UTTRAKHAND OPEN UNIVERSITY ***LM-109***

SCHOOL OF SOCIAL SCIENCE

(Law of Export Import Regulation)

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UTTRAKHAND OPEN UNIVERSITY
HALDWANI

LL.M.-12

Law of Export Import Regulation

LL.M. Part-2

Subject : Law of Export Import Regulation

Block I- Introduction; the Basic Needs of Export and Import Trade.

Unit-1- State Control over Import and Export of Goods – From Rigidity to Liberalization

STRUCTURE

1.1. INTRODUCTION

Import and export of goods play a vital role in all the economy. That too, India is a developing country, the role of export and import are of greater emphasis. There must be a free flow of exports and imports in order to improve the economy. But, the free flow should not affect the economy. So, the control over import and export of goods become the need of the hour. Regulation mandated by a state attempts to produce outcome which might not otherwise occur, produce or prevent outcomes in different places to what might otherwise occur, or produce or prevent outcomes in different timescales than would otherwise occur. In this way, regulations can be seen as implementations artifacts of policy statements. The economics of imposing or removing regulations relating to markets is analyzed in regulatory economics.

1.2 OBJECTIVES

The object of this lesson is to ascertain the areas of export and import of goods and the law relating to constitutional control over export and import business. Further, to locate the areas and legislations for the development of export and import business. The lesson will also be helpful for all who are not able to get the material from any book or source. SUNILRAJA MAHALINGAM Student, Master of Law, P.G.Department, Tamilnadu Dr.Ambedkar Law University, has analysed the concept in his article properly.

1.3 TOWARDS LIBERALISATION

Development of economic legislation is of comparatively recent origin. Reserve Bank of India was established in 1935 to exercise control over banking and fiscal activities. Need to control economic activities through legislation arose during the Second World War to face shortages. Price and distribution controls were established on various essential commodities under the Defense of India Act, 1939 (later converted into Essential Supplies (Temporary Powers) Act of 1946 and Essential commodities Act in 1955). Foreign Exchange Regulation Act, 1947 was passed to control the difficult position of foreign exchange. Industries (Development and Regulation) Act, 1951 provided for industrial licensing and registration. MRTP Act was passed in 1969 to exercise control over monopolies, unfair trade practices and restrictive trade practices.

India had socialistic ideals and a 'controlled economy' was envisaged on the pattern of Russia. Unfortunately, it was found that the policy was unable to give required push to the economic growth of the country. Public sector enterprises which were supposed to lead economic growth and 'reach commanding heights' turned out to be highly inefficient and wasteful.

The main purpose of economic legislation is

a. to support the economic policies of the Government.

b. to exercise control over economic activities.

c. to protect consumers from unscrupulous persons.

d. to prevent bad side effects of the development.

India decided to follow Russian model of 'controlled economy' and 'leading role to public sector'.

1.3.1 CONSTITUTIONAL CONTROL

In the basic scheme of constitution, broadly, aspects of law and order, agriculture, public health etc… are looked after by the State Governments. Article 246 of Indian Constitution indicates bifurcation of powers to make laws, between Union Government and State Governments. Parliament has exclusive powers to make laws, between Union Government and State Governments. Parliament has exclusive powers to make laws in respect of matters given in List I of the Seventh Schedule of the Constitution (called Union List). List II (State List) contains items under the jurisdiction of States. List III (Concurrent List) contains items where both Union and State Governments can exercise power.[1]

Union List

List I called 'Union List', contains items like Defense of India, Foreign affairs, War and Peace, Banking, etc… Items in this list relevant to export and import are as follows:

Item No. 36 – Currency, coinage and legal tender; foreign exchange.

Item No. 41 – Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.

Item No. 42 – Inter – State trade and commerce.

Item No. 51 – Establishment of standards of quality for goods to be exported out of India or transported from one state to another.

Item No. 59 – Cultivation, manufacture and sale for export of opium.

Item No. 83 – Duties of customs including export duties.

[1] SUNILRAJA MAHALINGAM, Student, Master of Law, P.G.Department, Tamilnadu Dr.Ambedkar Law University,

Item No. 84 – Duties of excise on tobacco and other goods manufactured or produced in India except:-

a) Alcoholic liquors for human consumption.

b) Opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

Concurrent list

List III of Seventh Schedule called ‘Concurrent List’, includes matters where both Central Government and State Government can make laws. This list includes items like Criminal law and Procedure, Trust and Trustees, Civil procedures, economic and social planning, trade unions, charitable institutions, price control, factories, etc.. Items in this list relevant to export and import are as follows:

Item No. 19 – Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

Item No. 33 – Trade and commerce in, and the production, supply and distribution of, -

a) the products of any industry where the control of such industry by the union is declared by parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

b) Foodstuffs, including edible oilseeds and oils;

c) Cattle fodder, including oilcakes and other concentrates;

d) Raw cotton, whether ginned or unginned, and cotton seed; and

e) Raw jute.

1.3.2 IMPORT AND EXPORT

‘Imports’ means bringing of goods to India from outside India. In other words, it refers to the goods which are produced abroad by foreign producers and are used in the domestic economy in order to cater to the needs of the domestic consumers. India includes the territorial waters of India which extend up to 12 nautical miles into the sea to the coast of India. Similarly, ‘exports’ of goods means taking goods from India. It refers to the goods which are produced domestically and are used to cater to the needs of the consumers in other countries. The country which is purchasing the goods is known as the importing country and the country which is selling the goods known as exporting country. The traders involved in such transaction are importers and exporters respectively.

In India, exports and imports are regulated by Foreign Trade (Development and Regulation) Act, 1992, which replaced the Imports and Exports (control) Act, 1947, and gave the Government of India enormous

powers to control it. Besides the FTDR Act, there are some other laws which control the export and import of goods. These include:-
a. Tea Act, 1953
b. Coffee Act, 1942
c. The Rubber Act, 1947
d.The Marine Products Export Development Authority Act, 1972
e.The Enemy Property Act, 1968
f. The Export (Quality Control and Inspection) Act, 1963.
g. The tobacco Board Act, 1975[3]

1.3.3 IMPORT RESTRICTIONS

Control over the import of the goods in to India is exercised by the Import Trade Control Organization, which functions under the ministry of commerce. This organization is supervised by the director General of foreign trade station at New Delhi, who is assisted by Additional and Joint director general and by other licensing authorities at various centers. Current import policy is embodied in the export and import policy book out by the DGFT.

Customs Act, 1962

Section 12(1) of the customs Act is the charging section which provides for imposition of a duty called Customs duty levied as per the customs Tariff act 1975, or any other law for the time being in force on the goods imported in to India or exported out of India. The objects of Customs Act are
i) To regulate imports and exports.
ii) To protect domestic industries from dumping.
iii) To collect revenue in the form of customs duty and indirect tax.
iv) To assist allied legislations such as FTDR and FEMA.

By virtue of the power conferred under Sec156 of the Customs Act 1962 Central government is empowered to make rules consistent with the provisions of the Act. Similarly by virtue of its powers conferred under Sec157 of the Act, the Central Board of Excise and Customs (CBEC) has been empowered to frame regulations (Customs House Agent Regulations)

1.3.4 EXPORT & IMPORT PROHIBITIONS

Sec11 of the Customs Act 1962 gives powers to central government to prohibit import or export of goods. Such a prohibition can be absolute or conditional. Absolute prohibition means an importer is totally prohibited in importing/exporting the subject goods. Some of the goods prohibited from time to time are narcotic drugs, explosives, live or dead animals /birds, arms and ammunition, counterfeit currency notes. On the other hand, conditional prohibition would mean that the prohibition would mean that the prohibition would mean that the prohibition is subject to certain conditions imposed. A conditional prohibition would attract in a case where the importer is prohibited in selling/trading the imported goods but can only use the same as a raw material for manufacture. Some item like wool, turmeric, onion, black pepper, tea, etc… are allowed to be exported only after they are graded by designated authorities.

In terms of Sec.11 (2) of the Customs Act, 1962, the prohibition may among other things relate to the following:

i) Maintenance of security of India.
ii) Prevention of smuggling
iii)Conservation of foreign exchange and safeguarding balance of payments.
iv) Prevention of serious injury to domestic production of goods.
v) Protection of national treasures.
vi) Maintenance of public order and standards of decency and morality.
vii) Protection of IPR (Patent/Trademark/Copyright)
viii) Any other matter conducive to the interest of general public.

Sec.2 (33) of the act defines prohibited goods means any goods the import or export of which is subject to any prohibition under this act or any other law for time being in force but doesn’t include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with.

Therefore, the prohibition under Customs Act applies to prohibition under any other law in India.

a) Ancient Monument Prevention Act prohibits/ restricts antiquities
b) Arms and ammunition cannot be imported or exported without licensee.
c) Wildlife Act prohibits certain exports- ‘red sandal wood ‘(which are used in Middle East countries for making musical instruments)
d) Environment Protection Act prohibits export of some items.

At the time of import of goods the customs authorities will first check whether the items imported is prohibited / restricted or subject to conditional import, before allowing clearance of the goods. Similarly at the time export also the goods are given ‘let export order’ only after they are checked with the reference to restrictions/prohibitions. If such goods are attempted to be smuggled the goods are liable to seizure/confiscation and the offender liable to penal action including arrest /prosecution under the Customs Act.

The word 'confiscation' implies appropriation consequential to seizure. The essence and concept of the confiscation is that after confiscation the property of the confiscated goods vest with the central govt.Sec111 of the Act provides for confiscation of improperly imported goods. The goods brought from a place outside India shall be liable for confiscation. Sec.111 (d) says "any goods which are imported or attempted to be imported or are brought within the Indian Customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this act or any other law for the time being in force.Sec113 of the Act deals with confiscation of goods attempted to be improperly exported . The export goods shall be liable for confiscation under sec 113 (d) says "any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported contrary to any prohibition imposed by or under this Act or any other law for time being in force.

COFEPOSA, 1974

Conservation of Foreign Exchange and prevention of smuggling Activities Act (COFEPOSA) was passed in 1974 when foreign exchange position in India was bleak and smuggling was beyond control. In view of recent liberalization, the Act has lost its significance.

The Act gives wide powers to executive to detain a person on mere Suspicion of smuggling (the draconian provisions of the act can be compared with provisions of TADA, where a person can be incarnated in jail merely for possessing a illegal weapon and having acquaintances with some underworld elements, without any proof of direct involvement in terrorist activities). The acts like COFEPOSA, TADA, etc… are criticized on the ground that they violate basic human rights. Freedom of a man can be taken away under such Acts, without judicial scrutiny and safeguards. The act has been given special protection by including the same in the 9th schedule to constitution.The validity of COFEPOSA particularly section 5A and SAFEMA smugglers and foreign Exchange Manipulators (forfeiture of property) Act 1976, have been upheld *in Attorney General of India v. Amaratlal Prajivandas* [2]. A 9 member bench SC order. Thus, individual civil liberties can be curtailed for national security and in national interest.

Under provisions of the act, a Government officer, not below the rank of Joint Secretary in case of central Government and Secretary in case of State Government, who is specifically authorized by central or state

[2] AIR 1994 SC 2179

government for that purpose, is authorized to order detention of a person (including a foreigner) with a view to prevent him from acting in any manner prejudicial to conservation or augmentation of foreign exchange, or to prevent him from smuggling or abetting smuggling of goods, or transporting, keeping concealing or dealing in smuggling goods or harboring persons engaged in smuggling of goods. (section.3). where an order of detention is made by state government officer, it should be reported to central government within 10 days. (Section.3 (2)).When detention is ordered by central government, central govt. is appropriate government. When detention is ordered by state government, that govt. is appropriate government. The significance of this definition is that the 'Appropriate government' has to make a reference to advisory board formed for the purpose of COFEPOSA and take action as per decision of advisory board. Appropriate government also has powers to revoke a detention, release a person temporarily, etc…

SAFEMA, 1976

Another act relevant to COEPOSA is SAFEMA – smugglers and Foreign Exchange Manipulators (Forfeiture of property) Act, 1976. The act applies to persons convicted under customs Act, FERA and to those detained under COFEPOSA. The purpose of the act is to forfeit the illegally acquired properties of the smugglers and foreign exchange manipulators. Property can be forfeited merely on the ground that he is detained under COFEPOSA. However, in case of customs and FERA, property can be forfeited only if a person is convicted under these Acts. An appellate tribunal has also been formed for this purpose. COFEPOSA is dreaded Act similar to TADA. It permits detention of a person even without a charge. Since the powers are extraordinary, generally courts are strict about the conditions prescribed in respect of detention.

1.3.5 FOREIGN TRADE (DEVELOPMENT AND REGULATION) ACT, 1992

The FTDR Act is designed to develop and regulate foreign trade by facilitating imports in to India, and augmenting exports from India, and for matters connected therewith. The salient features of the Act are as follows;

- It has empowered the Central Government to make provisions for development and regulation of foreign trade by facilitating imports into, and augmenting exports from India and for all matters connected therewith or incidental thereto.

- The Central Government can prohibit, restrict and regulate exports and imports, in all or specified cases as well as subject them to exemptions.
- It authorizes the Central Government to formulate and announce an **Export and Import (EXIM) Policy** and also amend the same from time to time, by notification in the Official Gazette.
- It provides for the appointment of a Director General of Foreign Trade by the Central Government for the purpose of the Act. He shall advise Central Government in formulating export and import policy and implementing the policy.
- Under the Act, every importer and exporter must obtain a '**Importer Exporter Code Number' (IEC)** from Director General of Foreign Trade or from the officer so authorized.
- The Director General or any other officer so authorized can suspend or cancel a licensee issued for export or import of goods in accordance with the Act. But he does it after giving the licensee holder a reasonable opportunity of being heard.

Penalty

Export or import in violation of provisions of the act, rules or policy is an offence. Penalty up to five times the value of goods can be imposed. The contravening goods and conveyance carrying the goods are liable to confiscation. The goods and conveyances confiscated can be released by paying redemption charges equal to market value of such goods or conveyance. Conveyance will not be confiscated if it is owner proves that the conveyance was used without his knowledge or he took reasonable precautions against its misuse. Penalty and confiscation can be ordered by ‘Adjudicatory authority’.

Appeal

Appeal against the order of DGFT for refusing of suspending or cancelling code number or licensee or imposing penalty can be filed within 45 days with prescribed authority. Appeal can be filed only on payment of penalty imposed, unless appellate authority dispense with such pre deposit (Section.15 of FTDR). Central Government can call and examine any records and pass revision orders in some cases (section.16 of the act).

Settlement

A person can opt for settlement by admitting contravention in the following circumstances.

a. Contravention was without willful mistake or without any collusion, fraud or without intention to cause loss of foreign exchange.

b. Person importing has not misutilised the imported goods, but condition of ‘Actual user’ or ‘Export obligation’ have not been satisfied. In such cases, the adjudicatory authority can order settlement by determining the amount payable by the person. Settlement order of adjudicatory authority is final (Rule 16 of Foreign Trade (regulation) Rules, 1993).

1.3.6 EXEMPTION FROM RESTRICTIONS:

Imports by Central or State Government, Statutory corporations, transshipments, baggage’s imported as per baggage rules, goods in transit, goods imported by UN or Ford foundation, import from exhibition etc… are exempted from import restrictions contained in FTDR A ct. Similarly, exports by central/state Governments, goods as ships stores, goods in transit, etc… are exempted from provisions of Foreign Trade (Regulation) Rules, 1993 (Exemption order) dated 30.12.1993.

Foreign Exchange Regulation Act, 1973

FERA has its origin at the time of Indian Independence. In the beginning, it was a temporary arrangement to control the flow of foreign exchange. In 1957, the act was made permanent. As the industrialization grew in India, there was increase in foreign exchange investment. As a result, there arose a need to protect it. Accordingly in 1973, the Foreign Exchange Regulation was amended. The very strict laws of the older version of FERA were removed after Amendment.Section 18 of FERA dealt with the export of goods. This section was very comprehensive and lengthy. It constituted a complete code which covered all aspects of exports, including the repatriation of the export proceeds. Section 18(3) contained an adverse presumption about the exporter not having taken reasonable steps to repatriate the export proceeds.

Foreign Exchange Management Act, 1999

The foreign exchange regulation Act 1973 was reviewed in the year 1993 as a part of ongoing process of economic liberalization in foreign investment and foreign trade. Since 1993 there has been substantial increase in our country’s foreign exchange reserves, growth in foreign trade, realization of tariff, liberalization in investment, increased access to external commercial borrowing by Indian companies. Therefore, the government repealed the FERA and in its place brought FEMA, 1999.

Section. 7, of the FEMA deals with export of goods and services. Section**7.** (1) Every exporter of goods shall—
(*a*) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and

correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India;

(*b*) Furnish to the Reserve Bank such other information as may be required by the

Reserve Bank for the purpose of ensuring the realization of the export proceeds by

Such exporter.

Section.7 (3) exporters of service shall furnish in the prescribed format the true and correct particulars in relation to payment of such services. The SOFTEX form is filed by exporters of services under this provision, as unlike the physical export of goods where the exporter has to file GR form before the customs authorities, the export takes place through web/internet where the customs are not involved. Rule 9 of FEM (Export of goods) Regulations 2000 – exporter to furnish value of goods/software realized within 6 months of export. 2nd proviso to Rule 9, RBI can extend time on sufficient/reasonable cause being shown. The exporter to produce evidence for reasonable and positive steps taken to realize the proceeds. When reasonable efforts are made no penalty shall be levied under FEMA.

Sec.13 deals with Penalties:

Sec.13 (1) says if any person contravenes provisions of the act/rules/regulations/notifications/conditions of RBI…

a) Upon adjudication of the contravention is liable to pay penalty up to thrice the sum involved (if quantifiable).

b) Upon rupees two lakhs if not quantifiable.

If the penalty is not paid by the person, then he will be liable to Civil Imprisonment.

Government of India has taken stringent measures to control and regulate the import and export of goods till its independence. FERA was enacted in 1947, in order to control the flow of foreign exchange as a temporary measure; and in 1957 that act was made permanent but, FERA was not in accordance with pro – liberalization policies of government in 1990's. so FERA was repealed by FEMA in order to manage the foreign exchange, which also deals with regulation of export of goods and services.

Our founding fathers of Indian constitution want to regulate the export and import of goods, so they impose various restrictions in Union, State and Concurrent list. In 1947, export and import control act was enacted. Later on it was repealed by Foreign Trade (Development and Regulation) Act, 1992. This act controls the export and import by giving EIC to exporters and importers. The customs act, 1962 prohibits import or export of certain goods by empowering the central government and also impose duties on export or import of goods.

All the above mentioned acts are of great importance. If the provisions of these acts are utilized to an optimum effect, then the export and in turn our economy will also be improved.

1.4 SUMMARY

Import and export of goods play a vital role in all the economy. That too, India is a developing country, the role of export and import are of greater emphasis. There must be a free flow of exports and imports in order to improve the economy. But, the free flow should not affect the economy. So, the control over import and export of goods become the need of the hour. Regulation mandated by a state attempts to produce outcome which might not otherwise occur, produce or prevent outcomes in different places to what might otherwise occur, or produce or prevent outcomes in different timescales than would otherwise occur. In this way, regulations can be seen as implementations artifacts of policy statements. The economics of imposing or removing regulations relating to markets is analyzed in regulatory economics.

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India decided to follow Russian model of 'controlled economy' and 'leading role to public sector'. In the basic scheme of constitution, broadly, aspects of law and order, agriculture, public health etc… are looked after by the State Governments. Article 246 of Indian Constitution indicates bifurcation of powers to make laws, between Union Government and State Governments. Parliament has exclusive powers to make laws, between Union Government and State Governments. Parliament has exclusive powers to make laws in respect of matters given in List I of the Seventh Schedule of the Constitution (called Union List). List II (State List) contains items under the jurisdiction of States. List III (Concurrent List) contains items where both Union and State Governments can exercise power. Imports' means, bringing into India, of goods from a place outside India. In other words, it refers to the goods which are produced abroad by foreign producers and are used in the domestic economy in order to cater to the needs of the domestic consumers. India includes the territorial waters of India which extend up to 12 nautical miles into the sea to the coast of India. Similarly, 'exports' of goods means, taking goods means, taking goods from India. It refers to the goods which are produced domestically and are used to cater to the needs of the consumers in other countries. The country which is purchasing the goods is known as the importing country and the country which is selling the goods known as exporting country. The traders involved in such transaction are importers and exporters respectively.

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i) To regulate imports and exports.

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v) Protection of national treasures.

vi) Maintenance of public order and standards of decency and morality.

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viii) Any other matter conducive to the interest of general public.
Sec.2 (33) of the act defines prohibited goods means any goods the import or export of which is subject to any prohibition under this act or any other law for time being in force but doesn't include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with.
Therefore, the prohibition under Customs Act applies to prohibition under any other law in India.
a) Ancient Monument Prevention Act prohibits/ restricts antiquities
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c) Wildlife Act prohibits certain exports- 'red sandal wood '(which are used in Middle East countries for making musical instruments)
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Conservation of Foreign Exchange and prevention of smuggling Activities Act (COFEPOSA) was passed in 1974 when foreign exchange position in India was bleak and smuggling was beyond control. In view of recent liberalization, the Act has lost its significance.
The Act gives wide powers to executive to detain a person on mere Suspicion of smuggling (the draconian provisions of the act can be compared with provisions of TADA, where a person can be incarnated in

jail merely for possessing a illegal weapon and having acquaintances with some underworld elements, without any proof of direct involvement in terrorist activities). The acts like COFEPOSA, TADA, etc… are criticized on the ground that they violate basic human rights. Freedom of a man can be taken away under such Acts, without judicial scrutiny and safeguards. The act has been given special protection by including the same in the 9th schedule to constitution. The validity of COFEPOSA particularly section 5A and SAFEMA smugglers and foreign Exchange Manipulators (forfeiture of property) Act 1976, have been upheld *in Attorney General of India Vs. Amaratlal Prajivandas*[3]*.* A 9 member bench SC order. Thus, individual civil liberties can be curtailed for national security and in national interest. Under provisions of the act, a Government officer, not below the rank of Joint Secretary in case of central Government and Secretary in case of State Government, who is specifically authorized by central or state government for that purpose, is authorized to order detention of a person (including a foreigner) with a view to prevent him from acting in any manner prejudicial to conservation or augmentation of foreign exchange, or to prevent him from smuggling or abetting smuggling of goods, or transporting, keeping concealing or dealing in smuggling goods or harboring persons engaged in smuggling of goods. (section.3). where an order of detention is made by state government officer, it should be reported to central government within 10 days. (Section.3 (2)). When detention is ordered by central government, central govt. is appropriate government. When detention is ordered by state government, that govt. is appropriate government. The significance of this definition is that the 'Appropriate government' has to make a reference to advisory board formed for the purpose of COFEPOSA and take action as per decision of advisory board. Appropriate government also has powers to revoke a detention, release a person temporarily, etc… Another Act relevant to COEPOSA is SAFEMA – smugglers and Foreign Exchange Manipulators (Forfeiture of property) Act, 1976. The act applies to persons convicted under customs Act, FERA and to those detained under COFEPOSA. The purpose of the act is to forfeit the illegally acquired properties of the smugglers and foreign exchange manipulators. Property can be forfeited merely on the ground that he is detained under COFEPOSA. However, in case of customs and FERA, property can be forfeited only if a person is convicted under these Acts. An appellate tribunal has also been formed for this purpose. COFEPOSA is dreaded Act similar to TADA. It permits

[3] AIR 1994 SC 2179

detention of a person even without a charge. Since the powers are extraordinary, generally courts are strict about the conditions prescribed in respect of detention.

The FTDR Act is designed to develop and regulate foreign trade by facilitating imports in to India, and augmenting exports from India, and for matters connected therewith. The salient features of the Act are as follows;

- It has empowered the Central Government to make provisions for development and regulation of foreign trade by facilitating imports into, and augmenting exports from India and for all matters connected therewith or incidental thereto.
- The Central Government can prohibit, restrict and regulate exports and imports, in all or specified cases as well as subject them to exemptions.
- It authorizes the Central Government to formulate and announce an **Export and Import (EXIM) Policy** and also amend the same from time to time, by notification in the Official Gazette.
- It provides for the appointment of a Director General of Foreign Trade by the Central Government for the purpose of the Act. He shall advise Central Government in formulating export and import policy and implementing the policy.
- Under the Act, every importer and exporter must obtain a '**Importer Exporter Code Number' (IEC)** from Director General of Foreign Trade or from the officer so authorized.
- The Director General or any other officer so authorized can suspend or cancel a licensee issued for export or import of goods in accordance with the Act. But he does it after giving the licensee holder a reasonable opportunity of being heard.

Export or import in violation of provisions of the act, rules or policy is an offence. Penalty up to five times the value of goods can be imposed. The contravening goods and conveyance carrying the goods are liable to confiscation. The goods and conveyances confiscated can be released by paying redemption charges equal to market value of such goods or conveyance. Conveyance will not be confiscated if it is owner proves that the conveyance was used without his knowledge or he took reasonable precautions against its misuse. Penalty and confiscation can be ordered by ‘Adjudicatory authority’ .Appeal against the order of DGFT for refusing of suspending or cancelling code number or licensee or imposing penalty can be filed within 45 days with prescribed authority. Appeal can be filed only on payment of penalty imposed, unless appellate authority dispense with such pre deposit (Section.15 of FTDR). Central Government can call and examine any records and pass revision orders in some cases (section.16 of the act).

A person can opt for settlement by admitting contravention in the following circumstances.

a. Contravention was without willful mistake or without any collusion, fraud or without intention to cause loss of foreign exchange.
b. Person importing has not misutilised the imported goods, but condition of ‘Actual user’ or ‘Export obligation’ have not been satisfied. In such cases, the adjudicatory authority can order settlement by determining the amount payable by the person. Settlement order of adjudicatory authority is final (Rule 16 of Foreign Trade (regulation) Rules, 1993).
The foreign exchange regulation Act 1973 was reviewed in the year 1993 as a part of ongoing process of economic liberalization in foreign investment and foreign trade. Since 1993 there has been substantial increase in our country’s foreign exchange reserves, growth in foreign trade, realization of tariff, liberalization in investment, increased access to external commercial borrowing by Indian companies. Therefore, the government repealed the FERA and in its place brought FEMA, 1999.

Section. 7, of the FEMA deals with export of goods and services. Section**7.** (1) Every exporter of goods shall—
(*a*) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India;
(*b*) furnish to the Reserve Bank such other information as may be required by the
Reserve Bank for the purpose of ensuring the realization of the export proceeds by
such exporter.Section.7(3) exporters of service shall furnish in the prescribed format the true and correct particulars in relation to payment of such services. The SOFTEX form is filed by exporters of services under this provision, as unlike the physical export of goods where the exporter has to file GR form before the customs authorities, the export takes place through web/internet where the customs are not involved. Rule 9 of FEM (Export of goods) Regulations 2000 – exporter to furnish value of goods/software realized within 6 months of export. 2nd proviso to Rule 9, RBI can extend time on sufficient/reasonable cause being shown. The

exporter to produce evidence for reasonable and positive steps taken to realize the proceeds. When reasonable efforts are made no penalty shall be levied under FEMA.

1.5 SUGGESTED READINGS

1. Foreign Trade (Development and Regulation) Act, 1992.
2. Constitution of India.
3. http://en.wikipedia.org/wiki/regulation access on date - 02 Apr. 2012.
4.http://www.business.gov.in/growing_business/imports_exports.php access on date - 02 Apr 2012.

1.6 TERMINAL QUESTIONS

1. How Export and Import policy of India is reflected globally?
2. Describe the constitutional protection to exporters and importers
3. What is the relationship between the policy and law of export and import?

LL.M. Part-2

Subject: Law of Export Import Regulation

Block I- Introduction; the Basic Needs of Export and Import Trade.
Unit-2- Impact of Regulation on Economy

STRUCTURE

2.1 INTRODUCTION

The role of an effective regulatory regime in promoting economic growth and development has generated considerable interest among researchers and practitioners in recent years (e.g. World Bank, 2004). Regulation can take many forms and the form of regulation policy adopted in developing countries has shifted over time[4] From the 1960s to the 1980s, market failure was used to legitimize direct government involvement in productive activities in developing countries, by promoting industrialization through import substitution, investing directly in industry and agriculture, and by extending public ownership of enterprises. However, following the apparent success of market liberalization programmers in some developed countries, and the evidence of the failure of state-led economic planning in developing ones[5] the role of state regulation was redefined and narrowed to that of ensuring an undistorted policy environment in which efficient markets could operate. Deregulation was widely adopted, often as part of structural adjustment programmes, with the aim of reducing the "regulatory burden" on the market economy. Privatisation and the more general process of economic liberalisation in developing countries have produced their own problems and failures and have resulted in the current focus on the regulatory state[6]. The regulatory state model implies leaving production to the private sector where competitive markets work well and using government regulation where significant market failure exists[7]. Arguably, however, the performance of the new regulatory state remains under researched, especially in the context of developing countries with their own peculiar economic and social problems and institutional characteristics. Building effective regulatory structures in developing countries is not simply an issue of the technical design of the regulatory instruments, it is also concerned with the quality of supporting regulatory institutions and capacity[8].Many of the institutions that support markets are publicly provided, and the effectiveness of these regulatory institutions will be an important determinant of how well markets function. The quality of regulatory governance will affect regulatory outcomes, which in turn can be expected to impact on economic growth. This paper explores the role of regulation in economic growth using an

[4].Minogue, 2005.
[5].World Bank, 1995.
[6].Majone, 1994, 1997.
[7].World Bank, 2001: 1.
[8].World Bank, 2002: 152.

econometric model. More precisely, it assesses through econometric modeling the impact of variations in the quality of regulation on economic performance. Although earlier studies have looked at governance as a cause of cross-country productivity or income differences[9], this paper differs in concentrating on regulation rather than wider governance issues. The results confirm that "good" regulation is associated with higher economic growth. The rest of the paper is organized as follows. Section 2 reviews issues in the literature pertinent to the debate on the role of regulation in economic growth, before turning to regulatory measures and proxies for the quality of regulation. In section 3 the models usedare presented. Section 4 deals with a descriptive analysis of the data and reports the regression results. The results confirm that the quality of state regulation impacts positively on economic growth. Finally, Section 5 provides conclusions and the implications for development policy.

2.2 OBJECTIVES

The objective of this lesson is to ascertain the regulatory mechanism and theories of regulation on economy, regulatory quality, development outcomes and measures of regulatory Governance. Further an attempt has been made to study all the relevant factors for the study.

