International Economic Law Practicum

ANALYSING INDIA'S STEEL TRADE UNDER ITS FREE TRADE AGREEMENTS WITH ASEAN, JAPAN, AND KOREA

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List of Abbreviations

Abbreviation	Full Form
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
ATIGA	ASEAN Trade in Goods Agreement
BIS Act	Bureau of Indian Standards Act
BIT	Bilateral Investment Treaty
CAB	Conformity Assessment Body
CAROTAR	Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020
CECA	Comprehensive Economic Cooperation Agreement
CEPA	Comprehensive Economic Partnership Agreement
CETA	Comprehensive Economic and Trade Agreement
CoO	Certificate of Origin
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CTC	Change in Tariff Classification
CTH	Change in Tariff Heading
CTSH	Change in Tariff Sub-Heading
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
HS	Harmonised Commodity Description and Coding System
ISLFTA	Indo - Sri Lanka FTA
ISO	International Organisation of Standards
JIS	Japan Industrial Standard
JISC	Japan Industrial Standard Commission
KAN	National Accreditation Committee
KS	Korean Standard
LsPro	Product Certification Institute
METI	Ministry of Economy Trade and Industry
MRA	Mutual Recognition Agreement
NTBs	Non-Tariff Barriers

PEM Convention	Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin
PSR	Product Specific Rule
RoO	Rules of Origin
RoO Agreement	Agreement on Rules of Origin
RVC	Regional Value Content
RVC	Ad Valorem Change
SIRIM	Ministry of Finance Malaysia
SNI	Indonesian National Standard
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TBT Agreement	Agreement on Technical Barriers to Trade
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
USMCA	United States–Mexico–Canada Agreement
USMCA	United States - Mexico - Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WCO	World Customs Organization
WTO	World Trade Organization

Research Questions & Objectives

The objective of this Report is to carry out a comprehensive doctrinal legal analysis of the domestic laws, regulations and policies in force in the jurisdictions of Japan, Korea and Association for South East Asian Nations ["**ASEAN**"] countries like Malaysia, Indonesia, Thailand, etc governing the steel sector. The aim is to identify and test these prevailing laws against the obligations set forth by: World Trade Organization ["**WTO**"] Agreements, *inter alia*, the Agreement on Technical Barriers to Trade ["**TBT Agreement**"], the Agreement on Rules of Origin; the commitments made by the countries in their individual FTAs with India; their Most Favoured Nation ["**MFN**"] duties and preferential duties under the Free Trade Agreements ["**FTA**"], as well as principles of customary international law. The Report has also delved into the domestic laws and regulations of India in order to draw a complete picture of the policies governing the steel industry. The purpose of this analytical exercise is to investigate the regulatory, structural and administrative reasons behind the growing Indian steel trade deficit with its FTA partner countries and whether Indian steel producers have been given de facto equitable market access as per the WTO agreements and the FTAs.

<u>This Report achieves this in four sections:</u>

- Analysing the MFN and preferential tariff rate under the FTAs and its impact on trend in imports and exports of product HS 72.
- Testing the WTO and FTA compliance of Japan, Korea and ASEAN countries' non-tariff barriers ["**NTBs**"] i.e., steel standards, import licensing requirements, conformity assessment procedures, etc.
- Identifying and analysing customs and trade facilitation provisions in FTAs to suggest changes in the provisions and its application.
- The application of rules of origin ["**RoO**"] i.e., origin determination tests and its administration.

<u>The research questions are as follows:</u>

- Whether India's FTAs with ASEAN, Japan and Korea are favourable for Indian steel industry?

- What textual, structural and/or proportional changes may be made in India's FTAs to ensure that they remain favourable to Indian steel industry?
- What non-tariff barriers have been implemented by India's FTA partner countries which may be affecting market access for Indian steel products?
- How effective are the existing customs and trade-facilitation-related provisions in the three FTAs and how can they be made more comprehensive?
- What changes can be made to the application of rules of origin in India's FTAs to prevent circumvention of the same?
- What are the recourses available to a state when there is no exit clause in the agreement? What is the model exit clause that best serves India?

Executive Summary

It is clear that India's FTAs with Japan, Korea, and ASEAN have not benefitted all parties equally. An examination of India's MFN tariffs and preferential tariffs, as compared to those of its trading partners indicates an asymmetry as to the advantages that have accrued. In light of this examination, it is recommended that India's preferential tariff schedule for HS 72 (Steel) be revised. Moreover, while the tariff rates are decreasing around the world, **NTBs** have been increasing throughout the world. These non-tariff barriers also include **technical barriers**, which are regulated in WTO by the TBT Agreement. An analysis of technical barriers by ASEAN countries, South Korea, and Japan show that most countries in question have adopted technical barriers in the form of standards for steel. While ASEAN countries including Indonesia, Malaysia and Vietnam have technical regulations in the form of mandatory standards for steel, Japan and South Korea have voluntary standards for steel. Such technical regulations and standards affect the trade between member States adversely.[1] To reduce the costs of such technical barriers, negotiation of mutual recognition agreement ["**MRA**"] between the parties is the best alternative, as it is cost effective and is easier to negotiate. Other options including harmonisation, and recognition of equivalence are not feasible for steel industry considering the high costs involved, and the difficulty in negotiation. Further, such other methods would not be feasible if the standards are not compatible with each other. To implement the recommendation of negotiating MRA, it is suggested that:

- The India – ASEAN Trade in Goods Agreements ["**AIFTA**"] be renegotiated to insert a chapter on technical measures, and a sub-committee on technical measures additionally formed to cooperate on technical measures. Additionally, a specific article be inserted specifically for conformity assessment, not only encouraging recognition of Conformity Assessment Bodies ["**CAB**"] of the other party, but also providing reasons if the party fails to do so.
- India – Korea Comprehensive Economic Partnership Agreement ["**CEPA**"] be renegotiated to insert steel sector in Annexure 2B (which lists sectors in which

[1] DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995); Kalypso Nicalaodis, Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects (Working Paper No. 8/97, Jean Monnet Center); MARK A. POLLACK & GREGORY C. SHAFFER, TRANSLANTIC GOVERNANCE IN THE GLOBAL ECONOMY (2001).

MRA is to be negotiated) such that negotiation of MRA in steel sector in encouraged;

- India push for negotiation of MRA in steel sector under Article 55 of India – Japan CEPA which provides for negotiation of MRA in mutually agreed sectors.

Another regulation for consideration is **import licensing**, which can be defined as administrative procedures requiring the submission of an application or other documentation to the relevant administrative body as a prior condition for importation of goods.[2] Indonesia,[3] Malaysia[4] and Vietnam[5] practice a system of import licensing for statistical, data collecting and monitoring purposes. Under the WTO, Agreement on Import licensing Procedures governs import licensing by Members. It classifies import licensing into automatic and non-automatic import licensing. Automatic import licensing is defined as import licensing where the approval of the application is granted in all cases. The import licensing regimes in Indonesia, Malaysia, and Vietnam qualify as automatic import licensing. However, Indonesian import licensing system has been criticised as costly, complicated and tedious. None of the FTAs under consideration contain any provision on import licensing. It is recommended that FTAs be renegotiated to include provision on import licensing to ensure that import licensing procedures if resorted to, must be in conformity with Agreement on Import Licensing Procedure, and must be simple. Further, specific obligation for transparency in import licensing procedures may be drafted.

Notably, recent trends indicate that not only has the use and proliferation of FTAs has seen a monumental spike, but they have also become more expansive and comprehensive in their scope and coverage. In particular, **trade facilitation issues and customs procedures**, i.e., measures aimed at increasing the efficiency of trade

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[2] Agreement on Import Licensing Procedures art. I, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 436 [hereinafter Import Licensing Agreement].

[3] Regulation of Minister of Trade, No. 110 of 2018, Annex., http://jdih.kemendag.go.id/backendx/image/regulasi/11190744_PERMENDAG_NOMOR_110_TAHUN_2018.PDF.

[4] Customs (Prohibition of Imports) Order 2017, P.U. (A) 103, (Mar. 31, 2017), https://importlicensing.wto.org/sites/default/files/Customs%20Prohibition%20of%20Imports%20Order%202017_31.03.2017_0.pdf.

[5]Circular No. 23/2012/TT-BCT of August 7, 2012, on the application of automatic import licensing to some steel products, § 11, https://importlicensing.wto.org/sites/default/files/Circular_No.23_2012_TT_BCT_07.08.2012.pdf.

procedures, are now almost systematically included in bilateral and regional trade agreements. Complicated and unnecessary documentation and data requirements for imports and exports, as well as cumbersome customs and border crossing procedures, are obstacles to international trade flows. Resultantly, need is increasingly felt to address issues faced by incorporating provisions to that effect within bilateral and multilateral agreements. Prominently, two issues arise with respect to trade facilitation – *first*, cumbersome data and documentation requirements; and *second,* complex customs and border facilitation procedures. Oftentimes, FTAs have dealt with these issues in a three-pronged manner, laying down transparency measures, harmonisation measures, and collaboration measures.

It is noted that the India – Korea CEPA deals with a variety of aspects and is fairly comprehensive in scope. The AIFTA, on the other hand, has only one provision dealing with customs and is sorely lacking. Both the India – Korea CEPA and the India – Japan CEPA make provision for the creation of a Sub-Committee on Customs Procedures. The incorporation of a similar provision – which is also contained in other agreements such as the United States–Mexico–Canada Agreement ["**USMCA**"] – in the AIFTA, and the strengthening of the existing provisions in the CEPAs with Japan and Korea would benefit India by increasing the ease of communication. In doing so, the composition, functions, mechanism for review, and timeline must be clearly laid down. Relatedly, only the India – Korea CEPA designates a specific contact point for the purposes of customs and trade facilitation. Similar provisions could also be incorporated in the FTAs with Japan and ASEAN, so as to further advance the goal of trade facilitation. It is noted that the issue of enforcement also in all three FTAs due to the use of soft language such as "parties must endeavour to". To address the issue, many argue that stronger language must be used, compelling the parties to modify their policies and bring them in consonance with the agreed-upon terms. However, the relative capacity of Indian institutions (as compared to that of Korea and Japan) must be considered. Furthermore, it is noteworthy that none of the CEPAs comprehensively deal with the requirement of online publication (although they address it in some respects), which is of vital importance in the ease of access. In this regard, reference has been had to the USMCA, which effectively deals with the same. Similar provisions dealing

comprehensively with the issue could be incorporated in all three of India's FTAs currently under review in this report.

Another important consideration in the examination of these FTAs are **rules of origin**, which consists of comprehensive tests and administrative rules that collectively assist in identifying the origin of the product. In the era of interconnected supply chains, identifying the true origin of a good is a complicated process, especially if the goods have undergone different stages of processing in different countries. While some RoOs are fairly harmonised across FTA models i.e. wholly-produced and obtained criteria, certification and verification procedures, etc., rules like product specific rules [PSR], drawback and cumulation may differ.

Goods of 'X' origin are considered to be originating because, either they have been wholly-produced or obtained in the territory of X, or they fulfil the tests of substantial transformation in X. A good undergoes substantial transformation if they fulfil one/or more of these tests, as drafted into the specific FTA. India has formulated its own testing model of origin determination – referred to as the "twin-test model". Indo – Sri Lanka FTA ["**ISLFTA**"] was the first occurrence of the 'twin test model' of origin determination i.e. requiring businesses to show a Change in Tariff Heading ["**CTH**"] and an ad valorem % change ["**RVC**"]. This was considered quite strict by Sri Lankan businesses who were unable to meet both of these tests simultaneously. At the same time, the stringent tests were not effective enough to deter the trade deflection of copper that took place using this ISLFTA. The aftermath of this case also reveals the importance of origin verification mechanisms and bilateral discussions. The AIFTA marked the next stage in the development in India's twin test model where test was diluted to Change in Tariff Subheading ["**CTSH**"] + RVC test. HS Chapter 72 goods i.e. iron and steel products are subject to Product-Specific Rules ["**PSRs**"] in Indian FTAs with Japan and Korea which requires a CTH degree change in tariff headings. However, in India FTAs with Malaysia and Singapore, Chapter 72 is subject to the stricter twin test rule. This displays the absence of harmonisation in PSRs applicable to Chapter 72 goods across various FTAs. It has been recommended that India should shed its hesitance towards PSRs. It should embark on a harmonisation mission of formulating PSR models for its FTA negotiations and

reviews. This will help businesses plan out their preferential claims under FTAs especially if the originating tests conform to their continuous production cycles.

Administration of RoOs is a complementary partner to origin determination rules for effective clearance of preferential claims. But, the systemic rules of administration of RoOs should not act as a non-tariff barrier with compliance delays and administrative costs. High administrative delays and costs may deter businesses from making use of the FTA route, especially if partner countries have low to nil MFN tariffs and easy compliance rules. Origin Certification is the process through which origin of a good is clearly enumerated and authorised before exportation. In ASEAN Trade in Goods Agreement ["**ATIGA**"], Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin ["**PEM Convention**"]and Indian FTAs, certification is carried by a competent authority while Comprehensive and Progressive Agreement for Trans-Pacific Partnership ["**CPTPP**"] and USMCA models have embraced the self-certification model. The former model is most commonly used and accorded a degree of trust and authentication to the proof of origin. The latter, however, reduces compliance costs, processing times and reduces the burden on customs authorities. Approved exporter system present in the PEM Convention is a hybrid system of both these models of certification. Under this system, a competent authority authorises a business on a basis of some pre-requisites, following which the business is empowered to issue its own declarations of origin. This is a favourable middle ground of assuring trust and authenticity and facilitating the compliance process for businesses that are established. Origin Verification is the final stage of administration of RoOs wherein the importing country is required to verify and confirm the authenticity of the certification and its particulars. The verification process constitutes of the following stages: the information collection stage and the verification visits stage. India should place strong focus on freeing up the burden on customs authorities and formulate systems to strengthen its risk assessment systems, record keeping systems and improving communication channels with competent authorities of partner countries.

Lastly, an examination of India's position vis-à-vis others would be incomplete without examining **exit / termination clauses in FTAs**. An exit clause allows a disappointed party to the agreement to terminate the trade policy obligations. In the

FTAs in question, all three FTAs consist of an exit clause. If India chooses to exit the FTA, it can be done by following the procedure provided in respective FTAs. An agreement without an exit clause can be terminated by utilizing the customary international laws. Customary international laws are those international obligations arising from established international practices, as opposed to obligations arising from formal written conventions and treaties. The report has recognized three ways to address termination without an exit clause under Vienna Convention on the Law of Treaties ["**VCLT**"] i.e., **termination with mutual consent, Unilateral Termination and modification.** Reading Article 54(b) with Article 56 of the VCLT shows that trade treaties are temporary in nature and can be terminated unilaterally. But instead of absolute termination, Article 59 of the VCLT allows the parties to terminate an older treaty by modifying and adopting a new treaty.

While customary international can be utilised in absence of an exit clause, one cannot deny the utility of exit clauses as they create certainty in the agreement. Thus, a model clause has been formulated based on the minor modifications in the standard exit clause in the FTAs in question. These modifications are based on 2 major recommendations i.e., fixing the term of notice to 12 months and utilising the exit clause as a threating strategy – as done by United States ["**US**"] for example – and extending the survival period to 20 years – as in the Canada – European Union Comprehensive Economic and Trade Agreement ["**Canada – EU CETA**"].

Introduction

The Indian steel industry consists one of the major products produced and exported out of India. India is also the second highest producer of crude steel[6]. It essential that the steel industry benefits from the FTAs India is a party to. But the Niti Aayog reports that every ten percent reduction in FTA tariffs for metals and machinery increases the imports by 1.4 per cent and 2.1 percent respectively.[7] The exports to FTA partners and non-partner countries have grown at the same pace. It has been widely noted that India has a very low utilisation factor of the FTAs.[8] When exporting or importing, a party may two types of barriers i.e., Tariff and Non-Tariff Barriers. Tariff barriers or Tariff Measures are those. Tariff measures are the duties imposed on the goods when they cross national borders.[9] Most Favoured Nation Tariffs and preferential tariffs are the primary examples of such tariffs. They aren't necessarily restrictive in nature. Non – tariff Barriers are those tariffs that are not tariffs. Unreasonable standards, Licensing requirements, technical barriers et cetera are few examples of such barriers.[10]

Part I of this report examines the preferential tariffs vis-à-vis the MFN tariffs of India and its FTA partners. Thereafter, **Part II** delves into the NTBs implemented by these partners. Technical barriers are a very common and, in principle, quite normal tool in national and international trade. NTBs have consistently increased from 2008.[11] Nowadays almost all products sold are subjected to certain requirements related to their characteristics or packaging and labelling; for example, safety rules for automobiles, content and nutrition requirements for baby food products, packaging rules for cigarettes, requirements for materials used in production and packaging of

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[6] India Ranks as Second Largest Steel Producer of Crude Steel: Pradhan, Business Standard (Feb. 5, 2020), *see also* Press release, India becomes second largest steel producer of crude Steel, Ministry of Steel (Feb. 5, 2020), https://pib.gov.in/PressReleasePage.aspx?PRID=1602023.

[7] V. K. Saraswat, et al, *A Note on Free Trade Agreements and Their Costs*, NITI AAYOG, https://niti.gov.in/writereaddata/files/document_publication/FTA-NITI-FINAL.pdf [hereinafter NITI Aayog].

[8] *Id.*

[9] *Tariffs: Tariff and Tax in International Trade*, SUPPLY CHAIN RESOURCE COOPERATIVE, NC STATE UNI. (Jan. 15, 2011), https://scm.ncsu.edu/scm-articles/article/tariffs-tariff-and-tax-in-international-trade; *see also* Tariffs, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm.

[10] Non-Tariff Barriers, Glossary of Statistical Terms, OECD (Mar. 28, 2014), https://stats.oecd.org/glossary/detail.asp?ID=1837.

[11] WORLD TRADE ORGANIZATION, REPORT ON G-20 TRADE MEASURES (2014).

toys, electronics, toilet paper and other useful daily consumer goods.[12] However, such regulatory protection of legitimate societal values may also create unnecessary barriers to international trade. This could be the case, for instance, if protection of important societal objectives is used as a pretext for disguised protectionism, or if a measure is not appropriate for adequate protection of the claimed objectives.[13] To this end, this report identifies such non-tariff measures which may reduce market access for Indian steel exporters, and suggests changes in FTAs to increase market access.

Furthermore, with attention increasingly being drawn to the issue of trade facilitation, countries have made efforts to address the same via bilateral and multilateral channels, particularly through incorporation of provisions in FTAs. These developments and their effect have been analysed at **Part III.** While India's FTAs with Korea, Japan, and ASEAN all deal with customs procedures and trade facilitation, questions arise as to whether they are comprehensive in scope, and whether they are being effectively enforced. In the undertaking of such an examination, guidance may also be had from other FTAs such as the USMCA, which provides a robust mechanism for the facilitation of trade, especially when dealing with vital aspects such as publication, review, and transparency, among others. Moreover, the report also examines the relevance of the language used in the texts, and the differences in interpretation that arise from the willingness and ability of different parties to be bound by strict commitments.

Part IV of the report notes that the Rules of Origin ["RoO"] chapter of FTAs are influential in ensuring minimal cases of trade deflection. RoOs are a system of administrative rules used to identify the origin of goods being imported into the market. This includes systems of tests for origin determination and procedural rules of origin certification and verification. Preferential claims need to be scrupulously verified at the customs clearance stage to specifically confirm the origin of the goods. However, the application of RoOs need to be negotiated by ensuring optimal

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[12] Arkady Kudryavtsev, *The TBT Agreement in Context, in* RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 17 (Tracey Epps & Micheal Trebilcock eds.).
[13] *Id.*

facilitation of goods. Underutilisation of Indian FTAs is a common problem, as identified by NITI Aayog.[14] Businesses have not harnessed the preferential benefits of these FTAs and continue to use the MFN route of importation due to issues including administration and compliance costs of RoOs. The negotiation of RoOs in FTAs has to take into account the following objectives: harmonisation of rules; facilitation of procedures; reduction of trade deflection; and ease and simplicity of rules.[15]

Lastly, **Part V** deals with the recourses available to the state when there is no exit clause in an agreement. If India is unsatisfied with the effects of these FTAs, it may look towards termination as a possible solution India may be motivated to terminate or exit the treaty for several reasons such as domestic preferences rendering the terms of the treaty burdensome or obsolete, the agreements seizing to be useful. The report ventures into the question of possible remedies available to India if the agreement does not contain an exit clause and what the model exit clause for India should be for future negotiations.

Though the FTAs are subject to the WTO covered agreements, the customary rules of international law are also applicable when interpreting these agreements. The report explores the legality of different methods of termination in Vienna Convention on Law of Treaties. Furthermore, the report examines the viability of modification and adoption of a new agreement instead of absolute termination. But ultimately, exit clauses are essential to an agreement as they provide a low-cost exit option to states and act as a safety net if the benefits anticipated were not achieved. The report proposes a model of exit clause based on slight modifications in the current standard exit clauses in the agreements in question. The recommended modifications are based on various models such as the tactical renewal model, the fixed term model, the Dutch Model BIT et cetera and various other FTAs. Finally, the report concludes with recommending the possible steps India can take to deal with the issues plaguing the Indian Steel Industry.

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[14] NITI Aayog, *supra* note 7.

[15] Rajan Sudesh Ratna, *Rules of Origin, Diverse Treatment and Future Development in the Asia and Pacific Region*, *in* TOWARDS COHERENT POL'Y. FRAMEWORKS: UNDERSTANDING TRADE & INVESTMENT LINKAGES (62 Studies in Trade & Investment, UNESCAP, 2007).

1. Tariff Measures

Tariff measures are those duties imposed on the goods as they cross national borders[16]. For our purpose, we shall look at the difference between MFN Tariffs and Preferential Tariffs under the FTAs in question. The aim of this section is to determine whether the tariff reductions under the FTAs are significant and have resulted in a shift in trade balance in favour of India.

MFN are the tariffs that the States impose on imports from other member States that are non-discriminatory in nature.[17] This is the tariff imposed on a State if it is not a party to a free trade agreement with the imposing state. MFN rates are the highest and most restrictive tariffs that WTO states impose on the other.[18] A **Preferential Tariff** is a rate of duty that is lower than the normal tariff duty rate in the tariff of a State. A preferential duty rate can be applied to certain goods from certain specified countries and groups of countries. This is done to accord with trade agreements that a state has entered into.[19]

On analysing the data on import and export of product HS 72, it is clear that there was a clear trade imbalance in favour of Korea before India – Korea CEPA came into force in 2010. The average MFN rate of Korea for HS 72 was 3.21 percent[20] which reduced to average 2.5.[21] This didn't significantly affect the exports to Korea. However, the Agreement led to an increase of imports as India's previous MFN duty of 15 percent[22] dropped close to zero for some products. Also, many steel products

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[16] *Tariffs: Tariff and Tax in International Trade*, SUPPLY CHAIN RESOURCE COOPERATIVE, NC STATE UNI. (Jan.15, 2011), https://scm.ncsu.edu/scm-articles/article/tariffs-tariff-and-tax-in-international-trade; *see also* Tariffs, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm.

[17] *MFN (most-favoured-nation) tariff,* WORLD TRADE ORG., GLOSSARY TERM, https://www.wto.org/english/thewto_e/glossary_e/mfn_tariff_e.htm.;

[18] *Types of Tariffs*, WORLD BANK, https://wits.worldbank.org/wits/wits/witshelp/content/data_retrieval/p/intro/c2.types_of_tariffs.htm.

[19] Preferential Tariff Duty Rates and an Explanation about the Rules of Origin, Custom Fact Sheet, New Zealand Custom Service, https://www.customs.govt.nz/globalassets/documents/fact-sheets/fact-sheet-08-preferential-tariff-duty-rates-and-an-explanation-about-the-rules-of-origin.pdf; *see,* Siddesh Kaushik, *Picture Trade: Types of Tariffs explained*, WORLD BANK BLOGS (Jan. 11, 2016), https://blogs.worldbank.org/trade/picture-trade-types-tariffs-explained.

