9%	5.9%	5.9%	27.9%	44.1%	74%	Unbound except as in horizontal commitments	Unbound except as in horizontal commitments
Health	0.0%	12.5%	0.0%	25.0%	12.5%	18.8%	100%	Unbound except as in horizontal commitments	Unbound except as in horizontal commitments
Travel & tourism	0.0%	50.0%	0.0%	75.0%	25.0%	75.0%	100%	Unbound except as in horizontal commitments	Unbound except as in horizontal commitments + service contract required
Recreational etc.	NS	20.0%	NS	40.0%	NS	40.0%	0-100% depending on the service	NS	Unbound except as in horizontal commitments
Transport	7.1%	10%	5.7%	14.3%	6.4%	14.3%	0-100% depending on the service	Unbound except as in horizontal commitments barring no limitations for maintenance and repair of vessels	Unbound except as in horizontal commitments barring no limitations for two sub-categories of maritime transport services
Average across sectors	4.7%	36.5%	3.6%	40%	10.1%	44.8%	72%		

Source: India's GATS Commitments; India's Revised Conditional Offer in the GATS; own calculations
 Note: NS = Not scheduled; GATS = India's GATS commitments; RO = India's Revised Conditional Offer

2.2.1.a Methodology

India's limitations to market access (MA) in each mode of supply were tabulated sector by sector and within that for each sub-category as laid down in the CPC of the GATS by analysing the information in the Revised Offer. The next step was to quantify these limitations such that no limitations was equivalent to 100% MA, unbound or not scheduled meant 0% MA and x% cap on FDI meant x% MA. Since the maximum openness possible is 100%, the degree of market access granted in each sub-category would be a proportion of this. For instance, medical and dental services have a MA commitment of 0.75; this then translates into a 75% figure under the Commitments column. Finally, the sub-categories under each services sector were added up to get the total for that entire sector and the same method applied as above to get the MA Commitment for that entire sector. As an illustration, the CPC has 11 sub-categories listed under 'professional services.' The MA equivalents, as defined above, for 'professional services' are 7, 8, 6.5 and 0 for the four modes of supply, respectively, when aggregated across the 11 sub-categories. Thus, the corresponding figures for 'professional services' for each mode under the Commitments column are $7/11*100$, $8/11*100$, $6.5/11*100$ and 0, which are 63.6%, 72.7%, 59.1% and 0%, respectively, as can be seen under RO for each of the four modes, for the category of 'professional services.'

As can be seen, not only is the level of actual market access granted very low across sectors, but very few sectors have actually been scheduled under GATS. Moreover, with the exception of banking, insurance, telecom, computer and related services, even within the scheduled sectors, very few sub-sectors have been scheduled. However, India's Revised Offers are a substantial improvement over the GATS Commitments. Not only has more effective market access been granted, but the sectoral coverage has also improved significantly. Even so, apart from computer and related services, India's market access offers are not 100% in any sector. In fact, there are still no offers in postal and courier services in any of the first three modes and audiovisual services in Modes 1 and 2 are still unbound.

Mode 4 is unbound for almost all services sectors (barring two sub-categories of maritime transport services) and market access in these is governed by India's horizontal commitments, which typically prescribe working requirements and duration of visas for all categories of natural persons like intra-corporate transferees (including managers, executives and specialists), business visitors, contractual service suppliers and independent professionals. But again the sectoral coverage is not 100%; moreover, the need for a service contract is explicitly indicated for contractual service suppliers and independent professionals in accounting, architecture, engineering, R&D, computer and related, management consultancy and travel and tourism services.

Clearly then, if India were to make these revised offers to the EU in this FTA, they would not meet the requirements of Article V of the GATS. The FTA thus would have to better India's Revised Offer. On the other hand, India seems to have done a lot better

autonomously, with the average level of Mode 3 market access granted across sectors being close to 70%.

2.3 How is policy made on Services?

Interviews with government officials, UNCTAD India and industry have indicated that autonomous liberalization measures in services are initiated at the level of the line departments and ministries¹¹, those for multilateral trade negotiations are initiated by the Ministry of Commerce and those for RTAs are a Prime Minister's Office-led initiative, supported by the Ministry of External Affairs, with the negotiations done by the Ministry of Commerce. The Ministry of Commerce prepares a Draft Consultation Paper which is put on its website for initiating a public debate on the subject (this has been done in the past for both legal and education services). The stakeholders in the line departments, industry associations, civil society and academics then discuss it further. A Group of Ministers is formed to deliberate on the issue and pass on its recommendations to the Cabinet Ministers, who need to approve the proposal. If the proposed measure requires an amendment to the governing legislative Act, then this has to follow the process established in the Indian Constitution and requires approval by the Members of Parliament and the President of India. Alternatively, the President can promulgate an Ordinance making the necessary legislative change. On the other hand, if the proposed measure does not require any legislative change, then it is effected through an Administrative Order of the line department. Once this process is over, the measure is announced by the line Ministry or the Ministry of Commerce as the case may be, vide a Government Notification. In practice, the Ministry of Commerce is liberalizing sectors that "exist in pairs" like construction and retail, and banking and professional services. The table below gives India's autonomous policy in various sectors.

¹¹ These are as follows: Ministry of Information Technology; Ministry of Telecommunications; Ministry of Housing & Urban Development (for Construction and related services); Ministry of Health; Ministry of Finance (for Banking, Insurance and other Financial Services); Ministry of Law, Justice and Company Affairs (for Legal & Accountancy Services); Ministry of Human Resource Development (for Education Services) and Ministry of Commerce and Industry's Department of Industrial Policy & Promotion (for Distribution Services).

Table 2.2: India's autonomous policy on services

SERVICE SECTOR	ISSUES
Accountancy	FDI not allowed; FSP not allowed to undertake statutory audit of companies. Only partnership firms allowed with number of partners limited to 20. (CHINA 2008 - Taxation fully liberalized. No restrictions on Mode 3 and wholly foreign owned subsidiaries permitted by 2007.)
Architecture	No cap on FDI. Foreign architects need to be registered by the Council of Architecture as individuals. Appointment of foreign architects as consultants to Indian architects subject to case-by-case approval by GoI. (CHINA 2008 - Fully liberalized barring restrictions on Mode 1. For mode 3, wholly foreign owned subsidiaries permitted by 2006.)
Legal	FDI not allowed. International law firms not allowed presence. Indian advocates cannot enter into profit-sharing arrangements with non-Indian advocates. (CHINA 2008 - Continued restrictions on business scope.)
Computer-related or software services	No cap on FDI. No explicit barriers on commercial presence of foreign firms. Intellectual property laws are not effectively enforced; Tax structure discourages movement along the value chain
Management & Consultancy	No cap on FDI. Foreign firms must be incorporated in India
Postal	FDI not allowed. Price preferences to state postal operators; No functional demarcation between regulator and service provider; Imprecise definition of USO.
Courier	No cap on FDI but subject to FIPB approval
Telecommunications	Fully owned foreign firms allowed in some segments, though voice telephone services continue to have 49% FDI limit. Policy uncertainty on tariff, inter-connect regimes, USOs remain.
Audio-visual services	No cap on FDI in motion picture but FDI not allowed in radio and television services. Up-linking restrictions.
Construction and related engineering	No cap on FDI. Price preference to PSUs, as well as a large number of barriers that are external to the sector: land ceiling; unclear land titles; minimum area restrictions; minimum capitalization norm; restriction on repatriation. (CHINA 2008 - Restrictions on business scope of fully foreign-owned enterprises. Mode 3: By 2004, fully foreign-owned enterprises permitted but only in projects financed by foreign investment and/or grants, or by loans from IFIs or those which are technically difficult for Chinese enterprises.)
Distribution	No cap on non-retail segments and 51% limit on FDI in single brand product retail. Lack of clear responsibilities within the government; Large unorganised sector with low tax compliance; Land market distortions. (CHINA - Continued restrictions on large chain stores. Mode 3: By 2006, no restrictions on products; foreign majority control allowed except in chain stores with more than 30 outlets selling a range of products.)
Education	FDI permitted without cap through the automatic route.
Environmental	FDI permitted without cap through the automatic route.
Financial services (Insurance)	Foreign equity limit of 26% in most segments. Minimum capitalization norms; Funds of policy-holders to be

	retained within the country; Compulsory exposure to rural and social sectors and backward classes. (CHINA 2008 - By 2004, fully liberalized except 50% foreign ownership limit in life insurance. Mode 3: By 2003, no establishment restrictions in non-life. By 2004, no geographic restrictions and no restrictions on business scope. By 2005, no cession requirement.)
Financial services (Banking)	Private domestic equity limited to 49% and foreign equity limited to 74% with 10% voting rights. FDI and portfolio investment in nationalized banks subject to overall statutory limits of 20%. Mandatory priority sector lending and rural branch requirements for domestic banks. (CHINA 2008 - Fully liberalized by 2006. On mode 3, geographic limitations phased out gradually by 2006. Clients: Local currency business with Chinese enterprises by 2003 and all clients by 2006.)
Health & Social Services	No cap on FDI. Movement of FSP subject to registration by the Medical/Dental/Nursing Council of India. FSP cannot provide services for profit. Responsibilities divided between the Centre and states; Absence of a standardized accreditation system. (CHINA 2008 - Full foreign ownership not allowed and needs based quotas.)
Tourism	No cap on FDI. Land market distortions.
Recreational, Cultural & Sporting	FDI is permitted in entertainment services (including theatre, live bands and cultural services), libraries, archives and museums. FDI is restricted to 26% through the Government route in print media. FDI is not allowed in News Agency Services. Lottery, betting and gambling is not allowed.
Transport	100% FDI in maritime and road transport but significant restrictions in air and rail transport. Restrictions on inter-state movement of goods; Overlapping responsibilities and coordination issues between government departments (e.g., multi-modal transport).

Source: World Bank (2004); India's FDI Policy (2006)

2.4 European interests in India's services and horizontal barriers

India's services suffer from both excessive and inadequate regulation. Many explicit and implicit restrictions - tax incentives, labour laws, for instance - favour small scale units and discriminate against larger set-ups. Weaknesses in the institutional and regulatory regimes have resulted in disparities in the quality of services and the abilities of professionals. Legitimate universal access goals are pursued not based on the most efficient means but through elaborate restrictions involving efficiency losses without any commensurate gain in equity and access. These policies thus lead to domestic firms that are sub-optimal in size, operate in a weakened regulatory environment, and are burdened with the legacy of pursuing equity goals. This section looks at such horizontal barriers, policy constraints and regulatory impediments that would also need to be discussed in the FTA for effective results.

Looking at the services sector as a whole, the following horizontal barriers cut across service sector categories:

- Archaic laws
- Multiplicity of rules and regulations
- Inconsistent practices across states and multiplicity of contact points at different levels of bureaucracy
- Regulatory gaps
- Public sector bias
- Limits on foreign investment and ownership

2.4.1 Regulatory weaknesses

The regulatory regime has a profound impact on sectoral performance in services. The need for regulation in services arises primarily from market failures attributable to natural monopoly and inadequate consumer information.

Consumers cannot easily assess the competence of professionals such as doctors and lawyers or the soundness of banks and insurance companies. There is adequate regulation in financial services, with the Reserve Bank of India for banking services, IRDA for insurance and SEBI for securities. There are, however, no independent regulators for most professional services, though de facto regulation occurs through a combination of statutory laws and by professional all-India and State Councils, including the Institute of Chartered Accountants of India and the Institute of Cost and Works Accountants of India, the Council of Architecture, the Bar Council of India and the State Bar Councils and the Medical, Dental and Nursing Councils of India. But there is an unevenness of standards in professional, educational, financial and health services, which is not only a problem domestically but also legitimizes foreign restrictions. This, therefore, needs to be addressed in the context of this FTA. One suggestion in this regard is the creation of a credible, all-India accreditation system that could grade different attributes in terms of training and experience in these services.

Recent studies have found that the regulatory and administrative burden in India is considerably higher than that in many other developing and developed countries in the world (World Bank Doing Business Reports). This regulatory burden could take many forms, including inordinate delays in getting new connections from public sector utilities, frequent visits by government inspectors, bureaucratic and excessively burdensome compliance procedures, and payment of bribes to get things done.

Table 2.3: Snapshot of regulatory requirements

Starting a business	India	SAR	OECD	China
No. of procedures required	11	7.9	6.2	13
Time (days)	35	32.5	16.6	35
Cost (% of PCY)	73.7	46.6	5.3	9.3
Registering property				
No. of procedures required	6	5.8	4.7	3
Time (days)	62	118.6	31.8	32
Cost (% of property value)	7.8	5.3	4.3	3.1
Enforcing contracts				
No. of procedures required	56	38.7	22.2	31
Time (days)	1420	968.9	351.2	292
Cost (% of debt)	35.7	26.4	11.2	26.8

Source: Doing Business Report, World Bank (2006)

As can be seen clearly, procedural requirements and their associated costs are, on average, the most cumbersome for India and even less favourable compared to the average for the entire South Asian Region. This reflects on the regulatory, procedural and implementation-related barriers that importers face in India.

Some of the Indian states, however, are taking steps to improve the regulatory barriers, including creating single-window clearance systems for approval of new projects and self-certification facilities for selected statutes, designing more transparent inspection regimes, and developing electronic systems to comply with regulatory procedures.

2.4.2 Barriers to European service providers in India: Sector-specific constraints

In the analysis that follows, India's services sectors are grouped into three categories – one, sectors that have seen substantial liberalization and face no explicit barriers; two, sectors that are moderately liberal with a few explicit barriers; and three, those that remain largely closed to foreigners. Within this, we look at India's GATS commitments and Revised Offers in each sector, India's autonomous FDI policy and other requirements, an assessment and the genesis of the most important barriers that exist and the ease of negotiating a change in the policy environment through this FTA.

2.4.2.a Significantly liberalized sectors

2.4.2.a.1 Computer and related services (“CRS”)

There are no limitations on market access in Mode 3 in India’s Revised Offer, except requiring establishment only through incorporation. Even as this is an improvement on India’s GATS commitments which allow FDI up to 51%, India has already autonomously liberalized this sector almost completely with very few explicit barriers. Thus, 100 percent FDI via the automatic route¹² is permitted in almost all segments of the software sector including consultancy services related to installation of computer hardware, software implementation, data processing, data base and other services. Even as this sector boasts of India’s major success stories in the last decade, caution needs to be exercised in wake of the backlash occurring abroad against the adverse effects on local employment of India’s growing IT-enabled services (“ITES”) and business process outsourcing (“BPO”) services. Further, in the absence of an independent regulator, intellectual property law and its enforcement, including developing legislation on E-Commerce, are important lacunae that need to be addressed.

Arguably, the growth of the IT sector has been attributed significantly to the absence of any directed government policy towards this sector, especially through the 80s and 90s. Of course, India now has an IT Act (2000) “to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934...” Significantly, unlike other archaic laws, this Act is more up-to-date and flexible to accommodate any changes that this FTA is likely to result in. However, the sector still suffers from the lack of an independent regulator, though, in its absence, the National Association of Software and Service Companies (NASSCOM)¹³ has done an enormous amount for collective action and for taking industry ideas and demands to the government and the consumer. 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.

- **WAY FORWARD:** There is no real issue here except for the need for an independent regulator and protection of intellectual property.

¹² The alternative to automatic approval is obtaining the approval of the Foreign Investment Promotion Board (FIPB).

¹³ NASSCOM is the premier trade body and the chamber of commerce of the IT software and services industry in India. NASSCOM is a global trade body with over 1050 members, of which over 150 are global companies from the US, UK, EU, Japan and China. NASSCOM was set up to facilitate business and trade in software and services and to encourage advancement of research in software technology. It is a not-for-profit organization, registered under the Societies Act, 1860.

2.4.2.a.2 Telecom

In *telecommunications* as well, the extent of India's autonomous relaxation of foreign ownership restrictions – ranging from a 74% to 100% foreign equity cap across different segments with automatic entry up to 49% and need for FIPB approval beyond that – exceeds its Revised Offer in this sector, which is 49 percent in voice telephone, wire-based and cellular services and 74 percent in data and message transmission services, both subject to FIPB approval. This again is an improvement on India's GATS commitments, where the foreign equity caps range from 25 to 51%.

However, domestic policy constraints still remain. For instance, even though Internet Telephony has been introduced, calls can still not be made within the country through the Internet. Then, existing operators in contiguous circles are still not permitted to combine together to become national long distance service providers, having access to both intra and inter-circle traffic. There are also restrictions on the number of licenses that can be issued to service providers but this emanates from constraints on spectrum availability. Then there are issues relating to 3G licenses and the insistence on the CEO being an Indian national. Finally, the growing convergence of IT, telecom and broadcasting is throwing up new regulatory issues that need to be tackled.

Even as the Telecom Regulatory Authority of India (“TRAI”) was set up as an independent regulator in this sector in 1997, there is a greater need to consider domestic policies regarding frequency allocation and assignment, and consumer protection. Most of the issues in this sector emanate from the lack of quality infrastructure and in that, point towards the need for investing in this area. Other issues are institutional, for instance, there is a need to replace the old laws governing the Indian telecom 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. Given the recent advancements in this sector and the state of play amongst the private domestic sector, these are changes which are likely to be negotiable, even though infrastructure investment would remain a challenge in itself that would need to be addressed first.

- **WAY FORWARD:** Need to relax licensing restrictions on service providers and remove policy uncertainty on tariff and inter-connect regimes. 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.

2.4.2.b Moderately liberalized sectors with a few explicit barriers

2.4.2.b.1 Construction

There are no limitations on market access in Mode 3 in India's Revised Offer in general construction, except requiring establishment only through incorporation and FIPB approval for foreign investors having prior collaboration. This again is an improvement on India's GATS commitments which allow for FDI up to 51%. India's autonomous FDI policy has no cap on FDI in this sector, but foreign companies are required to be registered as Indian Companies under the Companies Act, 1956. Further, there is a

stipulation on the minimum area that needs to be developed by a foreign company and this minimum requirement is 100 acres. Then, there are minimum capitalization norms at US \$ 10 million for wholly-owned subsidiaries and at US \$ 5 million for joint ventures with Indian partners, with the funds needed to be brought in within 6 months of the commencement of the business. There is also a stipulation on the minimum area to be developed. Finally, there is a minimum lock-in period of three years from the completion of minimum capitalization before original investment can be repatriated.

These laws have their genesis in the Urban Land (Ceiling and Regulation) Act, 1976 and the Rent Control Act. According to the ULCRA¹⁴, no person is entitled to hold any vacant land, in excess of the ceiling limit stated by the Act. The Act did not provide for a mechanism to force the entry of vacant urban land into the market, resulting in extremely low supply of urban land for housing and construction, sending land prices skyrocketing, especially in metropolitan cities. It also vested too many discretionary powers in state governments to grant exemptions leading to corruption in the exercise of these powers. Further, the government had the power to acquire the entire ceiling-surplus vacant land at a nominal price, leading to lengthy litigation disputes.

The ULCRA, 1976, was repealed by the Centre through the Urban Land (Ceiling and Regulation) Repeal Act, 1999. This Act stated that any state in India could repeal the Urban Land Ceiling Act, 1976. Many states have done away with this Act, but Maharashtra, Karnataka, Kerala and Orissa have yet to repeal it. Amendments to the RCA will be needed to remove the rent controller's draconian powers over the disposition of rented property. The statutes giving the rent controller power to virtually divest the owners of their natural right to their properties should be deleted. The RCA must focus on ensuring a level playing field in terms of rent (adjustment) negotiations and reasonable period for vacating property.

Another internal limitation is the preferences granted to public sector construction companies in the award of construction contracts. Since most large-scale construction projects are awarded by the government, this effectively restricts the market for private sector construction firms, both domestic and foreign. This practice therefore needs to be curbed to engender greater private sector participation in construction activities. As the USTR Trade Barriers Report for India (2006)¹⁵ says "many construction projects are offered only on a non-convertible rupee payment basis. Only government projects financed by international development agencies permit payments in foreign currency. Foreign construction firms are not awarded government contracts unless local firms are unable to perform the work. Foreign firms may only participate through joint ventures with Indian firms."

¹⁴ The objective of this Act is "...to provide for the imposition of a ceiling on vacant land urban agglomerations; for the acquisition of such land in excess of the ceiling limit; to regulate the construction of buildings on such land and matters connected therewith; with a view to prevent the concentration of urban land in the hands of a few persons and speculation and profiteering therein; and with a view to bringing about an equitable distribution of land in urban agglomerations to serve the common good."

¹⁵ US FT Barriers Report with respect to India (2006), p.310.

- **WAY FORWARD:** FDI is already allowed in this sector up to 100%, but the institutional problems that emanate from the use of the 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 in this FTA. 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.

2.4.2.b.2 Health

In India's Mode 3 Revised Offer in hospital services, foreign equity up to 74% is permitted through incorporation (up from 51% in the GATS commitments) and FIPB approval is needed for foreign investors having prior collaboration. Moreover, publicly funded services may be available only to Indian citizens or may be supplied at differential prices to foreigners. While autonomously there is no cap on FDI in this sector, most external barriers emanate from the lack of recognition of professional qualifications. For instance, there are explicit restrictions on foreign service providers. They are prohibited from providing services for profit and their movement is subject to registration by the Medical/Dental/Nursing Council of India, each of which is a statutory body that draws its authority from the respective Indian Medical (1956), Indian Dental (1948) and Indian Nursing Council Acts (1947). These Councils regulate the respective education and professions throughout India, through councils at the state level. Moreover, since the health sector is on the concurrent list, i.e. both the Central and State Governments have jurisdiction over this sector, a number of regulations are imposed by state governments, which results in multiple regulations. For example, to improve access of the poor to healthcare facilities, some states reserve a certain percentage of total hospital beds for low income families. With respect to Mode 3, there are also state specific regulations of the town and planning departments on the design and construction of healthcare infrastructure. All this points to the need for a health regulator *a la* TRAI to ensure standards of education in health and that of infrastructure in health services. Other impediments in this sector are related to the liberalization of insurance services. Limits on the reimbursement of medical expenses and the portability of insurance are constraining factors in India benefiting from the liberalization of trade in health services. While this also calls for these constraints to be relaxed externally, domestically further liberalization of the insurance sector, especially the life-insurance segment, would be extremely useful.

Clearly then health services suffer from a multiplicity of regulations, overlapping jurisdiction between the Centre and the states and the absence of an independent regulator. While the demand for an all-India accreditation system for health professionals and the need for an independent regulator could be negotiated in this FTA, the other institutional barriers would be far more difficult to negotiate.