2.3 SUBJECT

2.3.1 Regulation Theory

The theory of economic regulation developed from the nineteenth century and the literature is now vast[10]. The case for economic regulation is premised on the existence of significant market failure resulting from economies of scale and scope in production, from information imperfections in market transactions, from the existence of incomplete market sand externalities, and from resulting income and wealth distribution effects. It has been suggested that market failures may be more pronounced, and therefore the case for public regulation is stronger,

[9].Olson, et al.,1998; Kauffman and Kraay, 2002.
[10].for recent reviews, see Laffont and Tirole, 1993, 2000; Levy and Spiller, 1994;Newbery, 1999)

in developing countries[11]. More recent theoretical contributions to the regulation literature have provided a model of regulation for network industries that recognizes the particular structural and institutional characteristics of developing countries and have highlighted the role of effective regulation in achieving equitable and sustainable expansion of infrastructure services in the poorer countries of the world[12].However, regulation of markets may not result in a welfare improvement as compared to the economic outcome under imperfect market conditions. In particular, information asymmetries can contribute to imperfect regulation. The regulator and the regulated can be expected to have different levels of information about such matters as costs, revenues and demand. The regulated agent holds the information that the regulator needs to regulate optimally and the regulator must establish rules and incentive mechanisms to coax this information from the private sector. Given that it is highly unlikely that the regulator will receive all of the information required to regulate optimally to maximize social welfare, the results of regulation, in terms of outputs and prices remain "second best" to those of a competitive market, which centers attention on barriers to entry[13].Shapiro and Willing (1990) argue that state ownership provides more information to regulators than private ownership, so contracting should be less problematic when the state both owns and regulates. However, state ownership is associated with inadequate incentives to gather and use this information to maximize economic welfare[14]. In other words, there tends to be a tradeoff between state ownership reducing the information asymmetries and hence transaction costs of regulation and the relative incentives under state control and private ownership for agents to maximize economic efficiency[15].Welfare-improving regulation assumes that the regulatory authority's actions are motivated by the public interest. This has been criticized by public choice theorists who argue that individuals are essentially self-interested in or out of the public arena and it is necessary, therefore, to analyze the regulatory process as the product of relationships between different groups[16]. This has been refined in the concept of "regulatory capture", which involves the regulatory process becoming biased in favor of particular interests. In the extreme case, the regulatory

[11].Stiglitz 1998.
[12].Laffont, 1999; 2005.
[13].Djankov et al., 2002.
[14].Hayek, 1945.
[15].Grossman and Hart, 1986;Sappington and Stiglitz, 1987; Shapiro and Willig, 1990; Yarrow, 1999
[16].Buchanan, 1972.

capture literature concludes that regulation *always* leads to socially sub-optimal outcomes because of "inefficient bargaining between interest groups over potential utility rents"[17]. In the Chicago tradition of regulatory capture[18], regulators are presumed to favor producer interests because of the concentration of regulatory benefits and diffusion of regulatory costs, which enhances the power of lobbying groups as rent seekers[19].Regulation is also subject to "political capture"; indeed, political capture may be a much greater threat than capture by producer groups outside of the political system. Where political capture occurs, the regulatory goals are distorted to pursue political ends. Under political capture, regulation becomes a tool of self-interest within government or the ruling elite[20]. More generally, it is to be expected that both the process and outcomes of a regulatory regime will be determined by the specific institutional context of an economy, as reflected in its formal and informal rules of economic transacting (North, 1990). Besetting the "rules of the game", institutions impact on economic development[21]. Economic development is seen not simply as a matter of amassing economic resources in the form of physical and human capital, but as a matter of "institution building" so as to reduce information imperfections, maximize economic incentives and reduce transaction costs. Included in this institution building are the laws and political and social rules and conventions that are the basis for successful market production and exchange. In particular, relevant modes of conduct in the context of the regulatory state might include probity in public administration, independence of the courts, low corruption and cronyism, and traditions of civic responsibility. "Institution building" including building a "good" regulatory regime is one of the most difficult problems facing developing countries and the transition economies at the present time[22].

2.3.2 Regulatory Quality and Development Outcomes

The outcome of a regulatory system can be assessed against the yardsticks of effectiveness and efficiency. Effective regulation achieves the social welfare goals set down by the government for the regulatory

17.Newbery, 1999: 134; also, Laffont, 1999b
18.Stigler, 1971; Peltzman, 1976.
19.Reagan,1987.
20.Stiglitz, 1998.
21.World Bank,2002; Rodriket. al., 2004.
22.Kirkpatrick and Parker, 2004.

authority. In developing countries, the social welfare objectives of regulation are likely to be not simply concerned with the pursuit of economic efficiency but with wider goals to promote sustainable development and poverty reduction. Efficient regulation achieves the social welfare goals at minimum economic costs. The economic costs of regulation can take two broad forms: (1) the costs of directly administering the regulatory system, which are internalized within government and reflected in the budget appropriations of the regulatory bodies; and (2) the compliance costs of regulation, which are external to the regulatory agency and fall on consumers and producers in terms of the economic costs of conforming with the regulations and of avoiding and evading them.[23]Regulatory quality can also be assessed in terms of the criteria for good governance.1 Parker(1999: 224) argues that a well-functioning regulatory system is one that balances accountability, transparency and consistency. Accountability requires the regulatory agencies to be accountable for the consequences of their actions, to operate within their legal powers, and to observe the rules of due process when arriving at their decisions (e.g. to ensure that proper consultation occurs). Transparency relates to regulatory decisions being reached in away that is revealed to the interested parties. The third process which provides regulatory legitimacy is consistency. Inconsistent regulatory decisions undermine public confidence in a regulatory system. Inconsistency leads to uncertainty for investors, which raises the cost of capital and may seriously damage the willingness to invest. Since political intervention tends to undermine regulatory consistency, and politicians may be prone to alter the regulatory rules of the game for short-term political advantage, consistency is a primary argument for some kind of "independent" regulator. This discussion suggests that the capacity of the state to provide strong regulatory institutions will be an important determinant of how well markets perform. An economy with a1developed institutional capacity is more likely to be able to design and implement effective regulation, which should contribute to improved economic growth. Weaknesses in institutional capacity to deliver 'good' regulation may be predicted to affect adversely economic development[24].Evidence on the quality of regulation in developing countries is limited though growing. But where research has occurred, the evidence suggests that the results of state regulation have been disappointing. A recent study of 13 Asian countries found that 80% of regulators had no access to training and regulatory offices were usually understaffed. The report concludes:"Asia's

[23].Guasch and Hahn, 1999.
[24].World Bank, 2002.

governments rely too much on under-equipped and unsupported independent regulators to carry out tasks that are beyond their capabilities"[25]. In Latin America there is often a lack of political support for independent regulation and a lack of commitment to maintaining regulatory independence (Ugaz, 2003). In the context of Africa, it was found that "regulation is being examined as part of individual sector initiatives, but these efforts are uncoordinated, and implementation is being left to follow privatization instead of being put in place concurrently"[26]. A similar pattern of regulatory weaknesses can be discerned in the evidence for individual countries. In India, regulatory structures are associated with acute failures in institution building and with a bureaucratic approach that curtails enterprise (Lanyi, 2000). South Africa's proliferation of regulatory bodies is associated with a lack of clarity about roles and responsibilities and with the adoption of policy-making roles independent of government (Schwella, 2002: 3). In Malawi, the electricity industry regulator remains closely connected to the state electricity industry, compromising any notion of real regulatory independence and encouragingcapture.2 In Sri Lanka, the policies governing the regulatory process are judged to have been *ad hoc* and based on short-term political interests, with deficiencies apparent at each stage of the process (Knight-John, 2002). Experiences in the transitional economies also demonstrate much variability in the performance of the newly established regulatory institutions (Cave and Stern, 1998). In recognition that not all is well, the World Bank (2001) has stressed the importance of "improving regulatory regimes and building institutions and capacity effectively to supervise the private sector". The Asian Development Bank (2000: 18) has also emphasized the need for improved regulation. Several papers have identified the causal effects of better governance on higher per captaincies in the long run, using regressions with instrumental variables on a cross-section of countries[27]. The causal chain between governance and economic outcome has also been examined. Some studies find that the quality of governance and institutions is important in explaining rates of investment, suggesting that one way in which better governance can improve economic performance is by improving the climate for capital creation (World Bank, 2003; Kirkpatrick, Parker and Zhang, forthcoming,). Olson et al. (1998) find that productivity growth is higher in countries with better institutions and quality of governance. Kauffman and Kraay (2002) reinforce these findings,

[25].Jacobs, 2004: 4.
[26].Campbell-White and Bhatia, 1998: 5.
[27]Barro, 1997; Hall and Jones, 1999; Kauffman and Kraay, 2002.

relating the quality of governance to economic outcomes using a data set covering 175 countries for the period 2000-01.

2.3.3 Measures of Regulatory Governance

The literature suggests, therefore, that the ability of the state to provide effective regulatory institutions will be an important determinant of how an economy performs. The major variable of interest is the quality of regulation. Other researchers have operationalised the broader concept of governance using two different groups of variables. The International Country Risk Guide (ICRG) data set is produced annually and covers three aspects of government – bureaucratic quality, law and order and corruption[28]. Each variable is measured on a points scale with higher points denoting better performance with respect to the variable concerned. The assessment is based on expert analysis from an international network and is subject to peer review. The ICRG variables have been used as proxies for the quality of governance in research[29].The second set of governance variables comprises a set of six aggregate indicators developed by the World Bank and drawn from 194 different measures.[30]These indicators are based on several different sources (including international organizations, political and business risk rating agencies, think tanks and non-governmental bodies) and a linear unobserved components model is used to aggregate these various sources into one aggregate indicator. The indicators are normalized with higher values denoting better governance. The six indicators provide a subjective assessment of the following aspects of a country's quality of governance:− Voice and accountability: respect for political rights and civil liberties, public participation in the process of electing policy makers, independence of media, accountability and transparency of government decisions.− Political instability: political and social tension and unrest, instability of government.− Government effectiveness: perceptions of the quality of public provision, quality of bureaucracy, competence of civil servants and their independence from political pressure, and the credibility of government decisions.− Regulatory quality: burden on business via quantitative regulations, price controls another interventions in the economy.− Rule of law: respect for law and order, predictability and effectiveness of the judiciary system, enforceability of contracts.− Control

[28].Political Risk Services,2002.
[29].Neumayer, 2002; Olsonet al., 1998.
[30]. Kauffman, Kraay and Mastruzzi2005.

of corruption: perceptions of the exercise of public power for private gain. The focus of this study is on regulation rather than governance. We therefore use the two Variables in the World Bank data set that come closest to capturing the quality of the outcome and process dimensions of regulation, namely the regulatory quality and government effectiveness indices. The regulatory quality index measures the regulatory burden on business associated with inefficient quantitative controls and can be taken as a proxy for the quality of the outcomes of applying regulatory instruments. The government effectiveness index measures the quality of public provision, competence of civil servants and the credibility of government decisions, and can therefore act as a proxy for the process dimensions (consistency, accountability, transparency) of regulatory governance. The objective of the empirical analysis reported below, in section 3, is to test for a causal link between regulation quality and economic performance. The approach is to adopt a growth accounting framework, where economic growth is used as the measure of economic performance and regulation is entered as an input in the production function. Neoclassical growth modeling began with the work of Solow (1956), who employed a neoclassical production function to explain economic growth in the USA during the first half of the twentieth century. Important assumptions of this approach are constant returns to scale and diminishing returns to investment, which imply that for a given rate of saving and population growth economies move towards their steady-state growth path. This can be extended to differences in income levels between countries, to argue that in the long run income per capita levels will converge. A lack of empirical support for convergence and the presence of a large, unexplained “residual” factor in the function estimates have presented a major challenge to these models. The endogenous growth theory put forward by Roomer(1986) and Lucas (1988) led to renewed interest in economic growth analysis. An important advantage of endogenous over traditional growth models is that, through the assumption of constant or increasing returns to a factor input, in particular human capital, it is possible to explain a lack of growth and income convergence between countries and to account more fully for the residual factor in Solow-type analyses. The “growth accounting” exercises, popularized by Barrow and others[31], fall within the generalized Solow-type growth model. An important characteristic of this approach is the inclusion of various indicators of economic structure. Most empirical research using this approach has found evidence of “conditional” convergence, where convergence is conditional on the level or availability of complementary

[31].Barro, 1991, 2000; Barro and Sala-i-Martin, 1992.

forms of investment, including human capital and a supportive policy environment. This suggests that the failure of developing countries to converge on the income levels of developed countries may be attributed, at least in part, to institutional factors.4 The importance of institutional capacity for the design and implementation of effective economic policy has been demonstrated in various empirical studies of cross-country growth, for example Sachs and Warner (1995) and Barro (2000). A similar approach is adopted in this study to examine the role of regulatory institutional capacity in accounting for cross-country variations in economic growth. An issue that needed to be addressed at the outset is causality. It could be argued that instead of regulatory quality determining economic growth, regulatory quality could be determined by the economy's growth rate. Economies that grow faster are able to generate higher levels of income and are therefore able to support the development of better institutions. Or, alternatively, there may be a level of simultaneity, in the sense that institutional quality generates more sustained economic growth, which in turn supports more and better regulatory institutions. The Granger causality test is commonly used in empirical work to establish the direction of causation. However, this test is sensitive to the length of lags of the variables used and therefore requires a relatively long time series dimension to be able to select the right length of lag and to be relatively confident about the conclusion drawn. Since the time dimension of our regulation data is limited, we are unable to apply the Granger causality test. Fortunately, there is a substantial literature that indicates that better governance leads to higher income rather than causation being in the opposite direction [32] implement an empirical procedure for testing for causation, which leads to the identification of strong positive causal effects running from better governance to higher per capita incomes and suggest that a one standard deviation improvement in governance leads to a two- to three-fold difference in income levels in the long run. The authors state, 'Some observers have argued that ….. there is a strong causal impact of income on governance. However, we argue that the existing evidence does not support a strong causal channel operating in this direction – most of the correlation between governance and per capita income reflects causation from the former to the latter'[33]. They conclude: "available evidence suggests that the causal impact of incomes on governance is small. Rather, the observed correlation between governance and per capita incomes primarily reflects causation in the other direction: better

[32].Olson et al 1998;Acemoglu et al 2000; Rodrik et al 2004). Kauffman et al (2005: 38)

[33].Kauffman et al 2005, p3.

governance raises per capita incomes”. However, we accept that because we are unable to rigorously demonstrate causation in our modeling, the results should be read with this caveat. Endogeneity is another issue that should be addressed. To cope with the possible problem of endogeneity, a 2SLS or IV technique can be used. But to to do this effectively requires good sets of instruments for the variables that potentially could suffer from this problem, including lags of the variables concerned. Once again, data availability, particularly relating to the regulatory proxies, does not permit an effective test for endogeneity. We accept that this remains a weakness.

2.4 SUMMARY

The role of an effective regulatory regime in promoting economic growth and development has generated considerable interest among researchers and practitioners in recent years (e.g. World Bank, 2004). Regulation can take many forms and the form of regulation policy adopted in developing countries has shifted over time From the 1960s to the 1980s, market failure was used to legitimize direct government involvement in productive activities in developing countries, by promoting industrialization through import substitution, investing directly in industry and agriculture, and by extending public ownership of enterprises. However, following the apparent success of market liberalization programmers in some developed countries, and the evidence of the failure of state-led economic planning in developing ones the role of state regulation was redefined and narrowed to that of ensuring an undistorted policy environment in which efficient markets could operate. Deregulation was widely adopted, often as part of structural adjustment programmes, with the aim of reducing the “regulatory burden” on the market economy. Privatisation and the more general process of economic liberalization in developing countries have produced their own problems and failures and have resulted in the current focus on the regulatory state. The regulatory state model implies leaving production to the private sector where competitive markets work well and using government regulation where significant market failure exists. Arguably, however, the performance of the new regulatory state remains under researched, especially in the context of developing countries with their own peculiar economic and social problems and institutional characteristics. Building effective regulatory structures in developing countries is not simply an issue of the technical design of the regulatory instruments; it is also concerned with the quality of supporting regulatory institutions and capacity. Many of the institutions that support markets are publicly provided, and the effectiveness of these regulatory institutions will be an important determinant of how well markets function. The quality of regulatory governance will affect regulatory outcomes, which in turn can be expected to impact on economic growth. This paper explores the role of regulation in economic growth using an econometric model. More precisely, it assesses through econometric modeling the impact of variations in the quality of regulation on economic performance. Although earlier studies have looked at governance as a cause of cross-country productivity or income differences, this paper differs in concentrating on regulation rather than wider governance issues. The results confirm that "good" regulation is associated with higher economic growth. The rest of the paper is organized as follows. Section 2 reviews issues in the literature pertinent to the debate on the role of regulation in economic growth, before turning to regulatory measures and proxies for the quality of regulation. In section 3 the models used are presented. Section 4 deals with a descriptive analysis of the data and reports the regression results. The results confirm that the quality of state regulation impacts positively on economic growth. Finally, Section 5 provides conclusions and the implications for development policy.The theory of economic regulation developed from the nineteenth century and the literature is now vast. The case for economic regulation is premised on the existence of significant market failure resulting from economies of scale and scope in production, from information imperfections in market transactions, from the existence of incomplete markets and externalities, and from resulting income and wealth distribution effects. It has been suggested that market failures may be more pronounced, and therefore the case for public regulation is stronger, in developing countries. More recent theoretical contributions to the regulation literature have provided a model of regulation for network industries that recognizes the particular structural and institutional characteristics of developing countries and have highlighted the role of effective regulation in achieving equitable and sustainable expansion of infrastructure services in the poorer countries of the world. However, regulation of markets may not result in a welfare improvement as compared to the economic outcome under imperfect market conditions. In particular, information asymmetries can contribute to imperfect regulation. The regulator and the regulated can be expected to have different levels of information about such matters as costs, revenues and demand. The regulated agent holds the information that the regulator needs to regulate optimally and the regulator must establish rules and incentive mechanisms to coax this information from the private sector. Given that it is highly unlikely that the regulator will receive all of the information required to regulate optimally to maximize social welfare, the results of regulation, in terms of outputs and prices remain "second best" to those of a competitive market, which centers attention on barriers to entry. Shapiro and Willig (1990) argue that state ownership provides more information to regulators than private ownership, so contracting should be less problematic when the state both owns and regulates. However, state ownership is associated with inadequate incentives to gather and use this information to maximize economic welfare. In other words, there tends to be a tradeoff between state ownership reducing the information asymmetries and hence transaction costs of regulation and the relative incentives under state control and private ownership for agents to maximize economic efficiency. Welfare-improving regulation assumes that the regulatory authority's actions are motivated by the public interest. This has been criticized by public choice theorists who argue that individuals are essentially self-interested in or out of the public arena and it is necessary, therefore, to analyze the regulatory process as the product of relationships between different groups. This has been refined in the concept of "regulatory capture", which involves the regulatory process becoming biased in favor of particular interests. In the extreme case, the regulatory capture literature concludes that regulation *always* leads to socially sub-optimal outcomes because of "inefficient bargaining between interest groups over potential utility rents". In the Chicago tradition of regulatory capture[34], regulators are presumed to favor producer interests because of the concentration of regulatory benefits and diffusion of regulatory costs, which enhances the power of lobbying groups as rent seekers. Regulation is also subject to "political capture"; indeed, political capture may be a much greater threat than capture by producer groups outside of the political system. Where political capture occurs, the regulatory goals are distorted to pursue political ends. Under political capture, regulation becomes a tool of self-interest within government or the ruling elite. The

literature suggests, therefore, that the ability of the state to provide effective regulatory institutions will be an important determinant of how an economy performs. The major variable of interest is the quality of regulation. Other researchers have operationalised the broader concept of governance using two different groups of variables. The International Country Risk Guide (ICRG) data set is produced annually and covers three aspects of government – bureaucratic quality, law and order and corruption. Each variable is measured on a points scale with higher points denoting better performance with respect to the variable concerned. The assessment is based on expert analysis from an international network and is subject to peer review. The ICRG variables have been used as proxies for the quality of governance in research. The second set of governance

[34]. Stigler, 1971; Peltzman, 1976.

variables comprises a set of six aggregate indicators developed by the World Bank and drawn from 194 different measures. These indicators are based on several different sources (including international organizations, political and business risk rating agencies, think tanks and non-governmental bodies) and a linear unobserved components model is used to aggregate these various sources into one aggregate indicator. The indicators are normalized with higher values denoting better governance. The six indicators provide a subjective assessment of the following aspects of a country's quality of governance:− Voice and accountability: respect for political rights and civil liberties, public participation in the process of electing policy makers, independence of media, accountability and transparency of government decisions. − Political instability: political and social tension and unrest, instability of government. − Government effectiveness: perceptions of the quality of public provision, quality of bureaucracy, competence of civil servants and their independence from political pressure, and the credibility of government decisions. − Regulatory quality: burden on business via quantitative regulations, price controls and other interventions in the economy.− Rule of law: respect for law and order, predictability and effectiveness of the judiciary system, enforceability of contracts. − Control of corruption: perceptions of the exercise of public power for private gain. The focus of this study is on regulation rather than governance. We therefore use the two Variables in the World Bank data set that come closest to capturing the quality of the outcome and process dimensions of regulation, namely the regulatory quality and government effectiveness indices. The regulatory quality index measures the regulatory burden on business associated with inefficient quantitative controls and can be taken as a proxy for the quality of the outcomes of applying regulatory instruments. The government effectiveness index measures the quality of public provision, competence of civil servants and the credibility of government decisions, and can therefore act as a proxy for the process dimensions (consistency, accountability, transparency) of regulatory governance. The objective of the empirical analysis reported below, in section 3, is to test for a causal link between regulation quality and economic performance. The approach is to adopt a growth accounting framework, where economic growth is used as the measure of economic performance and regulation is entered as an input in the production function. Neoclassical growth modeling began with the work of Solow (1956), who employed a neoclassical production function to explain economic growth in the USA during the first half of the twentieth century. Important assumptions of this approach are constant returns to scale and diminishing returns to investment, which imply that for a given rate of saving and population growth economies move towards their steady-state growth path. This can be extended to differences in income levels between countries, to argue that in the long run income per capita levels will converge. A lack of empirical support for convergence and the presence of a large, unexplained “residual” factor in the function estimates have presented a major challenge to these models. The endogenous growth theory put forward by Romer (1986) and Lucas (1988) led to renewed interest in economic growth analysis. An important advantage of endogenous over traditional growth models is that, through the assumption of constant or increasing returns to a factor input, in particular human capital, it is possible to explain a lack of growth and income convergence between countries and to account more fully for the residual factor in Solow-type analyses. The “growth accounting” exercises, popularized by Barro and others, fall within the generalized Solow-type growth model.

2.5 SUGGESTED READINGS

1. Olson, et al., 1998.
2. Kauffman and Kraay, 2002.
3. Grossman and Hart, 1986.
4. Sappington and Stiglitz, 1987.
5. Shapiro and Willig, 1990.
6. Barro and Sala-i-Martin, 1992.
7. Rodrik et al 2004). Kauffman et al (2005: 38)

2.6 TERMINAL QUESTIONS

1.Write an essay on regulation theory.
2. Discuss the different theories of economic regulation.
3.What is the regulatory governance? Discuss.
4.Differentiate between the regulatory quality and development outcomes in the light of regulatory theories.

LL.M. Part-2
Subject : Law of Export Import Regulation

Block I- Introduction; the Basic Needs of Export and Import Trade.
Unit-3- Goods; Services; Transportation

STRUCTURE

3.1 INTRODUCTION

Transport Economics is the study of the movement of people and goods over space and time. It is a branch of economics that deals with the allocation of resources within the transport sector. Historically, it has been thought of as the intersection of microeconomics and civil engineering, as shown on the right. However, if we think about it, traditional microeconomics is just a special case of transport economics, with fixed space and time, and where the good being moved is money, as illustrated on the right. Topics traditionally associated with Transport Economics include Privatization, Nationalization, Regulation, Pricing, Economic Stimulus, Financing, Funding, Expenditures, Demand, Production, and Externalities.

3.2 OBJECTIVES

The objective of this lesson is to ascertain the goods; services; transportation for the purpose of export and import. Further an attempt has been made to study all the relevant factors related with the export and import management and services.

3.3 SUBJECT

3.3.1 TRANSPORT OF GOODS

3.3.1.1 Date of Introduction:

01.01.2005 vide Notification Nos. 33/2004-S.T,34/2004-S.T, 35/2004-S.T., dated 03.12.2004.

3.3.1.2 Definition and Scope of Service

"Goods" has the meaning assigned to it in clause (7) of section 2 of the Sale of Goods Act, 1930 (3 of 1930).(Section 65(50) of Finance Act, 1994 as amended)“Goods carriage” has the meaning assigned to it in clause (14) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988).(Section 65(50a) of Finance Act, 1994 as amended)
“Goods transport agency” means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called.(Section 65(50b) of Finance Act, 1994 as amended)
“Taxable Service” means any service provided or to be provided to any person, by goods transport agency, in relation to transport of goods by road in a goods carriage.(Section 65 (105) (zzp) of Finance Act, 1994 as amended)

3.3.1.3 Classification of Taxable Services:

(1) The classification of taxable services shall be determined according to the terms of the sub-clauses (105) of section 65;
(2) When for any reason , a taxable service is prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-
(a) The sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;
(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;
(c) When a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merits consideration.(Sec.65A of Finance Act, 1994)

3.3.3.4 Valuation of taxable services for charging Service tax

(1) Service tax chargeable on any taxable service with reference to its value shall,—
(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.
(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.
(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.
(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.
Explanation.—For the purposes of this Section,—
(a) “Consideration” includes any amount that is payable for the taxable services provided or to be provided;
(b) “money” includes any currency, cheque, promissory note, letter of credit, draft, pay order, travelers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;
(c) “gross amount charged” includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and ‘book adjustment, and any amount credited or debited, as the case may be, to any account, whether called “Suspense account” or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.(Sec.67 of Finance Act,1994)

3.3.3.5 Clarifications issued by the Board:

Service tax on transport of goods by road-

In the Budget 2004, it was proposed to levy service tax on services provided by a goods transport agency in relation to transport of goods by road. For this purpose vide Finance (No.2) Act, 2004, a sub-clause (zzp) was inserted in clause105) of section 65 of the Finance Act, 1994, defining taxable service as any service provided to a customer, by a goods transport agency, in relation to transport of goods byroad in a goods carriage. The definitions of “goods carriage” and “goods transport agency” were also provided by inserting clauses (50a) and 50b) in the Finance Act, 1994 as follows: (50a) “goods carriage” has the meaning assigned to it in clause (14) of section 2 of the Motor Vehicles Act, 1988; and

(50b) “goods transport agency” means any commercial concern which provides service in relation to transport of goods by road and issues consignment note, by whatever name called. In pursuance to an agreement dated 27th August, 2004 between the Government and representatives of transport industry, a Committee was set up to look into appropriate mechanism/ modalities for collection and payment of service tax. It was instructed vide letter issued from F.No. B2/8/2004-TRU, dated 10.09.2004 [2004(171) E.L.T. T17] that no tax would be payable by the goods transport agency till such time the Government comes out with the relevant rules/ notifications prescribing the modalities for levy and collection(refer para 26 of the letter). The Committee has submitted its report on 27th October, 2004. Taking into account there commendations of the Committee, Notification Nos. 32 to 35/20040service Tax all dated3rd December, 2004 have been issued prescribing the modalities for levy and collection of service tax in respect of transport of goods by road. These notifications would be effective from 1st January, 2005.Notification no. 32/2004-Service Tax, dated 3rd December, 2004 [now Notificationno.1/2006-S.T., dated 1.3.2006] exempts service tax on seventy-five per cent of the gross amount charged in respect of taxable service provided by a goods transport agency to a customer, provided that credit of duty paid on inputs or capital goods [now input services also] used for providing such taxable service is not taken and benefit of Notification No.12/2003-service tax, dated 20th June, 2003 is not availed of by the goods transport agency. Notification No. 33/2004-Service Tax, dated 3rd December, 2004 exempts service tax on taxable service provided by the goods transport agency to a customer, in relation to transport of fruits, vegetables, eggs or milk by road in a goods carriage. Notification No. 34/2004-Service Tax, dated 3rd December, 2004 exempts the taxable service provided by a goods transport agency to a customer , from the whole of service tax, in such cases where,-

(i) the gross amount charged on consignments transported in a goods carriage does not exceed rupees on thousand five hundred’ or

(ii) the gross amount charged on an individual consignment transported on a goods carriage does not exceed rupees seven hundred fifty. For the purpose of this notification, “an individual consignment” would mean all goods transported by a goods transport agency by road in a goods carriage for a consignee. Notification No. 35/2004-Service Tax, dated 3rd December, 2004 prescribes that the person making payment towards freight would be liable to pay the service tax, in case the consignor or the consignee of the goods transported in one of the following,-

(i) Factory registered under or governed by the Factories Act;

(ii) Company established by or under the Companies Act;

(iii) Corporation established by or under any law;
(iv) Society registered under Societies Registration Act or similar law;
(v) Co-operative society established by or under any law;
(vi) Dealer of excisable goods, registered under the Central Excise Law; or
(vii) Any body corporate established, or a partnership firm registered, by or under anylaw.

3.3.3.6Transport Agency

The actual amount of service tax payable is 25% of the amount of freightage. 75% of amount of freight is provided as abatement, subject of the condition that no Convert credit of the duty paid has been availed of under Convert Credit Scheme. It has been represented that fulfillment of the condition of non-a ailment of Cenvat credit by the service provider is, at times, difficult to prove, when the service tax is required to be paid not by the service provider but by the consignor or consignee who pays the freight. Taking into account the special nature of the goods transport agency (GTA) service, it is being exempted from the payment of service tax unconditionally to the extent of 75% of the freight. In other words, service tax is required to be paid only on 25% of the freight irrespective of who pays the service tax. Simultaneously, the benefit of Cenvat credit has been withdrawn to GTA service under Cenvat Credit Scheme by deleting the said service from the scope of output service in the CENVAT Credit Rules, 2004. Henceforth, the person who is required to pay service tax under reverse charge method on GTA service can pay service tax on 25% of the freight unconditionally. Recipient of GTA service paying service tax under reverse charge method is no more required to prove non-a ailment of CENVAT credit by GTA service provider.[Vide M.F. (D.R) Letter D.O.F. No. 334/1/2008-TRU, dated 29.3.2008.]

(G) Goods Transport Agency service- Clarification on ancillary services and classification.

1.GTA provides service to a person in relation to transportation of goods byroad in a goods carriage. The service provided is a single composite service which may include various intermediary and ancillary services such as loading/ unloading, packing/ unpacking, transshipment, temporary warehousing. For the service provided, GTA issues a consignment note and the invoice issued by the GTA for providing the said service includes the value of intermediary and ancillary services. In such a case, whether the intermediary or ancillary activities are to be treated as part of GTA service and abatement should be extended to the charge for such intermediary or ancillary service?