[20] Annexure A, Table 7.

[21] Annexure A, Table 8.

[22] Annexure A, Table 8.

the Korean MFN tariff is itself close to zero. Applied tariffs for certain products like Exporters of such products may not be using CEPA procedures.[23]

The majority of products under iron and steel are placed under category E-8 allowing for a phase-out period of 8 years. The average MFN tariff applied by India on E-8 products in 2014 was around 5.6 per cent but under CEPA, the preferential tariff in 2014 was around 1.88 per cent and has come down further in 2015 to 1.25 per cent. The significant tariff advantage is resulting in the rise in imports.[24]

Similar to the scenario with Korea, there was a trade imbalance before India – Japan came into force in 2011.[25] The preferential tariffs have not affected this trend. The average MFN rate of Japan was already close to zero and 3.43 on average.[26] This further got dropped to 0.4 average.[27] This difference is insignificant compared to the drop from 15% MFN rate of India. This has caused a shift in export trends. For example, export of ferro-manganese carbon increased between 2010-11 to 2014-15 probably as a result of the CEPA concessions. The MFN tariff on the product is 6.3% while the preferential tariff for India is 2.7%. Exports of ferro-chromium steel have declined sharply from in 2014-15 despite a preferential duty of zero per cent compared to an MFN duty of 5.3% in 2015.[28]

Overall, India has been able to maintain a positive trade balance in product HS 72 when trade with ASEAN countries is concerned. The ASEAN countries have not been able to take advantage of zero tariff rates like Korea and Japan. There is a not a significant variation in MFN and preferential rates in this product (15% MFN rate to close to 9% on average).[29] Thus, drawing parallels to the condition with Japan, Korea and ASEAN countries, it can be stated that India has not benefited when tariffs are in question.

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[23] V.S. Seshadri, *India – Korea CEPA: An appraisal of progress*, ASEAN – INDIA CENTRE AT RESEARCH AND INFORMATIVE SYSTEM FOR DEVELOPING COUNTRIES (2015).
[24] *Id.*
[25] Annexure A, Table 2.
[26] Annexure A, Table 7.
[27] Annexure A, Table 8.
[28] V.S. Seshadri, *India – Japan CEPA: An appraisal*, ASEAN – INDIA CENTRE AT RESEARCH AND INFORMATIVE SYSTEM FOR DEVELOPING COUNTRIES (2016).
[29] Annexure A, Tables 3, 4, 5 & 6.

Conclusion: Part I

A preliminary analysis of the trends in imports and exports with Japan and Korea vis-a-vis the MFN rate and the preferential rate show that India has not benefited from the tariff reduction in their respective FTAs. This is largely due to the fact that India's MFN rates have dropped from 15 percent to 0 percent preferential tariff while the MFN rates were already close to zero in Japan and Korea. Thus Indian exporters did not benefit as much as the Japanese or Korean exporters.

2. Non-Tariff Measures as Barriers to Trade

2.1. Introduction to NTBs.

NTBs may include any policy measures other than tariffs that can impact trade flows.[30] These measures may be broadly classified into two groups. The first type, called "technical" measures, includes regulations, standards, testing and certification, primarily sanitary and phytosanitary and Technical Barriers to Trade ["**TBT**"] measures.[31] The second type, called "non-technical" measures, includes quantitative restrictions (quotas, non-automatic import licensing), price measures, forced logistics or distribution channels, and so on.[32]

2.1.1. Treatment of NTBs Under WTO Agreements

Article III of General Agreement on Tariffs and Trade ["**GATT**"] as well as the TBT Agreement and the Agreement on the Application of Sanitary and Phytosanitary Measures ["**SPS Agreement**"] deal with the issue of NTBs to trade. Article III of the GATT,[33] provides for national treatment obligations on Members. National treatment prevents the WTO members to afford protection to domestic production through internal measures.[34] This rule in principle prevents the Members from substituting behind-the-border NTBs for tariffs, namely, discriminating in taxes and/or regulations against imported products.[35] However, need only National Treatment obligations were not enough, and need was felt to have more comprehensive obligations for NTBs.[36] Thus, along with national treatment, two new agreements were added in the WTO multilateral framework to deal with NTBs. The WTO, TBT, and SPS Agreements therefore, deal with domestic instruments that would otherwise come

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[30]Robert W. Staiger, *Non-tariff Measures and the WTO* (WTO, Staff Working Paper ERSD-2012-01, Jan 2012); *Non-Tariff Measures*, UNCTAD, https://unctad.org/topic/trade-analysis/non-tariff-measures.

[31]*Non-Tariff Measures*, OECD, https://www.oecd.org/trade/topics/non-tariff-measures/.

[32]*Id.*

[33] General Agreement on Tariffs and Trade 1994 art. III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

[34]PETROS C. MAVROIDIS, TRADE IN GOODS: THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS 193 (2007) [hereinafter Mavroidis].

[35]Robert W. Staiger, *Non-Tariff Measures and the WTO* 10 (WTO, Staff Working Paper ERSD-2012, Jan. 01, 2012).

[36]Mavroidis, *supra* note 34.

under the purview of Art. III:4 of the GATT.[37] The SPS Agreement covers all measures related to: a) human or animal health from food-borne risks; b) human or animal health from animal or plant carried diseases; c) animals or plants health from pests or diseases; and d) prevent other damage from pests.[38] TBT Agreement on the other hand, covers all technical regulations, standards, and conformity assessment procedures, except when they are covered by SPS Agreement.[39] Since the standards for steel are not related to any area covered by SPS Agreement, only TBT Agreement is relevant for steel sector.

2.1.2. Introduction to Agreement on Technical Barriers to Trade

The TBT Agreement is a multilateral agreement, that is, it is binding on all WTO Members. The Agreement is specially designed to address the major types of technical barriers to trade: mandatory 'technical regulations', voluntary 'standards' and procedures followed to verify conformity with technical regulations and standards – 'conformity assessment procedures'. While the use of these types of barriers is allowed, under the TBT Agreement these inherent rights of WTO Members are disciplined through the elaborate requirements that seek to ensure that measures adopted do not constitute arbitrary and unjustifiable discrimination, or a disguised restriction on international trade.

Technical Regulations: Annex 1.1 provides for definition of technical regulations. This definition as interpreted by the Appellate Body, in *EC – Asbestos*[40] and in *EC – Sardines* [41] case has developed a three-tier test containing three essential requirements, which must be met by a measure for it to qualify as a technical regulation within the meaning of the TBT Agreement. These requirements are:

- A measure must be applicable to an identifiable product or group of products;

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[37] *Id.*

[38] Agreement on Application of Sanitary and Phytosanitary Measures Annex A, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493.

[39] *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm.

[40] Appellate Body Report, *EC — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 67-70, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001).

[41] Appellate Body Report, *EC — Trade Description of Sardines*, ¶176, WTO Doc. WT/DS231/AB/R (adopted Oct. 23, 2002).

- A measure must lay down product characteristics or their related processes and production methods (PPMs);
- A measure must be mandatory.

The mandatory character of a technical regulation is the main, if not the only, factor which makes it different from a standard, as defined in Annex 1.2 of the TBT Agreement.

Standards: Annex 1.2 to the TBT Agreement contains a definition of standard similar to that of technical regulations. The Appellate Body in *US – Tuna II (Mexico)* noted that the language of the second sentences of the definitions of both technical regulation and standard is identical and thus, "terminology", "symbols", "packaging", "marking", and "labelling requirements" may be the subject-matter of either technical regulations or standards'.[42] However, the differences between technical regulation and standards are:

- compliance with a standard must not be mandatory, that is, voluntary;
- rules, guidelines or characteristics for products of related PPMs must be provided by a standard 'for common and repeated use';
- a standard must be 'approved by a recognized body'.

Under the Indian laws, the Bureau of Indian Standards Act, 2016 ["**BIS Act**"], defines standards.[43] Standards is defined under Section 2(39) of the Act as documented agreements containing technical specifications or other precise criteria to be used consistently as rules, guidelines, or definitions of characteristics, to ensure that goods, articles, processes, systems and services are fit for their purpose. However, it must be noted that standards in FTAs and WTO law is standards as defined in the TBT Agreement.

Conformity Assessment: As per the International Organization for Standards ["**ISO**"] conformity assessment involves a set of processes that show your product, service

[42] Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 187, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) [hereinafter AB, US – Tuna].

[43]The Bureau of Indian Standards Act, §2(39), No. 11 of 2016.

or system meets the requirements of a standard.[44] According to the definition in Annex 1.3 to the TBT Agreement, conformity assessment procedures are: "[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled." The Explanatory Note to the definition of conformity assessment procedures further clarifies:

> "Conformity assessment procedures include, inter alia, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations."

Under the BIS Act, a similar definition has been provided. The Act defines conformity assessment as demonstration that requirements as may be specified relating to an article, process, system, service, person or body are fulfilled.[45] Under FTAs and WTO law however, conformity assessment is as defined under the TBT Agreement.

Thus, under the TBT Agreement the term 'conformity assessment procedures' is understood broadly to include all kinds of procedures in which the compliance of products with technical regulations or standards is assessed.[46] For example, sampling and testing usually involves the collection of samples of the product and evaluation of their qualities against the appropriate requirements. Inspection may include sampling and testing, but is also usually accompanied by visual control of products in the place where they are located. Accreditation may be granted to an entity by an accrediting body in confirmation of its compliance with certain requirements.[47] Another type of procedure, which although not directly mentioned in the Explanatory Note, but which is clearly covered by the definition of conformity assessment procedure, is 'certification'. This is usually a sophisticated process involving complex procedures such as evaluation, verification and assurance of

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[44] *Certification & Conformity*, INTERNATIONAL ORGANIZATION FOR STANDARDS, https://www.iso.org/conformity-assessment.html.

[45] The Bureau of Indian Standards Act, §2(7), No. 11 of 2016.

[46] WORLD TRADE ORGANIZATION, WORLD TRADE REPORT: EXPLORING THE LINKS BETWEEN TRADE, STANDARDS AND THE WTO 97 (2005) [hereinafter World Trade Report].

[47] Arkady Kudryavstev, *The TBT Agreement in context, in* THE RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 39 (Tracey Epps & Michael J. Trebilcock eds., 2013).

conformity of a product with requirements of a technical regulation or a standard.[48] After completion of a process of certification, compliance is usually confirmed by an official document issued by a competent certifying body.[49]

2.2. Standards and Conformity Assessment Measures Adopted

2.2.1. Measures in ASEAN

2.2.1.1. Indonesia

Indonesia has mandatory standards in place for a on a number of steel products, and has fixed conformity assessment procedures as can be seen in the **Annexure B** summarising the standards. Indonesian National Standard ["**SNI**"] is the standard applicable nationally in Indonesia. The necessary conformity assessment measures include third–party product certification system through initial testing of samples of product, assessment and surveillance of the involved quality system, and surveillance by testing of product samples taken from the factory or the open market, or combination of both. [50]

The National Accreditation Committee ["**KAN**"], is the institution which performs the task of establishing accreditation and certification system. KAN has the authority to accredit institutions and laboratories to carry out certification activities. Such accredited institutions are called Product Certification Institute ["**LSPro**"]. LSPro carries out certification activities for products and gives SNI certifications. Issuance of such SNI certifications are carried out by LSPro, based on quality suitability testing of product in accordance with the provisions of respective SNI; and audits of the Quality Management System of SNS ISO 9001 2008 or its revision.

Testing Laboratories carry out testing activities on samples of goods according to the specifications of the SNI test method. Such laboratories must be accredited by KAN; or Overseas laboratories that have been accredited by the accreditation agency where the testing laboratory is located which has a MRA with KAN and the country

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[48] World Trade Report, 2005, at 97-100.

[49] *Id.*

[50] *SNI Marking*, TUV NORD, https://www.tuv-nord.com/id/en/our-services/product-certification/sni-indonesian-national-standard/.

concerned has bilateral or multilateral agreements in the field of technical regulations with the Government of Republic of Indonesia.

The audit of the Quality Management System implementation is based on Self statement on the application of the Quality Management System according to the revised SNI ISO 9001 2008, or Certificate of Quality Management System implementation in accordance with SNI ISO 9001 2008 or its revision or other Quality Management System that is recognised from a Quality Management System Certification body that has been accredited by KAN or a Quality Management System accreditation institution that has signed a MRA with KAN.

Further, companies are required to affix the SNI mark with each product by means of marking which is not easily lost.

2.2.1.2. Malaysia

The Ministry of Finance, Malaysia ["**SIRIM**"] as the responsible agency for the enforcement of Mandatory Standard Compliance for importation of Iron and Steel Products (for Non Construction Sector) through Custom (prohibition of imports) Order Amendment No. 5 2008, which cover 57 new tariff code.[51]The Mandatory Standard Compliance is in place to ensure that after the liberalization of iron and steel products, only products that conforms to Malaysia Standards and other International Standards (in the absence of Malaysian Standards) can be imported to Malaysia. **Annexure C** provides a list of standards applied in Malaysia. These standards have been set by **Department of Standards Malaysia**, which is a government standard setting body.

The Custom (prohibition of Imports) Order Amendment No 5. 2008, under Custom Act 1967, explain in details the manner of importation of iron and steel products:

> "That the import is accompanied by a certificate of approval issued by or on behalf of the Chief Executive of SIRIM for non-construction sector certifying

[51] Guideline for Importation of Iron and Steel Products Custom (Prohibition of Imports) Order Amendment No. 4 2009, https://www.sirim-qas.com.my/wp-content/uploads/2012/04/2-TCQS-DOC-01-2-COA-Guidelines-for-Importation-of-Metal-Products.pdf.

that the import conforms to Malaysian Standards(MS) or any other International Standards recognized by SIRIM (if Malaysian Standard is not available)"

In the implementation, Products with MS will be tested according to MS, whereas products without MS, however has ISO standards, it will be tested and verified using the existing international standards (ISO) until the adoption process into MS has completed. For products without MS nor ISO, however has Foreign National Standards ["**FNS**"], products will be tested to FNS, until adoption of FNS to MS is completed.

2.2.1.3. Vietnam

Vietnam introduced standards for Steel for the reinforcement of concrete, steel for the reinforcement and pre-stressing of concrete and epoxy-coated steel for the reinforcement of concrete.[52]The standards have been provided under **Annexure D.** The steel standards in Vietnam are set by **Directorate for Standards, Metrology and Quality**.

Further, importers are also required to include at least the following information in labels:[53]

- Name and address of the manufacturer;
- Name of the country manufacturing steel for the reinforcement of concrete;
- Name and address of the import organizations or personal
- Name of product;
- A reference to the applicable standard;
- Regulation conformity mark;
- Steel grade;
- Nominal diameter;
- Lot number (manufactured); and
- Date of manufacture (month, year).

[52]National Technical Regulation on Steel for the Reinforcement of Concrete, QCVN7: 2010/BKHCN, www.inmetro.gov.br/barrierastecnicas/pontofocal.
[53]*Id.*

Vietnam also introduced National Technical Regulation on Standard Steel, [54] specifying the limit of chemical contents of stainless steels, technical requirements and the requirements on quality management of stainless steels for domestic production, imported and circulated on the market. The applied standards must be announced for goods circulated in the market, which must be Vietnamese national standards, international standards, regional standards or association standards, such as American Society for Testing and Materials, American National Standards Institute, or Society of Automotive Engineers. However, the goods must comply with the chemical content requirements in the regulation. Further, requirements for methods of sampling and testing of goods, when assessing and certifying conformity, must comply with the respective regulations of the announced standards.[55]

2.2.1.4. AIFTA Provisions regarding technical barriers

AIFTA in Article 8 deals with Non-Tariff measures. It reaffirms the rights and obligations of the parties under TBT and SPS Agreements. It provides that each party shall not institute or maintain any NTM except in accordance with their WTO rights and obligations. It further provides that the party shall ensure transparency of such measures, and their full compliance with obligations under WTO Agreement.

FTAs being "agreement[s] concluded between States in written form and governed by international law", [56] shall be interpreted according to customary rules of interpretation. Articles 31 and 32 of the **VCLT** are considered as customary rules of interpretation.[57] Accordingly, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in

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[54] National technical regulation for stainless steel, https://ec.europa.eu/growth/tools-databases/tbt/en/search/?tbtaction=get.project&Country_ID=VNM&num=137&dspLang=en&basdateb=&basdatefin=&baspays=VNM&baspays2=VNM&basnotifnum=&basnotifnum2=&bastypepays=&baskeywords=&project_type_num=1&project_type_id=1&lang_id=VI.

[55] *Id.*

[56] Vienna Convention on the Law of Treaties art. 2(a), Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

[57] Appellate Body Report, *Japan — Taxes on Alcoholic Beverages II*, WTO Doc. WT/DS8/AB/R (adopted Nov. 1, 1996).

the light of its object and purpose.[58] From the ordinary meaning of the TBT provision in AIFTA reproduced above, it is clear that the rights and obligations of parties under AIFTA are the similar to those provided under the TBT Agreement.

Therefore, since the AIFTA neither provides any additional obligations regarding technical barriers, nor promotes signing of any **MRA**, the technical barriers are not sufficiently addressed by AIFTA. In this regard, a provision promoting MRA may be added to AIFTA. Recommended MRA provision has been discussed in detail later in the section.

2.2.2. Japan

The Japan Industrial Standards Commission ["**JISC"**] is the main body dealing with standards activities in Japan. Its mission consists of four elements:

- establishment and maintenance of Japan Industrial Standards ["**JIS**"];
- administration of accreditation and certification;
- participation in international standards activities; and
- development of measurement standards and technical infrastructure for standardization. JISC publishes plans each month for the preparation of new and revised JIS drafts on its website.[59]

Conformity Assessment

Under the JIS mark scheme, product certification bodies accredited by the Ministry of Economy, Trade and Industry ["**METI**"] conduct tests to verify compliance of products with JIS and audit the quality management system of facilities at which the products are manufactured. The certification process consists of two elements: evaluation of the conformity of products, electromagnetic records, or services with the relevant JIS, and the evaluation of the quality management system. There are 24 JIS-accredited certification bodies, including three outside of Japan.[60]

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[58]VCLT, *supra* note 56, art. 31(1).

[59] *Japan – Trade Standards,* EXPORT.GOV, https://www.export.gov/apex/article2?id=Japan-Trade-Standards.

[60] *Conformity Assessment Related to JIS*, JAPANESE INDUSTRIAL STANDARDS COMMITTEE, https://www.jisc.go.jp/eng/jis-mark/newjis-eng.html.

India-Japan CEPA Provisions Regarding Technical Barriers

The India – Japan CEPA at chapter 5 deals with technical regulations, standards and conformity assessment procedures. Article 51 of the treaty reaffirms parties' rights and obligations under TBT agreement. Article 53 establishes a sub-committee on Technical Regulations, Standards and Conformity Assessment Procedures, and SPS Measures. The functions of the Sub-Committee are:

(a) exchanging information on technical regulations, standards and conformity assessment procedures, and SPS measures, and where necessary, coordinating the exchange of information on generic medicine provided for in Article 54;
(b) undertaking consultations on issues related to technical regulations, standards and conformity assessment procedures;
(c) undertaking science-based consultations to identify and address specific issues that may arise from the application of SPS measures;
(d) consulting cooperative efforts between the Parties in international fora in relation to technical regulations, standards and conformity assessment procedures, and SPS measures;
(e) holding discussions on the participation of each Party in the existing frameworks for mutual recognition in technical regulations, standards and conformity assessment procedures under international agreements;
(f) discussing Mutual Recognition Arrangements (hereinafter referred to in this Chapter as "MRAs") pursuant to Article 55 and other technical cooperation in relation to technical regulations, standards and conformity assessment procedures, and SPS measures;
(g) reviewing the implementation and operation of this Chapter;
(h) reporting, where appropriate, its findings to the Joint Committee; and
(i) carrying out other functions as may be delegated by the Joint Committee pursuant to Article 14.

Article 55 deals with MRAs and provides that the Parties shall, through the Sub-Committee, discuss the feasibility of MRAs in such sectors as electrical products, telecommunications terminal equipment and radio equipment and other sectors as may be mutually agreed by the Parties. In elaborating MRAs, the Parties shall confirm the economic benefits of such arrangements and, where necessary, the

equivalence of the technical regulations of both Parties. Specific timelines have been provided for such agreements.

The provisions dealing with TBT standards and regulations are the most comprehensive in India – Japan CEPA. A specific sub-committee has been formed to deal with standard and technical issues. The sub-committee is also required to discuss feasibility of MRAs in electrical products, telecommunications terminal equipment, radio equipment and other sectors as mutually agreed.

2.2.3. South Korea

South Korea has not notified any national technical regulations (i.e., mandatory standards) regarding steel. However, Korea has voluntary Korean standards ["**KS**"] which apply to various goods including steel. KS applies to various Steel products.[61] Such standards are set by the Korean Steel setting body, **Korean Standards Association**. While the KS are voluntary and the government does not require compliance with KS for importation of products, the government frequently references KS in government regulations and technical specifications, and implemented by public agencies in procurement. Therefore, even when the standards are voluntary, the producers may still have to adhere to standards due to commercial reasons to increase the acceptability of the product.

The India-Korea CEPA in Article 2.28 deals with Technical Regulations and SPS Measures. It reaffirms rights and obligations of parties under TBT and SPS Agreements. In terms of TBT, it provides for various obligations. These include exchange of information on technical regulations, standards and conformity assessment procedures in the Parties; address any TBT issues to identify a practical solution; explore possibilities of mutual recognition agreements or arrangements on technical regulations, standards and conformity assessment procedures between the Parties. It also provides for consultations with a view to arriving at mutual recognition agreements or arrangements for conformity assessment of the sectors listed in Annex 2-B with specified deadlines for the same. Lastly, it promotes use of

[61] *Korean Steel Standards*, STEELJIS, http://steeljis.com/korea/ks_steel_standard.php.

international standards and conformity assessment guidelines by the parties, and framing guidelines for recognition of suppliers' declaration on conformity assessments and standards.

While the 'hard' obligations of the parties remain the same as in TBT agreement, the parties have agreed to take a number of measures for exchange of information, bilateral consultation, and mutual cooperation to facilitate bilateral trade. This includes consultations to arrive at mutual recognition agreements or arrangements for conformity assessments for telecommunication equipment, and electrical and electronic equipment.

2.3. Analysis

Main Obligations under TBT Agreement

The main obligations under TBT Agreement may be classified into following groups:

- Non-discrimination (MFN and national treatment) obligations
- Prohibition of unnecessary obstacles to trade
- Harmonization with relevant standards
- Equivalence and mutual recognition

Minimising Standards' costs — Harmonisation, Mutual Recognition Agreements or Equivalence Agreements

Various economic studies show that different national regulatory systems, such as technical regulations, standards and conformity assessment procedures lead to trade distortions and may cause impediments in trade.[62] The design and operation of various regulatory systems may thus cause high costs for traders which reduces the volume of trade.[63]

[62] DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995); Kalypso Nicalaodis, Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects (Working Paper No. 8/97, Jean Monnet Center); MARK A. POLLACK & GREGORY C. SHAFFER, TRANSLANTIC GOVERNANCE IN THE GLOBAL ECONOMY (2001).

[63] FRODE VEGGELAND & CHRISTEL ELVESTAD, EQUIVALENCE AND MUTUAL RECOGNITION IN TRADE ARRANGEMENTS: RELEVANCE FOR THE WTO AND THE CODEX ALIMENTARIUS COMMISSION (2004).

To minimise these costs of standards, various alternatives may be explored. These include harmonisation, Mutual Recognition Agreements (MRAs), or recognition of equivalence.