- **WAY FORWARD:** Need for a standardized accreditation system for health care professionals and an independent regulator. Need for streamlining regulations in this sector as well as liberalizing life-insurance services.

2.4.2.b.3 Banking & other financial services

In terms of India's Revised Offer, 49% FDI is allowed in private sector banks and FIPB approval is required for foreign investors having prior collaboration. For locally incorporated joint venture companies, the foreign equity limit is 74% (up from 51% in India's GATS commitments). In terms of autonomous FDI policy, foreign banks have a combined FDI and FII (foreign institutional investment) limit up to 74 percent subject to approval by the RBI and with the exception of wholly-owned subsidiaries of foreign banks, at least 26% of the paid-up capital has to be held by residents. Foreign banks, however, can only operate through licensed branches and as subsidiaries and there is a cap on the number of licenses for branches at 20 per annum for both new and existing banks (this was raised from 12 in the GATS Commitments). Unlike domestic banks, foreign bank operating through licensed branches are not obliged to open offices in rural areas. However, as subsidiaries, they must meet the rural branching requirement, i.e. at least one-quarter of the total branches need to be opened in rural centres and semi-urban areas. They also have to ensure that a certain proportion of their overall credit disbursements (32 percent for licensed branches and 40 percent for subsidiaries) goes to the priority sector comprising small-scale industries and credit for export. Moreover, the share of foreign bank assets in total banking assets should not exceed 15 percent. FDI and portfolio investment in nationalized banks are also subject to an overall 20 percent statutory limit. Finally, voting rights for shareholders of foreign banks are restricted to 10 percent. Most of these stipulations are part of the Indian Banking Regulation Act, 1970.

The banking sector also suffers from historical legacies; while 14 commercial banks were nationalized in 1969 and another 6 in 1980, the sector is still dominated by public sector banks. During the period of nationalization, India's banking system was subjected to a range of interventions, ranging from directed lending to priority sectors at subsidized interest rates and quantitative restriction on opening new branches. This has led to the Indian public sector banks being saddled with excessive labour and higher non-performing assets (NPAs) relative to both new private sector banks and foreign banks. Given these handicaps, large displacements are an inevitable consequence of liberalization in this sector and this, together with policy conservatism about full capital account convertibility and the need to create a level-playing field for domestic banks¹⁶, both public and private, explains India's gradualist approach to liberalizing its banking sector. One alternative to increasing market access would be to use the mechanism of the India-Singapore CECA wherein three specified Singapore banks have been allocated a separate quota of 15 branches over 4 years, over and above the quota for all foreign banks. The other barriers on European banks already operating in India stem from genuine universal service obligations in the banking sector. One way to address these issues in this FTA would be to suggest less restrictive and more efficient ways of meeting these obligations such as moving gradually from costly quantitative restrictions (such as priority sector lending and rural branch requirement) to more transparent fiscal interventions (like the universal service fund in basic telecommunications).

¹⁶ Interviews with government officials, CII and UNCTAD India.

- **WAY FORWARD:** Replicate the treatment of banking services as in the India-Singapore CECA; allocate more branch licenses and have fewer restrictions on select European banks.

2.4.2.b.4 Insurance

While India has not “bound” this sector in its GATS commitments, private and foreign sector participation in the insurance sector is restricted to 26% in terms of India’s FDI policy and the Revised Offer. For insurance advisory and actuary services, there is a 51% limit on foreign equity, the requirement of establishment only through incorporation, FIPB approval for foreign investors having prior collaboration and formal certification by the Actuarial Society of India. However, other constraints exist. For instance, while Indian firms can independently set up firms, foreign firms can only enter through partnerships. Moreover, domestic companies with majority foreign partner shares are not treated as domestic companies for this purpose. Foreign companies are also not allowed to hike their stake in the joint ventures through “financial engineering.” Further, there is a minimum capitalization requirement for life and general insurance companies at Rs. 2 billion and Rs. 1 billion, respectively. Minimum solvency margins have also been set at Rs. 500 million for life insurance companies, Rs. 500 million or an equivalent of 20% of net premium income for general insurance and Rs. 1 billion, for reinsurance companies. Finally, the 100% government equity in the two premier public-sector insurance companies, LIC and GIC, remains undiluted.

These regulations have their genesis in the IRDA Act (1999), which also set up the Insurance Regulatory and Development Authority (“IRDA”), to act as an independent regulator in this sector. The IRDA Act stipulates that the funds of policyholders be retained within the country and that there be compulsory exposure to the rural and social sector and the backward classes, including crop insurance, as fixed by the IRDA. It is always felt that these social sector obligations would be more difficult for foreign insurance providers. Interestingly, the impact of these regulations on competitive forces in this sector is recognized, as there is a mention of the stake of the Indian partner being reduced from 74% to 26% over a period of 10 years “to ensure competition.”

The IRDA that governs the liberalization of the insurance sector is very recent (1999) and as such, negotiating any changes in it, per se, should not be difficult for increasing Mode 3 access. In fact, the Union Budget for 2004 called for raising the foreign equity cap to 49% but this has not happened so far. The real issue, therefore, is one of political economy emanating from pressure from trade unions in the two public sector insurance companies (Life Insurance and General Insurance Corporations of India). In addition, as in the banking sector, ensuring universal service delivery to the poor is an issue, especially in the life-insurance segment. These are behind-the-scene barriers that would be more difficult to negotiate. It is however also felt that it is just a matter of time before the insurance sector too becomes more open¹⁷.

- **WAY FORWARD:** Need for raising the cap on FDI allowed in this sector.

¹⁷ Interviews with government officials and CII.

2.4.2.b.5 Distribution

India has not scheduled this sector in its GATS commitments. There are, however, no limitations on market access in Mode 3 in India's Revised Offer for commission agents and wholesale trade services, except requiring FIPB approval for foreign investors having prior collaboration. There are, however, no market access offers in retail services. Autonomously, 100% FDI is allowed in all except the retail segment of distribution services and within retailing, 51% FDI is allowed in single brand product retailing subject to FIPB approval. However, multiplicity of laws and regulations (ULCRA, for instance and the number of clearances required), limitations on the purchase and rental of real estate and restrictions on the number, size and location of outlets are major constraints. Wholesale trade is also affected by restrictions on the foreign provision of related services like transportation warehousing and express delivery. These laws need to be streamlined and the restrictions removed to facilitate greater internal movement of goods. On the regulatory side, there is no independent regulator, even as there is a need for developing appropriate legislation on E-Commerce to account for E-Commerce related issues arising from the cross-border supply of distribution services. While these issues are still negotiable, the liberalization of the retail sector suffers from political economy barriers and concerns about displacement of neighbourhood 'Mom-and-Pop' stores. These fears are not entirely misplaced as roughly a third of services sector employees work in the retail sector¹⁸. However, the organized retailing segment is now being opened up to private domestic operators (along with foreign partners) and the idea may be to develop a level-playing field before allowing foreign companies on their own¹⁹. From a negotiating stand-point, market access is a possibility here, but it may be gradual and phased-out and efficient mechanisms would need to be devised during this period to simultaneously address the labour issues.

- **WAY FORWARD:** Allowing entry of foreign firms in the retail segment and streamlining multiple laws and regulations. Need for an independent regulator and developing appropriate legislation on E-Commerce.

2.4.2.b.6 Education

India has not scheduled this sector in the GATS. However, there are no market access limitations on Mode 3 in higher education in India's Revised Offers, subject to fee being fixed by appropriate authority on a non-profit basis and other regulations applicable to domestic service providers. India's autonomous FDI policy also permits foreign investors to enter higher educational services with 100% equity holding under the automatic route. Thus, in principle, foreign universities can enter the market for higher educational services in India. However, problems arise if such foreign educational establishments seek formal recognition to get the status of a university from the All India Council of Technical Education (AICTE), because they then need to be subject to the AICTE's regulations pertaining to curriculum, fee and intake which conflicts with their autonomous functioning. The AICTE draws its authority from the University Grants Commission (UGC) Act of 1956 and in accordance with the Foreign Educational

¹⁸ World Bank (2004)

¹⁹ Interviews with CII.

Institutions Bill 2005, the UGC is empowered to regulate fee and monitor operations of foreign universities in India. They are also subject to the national reservation policy in matters of intake. All these requirements emanate from an India mindset about higher education being a merit good, which is the obligation of the State, and hence, needs to be imparted on a non-profit basis. It would thus not be easy to influence this thinking. However, given the excess demand for higher education in India, disparities in the quality of educational institutes and the resource constraint in the public sector, a case can be made for reform to attract high quality foreign institutes, but these would then be on an MFN basis and would not be specific to this FTA. At the same time, a mechanism would have to be devised to ensure that higher education does not remain the exclusive privilege of those who can afford it. The other issues would involve the need for regulating the entry of foreign institutions, concerns about consumer protection and quality standards and a level playing field for the private domestic sector.

- **WAY FORWARD:** Enabling formal recognition from AICTE without impeding the autonomous functioning of foreign institutes by making required changes in the UGC Act of 1956 and in the Foreign Educational Institutions Bill of 2005.

2.4.2.c Closed sectors

2.4.2.c.1 Legal

This sector has not been scheduled by India in the GATS. The situation has not changed in the Revised Offer. Autonomously as well, FDI is not allowed in this sector at all. The Advocates Act (1961) and the Bar Council of India Rules regulate the practice of law in India and impose many restrictions on foreign service providers in this sector through Sections 29 and 30. Section 47 of the Advocates Act empowers the Bar Council to prescribe conditions for recognition of foreign qualifications in law. A foreign national can practice law in India if and only if Indian nationals are permitted to practice law in their country. Further, the foreign national should have obtained a degree in law by a college recognized by the Bar. Thus as the World Bank Report²⁰ (2004) says, “legal services can be provided only by natural persons who are citizens of India, who are commercially present in the place of service and who are on the rolls of the advocates in the State where the service is being provided. The service providers can be part of a sole proprietorship or a partnership consisting of persons similarly qualified to practice law. The service can be provided only by a natural person and not a firm. In order to be eligible for enrolment as an advocate, a foreign service provider has to be from a country which allows Indian nationals to practice, has to hold a degree in law from an institution/university recognized by the Bar Council of India (BCI) and needs to be enrolled with the respective State Bar Council and/or the BCI. Further, FDI is not permitted in the sector at all. International law firms are not allowed to establish in India. Indian advocates are not permitted to enter into profit-sharing arrangements with persons other than Indian advocates. Foreign service providers may be engaged as employees or

²⁰ ‘Sustaining India’s Services Revolution: Access to Foreign Markets, Domestic Reform and International Negotiations,’ p 28.

consultants of local law firms but they can neither be appointed as partners nor can they sign legal documents and represent clients.”

There is, however, also the issue of the lack of a level playing field in the regulations in this area as the Bar Council of India Rule 36 puts restrictions on self-advertisement of Indian lawyers, while there are no prohibitions on foreign firms. Further, Section 11 of the Companies Act (1956) restricts the number of partners that an Indian firm may have. Indian lawyers are also prohibited from charging contingent fees, while there is no similar prohibition on foreign firms²¹.

Interviews conducted with professionals in this field reveal a sense of insecurity and incompetence within the legal services sector, and these are the same people that hold important positions in the Bar Council of India and in State Bar Councils. It is the resulting fear of competition and displacement that makes them opposed to opening up this sector to foreign players even as both the Ministry of Law and the Ministry of Commerce would like to push the reform agenda ahead. The fact remains, however, that even with the entry of foreign players, the functioning of the market would determine outcomes and these would not be different from those now. Those who can afford to pay for the best legal advice in the country would still do so; the only difference would be that this advice would come from a top foreign firm as opposed to the top Indian law firm. Conversely, those who can't afford the best legal advice now would still go to the second-best options in the future as well, and hence, the fears of fee hikes and employment displacement are completely misplaced. Perhaps the only group affected would be the rich Indian corporate sector, which may have to pay more for the best legal advice, but arguably it may already be doing so, insofar as it currently lays recourse to expensive legal advice abroad. Thus, strong private interests of the well-established Indian law firms, the rich Indian corporate sector and the inefficient and corrupt middlemen in this sector have stalled the reform agenda. There are enough reasons to inject the much-needed professionalism in this sector, which may hurt the self-interests of these groups but would lead to an improvement of the entire system from within and benefit all consumers and the legal profession on the whole.

- **WAY FORWARD:** Relevant changes in the Advocates Act and the Bar Council of India Rules to enable foreign service providers to practice in India. Allow FDI in this sector.

2.4.2.c.2 Accountancy

This sector has not been scheduled by India, either in the GATS commitments or in the Revised Offer. Autonomously, FDI is also not allowed at all in this sector. In the absence of an independent regulator, the sector is regulated through a combination of legal and professional self-regulation via the Institute of Chartered Accountants of India (“ICAI”) and the Institute of Chartered and Work Accountants of India (“ICWAI”) and through specific provisions in the Companies Act (1956) and the Income Tax Act (1961). The ICAI is a statutory body established under the Chartered Accountants Act, 1949, for the

²¹ Neha Sahai & Karan Bharihoke. ‘International Trade law Regime under the GATS and the Indian Legal Service Sector-II.’

regulation of the profession in India while the ICWAI gets its statutory recognition from The Cost and Works Accountants Act, 1959. In terms of regulations, only partnership firms and sole proprietorships are allowed in this sector. The number of partners is limited to 20 and the number of statutory audits of companies is restricted to 20 per partner. Further, accounting firms cannot train more than 15 persons as Articled Clerks. There are also restrictions on advertising and the creation of brand names even as tie-ups between domestic and foreign firms are not encouraged. Finally, foreign service providers are not allowed to undertake statutory audits of companies. Further, foreign accounting firms can practice in India, subject to mutual reciprocity to Indian firms. Then, only firms established as a partnership may provide financial auditing services. Foreign accountants may not be equity partners in an Indian accounting firm.

The above restrictions have resulted in the market remaining small and fragmented. As an illustration, the country has as many as 43,000 audit firms, of which as many as three-fourths are single person proprietary firms. Less than 200 firms (0.5%) have more than 10 partners. The restrictions on training persons have impeded the development of talent in the sector as it is tantamount to denying the opportunity to a large number from joining the better firms. Domestic firms are therefore unable to compete with international firms in the lucrative consultancy/advisory and non-statutory work markets.

Interviews with professionals in this field have revealed that there is less opposition to the liberalization of this sector than in the case of legal services. The “Big Four” accountancy firms have already been operating in India for long and their professionalism and resulting benefits to the practice have been experienced both by consumers and the ICAI. Professionals working with these firms have also been a part of the ICAI and in that, have pushed the reform agenda from within. The ICAI is thus less opposed to the opening up of this sector. In any case, foreign accountants and accountancy firms have always existed in India, albeit as tie-ups with Indian partners and as multi-disciplinary firms providing consultancy services. Any liberalization would thus only serve to make their presence more direct without requiring the need for tie-ups. However, India would require MRAs with the EU to make that possible as there is demand in the profession for reciprocity.

- **WAY FORWARD:** Getting rid of regulatory restrictions on firm size and practice and entering into MRAs in Accountancy. Allow FDI in this sector.

The problems in both the legal and accountancy sectors are similar in nature and all restrictions emanate from the disproportionate political influence that Indian lawyers and accountants have and so far, they have used this influence successfully to prevent any liberalization in these sectors. Both these sectors together account for a meagre 0.7% of India’s total services employment and in that there are no genuine employment displacements effects to be feared here. While both sectors suffer from a multiplicity of regulations, especially Accountancy, there are no institutional barriers here that cannot be surmounted or Acts that cannot be amended, just political economy factors that would not be too easy to overcome, unless there was enough of quid-pro-quo on the part of the EU.

2.5 India's interests in services and associated barriers

Trade agreements and negotiations are all about quid-pro-quo. In most of the cases discussed above where the EU has substantial interests in the Indian market - financial, retail, accountancy and legal services for instance - the success of the strategies indicated depend a lot on how much the EU is willing to give in return to India. The important issues for India, in descending order of priority, are market access for Mode 1 and Mode 4 (both contractual service providers and service professionals related to Mode 3), Mode 2 (education and health) and increasingly Mode 3 (IT and banking).

2.5.1 Mode 1

India occupies a leading position in the export of a wide range of services through this Mode. In addition to being a leading supplier of traditional IT Services, India is now becoming a major exporter of BPO services. Even within BPO activities, India is moving up the value-chain from low-end back-office services (data entry, etc.) to more integrated and higher-end service bundles in fields like customer care, human resource management and product development. There are no obvious limits to the range of services that could be exported by India and it is not unrealistic to assume that technology, the Indian skill set and business practices will evolve further to make possible and profitable cross-border trade in ever more sophisticated services (R&D, engineering services, etc.).

However, this development is not without its fears about relocation of work translating into protectionism. For instance the state of New York recently banned E-tutoring to India because the credentials of the tutors could not be verified as required by law, even though the results of this out-sourcing had been very positive²². There are instances of pending legislation in US states on an outsourcing ban with respect to government contracts. Other blatant measures could be similarly introduced to create barriers to the cross-border trade in services. In Europe, for example, legal norms designed to protect workers in outsourced deals, known as TUPE (Transfer of Undertakings and Protection of Employees), as well as recent data privacy directives, could have an inhibiting effect on trade. In a similar vein, the UK Law Society is considering treating outsourcing of legal work as a violation of client-attorney privileges. India would therefore like to use this FTA to pre-empt these protectionist tendencies and secure liberal cross-border trade of services.

In Mode 1, commitments have already been made in professional, computer and related, health and education, tourism, financial data transfer and other business services ("OBS"). India would thus be looking at increasing the coverage of sub-sectors to research & development, dental and health related sectors and telephone-based and other support services within OBS. One forward-looking suggestion that India has already tabled at the WTO calls for a horizontal commitment across all services sectors in Mode 1 which would not only lock-in the current regime and check any pre-emptive protectionism, but also cover the development of any new service(s) that may be delivered through Mode 1 in the future, made possible by technological advancements. This would be politically more acceptable to the EU than any agreement on Mode 4 and

²² The Times of India, October 28, 2006.

in that more amenable from the perspective of negotiations in this FTA. A recent study by Boston Consulting Group expects 6 million jobs and revenue worth \$170 billion to be generated by 2020 in India via Mode 1, which reflects on the importance of this mode of service delivery for India.

2.5.2 Mode 4

Despite the dramatic development in Mode 1, Mode 4 will remain important for a range of services exports for India. Even for the Indian software industry, the movement of service-supplying personnel remains a crucial means of delivery, with close to half of Indian exports still supplied through the temporary movement of programmers to the client's site overseas. Moreover, India has an interest in Mode 4 well beyond computer and related services. In fact, with aging populations and rising average levels of training and education, developed countries are beginning to face an increasing scarcity of moderately and less skilled labour. Given that there is really no substitute for human labour in occupations like the caring occupations, personal services, and a range of professional services, the demand for Mode 4 is likely to increase over time.

Mode 4 faces a range of barriers. As the World Bank Report²³ says “A major problem is that the temporary movement of service providers invariably comes under the purview, not of international trade policy, but of immigration legislation and labor market policy. *Visa formalities* are in themselves a significant obstacle, and the conditions attached are used to implement a range of restrictions. These include *prohibitions and quotas* either explicitly or through a variety of economic needs tests. *Wage-parity conditions* tend to erode the cost advantage of hiring foreigners and have the same restrictive impact as quotas. *Discriminatory treatment* is implemented through a variety of fiscal and regulatory means. *Non-recognition of professional qualifications* poses a particular challenge because of the difficulty in distinguishing between legitimate and protectionist denial of recognition.”

The elimination of these impediments would generate gains not just for India but also for the importing European countries. Estimates²⁴ suggest that an increase in developed countries' quotas on the inward movements of both skilled and unskilled temporary workers equivalent to 3 percent of their work forces would generate an increase in world welfare of over US\$150 billion a year.

In Mode 4, the issue is that of making effective access possible and the mutual recognition of qualifications/experience and licensing requirements/procedures is indispensable for that. Other issues relate to increasing sectoral coverage in Mode 4 and the duration of stay; the avoidance of double taxation on social security benefits of Indian services professionals abroad; delinking temporary movement of contractual services suppliers and independent professionals from the requirements to set up office/firm abroad; and the fact that domestic regulation is more burdensome than necessary. This is politically the most sensitive issue for the EU and unlikely to yield much, though there

²³ World Bank (2004) op.cit. p 29.

²⁴ Winters et.al. (2002). 'Negotiating the Liberalization of the Temporary Movement of Natural Persons,' Economics Discussion Paper 87, University of Sussex, Brighton.

are huge benefits to nation-wide and EU-wide accreditation of professional qualifications and agreements on mutual recognition of qualifications/experience and licensing requirements/procedures within professional services in these two trading partners and this could easily be covered under this FTA a la the India-Singapore CECA, where 127 professions have been specifically laid out in Annex 9A for mutual recognition of qualifications and experience. In fact, such mutual recognition would have benefits beyond Mode 4. While India would be interested in a horizontal approach here as well, certain sectors like health and education would be non-negotiable for the EU. Hence, one may have to do with greater sectoral coverage on a case-by-case basis.

2.5.3 Mode 2

India has an interest in the export of health services and this manifests itself in the inflow of foreign patients to domestic hospitals and doctors. Such trade results in significant cost savings for patients and health insurers. For example, the cost of coronary bypass surgery could be as low as Rs 70,000 to 100,000 in India, which is about 5% of the cost in developed countries. Similarly, the cost of a liver transplant is one-tenth of that in the United States (UNCTAD and WHO, 1998).

But a major barrier to such consumption of medical services abroad is the lack of portability of health insurance. For example, only licensed, certified facilities in the United States or in a specific U.S. state reimburse US federal or state government medical expenses. Similarly in the EU, public insurance does not cover elective care received abroad.²⁵ The lack of long-term portability of health coverage for retirees from OECD countries is also one of the major barriers to such trade. In the US, for instance, Medicare covers virtually no services delivered abroad. Other nations may extend coverage abroad, but only for limited periods such as two or three months. This constraint assumes significance as it tends to deter elderly persons from travelling or retiring abroad and those who do retire abroad are often forced to return home to obtain affordable medical care. In fact, the potential impact of permitting such portability could be substantial. If only 3 percent of the 100 million elderly persons living in OECD countries retired to developing countries, they would bring with them possibly US\$30 to 50 billion annually in personal consumption and \$10 to 15 billion in medical expenditures (UNCTAD and WHO, 1998).