Clarification: GTA provides a service in relation to transportation of goods by road which is a single composite service. GTA also issues consignment note. The composite service may include various intermediate and ancillary services provided in relation to the principal service of the road transport of goods. Such intermediate and ancillary services may include services loading/ unloading, packing/ unpacking, transshipment, temporary warehousing etc., which are provided in the course of transportation by road. These services are not provided as independent activities but are the means for successful provision of the principal service, namely, the transportation of goods by road. The contention that a single composite service should not be broken into its components and classified as separate services is a well-accepted principle of classification. As clarified earlier vide F.No. 334/4/2006-TRU, dated 28.2.2006 (para 3.2 and 3.3) [2006 (4) S.T.R..C30] and F.No.334/1/2008-TRU, dated 29.2.2008 (para 3.2 and 3.3) [2008 (9)S.T.R. C61], a composite service, even if it consists of more than one service, should be treated as a single service based on the main or principal service and accordingly classified. While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. The method of invoicing does not alter the single composite nature of the service and classification in such cases is based on essential character by applying the principle of classification enumerated in section 65A.Thus,ifany ancillary/ intermediate service is provided in relation to transportation of goods, and the charges, if any, for such services are included in the invoice issued by the GTA ,and not by any other person, such service would form part of GTA service and, therefore, the abatement of 75% would be available on it.

2. GTA providing service in relation to transportation of goods by road in a goods carriage also undertakes packing as an integral part of the service provided. It may be clarified whether in such cases service provided is to be classified under GT A service. Clarification: Cargo handling service [section 65(105)(zr)] means loading, unloading, packing or unpacking of cargo and includes the service of packing together with transportation of cargo with or without loading, unloading and unpacking. Transportation is not the essential character of cargo handling service but only incidental of the cargo handling service. Where service is provided by a person who is registered as GTA service provider and issues consignment note for transportation of goods by road in a goods carriage and the amount charged for the service provided is inclusive of packing, then the service shall be treated as GTA service and not cargo handling service.

3.Whether time sensitive transportation of goods by road in a goods carriage by a GTA shall be classified under courier service and not GTA service? Clarification: On this issue, it is clarified that so long as, (a) the entire transportation of goods is by road; and (b) the person transporting the goods issues a consignment note, it would be classified as ‘GTA Service’.[Based on CBE &C. Circular No. 104/7/2008-S.T., dated 6.8.2008-2008 (11) S.T.R.(C23)].

(H) Exemption & Exclusion:

1. **Exemption to Small Scale Service Providers:**

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts taxable services of aggregate value not exceeding Ten lakh* rupees in any financial year from the whole of the service tax livable thereon under section 66 of the said Finance Act:

Provided that nothing contained in this notification shall apply to,-

(i) taxable services provided by a person under a brand name or trade name, whether registered or not, of another person; or

(ii) such value of taxable services in respect of which service tax shall be paid by such person and in such manner as specified under sub-section (2) of section 68 of the said Finance Act read with Service Tax Rules,1994.

2. **The exemption contained in this notification shall apply subject to the following conditions, namely**:-

(i) the provider of taxable service has the option not to avail the exemption contained in this notification and pay service tax on the taxable services provided by him and such option, once exercised in a financial year, shall not be withdrawn during the remaining part of such financial year;

(ii) the provider of taxable service shall not avail the CENVAT credit of service tax paid on any input services, under rule 3 or rule 13 of the CENVAT Credit Rules, 2004 (herein after referred to as the said rules), used for providing the said taxable service, for which exemption from payment of service tax under this notification is availed of;

(iii) the provider of taxable service shall not avail the CENVAT credit under rule 3 of the said rules, on capital goods received in the premises of provider of such taxable service during the period in which the service provider avails exemption from payment of service tax under this notification;

(iv) the provider of taxable service shall avail the CENVAT credit only on such inputs or input services received, on or after the date on which the service provider starts paying service tax, and used for the provision of taxable services for which service tax is payable;

(v) the provider of taxable service who starts availing exemption under this notification shall be required to pay an amount equivalent to the CENVAT

credit taken by him, if any, in respect of such inputs lying in stock or in process on the date on which the provider of taxable service starts availing exemption under this notification;
(vi) the balance of CENVAT credit lying unutilized in the account of the taxable service provider after deducting the amount referred to in sub-paragraph (v), if any, shall not beutilised in terms of provision under sub-rule (4) of rule 3 of the said rules and shall lapse on the day such service provider starts availing the exemption under this notification;
(vii) where a taxable service provider provides one or more taxable services from one or more premises, the exemption under this notification shall apply to the aggregate value of all such taxable services and from all such premises and not separately for each premises or each services; and
(viii) the aggregate value of taxable services rendered by a provider of taxable service from one or more premises, does not exceed rupees *ten lakes in the preceding financial year.

3.**<u>Aggregatevalue</u>**

For the purposes of determining aggregate value not exceeding ten*lakh rupees, to avail exemption under this notification, in relation to taxable service provided by a goods transport agency, the payment received towards the gross amount charged by such goods transport agency under section 67 for which the person liable for paying service tax is as specified under subsection (2) of section 68 of the said Finance Act read with Service Tax Rules, 1994, shall not be taken into account.

3.3.2 SERVICES

Service Tax on Goods Transport from 1.7.2012 is on “Goods transport Agency” and “courier service” only. Goods transport freight for single consignee up to Rs.750 and for single vehicle up to Rs.1500 is exempt. Service tax has to be paid only on 25% of the gross amount paid to the Goods Transport Agency. For gross amount, octroi is not taken in account. The tax is payable on reverse charge basis by consignor or consignee who ever pays the freight, if the consignor or the consignee is factory, registered society, co-operative society, registered dealer, body corporate, partnership firm, LLP and association of persons. If the goods transport agency has charged service tax then no service tax is payable by consignor or consignee.

<u>Negative List of Services (Section 66D)</u>

Services by way of transportation of Goods-
(i) By road except the services of-

(A) A goods transportation agency; or
(B) A courier agency;

<u>Exempted Services Notification No.25/2012 ST dated 20.6.2012w.e.f 1.07.2012</u>

<u>Transport of Specified goods by Road</u>

Under this entry, exemption has been granted to services provided by a goods transport agency by way of transportation of –

(a) Fruits, vegetables, eggs, milk, food grains or pulses in a goods carriage;

(b) Goods where gross amount charged on a consignment transported in a single goods carriage does not exceed one thousand five hundred rupees; or

(c) Goods, where gross amount charged for transportation of all such goods for a single consignee in the goods carriage does not exceed rupees seven hundred fifty;

Similar exemptions existed earlier vide Notification No.34/2004-ST dated 3.12.2004 as amended by Notification No.4/2010-ST dated 27.02.2010 and Notification No.34/2004-ST dated 3.12.2004 (since rescinded)Also, transport of goods by road by goods transport agency also enjoys an abatement @ 75 per cent vide Notification No.26/2012-ST dated 20.6.2012 (earlier Notification No.1/2006-ST).

<u>New Scheme of Taxation of Services</u>

According to section 65(50b), goods transport agency means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called. Therefore, goods transport agency may be ---

• Any person who provides services in relation to transport of goods by road, and
• Issues consignment note, by whatever name called.

<u>Goods transport Agency should meet the following tests –</u>

(a) It should be any person

(b) It should provide service in relation to transport of goods

(c) Such transportation should be by road

(d) Agency should book the goods for transport

(e) It must issue a consignment note (or such document called by any other name) against the goods so booked and transported.

3.4 SUMMARY

"Goods" has the meaning assigned to it in clause (7) of section 2 of the Sale of Goods Act, 1930 (3 of 1930).(Section 65(50) of Finance Act, 1994 as amended) “Goods carriage” has the meaning assigned to it in clause (14) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988).(Section 65(50a) of Finance Act, 1994 as amended)

“Goods transport agency” means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called.(Section 65(50b) of Finance Act, 1994 as amended)

“Taxable Service” means any service provided or to be provided to any person, by a goods transport agency, in relation to transport of goods by road in a goods carriage. (Section 65 (105) (zzp) of Finance Act, 1994 as amended).In the Budget 2004, it was proposed to levy service tax on services provided by a goods transport agency in relation to transport of goods by road. For this purpose vide Finance (No.2) Act, 2004, a sub-clause (zzp) was inserted in clause 105) of section 65 of the Finance Act, 1994, defining taxable service as any service provided to a customer, by a goods transport agency, in relation to transport of goods by road in a goods carriage.The definitions of “goods carriage” and “goods transport agency” were also provided by inserting clauses (50a) and 50b) in the Finance Act, 1994 as follows:

(50a) “goods carriage” has the meaning assigned to it in clause (14) of section 2 of the Motor Vehicles Act, 1988; and

(50b) “goods transport agency” means any commercial concern which provides service in relation to transport of goods by road and issues consignment note, by whatever name called.

In pursuance to an agreement dated 27th August, 2004 between the Government and representatives of transport industry, a Committee was set up to look into appropriate mechanism/ modalities for collection and payment of service tax. It was instructed vide letter issued from F.No. B2/8/2004-TRU, dated 10.09.2004 [2004(171) E.L.T. T17] that no tax would be payable by the goods transport agency till such time the Government comes out with the relevant rules/ notifications prescribing the modalities for levy and collection (refer para 26 of the letter).The Committee has submitted its report on 27th October, 2004. Taking into account the recommendations of the Committee, Notification Nos. 32 to 35/20040service Tax all dated 3rd December, 2004 have been issued prescribing the modalities for levy and collection of service tax in respect of transport of goods by road. These notifications would be effective from 1st January, 2005.

Notification No. 34/2004-Service Tax, dated 3rd December, 2004 exempts the taxable service provided by a goods transport agency to a customer , from the whole of service tax, in such cases where,-

(i) the gross amount charged on consignments transported in a goods carriage does not exceed rupees on thousand five hundred' or

(ii) the gross amount charged on an individual consignment transported on a goods carriage does not exceed rupees seven hundred fifty. For the purpose of this notification, "an individual consignment" would mean all goods transported by a goods transport agency by road in a goods carriage for a consignee.

Notification No. 35/2004-Service Tax, dated 3rd December, 2004 prescribes that the person making payment towards freight would be liable to pay the service tax, in case the consignor or the consignee of the goods transported in one of the following,-

(i) Factory registered under or governed by the Factories Act;
(ii) Company established by or under the Companies Act;
(iii) Corporation established by or under any law;
(iv) Society registered under Societies Registration Act or similar law;
(v) Co-operative society established by or under any law;
(vi) Dealer of excisable goods, registered under the Central Excise Law; or
(vii) Anybody corporate established, or a partnership firm registered, by or under any law.

The actual amount of service tax payable is 25% of the amount of freight i.e. 75% of amount of freight is provided as abatement, subject of the condition that no Cenvat credit of the duty paid has been availed of under Cenvat Credit Scheme. It has been represented that fulfillment of the condition of non-a ailment of Cenvat credit by the service provider is, at times, difficult to prove, when the service tax is required to be paid not by the service provider but by the consignor or consignee who pays the freight. Taking into account the special nature of the goods transport agency (GTA) service, it is being exempted from the payment of service tax unconditionally to the extent of 75% of the freight. In other words, service tax is required to be paid only on 25% of the freight irrespective of who pays the service tax. Simultaneously, the benefit of Cenvat credit has been withdrawn to GTA service under Cenvat Credit Scheme by deleting the said service from the scope of output service in the CENVAT Credit Rules, 2004. Henceforth, the person who is required to pay service tax under reverse charge method on GTA service can pay service tax on 25% of the freight unconditionally. Recipient of GTA service paying service tax under reverse charge method is no more required to prove non-a vailment of CENVAT credit by GTA service provider.[Vide M.F. (D.R) Letter D.O.F. No. 334/1/2008-TRU, dated 29.3.2008.]

Goods Transport Agency service- Clarification on ancillary services and classification.-

GTA provides service to a person in relation to transportation of goods by road in a goods carriage. The service provided is a single composite service which may include various intermediary and ancillary services such as loading/ unloading, packing/ unpacking, transshipment, temporary warehousing. For the service provided, GTA issues a consignment note and the invoice issued by the GTA for providing the said service includes the value of intermediary and ancillary services. In such a case, whether the intermediary or ancillary activities are to be treated as part of GTA service and abatement should be extended to the charge for such intermediary or ancillary service?

GTA provides a service in relation to transportation of goods by road which is a single composite service. GTA also issues consignment note. The composite service may include various intermediate and ancillary services provided in relation to the principal service of the road transport of goods. Such intermediate and ancillary services may include services loading/unloading, packing/ unpacking, transshipment, temporary warehousing etc., which are provided in the course of transportation by road. These services are not provided as independent activities but are the means for successful provision of the principal service, namely, the transportation of goods by road. The contention that a single composite service should not be broken into its components and classified as separate services is a well-accepted principle of classification. As clarified earlier vide F.No. 334/4/2006-TRU, dated 28.2.2006 (para 3.2 and 3.3) [2006 (4) S.T.R..C30] and F.No. 334/1/2008-TRU, dated 29.2.2008 (para 3.2 and 3.3) [2008 (9)S.T.R. C61], a composite service, even if it consists of more than one service, should be treated as a single service based on the main or principal service and accordingly classified. While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. The method of invoicing does not alter the single composite nature of the service and classification in such cases is based on essential character by applying the principle of classification enumerated in section 65A. Thus, if any ancillary/ intermediate service is provided in relation to

transportation of goods, and the charges, if any, for such services are included in the invoice issued by the GTA, and not by any other person, such service would form part of GTA service and, therefore, the abatement of 75% would be available on it.
GTA providing service in relation to transportation of goods by road in a goods carriage also undertakes packing as an integral part of the service provided. It may be clarified whether in such cases service provided is to be classified under GTA service.
Clarification: Cargo handling service [section 65(105)(zr)] means loading, unloading, packing or unpacking of cargo and includes the service of packing together with transportation of cargo with or without loading, unloading and unpacking. Transportation is not the essential character of cargo handling service but only incidental of the cargo handling service. Where service is provided by a person who is registered as GTA service provider and issues consignment note for
transportation of goods by road in a goods carriage and the amount charged for the service provided is inclusive of packing, then the service shall be treated as GTA service and not cargo handling service.
Whether time sensitive transportation of goods by road in a goods carriage by a GTA shall be classified under courier service and not GTA service? Clarification: On this issue, it is clarified that so long as, (a) the entire transportation of goods is by road; and (b) the person transporting the goods issues a consignment note, it would be classified as 'GTA Service'.[Based on CBE &C. Circular No. 104/7/2008-S.T., dated 6.8.2008-2008 (11) S.T.R.(C23)]. In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts taxable services of aggregate value not exceeding Ten lakh* rupees in any financial year from the whole of the service tax livable thereon under section 66 of the said Finance Act:

Provided that nothing contained in this notification shall apply to,-

(i) taxable services provided by a person under a brand name or trade name, whether registered or not, of another person; or

(ii) such value of taxable services in respect of which service tax shall be paid by such person and in such manner as specified under sub-section (2) of section 68 of the said Finance Act read with Service Tax Rules,1994.

3.5 SUGGESTED READINGS

1.Janeen R. Adil, Goods and Services(Capstone, 2006)
2.Gillian Houghton,Goods and Services(The Rosen Publishing Group, 2009)

3.6TERMINAL QUESTIONS

1**.**How many notifications are issued for services and transportation of goods?

2.Write a short note on Goods Transport Agency service.

3.Mention the notification under which Exemption & Exclusion of Services are discussed.

LL.M. Part-2
Subject : Law of Export Import Regulation

Block-II - International Regime
Unit-4- WTO Agreement; WTO And Tariff Restrictions; TO And Non-Tariff Restrictions

STRUCTURE

INTRODUCTION

As stated in the preamble of the Agreement Establishing the World Trade Organization, the objectives of the WTO Agreements include "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services"; in other words, developing the world economy under market-economy principles. In order to contribute to these objectives, the WTO Agreements are established for the purpose of entering into reciprocal and mutually advantageous arrangements designed for "the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations." This means that the WTO Agreements are structured, for the purpose of introducing market-economy principles into international trade, on the basis of the two ideals: (1) reducing trade barriers, and (2) applying nondiscriminatory rules. Such an approach conforms to the traditional spirit of GATT (The General Agreement on Tariffs and Trade), which was carried over from the preamble of the GATT 1947 to the new WTO preamble. In light of the subsequent changes, two objectives were added to the WTO. One is environmental consideration, which entails "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." The other is consideration for developing countries, which seeks to recognize "that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development." The WTO Agreements also provide more consideration to the interests of developing countries, because the number of its members is by far larger than when GATT was established and single undertaking was a condition of entry.

4.2 OBJECTIVES

The objective of this lesson is to ascertain the WTO Agreement; WTO and Tariff Restrictions; WTO and Non-Tariff Restrictions and impact of WTO on economy and development outcomes for economic governance. Further an attempt has been made to study all the relevant factors related with the WTO for the study.

4.3 SUBJECT

The **World Trade Organization** (**WTO**) is an organization that intends to supervise and liberalize international trade. The organization officially commenced on January 1, 1995 under the Marrakech Agreement, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948. The organization deals with regulation of trade between participating countries; it provides a framework for negotiating and formalizing trade agreements, and a dispute resolution process aimed at enforcing participants' adherence to WTO agreements, which are signed by representatives of member governments and ratified by their parliaments. Most of the issues that the WTO focuses on derive from previous trade negotiations, especially from the Uruguay Round (1986–1994).The WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), was established after World War II in the wake of other new multilateral institutions dedicated to international economic cooperation — notably the Breton Woods institutions known as the World Bank and the International Monetary Fund. A comparable international institution for trade, named the International Trade Organization was successfully negotiated. The ITO was to be a United Nations specialized agency and would address not only trade barriers but other issues indirectly related to trade, including employment, investment, restrictive business practices, and commodity agreements. But the ITO treaty was not approved by the U.S. and a few other signatories and never went into effect. In the absence of an international organization for trade, the GATT would over the years "transform itself" into a *de facto* international organization.

4.3.1 GATT Rounds of Negotiations

The GATT was the only multilateral instrument governing international trade from 1946 until the WTO was established on January 1, 1995. Despite attempts in the mid-1950s and 1960s to create some form of institutional mechanism for international trade, the GATT continued to operate for almost half a century as a semi-institutionalized multilateral treaty regime on a provisional basis.

From Geneva to Tokyo

Seven rounds of negotiations occurred under GATT. The first real GATT trade rounds concentrated on further reducing tariffs. Then, the Kennedy Round in the mid-sixties brought about a GATT anti-dumping Agreement and a section on development. The Tokyo Round during the seventies was the first major attempt to tackle trade barriers that do not take the form of tariffs, and to improve the system, adopting a series of agreements on non-tariff barriers, which in some cases interpreted existing GATT rules, and in others broke entirely new ground. Because these plurilateral agreements were not accepted by the full GATT membership, they were often informally called "codes". Several of these codes were amended in the Uruguay Round, and turned into multilateral commitments accepted by all WTO members. Only four remained plurilateral (those on government procurement, bovine meat, civil aircraft and dairy products), but in 1997 WTO members agreed to terminate the bovine meat and dairy agreements, leaving only two.

Uruguay Round

During the Doha Round, the US government blamed Brazil and India for being inflexible and the EU for impeding agricultural imports. The then-President of Brazil, Luiz Inácio Lula da Silva (above right), responded to the criticisms by arguing that progress would only be achieved if the richest countries (especially the US and countries in the EU) made deeper cuts in their agricultural subsidies and further open their markets for agricultural goods. Well before GATT's 40th anniversary, its members concluded that the GATT system was straining to adapt to a new globalizing world economy. In response to the problems identified in the 1982 Ministerial Declaration (structural deficiencies, spill-over impacts of certain countries' policies on world trade GATT could not manage etc.), the eighth GATT round — known as the Uruguay Round — was launched in September 1986, in Punta del Este, Uruguay. It was the biggest negotiating mandate on trade ever agreed: the talks were going to extend the trading system into several new areas, notably trade in services and intellectual property, and to reform trade in the sensitive sectors of agriculture and textiles; all the original GATT articles were up for review. The Final Act concluding the Uruguay Round and officially establishing the WTO regime was signed April 15, 1994, during the ministerial meeting at Marrakesh, Morocco, and hence is known as the Marrakesh Agreement.

The GATT still exists as the WTO's umbrella treaty for trade in goods, updated as a result of the Uruguay Round negotiations (a distinction is made between *GATT 1994*, the updated parts of GATT, and *GATT 1947*, the original agreement which is still the heart of GATT 1994). GATT 1994 is not however the only legally binding agreement included via the Final Act at Marrakesh; a long list of about 60 agreements, annexes, decisions and understandings was adopted. The agreements fall into a structure with six main parts:

- The Agreement Establishing the WTO
- Goods and investment — the Multilateral Agreements on Trade in Goods including the GATT 1994 and the Trade Related Investment Measures (TRIMS)
- Services — the General Agreement on Trade in Services
- Intellectual property — the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
- Dispute settlement (DSU)
- Reviews of governments' trade policies (TPRM)

In terms of the WTO's principle relating to tariff "ceiling-binding" (No. 3), the Uruguay Round has been successful in increasing binding commitments by both developed and developing countries, as may be seen in the percentages of tariffs bound before and after the 1986-1994 talks.

4.3.2 Accession and Membership

The process of becoming a WTO member is unique to each applicant country, and the terms of accession are dependent upon the country's stage of economic development and current trade regime. The process takes about five years, on average, but it can last more if the country is less than fully committed to the process or if political issues interfere. The shortest accession negotiation was that of the Kyrgyz Republic, while the longest was that of Russia, which, having first applied to join GATT in 1993 was approved for membership in December 2011 and became a WTO member on August 22, 2012. The second longest was that of Vanuatu, whose Working Party on the Accession of Vanuatu was established on 11 July 1995. After a final meeting of the Working Party in October 2001, Vanuatu requested more time to consider its accession terms. In 2008, it indicated its interest to resume and conclude its WTO accession. The Working Party on the Accession of Vanuatu was reconvened informally on 4 April 2011 to discuss Vanuatu’s future WTO membership. The re-convened Working Party completed its mandate on 2 May 2011. The General Council formally approved the Accession

Package of Vanuatu on 26 October 2011. On 24 August 2012, the WTO welcomed Vanuatu as its 157th member. An offer of accession is only given once consensus is reached among interested parties.

4.3.3 Members and observers

The WTO has 159 members and 25 observer governments. In addition to states, the European Union is a member. WTO members do not have to be full sovereign nation-members. Instead, they must be a customs territory with full autonomy in the conduct of their external commercial relations. Thus Hong Kong Special Administrative region (as "Hong Kong, China" since 1997) became a GATT contracting party, follow by was the "China" (Mainland China, not include Taiwan, Macau and Hong Kong) joining at 2001 for after 15 years of negotiations, and the Republic of China (Taiwan) acceded to the WTO in 2002 as "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu" (Chinese Taipei) despite its disputed status The WTO Secretariat omits the official titles (such as Counselor, First Secretary, Second Secretary and Third Secretary) of the members of Chinese Taipei's Permanent Mission to the WTO, except for the titles of the Permanent Representative and the Deputy Permanent Representative. Iran is the biggest economy outside the WTO. With the exception of the Holy See, observers must start accession negotiations within five years of becoming observers. A number of international intergovernmental organizations have also been granted observer status to WTO bodies. 14 states and two territories so far have no official interaction with the WTO.

4.3.4 Agreements

The WTO oversees about 60 different agreements which have the status of international legal texts. Member countries must sign and ratify all WTO agreements on accession. A discussion of some of the most important agreements follows. The Agreement on Agriculture came into effect with the establishment of the WTO at the beginning of 1995. The AoA has three central concepts, or "pillars": domestic support, market access and export subsidies. The General Agreement on Trade in Services was created to extend the multilateral trading system to service sector, in the same way as the General Agreement on Tariffs and Trade (GATT) provided such a system for merchandise trade. The agreement entered into force in January 1995. The Agreement on Trade-Related Aspects of

Intellectual Property Rights sets down minimum standards for many forms of intellectual property (IP) regulation. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994.The Agreement on the Application of Sanitary and Phytosanitary Measures—also known as the SPS Agreement—was negotiated during the Uruguay Round of GATT, and entered into force with the establishment of the WTO at the beginning of 1995. Under the SPS agreement, the WTO sets constraints on members' policies relating to food safety (bacterial contaminants, pesticides, inspection and labeling) as well as animal and plant health (imported pests and diseases). The Agreement on Technical Barriers to Trade is an international treaty of the World Trade Organization. It was negotiated during the Uruguay Round of the General Agreement on Tariffs and Trade, and entered into force with the establishment of the WTO at the end of 1994. The object ensures that technical negotiations and standards, as well as testing and certification procedures, do not create unnecessary obstacles to trade". The Agreement on Customs Valuation, formally known as the Agreement on Implementation of Article VII of GATT, prescribes methods of customs valuation that Members are to follow. Chiefly, it adopts the "transaction value" approach.

4.3.5. Principles of the Trading System

The WTO establishes a framework for trade policies; it does not define or specify outcomes. That is, it is concerned with setting the rules of the trade policy games. Five principles are of particular importance in understanding both the pre-1994 GATT and the WTO:

1.Non-discrimination.

It has two major components: the most favored nation (MFN) rule, and the national treatment policy. Both are embedded in the main WTO rules on goods, services, and intellectual property, but their precise scope and nature differ across these areas. The MFN rule requires that a WTO member must apply the same conditions on all trade with other WTO members, i.e. a WTO member has to grant the most favorable conditions under which it allows trade in a certain product type to all other WTO members. "Grant someone a special favor and you have to do the same for all other WTO members." National treatment means that imported goods should be treated no less favorably than domestically produced goods (at least after the foreign goods have entered the market) and was introduced to tackle non-tariff barriers to trade (e.g. technical standards, security standards et al. discriminating against imported goods).

1. **Reciprocity**. It reflects both a desire to limit the scope of free-riding that may arise because of the MFN rule, and a desire to obtain better access to foreign markets. A related point is that for a nation to negotiate, it is necessary that the gain from doing so be greater than the gain available from unilateral liberalization; reciprocal concessions intend to ensure that such gains will materialize.
2. **Binding and enforceable commitments.** The tariff commitments made by WTO members in a multilateral trade negotiation and on accession are enumerated in a schedule (list) of concessions. These schedules establish "ceiling bindings": a country can change its bindings, but only after negotiating with its trading partners, which could mean compensating them for loss of trade. If satisfaction is not obtained, the complaining country may invoke the WTO dispute settlement procedures.
3. **Transparency.** The WTO members are required to publish their trade regulations, to maintain institutions allowing for the review of administrative decisions affecting trade, to respond to requests for information by other members, and to notify changes in trade policies to the WTO. These internal transparency requirements are supplemented and facilitated by periodic country-specific reports (trade policy reviews) through the Trade Policy Review Mechanism (TPRM). The WTO system tries also to improve predictability and stability, discouraging the use of quotas and other measures used to set limits on quantities of imports.
4. **Safety valves.** In specific circumstances, governments are able to restrict trade. The WTO's agreements permit members to take measures to protect not only the environment but also public health, animal health and plant health. There are three types of provision in this direction:

- articles allowing for the use of trade measures to attain non-economic objectives;
- articles aimed at ensuring "fair competition"; members must not use environmental protection measures as a means of disguising protectionist policies.
- Provisions permitting intervention in trade for economic reasons. Exceptions to the MFN principle also allow for preferential treatment of developing countries, regional free trade areas and customs unions.

- The WTO is an organization established for achieving the objectives of the WTO Agreements and other multilateral trade agreements. Under the WTO system, the operation and implementation of agreements, including dispute settlement and trade policy review, are accomplished and multilateral trade negotiations are carried out to further liberalize, strengthen and expand trade rules. The ministerial conference, general councils for trade in goods, services and TRIPs, etc. have been established in the WTO for these purposes
- The International Dairy Agreement and the International Bovine Meat Agreement, which were in effect for three years from 1995, ceased to be effective as of the end of 1997 because of a decision not to renew them.

4.3.6 Tariffs and Trade Barriers

International trade increases the number of goods that domestic consumers can choose from, decreases the cost of those goods through increased competition, and allows domestic industries to ship their products abroad. While all of these seem beneficial, free trade isn't widely accepted as completely beneficial to all parties. This article will examine why this is the case, and look at how countries react to the variety of factors that attempt to influence trade.In simplest terms, a tariff is a tax. It adds to the cost of imported goods and is one of several trade policies that a country can enact. Tariffs are often created to protect infant industries and developing economies, but are also used by more advanced economies with developed industries. Here are five of the top reasons for tariffs are used:

1. **ProtectingDomesticEmployment**
   The levying of tariffs is often highly politicized. The possibility of increased competition from imported goods can threaten domestic industries. These domestic companies may fire workers or shift production abroad to cut costs, which means higher unemployment and a less happy electorate. The unemployment argument often shifts to domestic industries complaining about cheap foreign labor, and how poor working conditions and lack of regulation allow foreign companies to produce goods more cheaply. In economics, however, countries will continue to produce goods until they no longer have a comparative advantage.

2. **Protecting*Consumers***
   A government may levy a tariff on products that it feels could endanger

its population. For example, South Korea may place a tariff on imported beef from the United States if it thinks that the goods could be tainted with disease.

InfantIndustries

The use of tariffs to protect infant industries can be seen by the Import Substitution Industrialization (ISI) strategy employed by many developing nations. The government of a developing economy will levy tariffs on imported goods in industries in which it wants to foster growth. This increases the prices of imported goods and creates a domestic market for domestically produced goods, while protecting those industries from being forced out by more competitive pricing. It decreases unemployment and allows developing countries to shift from agricultural products to finished goods. Criticisms of this sort of protectionist strategy revolve around the cost of subsidizing the development of infant industries. If an industry develops without competition, it could wind up producing lower quality goods, and the subsidies required to keep the state-backed industry afloat could sap economic growth.

3. ***NationalSecurity***

   Barriers are also employed by developed countries to protect certain industries that are deemed strategically important, such as those supporting national security. Defense industries are often viewed as vital to state interests, and often enjoy significant levels of protection. For example, while both Western Europe and the United States are industrialized, both are very protective of defense-oriented companies.

4. **Retaliation**

   Countries may also set tariffs as a retaliation technique if they think that a trading partner has not played by the rules. For example, if France believes that the United States has allowed its wine producers to call its domestically produced sparkling wines "Champagne" (a name specific to the Champagne region of France) for too long, it may levy a tariff on imported meat from the United States. If the U.S. agrees to crack down on the improper labeling, France is likely to stop its retaliation. Retaliation can also be employed if a trading partner goes against the government's foreign policy objectives.