Harmonisation: Harmonisation may be regarded as the drawing up of common or identical rules by a group of authorities, with the intention that the mandatory rules governing a product or service shall be same among them. [64] Therefore, Harmonisation would require parties to decide upon identical standards applicable in the jurisdictions. That is achieved through regulatory adaptation, by wither bringing one country's rules into alignment with the other's, or by way of development of entirely new set of rules. [65] This involves considerable costs, both for the administration, as well as producers who need to adapt to such standards. Further, different regulatory systems may not be compatible. As analysed in the previous section, most States have a voluntary or mandatory standard for steel, and negotiations with so many parties for harmonisation of standards is not feasible. Further, for a sector such as Steel, change in standards would lead to considerable adaptation costs for producers. Considering all these reasons, harmonisation is not suitable to minimise standards' costs for Steel.

Recognition of Equivalence: Even where the standards are different, different States may be recognised as equivalent. Where the regulations or standards have the same regulatory objective as that of the other State, and the two sets of regulations both fulfil that same objective, the authorities may agree to regard them as equivalent.[66] In such a scenario, the Sate may agree that the products conforming to either party's standards may be placed in their markets. However, equivalence involves that the objectives of a regulation be set out by both parties, they are agreed upon as being equivalent, and agreement has to be reached on their

[64]Commission of the European Communities, Implementing Policy for External Trade in the Fields of Standards and Conformity Assessment: A Tool Box of Instruments, (Commission Staff Working Paper, SEC (2001) 1570).
[65]*Id.*
[66]*Id.*; Helen Churchman, *Mutual Recognition Agreements and Equivalence Agreements, in* RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 290 (Tracey Epps & Micheal J. Trebilcock, eds. 2013).

acceptability.[67] This is a complicated process with a high cost. Further, any change in standards may again warrant such negotiations. While equivalence agreement may be considered valuable, such an arrangement is feasible only where regulatory differences among different jurisdictions are minimal, and the levels of development are comparable.[68] In steel sector specifically, compatibility issues may also arise as certain applications of steel may be compatible only with the physical characteristics of steel of national standard, and thus equivalence agreement would not be practical in such cases. Considering the above reasons, equivalence agreement is not suitable in the particular case.

Mutual Recognition Agreement: An MRA is an agreement entered into between two or more governmental or non-governmental bodies. The function of an MRA is to facilitate the acceptance by one party of the results of conformity assessment procedures undertaken by the other party's CAB.

Various economic studies show MRAs promote trade between the parties.[69] Such positive effects have been noticed in developing countries as well. Further, a study shows that the trade promotion effects of MRAs are much stronger when developing export to developed countries.[70] The MRAs are of two types, governmental and non-governmental. Governmental MRAs are suggested in the present case as they are binding in nature, while non-governmental MRAs are voluntary in nature.

The advantages of entering into a MRA include reduced time and cost while exporting goods, as the goods are certified in exporting country and are not to be retested at the point of entry; reduction in cost due to avoidance of double testing;

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[67]Commission of the European Communities, Implementing Policy for External Trade in the Fields of Standards and Conformity Assessment: A Tool Box of Instruments, (Commission Staff Working Paper, SEC (2001) 1570).

[68]VERITE RESEARCH, IMPROVING TRADE WITH INDIA: MUTUAL RECOGNITION IN CONFORMITY ASSESSMENT (Oct. 2015), https://www.veriteresearch.org/wp-content/uploads/2018/05/Improving-trade-with-India-1.pdf.

[69] Amurgo Pacheco, Mutual recognition agreements and trade diversion: Consequences for developing nations, (Graduate Institute of Int'l Studies, IHEID Working Papers 20-2006); M. Chen & A. Mattoo. *Regionalism in standards: Good or bad for trade*, 41(3) CANADIAN J. ECON., 838, 842 (2008).

[70]Yong Joon Jang, *How do mutual recognition agreements influence trade?*, REV. DEV. ECON. 1, 18 (2018).

increased cooperation between authorities; and lesser efforts needed for reaching an agreement as the standards remain the same. As per these benefits, it would be beneficial if the MRA are entered into with the parties. Certain ASEAN countries including Indonesia, Malaysia, and Vietnam require mandatory standard for importation of steel. Thus, MRA is particularly useful in context of AIFTA. On the other hand, while Japan and South Korea do not impose technical regulations, Indian steel exporters have to comply with the respective standards to gain broader acceptance of their product in their Japanese and Korean markets. Thus, MRAs would be useful in India-Japan CEPA and India-Korea CEPA too as it would allow Indian CABs to conduct conformity assessment and hence save time and costs.

2.4. Recommendations

As discussed in the previous section, MRAs provide the best alternative for steel sector. Amongst the three FTAs in question, AIFTA is the most basic in terms of dealing with technical barriers. Accordingly, it is suggested that AIFTA may be renegotiated to add a chapter on technical barriers. A sub-committee for technical barriers may be formed, on lines of the sub-committee formed in India-Japan CEPA. Further, it is suggested that a particular article be drafted specifically for conformity assessment, not only encouraging recognition of CABs of the other party, but also providing reasons if the party fails to do so. Such clauses have been used in various FTAs such as Australia-Chile, Australia-US, Canada-Peru, and Japan-Peru.[71] A sample clause for the same is Article 96 of the Agreement between Japan and the Republic of Peru for an Economic Partnership as reproduced below:

> "**Article 96: Conformity Assessment**
>
> 1. The Parties recognize that a broad range of mechanisms exists to facilitate the acceptance in a Party of the results of conformity assessment procedures conducted in the other Party. Each Party shall, on request of the other Party, provide information on the range of such mechanisms used in its Area.
>
> 2. Where a Party does not accept the results of a conformity assessment procedure conducted in the other Party, it shall, on request of the other Party

[71]Anabela Correia de Brito et al., The Contribution of mutual recognition to international co-operation (OECD Regulatory Policy Working Papers No. 2, 2016).

and subject to the laws and regulations of that Party, *explain the reasons for its decision so that corrective action may be taken by the other Party when appropriate*.

3. Each Party shall, whenever possible, accredit, designate or recognize conformity assessment bodies in the other Party on terms no less favorable than those it accords to conformity assessment bodies in its Area. If a Party accredits, designates or recognizes a body assessing conformity with a particular technical regulation or standard in its Area and *it refuses to accredit, designate or recognize a body in the other Party assessing conformity with that technical regulation or standard, it shall, on request, explain the reasons for its refusal*.

4. Where a Party declines a request from the other Party to enter into negotiations to conclude an arrangement for recognition in its Area of the results of conformity assessment procedures conducted by conformity assessment bodies in the other Party, it shall explain the reasons for its decision." (emphasis added)

The India – Korea CEPA provides a specific timeline for negotiation of MRA in sectors listed in Annex 2-B. It is suggested that steel sector may be added in the Annex, and parties be encouraged to arrive at a MRA in steel sector. Further, a clause may be added for providing reasons in case a party refuses to recognise conformity assessment procedure conducted by the other party, as suggested for AIFTA.

India – Japan CEPA in Article 55 provides for discussion on feasibility of MRA, on "sectors as may be mutually agreed by the parties". It is suggested that India push for a MRA to be negotiated under this agreement. A Memorandum of Cooperation is already in place between BIS and JISC. India may increase the cooperation with JISC in steel sector under the Memorandum of Cooperation which may lead to acceptance of CAP conducted by the other party.

2.5. Import Licensing Measures for Steel

2.5.1. Import Licensing under the WTO

Import licensing can be defined as administrative procedures requiring the submission of an application or other documentation (other than those required for customs purposes) to the relevant administrative body as a prior condition for importation of goods.[72] A multilateral agreement, Agreement on Import Licensing Procedures[73] governs import licensing under WTO. It provides that Members must apply import licensing procedures neutrally, and administer them in a fair and equitable manner. [74] Further, applications are not to be refused for minor documentation errors, not to be penalized heavily for any omissions or mistakes in documentation or procedures obviously made without fraudulent intent or gross negligence.[75] Licensed imports are to not be refused for minor variations in value, quantity or weight from the amount shown on the licence for reasons consistent with normal commercial practices.[76]

The agreement provides various obligations to simplify the process. Applications forms and renewal forms should be simple.[77] Application procedures and renewal procedures are to be simple. Applicants are to be allowed a reasonable period to submit licence applications. Where there is a closing date for applications, this period should be at least 21 days. The number of administrative bodies which an applicant has to approach in connection with an application is not to exceed to a maximum of three.[78]

The agreement classifies import licensing as **automatic import licensing** or **non-automatic import licensing**. Automatic import licensing (licensing maintained to collect statistical and other factual information on imports) is defined as import

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[72] *Technical Information on Import Licensing,* WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/implic_e/implic_info_e.htm.
[73] Agreement on Import Licensing Procedure, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 436.
[74] *Id.* at art. 1.3.
[75] *Id.* at art. 1.7.
[76] *Id.* at art. 1.8.
[77] *Id.* at art. 1.5.
[78] *Id.* at art. 1.6.

licensing where the approval of the application is granted in all cases.[79] On the other hand, non-automatic import licensing uses a negative definition, and is defined as licensing not falling within the definition of automatic import licensing.[80] It is clear that automatic licensing is being used by the countries, as approval is granted in all cases where the importer is eligible.

The main provisions applicable to automatic import licensing are that licence applications may be submitted on any working day before customs clearance; they shall be approved immediately on receipt but in any case, within ten working days.[81] The agreement requires Members to remove automatic import licensing as soon as the circumstances which have given rise to its introduction no longer prevail.[82]

2.5.2. ASEAN

2.5.2.1. Indonesia

Indonesia applies importing licensing requirements for a wide range of reasons like protection of national interest, health and safety of animals, plants, environment, etc. However, some of the reasons for restriction mentioned may open up possibilities of disguised non-tariff barriers for importers, for e.g. protection of balance of payments and/or trade balance; promotion of use of locally produced goods for development of domestic industries.[83] Prior to 2018, Importers were required to obtain an import license as either an importer of goods for further distribution ["**API-U**"] or as an importer for their own manufacturing ["**API-P**"], but importers are not permitted to obtain both types of licenses. For companies applying for import approval as API-P, the validity of import approval is one year, while validity is six months for company who apply as API-U. An application of import approval may be refused under the ordinary criteria or when the application is incomplete or incorrect. The process was considered to be tedious, time consuming and confusing by foreign importers as it

[79] *Id.* at art. 2.1.
[80] *Id.* at art. 3.1.
[81] *Id.* at art. 2.2.
[82] *Id.*
[83] Law of the Republic of Indonesia No. 7 of 2014 about Trade, art. 22, https://www.informea.org/en/legislation/law-republic-indonesia-no-7-2014-about-trade.

required various businesses licenses, custom identification numbers and approvals.[84]

However, in 2018, Indonesia introduced the Online Single Submission system to liberalise and streamline the process of import licensing.[85] Under the current regime, importers are no longer required to obtain an API license or Customs Registration number.[86] Importers are assigned a Business Identity Number ["**NIB**"] that prevails throughout the company's life and does not have to be periodically renewed. Alterations and changes in licensing data can be made easily updated without having to apply for a fresh license. However, users and businesspeople have criticised the roll-out of the system which has ended becoming more complicated and costly.[87]

Indonesia enforces a system of import licensing for iron and steel products. The licensing system applies to 341 product of iron or steel, 65 products of alloy steel, and 47 products of its derivative products identified by 8-digit HS Code.[88]

2.5.2.2. Malaysia

The Customs (Prohibition of Imports) Order 2017,[89] is the governing document containing all the required information about the import licensing regime in Malaysia. Goods subject to import licensing requirements have been classified in its four Schedules. Part III of the Second Schedule includes those products that are subject to a "*conditional prohibition except under import license*". However, such goods are

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[84] *See, Update: Securing an Import License via OSS*, CEKINDO, https://www.cekindo.com/blog/import-license-indonesia-oss.

[85] *Online single submission licensing system launched*, THE JAKARTA POST (July 9, 2018), https://www.thejakartapost.com/news/2018/07/09/online-single-submission-licensing-system-launched.html.

[86] World Trade Report, *supra* note 46.

[87] *Same difference: Businesses say OSS has yet to end to complex licensing*, THE JAKARTA POST (Sept. 27, 2019), https://www.thejakartapost.com/news/2019/09/27/same-difference-businesses-say-oss-has-yet-to-end-to-complex-licensing.html.

[88] Regulation of Minister of Trade, No. 110 of 2018, Annex., http://jdih.kemendag.go.id/backendx/image/regulasi/11190744_PERMENDAG_NOMOR_110_TAHUN_2018.PDF.

[89] Customs (Prohibition of Imports) Order 2017, P.U. (A) 103, (Mar. 31, 2017), https://importlicensing.wto.org/sites/default/files/Customs%20Prohibition%20of%20Imports%20Order%202017_31.03.2017_0.pdf.

free from such prohibition in specified free zones. By virtue of this Schedule, various Chapter 72 goods are prohibited from being imported expect under an import license. Even if such products enter the market through the specified free zone, their movement into the principal customs area is subject to an import license. However, in 2017, the import licensing requirements for 181 iron and steel tariff lines were deleted[90] and existing prohibitions were placed on specific tariff lines on the 10-digit level instead of on an entire heading.[91]

Part II of the Fourth Schedule classifies those goods which are not allowed to be imported into Malaysia unless they conform to the "*Malaysian standard or other standards approved by the Malaysian authorities*". Many Chapter 72 goods are subject to this Schedule and are required to produce a certificate of approval of letter exemption from the Chief Executive of the Construction Industry Development Board or from the SIRIM Berhad for non-construction purposes. The Chapter 72 tariff lines subject to import licensing requirements have been listed in **Annexure E.**

Such licenses are issued for the purposes of monitoring and data collection.[92] Such requirements also aim to police the influx of sub-standard products into its market. Import licenses and Certificates of Approval may be obtained by applying manually or via their single window clearance website – epermit.dagangnet.com. Certain non-compliances in application for import licenses have been classified as offences and may be subject to penalties.[93]

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[90] Trade Policy Review, *Report by the Secretariat – Malaysia*, WORLD TRADE ORG., https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=245412,241098,123898,123743,123644,122030,100985,106138,100718,55687&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

[91] *Id.*

[92] Guideline for Importation of Iron and Steel Products Custom (Prohibition of Imports) Order Amendment No. 4 2009, https://www.sirim-qas.com.my/wp-content/uploads/2012/04/2-TCQS-DOC-01-2-COA-Guidelines-for-Importation-of-Metal-Products.pdf.

[93] *Action Guidelines for Non-Compliance in the Import and Export Licenses Application for Iron & Steel*, https://www.miti.gov.my/miti/resources/Approve%20Permit/Acts%20and%20Policies/Garis_Panduan_Tindakan_Bagi_Kes_Ketidakpatuhan_Dalam_Permohonan_Lesen_Import_09102019.pdf.

2.5.2.3. Vietnam

Automatic import licences are required for importing a number of steel products.[94] An automatic import license is granted within seven working days by the Ministry of Industry and Trade upon receipt of complete and valid dossier from a trader. In case of applying for license electronically, license is granted within five working days.[95] The importer is required to submit the following documents:

- An automatic import licence registration form;
- A copy of the business registration certificate;
- A copy of import contract or contract equivalent documents;
- A copy of the commercial invoice;
- A copy of the Letter of credit or payment documents;
- A copy of the Bill of lading.

The licence is valid for 30 days from the date of issuance. In case the licence is expired, importers can apply for a new automatic import licence. There is no penalty for the non-utilization of a licence or a portion thereof. Licences are not transferable between importers. There are no administrative fees or conditions attached to the issuance of a licence[96] and no deposit or advance payment is required. Licensing is followed for statistical purposes, and no quantitative restriction is involved.[97]

2.5.2.4. Thailand

Thailand does not apply any automatic,[98] or non-automatic[99] import licensing requirements on steel products.

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[94] *Import Licensing Procedures*, WORLD TRADE ORGANIZATION, https://importlicensing.wto.org/content/iron-and-steel-products-1.

[95] Circular No. 23/2012/TT-BCT of August 7, 2012, on the application of automatic import licensing to some steel products, § 11, https://importlicensing.wto.org/sites/default/files/Circular_No.23_2012_TT_BCT_07.08.2012.pdf.

[96] COMMITTEE ON IMPORT LICENSING, REPLIES TO QUESTIONNAIRE ON IMPORT LICENSING PROCEDURES, WTO Doc. G/LIC/3/VNM/2, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/LIC/N3VNM2.pdf&Open=True.

[97] *Id.*

[98] *Import Licensing Procedures*, WORLD TRADE ORGANIZATION, https://importlicensing.wto.org/product-categories-thailand/goods-subject-automatic-import-licensing?member=144.

[99] *Import Licensing Procedures*, WORLD TRADE ORGANIZATION, https://importlicensing.wto.org/product-categories-thailand/goods-under-non-automatic-import-licensing?member=144.

2.5.3. Japan

The Import Trade Control Order[100] is periodically updated by the Ministry of Economy, Trade and Industry to include goods subject to import licensing approval based on their origin and place of shipment. Currently, iron and steel goods are not subject to any import quotas or import approvals under the Order. Thus, no import approval requirement is needed for Chapter 72 products exported from India.

2.5.4. South Korea

Korea's Foreign Trade Act, provides that approval has to be sought for import or export of goods which are restricted from being exported or imported by the Ministry of Trade, industry and energy.[101] Steel is not restricted from being imported,[102] and hence these measures do not apply to steel.

2.6. Analysis & Recommendations

As noted above, the import licenses imposed by Indonesia, Malaysia and Thailand are not for the purposes of quantitative restrictions or other such reasons, but mostly for statistical reasons. As per the domestic legislations notified by these countries, import licenses are approved if the importer is eligible, and thus the measures imposed are automatic import licensing.

Under automatic import licensing, applications must be approved within ten working days. Application in Indonesia are approved within three working days.[103] Vietnam takes seven days to approve the application in physical form, and five days when submitted online. Thus, the requirement of approving licences within ten days is adhered to. Further, AIFTA, India – Japan CEPA, and India – Korea CEPA do not

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[100] Import Trade Control Order, Cabinet Order No. 414, https://importlicensing.wto.org/sites/default/files/Import_Trade_Control_Order_01.12.1949.pdf.

[101] Foreign Trade Act, § 11, https://importlicensing.wto.org/sites/default/files/Foreign%20Trade%20Act%201996_27.01.2016.pdf.

[102] *Import Licensing Procedures*, WORLD TRADE ORGANIZATION, https://importlicensing.wto.org/members/78/legislations/all.

[103] Regulation of Minister of Trade, No. 110 of 2018, § 5, http://jdih.kemendag.go.id/backendx/image/regulasi/11190744_PERMENDAG_NOMOR_110_TAHUN_2018.PDF.

contain any provisions dealing with import licensing. The import license regimes in the Indonesia, Malaysia, and Vietnam are automatic import license regimes, and are compliant with Import Licensing Agreement and the FTAs. However, licensing requirements and issues with electronic facilitation as faced by importers in Indonesia may act as a non-tariff barrier. The intent of import licensing legislations must be scrutinised to monitor the rationale behind such prohibitions. As Indonesia allows imposition of import licensing restrictions for protection of trade balance and domestic industry, notified regulations must be monitored to prevent barriers to trade in violation of WTO Agreements. Difficulties in obtaining authentic and official English translations to Indonesian laws and regulations may prevent importers from being privy to changes made in the import licensing system.

Conclusion: Part II

An analysis of NTBs in relevant parties show that two kinds of NTBs have been adopted by the parties. Under technical barriers, ASEAN States have technical regulations in the form of mandatory standards, while Japan and Korea have voluntary standards for steel products. Under non-technical barriers, ASEAN States have automatic import measures.

To reduce costs for such standards and technical regulations, it is suggested that negotiation of MRAs be promoted through renegotiation of FTAs. Under AIFTA, it is suggested that a chapter on technical barriers be added. It is further suggested that a particular article be drafted specifically for conformity assessment, not only encouraging recognition of CABs of the other party, but also providing reasons if the party fails to do so. India-Korea CEPA and India-Japan CEPA already contain provisions on MRAs. It is suggested that India pushes for negotiation of MRAs under these provisions. Further, a clause may be added requiring that reasons may be provided in case a party refuses to recognise CABs from other party's jurisdiction.

By virtue of Article VIII GATT and the Agreement on Import Licensing Procedure empowers countries to place import licensing prohibitions and restrictions on foreign imports. However, these administrative procedures are subject to expectations of compliance with Article XX and Article XXI GATT and thus, they should be fair and

equitable. Countries are subjected to requirements of liberalising their rules and penalties and should promptly publish all import licensing laws, regulations in public domain. Japan, Korea and ASEAN countries have mostly complied with the WTO requirements of prompt publication and improving facilitation by promoting e-licensing and single window clearance systems. Malaysia has instituted import licensing requirements for iron and steel goods wherein importers are expected to either comply with Malaysian Standards or obtain a Certificate of Approval for its own standards. Malaysia should be urged to harmonise its steel standards with internationally recognised steel standards. Certificate of Approval systems should be streamlined. Fortunately, Malaysia has taken steps to remove import prohibitions on Chapter 72 goods and has developed an e-licensing system. Indonesia has often been criticised for its complicated and time-consuming import licensing process. Import licensing restrictions can be placed for a wide range of reasons including: protection of trade balance and development of domestic industry. This may open up the possibility of institution of trade-distorting non-tariff barriers. Additionally, Indonesia had a tedious process of import licensing that required various licenses and registrations. They have attempted to introduce an e-licensing system but the roll-out has been heavily criticised for being costly and complicated. Indonesia should be urged to improve their import licensing process so that importers are able to obtain clearance easily. Indonesia should also be urged to publish its laws, rules and regulations in the English language for wider dissemination.

3. A Review of Trade Facilitation and Customs Procedures

The use and proliferation of FTAs has grown rapidly in the recent past, particularly over the last two decades.[104] As a result of this increased use, the scope of FTAs has transcended beyond merely dealing with (the elimination of) preferential tariffs. It is not uncommon for contemporary bilateral and multilateral FTAs to have chapters dealing with issues pertaining to trade facilitation.[105] Generally, trade facilitation is understood as being a "comprehensive and integrated method of reducing the complexity and cost of trade processes".[106] The predominant goal of such measures is the reduction of red-tapism that often plagues international supply chains, especially in case of cross-border trade. Cumbersome and excessive data and documentation requirements for trade, in addition to taxing regulations as to border facilitation, are major hurdles to the smooth flow of trade. As has been dealt with in the previous part of this report,[107] complex procedural requirement often take the form of non-tariff barriers, and are a major cause of concern.[108]

[104] JEFFREY J. SCHOTT, FREE TRADE AGREEMENTS: BOON OR BANE OF THE WORLD TRADING SYSTEM? https://www.piie.com/publications/chapters_preview/375/01iie3616.pdf.

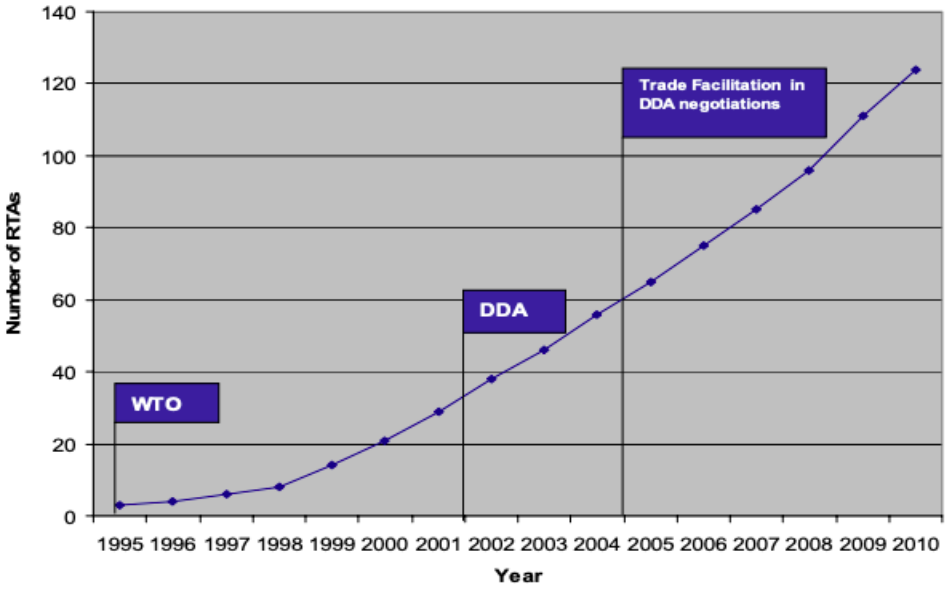
[105] Yann Duval, Nora Neufeld & Chorthip Utoktham, *Do trade facilitation provisions in regional trade agreements matter? Impact on trade costs and multilateral spillovers* (Asia-Pacific Research and Training Network on Trade Working Paper No. 164, 2016).