India would thus like this issue to be addressed in the FTA and the sectors of interest would include education and health services.

2.5.4 Mode 3

In Mode 3, issues across sectors relate to the need for huge minimum capital requirements imposed by the EU, residency requirements, restrictions on legal entity and the absence of national treatment. The last three are similar to the sort of issues that the EU has with respect to India and in that could become a part of the negotiations on a quid

²⁵ European citizens are covered for emergency and elective care within the European Economic Area (EEA). However, for elective care, they have to receive prior authorization from their local/national authority; the criteria for authorization vary, but can be very strict.

pro quo basis. The approach would have to be sector-specific, especially with increasing Indian interests in commercial presence in banking and IT.

Other general issues for priority are transparency in EU policies and their implementation and the need for harmonization of EU policies (commitments made in Brussels should translate into those at the level of every EU Member state). As an illustration from the financial services sector, banking sector licenses granted by any one EU Member should be acceptable across the EU.

2.5.5 Impact of domestic regulations in the EU

Domestic regulations to deal with market failures also impede competition and trade, as a result of differences across jurisdictions in technical standards, qualification and licensing requirements. This is especially true in professional, health and education services. Domestic regulations affect India's trade through all modes, and are the main challenge to ensuring open conditions for electronic delivery of services, for instance.

Box 2.1: Preventing conflict over competition in the EU-Mexico Agreement

An issue that could have a profound effect on electronic commerce is privacy. In late 1998, the European Union issued a wide-ranging directive that aims to safeguard the privacy of personal data of EU citizens and prevent its misuse worldwide. It is backed by the power to cut off data flows to countries that the EU judges not to have adequate data protection rules and enforcement. The directive caused frictions with the US, which accused the EU of trying to impose laws beyond its own frontiers. A compromise was reached under which the US agreed to set up arrangements for the processing by companies of personal data from the EU, but the issue has not been fully resolved. The issue could have an impact on India's exports of data processing services and poses a difficult choice. If it chooses not to enact laws deemed adequate, they could be shut off from participation in this growing market. In the absence of such laws and cumbersomeness of legal systems, it might be difficult for private firms to emulate United States firms like Microsoft and credibly commit to meet the required high standards. If it does enact stringent laws, they should be made specific to trade with particular jurisdictions, otherwise the result could be an economy-wide increase in the costs of doing business.²⁶

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

²⁶ For instance, if private sector estimates generated in the United States are to be believed, information sharing saves the customers of 90 financial institutions (accounting for 30 percent of industry revenues), \$17 billion a year (\$195 per average customer household) and 320 million hours annually (4 hours per average customer household) (Glassman, 2000).

3 Investment

3.1 Background

There has been considerable debate about the wisdom of including formal agreements on trade and investment in the WTO. Paradoxically, market access and regulatory commitments are made for investment in services (Mode 3) but not in manufacturing. The nature of the MAI negotiations and their subsequent failure convinced many people that despite the apparent logic of a set of multilateral rules, there was little to be gained. Then focus on investor rights as opposed to investor obligations worried many. The EU failed to convince its partners of the desirability of a WTO trade and investment pact. Scepticism is further fuelled by the lack of evidence that such agreements are actually effective in promoting FDI. A recent World Bank Study concluded: "Analyzing twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITs have stimulated additional investment."²⁷

3.1.1 What are WTO rules that an RTA takes as departure?

Investment regimes outside services are not covered by specific WTO disciplines. The TRIMs agreement covers trade related aspects of investment incentives rather than rules governing market access or investor rights/obligations. However the broad remit of Article III requires national treatment for all rules and regulations that might affect trade in goods even indirectly. This area is therefore one in there is in principle considerable scope for bilateral regimes.

3.1.2 What issues have surfaced in EU-India relations?

Since 1991, India has been substantially liberalising and simplifying its FDI regime to attract higher foreign investment, which has led to an increase in FDI inflows. However the inflows are still quite poor compared India's biggest competitor in economic growth - China. India's inflows are much lower than China's even after accounting for measurement differences. Moreover the gap between approved investment and actual investment is quite substantial. Less than 50% of foreign investment direct (FDI) projects which are approved by the Indian government actually materialise. While FDI policy especially for the manufacturing sector is quite liberal, there are substantial problems at the procedural and implementation levels, which are perhaps preventing a higher inflow of FDI.

Investment flows have been rising between the EU and India as well. However India's investment regime still deters many EU companies from investing in India. Other than the horizontal problems faced by all foreign investors in India, some EU companies probably find it culturally difficult to understand the system and operate in India. India's outward investment has been increasing and it is becoming an important investor in the EU. An investment agreement in the EU-India FTA may remove some of the problem and make the process of investing in each others markets much smoother.

²⁷ Hallward-Driemeier (2003)

3.2 Data

3.2.1 FDI Trends

As per the Reserve Bank of India's (RBI) revised calculations using international norms (including reinvested earnings etc.²⁸) provisionally India received FDI of US\$ 7,751 million in 2005-06, which is 37% higher than the previous estimate of US\$ 5,546 million. However the inflows are still far lower than that received by China.

Though inflows are still low India, has been receiving higher FDI since 2003 (Table 3.1). In keeping with the trend, more EU companies are now investing in India than before or expressing interest in investing in India. EU FDI interests in India are in the following manufacturing sectors: consumer goods, automotive, steel, chemical products, testing equipment, leather products, metallurgy, engineering goods, electrical goods, electronic goods, IT, environmental technology, bio energy, power, media, bio technology and bio pharma, textiles, printing, optical goods, capital goods, textiles machinery, R&D, pharmaceuticals.

Table 3.1: FDI Inflows between January 2000 and July 2006, and share of countries from the EU in Top Ten (US\$ Million)

Year	FDI inflows (% increase over last year)	Total inflow from Netherlands, UK, Germany and France (EU Countries in the top investing countries) (% of total FDI)
2000-2001	2,908	-
2001-2002	4,222 (45.2)	-
2002-2003	3,134 (-25.8)	-
2003-2004	2,634 (-15.9)	775 (29.4)
2004-2005	3,755 (42.6)	630 (16.7)
2005-2006	5,546 (47.7)	663 (11.9)
2006-2007 (up to July 2006)	2,896 (91.8) (Compared to the same period the year before)	220 (7.5)

Source: Department of Industrial Policy & Promotion (DIPP), Ministry of Commerce & Industry, India

An interesting feature of India's FDI trend is increasingly higher flows of outward FDI. In 2005, for the first time India's outward FDI was higher than its inward FDI. The largest destination for Indian investment has been the US but investment in the EU is also

²⁸ See the RBI website for more details

rising. Biggest destinations in Europe are the UK, France and Germany. Most India's investment has been in the manufacturing sector, while services investment has been rising fast. While this phenomenon can be looked at as 'coming off age' of India's companies, it may also be interpreted as problems in India's investment regime preventing higher FDI inflows.

Table 3.2: Region-wise Breakdown of FDI Inflows between January 2000 and July 2006

Region (as per RBI's classification of areas handled by its regional offices)	FDI inflows (US\$ millions)	Percentage of total
Delhi, Part of UP and Haryana	5,732.7	24.18
Maharashtra, Dadra & Nagar Haveli, Daman & Diu	5,239	22.16
Karnataka	1,676.6	7.08
Tamil Nadu & Pondicherry	1,560	6.67
Andhra Pradesh	849.7	3.61
Gujarat	826.1	3.49
Chandigarh, Punjab, Haryana, Himachal Pradesh	328.3	1.42
West Bengal, Sikkim, Andaman & Nicobar Islands	311.1	1.32
Goa	180.2	0.77
Kerala, Lakshwadeep	73.9	0.31
Orissa	73.3	0.31
Madhya Pradesh, Chattisgarh	37.4	0.16
Assam, Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Tripura	9.0	0.04
Rajasthan	8.0	0.03
Uttar Pradesh, Uttranchal	3.4	0.01
Bihar, Jharkhand	0.6	0.0

Inflows through acquisition of existing shares by transfer from residents are not indicated here. Percentage of such FDI not included here is 28.1% (US\$ 6700 million)

This has not been revised as per international practices.

Source: DIPP

Table 3.2 shows regional breakdown of FDI as registered in different regional offices in the Reserve Bank of India. Though the regions given in Table 3.2 do not exactly correspond to states and the figures represent only the equity capital component, broad conclusions can be drawn from the table. It can be deduced that between January 2000

and July 2006 that following states attracted the largest FDI inflows: Delhi, Maharashtra, Karnataka, Tamil Nadu, Andhra Pradesh and Gujarat.

Table 3.3: Foreign Direct Investment Approvals and Inflows in India (1991-1992 to 2004-2005)

Year (April-March)	FDI Approvals	FDI Inflows
1999-00	4266.40	2439
2000-01	5754.50	2908
2001-02	3159.70	4222
2002-03	1653.90	3134
2003-04	1352.90	2634
2004-05	-	3754

Source: IndiaStat

In addition to low FDI inflows, India has a gap between approvals and actual FDI (Table 3.3) though the gap has narrowed in recent years. Between 1991 and 2004, India approved US\$ 66,894.90 millions worth of FDI projects but actual inflows were US\$ 29,599 millions, which is an actualisation rate of 44.24%²⁹.

3.3 Procedures and Processes in India

3.3.1 Issues Related to the Indian FDI Regime

India's FDI regime, the reasons for poor inflows and low actualisation of FDI has been a subject of much debate and discussions. In recent years, the Indian government and RBI have come out with various reports studying India's investment regime and FDI measurement, for example:

- Report on Reforming Investment Approval and Implementation Procedures
 - Part I: Investment Approval Procedures – Government and Public Sector Projects
 - Part II: Downstream Issues – Implementation and Operation
- Parliamentary Standing Committee Report on Foreign Direct Investment
- Report of the Committee on Compilation of Foreign Direct Investment in India
- Technical Monitoring Group on Foreign Direct Investment: First Action Taken Report

There have also been a few studies and surveys on investment climate in India. Some surveys rank the Indian states according to their investment climate. There are broadly two types of barriers faced by foreign investors in India: **policies** and **procedure/implementation**.

3.3.1.a Policies

India has liberalised its FDI regime in recent years and therefore FDI in manufacturing sector is largely open for foreign investors. Table 10.1 in the Appendix provides details on FDI policies in various manufacturing sectors. There are more FDI caps in services ad

²⁹ Calculated from IndiaStat

infrastructure sectors. In spite of liberalisation, a few policy-related barriers still exist. EU companies and the interviews with EU missions in Delhi have pointed out some of them.

A major policy-related barrier exists because manufacture of certain activities is reserved for small scale industries (SSI). The SSI list has been steadily reduced from 800 a few years ago, to 326 at present. The list of industries reserved for SSI consists of items such as wood and wood products, food and allied industries, paper products, plastic products, injection moulding thermoplastic products, chemical and chemical products, electrical machines, appliances and apparatus etc. SSI reservations have been mentioned by EU companies as a barrier. Often investors from the EU wait until de-reservation takes place. There has been a case of at least one EU company which entered India only after the relevant sector was de reserved from the SSI list³⁰.

A particular policy hurdle frequently mentioned is related to Press Note 18. However there has been a change in the earlier notification. To provide information on changes in FDI policies, the Secretariat of Industrial Assistance (SIA) in the Ministry of Commerce & Industry (MOCI) issues Press Notes. Press Note 18 of 1998 was one of the most controversial Press Notes but it was replaced by Press Note 1 of 2005. Press Note 18 said that 'automatic route for FDI and/or technology collaboration would not be available to those who have or had any previous joint venture or technology transfer/trade-mark agreement in the same or allied field in India' and that the onus is on an investor to prove that 'the new proposal would not in any way jeopardise the interests of the existing joint venture or technology/trade-mark partner or other stakeholders'. Press Note 18 gave Indian partners undue advantage because they could thwart any new venture of their foreign partner in India by refusing to supply the mandatory 'no-objection certificate'.

Press Note 1(2005) allowed new proposal of foreign investment/technical collaboration under the automatic route. It says that 'prior approval of the government would be required only in cases where the foreign investor has an existing joint venture or technology transfer/trademark agreement in the same field'. The new Press Note diluted the advantage of an Indian partner. It said 'the onus to provide requisite justification as also proof to the satisfaction of the government that the new proposal would or would not in any way jeopardise the interests of the existing joint venture or technology/ trademark partner or other stakeholders would lie equally on the foreign investor/ technology supplier and the Indian partner'³¹.

The Special Economic Zones (SEZ) policy has been mentioned by an interviewee as a policy hurdle. The SEZ Act of 2005 classifies SEZs as a duty free enclave, which is treated as a foreign territory for purposes of trade operations, duties and tariffs. Goods entering the Domestic Tariff Area (DTA) from SEZs are treated as imports and thus

³⁰ Source: Interview

³¹ The Press Note also gave exemptions to cases when prior government approval will not be required even when foreign investor does not have collaboration in the same field. Lastly the press note recommended that 'the joint venture agreement may embody a 'conflict of interest' clause to safeguard the interests of joint venture partners in the event of one of the partners desiring to set up another joint venture or a wholly owned subsidiary in the 'same' field of economic activity'.

attract the usual tariffs and regulations and by similar logic goods entering SEZs from the DTA are treated as exports. SEZs can be set up as private, public or joint sectors, or by state governments and FDI upto 100% is permitted. Since products of companies which are set up in SEZs attract similar high duties when they enter the DTA, they will be at a similar disadvantage as any foreign exporters. For example, some EU engineering companies would need to import raw materials and inputs, therefore they would prefer to be established in SEZs since the inputs and raw materials would attract zero duty. However since they would not be able to take advantage of the huge domestic market, some of them are reluctant to set up base in India³². A related barrier mentioned is that the establishment of over 200 SEZs would create further confusion and non transparency in the investment regime. Compared to China with only three SEZs, too many SEZs with different rules and new rules being formulated would not help to improve the investment climate.

A major policy-related barrier for almost all EU companies is India's taxation system. There are taxes at three levels: 1) The federal or central government imposes the following: income tax (except agricultural income, which comes under the purview of the state governments), customs duties, central excise and sales tax and services tax; 2) state governments can impose the following: value added tax (sales tax in the states where the VAT is still not in place), stamp duty, state excise, land revenue, tax on professions; and 3) local bodies levy property taxes, octroi and tax on utilities such as water supply, drainage etc. Even though peak level of applied import tariff has been brought down to 12.5% in 2006 Union (or Federal) Budget, after adding local taxes etc, actual taxes on goods of EU exports interest and, inputs and intermediate goods may go up to 35% or in some cases 60%.

There are additional taxes such as countervailing duty and special additional duty applied by the Central government. A countervailing duty (CVD) of 4% is imposed across a range of products. However this is not really a CVD as it is understood in the World Trade Organisation (WTO). The current CVD of 4% on certain categories of imports has been imposed to provide a level playing field to domestic companies to offset the impact of excise duties. Special additional duty is imposed to counter the impact of the value added tax (VAT) in some states. The CVD and the special additional duty are imposed on the top of the basic tariffs applicable on products and thus they add to prices of products. Further, there is a lack of information on the applicable taxes. It is often difficult for a foreign investor to calculate the final rate of tax, until they actually pay it.

3.3.1.b Procedures

A greater hurdle for foreign investors appears to be poor implementation and cumbersome FDI procedures at central and state government levels. As explained in Box 3.1, first a foreign investor has to seek approval and clearances at the central level. A foreign investor can enter through the FIPB route or the RBI route. The FIPB is said to grant investment approval in 4-6 weeks and the RBI approvals require about two weeks.

³² Source: Interview

Box 3.1: FDI Procedures at the Federal Level

- Approval for FDI is granted through the **automatic route** (which does not require pre-approval from the government) or **government approval** (through the Foreign Investment Promotion Board-FIPB)
- In case of automatic approval, investors are required to notify the concerned regional office of the **Reserve Bank of India (RBI)** within 30 days of receipt of inward remittances and file required documents with that office within 30 days of issue of shares to foreign investors. Under the government approval route,
 - FDI proposals are received by the **Department of Economic Affairs (DEA), Ministry of Finance (MOF)**. However proposals from non resident residents and single brand retailing are received by **Department of Industrial Policy & Promotion (DIPP), Ministry of Commerce & Industry (MOCI)**.
 - Foreign investors are also guided by the **Foreign Exchange Management Act (FEMA)** administered by the RBI.
 - Portfolio investment is guided by the RBI and Securities Exchange Board of India (SEBI)
 - All foreign investment proposals considered by the FIPB are forwarded to it by **the Secretariat of Industrial Assistance (SIA), DIPP**. Applications can also be made with the Indian missions abroad who forward it to the DEA. Information of FDI policies and procedures are available on the DIPP website.
 - Entrepreneurs require **environmental clearance** for 31 types of industries. The industries include petrochemical complexes, petroleum refineries, cement, thermal power plants, bulk drugs, fertilisers, dyes, paper etc. There are exemptions in this. Setting up of projects in environmentally fragile areas are regulated by Ministry of Environment & Forests guidelines.
 - Foreign investors can enter India as incorporated entity (Under the Companies Act 1956) through joint venture or wholly owed subsidiary routes or as unincorporated entity as liaison/representative office, project office or branch office. There is no restriction on repatriation of profits or dividends. Any foreign investor who has the RBI approval to establish an entity other than a liaison office is permitted to acquire immovable property in India. However they cannot transfer ownership of such property without prior permission of the RBI.
 - The **SIA** has been set up to 'provide a single window for entrepreneurial assistance, investor facilitation, assisting entrepreneurs in setting up of projects (including liaison with other organisations and state governments) and monitoring implementation of projects'.
 - **Foreign Investment Implementation Authority (FIIA)** has been set up to facilitate quick translation of Foreign Direct Investment (FDI) approvals into implementation, to provide a pro-active one stop after care service to foreign investors by helping them obtain necessary approvals, sort out operational problems and meet with various Government agencies to find solution to their problems.

Source: DIPP

However once investors receive central approvals, they need to approach state governments for allotment of land/shed, acquisition of land, change in land use, approval of building plan, release of water connection etc. While FDI rules in the states are the

same there are differences in practices, efficiency level, bureaucracy and political factors across states. Typically approvals in most states take about 2 months, however, in some states approvals can take up to 7-12 months, at the least³³. Procedures in all the states are not the same. For example, some state governments have set up investment facilitation centres (e.g. West Bengal), which help investors to get clearances at the central level (e.g. from the FIPB, SIA etc), registration at the state level, power, water connections, land acquisitions etc.

Table 3.4: FDI Procedures and Agencies Involved at State Level

Clearances Required	Relevant Agencies in the State
Allotment of land	Concerned Industrial Development Authority District Collector/ Revenue Department District Collector/ State Government
Change in land use	District Collector/ Revenue Department Town Planning Department
Approval of building plan	Concerned Industrial Development Authority Local Authorities
‘No Objection’ from Fire Department	Fire Services Department
Release of power connection	State Electricity Board
Consent for setting up captive power plant	State Electricity Board
Release of water connection	Industrial Development Authority State Water Supply Department State Government
Site Clearance Certificate – required in case of identified highly polluting industries	
Boiler Certification	Chief Inspector of Boilers
Registration as a Factory	Chief Inspector of Factories
Sales Tax Registration	Sales Tax Department
Registration under the Trade Union Act, 1926	Labour Department of State Government
Registration under the Provident Funds Act, 1925	Labour Department of State Government
Registration under Shops and Establishments Act, 1988	Labour Department of State Government
Registration under Industrial Disputes Act, 1947	Labour Department of State Government
Registration under Minimum Wages Act	Labour Department of State Government
Registration under the State Employees Insurance Act 1948	Labour Department of State Government

Source: Report on Reforming Investment Approval and Implementation Procedures, Government of India, November 2002

³³ Source: interview

Among all the procedures, environmental clearance probably takes the maximum time and thus causes delays in implementation of projects. The information required to give environmental clearance applications are quite detailed. Besides inefficiencies and bureaucratic delays cause more hindrance³⁴. For certain types of investment projects, more number of approvals are required. The most obvious example is power projects, which require additional clearances and renewal of some of the approvals from time to time. There are also delays in finalising different agreements such as powder purchase agreement, fuel supply agreement etc. Inability of cash-strapped state electricity boards to make payments causes more hold ups.

However there is no 'single window' from which investors can get all the information about different states. Differences in practices and the lack of a single window facility where all the information related investing in India may be available can be quite confusing for foreign investors and may create difficult situations. For example, often EU companies prefer the joint venture route in India. If a local partner does not act in the right way, it may be difficult for the foreign partner to redress this. In case of a particular EU investment proposal, the local partner wanted to have a detailed knowledge prior to entering into an agreement and cited state-specific regulation. Since information about the relevant state rules are not is available, it was not easy for the company to ascertain this³⁵.

As per recent reports, there has been an improvement in approval mechanism both at central and state levels³⁶. However there is still a multiplicity of procedures and often too many agencies dealing with clearances especially at state levels. There are differences between states in dealing investment approvals and offering a favourable investment climate for foreign investment.

3.3.2 Investment Attractiveness of Indian States

Investor experiences in operating in some states are better than in other states. Southern states, Andhra Pradesh, Karnataka and Tamil Nadu seem to have fared better than others in attracting certain kind of investment. For example, Andhra Pradesh and Karnataka have attracted IT and related investment because of certain factors (explained below). Tamil Nadu has emerged as an automotive hub. Big global companies (Ford, Hyundai, Mitsubishi) established their assembling plants in Tamil Nadu in late 1990s. A new BMW plant has been established near Chennai (capital city of Tamil Nadu) in few months back without any complaint. Nokia has established a big unit too in the state. Tamil Nadu appears to have become the new hub for many EU businesses³⁷. Besides these, other states, which have done relatively well in attracting FDI, are Maharashtra, Delhi and Gujarat (also explained in Table 3.2).