4.3.7 Types of Tariffs and Trade Barriers

There are several types of tariffs and barriers that a government can employ:

- Specific tariffs
- Ad valorem tariffs
- Licenses
- Import quotas
- Voluntary export restraints
- Local content requirements

Specific Tariffs

A fixed fee levied on one unit of an imported good is referred to as a specific tariff. This tariff can vary according to the type of good imported. For example, a country could levy a $15 tariff on each pair of shoes imported, but levy a $300 tariff on each computer imported.

AdValorem Tariffs

The phrase *ad valorem* is Latin for "according to value", and this type of tariff is levied on a good based on a percentage of that good's value. An example of an ad valorem tariff would be a 15% tariff levied by Japan on U.S. automobiles. The 15% is a price increase on the value of the automobile, so a $10,000 vehicle now costs $11,500 to Japanese consumers. This price increase protects domestic producers from being undercut, but also keeps prices artificially high for Japanese car shoppers. Non-tariff barriers to trade include:

Licenses

A license is granted to a business by the government, and allows the business to import a certain type of good into the country. For example, there could be a restriction on imported cheese, and licenses would be granted to certain companies allowing them to act as importers. This creates a restriction on competition, and increases prices faced by consumers.

Import Quotas

An import quota is a restriction placed on the amount of a particular good that can be imported. This sort of barrier is often associated with the issuance of licenses. For example, a country may place a quota on the volume of imported citrus fruit that is allowed.

Voluntary Export Restraints (VER)

This type of trade barrier is "voluntary" in that it is created by the exporting country rather than the importing one. A voluntary export restraint is usually levied at the behest of the importing country, and could be accompanied by a reciprocal VER. For example, Brazil could place a VER on the exportation of sugar to Canada, based on a request by Canada. Canada could then place a VER on the exportation of coal to Brazil. This increases the price of both coal and sugar, but protects the domestic industries.

Local Content Requirement

Instead of placing a quota on the number of goods that can be imported, the government can require that a certain percentage of a good be made domestically. The restriction can be a percentage of the good itself, or a percentage of the value of the good. For example, a restriction on the import of computers might say that 25% of the pieces used to make the computer are made domestically, or can say that 15% of the value of the good must come from domestically produced components.

In the final section we'll examine who benefits from tariffs and how they affect the price of goods.

WhoBenefits?

The benefits of tariffs are uneven. Because a tariff is a tax, the government will see increased revenue as imports enter the domestic market. Domestic industries also benefit from a reduction in competition, since import prices are artificially inflated. Unfortunately for consumers - both individual consumers and businesses - higher import prices mean higher prices for goods. If the price of steel is inflated due to tariffs, individual consumers pay more for products using steel, and businesses pay more for steel that they use to make goods. In short, tariffs and trade barriers tend to be pro-producer and anti-consumer. The effect of tariffs and trade barriers on businesses, consumers and the government shifts over time. In the short run, higher prices for goods can reduce consumption by individual consumers and by businesses. During this time period, businesses will profit and the government will see an increase in revenue from duties. In the long term, businesses may see a decline in efficiency due to a lack of competition, and may also see a reduction in profits due to the emergence of substitutes for their products. For the government, the long-term effect of subsidies is an increase in the demand for public services, since increased prices, especially in foodstuffs, leaves less disposable income. (For related reading, check out

Tariffs and Modern Trade

The role tariffs play in international trade has declined in modern times. One of the primary reasons for the decline is the introduction of international organizations designed to improve free trade, such as the World Trade Organization (WTO). Such organizations make it more difficult for a country to levy tariffs and taxes on imported goods, and can reduce the likelihood of retaliatory taxes. Because of this, countries have shifted to non-tariff barriers, such as quotas and export restraints. Organizations like the WTO attempt to reduce production and consumption distortions created by tariffs. These distortions are the result of domestic producers making goods due to inflated prices, and consumers purchasing fewer goods because prices have increased. (To learn about the WTO's efforts, Since the 1930s, many developed countries have reduced tariffs and trade barriers, which has improved global integration and brought about globalization. Multilateral agreements between governments increase the likelihood of tariff reduction, while enforcement on binding agreements reduces uncertainty.

The Bottom Line

Free trade benefits consumers through increased choice and reduced prices, but because the global economy brings with it uncertainty, many governments impose tariffs and other trade barriers to protect industry. There is a delicate balance between the pursuit of efficiencies and the government's need to ensure low unemployment.

4.3.8. Tariff and Non-Tariff Barriers to Trade

In the Uruguay round of the GATT/WTO negotiations, members agreed to drop the use of import quotas and other non-tariff barriers in favor of tariff-rate quotas. Countries also agreed to gradually lower each tariff rate and raise the quantity to which the low tariff applied. Thus, over time, trade would be taxed at a lower rate and trade flows would increase. Given current U.S. commitments under the WTO on market access, options are limited for U.S. policy innovations in the 2002 Farm Bill vis a vis tariffs on agricultural imports from other countries. Providing higher prices to domestic producers by increasing tariffs on agricultural imports is not permitted. In addition, particularly because the U.S. is a net exporter of many agricultural commodities, successive U.S. governments have generally taken a strong position within the WTO that tariff and TRQ barriers need to be reduced.

4.3.9 Non-Tariff Trade Barriers

Countries use many mechanisms to restrict imports. A critical objective of the Uruguay Round of GATT negotiations, shared by the U.S., was the elimination of non-tariff barriers to trade in agricultural commodities (including quotas) and, where necessary, to replace them with tariffs – a process called tarrification. Tarrification of agricultural commodities was largely achieved and Viewed as a major success of the 1994 GATT agreement. Thus, if the U.S. honors its GATT commitments, the utilization of new non-tariff barriers to trade is not really an option for the 2002 Farm Bill.

4.3.10.Domestic Content Requirements

Governments have used domestic content regulations to restrict imports. The intent is usually to stimulate the development of domestic industries. Domestic content regulations typically specify the percentage of a product's total value that must be produced domestically in order for the product to be sold in the domestic market. Several developing countries have imposed domestic content requirements to foster agricultural, automobile, and textile production. They are normally used in conjunction with a policy of import substitution in which domestic production replaces imports. Domestic content requirements have not been as prevalent in agriculture as in some other industries, such as automobiles, but some agricultural examples illustrate their effects. Australia used domestic content requirements to support leaf tobacco production. In order to pay a relatively low import duty on imported tobacco, Australian cigarette manufacturers were required to use 57 percent domestic leaf tobacco. Member countries of trade agreements also use domestic content rules to ensure that nonmembers do not manipulate the agreements to circumvent tariffs. For example, North American Free Trade Agreement (NAFTA) rules of origin provisions stipulate that all single-strength citrus juice must be made from 100 percent NAFTA origin fresh citrus fruit. Again, as is the case with other trade barriers, it seems unlikely that introducing domestic content rules to enhance domestic demand for U.S.Agricultural commodities is a viable option for the 2002 Farm Bill.

4.3.11 Import Licenses

Import licenses have proved to be effective mechanisms for restricting imports. Under an import- licensing scheme, importers of a commodity are required to obtain a license for each shipment they bring into the country. Without explicitly utilizing a quota mechanism, a country can simply restrict imports on any basis it chooses through its allocation of import licenses. Prior to the implementation of NAFTA, for example, Mexico required that wheat and other agricultural commodity imports be permitted only under license. Elimination of import licenses for agricultural commodities was a critical objective of the Uruguay Round of GATT negotiations and thus the use of this mechanism to protect U.S. agricultural producers is unlikely an option for the 2002 Farm Bill.

4.3.12 Import State Trading Enterprises

Import State Trading Enterprises (STEs) are government owned or sanctioned agencies that act as partial or pure single buyer importers of a commodity or set of commodities in world markets. They also often enjoy a partial or pure domestic monopoly over the sale of those commodities. Current important examples of import STEs in world agricultural commodity markets include the Japanese Food Agency (barley, rice, and wheat), South Korea’s Livestock Products Marketing Organization, and China’s National Cereals, Oil and Foodstuffs Import and Export Commission (COFCO). STEs can restrict imports in several ways. First, they can impose a set of implicit import tariffs by purchasing imports at world prices and offering them for sale at much higher domestic prices. The difference between the purchase price and the domestic sales price simply represents a hidden tariff. Import STEs may also implement implicit general and targeted import quotas, or utilize complex and costly implicit import rules that make importing into the market unprofitable. Recently, in a submission to the current WTO negotiations, the United States targeted the trade restricting operations of import and export STEs as a primary concern. A major problem with import STEs is that it is quite difficult to estimate the impacts of their operations on trade, because those operations lack transparency. STEs often refuse to provide the information needed to make such assessments, claiming that such disclosure is not required because they are quasi-private companies. In spite of these difficulties, the challenges provided by STEs will almost certainly continue to be addressed through bilateral and multilateral trade negotiations rather than in the context of domestic legislation through the 2002 Farm Bill.

4.3.13 Technical Barriers to Trade

All countries impose technical rules about packaging, product definitions, labeling, etc. In the context of international trade, such rules may also be used as non-tariff trade barriers. For example, imagine if Korea were to require that oranges sold in the country be less than two inches in diameter. Oranges grown in Korea happen to be much smaller than Navel oranges grown in California, so this type of "technical" rule would effectively ban the sales of California oranges and protect the market for Korean oranges. Such rules violate WTO provisions that require countries to treat imports and domestic products equivalently and not to advantage products from one source over another, even in indirect ways. Again, however, these issues will likely be dealt with through bilateral and multilateral trade negotiations rather than through domestic Farm Bill policy initiatives.

4.3.14 Exchange Rate Management Policies

Some countries may restrict agricultural imports through managing their exchange rates. To some degree, countries can and have used exchange rate policies to discourage imports and encourage exports of all commodities. The exchange rate between two countries' currencies is simply the price at which one currency trades for the other. For example, if one U.S. dollar can be used to purchase 100 Japanese yen (and vice versa), the exchange rate between the U.S. dollar and the Japanese yen is 100 yen per dollar. If the yen depreciates in value relative to the U.S. dollar, then a dollar is able to purchase more yen. A 10 percent depreciation or devaluation of the yen, for example, would mean that the price of one U.S. dollar increased to 110 yen. One effect of currency depreciation is to make all imports more expensive in the country itself. If, for example, the yen depreciates by 10 percent from an initial value of 100 yen per dollar, and the price of a ton of U.S. beef on world markets is $2,000, then the price of that ton of beef in Japan would increase from 200,000 yen to 220,000 yen. A policy that deliberately lowers the exchange rate of a country's currency will, therefore, inhibit imports of agricultural commodities, as well as imports of all other commodities.

Thus, countries that pursue deliberate policies of undervaluing their currency in international financial markets are not usually targeting agricultural imports. Some countries have targeted specific types of imports through implementing multiple exchange rate policy under which importers were required to pay different exchange rates for foreign currency depending on the commodities they were importing. The objectives of such programs have been to reduce balance of payments problems and to raise revenues for the government. Multiple exchange rate programs were rare in the 1990s, and generally have not been utilized by developed economies. Finally, exchange rate policies are usually not sector-specific. In the United States, they are clearly under the purview of the Federal Reserve Board and, as such, will not likely be a major issue for the 2002 Farm Bill. There have been many calls in recent congressional testimony, however, to offset the negative impacts caused by a strengthening US dollar with counter-cyclical payments to export dependent agricultural products.

4.3.15 The precautionary principle and sanitary and Phytosanitarybarriers to trade

The precautionary principle, or foresight planning, has recently been frequently proposed as a justification for government restrictions on trade in the context of environmental and health concerns, often regardless of cost or scientific evidence. It was first proposed as a household management technique in the 1930s in Germany, and included elements of prevention, cost effectiveness, and ethical responsibility to maintain natural systems. In the context of managing environmental uncertainty, the principle enjoyed a resurgence of popularity during a meeting of the U.N. World Charter for Nature (of which the U.S. is only an observer) in 1982. Its use was re-endorsed by the U.N. Convention on Bio-diversity in 1992, and again in Montreal, Canada in January 2000.The precautionary principle has been interpreted by some to mean that new chemicals and technologies should be considered dangerous until proven otherwise. It therefore requires those responsible for an activity or process to establish its harmlessness and to be liable if damage occurs. Most recent attempts to invoke the principle have cited the use of toxic substances, exploitation of natural resources, and environmental degradation. Concerns about species extinction, high rates of birth defects, learning deficiencies, cancer, climate change, ozone depletion, and contamination with toxic chemicals and nuclear materials have also been used to justify trade and other government restrictions on the basis of the precautionary principle.

Thus, countries seeking more open trading regimes have been concerned that the precautionary principle will simply be used to justify nontariff trade barriers. For example, rigid adherence to the precautionary principle could lead to trade embargoes on products such as genetically modified oil seeds with little or no reliance on scientific analysis to justify market closure. Sometimes, restrictions on imports from certain places are fully consistent with protecting consumers, the environment, or agriculture from harmful diseases or pests that may accompany the imported product. The WTO Sanitary and Phytosanitary (SPS) provisions on technical trade rules specifically recognize that all countries feel a responsibility to secure their borders against the importation of unsafe products. Prior to 1994, however, such barriers were often simply used as excuses to keep out a product for which there was no real evidence of any problem. These phony technical barriers were just an excuse to keep out competitive products. The current WTO agreement requires that whenever a technical barrier is challenged, a member country must show that the barrier has solid scientific justification and restricts trade as little as possible to achieve its scientific objectives. This requirement has resulted in a number of barriers being relaxed around the world. It should be emphasized that WTO rules do not require member countries to harmonize rules or adopt international standards — only that there must be some scientific basis for the rules that are adopted. Thus, any options for sanitary and phytosanitary initiatives considered in the 2002 Farm Bill must be based on sound science and they do not have to be harmonized with the initiatives of other countries.

4.4 SUMMARY

As stated in the preamble of the Agreement Establishing the World Trade Organization, the objectives of the WTO Agreements include “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services”; in other words, developing the world economy under market-economy principles. In order to contribute to these objectives, the WTO Agreements are established for the purpose of entering into reciprocal and mutually advantageous arrangements designed for “the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.” This means that the WTO Agreements are structured, for the purpose of introducing market-economy principles into international trade, on the basis of the two ideals: (1) reducing trade barriers, and (2) applying nondiscriminatory rules. Such an approach conforms to the traditional spirit of GATT (The General Agreement on Tariffs and Trade), which was carried over from the preamble of the GATT 1947 to the new WTO preamble. In light of the subsequent changes, two objectives were added to the WTO. One is environmental consideration, which entails "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." The other is consideration for developing countries, which seeks to recognize "that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development." The WTO Agreements also provide more consideration to the interests of developing countries, because the number of its members is by far larger than when GATT was established and single undertaking was a condition of entry.

The **World Trade Organization** (**WTO**) is an organization that intends to supervise and liberalizeinternational trade. The organization officially commenced on January 1, 1995 under the Marrakech Agreement, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948. The organization deals with regulation of trade between participating countries; it provides a framework for negotiating and formalizing trade agreements, and a dispute resolution process aimed at enforcing participants' adherence to WTO agreements, which are signed by representatives of member governments and ratified by their parliaments. Most of the issues that the WTO focuses on derive from previous trade negotiations, especially from the Uruguay Round (1986–1994).The WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), was established after World War II in the wake of other new multilateral institutions dedicated to international economic cooperation — notably the Breton Woods institutions known as the World Bank and the International Monetary Fund. A comparable international institution for trade, named the International Trade Organization was successfully negotiated. The ITO was to be a United Nations specialized agency and would address not only trade barriers but other issues indirectly related to trade, including employment, investment, restrictive business practices, and commodity agreements. But the ITO treaty was not approved by the U.S. and a few other signatories and never went into effect. In the absence of an international organization for trade, the GATT would over the years "transform itself" into a *de facto* international organization. The WTO establishes a framework for trade policies; it does not define or specify outcomes. That is, it is concerned with setting the rules of the trade policy games. Five principles are of particular importance in understanding both the pre-1994 GATT and the WTO

1. **Non-discrimination**. It has two major components: the most favoured nation (MFN) rule, and the national treatment policy. Both are embedded in the main WTO rules on goods, services, and intellectual property, but their precise scope and nature differ across these areas. The MFN rule requires that a WTO member must apply the same conditions on all trade with other WTO members, i.e. a WTO member has to grant the most favorable conditions under which it allows trade in a certain product type to all other WTO members. "Grant someone a special favour and you have to do the same for all other WTO members." National treatment means that imported goods should be treated no less favorably than domestically produced goods (at least after the foreign goods have entered the market) and was introduced to tackle non-tariff barriers to trade (e.g. technical standards, security standards et al. discriminating against imported goods).
2. **Reciprocity**. It reflects both a desire to limit the scope of free-riding that may arise because of the MFN rule, and a desire to obtain better access to foreign markets. A related point is that for a nation to negotiate, it is necessary that the gain from doing so be greater than the gain available from unilateral liberalization; reciprocal concessions intend to ensure that such gains will materialize.
3. **Binding and enforceable commitments**. The tariff commitments made by WTO members in a multilateral trade negotiation and on accession are enumerated in a schedule (list) of concessions. These schedules establish "ceiling bindings": a country can change its bindings, but only after negotiating with its trading partners, which could mean compensating them for loss of trade. If satisfaction is not obtained, the complaining country may invoke the WTO dispute settlement procedures.
4. **Transparency**. The WTO members are required to publish their trade regulations, to maintain institutions allowing for the review of administrative decisions affecting trade, to respond to requests for information by other members, and to notify changes in trade policies to the WTO. These internal transparency requirements are supplemented and facilitated by periodic country-specific reports (trade policy reviews) through the Trade Policy Review Mechanism (TPRM). The WTO system tries also to improve predictability and

stability, discouraging the use of quotas and other measures used to set limits on quantities of imports.

5. **Safety valves**. In specific circumstances, governments are able to restrict trade. The WTO's agreements permit members to take measures to protect not only the environment but also public health, animal health and plant health.

There are three types of provision in this direction:

- articles allowing for the use of trade measures to attain non-economic objectives;
- articles aimed at ensuring "fair competition"; members must not use environmental protection measures as a means of disguising protectionist policies.
- Provisions permitting intervention in trade for economic reasons.

Exceptions to the MFN principle also allow for preferential treatment of developing countries, regional free trade areas and customs unions.

The WTO is an organization established for achieving the objectives of the WTO Agreements and other multilateral trade agreements. Under the WTO system, the operation and implementation of agreements, including dispute settlement and trade policy review, are accomplished and multilateral trade negotiations are carried out to further liberalize, strengthen and expand trade rules. The ministerial conference, general council, councils for trade in goods, services and TRIPs, etc. have been established in the WTO for these purposes.

1 The International Dairy Agreement and the International Bovine Meat Agreement, which were in effect for three years from 1995, ceased to be effective as of the end of 1997 because of a decision not to renew them. International trade increases the number of goods that domestic consumers can choose from, decreases the cost of those goods through increased competition, and allows domestic industries to ship their products abroad. While all of these seem beneficial, free trade isn't widely accepted as completely beneficial to all parties. This article will examine why this is the case, and look at how countries react to the variety of factors that attempt to influence trade. In simplest terms, a tariff is a tax. It adds to the cost of imported goods and is one of several trade policies that a country can enact. Tariffs are often created to protect infant industries and developing economies, but are also used by more advanced

economies with developed industries. Here are five of the top reasons for tariffs are used:

1. *Protecting Domestic Employment*

The levying of tariffs is often highly politicized. The possibility of increased competition from imported goods can threaten domestic industries. These domestic companies may fire workers or shift production abroad to cut costs, which means higher unemployment and a less happy electorate. The unemployment argument often shifts to domestic industries complaining about cheap foreign labor, and how poor working conditions and lack of regulation allow foreign companies to produce goods more cheaply. In economics, however, countries will continue to produce goods until they no longer have a comparative advantage (not to be confused with an absolute advantage).

2. ***Protecting Consumers***
   A government may levy a tariff on products that it feels could endanger its population. For example, South Korea may place a tariff on imported beef from the United States if it thinks that the goods could be tainted with disease.

3. ***Infant Industries***
   The use of tariffs to protect infant industries can be seen by the Import Substitution Industrialization (ISI) strategy employed by many developing nations. The government of a developing economy will levy tariffs on imported goods in industries in which it wants to foster growth. This increases the prices of imported goods and creates a domestic market for domestically produced goods, while protecting those industries from being forced out by more competitive pricing. It decreases unemployment and allows developing countries to shift from agricultural products to finished goods.

   Criticisms of this sort of protectionist strategy revolve around the cost of subsidizing the development of infant industries. If an industry develops without competition, it could wind up producing lower quality goods, and the subsidies required to keep the state-backed industry afloat could sap economic growth.

4. ***National Security***
   Barriers are also employed by developed countries to protect certain industries that are deemed strategically important, such as those

supporting national security. Defense industries are often viewed as vital to state interests, and often enjoy significant levels of protection. For example, while both Western Europe and the United States are industrialized, both are very protective of defense-oriented companies.

5. ***Retaliation***
   Countries may also set tariffs as a retaliation technique if they think that a trading partner has not played by the rules. For example, if France believes that the United States has allowed its wine producers to call its domestically produced sparkling wines "Champagne" (a name specific to the Champagne region of France) for too long, it may levy a tariff on imported meat from the United States. If the U.S. agrees to crack down on the improper labeling, France is likely to stop its retaliation. Retaliation can also be employed if a trading partner goes against the government's foreign policy objectives.

There are several types of tariffs and barriers that a government can employ:

- Specific tariffs
- Ad valorem tariffs
- Licenses
- Import quotas
- Voluntary export restraints
- Local content requirements

The benefits of tariffs are uneven. Because a tariff is a tax, the government will see increased revenue as imports enter the domestic market. Domestic industries also benefit from a reduction in competition, since import prices are artificially inflated. Unfortunately for consumers - both individual consumers and businesses - higher import prices mean higher prices for goods. If the price of steel is inflated due to tariffs, individual consumers pay more for products using steel, and businesses pay more for steel that they use to make goods. In short, tariffs and trade barriers tend to be pro-producer and anti-consumer.

The effect of tariffs and trade barriers on businesses, consumers and the government shifts over time. In the short run, higher prices for goods can reduce consumption by individual consumers and by businesses. During this time period, businesses will profit and the government will see an increase in revenue from duties. In the long term, businesses may see a decline in efficiency due to a lack of competition, and may also see a reduction in profits due to the emergence of substitutes for their products. For the government, the long-term effect of subsidies is an increase in the demand for public services, since increased prices, especially in foodstuffs, leaves less disposable income. (For related reading, check out the role tariffs play in international trade has declined in modern times. One of the primary reasons for the decline is the introduction of international organizations designed to improve free trade, such as the World Trade Organization (WTO). Such organizations make it more difficult for a country to levy tariffs and taxes on imported goods, and can reduce the likelihood of retaliatory taxes. Because of this, countries have shifted to non-tariff barriers, such as quotas and export restraints. Organizations like the WTO attempt to reduce production and consumption distortions created by tariffs. These distortions are the result of domestic producers making goods due to inflated prices, and consumers purchasing fewer goods because prices have increased. (To learn about the WTO's efforts, Since the 1930s, many developed countries have reduced tariffs and trade barriers, which has improved global integration and brought about globalization. Multilateral agreements between governments increase the likelihood of tariff reduction, while enforcement on binding agreements reduces uncertainty. Governments have used domestic content regulations to restrict imports. The intent is usually to Stimulate the development of domestic industries. Domestic content regulations typically specify the percentage of a product's total value that must be produced domestically in order for the product to be sold in the domestic market. Several developing countries have imposed domestic content requirements to foster agricultural, automobile, and textile production. They are normally used in conjunction with a policy of import substitution in which domestic production replaces imports. Domestic content requirements have not been as prevalent in agriculture as in some other industries, such as automobiles, but some agricultural examples illustrate their effects. Australia used domestic content requirements to support leaf tobacco production. In order to pay a relatively low import duty on imported tobacco, Australian cigarette manufacturers were required to use 57 percent domestic leaf tobacco. Member countries of trade agreements also use domestic content rules to ensure that nonmembers do not manipulate the agreements to circumvent tariffs. For example, North American Free Trade Agreement (NAFTA) rules of origin provisions stipulate that all single-strength citrus juice must be made from 100 percent NAFTA origin fresh citrus fruit. Again, as is the case with other trade barriers, it seems unlikely that introducing domestic content rules to enhance domestic demand for U.S. agricultural commodities is a viable option for the 2002 Farm Bill. The precautionary principle, or foresight planning, has recently been frequently proposed as a justification for government restrictions on trade in the context of environmental and health concerns, often regardless of cost or scientific evidence. It was first proposed as a household management technique in the 1930s in Germany, and included elements of prevention, cost effectiveness, and ethical responsibility to maintain natural systems . In the context of managing environmental uncertainty, the principle enjoyed a resurgence of popularity during a meeting of the U.N.World Charter for Nature (of which the U.S. is only an observer) in 1982. Its use was re-endorsed by the U.N. Convention on Bio-diversity in 1992, and again in Montreal, Canada in January 2000.The precautionary principle has been interpreted by some to mean that new chemicals and technologies should be considered dangerous until proven otherwise. It therefore requires those responsible for an activity or process to establish its harmlessness and to be liable if damage occurs. Most recent attempts to invoke the principle have cited the use of toxic substances, exploitation of natural resources, and environmental degradation. Concerns about species extinction, high rates of birth defects, learning deficiencies, cancer, climate change, ozone depletion, and contamination with toxic chemicals and nuclear materials have also been used to justify trade and other government restrictions on the basis of the precautionary principle. Thus, countries seeking more open trading regimes have been concerned that the precautionary principle will simply be used to justify nontariff trade barriers. For example, rigid adherence to the precautionary principle could lead to trade embargoes on products such as genetically modified oil seeds with little or no reliance on scientific analysis to justify market closure. Sometimes, restrictions on imports from certain places are fully consistent with protecting consumers, the environment, or agriculture from harmful diseases or pests that may accompany the imported product. The WTO Sanitary and Phytosanitary (SPS) provisions on technical trade rules specifically recognize that all countries feel a responsibility to secure their borders against the importation of unsafe products. Prior to 1994, however, such barriers were often simply used as excuses to keep out a product for which there was no real evidence of any problem. These phony technical barriers were just an excuse to keep out competitive products. The current WTO agreement requires that whenever a technical barrier is challenged, a member country must show that the barrier has solid scientific justification and restricts trade as little as possible to achieve its scientific objectives. This requirement has resulted in a number of barriers being relaxed around the world. It should be emphasized that WTO rules do not require member countries to harmonize rules or adopt international standards — only that there must be some scientific basis for the rules that are adopted. Thus, any options for sanitary and phytosanitary initiatives considered in the 2002 Farm Bill must be based on sound science and they do not have to be harmonized with the initiatives of other countries.

4.5 SUGGESTED READINGS

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4.6TERMINAL QUESTIONS

1. What is the impact of international trading on WTO?
2. What are tariff restrictions? Discuss them in the light of GATT.?
3. Discuss about the Exchange Rate Management Policies.?
4. What are the WTO and Non-Tariff Restrictions?
5. Write an essay about the GATT Agreements.

LL.M. Part-2
Subject : Law of Export Import Regulation

Block-II - International Regime
Unit-5- Investment and Transfer of Technology; Quota restriction and Anti-Dumping; Permissible Regulations

STRUCTURE

5.1 INTRODUCTION

Technology transfer is an important means by which developing countries gain access to technologies that are new to them. Most technology transfer has between developed and developing countries through commercial technology transfers by the private sector. These include transfers through foreign direct investment, foreign licensing, turnkey projects, technical consultancy, capital goods acquisition, international subcontracting and joint ventures. By opening of the Indian economy (LPG policies-1991), several Indian companies are poised for different types of financial, technical and other forms of collaborations. Though they enter with proper technology transfer agreements, some are not successful with different reasons. Government of India's Ministry of Scientific and Industrial Research is playing a vital role through its technology transfer policy in both inward and outwards technology transfers to the Indian companies through automatic route and some are through project approval board (PAB). The ability of the country to use technology transfers to develop their domestic capabilities to reap the social and economic benefits have been very mixed.

Internationalization of technologies and production is becoming a common phenomenon for attaining and retaining the global competitiveness. Technology is an important ingredient of the development mix and an important aspect of the international economic gap is the technological gap. While technological backwardness and a slow pace of technological progress generally characterize the developing countries, the advanced countries boast a rich stock of technology and fast technological progress. Technology transfer is the term used to describe the processes by which technological knowledge moves within or between organizations. International technology transfer refers to the way in which this occurs between countries. Transfer of technology from the developed to the developing countries, there, is a necessary measure to speed up the pace of the economic development and modernization process in the low developing countries (LDCs). Indeed, *transfer of technology to developing countries is a major area of concern in the discussions on the establishment of a New International Economic Order (NIEO). It is given so much importance that there is a talk of building a New International Technological Order (NITO) as an integral part of the NIEO*.

The transferred technological knowledge was in various forms. It can embodied in goods (including physical goods, plant and animal organisms), services and people, and organizational arrangements, or codified in blueprints, designs, technical documents, and the content of innumerable types of training. All these forms of knowledge may vary in a further important way. At one end of the spectrum, the transfer involved can be concerned with the knowledge for using and operating technology. At the other end, it can be concerned with the knowledge necessary for changing technology and innovating. In between, transferred knowledge may involve the many different kinds of design and engineering knowledge required to replicate and modify technologies. Technology transfer is an important means by which developing countries gain access to technologies that are new to them. For example, the acquisition of foreign technologies by East Asian newly industrialized countries, coupled with domestic 'technological learning' — efforts to accumulate the capability to change technologies — have been key factors in their rapid technological and economic development. Most countries are important to transfer their technology due to its inherent strengths of huge market, high middle-income group people, and easily adoptable nature of the consumer besides cheap labour and availability of technically qualified human capital. To attract foreign investment in India, the Government has offered several facilities to the NRIs, PIO and overseas corporate bodies (OCBs).

5.2 OBJECTIVES

The objective of this lesson is to ascertain the “Investment and Transfer of Technology; Quota restriction and Anti-Dumping; Permissible Regulations” on economy and development outcomes for economic governance. Further an attempt has been made to study all the relevant factors related with the investment and transfer of technology for the study.