[106] Olu Fasan, *Comparing EU free trade agreements: Trade Facilitation*, ECDPM (July, 2004), https://ecdpm.org//wp-content/uploads/2013/11/IB-6F-Comparing-EU-Free-Trade-Agreements-Trade-Facilitation-2004.pdf [hereinafter Olu Fasan].

[107] *Infra* Part II.

[108] *Id.*

Figure: Number of free trade agreements containing measures on customs and trade facilitation:



Source: UNCTAD Secretariat based WTO RTA Database[109]

The issues arising in respect of trade facilitation[110] are two-fold – *first*, cumbersome data and documentation requirements; and *second,* complex customs and border facilitation procedures. Both these issues constitute significant obstacles to the movement of goods, and cause additional costs and delays for traders. Resultantly, they are undoubtedly detrimental to the economic interests of developing countries, as well as least developed countries ["**LDCs**"]. Question then arises as to how the this burden – for both internal and external stakeholders – may be minimised. The key to such minimisation can arise only out of the related minimisation of the application and enforcement of national laws and regulations. These national laws and regulations may, *inter alia*, be in the form of excessive control of customs

[109] UN Conference on Trade & Dev., *Trade Facilitation in Regional Trade Agreements*, UNCTAD/DTL/TLB/2011/1 (2011), https://unctad.org/system/files/official-document/dtltlb2011d1_en.pdf [hereinafter UNCTAD TF Guide].

[110] *Trade facilitation – principles and benefits*, UN TRADE FACILITATION IMPLEMENTATION GUIDE, http://tfig.unece.org/details.html.

procedures, monopoly of service providers, and even valuation procedures.[111] In fact, valuation procedures in particular cause significant uncertainty for importers.[112]

Since the onset of trade facilitation negotiations at the WTO's Doha Development Agenda, there has been a significant rise in trade agreements with trade facilitation provisions. Such provisions have been adopted in the form of general principles, or as part of a larger chapter dealing with customs procedures, and have even (in some cases) been negotiated as an independent chapter. Customs procedures in FTAs have expanded to encompass areas addressing transparency, coordination among agencies, and simplification and harmonisation of documents. At times, the measures also covers risk management, the right of appeal, advance rulings, the release of goods, temporary admission, and express shipments.[113] These measures can largely be classified into three types based on their content and objectives:

a. Transparency measures. Transparency in trade facilitation creates predictability in application of rules and the administration of trade procedures, and such certainty resultantly affects the costs incurred by a trader.[114] This can be achieved through (i) publication of rules and regulations, which works better in the case of multilateral treaties since a bulk of information is available; [115] (ii) by creation of points for enquiry; and[116] (iii) intervals between publication and implementation of trade laws and regulations to allow for prior consultation on new or amended rules, and effective appeal mechanisms.[117]

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[111] Patrick A. Messerlin & Jamel Zarrouk, *Trade Facilitation: Technical Regulations and Customs Procedures*, 23(4) WORLD ECON. 577 (2000).

[112] *Id.*

[113] UNCTAD TF Guide, *supra* note 109.

[114] Marcus Bartley et al., Lowering Trade Costs through Transparency: The Importance of Trade Information Portals, WORLD BANK BLOGS (Jul. 12, 2017), https://blogs.worldbank.org/trade/lowering-trade-costs-through-transparency-importance-trade-information-portals.

[115] MATHIAS HELBE ET AL., TRANSPARENCY AND TRADE FACILITATION IN THE ASIA PACIFIC: ESTIMATING THE GAINS FROM REFORM.

[116] Arantzazu Sanchez & Brook Kidane, *Trade Facilitation: Why is it so challenging to implement an enquiry point?* UNCTAD TRANSPORT AND TRADE FACILITATION NEWSLETTER, (Mar. 13, 2019), https://unctad.org/news/trade-facilitation-why-it-so-challenging-implement-enquirypoint#:~:text=Transparency%20is%20one%20of%20the,the%20predictability%20of%20trade%20transactions.

[117] ANALYSIS OF TECHNICAL MEASURES, WTO AGREEMENT ON TRADE FACILITATION, REV. 3, SEPTEMBER 2016, http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/wto-atf/analysis-of-section-i/analysis-of-technical-measures-en.pdf?db=web.

b. **Simplification and harmonisation measures.** Simplification and harmonisation can be achieved through measures including customs facilitations, express shipments, single window automation, transit matters, adoption of international standards, and fees and charges.[118] These measures help create more-lean and streamlined procedures in addition to simpler documentation procedures and requirements. These are based on international standards recommended by the World Customs Organisation ["**WCO**"] or the United Nations Economic Commission for Europe ["**UNECE**"].[119]
c. **Collaboration measures**. Collaboration measures apply to trade between two or more states, which inevitably involves a number of individuals and parties from both public and private sectors. Need has often been felt for these entities to collaborate.[120] This can be achieved through to creation of working groups or committees at the national and cross-border levels between domestic agencies and trading partners. Such collaboration measures, particularly when done in a manner transcending borders, target different stakeholders, including but not limited to customs agencies, other relevant government agencies, as well as trading entities.[121]

This part delves into the provisions pertaining to trade facilitation and customs procedures in three FTAs – between India and Japan, India and Korea, and India and the ASEAN – to examine the extent of their application and suggest changes, if necessary.

3.1. An Overview of the Provisions in the FTAs

3.1.1. India – Korea CEPA.

Although lacking in certain respects, the India – Korea FTA is indubitably the most comprehensive of the three CEPAs under examination in this report. It deals with a wide variety of aspects, key among them being:

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[118] MADRAS INSTITUTE OF DEVELOPMENT STUDIES, NIRMAL SENGUPTA ET AL., A STUDY OF TRADE FACILITATION MEASURES FROM WTO PERSPECTIVE, REVISED INTERIM REPORT (Aug., 2003), http://wtocentre.iift.ac.in/DOC/Study%20on%20Trade%20Facilitation.PDF.

[119] UN CONFERENCE ON TRADE & DEV., TECHNICAL NOTES ON TRADE FACILITATION MEASURES, UNCTAD/DTL/TLB/2010/1 (2010), https://unctad.org/system/files/official-document/dtltlb20101_en.pdf.

[120] UNCTAD TF Guide, *supra* note 109.

[121] UNCTAD TF Guide, *supra* note 109.

- To ease the process of release of goods, both parties are to adopt or maintain simplified customs procedures to facilitate and ease trade. It envisages and recommends a system of procedures that allows the goods needed for emergency purposes to pass through customs within 24 hours.[122]
- To facilitate automation in the procedures, both parties are to make electronic systems accessible to traders. Adhering to international standards in accordance with WCO Customs Data Model and related WCO recommendations and guidelines.[123]
- Electronic and automated risk management systems are to be adopted for risk targeting and analysis. This eases the process of inspection of high-risk goods and fast clearance of low-risk goods by custom authorities.[124]
- The parties are also required to publish the regulations and laws regarding the custom procedures so as to ensure transparency in procedure. If published in advance, the stakeholders may get an opportunity to comment.[125]
- The CEPA also expedites the issuance of written advance rulings, prior to the importation of a good into its territory, to the traders.[126]
- International best practices for trade facilitation, which may include the adoption of advanced customs procedures, are also required to be adopted so as to facilitate cooperation between the parties. [127]
- The Parties are also to ensure easy access to the administrative and judicial review or appeal of the customs authority.[128]

In addition to these provisions, the India – Korea CEPA also introduces a two-step process for the redressal of customs-related issues arising between the Parties and the effective implementation of the Chapter.

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[122] Comprehensive Economic Partnership Agreement Between India and Republic of Korea, 1 Jan., 2010, art. 5.2 [hereinafter IKCEPA].
[123] *Id.* at 5.3.
[124] *Id.* at 5.4.
[125] *Id.* at 5.6.
[126] *Id.* at 5.8.
[127] *Id.* at 5.9; UN ECON. & SOCIAL COMM. FOR ASIA & THE PACIFIC, DESIGNING AND IMPLEMENTING TRADE FACILITATION IN ASIA AND THE PACIFIC: 2013 UPDATE 133 (2013).
[128] IKCEPA, *supra* note 122 at 5.7.

- At Article 5.10,[129] the CEPA establishes the Customs Committee, and lists its tasks as follows:
  (a) the uniform interpretation, application and administration of Chapter Three (Rules of Origin), Chapter Four (Origin Procedures), this Chapter and Uniform Regulations/Rules;
  (b) addressing issues on tariff classification and valuation relating to determinations of origin;
  (c) reviewing of rules of origin;
  (d) developing detailed guidelines for origin verification procedures to ensure uniform interpretation, application and administration of Articles 4.11 through 4.13; and
  (e) considering any other customs-related matter referred to it by the customs authority of the Parties or the Parties or Joint Committee.

- At Article 5.11,[130] the CEPA provides for the establishment of 'Customs Contact Points'. Using mandatory language, it states that each Party "shall designate official contact points and provide details thereof to the other Party". It also provides that in the event the issue is not resolved through the contact points, reference may be had to the Customs Committee.

3.1.2. India – Japan CEPA.

Chapter 4 of the India – Japan CEPA deals with customs procedures and applies to customs procedures required for the clearance of goods traded between the Parties.[131] In pursuance of the goal of transparency, the parties are required to ensure that all relevant information of general application pertaining to its customs laws (including revisions thereto) is readily available to any interested person. Moreover, parties must apply their respective customs procedures in a predictable, consistent, transparent and fair manner, and cooperate and exchange information with each other on customs matters. The CEPA also includes within it a provision for

[129] IKCEPA, *supra* note 122 at 5.10.
[130] IKCEPA, *supra* note 122 at 5.1.
[131] Comprehensive Economic Partnership Agreement between Japan and the Republic of India, 1 Aug., 2011, 2862 U.N.T.S., at Chapter 4 [hereinafter IJCEPA].

the creation of a **Sub-Committee on Customs Procedures**, as under Article 49.[132] Notably, in addition to providing for the creation of the sub-committee, the provision also lays down its functions. They are as follows:

- reviewing the implementation and operation of the Chapter on customs;
- identifying areas, relating to the Chapter, to be improved for facilitating trade between the Parties;
- reporting its findings to the Joint Committee;
- reviewing and making appropriate recommendations to the Joint Committee on the provisions of the Implementing Procedures; and
- carrying out other functions as may be delegated by the Joint Committee pursuant to Article 14 of the FTA.[133]

In furtherance of the same, the Parties also agreed upon a Practical Arrangement on Information Exchange for the implementation of the Chapter on Customs Procedures of CEPA and the Chapter on Customs Procedures of the Implementing Agreement of CEPA.[134]

It is also important to note, however, that the India – Japan CEPA – although making provision for the establishment of contact points for other parts of the Agreement – does not provide for the designation of a dedicated contact point for customs procedures and trade facilitation, as is the case with the India – Korea CEPA.

3.1.3. AIFTA

The AIFTA is the least comprehensive of the three in terms of customs procedure and trade facilitation. It has only one provision dealing with the same – Article 14 – which calls upon the Parties to:

a. apply customs procedures in a consistent, predictable, and transparent fashion;

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[132] *Id.*, art. 49.

[133] *Id.*, art. 14.

[134] Practical Arrangement on Information Exchange for the implementation of the Chapter on Customs Procedures of CEPA and the Chapter on Customs Procedures of the Implementing Agreement of CEPA, India – Japan, 2009, https://commerce.gov.in/writereaddata/pdf_download/_Practical%20Arrangement%20on%20Information%20Exchange%20for%20implementation%20of%20Chapter%20on%20Customs%20Procedures.PDF.

b. provide any information relating to its customs procedures specifically requested by an interested person;
c. supply any other relevant information that an interested person should be made aware of;
d. simplify customs regulations and procedures; and
e. harmonise its customs procedures with international standards and recommended practices.[135]

This CEPA does not comprehensively deal with the issue of trade facilitation, as in the case of the FTAs with Korea and Japan. In addition to detailing only general, broad suggestions, the India _ ASEAN CEPA neither provides for the establishment of a sub-committee to deal with issues pertaining to customs and trade facilitation, nor designates a contact point to that effect (although it does envisage the creation of a contact point for non-tariff measures).[136] Due to its lack of effective obligations and redressal mechanisms, this FTA is the least comprehensive of the three presently under analysis.

3.2. Issues & Recommendations

The issue with the customs and trade facilitation provisions incorporated in the FTAs at hand don't stem solely from the absence of a robust mechanism, but also from the lack of enforcement of existing provisions. This problem is not an uncommon one, and often confronts nations. Recommendations in this section cover four aspects – language (1.2.1), the creation of a sub-committee (1.2.2), the designation of a contact point (1.2.3), and publication (1.2.4).

3.2.1. Language

While the Japanese and Korean FTAs are fairly comprehensive, they too need to be refined to ensure effective implementation of the terms and provisions. The AIFTA, being the least comprehensive, needs to be significantly reworked. The United

[135] Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of Southeast Asian Nations, Annex 2 ,1 Jan., 2010, at art. 14 [hereinafter AIFTA].
[136] IJCEPA, *supra* note 131, art. 8.

Nations Conference on Trade and Development ["**UNCTAD**"] has noted that although a significant proportion of FTAs currently in force have provisions as to customs and trade facilitation, they vary greatly in "scope, depth, and language".[137] While some FTAs lay down detailed provisions on a variety of aspects, others resort to generally noting the importance of bilateral or multilateral cooperation for speedy redressal. FTAs of the latter kind, more often than not, rely on soft language – they employ terms such as "shall endeavour to", or "shall make cooperative efforts for"[138] – instead of compelling parties by using terms such as "shall" and "must" (therefore establishing a mandatory commitment).[139] The use of such soft, non-mandatory language can be seen across all three of India's FTAs.

While undertaking such an analysis, it is imperative to look into the reasons behind such variations. Two factors must necessarily be considered – the willingness of a party to bind themselves to strict and comprehensive obligations, and their ability to be so bound.[140] Given the flexibility of most FTAs, it is not uncommon to find that obligations can, at certain instances, be tailor-made to suit a party's requirements. Precedence for the same can be found in many of the EU's agreements with Mediterranean states. The EU – Israel FTA, for instance, does not require Israel to create a single administrative document or link its transit system with the EU's;[141] relatedly, the EU's FTA with Palestine does not include within it a Protocol on providing mutual assistance on the ground that the state is not in a position to provide any.[142] Keeping in mind the recent recognition of the importance of such facilitation measures, it has been argued that the more strongly "a developing country is committed to pursuing liberal economic policy and institutional reforms at home, the more willing it should be to accept international obligations that involve even deeper institutional and policy reforms".[143]

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[137] UNCTAD TF Guide, *supra* note 109.
[138] *Id.*
[139] Nora Neufeld, *Trade facilitation under the regional trade agreement umbrella: origins and evolution*, *in* PART ONE - TRADE IN GOODS AND SERVICES (Cambridge Universiry Press Ed. 2016); Appellate Body Report, *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides*, WTO Doc. WT/DS495/AB/R (adopted Apr. 11, 2019).
[140] Olu Fasan, *supra* note 106.
[141] *Id.*
[142] *Id.*
[143] *Id.*

Along these lines, it is suggested that the Parties concerned dealt with in this report develop a mechanism for entering into consultations regarding the mandatory and obligatory nature of current or any future commitments. While doing so, emphasis must also be laid on the fact that the willingness and ability of nations like Korea and Japan exceed that of India. Commitments must be so devised so as to ensure that India is not over-burdened by any mandatory requirements that it is not in a position to meet; the disparity in the institutional capacity, technical expertise, and available capital of the nations must be taken into account.

3.2.2. Sub-Committee on Customs and Trade Facilitation

A sub-committee for customs procedures and trade facilitation, akin to the kind in India's FTAs with Japan and Korea, should be incorporated in the AIFTA. The merits of the creation of such committees towards the attainment of trade facilitation goals is evident from the success of the Sub-Committee on Customs Procedures, created within the auspices of the Asia Pacific Economic Cooperation ["**APEC**"],[144] and has also been recognised by scholars in that the incorporation of such provisions "serve to underscore the importance attached to trade facilitation". [145] The USMCA is also of relevance here in that it is extremely comprehensive – it envisages within it the creation of multiple subcommittees, including one each for trade facilitation[146] and customs enforcement.[147]

Furthermore, it is worth noting that India has already incorporated such provisions in its FTAs with other countries like Sri Lanka, which goes to show the importance India accords to it.[148] ASEAN countries being a large bloc of some of India's key trading partners, the creation of such a committee within the auspices of the FTA would benefit India in terms of ease of communication, easy redressal, transparency, and

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[144] *Sub-Committee on Customs Procedures*, ASIA PAC. ECON. COOPERATION, https://www.apec.org/groups/committee-on-trade-and-investment/sub-committee-on-customs-procedures.

[145] Olu Fasan, *supra* note 106.

[146] United States-Mexico-Canada Agreement, Chapter 4, 1 July, 2020, art. 7.24 [hereinafter USMCA].

[147] *Id.* at art. 7.29.

[148] Free Trade Agreement Between the Republic of India and the Democratic Socialist Republic of Sri Lanka (Ind. – Sri Lanka), Dec. 28, 1998, art. XI [hereinafter ISLFTA].

harmonisation. Further, making the powers of the existing two subcommittees more comprehensive and ensuring regular meetings would benefit India as well; the composition, functions, mechanism for review, and timeline must be clearly laid down.

3.2.3. Designation of Contact Points for Customs and Trade Facilitation

Relatedly to the creation of sub-committees, Scholars have noted the use and benefits of creating such designated points, in that they "can create viable preconditions for the future implementation of similar measures at the WTO level".[149] It can be seen from this analysis that only the India – Korea CEPA specifically designates a contact point for customs and trade facilitation. Similar designations made within India's FTAs with Japan and ASEAN would greatly increase the ease of communication and advance the goal of trade facilitation.

3.2.4. Publication

Furthermore, none of the FTAs comprehensively deal with the requirement of publication – although they make some reference to it – which is of vital importance.[150] In this regard, reference may be had to the USMCA, which provides for 'Online Publication' at Article 7.2.[151] Under it, Each Party is mandated to make certain information on a free, publicly accessible website, and update the same as necessary. Similar online publication directions may be incorporated within all three FTAs currently under examination. Doing so will benefit not only the parties in question, but also all of India's trading partners. The information required to be published under the USMCA is as follows:

(a) an informational resource that describes the procedures and practical steps an interested person needs to follow for importation into, exportation from, or transit through the territory of the Party;

(b) the documentation and data that it requires for importation into, exportation from, or transit through its territory;

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[149] UNCTAD TF Guide, *supra* note 109 at 10.

[150] *Id.*

[151] USMCA, *supra* note 146, art, 7.2

(c) its laws, regulations, and procedures for importation into, exportation from or transit through its territory;

(d) web links to all current customs duties, taxes, fees, and charges it imposes on or in connection with importation, exportation, or transit, including when the fee or charge applies, and the amount or rate;

(e) contact information for its enquiry point or points established or maintained pursuant to Article 7.4 (Enquiry Points);

(f) its laws, regulations, and procedures for becoming a customs broker, for issuing customs broker licenses, and regarding the use of customs brokers;

(g) informational resources that help an interested person understand their responsibilities when importing into, exporting from, or transiting goods through its territory, how to be compliant, and the benefits of compliance; and

(h) procedures to correct an error in a customs transaction, including the information to submit and, if applicable, the circumstances when penalties will not be imposed.[152]

Conclusion: Part III

The issues arising in respect of trade facilitation are two-fold – *first*, cumbersome data and documentation requirements; and *second,* complex customs and border facilitation procedures. FTAs have dealt with these issues in a three-pronged manner: laying down transparency measures, harmonisation measures, and collaboration measures. The India – Korea CEPA deals with a variety of aspects and is fairly comprehensive in scope. The India – ASEAN CEPA, on the other hand, has only one provision dealing with customs and is sorely lacking. In an analysis of the customs and trade facilitation provisions four significant points of concern arise – those pertaining to the use of soft (as opposed to strict language), provision as to the establishment of a sub-committee, the designation of a specific contact point for this purpose, and the publication of relevant information. All these points have been addressed in the foregoing part.

[152] *Id.*

4. Rules of Origin

4.1. Introduction

Rules of Origin are the comprehensive system of substantive principles and administrative laws, regulation and determinations that collectively assist in determining the 'nationality' of a traded good. These rules include concrete tests of 'origin determination' for customs clearance; methods of proving the same i.e., certification and declaratory procedures; and mechanisms for its verification. With the advent of trade liberalisation and the evolution of trading channels into global supply chains, origin of a good is no longer simply attributable to its geographic source or its final location of packaging and labelling. Established models of RoOs display that the analysis is based on 'congenital' traits like the origin of the inputs used and the value addition from the production process. Along with these questions, RoOs also address the practical aspects of claiming origin for proper bestowal of benefits under various multilateral and commercial agreements. The smooth processing of origin conferring documents allow customs authorities to apply non-preferential benefits of MFN treatment, anti-dumping and countervailing duties, safeguard measures and other discriminatory countermeasures like quotas or quantitative restrictions.[153] These are known as non-preferential RoOs and must be contrasted with preferential RoOs governing benefits under an FTA.

4.2. Harmonisation of RoS

The WTO Agreement on Rules of Origin ["**RoO Agreement**"] governs the framework for defining the contours of an effective RoO system that does not create unnecessary barriers to trade without nullifying or impairing the intrinsic rights of the Member under the GATT.[154] In the backdrop of efforts to harmonise non-preferential RoOs, the RoO Agreement recognises the relevance of distinct models of preferential RoOs that strive to navigate the regulatory ambiguities on a bilateral/regional level.[155] The proliferation of bilateral FTAs, customs unions and mega-regionals following their own distinct model and principles of RoOs has led to

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[153] Agreement on Rules of Origin, 20 Sept., 1986, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14, at Article I.2 [hereinafter RoO Agreement].
[154] *Id.*, at Preamble.
[155] *Id.*, at Annex II.1.

the creation of distinct models of FTA/preferential RoOs. Certain disciplines of RoOs are relatively easier to harmonise and may be similar across all FTAs. These disciplines are: wholly obtained or produced provision, consignment criteria, preferential claim procedures, requirement of CoO, administrative rules of RoO i.e. rules governing issue and verification of CoO.[156] Simultaneously, provisions like tests for not-wholly obtained or produced goods, cumulation, PSRs require detailed negotiations and understanding of domestic interests to be drafted into an FTA's RoO.

In practice, RoOs in an FTA will be applied by and for the benefit of customs authorities and stakeholders of the global trading supply chain i.e., producers, exporters, importers, respectively. The optimal RoO provisions would be those that balance the business interests of exporters/importers and the regulatory capacity and manpower of the customs authorities. One of the main objectives of optimal RoO is the minimisation of trade deflection. As gradual liberalisation of tariffs across a substantial proportion of trade takes place by virtue of the FTA, the disparity between MFN tariffs and preferential tariff may become ripe ground for misuse.[157] RoOs attempt to prohibit trade deflection by preventing non-signatory parties from being able to take unauthorised benefit of the preferences exclusively granted to the FTA party. According to the WTO, India's average MFN applied tariff rate was 17.6% in 2019 along with an average bound rate of 50.8% - according considerable flexibility and range for increasing tariff rates.[158] Proliferation of multiple criss-crossing FTAs may increase risk of creating several duty-free channels for deflected goods and therefore, RoO chapters must be cautiously negotiated.