³⁴ SIA 2002

³⁵ Source: interview

³⁶ FICCI Survey 2004

³⁷ Source: interview

As mentioned before, a few studies and surveys have concentrated on investment attractiveness of the states³⁸. From the studies and interviews, the following factors can be identified as important in determining a state's investment climate:

- Federal policies: Often central policies determine whether a particular state would be an attractive FDI location. For example, policies favouring industries in which the state has a competitive advantage or policies restricting investment some other industries e.g. SSI reservation.
- Natural advantages of a state: Natural factors have helped a state such as Gujarat to attract investment in the development of ports, oil and gas pipelines. Natural advantage, however may not be enough to attract investment to a state. Though Central and Eastern India has a rich source of mineral resources, the region could not attract much FDI because the other factors were not favourable (e.g. poor infrastructure). South Korean company POSCO, which intends to invest US\$ 13 billion to mine iron ore and build a steel plant in the Eastern state of Orissa, has been facing delays.
- Infrastructure: Though poor infrastructure is a problem for almost whole of India, many of the infrastructure issues are state specific. For example, energy (or electricity) prices, availability of power, condition of roads maintained by the state government, water connection are dealt with by state governments and local bodies. Some states, however do offer better infrastructure than the others. States, which have been lagging behind in attracting FDI (such as Bihar, Jharkhand, Uttar Pradesh, North Eastern states) have poor infrastructure facilities. Some of the infrastructure issues require measures both at the central and state levels. For example, power is both a central and state subject. While the central government has been taking measures to attract larger investment in the power sector, the functioning and financial conditions of state electricity boards will have to be improved to attract higher investment. The other problems area usually identified is ports and airports infrastructure in India. Among the infrastructure sectors, the telecom sector seems to have been performing satisfactorily both in terms of investment and services.
- Education, skills, soft infrastructure: Such issues are more relevant for software and related companies (and other knowledge industries) which require particular locations such as big cities with good living conditions, availability of skilled and trained manpower and people with good English language skills. Presence of such conditions helps to create IT clusters which attract even higher IT investment. States, which traditionally had big metropolitan cities such as Delhi, Maharashtra and Tamil Nadu attracted more IT and related investment because of incidence of such soft infrastructure. However states which lagged behind for many years such as Andhra Pradesh and Karnataka managed to attract greater IT investment because of the incidence of such conditions.
- Law & order: enforcement of law is an important determinant of a state's attractiveness as an investment destination. Law and order has been an issue in many states of India. There have been problems such as riots in Gujarat, insurgency in the North East, militancy in Kashmir and the Naxalite movement across many Central-Eastern India states (Andhra Pradesh, Orissa, Bihar). Such violent situations create an uncertain investment environment and companies usually are reluctant to invest in these

³⁸For example, Morris (2005), Tewari (2002), Veeramani & Goldar (2004), World Bank (2004)

regions. Often companies which are operating from the North Eastern Indian states are faced with abductions of their employees. According an estimate, in 2003 Bihar had about 5,000 homicides and 12,000 other incidents of rioting and abduction per year³⁹. Such incidents also create poor perceptions of law and order situations. However law enforcement is a problem at the central level as well. For example an EU company, which won a case in the International Chamber of Commerce (ICC) arbitration, had to start proceedings in India again because the ruling could not be implemented in India.

- Quickness of decision making: Some states make decision on investment projects and complete the investment facilitation quicker than the others. States have also been taking steps to have a single window facility, such as Andhra Pradesh that has set up an e-service facility. Decision making depend on several factors. One could be political will to attract investment and policies of the state government. Excessive bureaucracy and corruption also slows down decision making and could make the process of investment facilitation non transparent.

- Labour relations: Formulation and implementation of labour-related policies in India fall under both central and state jurisdictions. Labour laws and relations vary widely from state to state. There is a multiplicity of laws at the central and state levels. There are also different attitudes to labour-related problems in different states. Trade union movement and strikes are more common in certain states, for example, in West Bengal, though its state government is making increasing efforts to not let trade unionism affect the regular industrial activity. Some states (e.g. Gujarat, Karnataka and Tamil Nadu) have industry-friendliness and industrial peace as their expressed labour policy, at the same time keeping in mind the goal of a smooth industrial growth, and have reported less unrest among industrial labour.

- Land: Land is a state subject and again there is a wide divergence in laws across states. In some states land ownership by foreign companies is an extremely politically and socially contentious topic. Generally land acquisition and ownership is a difficult topic in India. In fact, the issues related to land often prevent materialising of FDI projects. For example, in urban infrastructure 100% FDI has been permitted on the development of integrated townships since 2001. However no investment project has materialised because of rigid conditions relating to land procurement especially in urban areas, where land revenue and reform legislation have precedence over organisation. Moreover there are problems relating to lack of clear titles, old protective tenancy and rent control⁴⁰. This issue deters EU investors as well. A few EU retailers have indicated that they would not set up operations in India unless they can own land⁴¹.

- Attitudes: The most important issue in investment facilitation is the attitude of the state government and its bureaucracy towards foreign investment. Kerala is an example of the fact that foreign investment may not come in even if the social infrastructure is favourable. It is the most advanced state in India in terms of human development but it does not attract much investment because of the attitude of its communist governments and strong trade union movement. The recent controversy over pesticide in Pepsi and Coke illustrates the attitude of Kerala politicians towards foreign investors. Though this debate has been going on for three years, Kerala banned the sale and manufacture of the

³⁹ www.bbc.co.uk

⁴⁰ Singh (2005)

⁴¹ Source: interview

cola drinks in 2006 following a fresh controversy. In contrast, though West Bengal is also ruled by a communist government, its state government refused to impose a ban. Eventually the cola giants won a case in the Kerala High Court, which said the ban was unconstitutional. The companies also produced studies asserting that their products were safe to consume. Though ostensibly the ban was to protect the consumers but it was probably also a case of 'brand thrashing' by Indian politicians, who may do such things as a 'populist gimmick'.

Indian states also give a number of incentives such as tax concessions, concessions on land and infrastructure costs, environmental standards and in some cases exemptions from labour laws. There is a strong competition among the states for investment. Examples of incentives given: electricity exemptions, stamp duty exemption, refund of octroi, capital incentives, interest subsidy etc as well as fast track bureaucratic clearance. Often so many incentives at so many levels create confusion among potential investors. There is also a debate whether the Indian states, many of whom face serious fiscal deficits, can afford such heavy incentives and whether this promotes a 'race to the bottom'⁴² especially when there are studies, which show that investment incentives are less important determinants of FDI⁴³.

3.3.2.a Perceptions

An important dimension in the EU-India investment relation is perceptions of each other's market. There is perhaps a lack of awareness among companies from both economies. Indian investors may not be aware of the markets in some EU countries e.g. smaller EU countries or Eastern European countries. Again, the level of awareness EU investors have of India is poor and their impressions are negative. In fact, often they find it easier to operate in India than they had originally imagined⁴⁴. This lack of awareness may be less of an issue for some EU countries such as the UK, which has historical ties with India and a large Indian diaspora. However, for some other countries, it may continue to be a problem. Furthermore, Indian investors may be unclear of the concept of the EU as an entity. EU investors may find it culturally difficult to understand the system and work practices in India.

3.3.3 India's Bilateral Investment Treaties

Since 1991, India has signed Bilateral Investment Promotion and Protection Agreement (BIPA) with a number of countries. India usually follows a typical model for its BIPAs. It has not signed NAFTA-type investment treaty (which includes broad definition of investment, investors allowed to demand compensation for "indirect expropriation") till now. The Ministry of Finance website gives a structure of India's 'model BITS':

http://www.finmin.nic.in/the_ministry/dept_eco_affairs/investment_div/invest_index.htm#Background_and_salient_features

⁴² E.g. see Oskarsson (2005)

⁴³ E.g. see Banga (2003)

⁴⁴ Source; interview

India-Singapore Comprehensive Economic Cooperation Agreement (CECA) includes a chapter on investment, which covers services investment (establishment through commercial presence) and intellectual property rights as well. This agreement is different from India's other BIPAs. The investment chapter in the Singapore agreement had some additional clauses and a specific schedule of commitment from India on manufacturing investment and a schedule of exception from Singapore (See Table 3.5). The agreement does not contain any provision for investors on investor to state arbitration covering disputes relating to establishment, acquisition or expansion of investments. Interestingly, in an annex to the agreement, India undertakes that if it should conclude a future agreement which contains investor-state dispute settlement to the pre-establishment phase of investments, it will grant similar privilege to Singapore. The agreement provides for post establishment National Treatment but does not include any provision for Most-Favored Nation Treatment. The agreement does not provide for "Fair and Equitable Treatment" or "Full Protection and Security" either. This is a departure from India's 'model investment treaties'. The India-Singapore agreement also contains a decision to incorporate the provisions of the WTO Trade-Related Investment Measures (TRIMs) Agreement⁴⁵.

India has signed BIPAs with 16 EU Member States (Table 3.5) and with Bulgaria and Romania. The agreements typically contain clauses on investment promotion and protection, national treatment and most favoured nation treatment, expropriation, compensation for losses, repatriation of investment, dispute settlement between companies and the state, and between states.

The evidence on the effectiveness of bilateral investment treaties (BITs) is mixed. Banga (2003) shows that for developing countries, BITS with developed countries have more impact on attracting FDI inflows.

⁴⁵ http://www.iisd.org/pdf/2005/investment_investsd_aug3_2005.pdf

Table 3.5: India's Bilateral Investment Treaties

India's Investment Treaties	EU countries with which India has entered into BIPPA (and date on entry into or ratification)
The Ministry of Finance website gives the text of a model BIPA signed by India. However there may be minor differences e.g. in the clauses on compensation for losses, dispute settlement or promotion and protection clauses etc. However pre-entry national treatment has not been accorded to any foreign investor.	Austria (1 March 2001) Belgium (8 January 2001) Bulgaria (2 September 1999) Cyprus (12 January 2004) Czech Republic (6 February 1998) Denmark (12 August 1996) Finland (9 April 2003) France (17 May 2000) Germany (13 July 1998) Hungary (2 January 2006) Italy (26 March 1998) Netherlands (1 December 1996) Poland (31 December 1997) Portugal (19 July 2002) Romania (9 December 1999) Spain (16 October 1998) Sweden (1 April 2001) United Kingdom (6 January 1995)
In India-Singapore CECA, some major additional clauses are there on restrictions to safeguard balance of payments, security exceptions, transparency, case by case import duty exemptions in India for Singapore investment in infrastructure sectors. There are also schedules of specific commitments	

Source: Government of India websites

3.4 The Way Forward

It would probably benefit all EU Member states to have a blanket investment agreement with India with standard clauses and some Singapore-style provisions such as duty exemption on certain types of investment projects, specific schedule of commitments and transparency. The agreement may also contain provisions on tax holiday and remittances. Such an agreement would not necessarily replace existing bilaterals.

India would probably be keen to have an investment agreement with all EU Member States, which would give protection to its investment. India is increasingly becoming a global investor. More and more Indian companies are investing in the EU, the recent example being Corus, the Anglo-Dutch steel group, being taken over by the Indian conglomerate Tata Steels. It would be the Indian government's interest to have an agreement under the EU-India FTA, which would promote and protect such investment deals, especially from politically driven legislations (e.g. to avoid outsourcing type of controversy).

The investment agreement could provide for setting up a system of a single window information system for investors of both the economies. The single window information system could provide information on all federal laws and procedures and broad state government clearances, in case of India and, rules and regulations of all Member States as much possible, in case of the EU. Just like the EU, India complains of a lack of a

single window information system on investment in the EC and the differences in investment rules and practices in different Member States.

The other provisions, which could be explored in the investment agreement, are:

- Whether there should be a prohibition on the imposition of performance requirements, such as local content, export conditions and employment, as a precondition for the entry or operation of an investment.
- There could be a commitment to permit or facilitate the entry and stay of foreign personnel in connection with the establishment and operation of an investment project.

Certain problems cannot perhaps be dealt with in an FTA, e.g. issues related ownership of land and labour policy in India. Such issues are state subjects and politically controversial. However EU investors can seek remedy under the dispute settlement system of the agreement if a state government fails to hand over land, for example, after it agrees to do so. Once an investment agreement is signed, it would be the responsibility of the central government in India and the EC to ensure that Indian states and EU Member States abide by the provisions of the agreement.

4 Trade Facilitation

4.1 Background

While trading conditions in India have improved, according to a 2004 report there is room for improvement in areas, “such as the transparency of tariffs and trade regimes, multiplicity of import documents, controls of products by other authorities, classification and valuation issues and transit procedures.” However according to the same source, “The recent implementation of EDI and self assessment is a positive step towards a completely integrated automated system...”⁴⁶

4.1.1 Multilateral rules on trade facilitation

Articles V, VIII and X of the GATT relate to trade facilitation in some form or the other.

Article V specifies that “in transit” movements be duty free and that any related transportation or administrative fees be non-discriminatory and reasonable. Furthermore, “in transit” procedures implemented by a party to protect the safety of its citizens and to ensure that the goods do not enter their country illegally must be non-discriminatory and kept to a minimum.

Article VIII (Fees and Formalities) is the WTO trade facilitation measure that is most closely aligned with border procedures and practices. Article VIII requires that all fees and formalities reflect the actual or approximate cost of the services rendered; that Members do not impose significant penalties for technical or small violations; that charges and/or fees do not constitute a form of taxation; that fees and formalities are applied in a non-discriminatory fashion and do not protect domestic products or producers; and that the scope and complexity of fees and formalities be kept to a minimum.

Article X (Publication and Administration of Trade Regulations) of GATT 1994 establishes that all trade related laws and regulations be published in a timely fashion and all such instruments cannot be enforced until publication; the administration of trade law and regulations is applied in a uniform and equitable fashion; and Members should furnish the appeal process.

Notwithstanding the scope and focus of WTO Articles V, VIII and X, it is generally acknowledged that trade facilitation involves many more issues and dimensions. The following WTO agreements complement Articles V, VIII and X:

- Agreement on Import Licensing Procedures;
- GATT Article IX of Marks of Origin;
- The Agreement on Customs Valuation;

⁴⁶ ‘Identification of concrete trade obstacles to be removed through the future WTO negotiations on trade facilitations or other negotiations in the framework of the Doha development agenda: Study for the Market Access Unit of Directorate General Trade European Commission, Final Report,’ CEEL, 2004.

- General Agreement on Trade in Services (GATS);
- Agreement on Pre Shipment Inspection (PSI);
- Agreement on Trade Related Intellectual Property Rights (TRIPs);
- Agreement on the Application of Sanitary and Phytosanitary Measures;
- Agreement on Technical Barriers to Trade (TBT);
- Agreement on Rules of Origin (RoO);

4.1.2 Key issues of concern to the EU in trade facilitation in India

Our database on non-tariff barriers reveals that the EU has complained of burdensome customs registration and documentation procedures/requirements, lack of transparency/discretionary criteria for valuation by customs officials and resultant frequent delays in the export of food stuffs, professional equipment, machinery, textiles and clothing, automobiles and energy and environmental services.

1. **Transparency:** The rules of import and export are published and available in the public domain but these are complex and subject to frequent modifications.
2. **Different implementation/enforcement policies:** Many policies are at the discretion of the customs officials and degrees of enforcement vary.
3. **Complex procedures for calculating customs duties:** Tariff structures in India are complex and non-transparent as are the procedures for calculating import duties.
4. **Delays in customs clearance:** While there has been an improvement in the time taken for the imported goods to be cleared by customs, delays still occur on account of burdensome documentation requirements, customs valuation and classification issues, and compliance with pre-import requirements and inspections to assess compliance with respect to other agencies.
5. **Internal transit procedures:** Each state has its own legislation and there are difficulties in obtaining inland clearance.

Trade facilitation is all about actual changes implemented at the ground level in line with economic incentives and thus, as revealed during discussions with senior officials in the Indian Customs and Central Excise Service, **industry and trading associations** in India, a mere change in designation and nomenclature does not facilitate trade in any way. Trade facilitation measures directly translate into a loss in the discretionary power of the concerned government official and it is the misplaced sense of power and holding on to authority that exists in the system, more than limiting avenues for corrupt practices, which is the biggest deterrent to trade facilitation.

4.2 Data

Such barriers have translated into inefficient time delays and cost over-runs, as can be seen from the Table below on World Bank's Doing Business indicators of trade across borders. India fares much worse than the OCED and China on all these indicators and in terms of trade documentation required, has a more onerous regime than the one on average for the entire South Asian Region.

Table 4.1: Snapshot of customs procedures

Trading across borders...	India	SAR	OECD	China
Documents for export (number)	10	8.1	4.8	6
Time for export (days)	27	34.4	10.5	18
Cost to export (US\$ per container)	864	1,236	811	335
Documents for import (number)	15	12.5	5.9	12
Time for import (days)	41	41.5	12.2	22
Cost to import (US\$ per container)	1,244	1,495	883	375

Source: Doing Business Report, World Bank (2006)

4.3 Customs procedures⁴⁷

Following discussions with senior officers in the Indian Customs & Central Excise Service, the process of customs clearance is as set out as below:

1. Goods arrive at the port
2. If the ship cannot find a berth due to port congestion then there is a delay on account of lack of infrastructure
3. If the ship finds a berth, then the cargo is unloaded
4. The importer then files a bill of entry which is basically a declaration of imports and includes information on the description of the goods, their weight, the HS classification, the rate of duty imposed and any notification if duty exemption is being claimed. The importer can now file this bill of entry online even before the goods have arrived and this has created a lot of transparency in the system, besides facilitating trade. Alternatively, the importer can file this bill of entry in person at the service centre at the port. Interestingly, despite the facility now for e-filing, importers prefer to do this in person as they can distort the facts of trade to their advantage and get away with paying less duty by under-invoicing the imported goods.
5. The goods are then assessed and examined by the customs. All pertinent information for this including the HS classification and the import duty applicable is now available on the standard information network terminal and the customs officers have to follow this completely. There is hence no discretion left for any officer now. Rates of duty are determined by the Tax Research Unit of the Department of Revenue, Ministry of Finance at the behest of the domestic industry. These are then announced in the Annual Budget by the Finance Minister. Any new rates of duty or changes in those announced in the Annual Budget because of RTA negotiations for instance are made through Ministry of Finance Notifications. There is also a Directorate of

⁴⁷ Based on interviews with senior officers of the Indian Customs & Central Excise Service.

Valuation which makes standardized information on valuation of imports available to all ports and airports so that there is no discrepancy across formations in the valuation of imports for the purpose of imposing duty and hence, no discretion. Moreover, not only has the scale of examination come down enormously, but there is a Risk Management System (RMS) in place for established traders and their imports are not even examined by the customs. This RMS is followed by a port-clearance audit in line with international norms.

6. The importer is then asked to pay the duty in cash or through a demand draft. (There may be a delay here too if the banks are closed, for instance.)
7. Once the duty has been paid, the customs officer issues an 'out of charge' and the goods can be taken out of the port
8. There may be other delays now if there is a trucker's strike, for instance
9. Apart from the poor quality of the roads, the importer would also face restrictions in the inter-state movement of goods

There may be an additional leg in this journey if the imports are food items or pharmaceutical products in which case there are standard requirements that need to be met. In accordance with the Prevention of Food Adulteration Act (1954), all food imports need to be cleared by Food Control Laboratories which are there only at 5 locations in the country. So, samples need to be sent to these labs for testing.

The main actors involved in the entire process are:

1. The carrier
2. The custodian of the goods i.e. Airport Authority of India or the Port Operator as applicable
3. Indian Customs
4. Banks
5. Customs House Agents (they basically act as middlemen and can get the clearance done if the importer does not want to be involved directly)
6. Standards authorities

4.4 The Way Forward

The ambit of trade facilitation is very broad and includes several areas. While some of these would need to be addressed by the government, others would involve public-private partnerships⁴⁸:

• Improving Port Logistics

- o Berth facilities for ships
- o Warehousing facilities (including refrigerated warehouses for perishables)
- o Rail and road links from hinterland to ports

⁴⁸ This list is adapted from 'Economic Growth, Exports and Issue of Trade Facilitation: An Indian Perspective,' Ch. 9 in CUTS International ed. *Trade Facilitation: Reducing the Transactions Costs or Burdening the Poor,* December 2004.

- **Facilitating Inter-state Commerce**
 - o One-stop shop information on taxes and duties at the state level
 - o Rationalization of tax rates
 - o Improving road networks and related transport infrastructure

- **Standards Harmonisation**
 - o Reform of domestic standards setting and monitoring authorities
 - o Global convergence on standards
 - o MRA on standards

- **Encouraging Business Mobility**
 - o Movement of professionals and transparent visa systems
 - o Adequate financial systems including banking, insurance and clearance mechanisms

- **Setting up Trade Information and E-business facilities**
 - o Proper channels and access to market information, legal systems and standards and regulations
 - o Availability of electronic information
 - o E-Business infrastructure to enable B2B contacts

- **Fostering Administrative Transparency and Professionalism**
 - o Simple and transparent trade procedures
 - o Non-discriminatory enforcement based on risk assessment techniques
 - o Public-private partnerships and information sharing to improve enforcement and compliance

5 Trade Defence

5.1 Background

Trade defence measures include anti-dumping (AD) and countervailing duties (CVD) and safeguards that may be imposed on imports. While anti-dumping duties are imposed to offset the effects of injurious dumping in the importing country markets, CVDs are imposed to offset the injurious effects of countervailable subsidy that the exporter gets from the exporting country government. These trade defence measures in India fall under the jurisdiction of the Directorate General of Antidumping and Allied Duties in the Ministry of Commerce. The Designated Authority initiates and carries out both the dumping and the injury investigations, and makes a ruling based on its findings, the entire process taking between 12 to 18 months. Information on these investigations is made public through The Gazette of India: Extraordinary (an issue of the Ministry of Commerce) and is available online at http://commerce.nic.in/ad_cases.htm. The implementation is then done by the Ministry of Finance. Safeguards, on the contrary, are imposed with the sole objective of protecting domestic industry and the entire process of investigation, rulings and implementation for this, which may take up to 8 months, is carried out by the Ministry of Finance.⁴⁹ Indian rules incorporate a mandatory lesser duty rule⁵⁰. There is no mandatory public interest test but the Ministry of Finance has declined to impose duties in some cases.⁵¹

5.1.1 Multilateral rules on trade remedies

The GATT considers three types of trade remedial measures - anti-dumping, countervailing duties and safeguard actions. Article VI of GATT deals with dumping and subsidization and states that dumping or subsidisation, which causes or threatens to cause material injury, could be offset by imposition of antidumping or countervailing duties. Article XIX of the GATT deals with the imposition of safeguard measures in case of a sudden surge of imports. India and the EU are both subject to the same WTO disciplines and have both been active in the WTO in negotiations and dispute settlement. In general AD issues are dealt with at a multilateral level. Few FTAs have special rules on AD other than those between the EU and its immediate neighbours and candidates and the rare cases of Canada, Chile and ANZCERTA.