5.3 SUBJECT

5.3.1 Investment Options for NRIS in India

National priority level and state-specific projects are being implemented across the country. These projects offer huge investment opportunities in India. The government is in fact, promoting Public Private Partnerships (PPPs) in many projects opening up new vistas in sectors such as infrastructure, education, healthcare etc. The health care sector of India has also opened new investment opportunities for NRIs investing in India because of the rise in disposable income, penetration of health insurance and rising health related lifestyle challenges across demographics. The returns from the real estate sector in India have consistently been high and have even outperformed other investment options. The Government of India has created many policies and schemes to maximize investment options for NRIs/PIOs looking to invest in Indian real estate sector. Some of the most popular investment opportunities available to the NRIs and PIOs for investments in India are:

- **Non-Resident (External) Rupee (NRE) Accounts:** NRE account may be in the form of savings, current, recurring or fixed deposit accounts. Such accounts can be opened only by the non-resident himself and not through the holder of the power of attorney. The interest rates on NRE Savings deposits shall be at the rate applicable to domestic savings deposits.
- **Non-Resident Ordinary (NRO) Rupee Account:** NRO accounts may be opened / maintained in the form of current, savings, recurring or fixed deposit accounts. Account should be denominated in Indian Rupees. Permissible credits to NRO account are transfers from rupee accounts of non-resident banks.
- **Bank Fixed Deposits:** Bank failures are rare in India so bank fixed deposits are a very safe way to invest for *NRIs investing in India*. You know the rates up front so there is no uncertainty there. Taxes can eat into your returns though, especially if you are in the high tax bracket, but even then a fixed deposit (FD) that compounds quarterly and is done for a long maturity will yield well.
- **Foreign Currency Non Resident (Bank) Account ñ FCNR (B) Account:** FCNR (B) accounts are only in the form of term deposits of 1 to 5 years. All debits / credits permissible in respect of NRE accounts, including credit of sale proceeds of FDI investments, are permissible in FCNR (B) accounts also. Account can be in any freely convertible currency.
- **Senior Citizens Savings Scheme (SCSS):** It is a new *investment opportunity in India* for Senior Citizen. The account may be opened by an individual, who has attained age of 60 years or above on the date of opening of the account.
- **National Savings Certificates (NSC) IX Issue:** This is another safe investment with decent returns. There is no maximum limit for investment and no tax deduction at source (TDS). Certificates can be kept as collateral security to get loan from banks.

The Indian economy continues to grow at a good pace and holds a strong position. India is economy is amongst the largest in the world on the basis of purchasing power parity (PPP). It is today one of the most attractive destinations for business investment opportunities with the available large manpower base, diversified natural resources and strong macroeconomic fundamentals. During April-January 2012-13, India received foreign direct investments (FDI) worth US$ 30.82 billion while FDI equity inflows during January 2013 stood at US$ 2.16 billion, according to latest data released by the Department of Industrial Policy and Promotion (DIPP).

India is the third-most attractive destination for FDI in the world. Indian markets have significant potential and a favorable regulatory regime for foreign investors, according to a survey titled World Investment Prospects Survey 2012ñ2014 by UNCTAD. “We are keen to see FDI investment to surge in India and to that end, a favorable business climate will be helpful in going forward. We are encouraged to see there is a continued path towards fiscal consolidation,” according to Ms Christine Lagarde, Chief, International Monetary Fund (IMF).Changes made by the Mr. P Chidambaram, Union Minister for Finance, Government of India, in the Union Budget 2013-14 can greatly benefit high net worth individuals looking to invest in India, where returns on investments are higher than in any other market.

5.3.2 Key sectors in India for investment

India has become a trillion dollar economy with a self-sufficient agricultural sector, a varied industrial base and a well-established financial and services sector. There are numerous sectors that offer lucrative business opportunities in India. Some of the key investment sectors are:

- Aerospace &Defense
- Automotive
- Banking
- Biotechnology
- Information Technology
- Insurance
- Power
- Real Estate
- Retail
- Telecommunications

5.3.3 Investment opportunities in Indian states

India is one of the oldest civilizations in the world with diverse cultural heritage. It is divided into twenty eight States and seven Union Territories (UT). Each and every Indian states and UTs has a unique demography, history, language etc. which provides various investment opportunities. These states/UTs are blessed with large number of tourist places – beautiful landscapes, wildlife and forests, hills, plateaus, valleys, monuments, forts, palaces, temples, etc. Tourism is the major source for investments in Kerala. States and UTs of India are also gifted with distinct inherent strengths – from abundant supply of mineral resources and large forest reserves to the availability of good fertile lands, which are suitable for growing variety of agricultural and horticultural crops. Several global majors are present in these States which brings large investments into the country. These companies/ industries are confined to iron and steel, cement, textiles, agro-processing, mineral-based industries, drugs and pharmaceuticals, chemicals, electronics, automobiles, etc. Pharmaceuticals and automobiles are the major source of investments in Gujarat. Information technology (IT) is now being recognized as an essential part of the economy by the various State Governments, thereby attracting new players into the market. IT revolution is committed to provide good governance that ensures transparency, reduction in transaction costs, efficiency and citizen centric delivery of public services. Therefore, the Government is making all efforts to facilitate the growth of such industries and promote overall development of the economy.

5.3.4 Major investment states of India

Haryana: Due to its strategic location, Haryana has been recognized as a business-friendly State. Panipat, Rohtak, Gurgaon, Faridabad and Sonepat have a special potential for accelerated socio-economic development. Land and water are the important resources of the State, making it an agriculturally rich State. Large number of food grains and horticultural crops are produced, by using available irrigation facilities.

Kerala: The State of Kerala constitutes one of the most advanced societies of the country. Its literacy rate is the highest among the Indian States. The State has several advantageous features – pro-active administrative set up, simple and transparent procedures for investment, rich natural resource base, educated and hardworking manpower, including the highest density of science and technology personnel, etc. The Government has taken several policy measures and incentives for attracting *investments in Kerala*.

Punjab: Punjab is a land of numerous opportunities which are embedded in its advantageous position. These include:

- Simple and responsive administrative set-up
- Educated and professional work force with abundance of skilled workers
- Strong agricultural and industrial base
- Efficient infrastructural set up including transportation, telecommunication, stable and cheap power

Gujarat: Gujarat is the leading industrialized State of India. It houses a number of multinational corporations, private sector companies, public sector enterprises and a large number of medium and small scale units. It is a manufacturing powerhouse with world-class production capabilities. Textiles, petrochemicals, pharmaceuticals are some of the few sectors which attracts *investment in Gujarat*. The State is also known for its entrepreneurial spirit as well as robust social and physical infrastructure.

Andhra Pradesh: Andhra Pradesh is the resourceful land of minerals which includes coal, oil and natural gas, bauxite, limestone, gold, diamonds and much more. It is an agriculturally-prosperous State, endowed with fertile land, water and conducive agro-climatic conditions. It is among the largest producers of food grains, fruits, vegetables, cotton, maize, dairy and poultry products in the country.

5.3.5 Investment options in India for NRIs

If you're thinking about investing in India to make money especially into real estate, you need to first determine your financial goals. Do you need to make money quickly, invest for your children's college fund, or build wealth for your retirement? Once you determine your financial goals, you need investment consultants who help investors with their long-term investment planning. A consultant, unlike a broker, does more in-depth work on formulating clients' investment strategies, helping them fulfill their needs and goals. The idea behind a consultant is that they be part of the client's investment strategy for a long period of time. The *investment consultant* job is to actively monitor the client's investments and continue to work with the client as goals change over time.

Invest India is the country's official agency dedicated to investment promotion and facilitation. Set up as a joint venture between FICCI (51%

equity), DIPP (35% equity held by the Department of Industrial policy and Promotion, Ministry of Commerce & Industry) and State Governments of India (0.5% each), its mandate is to become the first reference point for the global investment community. It provides granulated, sector-specific and state-specific information to a foreign investor, assists in expediting regulatory approvals, and offers hand-holding services. Its mandate also includes assisting Indian investors make informed choices about investment opportunities overseas. Invest India partners with the official investment promotion agencies of several countries (USA, UK, France, Italy, Japan, Korea and Mauritius) to enhance investment and broader bilateral economic ties. In recent months, it has forged close ties with its counterpart agencies in the UAE, Saudi Arabia and Singapore, and is also the nodal agency for coordinating the investment-component of a joint initiative of the Ministry of External Affairs and the Ministry of Commerce and Industry relating to Africa. Over the past year, it has partnered with India's diplomatic missions abroad and the economic ministries at home to provide specialized information to market-leading companies in select sectors through video conferences (including in Brussels, Berlin, Detroit, Seoul, and Bruges). During the same period, it has also disseminated similar information to investors at events abroad, including in China, Russia, Japan, United States and South Korea, and used these platforms to engage public and private sector investors. While assisting the SME sector remains its core focus, Invest India is also working with some large companies and sovereign wealth funds who are considering substantial investments into India in the near term. Invest India's work is guided by the recognition that while India ranks as the third most attractive FDI destination since 2006, it needs to substantially improve its ranking on the Ease of Doing Business indices employed by the World Bank and other reputed agencies. By the end of 2012, Invest India hopes to develop sufficient capability to render project-specific assistance and facilitate investments into priority sectors identified by the central government – including the Delhi Mumbai Industrial Corridor – and later leverage the vast opportunity created by the offsets policy in the defense, civilian nuclear and aviation sectors to drive technology-embedded investments into India.

RCEPRCEP will enhance trade and investment flow: India has said the formation of the Regional Comprehensive Economic Partnership (RCEP) will enhance flow of trade and investment, create employment and bridge the development gaps among the 16 Asia-Pacific countries. Ministers of the 10 members of the Association of Southeast Asian Nations (ASEAN) and their six regional partners (India, Japan, China, South Korea, Australia and New Zealand) discussed at the Brunei capital ways to proceed with negotiations on lowering and eliminating tariffs for the creation of one of the world's largest free trade blocs."India firmly believes that greater economic integration among participating countries will boost economic growth, enhance flow of trade and investment, create employment opportunities and bring down the development gaps among the countries," Commerce and Industry Minister An and Sharma said while taking part in the meeting which began Monday. "Besides hoping to carve out a niche for itself in the regional value chains, India expects to benefit from the large integrated market for services and investments."The RCEP economies announced the start of talks in November 2012 and held the first round of working-level negotiations in May, aiming to conclude a deal by 2015.Sharma said the diversity in the economies of the RCEP demanded cooperation and compromise among the participants. "India, while maintaining a single schedule, will need adequate flexibility to address her sensitivities which may differ for each individual participating country."Besides the Trade Negotiating Committee, Working Groups were established for Trade in Goods, Trade in Services and Investment. The TNC has finalized the Scoping Paper and the three working groups, namely on trade in goods, trade in services and investment; have initiated discussions towards finalizing the approach and modalities for the negotiations. The RCEP envisages regional economic integration leading to the creation of a trading bloc amounting for almost 45 per cent of the world population with a combined GDP of $21.4 trillion. This will greatly facilitate the development of regional supply chains and increase the efficiency and competitiveness of the manufacturing industry in this region with a view to jointly improve their global standing. It is a comprehensive arrangement involving agreements in areas like trade in goods, trade in services and investment. The second round of RCEP negotiations will be held in Brisbane from Sept 24 to 27.

5.3.6 TECHNOLOGY TRANSFER IN INDIA

Technology Transfer Technology transfer is the process of sharing of kills, knowledge, technologies, methods of manufacturing, samples of manufacturing and facilities among governments and other institutions to ensure that scientific and technological developments are accessible to a wider range of users who can then further develop and exploit the technology into new products, processes, applications, materials or services. In India Technology transfer is an important means by which developing countries gain access to technologies that are new to them. Most technology transfer has between developed and developing countries through commercial technology transfers by the private sector. By opening of the Indian economy (LPG policies-1991), several Indian companies are poised for different types of financial, technical and other forms of collaborations. Though they enter with proper technology transfer agreements, some are not successful with different reasons. Indian and Foreign Companies with opening up of Indian economy more and more Indian companies are entering into technical, financial and other forms of collaboration. However, not all the collaborations are successful, even if, they are covered by proper technology transfer agreements. For a variety of reasons disputes arise in implementing the collaboration agreements. Technology Transfer Agreement Generally, there are two ways of acquiring technology. It can be developed through own research and development or it can be purchased through indigenous or imported sources. India has opted for a judicious mix of indigenous and imported technology. Purchase of technology is commonly called 'Technology Transfer' and it is generally covered by a technology transfer agreement. Technology Transfer Documents (partial list) Inventor Assignment Agreement Confidentiality Agreements License Agreements Patents Provisional applications PCT applications National applications Issued patents Drawings and Specification, Machinery and components list, etc., License& Technology Transfer Agreements IMPORTANT CLAUSES & ISSUES Define Technology and List of IPRs Grant of License Rights & Obligations of Licensee and Licensor Exclusive / Non-exclusive Transferability Revocability Territory Sub-licensing Advertising & Promotion Audit of accounts from outside agency Royalty Payment and Calculation RBI procedures and rules Automatic Route: Payment for foreign technology coloration by Indian companies are allowed under the automatic route subject to the following limits: The lump sum payments not exceeding US$2 million Royalty payable being limited to 5 per cent for domestic sales and 8 per cent for exports, without any restriction on the duration of the royalty payments. Disputes in Technology Transfers Disputes relating payment of royalty and fees Delay in completion of the projects Passing of unapproved technology up gradation and incomplete data and drawings Licensor is competing with licensee with the latest models in India After sales service and backup Intellectual Property Rights (IPR) issues like of trade mark Quality and cost of production, Delay and supply of inferior raw materials and components.

5.3.7 Channels for Flow of Technology

Most technology transfer has between developed and developing countries through commercial technology transfers by the private sector. These include transfers through foreign direct investment, foreign licensing, turnkey projects, technical consultancy, capital goods acquisition, international subcontracting and joint ventures.

Foreign Direct investment*:* Commercial transfers — especially those associated with foreign direct investment — are commonly thought to work by first transferring technology to an initial organization, usually a multinational subsidiary, and then further diffusing it to other firms in the local economy through knowledge 'spillovers' — involuntary leaks or intended exchanges of useful technological knowledge. However, the significance of spillovers, and the conditions under which they take place, is still a matter of debate.

Reverse Engineering: Technology transfers can also occur informally through, for example, 'reverse engineering', where learning how to design a product is achieved by taking an existing product to pieces and analyzing its parts. Informal technology transfer also takes place by moving skilled personnel from one country or organization to another, consulting trade journals and technical papers in international journals and participating in seminars, conferences and trade fairs.

The main drivers in these types of technology transfer tend to be acquirers that take an active role in searching, identifying and obtaining available knowledge, without relying on assistance from the sources of that knowledge.

Non-commercial Channels: A third way of transferring technology to developing countries is through non-commercial channels, including initiatives and development projects taken by international organizations, developed-country governments and aid agencies and nongovernmental organizations.

For example, international research centers like the Consultative Group on International Agricultural Research centers transfer technologies to local research institutes, farmers and firms in developing countries. Development agencies in industrialized nations can also help finance training, equipment purchase etc.

Technology License Agreements and Joint Ventures: Technology transfer has been taking place on a significant scale through licensing agreements and joint ventures. There has been a rapid growth of joint ventures, encouraged by Government restrictions on foreign investment and foreign trade or the perceived advantages of such ventu5res. When foreign capital participation in joint ventures is below 50 per cent, technological agreements assume considerable significance.

Moreover, international technology transfer can be distinguished between horizontal and vertical transfers. [1] Horizontal technology transfer consists of the movement of an established technology from one operational environment to another (for instance from one company to another).

Vertical technology transfer, in contrast, refers to the transmission of new technologies from their generation during research and development activities in science and technology organizations, for instance, to application in the industrial and agricultural sectors.

5.3.8 Technology Transfers in India

Government of India's Technology Transfer policy:

For promoting technological capability and competitiveness of the Indian industry, acquisition of foreign technology is encouraged through foreign technology collaboration agreements. Induction of knowledge through such collaborations has permitted either through automatic route or with prior Government approval.

Scope of Technology Collaboration:

The terms of payment under foreign technology collaboration, which are eligible for approval through the automatic route and by the Government approval route, includes technical knowhow fees, payment for design and drawing, payment for engineering service and royalty. Payments for hiring of foreign technicians, deputation of Indian technicians aboard, and testing of indigenous raw material, products, and indigenously developed technology in foreign countries has governed by separate RBI procedures and rules pertaining to current account transactions and are not covered by the foreign technology collaboration approval.

Automatic Route: Payment for foreign technology coloration by Indian companies is allowed under the automatic route subject to the following limits:

• The lump sum payments not exceeding US$2 million

• Royalty payable being limited to 5 per cent for domestic sales and 8 per cent for exports, without any restriction on the duration of the royalty payments.

Authorized dealers appointed by the Reserve bank of India (RBI) allow remittances for royalty payment of lump-sum fee and remittance for use of

Trademark/Franchise in India within the limits prescribed under the automatic route. RBI's prior approval is required for remittance towards purchase of trade mark/franchise.
Government Approval – Project Approval Board (PAB): Royalty payment in the following cases requires prior Government approval (through PAB when only technical collaboration is proposed and FIPB where both financial & technical collaboration are proposed):

a) Sectors/activities which are not on the automatic route for FDI, or

b) Proposals not meeting any of the parameters for automatic approval

Proposals for foreign technology transfer/collaboration not covered under the automatic route shall considered by the PAB in the department of Industrial Policy and Promotion. Application in such cases has submitted in Form FC-IL to the secretary for industrial Assistance.

5.3.9 Permissible regulations

Foreign Exchange Management (Permissible capital account transactions) Regulations,2000

In exercise of the powers conferred by sub-section (2) of Section 6, sub-section (2) of Section47 of the Foreign Exchange Management Act 1999 (42 of 1999), the Reserve Bank of India makes, in consultation with the Central Government, following regulations relating to capital account transactions, namely :
1. Short title and commencement :-
(i) These Regulations may be called the "Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000".
(ii) They shall come into force on the 1st day of June, 2000.
2. Definitions :-
In these Regulations, unless the context requires otherwise, -
(a) 'Act' means, the Foreign Exchange Management Act, 1999 (42 of 1999);
(b) "Drawl " means drawal of foreign exchange from an authorised person and includes opening of Letter of Credit or use of International Credit Card or International Debit Card or ATM card or any other thing by whatever name called which has the effect of creating foreign exchange liability.
(c) 'Schedule' means a schedule to these Regulations;

(d) 'Transferable Development Rights' means certificates issued in respect of category of land acquired for public purpose either by Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole;
(e) The words and expressions used but not defined in these Regulations shall have the same meanings respectively assigned to them in the Act.

3. Permissible Capital Account Transactions :-

(1) Capital account transactions of a person may be classified under the following heads, namely :-
(A) transactions, specified in Schedule I, of a
person resident In India;
(B) transactions, specified in Schedule II, of a
person resident outside India.
(2) Subject to the provisions of the Act or the rules or regulations or direction or orders made or issued there under, any person may sell or draw foreign exchange to or froman authorised person for a capital account transaction specified in the Schedules; Provided that the transaction is within the limit , if any, specified in the regulations relevant to the transaction.

4. Prohibition :-

Save as otherwise provided in the Act, rules or regulations made there under,
a) no person shall undertake or sell or draw foreign exchange to or from an authorized person for any capital account transaction,
b) no person resident outside India shall make investment in India , in any form, in any company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage -
(i) in the business of chit fund, or
(ii) as Nidhi Company , or
(iii) in agricultural or plantation activities or
(iv) in real estate business, or construction of farm houses or
(v) in trading in Transferable Development Rights (TDRs).

Explanation:

For the purpose of this regulation, "real estate business" shall not include development of townships, construction of residential/commercial premises, roads or bridges.

5. Method of payment for investment :-

The payment for investment shall be made by remittance from abroad through normal banking channels or by debit to an account of the investor maintained with an authorized person in India in accordance with the regulations made by the Reserve Bank under the Act.

6. Declaration to be furnished :-

Every person selling or drawing foreign exchange to or from an authorized person for a capital account transaction shall furnish to the Reserve Bank , a declaration in the form and within the time specified in the regulations relevant to the transaction.

Mumbai, the 14th August, 2013

Foreign Exchange Management (Permissible Capital Account Transactions) (Amendment) Regulations, 2013

G.S.R. 551(E).—In exercise of the powers conferred by sub-section (2) of Section 6,Sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) the Reserve Bank of India, in consultation with Central Government, makes the following Regulations to amend the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, (Notification No. FEMA.1/2000–RB dated May 3, 2000) namely:—

1. Short Title and Commencement:

(i) These Regulations may be called the Foreign Exchange Management (Permissible Capital Account Transactions) (Amendment) Regulations, 2013.

(ii) They shall come into force from the date of their publication in the Official Gazette.

2. Amendment to the Regulations:

In the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, in regulation 4, in sub-regulation (a), for the provisos, the following shall be substituted:-

“Provided that –

(a) subject to the provisions of the Act or the rules or regulations or directions or orders made or issued there under, a resident individual may, draw from an authorized person foreign exchange not exceeding USD 75000 per financial year or such amount as decided by Reserve Bank from time to time for a capital account transaction specified in Schedule I. Further, any remittances for acquisition of immovable property outside India under the Scheme shall not be permitted.

Explanation : Drawl of foreign exchange by resident individuals towards remittances of gift or donations as per item No. 3 and 4 of Schedule III to Foreign Exchange Management (Current Account Transactions) Rules, 2000 dated 3rd May 2000 as amended from time to time, shall be subsumed within the limit under proviso (a) above;

(b) Where the drawl of foreign exchange by a resident individual for any capital account transaction specified in Schedule I exceeds USD 75000 or as decided by Reserve Bank from time to time as the case may be, per financial year, the limit specified in the regulations relevant to the transaction shall apply with respect to such drawal :

Provided further that no part of the foreign exchange of USD 75000 or as decided by Reserve Bank from time to time as the case may be, drawn under proviso (a) shall be used for remittance directly or indirectly to countries notified as non-co-operative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned."

Capital Account Transaction means a transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person's resident outside India and includes transactions referred to in sub-section (3) of Section 6.

There are generally two types of prohibitions on capital account transactions:-

General Prohibition:- A person shall not undertake or sell or draw foreign exchange to or from an authorized person for any capital account transaction. This prohibition is subjected to the conditions specified by Reserve Bank in itscirculars and notifications. For example, Reserve Bank of India has issued an AP (DIR) Circular, wherein a resident individual can draw from an authorized person foreign exchange up to US$ 25,000 per calendar year for a capital account transaction specified in Schedule I to the Notification.

Special Prohibition:- A nonresident person shall not make investment in India in any form, in any company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage:- (i) in the business of chit fund, or (ii) as Nidhi Company, or (iii) in agricultural or plantation activities or (iv) in real estate business, or construction of farm houses or (v) in trading in Transferable Development Rights (TDRs).

Classes of capital account transactions of Persons resident in India

a) Investment by a person resident in India in foreign securities

b) Foreign currency loans raised in India and abroad by a person resident in India

c) Transfer of immovable property outside India by a person resident in India

d) Guarantees issued by a person resident in India in favour of a person resident outside India

e) Export, import and holding of currency/currency notes

f) Loans and overdrafts (borrowings) by a person resident in India from a person resident Outside India
g) Maintenance of foreign currency accounts in India and outside India by a person resident in India
h) Taking out of insurance policy by a person resident in India from an insurance company Outside India
i) Loans and overdrafts by a person resident in India to a person resident outside India
j) Remittance outside India of capital assets of a person resident in India
k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity
Derivatives abroad by a person resident in India.

Schedule II

[See Regulation 3 (1) (B)]

Classes of capital account transactions of persons resident outside India

a) Investment in India by a person resident outside India, that is to say,
i) Issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
ii) Investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.
b) Acquisition and transfer of immovable property in India by a person resident outside India.
c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
d) Import and export of currency/currency notes into/from India by a person resident outside India.
e) Deposits between a person resident in India and a person resident outside India.
f) Foreign currency accounts in India of a person resident outside India.
g) Remittance outside India of capital assets in India of a person resident outside India

5.4 SUMMARY

Technology transfer is an important means by which developing countries gain access to technologies that are new to them. Most technology transfer has between developed and developing countries through commercial technology transfers by the private sector. These include transfers through foreign direct investment, foreign licensing, turnkey projects, technical consultancy, capital goods acquisition, international subcontracting and joint ventures. By opening of the Indian economy (LPG policies-1991), several Indian companies are poised for different types of financial, technical and other forms of collaborations. Though they enter with proper technology transfer agreements, some are not successful with different reasons. Government of India's Ministry of Scientific and Industrial Research is playing a vital role through its technology transfer policy in both inward and outwards technology transfers to the Indian companies through automatic route and some are through project approval board (PAB). The ability of the country to use technology transfers to develop their domestic capabilities to reap the social and economic benefits have been very mixed. National priority level and state-specific projects are being implemented across the country. These projects offer huge investment opportunities in India. The government is in fact, promoting Public Private Partnerships (PPPs) in many projects opening up new vistas in sectors such as infrastructure, education, healthcare etc. The health care sector of India has also opened new investment opportunities for NRIs investing in India because of the rise in disposable income, penetration of health insurance and rising health related lifestyle challenges across demographics. The returns from the real estate sector in India have consistently been high and have even outperformed other investment options. The Government of India has created many policies and schemes to maximize investment options for NRIs/PIOs looking to invest in Indian real estate sector. Some of the most popular investment opportunities available to the NRIs and PIOs for investments in India are:

- **Non-Resident (External) Rupee (NRE) Accounts:** NRE account may be in the form of savings, current, recurring or fixed deposit accounts. Such accounts can be opened only by the non-resident himself and not through the holder of the power of attorney. The interest rates on NRE Savings deposits shall be at the rate applicable to domestic savings deposits.
- **Non-Resident Ordinary (NRO) Rupee Account:** NRO accounts may be opened / maintained in the form of current, savings, recurring or fixed deposit accounts. Account should be denominated in Indian Rupees. Permissible credits to NRO account are transfers from rupee accounts of non-resident banks.
- **Bank Fixed Deposits:** Bank failures are rare in India so bank fixed deposits are a very safe way to invest for *NRIs investing in India*. You know the rates up front so there is no uncertainty there. Taxes can eat into your returns though, especially if you are in the high tax

bracket, but even then a fixed deposit (FD) that compounds quarterly and is done for a long maturity will yield well.

- **Foreign Currency Non Resident (Bank) Account ñ FCNR (B) Account:** FCNR (B) accounts are only in the form of term deposits of 1 to 5 years. All debits / credits permissible in respect of NRE accounts, including credit of sale proceeds of FDI investments, are permissible in FCNR (B) accounts also. Account can be in any freely convertible currency.
- **Senior Citizens Savings Scheme (SCSS):** It is a new *investment opportunity in India* for Senior Citizen. The account may be opened by an individual, who has attained age of 60 years or above on the date of opening of the account.
- **National Savings Certificates (NSC) IX Issue:** This is another safe investment with decent returns. There is no maximum limit for investment and no tax deduction at source (TDS). Certificates can be kept as collateral security to get loan from banks.

The Indian economy continues to grow at a good pace and holds a strong position. India is economy is amongst the largest in the world on the basis of purchasing power parity (PPP). It is today one of the most attractive destinations for business investment opportunities with the available large manpower base, diversified natural resources and strong macroeconomic fundamentals. During April-January 2012-13, India received foreign direct investments (FDI) worth US$ 30.82 billion while FDI equity inflows during January 2013 stood at US$ 2.16 billion, according to latest data released by the Department of Industrial Policy and Promotion (DIPP). India is the third-most attractive destination for FDI in the world. Indian markets have significant potential and a favorable regulatory regime for foreign investors, according to a survey titled World Investment Prospects Survey 2012ñ2014 by UNCTAD. “We are keen to see FDI investment to surge in India and to that end, a favorable business climate will be helpful in going forward. We are encouraged to see there is a continued path towards fiscal consolidation,” according to Ms Christine Lagarde, Chief, International Monetary Fund (IMF).

Changes made by the Mr P Chidambaram, Union Minister for Finance, Government of India, in the Union Budget 2013-14 can greatly benefit high net worth individuals looking to invest in India, where returns on investments are higher than in any other market.

India has become a trillion dollar economy with a self-sufficient agricultural sector, a varied industrial base and a well-established financial and services sector. There are numerous sectors that offer lucrative business opportunities in India. Some of the key investment sectors are:

- Aerospace & Defiance
- Automotive
- Banking
- Biotechnology
- Information Technology
- Insurance
- Power
- Real Estate
- Retail
- Telecommunications

India is one of the oldest civilizations in the world with diverse cultural heritage. It is divided into twenty eight States and seven Union Territories (UT). Each and every Indian states and UTs has a unique demography, history, language etc. which provides various investment opportunities. These states/UTs are blessed with large number of tourist places – beautiful landscapes, wildlife and forests, hills, plateaus, valleys, monuments, forts, palaces, temples, etc. Tourism is the major source for investments in Kerala. States and UTs of India are also gifted with distinct inherent strengths – from abundant supply of mineral resources and large forest reserves to the availability of good fertile lands, which are suitable for growing variety of agricultural and horticultural crops. Several global majors are present in these States which brings large investments into the country. These companies/ industries are confined to iron and steel, cement, textiles, agro-processing, mineral-based industries, drugs and pharmaceuticals, chemicals, electronics, automobiles, etc. Pharmaceuticals and automobiles are the major source of investments in Gujarat. Information technology (IT) is now being recognized as an essential part of the economy by the various State Governments, thereby attracting new players into the market. IT revolution is committed to provide good governance that ensures transparency, reduction in transaction costs, efficiency and citizen centric delivery of public services. Therefore, the Government is making all efforts to facilitate the growth of such industries and promote overall development of the economy.

Haryana: Due to its strategic location, Haryana has been recognised as a business-friendly State. Panipat, Rohtak, Gurgaon, Faridabad and Sonepat have a special potential for accelerated socio-economic development. Land and water are the important resources of the State, making it an agriculturally rich State. Large number of food grains and horticultural crops are produced, by using available irrigation facilities.

Kerala: The State of Kerala constitutes one of the most advanced society of the country. Its literacy rate is the highest among the Indian States. The State has several advantageous features – pro-active administrative set up, simple and transparent procedures for investment, rich natural resource base, educated and hardworking manpower, including the highest density of science and technology personnel, etc. The Government has taken several policy measures and incentives for attracting *investments in Kerala*.

Punjab: Punjab is a land of numerous opportunities which are embedded in its advantageous position. These include:

- Simple and responsive administrative set-up
- Educated and professional work force with abundance of skilled workers
- Strong agricultural and industrial base
- Efficient infrastructural set up including transportation, telecommunication, stable and cheap power

Gujarat: Gujarat is the leading industrialized State of India. It houses a number of multinational corporations, private sector companies, public sector enterprises and a large number of medium and small scale units. It is a manufacturing powerhouse with world-class production capabilities. Textiles, petrochemicals, pharmaceuticals are some of the few sectors which attracts *investment in Gujarat*. The State is also known for its entrepreneurial spirit as well as robust social and physical infrastructure.