On the opposite end of the spectrum is the equally important objective of curbing FTA underutilisation. India is reported to have very low FTA utilization rates caused

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[156] Rajan Sudesh Ratna, *Rules of Origin, Diverse Treatment and Future Development in the Asia and Pacific Region*, *in* TOWARDS COHERENT POL'Y. FRAMEWORKS: UNDERSTANDING TRADE & INVESTMENT LINKAGES (62 Studies in Trade and Investment, UNESCAP, 2007).

[157] RAM UPENDRA DAS & RAJAN SUDESH RATNA, PERSPECTIVES ON RULES OF ORIGIN 7 (1st ed., 2011) [hereinafter Das].

[158] *India: Tariff Profile*, WORLD TRADE ORGANISATION, https://www.wto.org/english/res_e/statis_e/daily_update_e/tariff_profiles/IN_E.pdf.

by RoO associated issues of delays and administrative costs.[159] If an FTA's RoOs are complex and difficult to navigate, businesses may consider it more beneficial to use the long-established MFN route. In Japan, the average applied MFN rate is 4.3% with average applied rates as low as 1% for minerals and metals.[160] In Korea, the average applied rate on minerals and metals in 4.6%.[161] In the presence of low MFN tariffs, businesses decide to skip the compliance processes under RoO if they seem to be too strict, costly and time-consuming. As more FTAs are negotiated, multiplicity of RoOs is another strong deterrent for businesses as navigation of the 'spaghetti bowl' of rules is more burdensome than benefiting from preferential benefits.[162] Stringent administrative compliances required for claiming preferential benefits add unforeseen administrative costs for businesses. These include costs required to gather required information and documents for issuance of CoO; time spent in building, applying, responding, correcting, etc. to the certification and verification processes; and bearing the expenses of administrative irregularities.[163] Businesses have to perform a compliance cost v. preferential benefit analysis under which MFN route may end being more reasonable to their interests.

Another issue of multiplicity of RoO regimes is the nullification of certainty in international trading conditions. In the absence of preferential/non-preferential RoO harmonisation, businesses and customs authorities alike have to embark on a discovery process to cull out the specifics of multiple RoO obligations. Harmonisation of preferential RoOs, at least at the domestic stage will be influential in eradicating the uncertainty of multiple RoO regimes. Custom authorities are limited by problems of low manpower and appropriate training to strongly enforce the regulatory rules governing each stage of RoO verification.

The nature and strength of RoOs have to be framed by considering the following contrasting concerns:

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[159] NITI Aayog, *supra* note 7.

[160] *Japan: Tariff Profile*, WORLD TRADE ORGANISATION, https://www.wto.org/english/res_e/statis_e/daily_update_e/tariff_profiles/JP_E.pdf.

[161] *Korea: Tariff Profile*, WORLD TRADE ORGANISATION, https://www.wto.org/english/res_e/statis_e/daily_update_e/tariff_profiles/KR_E.pdf.

[162] M. Donner Abreu, *Preferential Rules of Origin in Regional Trade Agreements*, (WTO Staff Working Paper ERSD-2013-05, 2013), at 40.

[163] Dylan Geraets, et al., *Reconciling Rules of Origin and Global Value Chains: The Case for Reform*, 18 J. INT'L ECON. L., 287-305 (2015) at 294.

- Minimal Trade Deflection
- Promoting FTA utilisation
- Clarity and Simplicity of rules
- Trade Facilitation
- Encouraging regional integration via the established rules.

4.3. Origin Determination

Origin Determination and its variant tests have been commonly harmonised across all FTA models. Differences arise in the combination of tests applied and importance granted to one test over the other. Across all FTA models, goods are considered to be originating if they are:

a. Wholly obtained or produced in the territory of a/two or more countries; if not,
b. Goods have undergone substantial transformation/sufficient working in the territory of a/two or more countries.

The constituents of the list of wholly obtained or produced goods are essentially the same[164], tests of substantial transformation differ across FTAs. Substantial Transformation test for not-wholly obtained or produced goods is a direct ramification of integrated supply chains where countries at different levels of manufacturing capacity collaborate in the production cycle. Substantial transformation of a good may be established by the following three methods.

4.3.1. Change in Tariff Classification ["**CTC**"]

Input goods classified under an initial heading in the Harmonised Commodity Description and Coding System must undergo a change in its final HS tariff classification after application of the production process. Annex II.3(a)(i) of the RoO Agreement requires countries to clearly state the subheadings or headings desegregation addressed by the test.[165] Therefore, CTC classification can further be enforced in the following ways: Change in Tariff Heading; Change in Tariff

[164] Text of the Revised Kyoto Convention, Specific Annex K, 17 Apr. 2008 at Standard 2 [hereinafter Kyoto].
[165] *Id*., at Annex II.3(a)(i).

Subheading; Change in Tariff Chapter ["**CC**"]. Within this spectrum, CC method of CTC is the most stringent threshold while the CTSH is the most liberal.[166]

Article 28 of the ATIGA mandates a CTH test as one of the general rules of origin determination.[167] India's FTAs with Nepal[168], Sri Lanka[169], etc. apply the CTH test. However, in Indian FTAs with Japan[170], Korea[171], ASEAN[172] apply the CTSH test.

CTC test is considered to be a simple test to apply due to its straightforwardness. HS classification is widely established amongst traders and custom officers as a multi-purpose nomenclature making it accessible across all jurisdictions. In sectors where established production processing takes place with the same set of inputs and intermediates, this test can be easy to prove and cheap to administer.

However, CTC is not a necessary effect in every production process. Substantial transformation may occur in spite of CTC or it may not have taken place in spite of there being a CTC. Secondly, HS classification was not designed to be used for assigning origin to the final products; it was a harmonisation effort to synchronise product classifications for smooth data collection.[173] It was never formulated to take into consideration the various stages of a sector's production cycle. If raw materials, intermediates and final products are not classified under separate headings, CTC criteria may not be fulfilled even if substantial transformation of the inputs has taken place.

Application of this test would also require extensive training and knowledge about individual tariff headings and subheadings placing an extra compliance burden on

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[166] Ram Upendra Das, *Rules of Origin under Regional Trade Agreements*, RES. INFO. SYS. DEVELOPING COUNTRIES (RIS Discussion Papers #163, 2010), http://www.ris.org.in/rules-origin-under-regional-trade-agreements [hereinafter RIS].
[167] ASEAN Trade in Goods Agreement, 17 May, 2010, at Article 28(1)(a)(i) [hereinafter ATIGA].
[168] Revised Treaty of Trade Between the Government of Indian and the Government of Nepal, Protocol to the Treaty of Trade, Oct. 2009, at V.1(b)(i).
[169] ISLFTA, *supra* note 148, Annex C.
[170] IJCEPA, *supra* note 131, art. 29(1)(b).
[171] IKCEPA, *supra* note 122, art. 3.4(1)(b)(ii).
[172] AIFTA, *supra* note 135, Rule 4(a)(ii).
[173] Sherzod Shadikhodjaev, *Duty Drawback and Regional Trade Agreements: Foes or Friends,* 16(3) J. INT'L. ECON. L., 587 (2013), at 607.

producers. Periodic amendments to the HS take place every 5 years and would require businesses and custom officers to relearn and overhaul their entire RoO system.[174]

4.3.2. Ad Valorem Percentage Test

This test states that originating goods being processed with non-originating goods should not exceed a specified threshold of non-originating value. This percentage can be applied on the basis of either fixing a specific 'Maximum allowance of non-originating materials' threshold or a 'Minimum requirement of regional originating materials' there hold. Depending on the threshold chosen, the countries must include a method for calculation of this percentage.[175] The higher the percentage of non-originating materials allowed, more liberal is the rule. Higher mandates for originating materials makes the rule stricter.

This test is best suited to combat trade deflection in FTAs, given that it specifically mandates a certain percentage of value addition to take place using domestic content i.e. originating materials, labour costs, profits, overhead costs, etc. If the percentage requirement of the test is kept higher, goods trying to gain access on the basis of minimal processing will be easily eliminated. Processing activities which would have failed to comply with the CTC test may be able to prove origin under this test.

The demerits of this system highlight the possible complexities in application of this test if stakeholders have weak institutional foundations for record-keeping, data collection and tracking. Proving originating status of a goods would require businesses to keep sophisticated accounting systems for tracking the origin of input goods used in the production process. If businesses and customs establish strong systems for storage of documents like invoices, bills of lading for input goods, this test could be quite effective. This system is also subject to sensitive instabilities due to variables like currency rates, labour costs, input prices, etc.

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[174] Stefano Inama, *Drafting Preferential Rules of Origin*, *in* RULES OF ORIGIN IN INTERNATIONAL TRADE (2009) at 422 [hereinafter Inama].
[175] *Id*.

4.3.3. Product Specific Rules

PSRs are straightforward rules obligating a particular manufacturing process to take place for goods to attain originating status. If the PSR is commonly followed in production of a manufactured good, the compliance is quite easy. PSRs may not always be applied in the form of a specific manufacturing process and can also be applied as a mixture of CTC and/or RVC rules. In ATIGA, PSRs are drafted into separate provisions that overrides the application of general RoOs.[176] In the PEM Convention, PSRs are drafted under the general RoO provision[177] which assigns specific manufacturing processes for every HS heading. The USMCA[178] and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ["**CPTPP**"][179] also include PSRs as a general RoO that assigns a mixture of specific manufacturing rules, CTC and RVC tests.

Similar to the ATIGA model, Indian FTAs with Japan[180], Korea[181] and ASEAN[182] contains an overriding provision for PSRs. In spite of its relative ease, PSRs are one of the most unharmonized disciplines of RoO as it has been difficult to achieve consensus on a uniform production formulation that all countries irrespective of their developing status and level of technology can emulate. If the PSR involves many specific procedures, it can make the test quite restrictive.

Non-Qualifying Operations

In order to ensure that only manufacturing processes that fall within the range of substantial transformation count as origin conferring processes, most origin legislations contain provisions outlining lists of operations which are considered to have only minor effects on the final goods; these minor operations do not confer

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[176] ATIGA, *supra* note 167, art. 2(a).
[177] Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin, 1 May, 2012, at Article 4 [hereinafter PEM Convention].
[178] USMCA, *supra* note 146, art. 4.2(b).
[179] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Chapter 3, 30 Dec., 2018, art. 3.2(c) [hereinafter CPTPP].
[180] IJCEPA, *supra* note 131, art. 29(2).
[181] IKCEPA, *supra* note 122, art. 3.4(1)(a).
[182] AIFTA, *supra* note 135, Rule 6.

origin even where the applicable origin rule would have been satisfied by fulfilling of a change of tariff classification rule or an ad valorem rule included in the list of product specific origin rules. Insufficient operations carried out individually, or even in combination, will never confer origin to a final good.

The most comprehensive lists on insufficient transformation/minimal operations are found in the PAN-EURO-MED origin rules. The ATIGA origin legislation contains less exhaustive lists on minimal operations than the PAN-EURO-MED origin rules. The NAFTA model on the other hand, only contains a small description of non-qualifying operations, while the TPP has no list for minimal processes at all.

Similar to the PEM model, Indian FTAs have emulated the comprehensive and exhaustive list of operations that would be considered too minimal to be origin conferring. Operations for preservation of products in good condition; removal of dust, sifting or screening, sorting, classifying, matching, washing, painting, cutting; affixing of marks, labels or distinguishing signs; simple mixing of products; assembly and disassembly; inter alia are not considered to be origin conferring.

4.3.4. Indian Model of Origin Determination

The origin determination tests used in India FTAs have traversed through multiple formulations over time, all of varying stringencies. In early FTAs like India – Nepal FTA 1996, there was no detailed criterion for origin determination.[183] Originating status was granted under the sole test of the good being 'wholly produced i.e., grown/produced/manufactured' in Nepal. Subsequently the substantial transformation test was added and in 2002, a value addition requirement of 30% was added.

The ISLFTA, 2000 is influential in the developmental history of India's '*twin test model*' of origin determination i.e., this is the first FTA where simultaneous tests of CTH and 35% value addition was introduced. Businesses in Sri Lanka faced special difficulty in meeting the restrictiveness of the twin criteria especially for products like

[183] RIS *supra* note 166, at 15.

tea whose imports underwent processing but could not meet the CTH criteria.[184] For products like gems and jewellery, the importers were able to meet the CTH test but weren't able to display any value addition.[185] In spite of low utilisation rates, the restrictive twin tests were not able to control the trade deflection that took place under this FTA.

Couple of years into the implantation of ISLFTA, there was a large upsurge in the exports of copper items (HS Chapter 74) from Sri Lanka. Sri Lanka exported 20 per cent of its total copper exports to India. Since 2003–04 this figure took a sudden jump to 98 per cent and stayed there till recently. Sri Lanka, which was nowhere near the top five import partners of India in copper before ISLFTA, became the top-most import partner in 2003 and continued to remain so till 2006. Simultaneously, copper imports into Sri Lanka had also undergone a similar jump, especially of copper scrap and waste (HS 7404). It was reported that scrap was being refined and exported to India as copper wires (HS 7408), copper bars and rods (HS 7407). Sri Lanka did not have any copper mines and could not have been to use any originating copper raw materials during the production process. Neither did they have any level of manufacturing capacity in copper.[186]

This occurrence of trade deflection under ISLFTA make for an important case study for gauging how loopholes can be manipulated for deflection, in spite of there being stringent origin determination tests for protection. One of the loopholes is simply a common demerit RVC test i.e. scope for accounting manipulations. The build-down method of calculation was used to obtain a higher RVC percentage by under-invoicing the value of imported inputs of copper.[187] India and Sri Lanka entered into

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[184] Saman Kelegama & Indra Nath Mukherji, *India–Sri Lanka Bilateral Free Trade Agreement: Six Years Performance and Beyond*, RES. INFO. SYS. DEVELOPING COUNTRIES (RIS Discussion Papers #119, 2007), http://www.ris.org.in/india-sri-lanka-bilateral-free-trade-agreement-six-years-performance-and-beyond.

[185] Ajith De Silva, *Oily Row*, LANKA BUSINESS ONLINE (Apr. 5, 2006, http://www.lankabusinessonline.com/fullstory.php?newsID=137372311.

[186] JOINT STUDY GROUP REPORT ON INDIA-SRI LANKA COMPREHENSIVE ECONOMIC PARTNERSHIP AGREEMENT (2003), http://www.ips.lk/publications/series/gov_reports/indo_srilanka_cepa/islcepa.pdf.

[187] Suresh Nair, *Zero-Duty Imports from Lanka Hurt Local Copper Companies,* ECON. TIMES, (Feb. 12, 2005), https://economictimes.indiatimes.com/zero-duty-imports-from-lanka-hurt-local-copper-cos/articleshow/1018801.cms.

bilateral discussions where this issue was raised and a collective decision was made to accept London Metal Exchange prices to deter under-invoicing in the future.[188]

Three inferences can be made from this case study:

a. Stringent origin determination tests may not always deter trade deflection (instead may induce underutilisation);
b. Alert systems of customs verification would have been more influential in deterring further deflection.
c. Periodic bilateral discussions between partners should be harnessed to raise concerns and improve cooperation.

Another influential stage in the evolution of the Indian FTA model is the during the negotiation of the AIFTA. India had refused to budge from its twin test model i.e. CTH and 40% RVC while ASEAN demanded an easier individual RVC test.[189] Ultimately, India compromised by drafting a twin test criteria of CTSH and 40% RVC. The driving force of this compromise was a study launched to identify the products at 6-digit HS level that would never be able to achieve the mandated 4-digit CTH criterion. This study included 34 6-digit lines of iron and steel that would not have been able to meet the CTH criteria out of 920 lines in total.[190] Both FTAs with Japan[191] and Korea[192] include the twin requirement of CTSH and 35% RVC.

Two inferences can be made from this study:

a. The twin test model of CTC + RVC has grown to be an exclusive Indian model in itself;
b. Stringent tests will affect importers as much as domestic exporters.

It can be said that the current twin test model creates a balance between a liberal CTSH[193] test with a fairly robust RVC criteria. The success of the latter, however, is

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[188] Sejuti Jha, *Restrictive Rules of Origin and Their Circumvention: Studying Rules of Origin of the India-Sri Lanka Free Agreement,* 11(1) SOUTH ASIA ECON. J. 31-52 (2010), at 44.
[189] *Asean FTA: India likely to stick to twin ROO criteria*, FINANCIAL EXPRESS (July 2, 2005), https://www.financialexpress.com/archive/asean-fta-india-likely-to-stick-to-twin-roo-criteria/142988/.
[190] Das, *supra* note 157, at 146.
[191] IJCEPA, *supra* note 131, art. 29.
[192] IKCEPA, *supra* note 122, art. 3.4.
[193] RIS, *supra* note 166, at 5.

closely connected with the effective dispersion of custom verification and administration rules.

4.4. Product Specific Rules and Chapter 72

Indian model of FTAs have stuck to strengthening the general rules of RoO. The twin test model has been criticised for being strict and difficult to attain, especially for sectors where processes may only comply with one of the tests but not with the other. Given that the RVC test often acts a counterbalancing force against the specific demerits of the CTC test, the twin tests seems to compound the collective flaws of the two tests.

For businesses that are unable to meet the general rule, PSRs can come as a great respite. PSRs allow negotiators to assign personalised combination of tests according to realistic production processes instead of subjecting them to a sector-blind general test. It allows developing countries to negotiate rules on the basis of their technological capacity, manufacturing stage and comparative advantages. It also accords them benefit of applying a specific manufacturing test if their sectors are skilled in a specific manufacturing process. As stated above, PSR need not always recommend a particular process; it can also be applied as a CTC test or an RVC test. PSRs assigning a choice/alternative combination of tests introduces a flexible RoO system wherein the sector escapes the blind stringency of a general RoO and is able to exercise a choice in applying a test that best suit its interests.

While negotiating FTAs, India has been cautious about mandating a specific processing test requirement as a PSR and has chosen to stick a combination of CTC and RVC rules.[194] Alternative PSRs are also sporadically sprinkled across a few FTAs like in the India-Malaysia CECA and India-Singapore CECA. Neither of these FTAs include any PSRs for Chapter 72. In fact, India has included many PSRs that emulate the twin test standard followed in the general provision.

[194] Das, *supra* note 157, at 143.

The Consolidated Text of Non-Preferential Rules of Origin, published by the Harmonization Work Programme under Article 9 of RoO Agreement compiles a compendium of PSRs adopted and proposed for each HS Chapter. The compiled document recommends a mixture of CTH, CTSH and specific processing tests for 4-digit headings of Chapter 72. CTSH has been recommended for 26 lines. Another common recommendation is a CTC test that are drafted in a way that bars certain instances of tariff changes i.e. CTH, '*except from heading 72.XX'*.

In the PEM Convention, specific processing tests have been enumerated under Chapter 72. In the CPTPP, CTH tests have been assigned for almost all headings of Chapter 72, except for one CTSH requirement and one specific rule. Similarly, USMCA has just applied CTH tests for Chapter 72 with two CTSH exceptions. In ATIGA, PSRs vary from RVC requirements, CTC tests or a combination of the two. In India-Japan FTA and India-Korea FTA, CTSH tests have been assigned. India-ASEAN PSRs are currently being negotiated.

The coverage and level of segregation of headings and subheadings of Chapter 72 varies across multiple FTAs. As mentioned earlier, PSRs have not been successfully harmonised into the active FTAs leading to multiplicity of PSRs for the same Chapter. This can be better understood with a comparison of PSRs applied on HS 7220 across multiple FTAs.

In the ATIGA, PSRs have been applied to 4 specific HS lines at the 6-digit level. The PSR offers a choice between the RVC test or the CTSH test. Rest of the 6-digit tariff lines under HS 7220 would be subject to the general rule. In the PEM Convention, HS 7220 forms part of the range HS 72.19-72.22 and is subject to specific manufacturing test of '*Manufacture from ingots or other primary forms of heading 7218'*. Similarly, HS 7220 is also part of the range HS 72.18-72.22 in USMCA requiring a CTH test '*from any heading outside that group*'. In CPTPP, CTH test (*from any heading expect from HS 72.19*) is applied specifically to the heading with no desegregation.

In India – Japan CEPA, HS 72.20 forms part of very wide range of HS subheadings i.e., HS 7204.49-7229.90 requiring a change from any other heading i.e., the CTH

test. While in India-Korea FTA, the range is slightly shorter i.e., 7211.19-7229.90 with the same test. Both of these ranges are wide and encompasses a major chunk of steel products such that substantial processing and manufacturing activity would have to be carried out to achieve originating status. However, in India – Malaysia Comprehensive Economic Cooperation Agreement ["**CECA**"] and India – Singapore CECA HS 7220 would be subject to the general twin test rule of CTSH and 35% RVC and CTH and 30% RVC respectively. Multiplicity of RVC percentages may become confusing for steel producers as they would be required to account from an extra percentage of originating inputs in some agreements but less for others. The differences in applicable PSRs or lack thereof across various Indian FTAs display the degree of multiplicity of tests that may cause confusion for domestic producers.

Therefore, it is inferred that PSRs for Chapter 72 have not been uniformly applied across various FTAs. Chapter 72 may be subject to PSRs in some FTAs and to a relatively stringent general rule in another. An attempt should be made to formulate harmonised and specific PSRs for Chapter 72 along with an constructive negotiating plan to draft these rules into the FTAs.

4.5. Administration of RoO

Turning back to the inferences made about the trade deflection of copper under the ISLFTA, stringent origin determination tests are not always enough to combat misuse of FTAs; they need to work in tandem with robust mechanisms of certification and verification of preferential claims. The practical success of negotiating optimal origin-determination, PSRs, etc. is closely dependent on the efficiency of the domestic border authorities and its administrative rules.

The administration of RoO consists of three regulatory stages: (a) the issuance of a certificate of origin as documentary evidence for proving origin; (b) direct consignment conditions and related documentary evidence; (3) verification of certification and documents by the importing parties to determine entry and applicability of preferential benefits, punitive measures, etc.[195] Origin Certification is

[195] Inama, *supra* note 174, at 530.

the initiating stage for obtaining a certificate of origin or any other equal proof of origin and Origin Verification is the final stage ending at the importing country where the customs authority confirm, verify the particulars of the preferential claim.

Domestic producers have unanimously lobbied for the institution of robust RoO FTA chapters – consisting of not only strict origin determination tests but stringent systems for origin administration. This is further emboldened by cases of increased dumping of cheap products from non-signatory countries into the domestic market caused by origin certification fraud in FTA partner countries. India may find itself victim of such fraudulent schemes given that its MFN tariffs rates are high. For example, Indian customs authorities have detected several cases of origin fraud where CoOs have not been issued appropriately by the FTA country leading to rampant cases of origin mislabelling of products like gold jewellery, flat-panel TVs, beetle nuts, black pepper, cocoa powder, etc.[196] Steel producers have also alleged cases of trade deflection of cheap Chinese stainless steel from Indonesia.[197] They theorise that the cheap imports were dumped into the market using the AIFTA route. Another major instance of origin fraud and trade deflection of steel products was seen during the US-China trade war. After the US placed tariffs on imports of Chinese steel, the same were transhipped through Vietnam by replacing origin tags with “Made in Vietnam” tags.[198] Vietnam promptly cracked down such activities have taken steps to improve inspection and verification of CoO applications and documents.[199]

However, the application of administrative rules should be balanced with the essential goals of facilitation so to prevent it from becoming a sanctioned a disguise for non-tariff barriers. High administrative costs, compliance delays and inflexible

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[196] Najib Shah, *Rules of origin: Needless restrictive implementation could act as a trade barrier*, CNBC TV18 (Sept. 19, 2020), https://www.cnbctv18.com/economy/rules-of-origin-needless-restrictive-implementation-could-act-as-a-trade-barrier-6956941.htm.