5.1.2 Trade defence issues in EU-India relations

There have been a number of disputes at the WTO between India and the EU. India challenged some aspects of EU methodology on AD and the EU has recently challenged a large number of cases brought by India. The disputes appear to have been formally resolved, but it is evident that there are concerns on the EU side regarding process in

⁴⁹ Interview with a senior officer of the Indian Customs & Central Excise Service.

⁵⁰ Kommerskollegium/National Board of Trade, Sweden: Report (2005-02-10) *The Use of Antidumping in Brazil, China, India and South Africa*, p43. state that the rule is binding but research for part 4 suggested some scope for removing any doubts about its mandatory nature. India has also tabled proposals at the WTO for a mandatory lesser duty rule for all Members.

⁵¹ Kommerskollegium(2005), p. 44.

India. The EC continues to regret “the weak injury and causality analysis, disrespect of the confidentiality rules leading to partly meaningless disclosures, and disregard of comments submitted by the EC exporters⁵²”.

The EU has since the bed-linen case modified its procedures in line with WTO DS procedures and in some cases has been associating with India in cases against the US. As of December 2006, the EU market access database notes that the formal complaint DS304 has been settled, but the EU feels it necessary to continue monitoring Indian AD activities.

5.2 Anti-dumping in action

India is now the world’s top user of AD and it is now the second most active user against the EU and EU is the number two target for India, even though the actual totals are modest and have been declining overtime⁵³. (About 30% of Indian measures in force in 2005 being against the EU and about 15% of total measures against the EU being by India⁵⁴).

The first anti-dumping investigation in India was initiated in 1992. During 1992-2005, the DGAD received a large number of applications for initiating anti-dumping investigations and after examining these, anti-dumping investigations were initiated in 179 cases involving 35 countries/territories. The countries prominently figuring in anti-dumping investigations are China, EU, Chinese Taipei, Korea, Japan, USA, Singapore, Indonesia, Thailand and Russia. The status of the 179 anti-dumping investigations initiated by the DGAD till March 31, 2005 is as below.

Table 5.1: Analysis of anti-dumping investigations

Cases in which final findings have been issued	157
Cases in which preliminary findings have been brought out and further proceedings are on	3
Cases under investigation for preliminary findings	10
Cases initiated but closed	9
Total	179
Measures in force (as on 31.3.2005)	103

Source: Annual Report 2004-05, Ministry of Commerce, GoI

The major product categories attracting anti-dumping duty from the EU are Chemicals & Petrochemicals, Pharmaceuticals, Fibres/Yarns, Steel and other Metals and Consumer Goods. Sector-wise break up of the anti-dumping investigations initiated by DGAD till March 31, 2005 is given in the table below:

⁵² ‘Overview of the Third Country Trade Defence actions against the Community,’ Annual Report, DG Trade B.2, November 2006, p. 16.

⁵³ ‘Overview of the Third Country Trade Defence actions against the Community,’ Annual Report, DG Trade B.2, November 2006, p. 11.

⁵⁴ ‘Overview of the Third Country Trade Defence actions against the Community,’ Annual Report, DG Trade B.2, November 2006, p. 5.

Table 5.2: Analysis of anti-dumping duties imposed by product

Product Category	Number of cases
Chemicals & Petrochemicals	87
Pharmaceuticals	30
Textiles/Fibres/Yarns	16
Steel & Other Metals	14
Consumer Goods	13
Others Products	19
Total	179

Source: Annual Report 2004-05, Ministry of Commerce, GoI

The following is the trend of anti-dumping imposition on the EU over 1993-2005:

Table 5.3: ADD imposed overtime – EU and Total

Year	EU	Total	% EU
1993	0	5	0%
1994	0	1	0%
1995	0	0	0%
1996	1	9	11%
1997	7	18	39%
1998	6	27	22%
1999	15	57	26%
2000	6	25	24%
2001	12	67	18%
2002	7	57	12%
2003	5	41	12%
2004	0	1	0%
2005	0	4	0%
NA	12	62	19%
Total	71	374	19%

Source: Global Anti-dumping Database, The World Bank

Indian anti-dumping activity reached a peak around 2000-2003 and has since eased off. About 75% of the measures in force in 2005 appear to date from 2000-2003⁵⁵. The decline in the last few years may be the result of EU action at the WTO.

Over time the EU has been the no. 2 target of Indian action and despite the recent fall in the number of cases brought against the EU, the number of measures in force remains a concern. In 2005, 21 of the 103 AD measures in place against the EU came from India, down from 29 in 2003 and 34 in 2004.

⁵⁵ Anti-dumping report 2004-5 table 3.4.8

Indian data is not wholly consistent but it appeared that in 2005, 29 measures in force were directed against the EU as against 47 against China (no. 1 target), and 15 against Korea (no. 3).⁵⁶

EU trade affected by Indian definitive measures - calculated at the time of imposition of measures - amounted to ca. €46 Million at the end of 2006,⁵⁷ which was about 0.2% of EU's merchandise exports to India.

In 2003 the EU challenged 27 Indian cases. The EU Market access database states:

“In December 2003, the EC decided to request consultations with India under the Dispute Settlement Understanding (DSU) of the WTO to clarify the methodology applied by India in its anti-dumping practice. Following the consultations held in February 2004, India opened a review process which led in 2005 and 2006 to the termination of virtually all of the contested measures, including those of most economic interest for EU exporters (steel and pharmaceutical products). The problems in the particular cases that lead to the WTO consultations have now been removed. But the EC continues to closely monitor all other on going Indian AD cases to ensure that the WTO rules and rights of EC exporters are fully respected by the Indian authorities.”⁵⁸

A study commissioned by the Swedish government⁵⁹ concluded that the Indian legislation was “in consonance with the WTO Agreements on Anti Dumping and Anti Subsidy/Countervailing measures.” But it is evident that concerns still exist about the actual procedures. One EU expert interviewed (non-Commission) commented that Indian officials seemed to be very well informed about the rules, but severe resource pressure might lead to corner cutting.

The Swedish study⁶⁰ noted that a very high proportion of cases that were filed led to measures by India, lending support to the suggestion that decisions may be taken without balanced investigation. The study notes that over the period 1997-2003 more than half the normal value calculations were based on “best information available” due to apparent unwillingness of exporters to cooperate with the Indian authorities, which might have offered more scope for discretion. Injury analysis, it notes, is also carried out without formal modelling. The Swedish study notes (p.44) that a high proportion of complaints in

⁵⁶ Table 3.4.8, Annual Report 2004-05, Ministry of Commerce, Government of India. This table is not wholly consistent with others.

⁵⁷ As per information received from the Commission. It is estimated that in the first 6 months of 2006, the amount of Indian imports into the EU affected by EU AD/AS measures amounted to ca. 138 million EUR, which roughly represented 1.3% of total Indian merchandise imports into the EU during that period. In 2005, the respective figures were 295 million EUR and 1.64% accordingly.

⁵⁸ <http://mkaccd.db.eu.int/cgi-bin/stb/barrierdesint.pl?bnumber=020092>
accessed Feb 5th 2007

⁵⁹ Kommerskollegium 2005 p. 42

⁶⁰ Kommerskollegium 2005

India come from dominant firms in highly concentrated industries. This has also been noted in the Indian press.⁶¹

5.3 Framework for Anti-dumping and Countervailing Measures

5.3.1 National Law

After India became a member of the WTO, rules affecting anti-dumping were amended. These Rules are now commonly known as Anti-Dumping Rules and Countervailing Duty Rules, respectively. Anti-dumping Rules, 1995 were amended subsequently in July 1999 to include a lesser duty rule; and again in May 2001 in January 2002 and in November 2003. Details are available at <http://commerce.nic.in/dgad/compendium/contents.htm>.

5.3.2 Designated Authority

Antidumping & countervailing measures are administered in India by the Directorate General of Anti-dumping and Allied Duties (DGAD), set up on 13th April 1998. This Designated Authority was appointed under Rule 3 of the Anti-dumping Rules and Countervailing Duty Rules. The DGAD conducts anti-dumping and anti-subsidy/countervailing duty investigations and makes recommendations to the Central Government for imposing such trade defence measures where appropriate. The duties are finally imposed/levied (and collected) by the Department of Revenue, Ministry of Finance through a Notification. Thus, while the DGAD in the Department of Commerce recommends the antidumping/countervailing duty, it is the Department of Revenue, Ministry of Finance, which decides and actually levies the duties. Any appeal against the order of determination or review of the existence, degree and effect of any subsidy or dumping related to the import of any article lies before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT-formerly known as CEGAT) and thereafter to the Supreme Court of India. In addition, various High Courts of the country also hear these matters.

5.3.2.a DGAD

While the DGAD was constituted in April, 1998, the Designated Authority in the Department of Commerce has been handling Anti-Dumping cases since 1992. The DGAD is headed by the Designated Authority of the level of Additional Secretary to the Government of India who is assisted by a Joint Secretary and a Director. There are also eleven Investigating and Costing Officers to conduct investigations. The Directorate is serviced by one Section headed by a Section Officer. Generally, the investigating officers are drawn from Indian Trade Service and the costing officers from the Indian Cost & Accounts Service.

⁶¹ See “Are anti-dumping measures justified?” Nilanjan Banik , Business Line, Tuesday, May 21, 2002 www.thehindubusinessline.com/2002/05/21/stories/2002052100040800.htm

5.3.3 Import data in trade defence investigations:

Trade data is made available by the Directorate General of Commercial Intelligence & Statistics (DGCI&S), Kolkata. These are generally the first choice of the domestic industry. In a number of cases, the product being imported may not have a dedicated ITC HSN classification and it may get covered by a classification that covers imports of other products as well. In such cases, the domestic industry has to rely on import data from other private agencies. To overcome this difficulty and to improve the accuracy of data, the DGAD has been interacting with the DGCI&S to work out a procedure whereby the DGCI&S can supply transaction-wise import data to a *bona fide* applicant for trade defence application, subject to maintaining confidentiality of business sensitive information. The supply of such data is at a nominal cost to be paid to DGCI&S.

5.3.4 Dissemination of information on trade defence laws and procedures

Core legislation, general information and that on cases decided is available on the Department of Commerce website. <http://commerce.nic.in>.

5.4 Subsidies and CVD

India is protected by Annex VII of the Agreement on Subsidies and Countervailing Measures (ASCM), which says that India and some other developing countries (those with GNP per capita less than \$1000 per year) are not subject to the provisions of Paragraph 1.a of Article 3, which prohibits the following type of subsidies: *Subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I*. However, exemption under Annex VII does not provide immunity to Indian exports from countervailing actions. Other WTO Members are permitted to impose countervailing duties against Indian exports, if subsidised products cause material injury to domestic industries in importing countries. In fact, exports under some of these schemes have faced countervailing actions in other countries including the EU.

To illustrate a few of such subsidies, the Government of India through the Directorate General of Foreign Trade (DGFT) in the Ministry of Commerce and Ministry of Finance offers the following kinds of export incentives:

(a) Export Promotion Capital Goods (EPCG) Scheme: This allows for the import of capital goods at a concessional customs duty. Under this scheme an exporting producer or merchant/exporter tied to a producer, is eligible.

(b) Duty Exemption/Duty Remission Schemes: there are three schemes

Advance License Scheme: Advance License is issued to allow import of inputs, which are physically incorporated in the exported product. Import of raw material is on the basis of quantity based advance license. The quantity of raw materials is determined on the basis of the government-provided Standard Input-Output Norms (SIONs)

Duty Free Replenishment Certificate (DFRC): Merchant-exporter or manufacturer-exporter, after exporting their products, may obtain a transferable duty free replenishment certificate for importing inputs used in the export products as per SIONs. This allows imports of inputs used in manufacture of goods without payment of basic customs duty or special additional duty. However, additional customs duty equal to excise duty, and anti-dumping /safeguard duty are imposed on such imports at the time of import since a certificate or the material imported against it is freely transferable.

Duty Entitled Passbook Scheme (DEPB): DEPB is an optional facility given to exporters who are not interested in going through the licensing route. The DEPB is meant to neutralise the incidence of customs duty on the import content of the export product. The neutralisation is effected by way of grant of duty credit against the export product. This credit can be utilised for payment of customs duty on imported goods. The scheme is available to exporting producers or merchant-exporters.

(c) Schemes for Export oriented Units (EOUs)/ Export Processing Zones (EPZs)/ Special Economic Zones (SEZs)/ EHTPs/ Software Technology Parks (STPs): These schemes offer following types of benefits:

- i) Suspension of collection of duties due on purchases of capital goods used in production of exports during the period of bonding
- ii) Exemption of customs duties due on purchases of raw materials and consumables
- iii) Exemption from excise duty on indigenous goods
- iv) Reimbursement of central sales taxes

(d) Export Promotion Schemes for Diamonds, Gem & Jewellery: A license is issued to exporters which entitle them to import raw diamonds for export purposes without paying customs duty. This is applicable to import of gold and other precious metals as well.

India's concerns have not only been that CVDs were being imposed on its products but also that there are differences in practices in different countries in calculating subsidies. India raised the issue of the EU's manner of calculating subsidies while imposing countervailing duties.

India till now has not initiated any investigation on whether export subsidies given by other countries are affecting its domestic industry. India has not adopted any countervailing measure against any products of any country for several reasons, so there were no CVD measures in force by India against the EU during 2003-05⁶². However, in

⁶² 'Overview of the Third Country Trade Defence actions against the Community,' Annual Report, DG Trade B.2, November 2006, p. 27.

the last decade, 25 anti-subsidy measures have been in force against Indian exports, with 11 of these coming from the EU⁶³.

The most controversial of India's exports incentive scheme has been the DEPB scheme. The EU had imposed CVD on steel and textiles availing the DEPB benefits. The Indian government argued that the DEPB scheme should be deemed as countervailable only if there is any excess remission/refund of duties/taxes. The DEPB scheme currently covers 52 per cent of the country's exports by value. The Indian government has been considering replacing the DEPB scheme with a suitable alternative. However there is a disagreement within the government whether the DEPB scheme should be replaced.

5.5 The Way Forward

The issues raised by the EU in DS304 can be summarised as the view that:

“Indian authorities systematically carry out their investigations in apparent breach of some of the most basic WTO rules, most notably regarding a proper injury investigation and disclosure of the findings and conclusions.”⁶⁴

Transparency was a major problem. As we noted, India has withdrawn nearly all the contested measures and the EU complaint is formally settled, but the EU still has worries about Indian processes.

For an RTA to address these issues directly would be a pioneering step. As we noted above, EU FTAs rarely have specific anti-dumping provisions. RTA negotiations might be an occasion to prompt India to upgrade its laws on a WTO compatible *erga omnes* basis, e.g. mandatory public interest test, and perhaps clarifying the lesser duty rule if there is any doubt over its mandatory nature.⁶⁵ India's existing RTAs do not have any concrete provisions on RTAs,⁶⁶ though there is a provision for possible AD provisions to be introduced in the India ASEAN agreement. The EU has proposed at the WTO that there could be a fast track dispute resolution mechanism for anti-dumping cases, to avoid having to use DS after imposition.⁶⁷

⁶³ Section 6.2, Annual Report 2004-05, Ministry of Commerce, Government of India.

⁶⁴ <http://mkaccdb.eu.int/cgi-bin/stb/barrierdesint.pl?bnumber=020092>

⁶⁵ Kommerskollegium study p43. state that the rule is binding but the analysis of part 4 suggests that it may be overruled in some cases.

⁶⁶ Kommerskollegium study p.48

⁶⁷ WTO Negotiating Group on Rules - Negotiations on Anti-Dumping and Subsidies: Reflection Paper of the EC on a swift control mechanism for initiations 10 March 2003

6 Standards

6.1 Background

Debates in this area typically focus on demands by developing country exporters for more rigorous respect for scientific evidence in the regulatory regimes of developed countries to ward off “new protectionism” which may be a deliberate policy to replace tariffs by NTBs or a simple neglect of the adverse effect of onerous rules and procedures on developing country trade. We must distinguish carefully standards, conformity assessment and regulation, all of which have their separate problems. Mutual recognition of conformity assessment in the case of non-harmonised standards is a nut the EU and the US have yet to fully crack.

6.1.1 What are WTO rules that an RTA takes as departure?

The WTO Technical barriers to trade and Sanitary and Phytosanitary agreements together with the general provisions of GATT Article III constitute the disciplines all WTO members must adhere to. There is no scope for individual schedules or exemptions. Article III requires all measures behind the border to be non-discriminatory, while TBT and SPS go further in imposing a conditional obligation to base rules on international standards, the condition being that these are sufficient to meet national regulatory objectives. SPS and TBT define the margins of discretion WTO members have within these rules and Art II is subject to eventual derogations under Article XX.

The role for RTAs in these domains seems limited but can in fact be significant where partners desire to harmonise regulations. In theory it is possible for an RTA to make provisions for Mutual Recognition of conformity assessment in the absence of approximation, but we know that this is likely in reality only to be able to go as far in an RTA as statement of ambitions and principles.

Like all WTO members India is a signatory to the Agreements on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) and Technical Barriers to Trade (the TBT agreement) at the WTO, which came into force in 1995.

6.1.2 What issues have surfaced in EU-India relations?

EU-India discussions on SPS and TBT issues have been characterised by problems experienced on both sides, rather than merely the traditional issue of developed country norms being perceived as obstacles to developing country exports.

Broad characteristics of the standards regime in India:

- A multiplicity of standards, laws and agencies.
- Lack of awareness and a single enquiry point where all the information regarding various standards regime could be available. This problem is more acute for importers i.e. foreign exporters.
- Different regimes for trade and domestic production for domestic market.
- Different problems at different levels e.g. the inability of domestic producers to meet high standards, problems faced by Indian exporters in developed countries etc.

- . Due to wide divergences in India's production structure, it has been difficult to have uniform standards on certain products all around the country. India's standards (both SPS and TBT) regime- i.e. laws, institutions and standards- is still evolving.

There are additional problems in EU-India relations on standards. On one hand, Indian government officials usually complain that EU customs officials and standards organisations do not trust goods originating from India. On the other hand, EU officials complain about non transparency of the Indian regime and that it is difficult to judge whether standards applicable in India are based on scientific basis.

6.2 Data

- The BIS has nearly 19,000 standards. Around 6000-7000 are product specific standards. About 2000-3000 Indian standards are harmonised with international ones.
- AGMARK (operated by Ministry of Agriculture) for raw agricultural goods for 181 products
- 500 labs in India- 8 BIS labs
- 3 SPS enquiry points, 1 TBT enquiry point

6.3 Procedures and Processes in India

6.3.1 Work on Standards in India

Most research and projects in India have been concentrating on the exports regime. Almost all the projects look at ways to make the Indian standards regime geared to meet international standards and include capacity building activities of Indian exporters in certain sectors. For example, Research and Information System for the Non-Aligned and other Developing Countries (RIS), a Delhi based think-tank is involved in a project funded by Australian Centre for International Agricultural Research (ACIAR) entitled 'International Food Safety Regulation and Processed Food Exports from Developing Countries'. The project, which is in its third year in 2006, is a five year project.

India Development Foundation (IDF) another Delhi based think-tank conducted a project in 2005-06 funded by British High Commission, New Delhi entitled 'Capacity Building for Policy Makers, Regulators, Inspecting Firms, Small Agricultural Exporters and importers in India to Face the SPS Measures'.

UNCTAD India Programme has been conducting a project for the Ministry of Commerce & Industry (MOCI), Government of India, funded by the Department for International Development (DFID), UK entitled 'Strategies and Preparedness for Trade and Globalisation in India', which has programmes for capacity building of exporters on standards in developed countries.

The MOCI is also partnering with the European Commission under the project 'Trade and Industry Development Project (TIDP)'. A component of the TIDP is technical

assistance to Indian standards organisations to understand the EU system. It has three components: CE marking, WTO enquiry point and food safety system. The component on CE marking has already begun. An outcome of the project is that the Bureau of Indian Standards (BIS) will soon have an information centre on CE marking.

6.3.1.a Domestic Standards

India, like many other countries, imposes a number of standards on health, safety and environmental grounds. However India has a divergent domestic economy. One of the reasons being the existence of a wide spectrum of industries (% is the 'informal' or unorganised sector), which makes it difficult to have uniform or indeed high national or international standards across all the sectors. Moreover, there are a number of agencies and ministries in India that are responsible for the standards regime with a number of applicable laws.

Unsurprisingly, levels of standards on various sectors in India are at different stages of development and implementation. Standards for few products are relatively developed such as electrical/electronic goods and medical devices, while India does not have any standard for toys (well developed in Japan for example). Standards for drugs are not well developed in India either. Central Drugs Standard Control Organisation of India reportedly does not have the capability to certify on standards comparative to the ones imposed by the US Food and Drug Authority (FDA)⁶⁸. In electrical appliance and package drinking water, Indian standards are largely similar to international standards. Standards for medical laboratories (labs) are also developed. There are a few ISO 15189 medical labs. On food, concepts on standards are not as well developed but still food labs are first accredited and then accepted⁶⁹. CODEX and WHO standards are relatively easier for India to meet⁷⁰. For some products Bureau of Indian Standards (BIS) certification is mandatory. However some major products still do not have well developed standards. Unlike many other countries there is no mandatory certification on monitors, computer peripherals etc in India. Newer standards are also being developed. For example, in June 2006 the BIS came out with specific international safety standards for information security management systems (ISMS) for the IT industry. These standards are identical to the standards issued by the International Standardisation Organisation (ISO) and International Electrotechnical Commission (IEC)⁷¹.

6.3.1.a.1 Agencies Responsible for Standards

The Bureau of Indian Standards (BIS) is the national standards body of India, was set up by an Act of Parliament (autonomous but falls under the purview of Ministry of Consumer Affairs- see Table 6.4) and is the supreme body in India for matters concerning standardisation, certification and quality in India. The BIS is engaged in formulating standards in 14 broad sectors, formulating nearly 19,000 standards till now and employs around 20,000 technical people⁷². It has elaborate committee systems for

⁶⁸ Source: interview

⁶⁹ Source: interview

⁷⁰ Source: interview

⁷¹ www.tribuneindia.com/2006/20060605/biz.htm - 54k

⁷² Source: interview

these sectors with participation from stakeholders, which develop standards and circulate the drafts for comments. This is as per the International Organisation for Standardisation (ISO) norms. The BIS is a member of international standards bodies such as ISO, IEC and International Telecommunications Union (ITU). The BIS has formulated 6000-7000 product specific standards. About 2000-3000 Indian standards are harmonised with international ones and there are a few others based on international standards but with variations to account for Indian climactic or economic conditions⁷³.