Andhra Pradesh: Andhra Pradesh is the resourceful land of minerals which includes coal, oil and natural gas, bauxite, limestone, gold, diamonds and much more. It is an agriculturally-prosperous State, endowed with fertile land, water and conducive agro-climatic conditions. It is among the largest producers of food grains, fruits, vegetables, cotton, maize, dairy and poultry products in the country.

Invest India is the country's official agency dedicated to investment promotion and facilitation. Set up as a joint venture between FICCI (51% equity), DIPP (35% equity held by the Department of Industrial policy and Promotion, Ministry of Commerce & Industry) and State Governments of

India (0.5% each), its mandate is to become the first reference point for the global investment community. It provides granulated, sector-specific and state-specific information to a foreign investor, assists in expediting regulatory approvals, and offers hand-holding services. Its mandate also includes assisting Indian investors make informed choices about investment opportunities overseas. Invest India partners with the official investment promotion agencies of several countries (USA, UK, France, Italy, Japan, Korea and Mauritius) to enhance investment and broader bilateral economic ties. In recent months, it has forged close ties with its counterpart agencies in the UAE, Saudi Arabia and Singapore, and is also the nodal agency for coordinating the investment-component of a joint initiative of the Ministry of External Affairs and the Ministry of Commerce and Industry relating to Africa. Over the past year, it has partnered with India's diplomatic missions abroad and the economic ministries at home to provide specialized information to market-leading companies in select sectors through video conferences (including in Brussels, Berlin, Detroit, Seoul, and Bruges). During the same period, it has also disseminated similar information to investors at events abroad, including in China, Russia, Japan, United States and South Korea, and used these platforms to engage public and private sector investors. While assisting the SME sector remains its core focus, Invest India is also working with some large companies and sovereign wealth funds who are considering substantial investments into India in the near term. Invest India's work is guided by the recognition that while India ranks as the third most attractive FDI destination since 2006, it needs to substantially improve its ranking on the Ease of Doing Business indices employed by the World Bank and other reputed agencies. By the end of 2012, Invest India hopes to develop sufficient capability to render project-specific assistance and facilitate investments into priority sectors identified by the central government – including the Delhi Mumbai Industrial Corridor – and later leverage the vast opportunity created by the offsets policy in the defence, civilian nuclear and aviation sectors to drive technology-embedded investments into India. Most technology transfer has between developed and developing countries through commercial technology transfers by the private sector. These include transfers through foreign direct investment, foreign licensing, turnkey projects, technical consultancy, capital goods acquisition, international subcontracting and joint ventures.

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Vertical technology transfer, in contrast, refers to the transmission of new technologies from their generation during research and development activities in science and technology organizations, for instance, to application in the industrial and agricultural sectors.

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e) Export, import and holding of currency/currency notes

f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India

g) Maintenance of foreign currency accounts in India and outside India by a person resident in India

h) Taking out of insurance policy by a person resident in India from an insurance company outside India

i) Loans and overdrafts by a person resident in India to a person resident outside India

j) Remittance outside India of capital assets of a person resident in India
k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.

Schedule II

[See Regulation 3 (1) (B)]

Classes of capital account transactions of persons resident outside India

a) Investment in India by a person resident outside India, that is to say,
i) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
ii) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.
b) Acquisition and transfer of immovable property in India by a person resident outside India.
c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
d) Import and export of currency/currency notes into/from India by a person resident outside India.
e) Deposits between a person resident in India and a person resident outside India.
f) Foreign currency accounts in India of a person resident outside India.
g) Remittance outside India of capital assets in India of a person resident outside India

5.5 SUGGESTED READINGS

1. Dr. P. Srinivas Subbarao, IMM Ahmedabad (paper presented at FDP in Jan 2008
2. Technology Transfer, 3rd edition Written by Mark Anderson and Victor Warner
3. Intelligent Investor, Benjamin Grahm

5.6 TERMINAL QUESTIONS

1. What is the role of investment and transfer of technology in India?
2. Write a short note on Quota restriction and Anti-Dumping; Permissible Regulations.
3. What are the major channels for Flow of Technology in India?

LL.M. Part-2
Subject : Law of Export Import Regulation

Block-II - International Regime
Unit-6- Quarantine regulation; Dumping of discarded technology and goods in international market; Reduction of subsidies and counter measures.

STRUCTURE

6.1INTRODUCTION

Anti-dumping duty is a measure to correct the situation arising out of the dumping of goods and its distorting effect on domestic producers of similar goods. Rapid industrialization has resulted in large-scale production – and in this situation dumping enables the producer to establish a dominant position in the market. This is common in international commercial practice for export prices to be lower than the domestic ones. Therefore there is nothing inherently immoral about the practice of dumping. However, when dumping causes or threatens to cause, material injury to the domestic industry it is viewed gravely.
"Dumping" means export of goods by one territory to the market of another territory at a price lower than the normal value. If the export price is lower than the normal value, it constitutes dumping. Therefore, there are two fundamental parameters used for determination of dumping, namely, the export price and the normal value. Both these elements have to be compared at the same level of trade, normally at ex-factory level, for assessment of dumping." Normal value" is the comparable price at which the goods under complaint are sold, in the ordinary course of trade, in the domestic market of the exporting country.
One main objective of the procedural requirements is to ensure transparency of proceedings, a full opportunity for parties to protect their interests, and adequate explanations by investigating authorities of their determinations. The wide-ranging and detailed procedural requirements relating to investigations focus on the sufficiency of petitions to ensure that merit fewer investigations are not initiated, on the establishment of time periods for the completion of investigations, and on the provision of access to information to all interested parties, along with rational opportunities to present their views and arguments. The Rules and regulations also provide for the timing of the imposition of anti-dumping duties, the duration of such duties, and oblige Designated Authority to periodically review the continuing need for anti-dumping duties and price undertakings. It is also provided at its discretion, take anti-dumping actions at the request of a third country, which is a member of the World Trade Organization. The anti-dumping procedures are based on an application made by the concerned domestic industry. Under the Rules a valid application can be made only by those petitioners/domestic producers, who expressly support the application, and account for more than 25% of total domestic production of the like article in question.

6.2 OBJECTIVES

The object of this lesson is to ascertain the areas of Quarantine regulation; Dumping of discarded technology and goods in international market; Reduction of subsidies and counter measures. Further, to locate the areas and legislations for Quarantine regulation; Dumping of discarded technology. The lesson will also be helpful for all who are not able to get the material from any book or source.

6.3 SUBJECT

6.3.1 Quarantine Regulation

The list of prohibited plant species are covered under Schedule-IV of the Plant Quarantine (Regulation of Import into India) Order, 2003.The list of plant species for which the Plant Protection Adviser to the Government of India prescribed the additional declarations and special conditions as specified in Schedule-VI of Plant Quarantine (Regulation of Import into India) Order, 2003. The list of plant species for consumption purpose for which no specific additional declarations are specified by the Plant Protection Adviser are covered under Schedule-VII of Plant Quarantine (Regulation of Import into India) Order, 2003.No consignment of seed or gain shall be permitted, to be imported with contamination of quarantine weeds which are listed in Schedule-VIII of Plant Quarantine (Regulation of Import into India) Order, 2003.The passenger should ensure that no prohibited plant species is imported into India. The passenger should ensure that no restricted plant species is imported into India except those representing the authorized institute or organization. The passenger should ensure that the regulated plant species as covered under Schedule-VI and Schedule-VII should be accompanied with a Phytosanitary certificate issued by an authorized officer at the country of origin incorporating the additional declarations as specified in the Import Permit for freedom from specified pests and also the special conditions prescribed there under are met with. The passenger should ensure that only the commodities covered under Schedule-V, Schedule-VI and Schedule-VII should be brought into India. The commodities which are not covered under the above mentioned schedules shall not be allowed to be imported. For new commodities which are not covered under the above mentioned schedules, a Pest Risk Analysis (PRA) Request Form should be submitted well in advance to the Plant Protection Adviser and after evaluation of PRA, the Plant Protection Adviser shall allow the import of the same or else the same shall be rejected if found unfit for import based on the PRA evaluation. Further a special permit issued by the Director, National Bureau of Plant Genetic Resources, New Delhi regulates the import of transgenic seeds/plants, Germplasm and Genetically Modified Organisms for research/ experimental purpose by the public or private organizations. Such permit for import of Transgenic/ Genetically modified Organism/ Germplasm shall be issued subject to the approval of Review Committee on Genetic Manipulation (RCGM) and/ or Genetic Engineering Approval Committee set up under the Rules for manufacture, use, import export and storage of hazardous micro-organism, Genetically Engineered Organisms or cells made Sections 6,8 and 25 of the Environment (Protection) Act 1986 (29 of 1986) and subject to such restrictions and conditions prescribed thereof. The import of live insects, microbial cultures including mushroom, algae or bio-control agents is prohibited except by a special permit issued by The Plant Protection Adviser. Besides this a list of prohibited/restricted plant species covered under provisions of Para 3 &4 of Article IV of CITES and it shall be the responsibility of the passenger to ensure that the requirements stated under CITES are complied with and no prohibited plant species is imported.

6.3.2 Economic theory and Anti-Dumping

This section studies how economic theory deals with the issues of dumping and anti dumping. Trade and industrial economists from the US and European countries have discussed these issues from a theoretical and practical view point. Classical and modern trade theories support free trade on the grounds efficiency, specialization and maximization of consumer welfare. Though a low priced imports may maximize the consume welfare the free trade may also lead to the problem of dumping. Perspectives regarding dumping and anti dumping, however, vary. Following Hoekman (1998) we can classify the views into three categories. The first view recognizes dumping as a problem and considers anti dumping action as an appropriate response to the problem. According to the second view point the threat of dumping is a non issue in the long run and anti dumping is simple protectionism without any economic justification. The third view point favors' the use of anti dumping measures on the second best grounds. It may be necessary when a country closes its market to foreign imports but encourages its own firms to promote exports through predatory pricing. Anti dumping legislation provides level playing field when the competition laws are heterogeneous among various countries. Viner (1923) was one of the early writers to discuss the issue of dumping. He was of the view that dumping was a problem in the international trade and a foreign exporter had the potential to establish his monopoly through predatory pricing of the exports. Industrial economists have supported anti dumping measures wherever necessary. They look at it not only from the point of view of efficiency but also fairness. According to this view point a domestic producer has a right to be protected against a foreign seller who may not be restricted by the competition rules in his home market which restricts the domestic producers. Homes (1997) justify the use of anti dumping measures under the following conditions in the absence of other tools.

1) Monopolistic predatory pricing

2) A strategic dumping supported by the long purse of the government of the exporting country

3) Dumping by state trading organizations which do not have any profit constraint.

Howell and Ballentine (1997) are of the view that anti dumping action is necessary to address the divergence which exists between various national markets with respect to competition policy. An inefficient firm can realize higher price in the protected domestic market and resort to predatory pricing in a foreign market. As a result the firm may enjoy higher capacity utilization and lower unit cost. But an efficient domestic firm in the aforesaid foreign market may not enjoy such an advantage due to the competition policy in that country and end up with a lower capacity utilization and higher unit cost. This deters the domestic producers from investing in highly capital intensive industries producing products with shorter life cycles. Dale (1980) questioned the theoretical and practical validity of the concept of dumping under the changed world conditions. He argued that anti dumping is a serious problem in international trade. Finger (1993) stated that anti dumping is ordinary protection with grand public relations programme. The traditional view supported anti dumping measures to prevent the establishment of foreign monopoly through predatory pricing. According to Finger it is anti dumping law that kills the competition. He states that “it is harnessing of state power to serve private interest …..a means by which one competitor can use the power of the state to gain an edge over another. It removes the checks and balances in antitrust law. The only constraint is that the beneficiary must be a domestic one and apparent victim a foreign one”3Chicago school economists are skeptical about the argument which states that a foreign exporter can establish his monopoly through predatory pricing and then raise the price in future after driving out the domestic producers from the market. They believe that new firms will enter the industry in that eventuality and the foreign firm cannot retain the monopoly. The concept of contestable markets strengthens this argument. Therefore they feel that the consumers should be allowed to enjoy the fruits of dumped goods at low prices and anti dumping action is not warranted. Finger (1993) is of the view "anti dumping is a threat to the liberal trading system that post world war western leadership struggled courageously and effectively to create. It offers a legal means to destroy GATT system" Bhagwati (1988) takes the middle course and justifies the of Anti Dumping laws as they help in the progress of free trade by reducing the political opposition. But at same time he accepts the possibility of misuse of anti dumping law and recommends the strengthening of the institutions to prevent misuse of anti dumping provisions. Bhagwati (1988) makes a distinction between the free trade for one country based on national efficiency argument and free trade for all based on the cosmopolitan efficiency for all. Institutions like GATT or WTO are based on the cosmopolitan approach to free trade. They are based on full reciprocity with the essence of symmetric rights and obligations for member states the cosmopolitan efficiency arguments are based on efficient free market price but the pricing may not be efficient in the case of subsidy by a government or inadequate intellectual property right etc. Bhagwati justifies countervailing duties and AD actions as a remedy against price distortions. Bhagwati tries to establish a relationship to the growing demand for protection in United States and the anti dumping initiations to the falling tariff rates in the successive rounds of GATT. In US average tariff tell by nearly 92% over 33 years spanning Geneva round of GATT in 1947. It had gone down to 4.9% in US 6% in EEC and 5.4% in Japan (World development report 1987 quoted in Bhagwati 1988). Bhagwati is of the view that US threw its weight behind the liberal trade order in the belief that security interests of the country were best served by the pursuit of liberal trade policy. U.S was willing to overlook the asymmetries in MFN status with developing economies or within members of EEC. However the protectionist lobby was becoming more and more powerful from the 1970s as US economy started faltering on account of the oil crisis. As US was already committed to tariff reduction it was not possible to grant protection in the form of tariffs. It led to the increasing use of the administered protection like countervailing duties, anti dumping duties and negotiations for voluntary export restraints which are permitted within GATT and WTO frame work US started initiating more and more anti dumping actions against the trading partners. Increasing use of AD actions by US became a bone of contention between US and EU and Japan. These arguments can be extended to most of

WTO members today. The WTO imposes symmetric obligations in MFN status and tariff and non tariff barriers. The developed counties are under obligation to implement their commitments within a shorter time period compared to developing nations. However WTO allows the use of countervailing and antidumping duties in case of unfair trade. Auboin and Laird (1997) have pointed out how anti dumping duty has become a key defense instrument of European Union (EU) against developing country imports in order to protect EU industries.

6.3.3 Anti-dumping law in India

As per section 9A of the Act, dumping is a practice by which products of a country are exported to India at less than its normal value. A product is considered as being exported at less than its normal value, if its price (a) is less than the comparable price for the like product in the exporting country, or (b) in the absence of such domestic price, is less than (i) the highest comparable price for the like product for export to any third country, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit. Maintaining the spirit of the Agreement, the Indian law on anti-dumping does not restrain the practice of anti-dumping. It only safeguards the Indian market from the injuries of dumping. Accordingly, India can take action against the dumped product only if it causes actual injury to the domestic market. Mere intent to cause injury without actual injury is not actionable.

6.3.4 Determination of dumping

As per the explanation to section 9A of the Act, the following need to be established to determine dumping: To establish dumping, a comparison should be made between the export price and normal value. The Act defines export price as the price at which the product is exported to India and normal value as the price at which like articles are sold in the country of the exporter. If the normal value cannot be determined by means of domestic sales of the exporting country the following shall be taken into consideration while determining normal value: (a) export price of a third country, or (b) cost of production in the country of origin. A product shall be considered dumped if its export price is less than the normal price of a similar product in the exporting country. This is termed as dumping margin under the Act.

6.3.5 Ordinary course of trade:

A transaction in the ordinary course of trade refers to one between an independent buyer and seller where the buyer and seller are not related and price is the sole consideration for the sale. If there is a special or favored buyer from whom the seller charges an especially low price, it can be termed as dumping.

6.3.6 like products:

The term like product is a product which is identical in all respects to the product under consideration, or in the absence of such a product, another product, which has characteristics closely resembling those of the product under consideration. If material injury is caused to the Indian domestic industry producing the like product due to the low pricing of the imported goods, it can be termed as dumping.

6.3.7 Cause of action in case of dumping

The Act protects the domestic industry from any material injury caused by the dumping of products. Anti-dumping action can be taken in case of (a) material injury, (b) threat of material injury and (c) retardation of the establishment of a domestic industry. The determination of injury is based on the examination of the volume of the dumped imports and its effect on the prices in the domestic market for like products. Such injury must be proved by the domestic producers. In doing so, evidence towards decline in sales, profits, output, market share, productivity, etc. can be put forth by the domestic industry.

6.3.8 Investigation

Per rule 5(1) of the Rules, an investigation on dumping can be initiated only upon receipt of a written application to the designated authority by or on behalf of the domestic industry. In order to constitute a valid application, two conditions have to be satisfied by the domestic producers expressly supporting the application (1) must account for at least 25% of the total production of the like article by the domestic industry in India; and (2) must 2 Explanation (a) to section 9A of the Act To establish a threat of material injury, there must be (a) significant increase in imports into India; (b) imminent substantial increase in the exports to certain markets, taking into account the availability of other export markets; and (c) an alteration in the price of a product causing a significant suppressing effect on domestic prices, leading to increase in demand for further imports . Rule 3 of the Rules empowers the Central Government to appoint any person above the rank of a Joint Secretary or any person the Government may think fit to be appointed as the designated authority. Such person heads the Directorate General of Anti-dumping and Allied Duties functioning in the Ministry of Commerce and Industry account for more than 50% of the total production of the like article by those expressly supporting and those opposing the application. The designated authority shall expeditiously conduct the investigations and record a preliminary finding regarding export price, normal value, margin of dumping and injury. The Department of Revenue, Ministry of Finance may, on the basis of this preliminary finding of the designated authority impose a provisional duty on the offender.8 However, rule 13 of the Rules disallows the provisional duty to exceed the margin of dumping. The final finding shall be submitted by the designated authority to the Central Government within 1 year from the date of initiation of the investigation.

6.3.9 Relief to the domestic industry

Relief can be provided to the Indian domestic industry in the form of anti-dumping duties or price undertakings. Under Rule 18 of the Rules, anti-dumping duty is imposed by the Central Government within 3 months of the date of receipt of the final finding from the designated authority. The anti-dumping duty levied is either on the dumping margin or the injury margin, whichever is lower. The Act allows the levying of duty retrospectively if (a) there is a history of dumping which caused the injury or that the importer was, or, should have been aware that the exporter practices dumping and that such dumping would cause injury, and (b) the injury is caused by massive dumping, in a relatively short time, so as to seriously undermine the remedial effect of anti-dumping duty. Rule 15 of the Rules empowers the designated authority to suspend or terminate the investigation if the exporter concerned furnishes an undertaking to revise his price to remove the dumping or the injurious effect of dumping. In case the exporter issues a price undertaking, no anti-dumping duties are levied on the exporter. No undertaking can be accepted before preliminary determination is made.

6.3.10 Appeal

The parties under section 9C of the Act have a statutory right to file an appeal against the order of determination of anti-dumping duty or its review. The appeal is to be filed within 90 days of the date of the order before the Customs, Excise and Gold (Control) Appellate Tribunal constituted under section 129 of the Customs Act. Anti-dumping is a major threat to several countries like India, where often Chinese goods or goods manufactured by other countries are dumped. Accordingly, adequate antidumping legislations are necessary to protect the domestic industry. Bearing in mind that the existing anti-dumping law in India is based on the Agreement, it still is not an independent legislation dealing solely with the issue of anti-dumping. Enacting a single legislation dealing with anti-dumping will assist the judiciary by providing all the rules and regulations pertaining to anti-dumping in one place. Thus, India should enact an independent statute only to deal with anti-dumping issues.

6.4 SUMMARY

This section studies how economic theory deals with the issues of dumping and anti dumping. Trade and industrial economists from the US and European countries have discussed these issues from a theoretical and practical view point. Classical and modern trade theories support free trade on the grounds efficiency, specialization and maximization of consumer welfare. Though a low priced imports may maximize the consume welfare the free trade may also lead to the problem of dumping. Perspectives regarding dumping and anti dumping, however, vary. Following Hoekman (1998) we can classify the views into three categories. The first view recognizes dumping as a problem and considers anti dumping action as an appropriate response to the problem. According to the second view point the threat of dumping is a non issue in the long run and anti dumping is simple protectionism without any economic justification. The third view point favors' the use of anti dumping measures on the second best grounds. It may be necessary when a country closes its market to foreign imports but encourages its own firms to promote exports through predatory pricing. Anti dumping legislation provides level playing field when the competition laws are heterogeneous among various countries. Viner (1923) was one of the early writers to discuss the issue of dumping. He was of the view that dumping was a problem in the international trade and a foreign exporter had the potential to establish his monopoly through predatory pricing of the exports. Industrial economists have supported anti dumping measures wherever necessary. They look at it not only from the point of view of efficiency but also fairness. According to this view point a domestic producer has a right to be protected against a foreign seller who may not be restricted by the competition rules in his home market which restricts the domestic producers. Homes (1997) justify the use of anti dumping measures under the following conditions in the absence of other tools.

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A transaction in the ordinary course of trade refers to one between an independent buyer and seller where the buyer and seller are not related and price is the sole consideration for the sale. If there is a special or favored buyer from whom the seller charges an especially low price, it can be termed as dumping.

The term like product is a product which is identical in all respects to the product under consideration, or in the absence of such a product, another product, which has characteristics closely resembling those of the product under consideration. If material injury is caused to the Indian domestic industry producing the like product due to the low pricing of the imported goods, it can be termed as dumping.

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Per rule 5(1) of the Rules, an investigation on dumping can be initiated only upon receipt of a written application to the designated authority by or on behalf of the domestic industry. In order to constitute a valid application, two conditions have to be satisfied by the domestic producers expressly supporting the application (1) must account for at least 25% of the total production of the like article by the domestic industry in India; and (2) must 2 Explanation (a) to section 9A of the Act To establish a threat of material injury, there must be (a) significant increase in imports into India; (b) imminent substantial increase in the exports to certain markets, taking into account the availability of other export markets; and (c) an alteration in the price of a product causing a significant suppressing effect on domestic prices, leading to increase in demand for further imports . Rule 3 of the Rules empowers the Central Government to appoint any person above the rank of a Joint Secretary or any person the Government may think fit to be appointed as the designated authority. Such person heads the Directorate General of Anti-dumping and Allied Duties functioning in the Ministry of Commerce and Industry account for more than 50% of the total production of the like article by those expressly supporting and those opposing the application. The designated authority shall expeditiously conduct the investigations and record a preliminary finding regarding export price, normal value, margin of dumping and injury. The Department of Revenue, Ministry of Finance may, on the basis of this preliminary finding of the designated authority impose a provisional duty on the offender.8 However, rule 13 of the Rules disallows the provisional duty to exceed the margin of dumping. The final finding shall be submitted by the

designated authority to the Central Government within 1 year from the date of initiation of the investigation.
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6.5 SUGGESTED READINGS

1. Wolfgang Mueller, EC and WTO Anti-Dumping Law: A Handbook
2. Sehdev, Paul S, The Origin of Quarantine.

3. Brink Lindsey and Daniel J. Ikenson, **Antidumping Exposed: The Devilish Details of Unfair Trade Law (Hardback)**

4.PSA bulletin Issue V **|** August 2010.
5.Frati P: Quarantine, Trade and health policies 2000.

6.6 TERMINAL QUESTIONS

1. Write a short note on anti-dumping laws in India.?
2. How dumping is determined?
3 What is the role of Quarantine Regulation? Comment in the light of export and import of plants.?
4. How anti- dumping laws give relief to the domestic industry?

LL.M. Part-2
Subject : Law of Export Import Regulation

Block-III - General Law on Control of Imports and Exports.
Unit-7- Legislative Control; Power of Control: Central government and RBI.

STRUCTURE

7.1 INTRODUCTION

7.2 OBJECTIVES

7.3 SUBJECT

- **7.3.1 Legislative Control**
- **7.3.2 Importance of Food Export Control and Certification**
- **7.3.3 Export Food Control Policy and Strategy**
- **7.3.4 Control programmes**
- **7.3.5 Certification systems**
- **7.3.6 Assessment and verification of inspection and certification systems**
- **7.3.7 Export Control Systems in India**

7.4 SUMMARY

7.5 SUGGESTED READINGS

7.6 TERMINAL QUESTIONS

7.1 INTRODUCTION

The establishment of the WTO gives opportunities to all countries to benefit from greater access to world markets. The global trade is expanding rapidly and significantly due to increase in consumer demands linked to growing education and awareness of consumers, internationalization of tastes and habits, developments in science and technology, and improvement in communications and transportation. Coupled with the breaking down of tariff barriers and quantitative restrictions, quality and safety have become very important in international trade. Not only have consumers all over the world become conscious of quality, but at the same time governments have realized their role in protecting the health and safety of their populations by imposing stringent regulations based on health, safety and environmental considerations. The TBT and the SPS Agreements, while permitting countries to impose standards to protect their populations and ensure fair trade, require that certain rules and disciplines are maintained so that standards and regulations do not create unnecessary barriers to trade. Both the Agreements also encourage member countries to recognize each other's conformity assessment systems based on international standards so that products certified in one country are accepted without need for further inspection/testing by the other through 'equivalence' or 'Mutual recognition' Agreements. The need for a strong import control mechanism is quite obvious. The need for an equally strong export control mechanism is a natural corollary of such import control systems of importing countries, which have to have a provision for recognition of export certification systems of their trading partners through equivalence agreements. In recognizing that quality and safety can be assured through application of proper or well designed food control systems (exports and imports), the Codex Alimentary Commission established the Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS) to develop principles and guidelines in this area. Although food control should cover both export and import as is evident from the terms of reference of this Committee and most of the documents it developed, most governments have emphasized on development and strengthening of import control systems with a view to protecting their populations and to prevent dumping of inferior quality products into their country. However, the situation in India and some other exporting countries has been somewhat different, with export inspection and certification being compulsory in certain food items. Ms Shashi Sareen, in his article rightly analyzed with meticulous planning about the Food Export Control And Certification, the excerpts of which are here discussed.

7.2 OBJECTIVES

In this unit, the importance of food export control and certification, broad concepts to be followed, the experiences in the area of export control including the systems being implemented in India, observations regarding export control systems being developed in other countries and lessons to be learnt or issues of focus are highlighted.

7.3 SUBJECT

7.3.1 Legislative Control

Import and export of goods play a vital role in all the economy. That too, India is a developing country, the role of export and import are of greater emphasis. There must be a free flow of exports and imports in order to improve the economy. But, the free flow should not affect the economy. So, the control over import and export of goods become the need of the hour. Regulation mandated by a state attempts to produce outcome which might not otherwise occur, produce or prevent outcomes in different places to what might otherwise occur, or produce or prevent outcomes in different timescales than would otherwise occur. In this way, regulations can be seen as implementations artifacts of policy statements. The economics of imposing or removing regulations relating to markets is analyzed in regulatory economics.

Development of economic legislation is of comparatively recent origin. Reserve Bank of India was established in 1935 to exercise control over banking and fiscal activities. Need to control economic activities through legislation arose during the Second World War to face shortages. Price and distribution controls were established on various essential commodities under the Defense of India Act, 1939 (later converted into Essential Supplies (Temporary Powers) Act of 1946 and Essential commodities Act in 1955). Foreign Exchange Regulation Act, 1947 was passed to control the difficult position of foreign exchange. Industries (Development and Regulation) Act, 1951 provided for industrial licensing and registration. MRTP Act was passed in 1969 to exercise control over monopolies, unfair trade practices and restrictive trade practices.

India had socialistic ideals and a 'controlled economy' was envisaged on the pattern of Russia. Unfortunately, it was found that the policy was unable to give required push to the economic growth of the country. Public sector enterprises which were supposed to lead economic growth and 'reach commanding heights' turned out to be highly inefficient and wasteful.

The main purpose of economic legislation is

a. to support the economic policies of the Government.
b. to exercise control over economic activities.
c. to protect consumers from unscrupulous persons.
d. to prevent bad side effects of the development.

India decided to follow Russian model of 'controlled economy' and 'leading role to public sector'. In the basic scheme of constitution, broadly, aspects of law and order, agriculture, public health etc… are looked after by the State Governments. Article 246 of Indian Constitution indicates bifurcation of powers to make laws, between Union Government and State Governments. Parliament has exclusive powers to make laws, between Union Government and State Governments. Parliament has exclusive powers to make laws in respect of matters given in List I of the Seventh Schedule of the Constitution (called Union List). List II (State List) contains items under the jurisdiction of States. List III (Concurrent List) contains items where both Union and State Governments can exercise power. 'Imports' means bringing into India, of goods from a place outside India. In other words, it refers to the goods which are produced abroad by foreign producers and are used in the domestic economy in order to cater to the needs of the domestic consumers. India includes the territorial waters of India which extend up to 12 nautical miles into the sea to the coast of India. Similarly, 'exports' of goods means, taking goods means, taking goods from India. It refers to the goods which are produced domestically and are used to cater to the needs of the consumers in other countries. The country which is purchasing the goods is known as the importing country and the country which is selling the goods known as exporting country. The traders involved in such transaction are importers and exporters respectively. In India, exports and imports are regulated by Foreign Trade (Development and Regulation) Act, 1992, which replaced the Imports and Exports (control) Act, 1947, and gave the Government of India enormous powers to control it. Besides the FTDR Act, there are some other laws which control the export and import of goods. These include:-

a.Tea Act, 1953

b. Coffee Act, 1942
c. The Rubber Act, 1947
d. The Marine Products Export Development Authority Act, 1972
e. The Enemy Property Act, 1968
f. The Export (Quality Control and Inspection) Act, 1963.
g. The tobacco Board Act, 1975[3]

Control over the import of the goods in to India is exercised by the Import Trade Control Organization, which functions under the ministry of commerce. This organization is supervised by the director General of foreign trade station at New Delhi, who is assisted by Additional and Joint director general and by other licensing authorities at various centers. Current import policy is embodied in the export and import policy book out by the DGFT. Section 12(1) of the customs Act, 1962 is the charging section which provides for imposition of a duty called Customs duty levied as per the customs Tariff act 1975, or any other law for the time being in force on the goods imported in to India or exported out of India. The objects of Customs Act are

i) To regulate imports and exports.
ii) To protect domestic industries from dumping.
iii) To collect revenue in the form of customs duty and indirect tax.
iv) To assist allied legislations such as FTDR and FEMA.