[197] Smarak Swain, *How Budget counters ‘origin fraud’ in FTAs*, HINDU BUSINESSLINE, (Feb. 12, 2020), https://www.thehindubusinessline.com/opinion/how-budget-counters-origin-fraud-in-ftas/article30794429.ece.

[198] *Id.*

[199] Chuin-Wei Yap, *American Tariffs on China are being blunted by Trade Cheats*, WALL STREET J., (June 26, 2019), https://www.wsj.com/articles/american-tariffs-on-china-are-being-blunted-by-trade-cheats-11561546806#_=_.

rules of obtaining RoO documents can often deter importers/exporters from utilising the preferential benefits, especially if the MFN route is comparatively easier.

4.6. Origin Certification

Origin Certification is the procedural step that translates the results of the applicable origin determination tests into a tangible document for the purposes of proving origin. The individual steps of this process are widely harmonised across all FTA models; with novel modifications for enhancing facilitation. When the product is ready for export, the exporter/producer is required to obtain a documentary evidence of origin for the proper application of preferential duty at the importing country. Documentary evidence of origin may be in the form of certificate of origin, a certified declaration of origin or a declaration of origin.[200] A certificate of origin is the leading mode of proof used by FTA models[201]. The ATIGA and the PEM Convention follow a uniform specimen form of CoO that is included in their respective Annexes so that the format is clear, in writing and includes all the relevant information for proving origin. In contrast, CPTPP and USMCA have taken a liberal approach to the format of CoO. The CoO need not follow a prescribed format; businesses are required to only make a declaration about the origin of goods and should include a set of minimum data requirements[202] like the name of exporter, importer, producer, HS Classification, Origin Criterion, etc.

All the active FTAs models have one of the following types of certification systems: certification by a competent authority of the exporting country, self-certification under an approved exporter programme, registered exporter system or an importer-based system.[203]

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[200] Kyoto, *supra* note 164, at Chapter 2.
[201] Atsushi Tanaka, *World Trends in Preferential Origin Certification and Verification*, WORLD CUSTOMS ORG. (WCO Research Paper No. 20, 2011), at 2 [hereinafter Tanaka].
[202] USMCA, *supra* note 146, Chapter 5, at art. 5.2(3)(b); CPTPP, *supra* note 179, Chapter 3, at art. 3.20(3)(d).
[203] COMPARATIVE STUDY ON CERTIFICATION OF ORIGIN, WORLD CUSTOMS ORG. (2020), at 13 [hereinafter Comparative Study].

4.6.1. Competent Authority Certification

Origin Certification by a competent authority i.e. customs association of the exporting country, chambers of commerce and delegated governmental agencies is the most commonly accepted mode certification.[204] In this traditional mode of certification, the exporter is expected to submit an application for issue of CoO by attesting supplementary proofs and documents establishing originating processes. The competent authority is required to verify and confirm the information furnished to satisfy claim of origin and may even make verification visits to the exporter/producers' premises.[205] The verification of the competent authority confirms the quality and authenticity of the certificate and documents declared. The stamp and signature of a competent authority assigns a level of trust on the authenticity of the information and its supporting documents.[206]

Article 38 of the ATIGA allows certification by a '*government authority designated by the exporting member state*'. After receiving a written application and supporting documents from the exporter/or authorised representative [207] , the authority is required to properly examine the application to the '*best of their competence and ability*'.[208]

The certification under the PEM Convention is also issued by the '*customs authorities of the exporting country*' via written application by the exporter/representative.[209] The authorities have the right to call for any evidence and carry out any inspection of the accounts or any other appropriate check.[210]

However, with the rise in volume and frequency of trade across multiple FTA regimes, the competent authority will see a humongous rise in number of

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[204] Tanaka, *supra* note 201, at 3.
[205] GUIDELINES ON CERTIFICATION OF ORIGIN, WORLD CUSTOMS ORG. (2018), at 7 [hereinafter Guidelines].
[206] Erlinda M. Medalla, *Towards an Enabling Set of Rules of Origin for the Regional Comprehensive Economic Partnership*, (ERIA Discussion Paper Series, 2015).
[207] ATIGA, *supra* note 167, art. 38.
[208] *Id.*, at Annex 8, Rule 6,
[209] PEM Convention, *supra* note 177, art. 20.
[210] *Id*.

applications for certification. The authority may not have the time, capacity and manpower to manually verify the authenticity of each and every application with great detail. Verification visits and long processes of certification will lead delays in clearance of goods for a large group of exporters/producers.

4.6.2. Self-Certification

In contrast to dependence on a government agency for certification, many FTAs have begun embracing a system of self-certification to introduce a degree of facilitation and reduce the collective burden on government authorities. Under this system, the producer, exporter and/or importer is made a trustworthy issuer of authentic proof of origin.

The Origin Procedures of the CPTPP allows preferential access to goods on the basis of certificates issued by the exporter, producer or importer.[211] However, the self-certifying party may be rightfully asked to demonstrate the authenticity of the claims.[212] The producer can issue certification on the basis of having its own information about the origin of goods.[213] An issuing exporter, if not the producer of the goods, can do so on the basis of information about the origin of goods; or the reasonable reliance on producer's information.[214] If the issuer is the importer, the basis of certification is documentation about the origin or reasonable reliance on the documentation provided by the exporter or the producer.[215]

The previous North American Free Trade Agreement ["**NAFTA**"] regime also followed a system of self-certification by the exporter of the goods. An exporter could certify the origin of the goods on the basis of their knowledge or on the basis of written representation by the producer attesting to its origin. Emulating the CPTPP model of certification, the USMCA also allows importers to self-certify the origin of goods on the basis of reliable information demonstrating origin. Both of these shifts towards importer-based self-certification is to attain the most liberalised state of

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[211] CPTPP, *supra* note 179, Chapter 3, art. 3.20.
[212] *Id.*, at Footnote 2.
[213] *Id*., art. 3.21(1).
[214] *Id.*, art. 3.21(2).
[215] *Id.*, art. 3.21(3).

origin certification[216] where involvement of competent authority is kept as minimal as possible. In this system, certification is based on the hallmark of availability of relevant originating information instead of an official authorisation.

4.6.3. Approver Exporter System

The concept of approved exporters in the PEM Convention allows a certain category pre-approved exporter to enjoy special exceptions from the mandated form and frequency of issuance of CoO. Article 19 authorises approved exporters to issue origin declarations after being approved by competent authorities.[217] They are required to offer all guarantees required to verify the information in case importing party seeks to review the same.[218] This regime seems to be a hybridised version of certification by a competent authority and the self-certification regime.

4.6.4. Certification in India

Two types of CoOs are issued in India – non-preferential and preferential.[219] Non-preferential CoOs are issued by Government-nominated agencies under Article II of International Convention Relating to Simplification of Customs formalities, 1923. Exporters have to furnish the following documents:

a. Details of quantum/origin of inputs/consumables used in good;
b. Two copies of invoices;
c. Packing list
d. Fee (max Rs 100) per certificate.

The agencies are required to ensure that Indian origin goods meet the general principles governing RoO. It is not clear what these general principles are. Preferential CoOs are issued by nominated agencies i.e. Export Inspection Council in India as per the operating procedures drafted in the RoO Chapter of the FTAs.

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[216] Guidelines, *supra* note 205, at 10.
[217] PEM Convention, *supra* note 177, art. 19.
[218] *Id*.
[219] MINISTRY OF COMMERCE & INDUSTRY, HANDBOOK OF PROCEDURES (Vol. I) at 2.21.

4.7. Origin Verification

To achieve the objectives of rightful assignment of preferential benefits to originating goods, the importing parties must build robust mechanisms of origin verification to corroborate the claims made by a party claiming access.

When an importer enters the customs clearance area of the importing country, they are required to furnish identifying customs documents like bill of lading, import permit, etc. to the customs authority. If the importer seeks to claim preferential duty under an FTA, they must furnish an authentic CoO issued as per the requirements under the FTA. At this stage of the customs clearance, the customs authorities of the importing country have to exercise sharp scrutiny and judgement to verify the contents and particulars of the CoO.

In systems like the ATIGA, the PEM Convention and Indian FTAs that embrace certification by competent authorities, the certifying authority of the exporting country is the contact point for seeking further information and verification about the contents of the CoO. In self-certification systems like the USMCA and the CPTPP, the information is directly sought from the issuer of the certificate i.e. the exporter, importer and producer of the goods; the customs authorities of the exporting countries are not involved during the verification process. However, in both of these systems, successful verification of the CoO is dependent on easy availability and efficient exchange of information, therefore, all the parties involved must have robust systems of record keeping and communication networks for optimal facilitation of the verification process.

Verification of the CoO may be sought if the importing country finds reasonable grounds to: (a) doubt the authenticity of the documents; (b) doubt the accuracy of the particulars and contents of the CoO; or (c) On a random basis.[220]

There are two accepted methods of verification: (a) direct/indirect information seeking or Retroactive check and (b) verification visits. In the first stage, upon

[220] Kyoto, *supra* note 164, Recommended Practice 3.

receiving verification request from the importing country for the reasons stated above, the competent authority is obligated to verify the contents of the CoO on behalf of the importing country and submit the result of such verification within a designated time frame.

In FTAs like ATIGA, the importing party may request the competent authority of the exporting party to conduct a retroactive check on the producer/exporter's cost statement of the producer/exporter;[221] in the PEM Convention, the verifying authority is empowered to call for an evidence and carry out any inspection of the exporter's accounts and any other appropriate documentation.[222] In self-certifying FTAs like the USMCA[223] and the CPTPP[224], the direct information is sought from the importer, exporter or producer to furnish documents upon receiving a written request or questionnaire.

The origin verification provisions of the AIFTA and the India – Malaysia CECA are identical to the provisions in ATIGA. If the importing party is not satisfied with the results of the retroactive check, they may conduct a verification visit to the premises of the exporter/producer. India-Korea FTA also mandates a retroactive check as the first step of verification.[225] However, the importing party also has recourse to provisions that allows them to seek information directly from the exporter/importer/producer, as followed in the CPTPP and the USMCA. Before applying for a retroactive active check, request for information or documents relating to RoO may be sent to the importer.[226] If the importing party is not satisfied with the results of the retroactive check, they may conduct their own verification by sending a written request or questionnaires for seeking information and documents from the exporter or producer; and/or conduct a verification visit.[227] In the India – Japan CEPA, the nature of the involvement of the competent authority is not as active and involved as in the ATIGA; in fact they act as more of channel of information rather

[221] ATIGA, *supra* note 167, Rule 18.
[222] PEM, *supra* note 177, art. 34(3).
[223] USMCA, *supra* note 146, art. 5.9.
[224] CPTPP, *supra* note 179, art. 3.27.
[225] IKCEPA, *supra* note 122, at art. 4.11.
[226] *Id*., art. 4.11(2).
[227] *Id*., art. 4.12.

than an active inspector on behalf of the importing party. The importing party must make a request for information which would be sought form the exporter/producer by the certifying authority;[228] they are not expected to carry out any investigation themselves during the information stage. It would be beneficial to update the language of these provisions to match the latest model of the ATIGA.

Majority of the customs administration are vary of conducting verification visits[229] and seeking verification by the certifying authorities of the exporting country is commonly accepted.[230] FTAs contain important pre-requisites for requesting a verification visit i.e. a written notification to the certifying authority, the producer/exporter whose premises are to be visited, the focal customs authority of the exporting party and the importer of the good. The notification should be clear and comprehensive in its request and should contain important information like the date of verification, name of producer/exporter, names of the designated officials assigned to make the visits and scope of visit.

4.7.1. Verification in India

The Chapter V AA, Customs Act and Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 ["**CAROTAR**"] are a recent addition in the collection of customs rules regulating preferential claims of RoOs in India. The new chapter empowers the verifying official to seek more information about the origin of goods – even beyond the information mentioned in the CoO – from the importer of the goods.[231] In the pre-CAROTAR system, the importer merely submitted the CoO sent to them by the exporter/producer to claim preferential access. The importer was not required furnish supporting documents about the origin and production process of the goods. Going back to the verification processes for CoOs certified by a competent authority, the inspection of doubtful claims is usually carried out by such competent authority who is obligated to furnish the necessary information to the imported party.

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[228] IJCEPA, *supra* note 131, at Annex 3, Section 6.
[229] Tanaka, *supra* note 201, at 9.
[230] *Id.*
[231] CBIC Circular No. 38/2020 dated 21 Aug. 2020.

The CAROTAR makes it mandatory for the importer to possess and furnish some basic minimum information about the origin of goods i.e. description of the production process, origin determination criteria, RVC, PSRs and other origin related information.[232]

Conclusion: Part IV

- **Harmonisation of PSRs and Alternate Tests for Origin Determination**

India should be more proactive about negotiating specific PSRs in its FTAs using the PEM Convention as a model. By reconciling the PSRs for Chapter 72 in PEM, USMCA, CPTPP, the Non-Preferential Report and its own FTAs, India should reach a middle ground of optimal PSRs for the iron & steel industry. The specialised knowledge of industrial bodies and steel producers will be influential in recommending specific PSRs for steel. Currently, India should review the existing PSRs in its FTAs and harmonise a uniform set of tests for Chapter 72. As discussed previously, existence of PSRs are varied with differences in RVC % to being to general RoOs in some FTAs. All these rules should be harmonised so as to ensure certainty of exporting conditions for exporters. Alternate RoOs may be considered to liberalise the origin determination process for the exporters.

- **Facilitation in Administration of RoOs.**

USMCA and CPTPP are models that have chosen facilitation over paternalistic authorisation of competent authorities. Systems of self-certification and importer-based certification aims to reduce administrative delays and compliance costs while reducing certification burden on their customs authorities. This opens up time and space for authorities to strongly focus on strengthening its verification systems. While models of self-certification and importer-based certification would be premature in the Indian context, however, steps to facilitate certification and strengthening of verification channels are definitely needed. It has been noted that administrative costs and delays are responsible for the under-utilisation of FTAs in

[232] Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020, Notification No. 81/2020, 21 Aug. 2020, at Rule 4.

India.[233] With low or nil MFN tariffs in Japan, Korea, exporters are more likely to take the easier route than investing time and money on a complicated RoO system.

The approved exporter system followed in PEM should be introduced in the India context. India has already announced the inauguration of an approved exporter scheme.[234] This will allow well established producing/exporting bodies to easily issue their own proofs of origin without having to apply for a CoO for every shipment. For complete success of this scheme, a provision for approved exporter should be negotiated into the existing FTAs. Instead, India should focus on revitalising its cooperation channels with its FTA partners so as to improve communication, information gathering and discussion of grievances.

[233] NITI Aayog, *supra* note 7.

[234] *Approved Exporter System for Self-Certification of Origin*, Foreign Trade Policy 2015-20, Appendix 2F, DIR. GEN. FOREIGN TRADE, https://content.dgft.gov.in/Website/2F.pdf.

5. Exit Clause

5.1. Termination Without an Exit Clause?

In layman's terms, Exit Clause or a Termination Clause in an Agreement or Treaty is a clause that permits a disappointed party to terminate the obligations created under the Agreement or Treaty. As a general rule, this clause is a part of the final provisions of an agreement and act as a remedy to the party in cases where the commercial opportunities protected by these agreements were being nullified by other measures.[235] Usually such termination takes place with a short notice of a few months. Parties may be motivated to terminate or exit the treaty for various reasons. Shifts in political landscapes, domestic preferences rendering the terms of the treaty burdensome or obsolete, the agreements seizing to be useful, or the due to the effects of the agreement previously unforeseen by the negotiators are few of the examples of the reason why a party may utilize the Exit Clause of the Agreement. But what happens when the agreement does not contain an Exit Clause? If the agreement does not make provisions for the issue, can it be assumed that it is not covered? [236] One must venture into Pubic International Law when encountered with such situations.

Article 3.2 of the Dispute Settlement Understanding of the WTO establishes the nexus between WTO Covered Agreement and Public International Law. It recognizes that the covered agreements shall be interpreted as the customary rules of interpretation of public international law.[237] Customary international law can de defined as the obligations arising out of established international practices rather than obligations arising out of conventions or treaties.[238] These practices or customs are considered to be the source of international law because the states are acting in such a manner as they have a legal obligation to do so. This sense of obligation is

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[235] WORLD TRADE ORG., WORLD TRADE REPORT 2007: SIX DECADES OF MULTILATERAL TRADE COOPERATION: WHAT HAVE WE LEARNT, THE DESIGN OF INTERNATIONAL TRADE AGREEMENTS, https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr07-2c_e.pdf.

[236] RICHARD GARDINER, TREATY INTERPRETATION (2nd ed., 2008).

[237] Understanding on Rules and Procedures Governing the Settlement of Disputes art 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

[238] *Customary International Law*, LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/customary_international_law.

called Opinio Juris.[239] The tools of treaty interpretation are enshrined in the VCLT. Though India is not a party to VCLT, Indian courts have recognized the customary nature of some provisions of the VCLT.[240]

Article 31 of the VCLT covers the general rules of interpretation such as interpreting the treaty in good faith in light of its object and purpose, keeping the context in mind, taking into account any subsequent treaty, practice and relevant rules of international law.[241] Article 31 of the VCLT covering the rules of interpretation of treaties is recognized as customary international law on treaty interpretation.[242] The WTO Appellate Body too have recognized that Article 31 of the VCLT as the customary rule of interpretation of public international law.[243] Article 31(3)(c) states that while interpreting the treaty, any relevant rules of international law applicable too shall be considered. Under VCLT, in absence of an exit clause, three possible solutions may arise when exiting a treaty is concerned i.e., terminating the agreement with mutual consent, terminating the agreement unilaterally and negotiating a new agreement that replaces the old treaty, effectively terminating it.

5.2. Termination With Mutual Consent

In absence of an explicit termination clause, the parties of an agreement can terminate the agreement with mutual consent as per Article 54 of the VCLT covering termination of or withdrawal from a treaty under its provisions or by consent of the parties. Article 54(b) expressively states that the treaty can be terminated after consultation with the other contracting states. [244]Article 54(b) reflects the customary

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[239] Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21(1) EUROPEAN J. INT'L L., 173 (2010).

[240] Ram Jethmalani v. Union of India, 2011 8 SCC 1; AWAS 39423 Ireland Ltd. & Ors. v. Directorate General of Civil Aviation and Anr., 2015 SCC Online Del 8177.

[241] VCLT, *supra* note 56, art. 31.

[242] Appellate Body Report, *US – Gasoline*, at 16–17; Appellate Body Report, *Japan – Alcoholic Beverages II*, at 104; *also see,* I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2ND EDN, 1984), AT 153.

[243]Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (*US – Gasoline*), WTO Doc. WT/DS2/AB/R (adopted May 20, 1996), at 16–17; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* (*Japan – Alcoholic Beverages II*), WTO Doc. WT/DS8/AB/R (adopted Nov. 1, 1996).

[244] VCLT *supra* note 56, art. 54(b).

international law position.[245] The agreement can be terminated at any time if the contracting parties agree to do so. The consent of all parties creates a path for termination or withdrawal beyond the treaty.

Article 54(b) reflects the principle of the sovereignty of states.[246] If there are no grounds or procedure for termination laid down in the agreement. It confirms the status and power of the contracting parties as 'masters of their treaty' according to customary international law.[247] As termination ultimately deprives all the parties of their rights and obligations, the consent of all parties is indispensable. The consent of the parties can be brought subsequently and ad hoc. Reaching unanimity for termination of multilateral treaties can be an issue as different parties must have different reasons to enter the agreement in the first place and may not be as dissatisfied as the party withdrawing from it. Consent in bilateral agreements is less complicated.

The procedure of getting the consent of the form of consent is not specified. International law doesn't provide a straitjacket formula of consent and leaves it to the faculties of the parties to choose any form as they please.[248] The consent must be established beyond doubt. Even parties implicitly consent to the termination or withdrawal of the agreement will suffice.[249] As per Article 65(2) of the VCLT, one party may notify the other parties in writing of its intention to terminate or withdraw from a treaty.[250] The party is free to withdraw if there are no objections for 3 months post notification. The silence of the other parties is treated as consent.[251]

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[245] Tania SL Voon & Andrew D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law* 31(2) ICSID REV.: FOREIGN INV. L. J. 413 (2016). [hereinafter Voon], *see* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2nd edn, CUP 2007) 292 [hereinafter Aust]

[246] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2008) at 689 [hereinafter Villiger]

[247] *Id*. at 686.

[248] *Id.*

[249] *Id.*

[250] VCLT, *supra* note 56, art. 65(2)

[251] OLIVER DORR & KRISTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (1969) at 976 [hereinafter Dorr].

The consent of each and every party must be established beyond doubt, which can be difficult if it is not clearly expressed. For example, the negotiation and conclusion of a later treaty with no explicit terminating the former treaty does not constitute implicit consent of all the parties to terminate the former treaty.[252] Even emergence of an incompatible new rule of customary international law[253] or reciprocal non-compliance by the parties of a bilateral agreement cannot amount to implied consent.[254] The consultation with contracting states is not customary in nature.[255] But in accordance with the principle of good faith which pervades international treaty relationships, consultation in the context of Article 54(b) means that the contracting States must be informed in good time of the intention to terminate the treaty or withdraw from it.[256]

Thus, Article 54(b) enables the contracting parties under customary international law to dispose of their treaty at will. Though theoretically, parties may exclude the application of Art 54(b).

5.3. Unilateral Termination

Unilateral termination of an agreement means termination of an agreement without the consent or consultation with the other party in a bilateral agreement or parties in a multilateral agreement. Article 56 of the VCLT cover the Denunciation of or withdrawal from a treaty containing no provisions regarding termination, denunciation or withdrawal. Under Article 56, a party cannot terminate or withdraw from a treaty unless the parties admitted or intended the possibility of termination or if the right to withdraw is implied in the nature of treaty:[257] The withdrawing party has to provide a

[252] OLIVIER CORTEN & PIERRE KLIEN, THE VIENNA CONVENTIONS ON THE LAW OF TREATIES (2011) at 958 [hereinafter Cortern], *see* VCLT, supra note 56, arts. 59, 30 (3).
[253] *Id.*, *see also* art. 60.
[254] *Id.*, *also see,* Gabčíkovo-Nagymaros Project (Hungary v Slovakia) [1997] ICJ Rep. 7, para 114.
[255] Corten, *supra* note 252 at 960.
[256] *Id*.
[257] VCLT, *supra* note 56, art. 56.

notice of its intention to withdraw not less than 12 months before doing so.[258] On the whole, Article 56 is customary in nature.[259]

Article 56 is different from Article 54 as the former applies when there is no clause in the treaty and States parties have not consented to a state's withdrawal. In such cases, a state may proceed unilaterally if the conditions in Article 56 are fulfilled.[260] The provision supplements Article 54 of the VCLT. It creates a rebuttable presumption in favour of Article 54(b) of the VCLT i.e., parties cannot withdraw without the consent of the parties unless proven otherwise under the exceptions provided under Article 56.[261]

The presumption against denunciation or withdrawal can be rebutted by establishing that the parties intended to admit that possibility either unconditionally or on certain conditions. Article 56(1)(a) makes the contrary intention of the parties an exception. It also shows that the onus of establishing this exception is on the State willing to withdraw in spite of the presumption arising from the silence of the treaty.[262]

The nature of the agreement shall be paramount in determining whether a party can unilaterally terminate or withdraw from it. Under Article 56(b), some agreements are assumed to be temporary in nature.[263] The 1957 International Law Commission Report by Sir Gerald Fitzmaurice expressly states that agreements of commercial nature are assumed to have the right to unilateral termination unless expressly prohibited under the agreement.[264] Sir Humphrey Waldock recognized that exit is permitted in commercial or trading agreements unless the agreements establishes international regimes for water management or technical cooperation in economic,

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[258] *Id.*

[259]Fisheries Jurisdiction (United Kingdom v. Iceland) Case, Pleadings I 254; *see*, Villiger, *supra* note 246 at 706.