Table 6.1: The Coverage of the BIS on Standards Setting

Broad sectors	Categories of standards
Basic & Production Engineering	Product Specifications
Chemicals	Methods of Test
Civil Engineering	Codes of Practices, Guidelines, etc
Electronics and Information Technology	Terminologies, Glossaries, etc
Electrotechnical	Basic Standards
Food and Agriculture	
Mechanical Engineering	
Management and Systems	
Medical Equipment and Hospital Planning	
Metallurgical Engineering	
Petroleum Coal and Related Products	
Transport Engineering	
Textile	
Water Resources	

Source: BIS

The BIS has both product and management systems certification (Table 6.2). The product certification scheme of the BIS, aims at providing a third party guarantee of quality, safety and dependability of products. It is voluntary in nature and is largely based on ISO Guide 28. The certification mark is ISI or the Standard Mark and is an assurance of conformity to the specifications of a product. A large number of operational elements of the BIS product certification scheme correspond with the requirements of ISO Guide 65. Certification systems such as ISO 9000 or ISO 14000 are relatively easy for Indian companies to meet. It would not be difficult for Indian companies to meet newer certification systems such as ISO 18000 or ISO 27000 either, however Indian officials allege that constant revision of certification system is done to set up barriers for their companies⁷⁴. This issue is discussed again in the section on exports regime.

⁷³ Source: interview

⁷⁴ Source: interview

Table 6.2: Management Systems Certification Operated by the BIS:

Quality Management Systems Certification Scheme	Environmental Management Systems Certification Scheme	Occupational Health and Safety Management Systems	Hazard Analysis Critical Control Point (HACCP)
As per international (IS/ISO 9001:2000) standard Launched in 1991 covers a range of industry and service sectors e.g. engineering, chemicals, pharmaceutical, cement, ceramics, food, textiles, automotives, mechanical, metallurgical, electrical, electronics, aeronautics, hospitals, financial, banking services, construction, hospitals, wholesale & retail trade, education& training, hotel, power, printing, telecommunications, testing laboratories and information technology Accredited for 23 economic activities by Raad voor Accreditatie (RvA)-the Dutch Council for Accreditation	Corresponds to international (ISO 14000), which is a series of standards with a structure for managing environmental impacts of activities, products and services and to have a uniform international Environmental Management Systems (EMS)for use as environmental management tool, for achieving sustainable development	Indian standard developed by the BIS (IS 18001:2000) Requirements to enable an organisation to formulate a policy and objectives to protect its employees and others affected by the activities of the organization.	Two certification schemes to the food industry. Stand-alone Certification-Indian (IS 15000:1998) IS 15000 integrated with International (IS/ISO 9001) standard

Source: BIS

The other features of the BIS:

- There is a network of eight BIS laboratories, spread throughout the country provide conformity testing of BIS certified products against relevant Indian standards. Apart from its own laboratories, The BIS uses laboratories certified by NABL (see below), National Test House and laboratories operated by other institutions such as IIT Kanpur, IIT Mumbai etc. There are a total of around 500 labs in India⁷⁵.

⁷⁵ Source: interview

- It has a system of certification for both foreign manufacturers and Indian importers
- It is designated as a TBT enquiry point by the Government of India
- All the standards and relevant international standards are published in the BIS website
- It operates National Institute for Training for Standardisation (NITS)

The BIS has a process of continuous recruitment. It also looks at other options to facilitate its functioning, for example, it takes help of other certification bodies, private agencies and individuals. The BIS website provides information on various standards and certification and whether these are based on international standards.

The second important standards mark in India is AGMARK, which operated by Agricultural Marketing Information System Network (AGMARKNET) of the Ministry of Agriculture. It is applicable to raw food products while the ISI mark is for processed food (See Table 6.4). Agmark is a quality grading and certification mark for export and domestic trade, provides grading at farm level and acts as a third party guarantee to quality certified. 181 products have been notified under AGMARK till now. Grade standards have been prescribed for the following products

- Food Grains and Allied Products
- Fruits and Vegetables
- Spices and Condiments
- Edible Nuts
- Oilseeds
- Vegetable Oils and Fats
- Oil Cakes
- Essential Oils
- Fibre Crops
- Livestock Dairy and Poultry Products
- Other Products

Among the other standard setting bodies in India are the Quality Council of India (QCI) and accreditation bodies that operate under its umbrella. The QCI is an autonomous body set up by the Indian government jointly with industry associations to establish and operate accreditation structure for conformity assessment for the bodies offering certification, inspection, testing, registration of personnel and training programmes. There are a few bodies under the QCI which act as national accreditation bodies (See Table 6.3).

Table 6.3: Accreditation Bodies under the Quality Council of India

The National Accreditation Board for Certification Bodies (NABCB)	National Accreditation Board for Testing and Calibration Laboratories (NABL)	National Registration Board for Personnel and Training (NRBPT)	National Board for Quality Promotion (NBQP)	National Accreditation Board for Hospitals and Health Care Providers (NABH)
Responsible for providing national accreditation system for conformity assessment bodies such as certification bodies and inspection bodies.	Provides accreditation for laboratories; an independent body now under the Department of Science and Technology but would come under QCI umbrella eventually.	Responsible for registration of auditors, consultants and training programmes as per international norms	Concentrates on four sectors: public services, health, industry and education	Provides standards for evaluation of hospitals for grant of certification
Both NABCB and NABL are members of relevant international bodies and follow international accreditation system.				

Source: Quality Council of India

The National Physical Laboratory maintains and upgrades national standards of measurement compatible to international standards. It provides apex level calibration and dissemination of standards for maintaining traceability of measurement standards following quality system as per ISO 17025. Its responsibility is to ensure that units of physical measurements are based on the International System (SI units) and follow rules under the Weights & Measures Act 1956. The laboratory periodically carries out an exercise to compare national standards with relevant standards maintained in other countries. It provides NABL with qualified assessors, technical inputs and faculty to train testing laboratories. The responsibility on weights and measures is shared between the Centre and States. Matters of national policy and related issues such as uniform laws on weights and measures, technical regulations, training, precision laboratory facilities and implementation of international obligations are responsibilities of the Central Government purview. The State Governments are responsible for the day to day enforcement of the laws.

As Table 6.4 explains, besides the ministries of consumer affairs and agriculture, a number of other ministries and agencies are involved in setting standards. Other important agencies are Directorate General of Health Services (DGHS), Central Pollution Control Board, National Test House, which has India's largest network of laboratories for industrial testing, Central Drug Control Organisation etc.

A third important standards mark in India is the Scheme on Labelling of Environment Friendly Products (ECOMARK) operated by the BIS in association with the Central Pollution Control Board, which is voluntary by nature.

Central Drug Control Organisation lays down standards of drugs, cosmetics, diagnostics and devices. It regulates clinical research in India and standards of imported drugs. Foreign manufacturers apply to Central Drug Control Organisation for registration certificate for their manufacturing premises and the individual drugs to be imported. Testing of drugs is done in Central Drugs Laboratories.

In addition to these agencies, there are about 50 bodies in India providing ISO certification⁷⁶. Such multiplicity of standards setting bodies creates confusion. For example, though the CODEX contact point in India is the DGHS in the Ministry of Health, the Ministry of Food Processing Industries is closely associated with the activities of CODEX Alimentarius as well.

While the BIS is a standard setting agency, regulations are set by relevant regulatory authorities such as the Ministry of Agriculture and state governments for agriculture, Telecom Regulatory Authority of India (TRAI) for telecom, Ministry of Health for food safety etc. The BIS is involved in formulating voluntary standards, which manufacturers may or may not follow e.g. plywood or refrigerators may be available in the markets in India with or without the ISI mark. It is the government, which makes these regulations mandatory, by notifying them under some Act. The BIS Act also has a similar provision for notification, under which mandatory certification on cement and electrical goods have been notified. However mandatory certification on bottled water and milk powder have been notified by the Ministry of Health under the PFA Act and ISI mark is compulsory here. Again under the Explosives Act, LPG cylinder standard has been notified by the Department of Industrial Policy & Promotion. However the BIS does not formulate standards for drugs or the environment⁷⁷.

It is difficult to assess whether access to latest technologies or availability of skilled and trained manpower is a constraint for the BIS or any other standards or certification organisations in India. No definite estimate is available. While some government officials are confident that this is not a constraint for them, there are others who point out that compared to developed countries India does not have enough technical manpower⁷⁸.

At present, various committees and working groups are looking at ways to improve the standards regime. For example, there is a working group on quality set up by the Planning Commission of India. The BIS continuously revises existing regulations and comes out with new and improved standards. There is group working under the Department for Information Technology examining possible standards for IT goods. The

⁷⁶ Source: interview

⁷⁷ Source: interview

⁷⁸ Source: interviews

idea is to look at existing laws and recommend may suggest self conformity like for CE marking since it is time consuming to bring in new legislation in India⁷⁹.

Table 6.4: Important Ministries and Laws on Standards and Quality in India

Ministries	A Few Laws Governing Standards
Ministry of Agriculture: Various departments	Agricultural Produce (Grading and Marking) Act, 1937 (AGMARK) Insecticides Act 1968 Milk and Milk Product Control Order (MMPO) 1992 Meat Food Product Order 1973 Plant Quarantine (Regulation of Import into India) Order, 2003. Livestock Importation Act
Directorate General of Health Services, Ministry of Health and Family Welfare	Prevention of Food Adulteration Act 1954
Ministry of Food Processing Industries	Fruits & Vegetable Products (Control) Order – FPO 1955 Food Safety and Standards Act, 2006
Department of Commerce, Ministry of Commerce	Export (Quality Control & Inspections) Act 1963
Ministry of Consumer Affairs, Food and Public Distribution	Standards of Weights & Measures Act, 1976 Bureau of Indian Standards (BIS) Act 1986 Essential Commodities Act, 1955. Various orders passed under the Essential Commodities Act
Central Pollution Control Board, Ministry of Environment & Forests	Water (Prevention and Control of Pollution) Act, 1974 Air (Prevention and Control of Pollution) Act, 1981 Environmental (Protection) Act, 1986
Bureau of Energy Efficiency Ministry of Power	Energy Conservation Act 2001
Chief Controller of Explosives, Department of Industrial Policy & Promotion, Ministry of Commerce	Indian Explosives Act, 1884 Petroleum Act, 1934 Inflammable Substances Act, 1952
Directorate General of Mines Safety, Ministry of Labour & Employment	Mines Act 1952
Department of Road Transport and Highways, Ministry of Shipping, Road Transport and Highways	Motor Vehicles Act 1988

Source: Websites of Various Ministries of the Government of India

⁷⁹ Source: interview

6.3.1.b Standard for Food

Food standards and safety deserves a special mention because of the impact of the food sector on hygiene and health of the population, its importance in livelihoods of millions of Indians and divergent practices in the Indian food sector.

The major concern on food safety in India is physical, chemical and microbial contaminations. Consumer movement on this has been quite active. Mainly because of consumer activism but also because of proactiveness of environmental and food authorities, a number of food safety measures have been adopted. The Government of India set up a National Codex Committee under the Department of Health, Ministry of Health and Family Welfare. The committee with, inputs from relevant agencies such as Agricultural and Process Food Products Export Development Authority (APEDA), Spices Board etc, came out with recommendations on six major areas Fish and Marine Products, Meat & Meat Products, Fruits & Vegetables, Spices & Condiments, Milk Products and Cereal, Nuts & Oil Seeds.

Some of actions that were initiated from this exercise were:

- Training on HACCP, GMP (Fisheries, Fruits & Vegetables)
- Revision of PFA standards based on grade specifications for export (Spices & Condiments) including parameters for microbial limits
- maximum tolerance limit/MRLs for pesticide residue and aflatoxin
- Harmonisation of maximum tolerance limits for different pesticides for different food groups/foods under PFA and Codex

Ministry of Health acts as the Codex contact point (National Codex Contact Point) in India. The Government of India maintains a website on Codex in India, which gives information on working of Codex in India including risk analysis, research and development on SPS issues etc.

The standards regime for food and food processing industries in India can be quite confusing. The various laws and agencies governing the food sector (see Table 6.4) are Prevention of Food Adulteration Act (Ministry of Health), Agriculture Produce (Grading & Marking) Act (Ministry of Rural Development), regulations operated by the BIS, Essential Commodities Act and a number of quality control orders issued under the Essential Commodities Act such as MMPO, Meat Food Product Order and Vegetable Oils Control Order etc. The BIS prepare standards for food in association with other ministries. For some categories, the ISI mark is mandatory. While most foods-related standards designed for the Indian market do not meet international standards, some of the standards especially related to fertilisers and recognition of pesticides do meet international standards. The BIS website gives information on the applicable standards.

Measures have been adopted to reconcile the divergent and elaborate regime. A number of committees and groups were formed to look into the issue. For example:

1. The Ministry of Consumer Affairs brought out a paper, which recommends that BIS should formulate standards for all food items in the country.
2. A Task Force constituted by the Prime Minister of India under the chairmanship of industrialist Nulsi Wadia, which recommended that a Food Regulation Authority (FRA) be set up, Indian standards should be harmonised with quality norms of the CODEX and WTO, and a few other specific recommendations.

In August 2006, the Government of India enacted Food Safety and Standards Act with the aim to consolidate various laws governing food and to establish the Food Safety and Standards Authority (FSSA) of India to lay down 'science based standards of items of food and to regulate their manufacture, storage, distribution, sale and import', 'to ensure availability of safe and wholesome food for human consumption' and for other related matters.

The Act consolidates eight laws e.g. Prevention of Food Adulteration Act and various orders passed under the Essential Commodities Act. It envisages setting up of a three tier structure: an apex FSSA, a Central Advisory Committee and various scientific panels and committees. The law is based on CODEX. The Food Authority will have representation from seven ministries: agriculture, commerce, consumer affairs, food processing, health, legislative affairs and small scale industries. The standards formed by the FSSA will include specifications for ingredients, contaminants, pesticide residue, biological hazards and labels. The law will be enforced through State Commissioners of Food Safety and local level officials. The FSSA is expected to start functioning in another six months.

While the new law is good in the sense that it eliminates the multiplicity of laws and agencies and brings them under one umbrella, it perhaps poses a huge problem of implementation. The involvement of local authorities offers scope for harassment and corruption. Nevertheless the new law is expected to improve the food standards management in India.

6.3.1.c Exports Regime

India has been paying greater attention to standards of exported goods and meeting international standards whenever they are higher than Indian norms. The standards regime for India's exports is better developed and receives much attention from the government, civil society organisations and think-tanks.

Export Inspection Council (EIC) is India's official export certification body, is a part of the MOCI. It carries out pre-shipment inspection on items for exports. The EIC exercises control over five export inspection agencies established by the MOCI at Delhi, Chennai, Kochi, Kolkata and Mumbai.

Table 6.5: Certification by the EIC for exports

Together with the export inspection agencies, the EIC is responsible for:	There are about 1000 notified items:
<ul style="list-style-type: none">• Certification of quality of export commodities through installation of quality assurance systems (In-process Quality Control and Self Certification) in exporting units as well as consignment wise inspection.• Certification of quality of food items for export through installation of Food Safety Management System in food processing units.• Issue of Certificates of Origin to exporters for preferential tariff schemes	<ul style="list-style-type: none">Basmati riceBlack pepperEgg productsHoney unitsFish & fishery productsMilk productsEngineering itemsFootwear componentsPoultry meat componentsChemical products

Source: EIC

The EIC has developed a number of labs for the food sector. Its certification is recognised by the European Commission for Basmati rice (certificate of authenticity) and fish & fisheries product (particular processing units have been approved for export to the EU and names of the approved units sent to the EC for formal notification, after which they can export to EU countries).

The exports model by the EIC is now well developed and is being constantly improved upon. For example, The US and EU recommend HACCP for fisheries, which Indian exporters must comply. The EIC has a model for ensuring compliance with HACCP⁸⁰. It does not have a mandate to recommend or ensure compliance to international standards in the domestic market.

Other agencies involved in standards implementation of exports are Agricultural and Process Food Products Export Development Authority (APEDA) and Marine Products Export Development Authority (MPEDA) - both have schemes to ensure that relevant exporters meet HACCP. APEDA has a system of recognising HACCP implementation and certification agencies, and a scheme for laboratory recognition. There is a HACCP cell in MPEDA to offer advice on matters connected with EC Directives. The EC has agreement with both the agencies to approve imports from their certified laboratories and establishments. MPEDA also has a system of giving assistance to registered processors to set up quality control laboratories and modern pre-processing plants throughout the country to meet the ISO 9000 quality standards. The format followed by the two agencies especially MPEDA for marine products is working well.

As noted in an earlier section, a number of studies and projects have concentrated on India's export regime. Most studies, as well as Indian government officials and experts,

⁸⁰ Source: interview

who were interviewed for the present study, contend that Indian exporters face severe problem with EU standards. Some of the problems cited are

- EU CE marking is mandatory for 100,000s of products and many of them are quite stringent, which Indian companies sometimes find quite difficult to comply with. There are a number of specifications and information in concise form on individual products is not available. Often exporters have to do a lot of research but still can not be sure whether they have met all the requirements⁸¹.
- EU standards are typically more stringent than international standards. There are a number of standards based on health and environmental grounds but on social responsibility as well. It appears that the EU is going beyond quality marking to include social clauses. There are EC Directives such as that on Waste Electrical and Electronic Equipment (WEEE) and Restriction on Hazardous Substances (ROHS) in Electrical and Electronic Equipment (EEE) on waste and hazardous products, which the Indian industry find difficult to comply with.
- Some EU standards are changed frequently and at a short notice so that Indian exporters do not get the time to adjust to the new situation
- Indian government officials complain that EU customs officials and standards setting bodies do not trust goods originating from India
- The US has pre-shipment inspection of goods where they check each shipment. The EU has a system under which inspectors check some of the shipment and has a rapid alert system to inform the Indian authorities. There are also complaints from exporters that in the EU, a shipment which can not be permitted due to health or safety reasons could be destroyed. Sometimes a case may take 5-6 years to settle. This system reportedly causes huge losses to Indian exporters though no estimate is available.
- There is no uniform standard within the EU itself. There is no single window for information in the EC.
- In addition there are voluntary standards adopted because of consumer groups or by supermarkets etc. These standards are not informed to the WTO. It is difficult for Indian manufacturers to meet such standards, which are typically higher than international standards.

While there are a number of such complaints about the alleged barriers in the EU and other developed country markets, according to Indian government officials, India has not been effective in asking for scientific justification/counter data or argument in international fora when it felt that international standards have been set too high.

The level of awareness among Indian producers about international standards is not very high either. In some cases exporters are faced with shortages of suitable certification agencies or do not get adequate information from its standards institutions. For example, India signed FAO International Standards for Phytosanitary Measures (ISPM) No 15 that

⁸¹ Source: interview

guides wooden packaging. However there is no certification agency for this in India so exporters find it difficult to meet such standards⁸². Meeting high international standards require resources and access to technologies, which add to producers costs. This acts as barriers for many companies interested in exporting to the EU.

The compliance cost for Indian manufacturers to meet high international or EU standards can be quite high. The burden for Indian exporters can be reduced by spreading the cost over a larger producer community. Given the high compliance cost of meeting high international standards and general requirement of standards to protect health and safety in the country, India perhaps should not maintain different standards for trade and domestic production any longer. India needs to create more industries that can meet international standards e.g. through SEZs.

6.3.1.d Imports Regime

Compared to India's domestic and exports standard regime, its imports regime has received less attention from the government and others. Studies and information on the role of India's standards and regulatory bodies in regulating India's imports are scarce. The import regime in India is governed by the following agencies⁸³

- Directorate General of Foreign Trade (DGFT) in the MOCI
- Relevant Regulatory Authorities
- The BIS

Importers are required to obtain a number from the DGFT for importation of goods. The BIS launched its Product Certification Scheme for foreign manufacturers and Indian importers in 1999. Under the provisions of the scheme, foreign manufacturers and Indian importers can seek certification from the BIS for marking their product with BIS Standard Mark. Importers also have to approach the relevant regulatory authorities such as⁸⁴:

- Imports of food ingredients and additives with genetically modified or bioengineered organisms authorised by the Genetic Engineering Approval Committee, Department of Biotechnology, Ministry of Science and Technology the authorisation is valid for four years.
- Meat and poultry products imports are subject to compliance with all the provisions of Meat Food Product Order.
- An approval from the Ministry of Agriculture is required for import of primary agricultural products.
- Import permit issued by the Ministry of Agriculture is required for list of plants, plant products and seeds, and is valid for six months, under the Quarantine Order, 2004.
- Regulation on gas cylinders is handled by Petroleum and Explosives Safety Organisation (PESO) MOCI, which is responsible for the administration of Explosives Act, 1884, Petroleum Act, 1934, Inflammable substances Act, 1952⁸⁵.

⁸² Source: interview

⁸³ Department of Commerce, MOCI

⁸⁴ http://r0.unctad.org/trains_new/country_notes/india_2005.PDF

⁸⁵ <http://explosives.nic.in/activities.htm>

The EU has a number of complaints about India's import regime:

- The BIS rules are complex, time consuming and costly. The registration with the BIS is valid for a limited period of time (initially one year for foreign manufacturers), and has to be renewed after it lapses.
- Standards regime is non-transparent and bureaucratic, information is not easily available. Though the SPS and TBT enquiry points have been functioning in an increasingly effective manner, information on standards and rationale behind standards are still not easily available.
- Sector-specific technical regulations e.g. mandatory regulation on tyres, which appear to be of higher standards than international ones, homologation rules for cars, requirement of higher test pressure transport cylinders for shipment of compressed gases, standards and regulations in the construction sector sometimes not in line with international norms, the requirement for mineral water higher than international standards, regulations on medical devices, regulation on wooden barrels containing spirits.
- A number of regulations and standards in the food and edibles sector and related to plants and animals; e.g. ban on bovine products, ban on pig meat and pet food to prevent avian flu, breeding horses, shelf life requirement of not less than 60% of imported food products.
- A few horizontal regulations such as maximum retail price labelling in the country of origin before customs clearance, BIS mandatory certification on 109 products.