By virtue of the power conferred under Sec156 of the Customs Act 1962 Central government is empowered to make rules consistent with the provisions of the Act. Similarly by virtue of its powers conferred under Sec157 of the Act, the Central Board of Excise and Customs (CBEC) has been empowered to frame regulations (Customs House Agent Regulations) Sec11 of the Customs Act 1962 gives powers to central government to prohibit import or export of goods. Such a prohibition can be absolute or conditional. Absolute prohibition means an importer is totally prohibited in importing/exporting the subject goods. Some of the goods prohibited from time to time are narcotic drugs, explosives, live or dead animals /birds, arms and ammunition, counterfeit currency notes. On the other hand, conditional prohibition would mean that the prohibition would mean that the prohibition would mean that the prohibition is subject to certain conditions imposed. A conditional prohibition would attract in a case where the importer is prohibited in selling/trading the imported goods but can only use the same as a raw material for manufacture. Some item like wool, turmeric, onion, black pepper, tea, etc… are allowed to be exported only after they are graded by designated authorities. In terms of Sec.11 (2) of the Customs Act, 1962, the prohibition may among other things relate to the following:

i) Maintenance of security of India.
ii) Prevention of smuggling
iii) Conservation of foreign exchange and safeguarding balance of payments.
iv) Prevention of serious injury to domestic production of goods.
v) Protection of national treasures.
vi) Maintenance of public order and standards of decency and morality.
vii) Protection of IPR (Patent/Trademark/Copyright)
viii) Any other matter conducive to the interest of general public.

Sec.2 (33) of the act defines prohibited goods means any goods the import or export of which is subject to any prohibition under this act or any other law for time being in force but doesn't include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with.

Therefore, the prohibition under Customs Act applies to prohibition under any other law in India.

a)Ancient Monument Prevention Act prohibits/ restricts antiquities.
b)Arms and ammunition cannot be imported or exported without licensee.
c) Wildlife Act prohibits certain exports- 'red sandal wood '(which are used in Middle East countries for making musical instruments)
d) Environment Protection Act prohibits export of some items.

At the time of import of goods the customs authorities will first check whether the items imported is prohibited / restricted or subject to conditional import, before allowing clearance of the goods. Similarly at the time export also the goods are given 'let export order' only after they are checked with the reference to restrictions/prohibitions. If such goods are attempted to be smuggled the goods are liable to seizure/confiscation and the offender liable to penal action including arrest /prosecution under the Customs Act.

The word 'confiscation' implies appropriation consequential to seizure. The essence and concept of the confiscation is that after confiscation the property of the confiscated goods vest with the central govt.Sec111 of the Act provides for confiscation of improperly imported goods. The goods brought from a place outside India shall be liable for confiscation. Sec.111 (d) says "any goods which are imported or attempted to be imported or are brought within the Indian Customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this act or any other law for the time being in force.Sec113 of the Act deals with confiscation of goods attempted to be improperly exported. The export goods shall be liable for confiscation under sec 113 (d) says "any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported contrary to any prohibition imposed by or under this Act or any other law for time being in force.

Conservation of Foreign Exchange and prevention of smuggling Activities Act (COFEPOSA) was passed in 1974 when foreign exchange position in India was bleak and smuggling was beyond control. In view of recent liberalization, the Act has lost its significance.

The Act gives wide powers to executive to detain a person on mere Suspicion of smuggling (the draconian provisions of the act can be compared with provisions of TADA, where a person can be incarnated in jail merely for possessing a illegal weapon and having acquaintances with some underworld elements, without any proof of direct involvement in terrorist activities). The acts like COFEPOSA, TADA, etc… are criticized on the ground that they violate basic human rights. Freedom of a man can be taken away under such Acts, without judicial scrutiny and safeguards. The act has been given special protection by including the same in the 9th schedule to constitution. The validity of COFEPOSA particularly section 5A and SAFEMA smugglers and foreign Exchange Manipulators (forfeiture of property) Act 1976, have been upheld *in Attorney General of India Vs. Amaratlal Prajivandas.* A 9 member bench SC order. Thus, individual civil liberties can be curtailed for national security and in national interest. Under provisions of the act, a Government officer, not below the rank of Joint Secretary in case of central Government and Secretary in case of State Government, who is specifically authorized by central or state government for that purpose, is authorized to order detention of a person (including a foreigner) with a view to prevent him from acting in any manner prejudicial to conservation or augmentation of foreign exchange, or to prevent him from smuggling or abetting smuggling of goods, or transporting, keeping concealing or dealing in smuggling goods or harboring persons engaged in smuggling of goods. (section.3). where an order of detention is made by state government officer, it should be reported to central government within 10 days. (Section.3 (2)). When detention is ordered by central government, central govt. is appropriate government. When detention is ordered by state government, that govt. is appropriate government. The significance of this definition is that the 'Appropriate government' has to make a reference to advisory board formed for the purpose of COFEPOSA and take action as per decision of advisory board. Appropriate government also has powers to revoke a detention, release a person temporarily, etc… Another act relevant to COEPOSA is SAFEMA – smugglers and Foreign Exchange Manipulators (Forfeiture of property) Act, 1976. The act applies to persons convicted under customs Act, FERA and to those detained under COFEPOSA. The purpose of the act is to forfeit the illegally acquired properties of the smugglers and foreign exchange manipulators. Property can be forfeited merely on the ground that he is detained under COFEPOSA. However, in case of customs and FERA, property can be forfeited only if a person is convicted under these Acts. An appellate tribunal has also been formed for this purpose. COFEPOSA is dreaded Act similar to TADA. It permits detention of a person even without a charge. Since the powers are extraordinary, generally courts are strict about the conditions prescribed in respect of detention.

The FTDR Act is designed to develop and regulate foreign trade by facilitating imports in to India, and augmenting exports from India, and for matters connected therewith. The salient features of the Act are as follows;

- It has empowered the Central Government to make provisions for development and regulation of foreign trade by facilitating imports into, and augmenting exports from India and for all matters connected therewith or incidental thereto.
- The Central Government can prohibit, restrict and regulate exports and imports, in all or specified cases as well as subject them to exemptions.
- It authorizes the Central Government to formulate and announce an Export and Import (EXIM) Policy and also amend the same from time to time, by notification in the Official Gazette.
- It provides for the appointment of a Director General of Foreign Trade by the Central Government for the purpose of the Act. He shall advise Central Government in formulating export and import policy and implementing the policy.
- Under the Act, every importer and exporter must obtain a 'Importer Exporter Code Number' (IEC) from Director General of Foreign Trade or from the officer so authorized.
- The Director General or any other officer so authorized can suspend or cancel a licensee issued for export or import of goods in accordance with the Act. But he does it after giving the licensee holder a reasonable opportunity of being heard.

Export or import in violation of provisions of the act, rules or policy is an offence. Penalty up to five times the value of goods can be imposed. The contravening goods and conveyance carrying the goods are liable to confiscation. The goods and conveyances confiscated can be released by paying redemption charges equal to market value of such goods or conveyance. Conveyance will not be confiscated if it is owner proves that the conveyance was used without his knowledge or he took reasonable precautions against its misuse. Penalty and confiscation can be ordered by 'Adjudicatory authority'.

Appeal against the order of DGFT for refusing of suspending or cancelling code number or licensee or imposing penalty can be filed within 45 days with prescribed authority. Appeal can be filed only on payment of penalty imposed, unless appellate authority dispense with such pre deposit (Section.15 of FTDR). Central Government can call and examine any records and pass revision orders in some cases (section.16 of the act).

A person can opt for settlement by admitting contravention in the following circumstances.

a. Contravention was without willful mistake or without any collusion, fraud or without intention to cause loss of foreign exchange.
b. Person importing has not misutilised the imported goods, but condition of 'Actual user' or 'Export obligation' have not been satisfied. In such cases, the adjudicatory authority can order settlement by determining the amount payable by the person. Settlement order of adjudicatory authority is final (Rule 16 of Foreign Trade (regulation) Rules, 1993).
The foreign exchange regulation Act 1973 was reviewed in the year 1993 as a part of ongoing process of economic liberalization in foreign investment and foreign trade. Since 1993 there has been substantial increase in our country's foreign exchange reserves, growth in foreign trade, realization of tariff, liberalization in investment, increased access to external commercial borrowing by Indian companies. Therefore, the government repealed the FERA and in its place brought FEMA, 1999. Section7, of the FEMA deals with export of goods and services. Section**7.** (1) Every exporter of goods shall—

(*a*) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India;
(*b*) Furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realization of the export proceeds by Such exporter. Section 7(3) exporters of service shall furnish in the prescribed format the true and correct particulars in relation to payment of such services. The SOFTEX form is filed by exporters of services under this provision, as unlike the physical export of goods where the exporter has to file GR form before the customs

authorities, the export takes place through web/internet where the customs are not involved. Rule 9 of FEM (Export of goods) Regulations 2000 – exporter to furnish value of goods/software realized within 6 months of export. 2^{nd} proviso to Rule 9, RBI can extend time on sufficient/reasonable cause being shown.

7.3.2 Importance of Food Export Control and Certification

The SPS Agreement permits member countries to impose measures to protect human, animal and plant life or health. Furthermore, the Agreement, through its provision for adherence/adoption of Codex standards, which in turn provide for legislative framework for imports and the role for official/government inspection/certification agencies and recognition of such agencies at the exporting country's end through equivalence agreements, permits members to establish formal systems of import control to ensure the appropriate degree of protection for their populace. Taking strength from these Agreements developed and developing countries have installed strong import control systems in the food sector. Many of these countries also maintain export inspection systems, but these are very minimal and basically cater for providing sanitary, phytosanitary or health certificates when desired by the importing country. The need to have a well-developed food quality control system for export is more important for countries that are major exporters. Some of the benefits of such export control systems are highlighted below:

(i) Minimize impediments to trade by reducing the time for inspection and testing at the importing end.

(ii) Minimize and even eliminate rejection or non-compliance at the point of import.

(iii) Avoid duplication of inspection, sampling and tests at the exporting and importing ends and lead to usage of collective resources more efficiently and effectively.

(iv) Are financially more effective as cost of recall, cost of testing at importing end and cost of destruction of consignments is minimized.

(v) Take care of variation in quality due to production by small farmers, fishermen or enterprises.

(vi) Help in building up the image of the country, as ensures that inferior quality products are not exported by unscrupulous one-time or fly-by-night operators. Such problems can be minimized with mandatory export certification. For example, in the Indian dairy sector, export certification has become mandatory and it is obligatory for exports to take place only from material processed in an approved unit implementing food safety management systems.

(vii) Enable official inspection/health certificates to be given as the same are often required by the buyers.

(viii) Help in 'Capacity Building' in a country with respect to product as well as systems. With a mandatory export certification system, the country identifies the weaknesses and focuses on correcting these.

(ix) Decisions on a country's products that are exported are taken by the country itself rather than by the importing country. For example, if the product does not meet an importing country's requirement, the exporter can, in consultation with the official certifying body send it to a third country, which permits the same, rather than the importing country deciding that it is not fit for consumption as its requirements are not met and therefore needs to be destroyed.

(x) Facilitate negotiating Agreements/MOUS for recognition of food control systems and certification by the importing country.

(xi) Provide protection to the consumer of the importing country as the broad objective of the exporting country is to ensure that requirements of the importing country are met.

(xii) Facilitate implementation of various forms of voluntary certification which address the entire chain from farm to table. This is simplified as a major part of the total chain, namely processing is already covered and only additional areas such as those at farm level need to be certified.

7.3.3 Export Food Control Policy and Strategy

Export food control activity is a multi-disciplinary activity covering a number of aspects such as food science, microbiology, analytical chemistry, plant pathology, veterinary science, etc. A number of agencies would normally be involved in any country including various departments of government, control organizations, promotional bodies, research institutions, agricultural institutions, farming community, trade associations, non-governmental organizations (NGOs), consumers etc.

There needs to be a suitable documented export control food strategy with clear objectives, including the countries of focus, well designed plan of action with role clarity provided for different players and clear networking of the organizations within the country. Food legislation includes acts, regulations, and requirements or procedures prescribed by the government relating to export of foodstuffs to meet requirements of the importing country while ensuring conditions of fair trade. Food control needs to be simple, complete, covering various aspects of the food chain as needed and address requirements of importing country - both issues of safety and quality. It should provide authority to carry out controls at all stages of the food chain. Furthermore, it should be flexible to allow taking into account new technologies, developments and changing trade needs. It also needs to be WTO compatible and as far as possible based on Codex standards, guidelines and recommendations, but depending on importing country's requirements. Legislation may also include provisions for registration of establishments or listing of certified processing plants, establishment approval, licensing or registration of traders or agents, equipment design approval, penalties, coding requirements and charging of fees. Necessary provisions need to be included for ensuring integrity, impartiality and independence of the official and officially recognized inspection and certification systems.

7.3.4 Control programmes

Inspection services should design control programmes based on precise objective and appropriate risk analysis. HACCP or a similar quality and safety assurance and management system based approach should be encouraged with responsibility for meeting the food quality and safety regulatory requirements of importing country resting with the food industry with all segments of the food chain having responsibility for establishing food safety and quality controls. The responsibility of food control regulators is to ensure, through a surveillance system of industry and other components of the food chain that they meet the requirements specified by the importing country. Elements of a control programme should include the following:

-**Inspection;**
-Sampling and analysis;
-Checks on hygiene, including personal cleanliness and clothing;
-Examination of routine and other records;
-Examination of the results of any verification systems operated by

the establishment;
-Audit of establishments by the national competent authority responsible for export control;
-National audit and verification of the control programme.

An administrative procedure should ensure that controls by the inspection systems are carried out regularly proportionate to the degree of risk, where non-compliance is suspected and in a coordinated manner between different authorities (if several exist).Control should also cover, as appropriate, the establishment, installations, means of transport, equipment and material; raw materials and ingredients for preparation and production of food stuffs; semi-finished and finished products; cleaning and maintenance products; processes for manufacture or processing of foodstuffs; preservation methods; labeling integrity and claims etc. Formal documentation of the export control programmes is also necessary.

7.3.5 Certification systems

Certification should provide assurance of conformity of a product to importing country requirements by checks on each product or a batch of products or by approval of the system being implemented by the processor with regular checks by the inspection and certification service on various aspects of the system being implemented. The competent authorities should take all necessary steps to ensure the integrity, impartiality and independence of official or officially recognized certification systems.

7.3.6 Assessment and verification of inspection and certification systems

The export inspection and certification system should be subject to audit separate from routine inspection, may be self-evaluation or by third parties. Internationally recognized assessment and verification procedures should be used. Guidelines for conducting assessment and verification of an exporting country by an importing country have been given in the Annex to CAC/GL 26-1997 and an importing country may undertake a review of the exporting country's systems, if so agreed.

7.3.7 Export Control Systems in India

India has been operating export control systems since 1963 which have been well-defined and established under the Export (Quality Control and Inspection) Act, 1963. The Act empowers the Central Government to notify commodities for pre-shipment inspection and certification, specify the minimum standards (generally recognizing international, importing countries' standards and contractual specifications), and prescribe the manner of export inspection and certification, whether compulsory or voluntary. The export control system is operated by the Export Inspection Council of India (EIC), India's official export certification body, through its field organizations, the Export Inspection Agencies, having head offices in Chennai, Delhi, Kochi, Kolkata and Mumbai with 41 sub-offices including laboratories around the country. Over the years, under the provision of the Act, nearly 1000 commodities have been notified by the government for pre-shipment inspection and certification covering such sectors as chemicals, pesticides, rubber products, engineering products, food and agricultural products, textiles, footwear etc. However, presently only sensitive items such as marine products, egg products, dairy products, poultry products and honey are under compulsory export certification by the Export Inspection Council of India. In the case of other food products, although many of these are notified under the Act, there is no compulsory certification and in many cases, and in case required by an importing government, EIC certifies the products. An example is the case of black pepper exported to USA, or basmati rice to the EC for duty benefits, etc. However, if required by the buyer or government, these food items may be certified by private inspection agencies. Details of export control systems being operated by the Export Inspection Council of India are given in the Conference Room Document prepared by India.

7.4 SUMMARY

The establishment of the WTO gives opportunities to all countries to benefit from greater access to world markets. The global trade is expanding rapidly and significantly due to increase in consumer demands linked to growing education and awareness of consumers, internationalization of tastes and habits, developments in science and technology, and improvement in communications and transportation. Coupled with the breaking down of tariff barriers and quantitative restrictions, quality and safety have become very important in international trade. Not only have consumers all over the world become conscious of quality, but at the same time governments have realized their role in protecting the health and safety of their populations by imposing stringent regulations based on health, safety and environmental considerations. The TBT and the SPS Agreements, while permitting countries to impose standards to protect their populations and ensure fair trade, require that certain rules and disciplines are maintained so that standards and regulations do not create unnecessary barriers to trade. Both the Agreements also encourage member countries to recognize each other's conformity assessment systems based on international standards so that products certified in one country are accepted without need for further inspection/testing by the other through 'equivalence' or 'Mutual recognition' Agreements. The need for a strong import control mechanism is quite obvious. The need for an equally strong export control mechanism is a natural corollary of such import control systems of importing countries, which have to have a provision for recognition of export certification systems of their trading partners through equivalence agreements. In recognizing that quality and safety can be assured through application of proper or well designed food control systems (exports and imports), the Codex Alimentary Commission established the Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS) to develop principles and guidelines in this area. Although food control should cover both export and import as is evident from the terms of reference of this Committee and most of the documents it developed, most governments have emphasized on development and strengthening of import control systems with a view to protecting their populations and to prevent dumping of inferior quality products into their country. However, the situation in India and some other exporting countries has been somewhat different, with export inspection and certification being compulsory in certain food items.

Import and export of goods play a vital role in all the economy. That too, India is a developing country, the role of export and import are of greater emphasis. There must be a free flow of exports and imports in order to improve the economy. But, the free flow should not affect the economy. So, the control over import and export of goods become the need of the hour. Regulation mandated by a state attempts to produce outcome which might not otherwise occur, produce or prevent outcomes in different places to what might otherwise occur, or produce or prevent outcomes in different timescales than would otherwise occur. In this way, regulations can be seen as implementations artifacts of policy statements. The economics of imposing or removing regulations relating to markets is analyzed in regulatory economics. Development of economic legislation is of comparatively recent origin. Reserve Bank of India was established in 1935 to exercise control over banking and fiscal activities. Need to control economic activities through legislation arose during the Second World War to face shortages. Price and distribution controls were established on various essential commodities under the Defense of India Act, 1939 (later converted into Essential Supplies (Temporary Powers) Act of 1946 and Essential commodities Act in 1955). Foreign Exchange Regulation Act, 1947 was passed to control the difficult position of foreign exchange. Industries (Development and Regulation) Act, 1951 provided for industrial licensing and registration. MRTP Act was passed in 1969 to exercise control over monopolies, unfair trade practices and restrictive trade practices.

India had socialistic ideals and a ‘controlled economy’ was envisaged on the pattern of Russia. Unfortunately, it was found that the policy was unable to give required push to the economic growth of the country. Public sector enterprises which were supposed to lead economic growth and ‘reach commanding heights’ turned out to be highly inefficient and wasteful.

The main purpose of economic legislation is

a. to support the economic policies of the Government.
b. to exercise control over economic activities.
c. to protect consumers from unscrupulous persons.
d. To prevent bad side effects of the development.

India decided to follow Russian model of ‘controlled economy’ and ‘leading role to public sector’. In the basic scheme of constitution, broadly, aspects of law and order, agriculture, public health etc… are looked after by the State Governments. Article 246 of Indian Constitution indicates bifurcation of powers to make laws, between Union Government and State Governments. Parliament has exclusive powers to make laws, between Union Government and State Governments. Parliament has exclusive powers to make laws in respect of matters given in List I of the Seventh Schedule of the Constitution (called Union List). List II (State List) contains items under the jurisdiction of States. List III (Concurrent List) contains items where both Union and State Governments can exercise power. ‘Imports’ means bringing into India, of goods from a place outside India. In other words, it refers to the goods which are produced abroad by foreign producers and are used in the domestic economy in order to cater to the needs of the domestic consumers. India includes the territorial waters of India which extend up to 12 nautical miles into the sea to the coast of India. Similarly, ‘exports’ of goods means, taking goods means, taking goods from India. It refers to the goods which are produced domestically and are used to cater to the needs of the consumers in other countries. The country which is purchasing the goods is known as the importing country and the country which is selling the goods known as exporting country. The traders involved in such transaction are importers and exporters respectively. In India, exports and imports are regulated by Foreign Trade (Development and Regulation) Act, 1992, which replaced the Imports and Exports (control) Act, 1947, and gave the Government of India enormous powers to control it. Besides the FTDR Act, there are some other laws which control the export and import of goods. These include:-

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(i) Minimize impediments to trade by reducing the time for inspection and testing at the importing end.
(ii) Minimize and even eliminate rejection or non-compliance at the point of import.
(iii) Avoid duplication of inspection, sampling and tests at the exporting and importing ends and lead to usage of collective resources more efficiently and effectively.
(iv) Are financially more effective as cost of recall, cost of testing at importing end and cost of destruction of consignments is minimized.
(v) Take care of variation in quality due to production by small farmers, fishermen or enterprises.
(vi) Help in building up the image of the country, as ensures that inferior quality products are not exported by unscrupulous one-time or fly-by-night operators. Such problems can be minimized with mandatory export certification. For example, in the Indian dairy sector, export certification has become mandatory and it is obligatory for exports to take place only from material processed in an approved unit implementing food safety management systems.
(vii) Enable official inspection/health certificates to be given as the same are often required by the buyers.
(viii) Help in 'Capacity Building' in a country with respect to product as well as systems. With a mandatory export certification system, the country identifies the weaknesses and focuses on correcting these.
(ix) Decisions on a country's products that are exported are taken by the country itself rather than by the importing country. For example, if the product does not meet an importing country's requirement, the exporter can, in consultation with the official certifying body send it to a third country, which permits the same, rather than the importing country deciding that it is not fit for consumption as its requirements are not met and therefore needs to be destroyed.

(x) Facilitate negotiating Agreements/MOUS for recognition of food control systems and certification by the importing country.

(xi) Provide protection to the consumer of the importing country as the broad objective of the exporting country is to ensure that requirements of the importing country are met.

(xii) Facilitate implementation of various forms of voluntary certification which address the entire chain from farm to table. This is simplified as a major part of the total chain, namely processing is already covered and only additional areas such as those at farm level need to be certified.

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7.5 SUGGESTED READINGS

1. http://en.wikipedia.org/wiki/regulation access on date - 02 Apr. 2012.
2.http://www.business.gov.in/growing_business/imports_exports.php access on date - 02 Apr. 2012.
3.Ms Shashi Sareen, Food Export Control And Certification Director, Export Inspection Council, India

7.6 TERMINAL QUESTIONS

1. How Export and Import policy of India is reflected globally?

2. How central Govt. and TBI controls export and import policy?

3. What is the role of Export Food Control Policy and Strategy? Discuss.

LL.M. Part-2

Subject : Law of Export Import Regulation

Block-III - General Law on Control of Imports and Exports.
Unit-8-Foreign Trade Development and Regulation Act 1992; Restrictions under customs law

STRUCTURE

8.1 INTRODUCTION

Imports and exports are the two important components of a foreign trade. Foreign trade is the exchange of goods and services between the two countries, across their international borders. 'Imports' imply the physical movement of goods into a country from another country in a legal manner. It refers to the goods that are produced abroad by foreign producers and are used in the domestic economy to cater to the needs of the domestic consumers. Similarly, 'exports' imply the physical movement of goods out of a country in a legal manner. It refers to the goods that are produced domestically in a country and are used to cater to the needs of the consumers in foreign countries. Thus, the imports and exports have made the world a local market. The country which is purchasing the goods is known as the importing country and the country which is selling the goods is known as the exporting country. The traders involved in such transactions are importers and exporters respectively.

8.2 OBJECTIVES

The objective of this lesson is to ascertain the "Foreign Trade Development and Regulation Act 1992; Restrictions under customs law"and development outcomes for economic governance. Further an attempt has been made to study all the relevant factors related with the Foreign Trade Development and Regulation

8.3 SUBJECT

8.3.1 Foreign Trade Development and Regulation Act 1992

In India, exports and imports are regulated by the **Foreign Trade (Development and Regulation) Act, 1992**, which replaced the Imports and Exports (Control) Act, 1947, and gave the Government of India enormous powers to control it. The salient features of the Act are as follows:-

- It has empowered the Central Government to make provisions for development and regulation of foreign trade by facilitating imports into, and augmenting exports from India and for all matters connected therewith or incidental thereto.
- The Central Government can prohibit, restrict and regulate exports and imports, in all or specified cases as well as subject them to exemptions.
- It authorizes the Central Government to formulate and announce an **Export and Import (EXIM) Policy** and also amend the same from time to time, by notification in the Official Gazette.
- It provides for the appointment of a Director General of Foreign Trade by the Central Government for the purpose of the Act. He shall advise Central Government in formulating export and import policy and implementing the policy.
- Under the Act, every importer and exporter must obtain a '**Importer Exporter Code Number' (IEC)** from Director General of Foreign Trade or from the officer so authorized.
- The Director General or any other officer so authorized can suspend or cancel a license issued for export or import of goods in accordance with the Act. But he does it after giving the licensee holder a reasonable opportunity of being heard.
- As per the provisions of the Act, the Government of India formulates and announces an Export and Import policy (EXIM policy) and amends it from time to time. EXIM policy refers to the policy measures adopted by a country with reference to its exports and imports. Such a policy become particularly important in a country like India, where the import and export of items plays a crucial role not just in balancing budgetary targets, but also in the overall economic development of the country. The principal objectives of the policy are:-

To facilitate sustained growth in exports of the country so as to achieve larger percentage shares in the global merchandise trade.

To provide domestic consumers with good quality goods and services at internationally competitive prices as well as creating a level playing field for the domestic producers.

To stimulate sustained economic growth by providing access to essential raw materials, intermediates, components, consumables and capital goods required for augmenting production and providing services.

To enhance the technological strength and efficiency of Indian agriculture, industry and services, thereby improving their competitiveness to meet the requirements of the global markets.

To generate new employment opportunities and to encourage the attainment of internationally accepted standards of quality.

Besides this Act, there are some other laws which control the export and import of goods. These include:-Tea Act,1953,Coffee Act, 1942,The Rubber Act, 1947,The Marine Products Export Development Authority Act, 1972,The Enemy Property Act, 1968,The Export (Quality Control and Inspection) Act, 1963,The Tobacco Board Act, 1975.

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- Under the Act, every importer and exporter must obtain a '**Importer Exporter Code Number' (IEC)** from Director General of Foreign Trade or from the officer so authorized.
- The Director General or any other officer so authorized can suspend or cancel a license issued for export or import of goods in accordance with the Act. But he does it after giving the licensee holder a reasonable opportunity of being heard.

8.3.2Department of Commerce

At the central level, the **Ministry of Commerce and Industry** is the most important organ concerned with the promotion and regulation of the foreign trade in India. The Ministry has an elaborate organizational set up to look after the various aspects of trade. Within the Ministry, the **Department of Commerce** is responsible for formulating and implementing the foreign trade policy. The Department is also entrusted with responsibilities relating to multilateral and bilateral commercial relations, state trading, export promotion measures and development and regulation of certain export oriented industries and commodities.

Jurisdiction Of Department-

(a) **Two Attached Offices**

- **Directorate General of Foreign Trade (DGFT)**:- with its headquarters at New Delhi, is headed by the Director General of Foreign Trade. It is responsible for implementing the **Foreign Trade Policy/Exim Policy** with the main objective of promoting Indian exports. The DGFT also issues licences to exporters and monitors their corresponding obligations through a network of regional offices. The regional offices are located at 33 places.
- **Directorate General of Supplies and Disposal (DGS&D)**:- with its headquarters at New Delhi, is headed by the Director General. It functions as the executive arm of the Supply Division of the Department of Commerce for conclusion of **Rate Contracts** for common user items, procurement of stores, inspection of stores, shipment and clearance of imported stores/cargo. It has three Regional Offices located at Chennai, Mumbai and Kolkata.

(b) **Five Subordinate Offices**

Directorate General of Commercial Intelligence and Statistics (DGCI&S):- with its office located at Kolkata, is headed by the Director General. It is entrusted with the work of collecting, compiling and publishing/ disseminating trade statistics and various behalf of Pakistani nationals between the period 10.9.1965 and 26.9.1977 are vested in the Custodian of Enemy Property for India.

- Pay and Accounts Office (Supply):- The payment and accounting functions of Supply Division, including those of DGS&D, are performed by the **Chief Controller of Accounts (CCA)** under the Departmentalized Accounting System. Payment to suppliers across the country is made through this organization.

- **Pay and Accounts Office (Commerce & Textiles)**:- The Pay and Accounts Office, common to both the Department of Commerce and the Ministry of Textiles, is responsible for the payment of claims, accounting of transactions and other related matters through the four Departmental Pay & Accounts Offices in Delhi, two in Mumbai, two in Kolkata and one in Chennai.

(b) <u>Ten Autonomous Bodies</u>

(c) **Coffee Board** :- The Coffee Board of India is an autonomous body, functioning under the Ministry of Commerce and Industry, Government of India. The Board serves as a guide of the coffee industry in India. The Board focuses on research, development, extension, quality up gradation, market information, and the domestic and external promotion of Indian coffee.

(d) **Rubber Board** :- The board is engaged in the development of the rubber industry. This is done by assisting and encouraging scientific, technical and economic research; supplying technical advice to rubber growers; and training growers in improved methods of plantation and cultivation.

(e) **Tea Board** :- The primary functions of tea board include rendering financial and technical assistance for cultivation,manufacture,marketing of tea; promoting tea exports ;aiding research and developmental activities for augmentation of tea production and improvement of tea quality as well as encouraging and assisting small growers sector financially and technically.

(f) **Tobacco Board**:- The Government of India established the Tobacco Board, in place of Tobacco Export Promotion Council, under the **Tobacco Board Act of 1975** to regulate production, promotion of overseas marketing and to control recurring instances of imbalances in supply and demand, which lead to market problems, The Tobacco Board Act aims at the planned development of Tobacco Industry in the country. The activities of the Board include the regulation of the production and curing of Virginia Tobacco with regard to the demand in India and abroad.

(g) **Spices Board** :- Spices Board was constituted on 26th February 1986 under the Spices. It is one of the Commodity Boards functioning under the Ministry of Commerce & Industry. It is an autonomous body responsible for the export promotion of the scheduled spices and production or development of some of them such as Cardamom and Vanilla.

(h) **Export Inspection Council (EIC), New Delhi** :- The Export Inspection Council is responsible for the enforcement of quality control and compulsory preshipment inspection of various commodities meant for export and notified under the **Export (Quality Control & Inspection) Act, 1963**.