[260]Villiger, *supra* note 246 at 705.

[261] R. Plender, *The Role of Consent in the Termination of Treaties* (1986) 57 BYIL 133, 147.

[262] Dorr, *supra* note 251 at 976.

[263] Cortern, *supra* note 252.

[264] GG FITZMAURICE, SECOND REPORT ON THE LAW OF TREATIES II(16) YBILC, 1957, 22; *see* Laurence R. Helfer, *Terminating Treaties in* THE OXFORD GUIDE TO TREATIES 634 (2012) [hereinafter Helfer]

cultural, or social communication.[265] As expressly mentioned by Waldock and due to their commercial character, entering and ratifying a trade agreement does not create an irrevocable promise to cooperate. Free trade agreements will fall under the types of treaties whose nature in itself implies a right to withdraw.

Thus, the right of unilateral withdrawal is recognized in International Law. This right can be waived only by an express provision precluding exit or by other unequivocal evidence that the parties intended to prevent withdrawal.[266]

5.4. Is Termination the Only Way?

The remedies stated in the above sections shall be utilized in situations where India positively wants to exit the free trade agreement or terminate it completely. But that is not the only viable solution when an agreement doesn't yield the desired results. One can the solution in modification, amendment or revision of the agreement. Amendment or revision clauses are in the final clauses which often correspond to the conditions for the adoption of the treaty itself.

The Vienna convention provides that a treaty may be amended by the agreement between the parties and a second treaty can replace the initial treaty after requisite modifications.[267] Article 59 of the VCLT covers the termination or suspension of the operation of a treat implied by conclusion of a later treaty. This provision allows for implicit mutual termination by establishing that the parties intended to be governed by the latter treaty or the later and former treaties are incompatible and cannot be applied at the same time.[268] The parties can also merely suspend the former treaty if such was the intention.[269] The parties always have the option to renegotiate and

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[265] H. WALDOCK, SECOND REPORT ON THE LAW OF TREATIES, II(36) YBILC, 1963 (Draft Art. 17) [hereinafter Waldock].; *see* Helfer, *surpa* note 267 at 639

[266] The Case of S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10 at 18 (Sept. 7); *see*, pp. 1579-1648 (2005).

[267] Louis de Gouyon Matigon, *The Termination of Treaties in Public International Law*, SPACE LEGAL ISSUES (MAR. 15, 2019), https://www.spacelegalissues.com/space-law-the-termination-of-treaties-in-public-international-law/.

[268] VCLT, *supra* note 56, art. 59; *see* Voon, *supra* note 245.

[269] *Id.*

amend a treaty and formulate a new treaty covering the same subject matter that supersedes the previous treaty.

The USMCA replacing the NAFTA is the perfect example of such a situation. Article 2202 of the NAFTA provided the parties with the power to make modifications or additions to the Agreement. The same shall be approved by all the parties and be an integral part of the Agreement.[270] The protocol replacing the NAFTA with the Agreement between the USMCA states that the new agreement has been negotiated to amend the NAFTA pursuant to Article 2202, resulting in USMCA. It also states explicitly that USMCA supersedes NAFTA. Resultantly, the North American Agreement on Labour Cooperation also stands terminated as the same has been renegotiated and is now a part of the USMCA itself. Similar clauses can be found in agreements that India is a party to.[271] Agreements like India-Korea CEPA have joint committees to review the clauses and the impact of the agreement.[272]

The termination of the former treaty is implied once the latter treaty is concluded.[273] There are two tests to establish that the former treaty is terminated. First is the former treaty or agreement stands terminated if it is expressly mentioned in text the later treaty, for example, the USMCA. Second is the implicit intention of the parties to terminate the agreement.[274] This implicit intention can be found in means other than the treaty text,[275] such as in the statements made at the preparatory conference or in the circumstances of its conclusion.[276] We must also make sure that the new agreement is incompatible with the clauses of the former one to completely terminate and abrogate the former.[277] For example, India cannot be a party to a bilateral investment agreement with state X if the new agreement also contains clauses governing the investments between the two states. This overlap cannot exist.

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[270] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M 289 (1993), Art. 2202 [hereinafter NAFTA].
[271] *See*, IJCEPA, *supra* note 131, art. 145; *See* AIFTA, *supra* note 135, art. 21; IKCEPA, *supra* note 122, art. 15.5.
[272] IKCEPA, *supra* note 122, art. 15.2.
[273] Villiger, *supra* note 246, page 726
[274] *Id.*
[275] Villiger; *see* the statement by the *Byelorussian* delegation, OR 1968 CoW 351, para. 48.
[276] Waldock, *supra* note 265.
[277] Aust, *supra* note 245 at 292.

Termination of the North American Agreement on Labour Cooperation after USMCA came into force is a similar case. But, two such agreements can exist parallel if the earlier treaty is considered only suspended in operation. This is in coherence with the Article 59(2) of the VCLT. In toto, Article 59 is part of customary international law.[278]

India can enter into a later treaty only for a fixed duration and suspend the former meanwhile to fix certain domestic issues or please a domestic interest group. Article 59 in a sense is also strict as all the parties must wish to substitute the entire treaty with the later treaty which can be difficult in multilateral treaties.[279] This can lead to lengthy negotiations incurring a cost on trade. Ultimately, the new agreement will act like the instrument of termination in absence of the exit clause.

5.5. Drafting an Exit Clause

In the above sections, we have discussed the remedies available to India if the Agreement in question does not contain an exit clause. Renegotiation and replacing as a solution may successfully address the interests of the concerned parties dependent on the agreement but one cannot deny the usefulness of including termination clauses in these agreements.[280] We shall be look explore different models of Exit Clauses and determine what best suits the needs and purposes of India. When addressing drafting Exit clauses for free trade agreements and Bilateral Investment treaties, we must look at two commonly occurring models i.e., The Tacit Renewal Model of termination clause and the Fixed-Term Termination Clause.

Tacit Renewal termination clause refers to those clauses which automatically renew the agreement for an additional term after a specified number of years. This can be avoided if the parties use a provided window of time to terminate the agreement before the expiry of this window. The Agreement cannot be terminated once renewed before that term ends. Termination under this type of clause takes

[278] Dorr, *supra* note 251, Page 1012; *see also* Villiger, *supra* note 246 at 728.
[279] Villiger, *supra* note 246 at 729.
[280] *Id*. at 689.

effect as soon as the termination is notified, subject to the survival clause.[281] For example, in the **2019 Dutch Model Bilateral Investment Treaty** ["**BIT**"], a six-month notice must be given prior to the date of expiration or the treaty is renewed for five years.[282]

Fixed term termination clause refers to those clauses that allows the parties to terminate the agreement via a notice after the expiry of the set term of the agreement. The termination takes place after a specified period of time post notification, it usually being 1 year. For example, the **U.S. Model BIT (2004 and 2012)** provides that the treaty can be terminated at the end of a ten-year period or at any time after that once the written notice for termination is given.[283]

The distinguishing feature between the two models is the window for termination. Tacit renewal model doesn't allow the party to terminate once the window is missed. It is restrictive. But fixed term model allows parties to terminate at any time after the first term has elapsed.[284] India has adopted a general and simple model that allows the parties to terminate or exit the agreement after serving a written notice and waiting for a prescribed period of time, usually from 6 months to a year.

This pattern is also present in the agreements in question. Article 24 of the ATIGA allows India or any ASEAN member to terminate by giving a **written notice** and the agreement shall be terminated **12 months post notification**. Article 147 of the India – Japan CEPA allows either party to terminate by giving **one year's advance notice**. Article 15.8 of the India – Korea CEPA allows the parties to terminate by giving **a written notification** and the agreement shall be terminated **6 months post notification**. Simpler Exit Clauses such as these reduce uncertainty created in the

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[281] Nathalie Bernasconi et al, *Terminating a bilateral investment treaty* (Intl. Inst. Sustainable Dev., Best Practices Series, 2020) [hereinafter Bernasconi].

[282] Netherlands Model Investment Agreement, https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden [hereinafter Dutch model BIT]

[283]US Model Bilateral Investment Treaty, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [hereinafter U.S. Model BIT]

[284] Aust, *supra* note 245.

absence of such clauses and provide the states with a low-cost exit option if an agreement turns out badly. All other things being equal, such clauses attract and encourage other states for negotiations as they have an easy exit option.

But it is essential for us to realise that Exit clauses interacts with the agreement's other provisions to raise important issues concerning the form and structure of international agreement and institutions. They can act as an insurance policy, providing a safety net if the benefits anticipated out of an agreement were over blown. Although broad and easy exit from agreements has its benefits, it can also lead to overuse of such clauses. States may invoke them whenever economic, political or other pressures make compliance costly.[285] This uncertainty reduces incentives to invest through these agreements. Thus, we must find balance to reduce the opportunistic use of exit clauses but also not too onerous that discourages any negotiations from further progress.

5.5.1. Addressing Survival Clauses

Comprehensive economic partnership agreements like with Korea and Japan not only regulate goods, but also investments flowing between the party states. As stated above, broad exit clauses may deter investments due to the uncertainty and thus, we must include survival clauses in the final provisions of an agreement to safeguard the interests of the investors.

Survival Clauses refers to those clauses that allows the agreement to have a legal effects post termination for a specified period of time. The legal effect applies to investments established in the host country after the agreement came into force, but before it was terminated. Thus, an investor can initiate an arbitration against the state during the survival period. However, it does not grant any rights to the other party's investors that establish in the host country after the agreement is terminated.[286]

[285] Helfer, *supra* note 264.
[286] Bernasconi, *supra* note 281.

For example, the **2019 Dutch Model BIT**'s survival clause (Article 26.3) allows the agreement to have legal effect for **fifteen years** post termination with respect to investments.[287] The survival clause of the **2004/2012 U.S. Model BIT**, in turn, is formulated as follows (Article 22.3) has legal effect for **ten years**.[288] Article 38.2 of the 2015 Indian Model BIT has a fixed term termination clause that terminates the treaty if the parties do not confirm their willingness to renew the BIT. It also allows for unilateral termination at any time with 12 months' notice.[289]

5.5.2. The Model Exit Clause

Essentially, the model exit clause for India shall be able to provide an easy enough exit but also be able to protect the investments. The current model termination clauses India adopts are sufficient in providing the requisite safeguards to protect India's interests subject to few changes.

It is recommended that India maintain **consistency in the time period** for termination post notification i.e., **12 months**. The extended time periods of 12 months' notice leave a window for renegotiation or review between the states. The threat of termination may increase India's (the denouncing party) negotiating leverage.[290] It also allows India to reap the benefits of the FTA, if any for a year. The survival clause protects the investments for an extended period of time unless the survival clause is reduced or abolished by a subsequently negotiated treaty. The recommended usage of termination or withdrawal as a threating strategy has been adopted by developed countries in the past. For example, USA used threats of exit and the loss of support and funding it entailed in UNESCO to induce behavioural changes in the states.[291] Similar strategy was adopted by the USA and European Communities to negotiate the Uruguay Rounds of Negotiation that established the WTO. They did so by withdrawing from General Agreement on Tariffs and Trade and

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[287] Dutch Model BIT, *supra* note 282, art. 26.3.
[288] U.S. Model BIT, *supra* note 283, art. 22.3.
[289] Indian Model Bilateral Investment Treaty (2015), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download, Art. 38.2. [hereinafter India Model BIT].
[290] Helfer, *supra* note 264 at 646.
[291] Christopher C. Joyenr & Scott A. Lawson, *The United States and UNESCO: Rethinking the decision to withdraw*, 41(1) INT'L J. 37, 39 (1985).

negotiating the WTO agreement as a single undertaking to force the developing states to accept the WTO Agreement.[292]

It is recommended that the **survival clause** be negotiated to have a **legal effect for 20 years**. The 20-year period is inspired from Article 30.9(2) of the Comprehensive Economic and Trade Agreement between Canada and the European Union ["**Canada – EU CETA**"].[293] This is for the sole purpose of extending the legal protection for Indian investors. Usually, the survival clause is provided under the investments chapter of the agreement. But for ease, it may be considered to have all the provisions related to termination under one section of final clauses.

The FTAs in question also do not contain a process to provide the written notice for termination. The exit clause **may contain a designated authority** to whom the notice shall be communicated like in the Canada – EU CETA or have a general term of communication through "**Diplomatic Channels"** as in the **EU – UK Trade Cooperation Agreement**.[294]

Considering the recommendations stated above, the proposed model clause:

1. This Agreement shall remain in force until either party gives written notice to the other of their intention to terminate it through relevant diplomatic channels. The Agreement shall be terminated 12 months after the date of the notice of termination.
2. Notwithstanding paragraph 1, in the event that this Agreement is terminated, the provisions of Investment chapter shall continue to be effective for a period of 20 years after the date of termination of this Agreement in respect of investments made before that date.

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[292] Helfer, *supra* note 264 at 646.
[293] Comprehensive Economic and Trade Agreement between Canada and the European Union, art. 30.9 (Apr. 27, 2016).
[294] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, Art. FINPROV 8.

When negotiating a treaty with more than two parties, a modification shall be made stating that **the agreement will remain intact if one of the parties withdraws**. For example, **Article 34.6 of the USMCA** also states the same. This may enable India to keep an agreement intact in case any significant party withdraws from the agreement. Thus paragraph 1 shall be:

> This Agreement shall remain in force until a party gives written notice to the other parties of their intention to terminate it, in which case this Agreement shall terminate 12 months after the date of the notice of termination. If a Party withdraws, this Agreement shall remain in force for the remaining Parties.

Conclusion: Part V

In absence of any exit clause, customary international law enshrined in the VCLT provides us the ways to exit the agreement. The agreement can be terminated with the mutual consent of the parties as per Article 54(b) of the VCLT. The consent of all the parties must be established beyond doubt. This consent can be implicit, in writing and even silence of other parties. Article 56 of VCLT allows unilateral termination. It creates a rebuttable presumption against Article 54(b). The application of this method is dependent on the nature of the agreement. It is widely accepted by that treaties of commercial nature and trade agreements can be terminated unilaterally. Thus, trade agreements can be terminated unilaterally. Amendment and modification of the agreement to terminate is under Article 59 of the VCLT. Such termination of the former agreement must be expressly stated in the later agreement. Termination of the former agreement can also be implied from statements of preparatory conferences or the circumstances of the conclusion. This termination is dependent on the condition that the former and later agreement cannot co-exist.

India usually adopts a simple exit clause. For future negotiations, the model exit clause proposed is based on two recommendations making minor modifications i.e., adopting period of 12 months post notification to leverage the threat to exit while reaping any benefit whatsoever while renegotiating and extending the survival period to 20 years to safeguard investors interests.

Conclusion

India had entered into various FTAs since 2006 for greater economic integration and to provide foreign market for domestic producers. However, India has not seen the desired outcome from the FTAs. There are various issues which have come to the fore during years of operation of these FTAs. For steel industry specifically, these issues range from treatment of non-tariff measures, and trade facilitation to rules of origin. In this paper we have tried to identify the various issues for steel sector and suggest the changes to address these issues. As per this report, India should utilise the review clauses in the respective FTAs and try to re-negotiate the terms of the agreement to enforce the respective recommendations made in the respective sections.

This report finds that non-tariff measures such as standards and import licensing are being implemented by countries. While such measures are not prohibited by the WTO, they still hinder market access for exporters. To this end, India should renegotiate the FTAs, to include comprehensive provisions on technical standards. Such provisions should require parties to negotiate MRAs between the parties such that conformity assessment by one CAB is accepted by the other party. Similarly, FTAs should be renegotiated to add provisions dealing with import licensing, to bring greater transparency and simplify the procedures if import licensing is being adopted. Such measures would reduce costs for the exporters, and increase market access, potentially leading to increase in steel exports.

Furthermore, it is acknowledged that need is increasingly felt to incorporate provisions allowing for trade facilitation, transparency, harmonisation of customs procedures, and increased collaboration within bilateral and multilateral FTAs. To that end, there are two primary areas of concern – the multitude of customs systems and procedures, and the huge number of regulations and documentation requirements facing traders. While India's FTAs with Japan, Korea and ASEAN all deal with the same in some or the other form, this report finds that they lack in comprehension and scope, albeit in varying degrees. Various changes have been suggested in this report that aim towards expanding the scope and coverage of customs and trade facilitation. It is recommended that akin to the India – Korea and

India – Japan FTAs, India push for the establishment of a sub-committee tasked with identifying issues in customs procedures and suggesting solutions to tackle the same in the AIFTA. Moreover, it is also suggested that a contact point for this purpose be specifically designated within the India – Japan FTA and the AIFTA. Furthermore, guidance has also be sought from other FTAs like the USMCA, which exhaustively deal with the aspect of online publication (among others), which is currently absent from all three FTAs at hand. To that end, a relook must also be given to the language used in the FTAs, ensuring that the provisions are effectuated to the maximum possible extent while keeping in mind that varying degrees of willingness and ability among trading partners.

Moreover, in order to obtain the optimal level of protection from RoOs, it is recommended that India should consider embracing PSRs for determination of origin. PSRs are specifically designed to cater to the production stages of a product. As inferred from the aforementioned analysis, CTC and RVC tests suffer from their own individual flaws which the Indian twin test model compounds together. Under the general rule of RoOs, products may comply with one of the tests but may not be able to prove the latter. Chapter 72 products are subject to this sector-neutral twin-test in Indian FTAs with Malaysia and Singapore. PSRs for Chapter 72 are also quite unharmonised across various Indian FTAs.

It is recommended that India formulate personalised PSRs that cater to the production stages of iron and steel products. The PSRs should introduce a test that best account for value addition in steel products. The Chapter 72 PSR tests in the PEM Convention, CPTPP, USMCA and recommendations of steel producers will account for a large compendium of information for formulating PSR models. India should balance the two extreme objectives of robust administrative rules for certification and verification of RoOs; and improving facilitation of preferential claims. Schemes like the Approved Exporter Scheme should be negotiated into the FTA provisions. Established exporters of steel will benefit greatly from such a scheme as they will not be required to apply for a certificate of origin for each shipment and can issue declaration of origin themselves. India should also improve its communication channels for bilateral discussions with its FTA partners as they can be a productive

stage for resolving grievances related to RoOs, verification and information collection.

Further, the auto-trigger safeguard mechanism ["**ATSM**"] is an innovative protective trade remedy formulated by India in response to the now-defunct RCEP negotiations. Based on the model of the Special Safeguard Mechanism ["**SSM**"] enforced under the Agreement on Agriculture, the ATSM is expected to trigger when imports of 'sensitive' items from the FTA partner cross the pre-negotiated threshold within a specified time period.[295] Once this threshold is crossed, the FTA concessions would be withdrawn and the imports from the FTA partner would be subjected MFN tariffs.[296] SSMs can be found as trade remedy in various FTAs but they are usually applicable on agricultural products. India proposed the ATSM as a provisional safeguard system to protect domestic industry from possible import surges under the RCEP. While India can consider proposing the ATSM during its negotiating rounds with FTA partners, it will be essential to iron out the specific details. The steel industry would have to be designated as a 'sensitive' good under the FTA for the ATSM to kick in during import surges. The specific triggering threshold i.e. the volume of imports, etc would have to be explicitly mentioned in detailed provisions in the FTA. Therefore, any proposal for the ATSM should be proceeding with utmost clarity about its terms and conditions.

While addressing the issues arising out of these FTAs, the report has touched on issues arising out of termination of agreements in absence of an exit clause. Though the FTAs in question contain an exit clause, the report ventures into the situation where there is no exit clause in the agreement. Looking into the provisions of the VCLT recognised as customary rules of international law, the report determined three ways of termination with mutual consent, Unilateral Termination and modification. Article 54(b) of the VCLT provides a way to terminate the treaty with consent of all parties. Article 56 of the VCLT covers unilateral termination and supplements Article 54. It creates a rebuttable presumption against article 54(b).

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[295] Kirtika Suneja, *India for safeguards to counter import surge*, ECON. TIMES, (Sept. 12, 2019), https://economictimes.indiatimes.com/news/economy/foreign-trade/india-for-safeguards-to-counter-import-surge/articleshow/71089419.cms.
[296] *Id.*

Article 56 relies on the nature of treaty and it is recognized that trade agreements can be terminated unilaterally. But unilateral terminations though permissible under international law, can be waived by an express provision in the agreement. Article 59 of the VCLT that provides the termination of an agreement by the conclusion of a later one. The report recommends amendment and modification of the FTAs to terminate the former agreement and enter into a new agreement that addresses the issues faced by the parties. This can be done under This form of termination is determined by an express provision in the later agreement or the intention of the parties.

The absence of exit clauses leaves the agreement subject to international law creating ambiguities in the exit. Exit clauses act as a safety net, providing parties with a low-cost option to leave when the agreement does not benefit the state as projected. India seems to follow a simple exit clause model. Such simple exit clauses attract states for negotiating new agreements as exit is easy but also creates the possibility of misuse of exit clauses. This acts as a barrier for investors and traders alike as the agreement can seize to exist at any point of time. A model exit clause has been proposed based on the analysis of BITs and other FTAs by following the recommendations of being consistent in the term post notification to be 12 months and utilizing the exit clause as a threatening strategy and extending the survival period to 20 years to safeguard investor interests for a longer period of time.

Annexures

a. Annexure A (Tariff Measures)

Table 1: Data on import export of HS 72. (Korea)[297]

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
Export	393.3	214.2	329.8	468.1	397.1	442.5	317.3	219.4	333.9	339.1	449	284.2
Import	1206.4	1087.1	1401.5	1722.2	1744.1	1414.2	1818.8	1,877.1	1507.7	2,257.5	2,684.6	2,268.2

Table 2: Data on import export of Japan:

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
Export	250.5	159.4	373.5	201.3	243.2	274.8	245.2	141.8	154.9	252.4	235.5	188.0
Import	733.1	756.9	1049.4	1280.2	1636.7	1289.6	1453.7	1490.4	930.5	1,169.6	1,259.1	1,059.3

Table 3: Data on import export of Indonesia:

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
Export	133.75	160.87	108.53	198.92	200.5	203.9	224.93	135.68	300.73	540.82	276.76	198.24
Import	42.6	33.43	40.93	27.19	27.14	29.15	114.17	244.03	235.52	298.04	456.78	817.94

Table 4: Data on import export of Malaysia

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
Export	53.94	98.34	78.95	124.91	157.78	179.39	99.07	47.26	281.73	304.79	242.37	236.67
Import	138.57	91.22	164.63	170.15	263.33	171.07	277.2	242.79	187.48	283.26	348.26	297.85

Table 5: Data on import export of Thailand

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020

[297] Export – Import Data Bank, Ministry of Commerce and Industry, India, https://tradestat.commerce.gov.in/eidb/default.asp.