The issues between the EU and India- both from the EU and Indian sides- have been discussed in various forums. In July 2006 the issues were discussed in an EU-India SPS/TBT working group meeting in Delhi. In the meeting, the EU and India discussed their relevant legislative and regulations setting processes and sought responses from the other side on the specific problems described above. However, there was not much discussion on the way forward or possible clauses on SPS and TBT in the context of a free trade agreement.

Responses from the Indian side in the July meeting on some of the issues were

- BIS mandatory product certification: The BIS considered this to be a necessity. The Indian side recommended mutual recognition as a way to improve the India/EU problem on this issue. However there was a difference in the concept of mutual recognition as understood by the two sides. While the EU favours mutual recognition of conformity of assessment procedures, the Indian side would like to have mutual recognition of standards and technical regulations.
- Certification of tyres: the Indian side contended that on health and safety grounds, India needs to have a stricter regulation on tyres because Indian roads are typically bad and weather conditions in many parts quite harsh.
- Medical devices: This issue seemed to have been solved. While the Indian team said CE marked medical devices are acceptable, the EU informed that it is revising its regulation on medical devices

- Ban on bovine products: The Indian team informed that it is revising its protocol to allow imports of semen and embryos, however, import of beef would continue to be banned for religious reasons.
- Ban on breeding horses: India said that import from France is allowed, but not the UK, as it continues to be affected by Contagious Equine Metritis (CEM) disease. Further, certain categories of horses are allowed to be imported i.e. for males up to 5 years and females up to 7 years.
- Ban to prevent Avian Flu: India claimed that on scientific basis it banned pig meat because pigs are a natural carrier of the virus. However, India said that the ban does not extend to all the countries of the EU and said it would inform which EU countries are acceptable to it.
- Maximum retail price labelling: The EU argument was that the relevant Indian notification is open to interpretation whether imported goods can be labelled with maximum retail price in custom warehouses. The Indian side committed to provide a written interpretation of the relevant Indian notification.

As noted before, it is difficult for India impose high national or international standards across all the sectors in the domestic economy because many Indian producers would not be able to meet these. This, combined with the fact that India is a signatory to the WTO SPS and TBT agreements, implies that India cannot apply higher standards to imports than that for domestic production (violation of the National Treatment principle). In many of the cases of high national standards explained above, Indian producers are able to meet the high standards.

There have been criticisms of the manner in which India has used standards measures. It has been alleged by people from the government and academia that the India government has been using standards as non tariff barriers. For example, it has been alleged that after the abolition of quantitative restrictions on imports in 2001 to fulfil its WTO obligations, India imposed quality and testing requirements for some imported products⁸⁶. The Indian government has also been criticised for using standards measures to keep out exports from other developing countries⁸⁷. There is no systematic evidence of India using standards measures to keep out exports. However it is a fact that India's free trade agreements usually do not deal with standards issues.

A few of the problems in the standards regime are due to horizontal factors such as the bureaucracy, corruption and slow process of decision making that affects administrative procedures across almost all the government departments. In recent times, measures have been adopted to improve functioning of many government departments and public sector undertakings. The functioning of the BIS probably does need improvement. While on paper the BIS is autonomous, apparently there is a considerable bureaucratic interference⁸⁸. In the past it was alleged that the decision making process of the BIS is shrouded with secrecy and confidentiality. There have been complaints that vested interests, particularly big business houses, often influence the standards formulation of

⁸⁶ The Hindu Business Line, 3 April

⁸⁷ Debroy (2005)

⁸⁸ Source: Interview

the BIS⁸⁹. Recently a fresh controversy on the presence of pesticides in cola drinks (Pepsi and Coke) brought the issue of functioning of the BIS in public discussion. It was alleged that the BIS failed to notify the final standards on cola drinks even though the standard formulation was in process. It should be noted that the BIS has been taking steps to improve transparency, encourage greater participation of people, and ensure greater use of computers, website and the internet.

Many Indian officials and exporters do not trust EU (and other developed countries) standards. Indian bureaucrats and government technical officers contend that many of the EU standards are too stringent and have been formulated to keep out Indian (and other developing country) exports. Perhaps this has led to a mindset of not to be helpful with EU exporters complaints on standards issues.

There are some sector specific problems for example, the problems related to the food sector as explained before or the characteristic of the automotive sector, which in turn may affect formulation of standards for these sectors. Some of the problems are described below.

The Automotive Industry

The regulations in and problems of the industry is given a closer look here since there are more than one technical problem related to this sector. The Indian auto industry has seen an impressive growth in the last decade fast becoming an outsourcing and manufacturing hub for global car makers as well as experiencing a rapid growth in the domestic demand for cars and auto components. In India, the rules and regulations related to cars, tyres and all other matters related to automotive industry are governed by the Motor Vehicles Act 1988 and the Central Motor Vehicles Rules 1989. The **Ministry of Shipping, Road Transport & Highways**⁹⁰ acts as a nodal agency for formulation and implementation of various provisions of these acts. States also have their State Motor Vehicle Rules.

The Government of India set up an **Automotive Industry Standards (AIS)** Committee, which formulates standards that are converted into Indian standards by the **BIS**⁹¹. The industry has been suggesting that a national standard regime for the sector be created by merging BIS with AIS standards. Since 2000 United Nations Economic Commission for Europe (UNECE) regulations have been used as a basis for Indian regulations and, since 2003 India has made efforts to technically align national standards (AIS/BIS) with ECE though with a few variations⁹².

The issues faced by the tyre industry are a good example of the challenges faced by the automotive sector in India. Large tyre companies in India have all voluntarily adopted

⁸⁹ Ministry of Consumer Affairs Report on the Presence of Pesticides in Mineral/Bottled Water

⁹⁰ There are other Ministries, Ministry of Environment & Forest, Ministry of Petroleum & Natural Gas and Ministry of Non-conventional Energy Sources, which are also involved in formulation of regulations relating to emissions, noise, fuels and alternative fuel vehicles.

⁹¹ www.competition-commission-india.nic.in/competition_forum/iti_comp_comm_pres.pdf -

⁹² The Union Cabinet in October 2002, approved a proposal to join the World Forum for Harmonisation of Vehicle Regulations (WP.29) as an Observer and the constitution of a National Level Standing Committee to deal with issues pertaining to WP.29; <http://www.siamindia.com/scripts/harmonisation%20.aspx>

BIS standards so apparently there is no violation of the national treatment clause. There are speculations whether the new regulations on tyres could be looked at as means to protect the domestic industry⁹³. While such contention is difficult to prove, the Indian tyre industry does have apprehensions such as

- There may be an influx of low cost tyres from China or South East Asian economies. The Indian tyre industry also faces competition from these countries while exporting to third countries.
- India may become a dumping ground to dispose of mountains of used tyres in developed countries⁹⁴
- A parliamentary standing committee in 2003 pointed out that tyres with BIS certification are subjected to additional requirements of testing, standards and technical parameters in some other countries⁹⁵

Given the complexity and dynamics of the industry, and the slow decision making process, it is unlikely that issue of tyres and homologation of cars⁹⁶ would be solved by the AIS or BIS soon.

Mineral/bottled water

The regulation on mineral and bottled water came into force as a result of a big debate in the Indian media in 2003 on the presence of pesticides in mineral and bottled water sold in India. An independent study by the Centre for Science and Environment (CSE)- a Delhi based NGO- highlighted the quality of bottled water sold in particularly Delhi and Mumbai. The study said the safety standards the Indian bottled water industry on 'pesticide content' were much lower than the permitted norms in the European Union though they met the BIS standard. Some big companies were named in the report. CSE alleged that traces of agricultural pesticides like DDT, Lindane, Malithion and Chloropyrifos were found in these brands. The BIS came under lot of flak following the publication of the report⁹⁷. The Department of Consumer Affairs immediately constituted a committee which had the mandate to examine:

- The adequacy of prescribed standards for packaged drinking water and natural mineral water and enforcement thereof
- The effectiveness of testing facilities at present available with the BIS
- The alignment of standards for packaged drinking water and natural mineral water with current international standards; and
- The linkage of BIS standards with the Prevention of Food Adulteration Act (PFA).

It was also required to fix responsibility and prescribe remedial measures. The BIS looked and re-examined its standards. Until then, testing was more relaxed in India

93 Source: interview

94 www.tribuneindia.com/2003/20030901/biz.htm - 57k

95 <http://www.thehindubusinessline.com/bline/2003/08/26/stories/2003082602080400.htm>

96 There is mandatory homologation requirement of cars of value of less than US\$ 40,000, which again raises the question whether this is a protectionist measure.

97 <http://www.ndtv.com/template/template.asp?template=health&id=11229&callid=0>

because of Indian 'weather and manufacturing conditions'. It was also found out that out of 7 laboratories, which the BIS had at that time, only the Central Laboratory, Sahibabad had the capability of testing packaged drinking water/package natural mineral water for biological and chemical parameters except pesticide residues and radioactive emitters. The BIS was dependent on independent laboratories for this. A comparison of BIS standards with international standards revealed that the BIS norm on pesticides was actually more stringent than international requirements but there were lapses in procedures and testing⁹⁸. While measures to bring in Indian standards with international standards were being adopted, the BIS expressed its inability to align completely with international standards. For mineral water, producers in based in certain geographical areas of India are able to meet the high standards⁹⁹. Further, this is a politically sensitive issue in India and thus the BIS may be unable to relax its norms.

BIS Mandatory Certification

The list of 109 items for BIS mandatory certification is quite varied. It includes food items (under PFA rules), cement-related products (Cement (Quality Control) Order 2003), steel tubes (Mild Steel Tubes (excluding seamless tube & tubes according to API specification) (Q.C.) order, 1978 and Amendment Order, 1983), stoves (Oil Pressure Stove (Q.C) Order, 1997), electrical goods (Electrical Wires, Cables, Appliances and Protection Devices and Accessories (Quality Control) Order, 2003), equipment used in the mining industry (Coal Mines Regulations), gas cylinders (Gas Cylinder Rules, 1981), mineral and packaged drinking water (PFA), thermometers (Clinical Thermometers (Quality Control), 2001). The DGFT issued a notification in 2000, which said that products which are under the mandatory BIS Certification cannot be imported into India without BIS Certification. For compliance to this requirement, all foreign manufacturers of these products who intend to export to India are required to obtain a BIS product certification license. This is perhaps unusual because not many countries recommend certification to ensure compliance to standards.

Information on the need to have mandatory certification on these particular commodities is not easily available. One of the reasons for having a mandatory certification appears to be quality upgradation in these domestic industries to protect health and safety of the population. Especially since many of these products are domestically produced by tiny and small manufacturers. For example, thermometers of up to 150 degrees centigrade and certain categories of electrical appliances are reserved for production by small scale industries.

In case of cement, after it was removed from the list under the Essential Commodities Act in 2001¹⁰⁰, the mandatory BIS certification was recommended to ensure protection of consumer interests. At the same time, electrical items such as electrical wires and cables, circuit breakers, fuses and energy meters were brought under mandatory quality

⁹⁸ BIS

⁹⁹ Source: interview

¹⁰⁰ As per the Cement (Quality Control) Order, 1995, issued under the Essential Commodities Act, 1955, no person could manufacture, store for sale, distribute or sell cement without the ISI marks issued by the BIS. The government removed cement from the Essential Commodities Act in 2001, <http://www.tribuneindia.com/2002/20020610/biz.htm#5>

control. The certification on electrical goods resulted from complaints by consumer organisations and activists on the quality of goods. NGOs such as Common Cause, Delhi complained on the quality of bulbs, Consumer Education and Research Centre complained on comparative testing of electric goods including plugs and sockets, iron, immersion rods and Grahak Panchayat, Delhi (Consumer Court) brought a writ petition in the Delhi High Court on the poor enforcement of quality control orders.

The BIS reviews its list from time to time. According to officials, 50 of these products will be taken off from the list soon. With gradually improving testing and certification system of the BIS, better enforcement of standards and enhanced quality of domestic production, this list would probably be reduced or eliminated and replaced with a suitable alternative system of ensuring compliance to standards.

Maximum Retail Price

In 1990 changes were brought into Standards Weights and Measures Act so that all manufacturers had to print maximum retail prices inclusive of all taxes. Till December 1990, manufacturers of packaged commodities in India could print the price of the commodity in two separate ways, one was 'retail price with local taxes extra', and the second one was 'maximum retail price inclusive of all taxes'. However there were complaints from consumers and consumer organisations that retailers were over-charging consumers by adding on a cost to the printed price, under the guise of local taxes, even when the local tax was much lower. It was difficult for consumers to keep track of all local taxes on all products in a market¹⁰¹. However the new system came with downsides for domestic consumers- an issue which is still being debated in India. There is no indication that this regulation is likely to change soon.

A DGFT notification in 2000 specified that for all pre-packaged items imported into India should carry a few declarations including 'maximum retail sale price at which the commodity in packaged form may be sold to the ultimate consumer. This price shall include all taxes local or otherwise, freight, transport charges, commission payable to dealers and all charges towards advertising, delivery, packing, forwarding and the like as the case may be'

The EC has raised the issue with the Indian authorities that price calculations are based on freight, insurance, internal taxes etc. Since such costs vary from state to state, the calculation of the MRP before customs clearance is quite difficult. The Indian authorities reportedly clarified to the EC that the notification allows the flexibility of fixing MRP labels in container freight stations or customs warehouses prior to release of goods for home consumption. As mentioned earlier, the India side in the EU-India SPS/TBT meeting said that they will get back with further clarification.

Bovine Products, Breeding Horses & Avian Flu

EU export interests to India affected by such regulations as

¹⁰¹ Financial Express, 15 April 1999

- The animals from which the milk has been derived were not subjected to the exposure of Bovine Growth Hormones (BGH)/Bovine Somatotropin Hormones (BST)
- Pork meat and pet food from the EU banned to prevent Avian Flu.
- Ban on the importation of breeding horses from CEM affected areas

Imports of such products are regulated by Department of Animal Husbandry, Dairying and Fisheries, Ministry of Agriculture. However it is quite difficult to get information on how these standards and regulations have been decided. Officials from the Ministry of Agriculture are not easily approachable.

One of the contentious regulations is the ban on meat to deal with Avian Flu. The Department of Animal Husbandry banned import of specified livestock and livestock products February 2006 following outbreak of avian flu under Livestock Importation Act, 1898. This was extended by six months in August 2006. The government changed its original notification to permit imports from Avian Flu negative countries. A country should receive a certificate from OIE. This policy is reviewed every three months and if a country gets a certificate from OIE, the restriction on imports are lifted. The EU has expressed its concern that only two EU Member States were affected by the disease while India prohibited imports from all EU countries. India has agreed to get back with a list of countries from which imports are permitted.

Table 6.6: Import of Products Banned to Prevent Avian Flu

From all countries	Domestic and wild birds including the captive birds (excluding poultry) Unprocessed meat and meat products from Avian species including wild birds (except poultry) Semen of domestic and wild birds
From the countries reporting an outbreak of Avian Flu	Live poultry Day old chicks, ducks, turkey and other newly hatched avian species Meat and meat products from Avian species including wild birds Hatching eggs Eggs and egg products Feathers Live pig and pig meat products Pathological material and biological products from birds Product of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use.

Source: Department of Animal Husbandry, Dairying and Fisheries

Regarding imports of horses from CEM affected countries, the Department of Animal Husbandry in a recent clarification reiterated that certain categories of horses are allowed and from EU countries, which have not been affected by CEM. India however pointed

out that the relevant EU directives do not permit transit or trans shipment of Indian horses through the EU¹⁰².

There is a continuous process to revise various bans and restrictions on animals and plants, and animal products. It appears that the government has a risk assessment procedure to arrive at policy decisions but the decision making in this area is not very transparent and the information is not easily available. Often it takes time to make a decision because the government machinery moves slowly and perhaps there is a shortage of manpower and technical knowledge as well.

6.4 The Way Forward

India's standards regime is still evolving but there is growing awareness among Indian consumers about the need to have health and safety measures, and companies about meeting standards to access export markets. Though the BIS has come a long way, its functioning still needs to be improved by bringing more transparency in the formulation of standards, improve its testing and certification procedures, and engage in greater information dissemination, training and capacity building activities.

In India-Singapore Comprehensive Economic Cooperation Agreement (CECA) MRAs on conformity and standards were signed for four products: food, drugs, telecom and electric goods. It also contains a section on technical training. India has MRAs with five other countries.

Mutual recognition of conformity assessment between the EU and India in certain identified sectors may help to lessen some of the barriers and will be beneficial to both the economies. There may be various ways to conformity assessment. Firstly, the EC could assess existing labs, certification and inspection bodies in India. Secondly, there could be accreditation of relevant bodies- a more cost effective procedure. India is slowly learning and accepting the system of accreditation. Accreditation is not so well established in the food sector which is governed by Codex standards but much ore accepted in the engineering and other non-food sectors, in which ISO standards are accepted and have elaborate standards for conformity assessment¹⁰³.

Greater exchange of ideas between the two sides may help lessen the mistrust. While India is hesitant on technical assistance, training and capacity building to officers from various standards bodies may be useful in bringing India's standards regime in line with international best practices.

¹⁰² Letter from the Department of Animal Husbandry to European Commission Members dated 17 November 2006

¹⁰³ ISO 17020 for inspection bodies, ISO 17025 for labs and ISO Guide 65 for product certification; Source: Interview

7 Intellectual Property Rights

7.1 Background

This has been an area of major controversy since the Uruguay Round. The toughness of the TRIPS agreement has been widely criticised, and this is one area where progress has been made since Doha. IPR regimes might seem by their nature to be a concern for multilateral negotiations, whether at the WTO or WIPO, but RTAs can be a forum in which countries are persuaded to make modifications to their IPR rules, that then apply *erga omnes*.¹⁰⁴

7.1.1 What are WTO rules that an RTA takes as departure?

The WTO TRIPS agreement is the key agreement in this area. Formally it does not contain any country specific obligations or schedules once transition periods are past. However there is some “wobble room”¹⁰⁵. RTAs may be an occasion in which this is pinned down. TRIPS for example leaves open the question of the exhaustion of patent rights and countries could if they wished negotiate in an RTA on the extent to which buyers’ rights to use a protected item as they wish after a purchase in one territory also applied in the other.

7.1.2 What issues have surfaced in EU-India relations?

India has strengthened its intellectual property rights (IPR) regime in recent years and has Agreement on Trade-Related Intellectual Property Rights (TRIPS)-compliant laws in place. The Indian government has shown a firm commitment to ensuring a strong IPR regime. However, there are still a few controversies about a few of the IPR provisions and concerns about the implementation regime, though previous EU-India WTO disputes appear to have been settled.

The positions of India and the EU may have moved closer recently as the EU has acknowledged the need to ensure that TRIPS does not frustrate access to essential medicines whilst India is developing an indigenous export capacity that is moving, albeit slowly from a generic to a research based industry.

Protection of traditional knowledge is an issue for both parties, along with geographical indicators.

7.2 Data

As we will see, since the signing of TRIPS India has had to reform its patent regime. This has been associated with one of the fastest increases in the amount of domestic patenting activity in the world. In a nutshell, since 1995, the volume of IPR activity of all kinds has risen very sharply in India, but the absolute level of IPR activity remains relatively low.

¹⁰⁴ Cf. Business methods and software patents in US Jordan.

¹⁰⁵ Finger and Schuler 2000

Table 7.1: Comparative Trend of IPRs Granted

	1995-1996	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005
Patents	1533	907	1844	1800	1881	1318	1591	1379	2469	1911
Designs	1851	1765	1879	2219	1382	2430	2426	2364	2547	3728
Trade Marks	5310	4686	4120	5300	8010	14202	6204	11190	39762	45015

Source: Annual Report of the Office of the Controller General of Patents, Designs, Trade Marks and Geographical Indications for the year 2004-05, GoI.

Table 7.2: Yearly Trend in Patent Applications

	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005
Filed	4824	8503	10592	11466	12613	17466
Examined	2824	4264	5104	9538	10709	14813
Granted	1881	1318	1591	1379	2469	1911

Source: Annual Report of the Office of the Controller General of Patents, Designs, Trade Marks and Geographical Indications for the year 2004-05, GoI.

<http://www.patentoffice.nic.in/ipr/patent/publications.htm>

As these tables reveal, there has been a major increase in IPRs granted by India between 1995/96 and 2004/05 and this is especially so in the case of trade marks which have witnessed a near 10-fold increase. The grant of patents has increased by 25%. In fact, the annual trend in patent applications reveals that the number of patent *filings* have actually shown a near four-fold increase over 1999/00-2004/05.

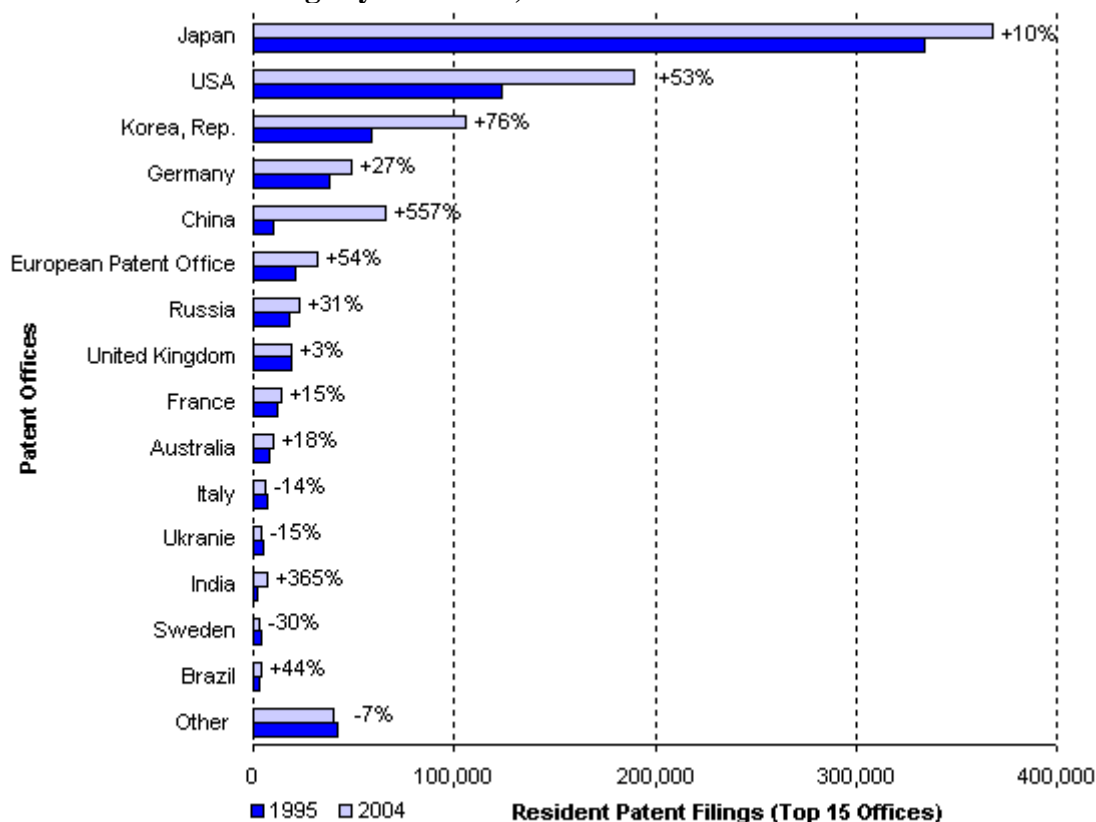
Comparing globally¹⁰⁶, India ranks 12th amongst the top 20 patent offices for application *filings* in the year 2004. In absolute numbers, however, the number of patent applications filed in India is not impressive by international standards. Having said that, more than half of these patents filed in India were by non-residents and this is an impressive statistic that compares quite well with the other top 20 offices. However, in terms of actual patents *granted*, India is at the bottom of the top 20 patent offices. India's patents filings per head of population were 7 in 2004 ahead only of Mexico (5) well below Brazil (21) and China (51). India is also low in the league table of patents filed per \$ of GDP.