Export	277.62	106.39	121.6	191.44	421.86	382.35	264.77	121.86	223.32	250.31	201.61	193.77
Import	181.63	58.34	85.07	92.48	98.05	120.64	163.27	137.79	131.51	136.97	182.36	137.03

Table 6: Data on import export of Vietnam

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
Export	80.84	83.01	27.06	78.35	183.08	362.87	117.31	70.9	561.49	579.78	486.22	1098.14
Import	11.05	5.45	51.49	88.14	56.51	39.84	57.1	38.91	69.66	208.02	227.72	106.05

Table 7: Comparison of average MFN applied duty rates (Tariff line averaging method)

	India (2019)	Korea (2020)	Japan (2020)	Indonesia (2018)	Malaysia (2020)	Vietnam (2018)	Thailand (2020)
Simple Average	15	3.21	3.43	14.06	10.74	9.69	5.2
Duty Range	15 -15	1-5	2 - 6.3	5-20	5-15	1-25	1-10

Table 8: Preferential duty rate under the FTAs in question (2020)

	Korea (2020)	Japan (2020)	Indonesia (2018)	Malaysia	Vietnam (2018)	Thailand
Simple Average	2.5	0.4	9.44	Not available	9.31	Not available
Duty Range	0 – 0	0.2-0.5	3-20	Not available	1-25	Not available

b. Annexure B (Indonesian Standards)

Mandatory Steel Standards in Indonesia:

S. No.	Product	Standard applicable	Tariff lines	Objects of Standards
1.	**Low Zinc coated sheet**[298]	SNI Code 07-2053-2016	7210.41.11.00; 7210.41.12.00; 7210.41.19.00; 7210.49.11.00; 7210.49.12.00; 7210.49.13.00; 7210.49.19.00; 7212.30.10.00; 7212.30.20.00; 7212.30.91.00	a) To Protect the consumers; b) To increase the quality of the steel products; c) To establish fair trade competitions
2.	**Steel bar for concrete reinforcement**[299]	SNI Code 07-2052-2002	7214.20.11.00; 7214.20.19.00; 7214.20.21.00; 7214.20.29.00; 7214.99.10.10; 7214.99.10.90; 7214.99.90.10; 7214.99.90.90	a) To Protect the consumers; b) To increase the quality of the steel products; c) To establish fair trade competitions
3.	**Re-rolled concrete enforcement steel bars**[300]	SNI 07-0065-2002		
4.	**Concrete reinforcement steel bar in reel**[301]	SNI 07-0954-2005	7213.10.00.10; 7213.10.00.90; 7213.10.00.00; 7213.99.00.00	
5.	**Hot rolled Sheet and Coil Steel**[302]	SNI 07-0601-2006	7208.25.10.00; 7208.25.90.00; 7208.26.00.00; 7208.27.00.00; 7208.36.00.00; 7208.37.00.00; 7208.38.00.00; 7208.39.00.00; 7208.51.00.00; 7208.52.00.00; 7208.53.00.00; 7208.54.00.00; 7208.90.00.00; 7211.13.10.00; 7211.13.90.00; 7211.14.10.00; 7211.14.90.00; 7211.19.10.00; 7211.19.90.00.	a) To Protect the consumers from safety aspect; b) To increase the product quality; c) To establish fair trade competitions
6.	**Hot Rolled Sheet and Coil Steel for Gas Cylinder**[303]	SNI 07-3018-2006	7208.25.10.00; 7208.25.90.00; 7208.26.00.00; 7208.27.00.00; 7208.36.00.00; 7208.37.00.00; 7208.38.00.00; 7208.39.00.00; 7208.51.00.00; 7208.52.00.00;	

[298] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO DOC. G/TBT/N/IDN/17, (Oct. 1, 2007), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FIDN%2F17%22&language=1&ct=DDFEnglish.

[299] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO DOC. G/TBT/N/IDN/16, (Oct. 1, 2007), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FIDN%2F16%22&language=1&ct=DDFEnglish.

[300] *Id.*

[301] *Id.*

[302] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO DOC. G/TBT/N/IDN/23, (Feb. 23, 2009), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FIDN%2F23%22&language=1&ct=DDFEnglish.

[303] *Id.*

			7208.53.00.00; 7208.54.00.00; 7208.90.00.00; 7211.13.10.00; 7211.13.90.00; 7211.14.10.00; 7211.14.90.00 ; 7211.19.10.00; 7211.19.90.00.	
7.	**Zinc Aluminium - Coated Sheet and Coil Steel**[304]	SNI: 07-0601-2006	7208.25.10.00 ; 7208.25.90.00 ; 7208.26.00.00 ; 7208.27.00.00 ; 7208.36.00.00 ; 7208.37.00.00 ; 7208.38.00.00 ; 7208.39.00.00 ; 7208.51.00.00 ; 7208.52.00.00 ; 7208.53.00.00 ; 7208.54.00.00 ; 7208.90.00.00 ; 7211.13.10.00 ; 7211.13.90.00 ; 7211.14.10.00 ; 7211.14.90.00 ; 7211.19.10.00 ; 7211.19.90.00	a) To Protect the consumers from safety aspect; b) To increase the product quality; c) To establish fair trade competitions
8.	**Cold rolled steel sheets and strips**[305]	SNI: 07-3567-2006	7209.15.00.00, 7209.16.00.10, 7209.16.00.90, 7209.17.00.10, 7209.17.00.90, 7209.18.20.00, 7209.18.90.00, 7209.25.00.00, 7209.26.00.10, 7209.26.00.90, 7209.27.00.10, 7209.27.00.90, 7209.28.10.00, 7209.28.90.00, 7209.90.90.00, 7211.23.20.00, 7211.23.30.00, 7211.23.90.10, 7211.23.90.90, 7211.29.20.00, 7211.29.30.00, 7211.29.90.00, 7211.90.10.00, 7211.90.30.00, 7211.90.90.00	a) To Protect the consumers from safety aspect; b) To increase the product quality; c) To establish fair trade competitions
9.	**Uncoated seven strainless steel wire for prestressed concrete reinforcement**[306]	SNI 07-1154-1989	7312.10.10.00; 7312.10.90.00	a) To Protect the consumers from safety aspect; b) To increase the product quality; c) To establish fair trade competitions
10.	**Uncoated strainless steel wire for prestressed**	SNI 07-1155-1989	7217.10.31.00; 7217.10.39.00; 7217.90.10.00	

[304] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO DOC. G/TBT/N/IDN/24, (Feb. 24, 2009), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FIDN%2F24%22&language=1&ct=DDFEnglish.

[305] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO DOC. G/TBT/N/IDN/33, (Feb. 10, 2010), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FIDN%2F33%22&language=1&ct=DDFEnglish.

[306] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO DOC. G/TBT/N/IDN/46, (Oct. 11, 2010), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FIDN%2F46%22&language=1&ct=DDFEnglish.

	concrete reinforcement[307]			
11.	**Prestressed concrete steel**[308]	SNI 07-3651.3-1995	7228.60.90.00; 7228.80.19.00; 7229.90.00.90	
12.	**Electrolysis tin coated thin steel sheets**[309]	SNI 07-0602-2006	7210.11.10.00; 7210.11.90.00; 7210.12.10.00; 7210.12.90.00.	a) To Protect the consumers from safety aspect; b) To increase the product quality; c) To establish fair trade competitions.
13.	**Hot-rolled right angle profile steels**; [310] HS 7216.10.00.00; 7216.33.00.00	SNI 07-2054-2006	7216.21.00.00; 7216.40.00.00	a) To Protect the consumers from safety aspect; b) To increase the product quality; c) To establish fair trade competitions.
14.	**Hot rolling mill I-beam profile steel** [311]	SNI 07-0329-2005	7216.10.00.00; 7216.32.00.00	
15.	**Hot-rolled channel-U steel profiles (Bj P channel-U)**[312]	SNI 07-0052-2006	7216.10.00.00; 7216.31.00.00	
16.	**Hot-rolled WF-beam steel profiles (Bj P WF-beam)**[313]	SNI 07-7178-2006	7216.10.00.00; 7216.33.00.00	
17.	**Filer welded H profile steel for general structure**[314]	SNI 07-2610-1992	7216.10.00.00; 7216.33.00.00	
18.	**Steel bars for general**	SNI 7614:2010	7214.99.90.90	a) To Protect the consumers from safety aspect;

[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] *Id.*

	purposes (BjKU) [315]			b) To increase the product quality; c) To establish fair trade competitions.
19.	**Cold Rolled Stainless Steel in Sheet dan Coil**[316]	SNI 7840: 2012	7219.32.00.00; 7219.33.00.00; 7219.34.00.00; 7219.35.00.00; 7219.90.00.00; 7220.90.10.00; 7220.90.10.00; 7220.90.90.00	a) To establish fair trade; b) To increase product quality; c) Prevention of deceptive practices and consumer protection; and d) Quality requirements.
20.	**Bead Wire**[317]	SNI 8347:2016	7217.30.11; 7217.30.21; 7217.30.34; 7217.90.90; 7229.90.20	a) To protect consumers: safety aspect; b) To increase product quality; and c) To establish fair trade

[315] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO DOC. G/TBT/N/IDN/52, (Jan. 16, 2012), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FIDN%2F52%22&language=1&ct=DDFEnglish.

[316] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO DOC. G/TBT/N/IDN/111, (Jan. 6, 2017), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FIDN%2F111%22&language=1&ct=DDFEnglish.

[317] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO DOC. G/TBT/N/IDN/118, (Jan. 31, 2018), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FIDN%2F118%22&language=1&ct=DDFEnglish

c. Annexure C (Malaysian Standards)

Mandatory Malaysian Standards are as follows:[318]

Sr. No.	Description of Goods	HS Code
1.	**Semi-finished products of iron or non-alloy steel**	7207 11 900; 7207 19 900; 7207 20 910; 7207 20 990
2.	**Flat-rolled products of iron or non-alloy steel, of a width of 60mm or more, hot-rolled, not clad,plated or coated:** **a. In coils, not further worked than hot-rolled:** **i. with patterns in relief** **ii. pickled** **iii. others (excluding containing by weight less than 0.6% of carbon, of a thickness of 0.17 mm or less)** **b. not in coils, not further worked than hot-rolled:** **i. with patterns in relief** **ii. others (excluding containing by weight less than 0.6% of carbon, of a thickness of 0.17 mm or less)**	 7208 10 000 7208 25 000, 7208 26 000, 7208 27 000 7208 36 000, 7208 37 000, 7208 38 000, 7208 39 100, 7208 39 990 7208 40 000 7208 51 000, 7208 52 000, 7208 53 000, 7208 54 100, 7208 54 990
3.	**Flat rolled products of iron or non-alloy steel, of a width of 60mm or more, cold-rolled (coal reduced) not clad, plated or coated:** **a. In coils, not further worked than cold-rolled:** **i. of a thickness of 0.5mm or more** **ii. containing by weight less than 0.6% of carbon, of a thickness of more than 0.17 mm but less than 0.5mm** **b. not in coils, not further worked than cold-rolled:** **i. of a thickness of 0.5mm or more** **ii. containing by weight less than 0.6% of carbon, of a thickness of more than 0.17 mm but less than 0.5mm**	 7209 15 000, 7209 16 000, 7209 17 000 7209 18 990 7209 25 000, 7209 26 000, 7209 27 000 7209 28 990
4.	**Flat rolled products of iron or non-alloyed steel, of width of 600 mm or non-clad, plated or coated:** **a. eloctrolytically plated or coated with zinc, containing by weight less than 0.6% of carbon, of a thickness less than 3mm**	 7210 30 910, 7210 30 920

[318] Customs (Prohibition of Imports) (Amendment) (No. 4) Order 2009, https://members.wto.org/crnattachments/2009/tbt/mys/09_4215_00_e.pdf.

	b. otherwise plated or coated with zinc	7210 41 910, 7210 49 910, 7210 49 990
	c. plated or coated with aluminium – zinc alloys, containing by weight less than 0.6% of carbon	7210 61 210, 7210 61 220, 7210 61 921, 7210 61 922
	d. painted, vanished or coated with plastic, containing by weight less than 0.6% of carbon	7210 70 910, 7210 70 920
5.	**Flat rolled products of iron or non-alloyed steel, of width of 600 mm or non-clad, plated or coated:**	
	a. Not further worked than hot-rolled:	
	i. Rolled on four faces or in closed box pass, of a width exceeding 150mm and a thickness of not less than 4mm, not in coils and without patterns in relief, containing by weight less than 0.6% of carbon, of universal plates and hoop and strip	7211 13 910, 7211 13 921, 7211 13 929
	ii. Others, of a thickness of 4.75 mm or more (excluding containing by weight 0.6% or more of carbon or containing by weight less than 0.6% of carbon corrugated)	7211 14 910, 7211 14 921, 7211 14 922, 7211 14 929, 7211 14 930, 7211 14 990
	iii. Others (excluding containing by weight 0.6% or more of carbon or containing by weight less than 0.6% of carbon, corrugated)	7211 19 911, 7211 19 912, 7211 19 919, 7211 19 920, 7211 19 991, 7211 19 999
	b. Not further worked than cold-rolled (excluding containing by weight less than 0.6% of carbon, corrugated)	7211 23 110, 7211 23 120, 7211 23 190, 7211 23 910, 7211 23 990, 7211 29 111, 7211 29 112, 7211 29 119, 7211 29 191, 7211 29 199, 7211 29 211, 7211 29 212, 7211 29 219, 7211 29 290
6.	**Flat rolled products of iron or non-alloyed steel, of width of 600 mm or non-clad, plated or coated:**	
	a. electrolytically plated or coated with zinc, containing by weight less than 0.6% of carbon	7212 20 911, 7212 20 912, 7212 20 919, 7212 20 991, 7212 20 999
	b. otherwise plated or coated with zinc, containing by weight less than 0.6% of carbon	7212 30 911, 7212 30 912, 7212 30 919, 7212 30 991, 7212 30 999
	c. painted, vanished or coated with plastic, containing by weight less than 0.6 of carbon	7212 40 911, 7212 40 912, 7212 40 919, 7212 40 991, 7212 40 992
	d. otherwise plated or coated, containing by weight less than 0.6 of carbon	7212 50 911, 7212 50 912, 7212 50 919, 7212 50 991, 7212 50 992
7.	**Bars and rods, hot rolled in irregularly wound coils, of iron or non-alloy steel**	7213 10 000, 7213 20 000, 7213 91 000, 7213 99 000
8.	**Other bars and rods of iron or non-alloy steel, not further worked than forged, hot-rolled, hot-drawn**	7214 10 110, 7214 10 910, 7214 10 990, 7214 20 110, 7214 20 910, 7214 30 100, 7214 99 110, 7214 99 910

	or hot-extruded, but including those twisted after rolling	
9.	**Other bars and rods of iron or non-alloy steel, round**	7215 10 100, 7215 50 110, 7215 50 910, 7215 90 100
10.	**Angles, shapes and sections of iron or non-alloy steel**	7216 10 100, 7216 10 900, 7216 21 900, 7216 22 100, 7216 22 900, 7216 31 100, 7216 31 900, 7216 32 100, 7216 32 900, 7216 33 100, 7216 33 911, 7216 33 919, 7216 40 100, 7216 40 910, 7216 40 990, 7216 50 191, 7216 50 192, 7216 50 211, 7216 50 219, 7216 50 221, 7216 50 229
11.	**Angles, shapes and sections, not further worked than cold-formed or cold-finished**	7216 61 191, 7216 61 192, 7216 61 211, 7216 61 219, 7216 69 211, 7216 69 219
12.	**Wire of iron and non-alloy steel**	7217 10 000, 7217 20 000, 7217 30 000, 7217 90 000
13.	**Other bars and rods of stainless steel, angles, shapes and sections of stainless steel**	7222 20 100, 7222 30 100
14.	**Other bars and rods of stainless steel; angles, shapes and sections of stainless steel; hollow drill bars and rods of alloy or non-alloy steel**	7228 70 110, 7228 70 120, 7228 70 211
15.	**Wire of other alloy steel of silico-manganese steel**	7229 900

d. Annexure D (Vietnam Standards)

Standards specified for products are:[319]

Product	Standard
Plain Bars for reinforcement of the concrete	Vietnam Standards ("**TCVN**") 1651-1:2008
Ribbed bars for the reinforcement of the concrete	TCVN 1651-2:2008
Welded fabric for the reinforcement of the concrete	TCVN 1651-3:2008
Steel for the pressing of concrete: Part 1: General requirements; Part 2: Cold draw wire; Part 3: Quenched and tempered wire; Part 4: Strand; Part 5: Hot-rolled steel bars with or without subsequent processing.	TCVN 6284: 1997 (ISO 6934: 1991)
Epoxy-coated steel for the reinforcement of concrete	TCVN 7934: 2009 (ISO 14654: 1999)
Epoxy-coated strand for the pre-stressing of concrete	TCVN 7935: 2009 (ISO 14655: 1999)

The standards also apply to stainless steels under HS codes:[320]

- **7218:** Stainless steel in ingots or other primary forms; semi-finished products of stainless steel
- **7219:** Flat-rolled products of stainless steel, of a width of 600 mm, hot-rlled or cold-rolled "cold-reduced"
- **7220:** Harmonised System Code of Flat-rolled products of stainless steel,of a width of less than 600 mm
- **7221:** Harmonised System Code of Bars and Rods, hot-rolled, in irregularly wound coils, of stainless steel
- **7222:** Other bars and rods of stainless steel; angles, shapes and sections of stainless steel
- **7223:** Wire of stainless steel

The objective and rationale for the standards provided is

- Prevention of deceptive practices and consumer protection[321]
- To ensure safety in building[322]

[319] National Technical Regulation on Steel for the Reinforcement of Concrete, Regulation No. QCVN 7: 2010/BKHCN, https://tsapps.nist.gov/notifyus/docs/wto_country/VNM/full_text/pdf/VNM16(english).pdf.

[320] *Id.*

[321] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO Doc. G/TBT/N/VNM/137, (Dec. 11, 2018), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FVNM%2F137%22&language=1&ct=DDFEnglish.

[322] COMMITTEE ON TECHNICAL BARRIERS TO TRADE, WTO Doc. G/TBT/N/VNM/16, (June 1, 2011), http://docs.wto.org/imrd/gen_redirectsearchdirect.asp?RN=0&searchtype=browse&query=@meta_Symbol%22G%2FTBT%2FN%2FVNM%2F16%22&language=1&ct=DDFEnglish.

e. Annexure E (Japanese Standards)

Voluntary Structural and constructional steels JIS standards:

Standard Number	Last Version	Description
G 3111	2005	Rerolled carbon steel
G 3113	2006	Hot-rolled steel plate, sheet and strip for automobile structural uses
G 3114	2008	Hot-rolled atmospheric corrosion resisting steels for welded structure
G 3115	2005	Steel plates for pressure vessels for intermediate temperature service
G 3116	2005	Steel sheets, plates and strip for gas cylinders
G 3117	1991	Rerolled steel bars for concrete reinforcement
G 3118	2005	Carbon steel plates for pressure vessels for intermediate and moderate temperature services
G 3124	2009	High strength steel plates for pressure vessel for intermediate and moderate temperature service
G 3125	2004	Superior atmospheric corrosion resisting rolled steels
G 3126	2009	Carbon steel plates for pressure vessels for low temperature service
G 3128	1999	High yield strength steel plates for welded structure
G 3132	2005	Hot-rolled carbon steel strip for pipes and tubes
G 3134	2006	Hot-rolled high strength steel plate, sheet and strip with improved formability for automobile structural uses
G 3135	2006	Cold-reduced high strength steel sheet and strip with improved formability for automobile structural uses
G 4052	2008	Structural steels with specified hardenability bands
G 4802	2005	Cold-rolled steel strips for springs

Stainless Steel:

Standard Number	Last Version	Description
G 3214	1991	Stainless steel forgings for pressure vessels
G 3446	2004	Stainless steel pipes for machine and structural purposes
G 3447	2004	Stainless steel sanitary pipes
G 3448	2004	Light gauge stainless steel tubes for ordinary piping
G 3459	2004	Stainless steel pipes
G 3463	2006	Stainless steel boiler and heat exchanger tubes
G 3550	2003	Stainless steel wire ropes for structure
G 3557	2004	Stainless steel wire ropes for general purposes
G 3601	2002	Stainless-clad steels
G 4303	2005	Stainless steel bars
G 4304	2005	Hot-rolled stainless steel plates, sheet and strip
G 4305	2005	Cold-rolled stainless steel plate, sheet and strip
G 4308	1998	Stainless steel wire rods
G 4309	1999	Stainless steel wires
G 4311	1991	Heat-resisting steel bars
G 4312	1991	Heat-resisting steel plates and sheets
G 4313	1996	Cold rolled stainless steel strip for springs
G 4314	1994	Stainless steel wires for springs
G 4317	2005	Hot-formed stainless steel sections
G 4318	1998	Cold finished stainless steel bars
G 7222	2003	Seamless steel tubes for pressure purposes - Technical delivery conditions - Part 4: Austenitic

		stainless steels
G 7226	2003	Welded steel tubes for pressure purposes - Technical delivery conditions - Part 6: Longitudinally welded austenitic stainless steel tubes
G 7602	2000	Stainless steels for springs - Part 1: Wire
G 7604	2000	Nickel and nickel alloys bars
G 7605	2001	Nickel and nickel alloy plate, sheet and strip

Coated steels:

Standard Number	Last Version	Description
G 3302	2007	Hot-dip zinc-coated steel sheets and coils
G 3312	2008	Prepainted hot-dip zinc-coated steel sheets and coils
G 3313	2007	Electrolytic zinc-coated steel sheets and coils
G 3314	2006	Hot-dip aluminium-coated steel sheets and coils
G 3315	2008	Chromium coated tin free steel
G 3317	2007	Hot-dip zinc - 5 % aluminium alloy-coated steel sheets and coils
G 3318	2008	Prepainted hot-dip zinc - 5% aluminium alloy-coated steel sheets and coils
G 3320	1999	Coated stainless steel sheets
G 3321	2007	Hot-dip 55% aluminium-zinc alloy-coated steel sheets and coils
G 3322	2008	Prepainted hot-dip 55 % aluminium-zinc alloy-coated steel sheets and coils
G 3443	2004	Coated steel pipes for water service
G 3443-1	2007	Coated steel pipes for water service - Part 1: Pipes
G 3443-2	2007	Coated steel pipes for water service - Part 2: Fittings
G 3443-3	2007	Coated steel pipes for water service - Part 3: External plastic coatings
G 3443-4	2007	Coated steel pipes for water service - Part 4: Internal epoxy coatings
G 3451	1987	Fittings of coated steel pipes for water service
G 3537	1994	Zinc-coated steel wire strands
G 3542	1993	Precoated color zinc-coated steel wires
G 3543	2005	Steel wire coated with colored plastics
G 3544	1993	Hot-dip aluminium-coated steel wires
G 3547	1993	Zinc-coated low carbon steel wires
G 3548	1994	Zinc-coated steel wires
G 7121	2000	Cold-reduced electrolytic tinplate
G 7122	2000	Cold-reduced electrolytic chromium/chromium oxide-coated steel
G 7123	2000	Cold-reduced blackplate in coil form for the production of tinplate or electrolytic chromium/chromium oxide-coated steel
G 7124	2000	Continuous hot-dip aluminium/silicon-coated cold-reduced carbon steel sheet of commercial and drawing qualities
G 7302	2000	Zinc coatings for steel wire
G 7303	2000	Zinc-coated steel wire for fencing
K 5554	2002	Phenolic resin type Micaceous Iron Oxide paint
K 5555	2002	Epoxy resin Micaceous Iron Oxide paint

f. Annexure F (Malaysian Standards)

Malaysia's import licensing regime is applicable on the following products:[323]

Sr. No.	Description	H.S. Code
1.	Flat-rolled products of iron or non-alloy steel, of a width of 600 mm or more, cold-rolled (cold-reduced), not clad, plated or coated	7209
2.	Flat-rolled products of iron or non-alloy steel, of a width of 600 mm or more, clad, plated or coated	7210
3.	Flat-rolled products of iron or non-alloy steel, of a width of less than 600mm, not clad, plated or coated	7211
4.	Flat-rolled products or iron or non-alloy steel, of a width of less than 600 mm, clad, plated or coated	7212
5.	Bars and rods, hot-rolled, in irregularly wound coils, of iron or non-alloy steel	7213
6.	Other bars and rods of iron or non-alloy steel, not further worked than forged, hot-rolled, hot-drawn or hot-extracted, but including those twisted after rolling	7214
7.	Other bars and rods of iron or non-alloy steel	7215
8.	Flat-rolled products of stainless steel, of a width of 600mm or more	7219
9.	Flat-rolled products of stainless steel, of a width of less than 600 mm	7220

[323] Customs (Prohibition of Imports) Order 2017, P.U. (A) 103, (Mar. 31, 2017), https://importlicensing.wto.org/sites/default/files/Customs%20Prohibition%20of%20Imports%20Order%202017_31.03.2017_0.pdf.

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