Comparing intertemporally, India has shown the second highest increase (365%) in the number of resident patents filed over 1995-2004 amongst the top 15 patent offices, China having being the fastest growth. In terms of non-resident filings, India has shown the 7th largest increase (105%) amongst the top 15 patent offices over 1995-2004. However, even as the growth has been impressive, the actual numbers are quite low by both global standards and overtime in both cases.

¹⁰⁶ Data in the rest of this section comes from WIPO:

<http://www.wipo.int/ipstats/en/statistics/patents/patent_report_2006.html#P168_18545>

Table 7.3: Patent Filings by Residents, Levels and Growth 1995 and 2004



Source: WIPO Statistics Database

Source: WIPO¹⁰⁷

7.3 Procedures and Processes in India

7.3.1 Legislation

India was one of the signatories of the WTO and thus party to the TRIPS, which came into force in 1995. As part of its commitment to the WTO, India made its IPR regime TRIPS-compliant by 1 January 2005. India's IPR regime dates back to the pre-independence era. India amended the following laws in the recent few years to ensure intellectual property protection:

- Copyrights and related rights: The Indian Copyright Act, 1957 was amended in 1999 to reflect developments in satellite broadcasting, computer software and digital technology. It also protects performers' rights for the first time. It provides 60 years of minimum protection, a TRIPS-plus feature.
- Trademarks: The Trade and Merchandise Marks Act, 1958 was repealed and replaced in 1999. The act makes trademarks TRIPS compliant and harmonises it with international systems and practices.

¹⁰⁷ Table C1. http://www.wipo.int/ipstats/en/statistics/patents/patent_report_2006.html#P168_18545

- Geographical indications: The Geographical Indications of Goods (Registration and the Protection) Act was passed by the parliament in 1999.
- Industrial designs: The parliament passed a new designs act in 2000 replacing the Designs Act 1911.
- Patents: In 2005, an act to amend the Patent Act of 1970 was passed, which made the Indian patent regime TRIPS compliant.

7.3.2 Implementation

While India's IPR regime is at present TRIPS compliant, its implementation falls short of expectations though there have been improvements in the implementation regime. The Indian industry itself has become more conscious of the IPR situation and has been pushing for IPR protection. For example, in audio visual (which is affected by piracy in a big way), the film industry is now more conscious of IPR infringement and piracy and have been making representation from the government to strengthen the IPR regime.

The IPR infrastructure is still inadequate, procedures are slow and bureaucratic, and information on patents that have been granted is not easily available. There is a need to ensure effective implementation of IPR laws, train and build capacity of IPR officials, enable law enforcement agencies and the judiciary to prevent and punish IPR infringements, and modernise of IPR offices. Some of the steps have already been taken, for example, the Indian patent offices (in Delhi, Mumbai, Chennai and Kolkata) are being revamped.

The Indian government and the Indian IPR office have signed agreements of cooperation with various countries for training and capacity building of IP officials, awareness generation and exchange programs on IP courses. India has signed agreements with France and the UK. India also has partnership with the European Commission under a project 'Trade and Industry Development Project (TIDP).' The TIDP has been developed by the European Commission (EC) on behalf of the EU in partnership with the Department of Commerce of the Ministry of Commerce and Industry and in close coordination with the relevant ministries of the Government of India and their respective field organisations. In IPR, its aim is to provide training in IPR enforcement and awareness-raising in order to protect businesses and consumers.

7.3.2.a Indian Pharmaceutical Companies and Patents

The pharmaceutical industry is among the most globally competitive industries in India, with over one-third of its output being exported¹⁰⁸. The Indian government and industry realise that a strong IPR regime is required to ensure an attractive foreign investment climate and for the Indian pharmaceutical (and other sectors such as IT) to maintain their impressive growth. Indian pharma companies realise the importance of IPR, both as an asset and as a marketing tool- they have benefited from patent protection in other countries. Many of these companies have established patent cells attached to their R&D

¹⁰⁸ Ministry of Commerce & Industry Press Release, April 2005

departments as their customers insist on receiving non-infringement statements. The number of patent applications in India has increased- a large number of them from the domestic industry- signalling a growth in the IP culture in India. India is also rapidly emerging as a centre of innovation and contract research, which requires a strong IPR regime. An implication of the new Patent Act of 2005 is that the Indian Pharmaceutical industry must innovate. Though Indian companies have been involved in new models of research and development, production and of export of generic medicines and have been expanding their operations in several EU countries e.g. Finland, UK, no new molecule has been discovered and patented by an Indian company.

7.3.2.b Compulsory Licensing

The most important and controversial of the IPR legislation is the Patent (Amendment) Act 2005, which made production of generic drugs illegal in India. The new act brought into effect a process patent regime. For EU pharmaceutical companies, the new process patent regime is a welcome development though compulsory licenses may be a threat for them. However the process of issuing a compulsory license can be quite cumbersome, as explained below. The new regime provides a lucrative environment for both Indian and EU companies in form of new business models such as contract research and contract manufacturing, and greater two-way investment opportunities. The Indian government may seek US-FDA like approval in the EU market in an FTA.

Earlier India had protection for only product patents, which facilitated a growth in domestic pharmaceutical companies producing generic medicines at low cost using reverse engineering processes. Among these drugs were vital life-saving drugs such as Anti Retroviral drugs used to treat HIV/AIDS, which Indian companies also export to poor African countries affected by AIDS. The new Patent Act was under severe criticism from Indian as well as international civil society organisations, who said that it does not ensure affordability of life saving drugs. The new act does incorporate provisions of compulsory licensing as per the declaration on TRIPS and public health of 2003, which would enable India to produce and export any generic medicine produced under a compulsory licence to export to other countries. Civil society organisations, however, point out that the process of compulsory licenses is quite bureaucratic.

Till date no compulsory license for any drug has been issued in India. After passing of the Patent Amendment Act, only once did India consider issuing a compulsory license. To deal with Avian Flu, the Indian Cabinet considered issuing compulsory licenses to Indian generic companies such as Ranbaxy, Cipla or Hetero Drugs which would allow, one of these companies to produce copied of Swiss pharma company Roche's anti-influenza medicine Tamiflu (Oseltamvir) for the domestic market as well as for export. There was a controversy whether a compulsory license need to be issued for Tamiflu because Roche's application for a patent is pending. However since the application is in the mailbox (formed for all patent applications between 1995 and 2005), it appears that Tamiflu production would require a compulsory license. The cabinet did not pursue the issue of compulsory license as there was no need any longer, because Hetero Drugs, an Indian generic company managed to negotiate for a sub license from Roche to produce Tamiflu for India and other developing countries.

7.3.2.c Data Protection and Data Exclusivity

A data exclusivity clause ensures that for a fixed period of time, drug regulatory authorities do not allow the registration files of an originator to be used to register a therapeutically equivalent generic version of that medicine. When manufacturers of generics apply for approval for their drug, they claim bioequivalence, or having a similar molecular structure, to the originator's product. Instead of conducting tests themselves, they make a reference to the latter's submitted data for approval. Data exclusivity would then ensure that such data may not be referred to for marketing approval for a given number of years. It varies from five years in USA, six in China and up to 10 years amongst European Union members. The Patent Amendment Act 2005 does not contain any provision on data exclusivity or data protection in India. Lack of data protection and exclusivity is a major concern for a number of European pharmaceutical companies in India (e.g. Astra Zeneca, GSK).

Article 39.3 of the TRIPS agreement says: 'Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilise new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use'.

There is a disagreement among Indian government officials whether article 39.3 requires governments to merely protect the confidentiality of clinical dossiers (non-disclosure) or whether they are also obliged to provide protection against unfair commercial use by disallowing reliance on the data (non-reliance). Further, there is also a debate on whether the issue of data protection or exclusivity should be linked with IPR. A reason being that the concept of data protection/exclusivity is broader than intellectual property rights since not all data generated in clinical trials can be patented.

The debate on the need to have data exclusivity also concentrates on benefits and drawbacks of having such a protection. The opponents of data exclusivity, e.g. the Indian Pharmaceutical Association (IPA)- an association of Indian pharma companies, say that it is a superfluous form of protection, because it undermines genuine innovation by encouraging companies to focus on changes in the existing product ('evergreening' of drugs) rather than focusing on developing new innovative and beneficial product. When a patent on a drug is extended by modifying the original drug and updating the first patent before its expiry, it is called evergreening of drugs. This effectively extends the patent of a drug for the patent owner beyond its original period of protection (e.g. twenty years). The proponents, mainly Indian Drug Manufacturers Association (IDMA) (an association of foreign drug companies in India), say that a data protection regime without non-reliance would be of little value to the R&D based pharma companies because it would not provide protection against early entry of generic competitors who do not bear the costs and risks associated with the often quite lengthy R&D of new drugs.

A data exclusivity clause will prevent India companies from producing generic copies of drugs that are about to be off patent. Many Indian companies have asked for a safeguard clause to prevent evergreening, such as that the period of data exclusivity should not run beyond the life of the patent, which multinational pharma companies in India are not ready to accept. Multinational companies are of the view that product introductions, research and development and clinical trials activities of pharma companies would not take place in India if data exclusivity is not guaranteed. Indian government officials and pharma companies are not convinced that whether activities would take place in India even after data exclusivity is ensured.

The Government of India has established an inter-ministerial committee to consider the steps necessary to ensure India's compliance with its obligations to the TRIPS agreement. Though the inter-ministerial committee is still looking at the issue, indications from the Indian government suggest that they may not agree to non reliance clause. It also perhaps depends on what Indian pharmaceutical companies lobby for.

7.3.2.d Pre-grant Opposition

India has permitted pre-grant opposition to patent applications in addition to the post-grant opposition in the 2005 Patent Amendment Act. EU pharmaceutical companies contend that India generic drug companies are using this provision to delay the grant of patents by lodging serial pre-grant oppositions to delay the granting of patents. Since passing of the new Act, Indian pharmaceutical companies have reportedly filed 150 pre-grant oppositions to patent applications in India¹⁰⁹. It is difficult to prove this contention. Patent officials in India point out that the clause of pre-grant opposition has been introduced to help patent examiners so that they have complete information on a patent application. The patent is granted within a year so a decision on pre-grant opposition has to be made within this period itself. Further, they point out, the EPO has a similar provision known as representation which is pre-grant opposition without any hearing.

7.3.2.e Copyrights and Piracy

The problem of piracy exists in India, though not in as large scale as in South East Asia. The Indian government has shown commitment to tackle piracy. Last year there were 6000 seizures of pirated items¹¹⁰. The industries affected by the problems of piracy are publishing and audio-visual. While the legislation is in place, implementation needs to be strengthened. Implementation involves the police, judiciary, lawyers, customs officials and the relevant ministries (both commerce and human resources development). The publishing industry faces problem because books can be published at a lower cost, than for example in the US or the UK, in India and can be sold in the domestic market at a lower than the actual price or (often illegally) exported to a third country. Though any definite estimate is not available, the EU (mainly UK) publishing firms in India lose a huge sum of money every year due to piracy and illegal shipment of books. The Indian government stance is that the implementation regime is being strengthened. Government officials recognise that there is a long queue in Indian courts but point out that the justice

¹⁰⁹ <http://ipfactor.wordpress.com/2006/10/25/indian-generic-pharma-companies-delay-patent-protection-by-pre-grant-opposition-proceedings/>

¹¹⁰ Source: interview

system is independent. They also point out that the government has been organising programs for sensitising judges.

The other industry affected by poor IPR implementation and piracy is the IT sector. In India, pirated software business is estimated at about \$239 billion and a 10 per cent drop could lead additional 115,000 jobs and generate US\$ 386 million in tax revenue in the IT sector¹¹¹. The IT sector does not get any protection from the Patent Act, it is covered under the Copyright Act. With better implementation and firm measures as described earlier, the problem is expected to go down.

7.3.2.f Geographical Indications

India is a part of the friends of geographical indications. Its position is that the additional protection that is given to wines and spirits should be extended to other products such as traditional Indian textiles as well. This would enable India to have protection for products of its export interest such as Basmati rice, Darjeeling tea, alphonso mangoes and Kohlapur slippers. The Indian government has also established a new geographical indication registry. In an FTA discussion, India may request that the EU extend its GI protection to cover industrial products so that Indian traditional goods such as handicrafts and handlooms, and products such as Basmati can be protected in the EU market.

7.3.2.g Traditional Knowledge, TRIPS and Conventions of Biodiversity (CBD)

At present Indian IPR laws forbid patenting of Traditional Knowledge (TK). The Indian government has been expressing its concerns about bio piracy and misappropriation of TK for commercial gains. A website of TK Digital Library (TKDL) containing information on 50-60% of India's TK would be launched in January 2007. India has taken a strong position on the relationship between TRIPS and CBD issues at the WTO. India presented a paper with Brazil, Pakistan, Peru, Thailand and Tanzania, which contained proposed amendments to the TRIPS Agreement to make the disclosure of the source of origin of biological resources and traditional knowledge mandatory for patent applicants. India may ask the EU to recognise its sensitivity on the TK issue in an FTA.

7.4 The Way Forward

In spite of the implementation-related problems and barriers such as piracy and lack of data protection, the Indian patent regime is becoming stronger. Indian government and pharma companies have also realised benefits of IPR protection. The EU should probably continue to engage and provide technical assistance to India on this. Further, there is perhaps a need to ensure access to essential medicines is not hindered by a stronger IP culture. India may ask for sensitivity from the EU on India's need to protect its traditional knowledge and GI for some its products.

¹¹¹ <http://www.thehindubusinessline.com/2006/05/05/stories/2006050502890800.htm>

8 Competition Policy

8.1 Background

India was a consistent opponent of the inclusion of trade and competition issues in a Doha agreement. It may seem paradoxical therefore that the HLG study identifies competition issues as a priority for India in an RTA. However as Holmes et al. (2003)¹¹² have shown, India's position at the WTO was far closer to the EU than appeared from the public declarations. Indian officials have repeatedly declared their support in principle for a multilateral agreement on competition policy that would be based on the principle of the UNCTAD "Set"¹¹³. Close reading of the EU's actual proposals and the UNCTAD Set reveals less of a discrepancy than one might suppose. What India appears to have objected to at the WTO is the idea that the EU's proposals appeared to be oriented towards pressing developing countries to adopt competition laws that would seem to give additional market access to EU firms without however offer significant benefits in terms of cooperation eg on international cartels etc.

The EU in its bilateral agreements has, wherever possible, incorporated wording based on Articles 81 and 82, especially with close trading partners to secure a commitment on competition policy that would do away with private barriers to entry of importers. The looser the relationship, the laxer this wording. It seems unlikely that India would agree to any wording that would require it to modify its laws. The potential significance of existing EU FTAs is considered in depth in Annex 4.

8.2 Procedures and process in India

India has just adopted a new law, whose wording has been widely welcomed. This is fully discussed in Annex 4, and therefore this section is relatively brief. There are some doubts about effectiveness of enforcement.¹¹⁴ The EU may wish to raise this, but as far as we can tell, judging by the material we have gathered for our database, there do not seem to be very many business concerns specifically linked to the operation of competition policy in India, except where regulation rules out competition at all.

In the textile case, for example, there do not appear to be concerns about the distribution sector that relate to competition policy.

¹¹² P. Holmes, S.J. Evenett, J.H. Mathis, & T.C.A. Anant "The EU and India on Competition Policy at the WTO: Is There a Common Ground?" in *Bridging the Differences, Analyses of Five Issues of the WTO Agenda* eds. L.A. Winters, P.S. Mehta CUTS, Jaipur 2003 available at <http://www.evenett.com/chapters/compfinaljune.pdf>

¹¹³ The Set Of Multilaterally Agreed Equitable Principles And Rules For The Control Of Restrictive Business Practices
<http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm>

¹¹⁴ See P. Mehta 2003, <http://www.thehindubusinessline.com/2003/01/10/stories/2003011000050800.htm>.

Complaints have been raised by Indonesia (Float Glass) and the US (Soda Ash) that the new act allows the authorities to use accusations of predatory pricing too freely where dumping is suspected.¹¹⁵

But an appeal to the Supreme Court led to rulings that, according to the Indian authorities, should ease these concerns. The Court found:

”Under the MRTP Act, there is no power to stop import; the MRTP Act does not confer extra territorial jurisdiction on the MRTP Commission; if a cartel is selling goods to India and still making profit then it is not in the interest of the general body of consumers in India to prevent the import of such goods.”¹¹⁶

The relationship between predatory pricing rules and anti-dumping is one that has clearly led to some concern in India (see part/annex 4), but in this case over-eager use of competition law to curb imports was restrained by the Supreme Court.

Another issue these cases highlight is that of the standing of foreign firms, which in this case were able to appear in the Supreme Court.

Further issues that have been identified include the so- called canalisation of imports. As the EU’s MA Database points out "India applies canalised trade through designated government agencies for certain products (agricultural products, petroleum products and urea). Canalisation agencies are mostly state trading enterprises but some minor private trading is allowed with a license from the Director General of Foreign Trade (DGFT). Most of the total canalised trade concerns petroleum products. State trading enterprises retain exclusive rights regarding imports and exports.”

According to the EU database, these state trading enterprises are legally obliged to operate solely in accordance with commercial considerations (including price, quality, availability, marketability, transportation, etc.) and in a non-discriminatory manner¹¹⁷.

State aids are not covered by Indian competition law. One issue that has been raised by the US but not by the EU is the use of subsidies to fertilizers as a way of reducing farm costs and whether this should be considered an industrial or an agricultural subsidy.

¹¹⁵

<http://www.oecd.org/dataoecd/48/54/34284291.pdf#search=%22soda%20ash%20india%20competition%20law%22>

¹¹⁶

<http://www.oecd.org/dataoecd/48/54/34284291.pdf#search=%22soda%20ash%20india%20competition%20law%22>

¹¹⁷ <http://mkaccd.db.eu.int/cgi-bin/stb/barrierdesint.pl?bnumber=960030>

8.3 Issues for possible negotiation

It is not clear how far negotiations might go in this area. The unwillingness of India to negotiate on trade and competition at the WTO does not mean that it would rule out addressing such issues in an FTA. The standard competition provisions of an EU FTA would not seem to pose major challenges for India. A clause confirming that both parties would have a competition law would seem easy to agree. Details of the operation of the systems would seem beyond the scope of an FTA.

However for India to see benefits from a competition chapter in an FTA it might wish to see more on competition and information exchange.

Part 4 and Annex 4 identify a number of further issues that could be of interest to India.

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10 Appendix

Table 10.1: FDI Limits and Conditions in Particular Manufacturing and Infrastructure Sectors

FDI restricted in six sectors, caps in other sectors			
Airports	100%	1. Automatic for Greenfield projects 2. FIPB for more than 74% in existing airports	Subject to sectoral regulations notified by Ministry of Civil Aviation
Alcohol-Distillation & Brewing	100%	Automatic	Subject to license by appropriate authority
Atomic Minerals	74%	FIPB	Subject to guidelines issued by Department of Atomic Energy
Coal & Lignite mining for captive Coal Mines consumption by power projects and iron & steel, cement production and other eligible activities permitted under the Coal Mines (Nationalisation) Act, 1973.	100%	Automatic	Subject to provisions of Coal Mines Nationalisation Act (1973)
Defence Production	26%	FIPB	Subject to licensing under Industries (Development & Regulation) Act, 1951 and guidelines on FDI in production of arms & ammunition.
Hazardous chemicals, viz., industrial license under hydrocyanic acid and its derivatives, phosgene and its derivatives; isocyanates diisocyanates of hydrocarbon.	100%	Automatic	Subject to industrial license under the Industries (Development & Regulation) Act, 1951 and other sectoral license
Industrial explosives- Manufacture	100%	Automatic	Subject to industrial license under Industries (Development & Regulation) Act, 1951 and

			regulations under Explosives Act, 1898
Manufacture of telecom equipment	100%	Automatic	Subject to sectoral requirements
Mining covering exploration and mining of diamonds & precious stones; gold, silver and minerals.	100%	Automatic	Subject to Mines & Minerals (Development & Regulation) Act, 1957 Press Note 18 (1998) and Press Note 1 (2005) are not applicable for setting up 100% owned subsidiaries in so far as the mining sector is concerned, subject to a declaration from the applicant that he has no existing joint venture for the same area and/or the particular mineral
Power including generation (except Atomic energy); transmission, distribution and Power Trading	100%	Automatic	Subject to the provisions of the Electricity Act, 2003
<i>Print Media</i>			
Publishing newspaper and periodicals dealing with news and current affairs	26%	FIPB	Subject to guidelines notified by Ministry of Information and Broadcasting
Publishing of scientific magazines specialty journals/periodicals	100%	FIPB	Same as above
Satellites -Establishment and operation	74%	FIPB	Subject to sectoral guidelines issued by Department of Science/Indian Space Research Organisation (ISRO)
Special Economic Zones and Free Trade Warehousing Policy Zones covering setting up of these Zones and setting up units in the Zones	100%	Automatic	Subject to Special Economic Zones Act 2005 and Foreign Trade Policy

Source: DIPP