(i) **Indian Institute of Foreign Trade (IIFT), NewDelhi** :- is engaged in the following activities:-

a. Training of Personnel in modern techniques of international trade;
b. Organisation of Research in problems of foreign trade;
c. Organisation of marketing research, area surveys, commodity surveys, market surveys;
d. Dissemination of information arising from its activities relating to research and market studies.

(j) **Indian Institute of Packaging (IIP), Mumbai** is registered under the Societies Registration Act. The main aim of this Institute is to undertake research of raw materials for the packaging industry, to organize training programmes on packaging technology and to stimulate consciousness of the need for good packaging etc.

(k) **Marine Products Exports Development Authority (MPEDA), Kochi** :- functions under the Ministry of Commerce, Government of India and acts as a coordinating agency with different Central and State Government establishments engaged in fishery production and allied activities. The Authority is responsible for development of the marine products industry with special focus on marine exports. The role envisaged for the MPEDA is comprehensive covering fisheries of all kinds, increasing exports, specifying standards, processing, marketing, extension and training in various aspects of the marine industry.

(l) **Agricultural and Processed Food Products Export Development Authority (APEDA), New Delhi** came into existence in 1986 to further develop agricultural commodities and processed foods, and to promote their exports. The aim is to maximize foreign exchange earnings through increased agro exports, to provide better income to the farmers through higher unit value realization and to create employment opportunities in rural areas by encouraging value added exports of farm produce.

(m) (e) **Other Organizations**

(n) Export Promotion Councils (EPCs)

(o) Presently there are twelve EPCs under the administrative control of the Ministry of Commerce. These councils are registered as non-profit organizations under the **Companies Act**.The Councils perform both the advisory and executive functions. These councils are also the registering authorities under the Import Policy for Registered Exporters.

- **Federation of Indian Export Organizations (FIEO)**:- is an apex body of various export promotion organizations and institutions with its major regional offices at Delhi, Mumbai, Chennai and Kolkata. It provides the content, direction and thrust to India's global export effort.
- **Indian Council of Arbitration (ICA), New Delhi** :- set up under the **Societies Registration Act** promotes arbitration as a means of settling commercial disputes and popularizes the concepts of arbitration among the traders, particularly those engaged in international trade.
- **Indian Diamond Institute (IDI), Surat** :- With the objective of enhancing the quality, design and global competitiveness of the Indian Jewellery, the **Indian Diamond Institute (IDI)** was established as a pivotal institute for imparting technical skills to the Gems and Jewellery industry in the areas of Gemology and Jewellery manufacture.

(f) **Advisory Bodies**

- **Board of Trade (BOT)**:- was set up on May 5, 1989 with a view to providing an effective mechanism to maintain continuous dialogue with trade and industry in respect of major developments in the field of International Trade.
- **Export Promotion Board (EPB)**:- provide policy and infrastructural support through greater coordination amongst concerned Ministries for boosting the growth of exports.
- Directorate General of Anti-Dumping & Allied Duties (DGAD):- The Directorate is responsible for carrying out investigations and to recommend, where required, under Customs Tariff Act, the amount of anti-dumping duty/countervailing duty on the identified articles which would be adequate to remove injury to the domestic industry.

(g) **Public Sector Undertakings**

The following trading/service corporations are functioning under the administrative control of the Department of Commerce:-

State Trading Corporation (STC) of India Ltd.

MMTC (Minerals and Metals Trading Corporation of India) Limited,

PEC Ltd,

Export Credit Guarantee Corporation (ECGC) of India Ltd.

India Trade Promotion Organization (ITPO)

8.3.3 Restrictions under customs law

Under sub-section (d) of section 111 and sub-section (d) of Section 113, any goods which are imported or attempted to be imported and exported or attempted to be exported, contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force shall be liable to confiscation. Section 112 of the Customs Act provides for penalty for improper importation and Section 114 of the Customs Act provides for penalty for attempt to export goods improperly. In respect of prohibited goods the Adjudicating Officer may impose penalty up to five times the value of the goods. It is, therefore, absolutely necessary for the trade to know what are the prohibitions or restrictions in force before they contemplate to import or export any goods.

The terms "Prohibited Goods" have been defined in sub-section 33 of Section 2 of the Customs Act as meaning "any goods the import or export of which is subject to any prohibition under the Customs Act or any other law for the time being in force".

Under section 11 of the Customs Act, the Central Government has the power to issue Notification under which export or import of any goods can be declared as prohibited. The prohibition can either be absolute or conditional. The specified purposes for which a notification under section 11 can be issued are maintenance of the security of India, prevention and shortage of goods in the country, conservation of Foreign Exchange, safeguarding balance of payments etc. The Central Govt. has issued many notifications to prohibit import of sensitive goods such as coins, obscene books, printed waste paper containing pages of any holy books, armored guard, fictitious stamps, explosives, narcotic drugs, rock salt, saccharine, etc. Under Export and Import Policy, laid down by the DGFT, in the Ministry of Commerce, certain goods are placed under restricted categories for import and export. Under section 3 and 5 of the Foreign Trade (Development and Regulation) Act, 1992, the Central Government can make provisions for prohibiting, restricting or otherwise regulating the import of export of the goods. As for example, import of second hand goods and second hand capital goods is restricted. Some of the goods are absolutely prohibited for import and export whereas some goods can be imported or exported against a license. For example export of human skeleton is absolutely prohibited whereas export of cattle is allowed against an export license. Another example is provided by Notification No.44 (RE-2000) 1997 dated 24.11.2000 in terms of which all packaged products which are subject to provisions of the Standards of Weights and Measures (Packaged Commodities) Rules, 1997, when produced/packed/sold in domestic market, shall be subject to compliance of all the provisions of the said Rules, when imported into India. All packaged commodities imported into India shall carry the name and address of the importer, net quantity in terms of standard unit of weights measures, month and year of packing and maximum retail sale price including other taxes, local or otherwise. In case any of the conditions is not fulfilled, the import of packaged products shall be held as prohibited, rendering such goods liable to confiscation.

Another restriction under the aforesaid Notification issued by the Ministry of Commerce is that the import of a large number of products, presently numbering 133, are required to comply with the mandatory Indian Quality Standards (IQS) and for this purpose exporters of these products to India are required to register themselves with Bureau of Indian Standards (BIS). Non-fulfillment of the above requirement shall render such goods prohibited for import.

Import and export of some specified goods may be restricted/prohibited under other laws such as Environment Protection Act, Wild Life Act, Indian Trade and Merchandise Marks Act, Arms Act, etc. Prohibition under those acts will also apply to the penal provisions of the Customs Act, rendering such goods liable to confiscation under section 111(d) of the Customs Act (for import) and 113 (d) of the Customs Act (for export).

Any Importer or Exporter for being knowingly concerned in any fraudulent evasion or attempted evasion of any prohibition under the Customs Act or any other law for the time being in force in respect to any import or export of goods, shall be liable to punishment with imprisonment for a maximum term of three years (seven years in respect of notified goods) under section 135 of the Customs Act. Any person who is reasonably believed to be guilty of an offence, punishable under section 135, may be arrested under the provisions of section 104 of the Customs Act. Keeping in view the above penal provisions in the Customs Act to deal with any deliberate evasion of prohibition/restriction of import of export of specified goods, it is advisable for the Trade to be well conversant with the provisions of EXIM Policy, the Customs Act, as also other allied Acts. They must make sure that before any imports are effected or export planned, they are aware of any prohibition/restrictions and requirements subject to which alone goods can be imported/exported, so that they do not get penalised and goods do not get involved in confiscation etc. proceedings at the hands of Customs authorities.

Principles of Restriction

DGFT may, through a notification, adopt and enforce any measure necessary for:-

- Protection of public morals.
- Protection of human, animal or plant life or health.
- Protection of patents, trademarks and copyrights and the prevention of deceptive practices.
- Prevention of prison labour.
- Protection of national treasures of artistic, historic or archaeological value.
- Conservation of exhaustible natural resources.
- Protection of trade of fissionable material or material from which they are derived; and
- Prevention of traffic in arms, ammunition and implements of war.

Terms and Conditions of a Licence/Certificate/Permission
Everylicence/certificate/permission shall be valid for the period of validity specified in the licence/ certificate/ permission and shall contain such terms and conditions as may be specified by the licensing authority which may include:

- The quantity, description and value of the goods;
- Actual User condition;
- Export obligation;

- The value addition to be achieved; and
- The minimum export price.

Licence/Certificate/Permission not a Right

No person may claim a licence/certificate/ permission as a right and the Director General of Foreign Trade or the licensing authority shall have the power to refuse to grant or renew a licence/certificate/permission in accordance with the provisions of the Act and the Rules made there under.

Penalty

If a licence/certificate/permission holder violates any condition of the licence/certificate/ permission or fails to fulfil the export obligation, he shall be liable for action in accordance with the Act, the Rules and Orders made there under, the Policy and any other law for the time being inforce.

Registration-cum-MembershipCertificate

Any person, applying for (i) a licence/ certificate/ permission to import/ export, [except items listed as restricted items in ITC(HS)] or (ii) any other benefit or concession under this policy shall be required to furnish Registration-cum-Membership Certificate (RCMC) granted by the competent authority in accordance with the procedure specified in the Handbook (Vol.1) unless specifically exempted under the Policy.

Notification No.44(RE-2000)/1997-2002, dated 24.11.2000

November, 2000, the Director General of Foreign Trade (DGFT) had issued a notification {No.44 (RE-2000)/1997-2002, dated 24.11.2000} to regulate the imports of packaged commodities into India. As per this notification, all packaged products, which are subject to the provisions of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977, when produced/packed/sold in the domestic market, shall be subject to compliance of all the provisions of the said Rules, when imported into India. It is provided that compliance of the provisions of the notification shall be ensured by the Customs before the consignments are cleared for home consumption. The notification further states that all pre-packaged commodities imported into India shall, in particular, carry the declarations, such as, name and address of the importer, net quantity, month and year of packing and maximum retail price. It has been clarified by the DGFT vide Circular No.38 (RE-2000)/1997-2002, dated 22.1.2001 that the labeling requirements is applicable only to imports of those pre-packaged commodities which are intended for retail sale. As imported raw materials, components, bulk imports, etc. would invariably undergo further processing or assembly before they are sold to consumers, these imports shall not invite the application of labeling requirements.

Notification No.3(RE-2001)/1997-2002, dated 31.3.2001

In the wake of removal of quantitative restrictions, the DGFT has issued a notification No.3 (RE-2001)/1997-2002, dated 31.3.2001 for regulating import of meat and poultry products, edible/food products and primary agricultural products. As per this notification import of meat and poultry products will be subject to the compliance of conditions regarding manufacture, slaughter, packing, labeling and quality conditions as laid down in Meat Food Products Order, 1973. The notification also states that all manufacturers of meat/poultry products exporting their goods to India shall be required to meet the sanitary and hygienic requirements as stipulated under Schedule-II of the aforementioned Order. The imported product shall also comply with the specified packaging, labeling and quality standards as laid down in Schedule-IV of the Order. It is provided that the Customs has to ensure compliance of these conditions before allowing clearance of the consignments. In regard to edible/food products, the notification stipulates that the import of such products, domestic sale and manufacture of which are governed by Prevention of Food Adulteration Act, 1954, shall be subject to all the conditions laid down in the said Act. Import of all these products thus will have to comply with the quality and packaging requirements as laid down in the aforesaid Act. The notification enjoins Customs to ensure compliance of these conditions before allowing clearance of the consignments. Further, as per the aforesaid notification, import of all primary agricultural commodities will be subject to a Bio Security & Sanitary-Phytosanitary Import Permit, to be issued by Department of Agriculture and Co- operation, as per conditions of PFS Order, 1989. The Permit will be based on import risk analysis of the product, to be conducted on scientific principles, in accordance with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The import risk analysis will be conducted based on various scientific principles, including inter alia, (a) the type of pests etc. known to be associated with the particular product in the exporting country; (b) the organisms already established in India; and (c) the potential impact of such organisms on India's international trade.

Customs Clearance Procedure for Food Item

Circular No.36/2001-Customs dated 15.6.2001 (issued from F.No.450/21/98-CUS.IV) lays down detailed guidelines for examination and testing of food items prior to customs clearance. This circular enjoins Customs to undertake certain general checks in addition to testing of samples. First, the Customs should check the condition of the hold in which the products were transported. This is basically to see whether they meet the requirements of storage as per the nature of the product, and does not in any way cause deterioration or contamination of the products. In the second place, the Customs is required to check the physical/visual appearance of goods in terms of possible damage – whether it is swollen or bulged in appearance and also for rodent/insect contamination or presence of filth, dirt, etc. The third important thing is compliance of labeling requirements under the Prevention of Food Adulteration Rules and the Packaged Commodities Rules. This includes ensuring that the label is written not only in any foreign language, but also in English. The details of ingredients in descending order, date of manufacture, batch number, and best before date, etc. are other mandatory requirements. Further, all products will also have to indicate details of best before on all food packages. The Customs should check that imported food articles meet the above labeling requirements. Recently, the DGFT has issued a notification {No.22(RE-2001/1997-2002) dated 30.7.2001 to the effect that the imported food item, at the time of its import, should have a valid shelf life of not less than 60% of original shelf life. In other words, the time period between 'best before date' and 'date of import' should be at least 60% of time period between 'date of manufacture' and 'best before date'. The Customs has to ensure that the food articles which do not meet this condition are not allowed clearance for home consumption. Apart from the general checks referred to above, all the consignments of edible/food products imported through Ports, Inland Container Depots (ICDs), Air Cargo Complexes (ACCs), Container Freight Stations (CFSs) and Land Customs Stations (LCSs) are required to be referred to the Port Health Officer (PHO) for testing. For alleviating the difficulties of importers it has been decided that pending receipt of the test report, such consignments can be allowed to be stored in warehouses under section 49 of the Customs Act, 1962. The circular makes it clear that clearance for home use will be allowed only after receipt of the test report. If the product fails the test, the Customs authorities will ensure that the goods are re-exported out of the country by following the usual adjudication procedure or destroyed as required under the relevant rules. As regards ICDs/CFSs/Ports/ACCs/LCSs where PHOs are not available, the Customs is required to draw the samples and get them tested from the nearest Central Food Laboratory or a Laboratory authorized to conduct such testing by the Directorate General of Health Services.In addition to testing of food items under the PFA Act, 1954, these items shall also be subject to examination/testing to ensure compliance of the requirements of other Acts, Regulations and Orders such as Meat Food Products Order, 1973, PFS Order, 1989, the Livestock Importation Act, etc., if applicable, before these are allowed clearance into the country.

Customs Clearance Procedure for Livestock Products

The livestock products, namely, (i) meat and meat products of all kinds including fresh, chilled and frozen meat, tissue or organs of poultry, pig, sheep, goat; (ii) egg and egg powder; (iii) milk and milk products; (iv) bovine, ovine and caprine embryos, ova or semen; and (v) pet food products of animal origin are allowed to be imported only against a sanitary import permit issued by the Department of Animal Husbandry and Dairying. For this purpose, a detailed import risk analysis is carried out and a sanitary import permit is issued only after the concerned authorities are satisfied that the import of the consignment will not adversely affect the health of the animal and human population of this country. The Import Permit lays down the specific conditions that will have to be fulfilled in respect of the consignment, including pre-shipment certifications and quarantine checks. The Permit also specifies the post-import requirements with regard to quarantine inspection, sampling and testing. The Import Permit is generally issued for a period of six months and can be extended by the concerned authorities for a further period of six months.

As mentioned earlier, the livestock products are allowed to be imported into India only through the sea ports or airports located at Delhi, Mumbai, Kolkata and Chennai, where the Animal Quarantine and Certification Services Stations are located. On arrival at the port/seaport, the livestock product is required to be inspected by the officer in-charge of the Animal Quarantine and Certification Services Station or any other veterinary officer duly authorized by the Department of Animal Husbandry and Dairying. After inspection and testing, wherever required, quarantine clearance is accorded by the concerned quarantine or veterinary authority for the entry of the livestock product into India. If required in public interest, the quarantine or veterinary authority may also order the destruction of the livestock product or its return to the country of origin. Wherever any disinfection or any other treatment is considered necessary in respect of any livestock product, it is the importer who on his own or at his cost has to arrange for disinfection or other treatment of the consignment under the supervision of a duly authorized quarantine or veterinary officer. The Customs will have to ensure that the livestock products are granted clearance for home consumption only after necessary permission is granted by the concerned quarantine or veterinary authorities. It may be noted that the Government has recently issued a notification on 30.5.2001 prohibiting import of all poultry products from Hongkong (China), Honduras, Italy, Laos and Pakistan for a period of six months from the date of issue of this notification in view of reported outbreak of Avian Influenza (Fowl Plague) in these countries. The products prohibited for import are domestic and wild birds, day-old chicks, turkeys, poultry and other newly hatched avian species, hatching eggs, semen of domestic and wild birds, fresh meat of domestic and wild birds, products of animal origin (from birds) destined for use in animal feeding or for industrial use, pathological material and biological products (from birds) which have not been processed to ensure the destruction of Avian Influenza (Fowl Plague) virus. The question of allowing clearance of these products for home use, therefore, does not arise.

Plant/Plant Materials for Sowing/Planting/Propagation/Consumption

The above products are allowed to be imported only on the basis of an Import Permit issued by the Department of Agriculture & Co-operation. The Import Permit is issued after conducting a detailed import risk analysis. This Permit is generally issued for a period of six months and can be extended by the concerned authorities for a further period of six months. The Department of Agriculture & Co-operation has issued detailed guidelines for inspection and clearance of plant/plant materials. The basic features of the guidelines are given below:-

(a) Registration of application: The importer or his authorised Custom House Agent is required to file an application at the Plant Quarantine Station in respect of each consignment immediately upon arrival at the port. In case of perishable consignments, such application can be filed in advance to enable the Plant Quarantine authorities to organize inspection/testing on priority. Along with application for registration, copies of documents namely, import permit, phyto-sanitary certificate issued at the country of origin, copy of bill of entry, invoice, packing list and fumigation certificate, etc. are required to be submitted. After scrutinizing the application, the Plant Quarantine Officer registers the application. The assessed inspection fee is required to be paid by the importer or his authorised agent.

In the case of import of plant and plant materials through passenger baggage and post parcels, no such application is required to be filed.

(b)Sampling/inspection/fumigation of consignments: The importer or his authorised Custom House Agent is required to arrange for inspection/sampling of the consignment. In the event of live insect infestation having been noticed, the importer or his authorised Custom House Agent shall arrange for fumigation of consignment by an approved pest control operator at his own cost under the supervision of the Plant Quarantine officer.

(c)Release/detention of consignments: A release order is issued to Customs, if a consignment on inspection is found to be free from pests. However, in case a consignment is found to be infested with live pests, the same is permitted clearance only after fumigation and re-inspection. The detention order is issued, if the consignment is imported in contravention of the PQ Regulations, for arranging deportation failing which the same shall be destroyed at the cost of importer under the supervision of the Plant Quarantine Officer, in presence of Customs Officers after giving due notice in advance i.e. for perishable plant material 24-48 hours and 7 days in other type of plant material.

The Customs will have to ensure that plant/plant material (primary agricultural products) are granted clearance for home consumption only after necessary permission is granted by the concerned Plant and Quarantine Office.

8.5SUGGESTED READINGS

1 Foreign Trade Development and Regulation Act 1992.
2.Customs Act,1962.
3.Gururaj's, Guide to the Customs Act (2 Vols.)

8.6 TERMINAL QUESTIONS

1.What is the role of Foreign Trade Development and Regulation Act 1992? Discuss.
2.What is the role of Customs Act, 1962? Discuss.
3.Give a brief account of branches of department of commerce
4.How export and import of goods are controlled in India

LL.M. Part-2
Subject: Law of Export Import Regulation

Block-III - General Law on Control of Imports and Exports.
Unit-9- Control under FEMA; Foreign Exchange and Currency.

STRUCTURE

9.1 INTRODUCTION

The **Foreign Exchange Management Act** (FEMA) is a 1999 Indian law "to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India". It was passed in the winter session of Parliament in 1999, replacing the Foreign Exchange Regulation Act (FERA). This act seeks to make offenses related to foreign exchange civil offenses. It extends to the whole of India., replacing FERA, which had become incompatible with the pro-liberalization policies of the Government of India. It enabled a new foreign exchange management regime consistent with the emerging framework of the World Trade Organization (WTO). It is another matter that the enactment of FEMA also brought with it the Prevention of Money Laundering Act of 2002, which came into effect from 1 July 2005.

Foreign Exchange Management Act or in short (FEMA) is an act that provides guidelines for the free flow of foreign exchange in India. It has brought a new management regime of foreign exchange consistent with the emerging frame work of the World Trade Organization (WTO). Foreign Exchange Management Act was earlier known as FERA (Foreign Exchange Regulation Act), which has been found to be unsuccessful with the proliberalisation policies of the Government of India.FEMA is applicable in all over India and even branches, offices and agencies located outside India, if it belongs to a person who is a resident of India. Broadly, the objectives of FEMA are: (i) To facilitate external trade and payments; and (ii) To promote the orderly development and maintenance of foreign exchange market. The Act has assigned an important role to the Reserve Bank of India (RBI) in the administration of FEMA. The rules, regulations and norms pertaining to several sections of the Act are laid down by the Reserve Bank of India, in consultation with the Central Government. The Act requires the Central Government to appoint as many officers of the Central Government as Adjudicating Authorities for holding inquiries pertaining to contravention of the Act. There is also a provision for appointing one or more Special Directors (Appeals) to hear appeals against the order of the Adjudicating authorities. The Central Government also establishes an Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the Adjudicating Authorities and the Special Director (Appeals). The FEMA provides for the establishment, by the Central Government, of a Director of Enforcement with a Director and such other officers or class of officers as it thinks fit for taking up for investigation of the contraventions under this Act. FEMA permits only authorised person to deal in foreign exchange or foreign security. Such an authorised person, under the Act, means authoriseddealer, money changer, off-shore banking unit or any other person for the time being authorised by Reserve Bank. The Act thus prohibits any person who:-

- Deal in or transfer any foreign exchange or foreign security to any person not being an authorized person;
- Make any payment to or for the credit of any person resident outside India in any manner;
- Receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner;
- Enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person is resident in India which acquires, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

9.2 OBJECTIVES

The objective of this lesson is to ascertain the “Control under FEMA, Foreign Exchange and Currency for economic governance. Further an attempt has been made to study all the relevant factors related with the export and import under FEMA.

9.3 SUBJECT

9.3.1 Some Highlights of FEMA

it prohibits foreign exchange dealing undertaken other than an authorized person;

- It also makes it clear that if any person residing in India received any forex payment (without there being a corresponding inward remittance from abroad) the concerned person shall be deemed to have received they payment from a nonauthorised person.
- There are 7 types of current account transactions, which are totally prohibited, and therefore no transaction can be undertaken relating

to them. These include transaction relating to lotteries, football pools, banned magazines and a few others.

- FEMA and the related rules give full freedom to Resident of India (ROI) to hold or own or transfer any foreign security or immovable property situated outside India.
- Similar freedom is also given to a resident who inherits such security or immovable property from an ROI.
- An ROI is permitted to hold shares, securities and properties acquired by him while he was a Resident or inherited such properties from a Resident.
- The exchange drawn can also be used for purpose other than for which it is drawn provided drawl of exchange is otherwise permitted for such purpose.
- Certain prescribed limits have been substantially enhanced. For instance, residence now going abroad for business purpose or for participating in conferences seminars will not need the RBI's permission to avail foreign exchange up to US$. 25,000 per trip irrespective of the period of stay, basic travel quota have been increased from the existing US$ 3,000 to US$ 5,000 per calendar year.

9.3.2 Main Features

Activities such as payments made to any person outside India or receipts from them, along with the deals in foreign exchange and foreign security is restricted. It is FEMA that gives the central government the power to impose the restrictions.

-Restrictions are imposed on people living in India who carry out transactions in foreign exchange, foreign security or who own or hold immovable property abroad.

-Without general or specific permission of the MA restricts the transactions involving foreign exchange or foreign security and payments from outside the country to India – the transactions should be made only through an authorized person.

-Deals in foreign exchange under the current account by an authorized person can be restricted by the Central Government, based on public interest.

-Although selling or drawing of foreign exchange is done through an authorized person, the RBI is empowered by this Act to subject the capital account transactions to a number of restrictions.

- People living in India will be permitted to carry out transactions in foreign exchange, foreign security or to own or hold immovable property abroad if the currency, security or property was owned or acquired when he/she was living outside India, or when it was inherited by him/her from someone living outside India.

- Exporters are needed to furnish their export details to RBI. To ensure that the transactions are carried out properly, RBI may ask the exporters to comply with its necessary requirements.

9.3.3Application and definitions

Whereas FERA applied to citizens of India, FEMA omits the reference to citizens. There are certain interesting definitions under FEMA. A ``capital account transaction'' is defined as one that alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India, or assets or liabilities in India of persons resident outside India. A ``current account transaction'' means one other than a capital account transaction and includes payments due in connection with foreign trade, other current business services and short-term banking and credit facilities in the ordinary course of business. It also includes payments due as interest on loans and net income from investments. These definitions will be found useful even in income-tax proceedings, as the income-tax law has no precise meaning of capital and current account transactions and has le ft it to judicial interpretation on the basis of facts and circumstances of the case.FEMA also defines `export' as meaning the taking out of India to a place outside India any goods and the provision of services from India to any person outside India. There is a corresponding definition of import. These definitions again will be found useful in cases concerning Chapter VI A claims under the I-T Act. An interesting definition relates to the term `service'. Sec. 2(zb) defines `service' to mean service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical and legal assistance, chit fund, real estate, and so on. It also includes the providing of entertainment and the purveying of news or other information. It does not include the rendering of any service free of charge or under a contract of personal service. A significant omission relates to services falling under the category of information technology. The old Sec. 8 of FERA has been recast. Sec. 3 of FEMA governs dealings in foreign exchange and Sec. 5 and 6 cover current account and capital account trans actions. Sec. 7 relates to export of goods and services.

9.3.4 Control under FEMA; Foreign exchange and currency

THE Government has ushered in the second generation of reforms in great style. The 13th LokSabha has enacted the Insurance Regulatory Authority Act and followed it up with the new law regulating foreign exchange. One has only to compare the preambles of the Foreign Exchange Regulation Act of 1973 and the Foreign Exchange Management Act of 1999 (passed by Parliament on December 2, 1999) to understand the sea change that has come over the fiscal and monetary policy in India in the intervening period. The object behind FERA, 1973 was to consolidate the law regarding certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and import and export of currency for the conservation of the foreign exchange resources of the country and the proper utilization thereof in the interests of the economic development of the country. That was an era of controls and restrictions, when foreign exchange was scarce. As the Indian economy chose to liberalize in order to integrate with the new global dispensation, FERA had become archaic and the threats of punishments ranging from stiff penalties to severe imprisonments appeared antediluvian and an impediment to free trade. The law had become cumbersome. Like the Central Excise and Customs laws, FERA too came to be administered by way of circulars and notifications from the Exchange Control Department of the RBI. FERA was standing in the way of India competing in world markets. Currency convertibility was partially allowed on the revenue account and this necessitated redrafting of the law. There was a crying need for moving in step with international trends with regard to currency management. It was in this background that the law regulating foreign exchange has undergone radical changes. The FEMA preamble declares the consolidation and amendment of the law relating to foreign exchange _ so as to facilitate external trade and payments and for promoting the orderly development and maintenance of the foreign exchange market in India _ as it s object. The state assumes the role of facilitator and promoter of economic development. Whereas FERA had 81 sections, FEMA has only 49. FERA had a separate section to deal with prosecutions _ Sec. 56 stipulated a punishment of not less than six months and not more than seven years in addition to penalty and fine for contravention of its provisions. Sec. 59 of FERA enacted a new law on presumption of culpable mental state and the burden was cast on the defendant to prove that he had no such mental stat e with respect to the act charged as an offence in the prosecution.FEMA, on the other hand, holds out no threat of prosecution. Violations of FEMA will not drag the accused to criminal courts. Foreign exchange violation will hereafter be treated as a civil offence. The relief that FEMA brings in can be felt only by those who were perpetually living in the fear of a search followed by prosecution by the Enforcement Directorate. Scions of industrial houses were hauled up during the regime of Mr. V. P. Singh as Finance Minister for FERA violations and an obliging Supreme Court granted them bail at a midnight session. All that terror is now off. The police will have nothing to do with FERA violations. At the same time, Sec. 49 of FEMA lays down that no court shall take cognizance of an offence under FERA and no adjudicating officer shall take notice of any contravention under Sec. 51 of the repealed Act after the expiry of two years from the date of commencement of FEMA. This is a sort of amnesty to those who face prosecution under FERA. All that they have to do is to drag on the proceedings for two years to get out of the prosecution. An incongruous situation has come about because of this amnesty provision. A person committing the same offence both under FERA and FEMA will be visited with dissimilar consequences. He will be penalized under FEMA but let off under FERA.

9.3.5Penalties and compounding

Sec. 13 of FEMA provides for a penalty up to three times the amount involved for contravention of the rules, regulations and directions under FEMA. If the amount is not quantifiable, the penalty can go up to Rs. 2 lakhs. A continuing offence will invite a penalty which may extend to Rs. 5,000 per day of contravention. There is also the provision for confiscation and for compounding of the offence. FERA, under the old Sec. 50, provided for a penalty of up to three times the amount involved. The procedure for adjudication and appeal has been streamlined. An innovation of sorts relates to the proposed setting up an appellate tribunal for foreign exchange _ on the lines of the ITAT _ under Sec. 18 of FEMA. The Tribunal will hear appeals from t he orders of the Special Director (Appeals). Thus, in many ways, the income-tax set-up is sought to be duplicated under FEMA.

9.3.6 Residential Status

The most interesting part of FEMA relates to the definition of a person resident in India, a term familiar to students of I-T law. FEMA incorporates an inclusive definition of the term person and takes in any agency, office or branch owned or controlled by such person. Sec. 2(v) of FEMA is to be contrasted with Sec. 2(p) of FERA. The term `citizen' is omitted in FEMA. Any person residing in India for more than 182 days during the course of the preceding financial year will be taken as resident in India. Note the reference to the preceding financial year. This is a concept brought into FEMA from the I-T law and was not found in FERA. Critics have already pointed out that the importation of the concept of the previous financial year can bring in unintended hardships for returning Indians. They can become resident in India under Sec. 2(v) from the year following the financial year in which they had spent more than 182 days in India. The definition also excludes persons going outside India for taking up employment or for carrying on business outside India and those who go out with the intention of staying abroad for an uncertain period. A body corporate registered or incorporated in India will be deemed to be resident in India even if its entire share capital is held by a foreigner or non-resident. Again, an office, branch or agency in India will be deemed to be resident in India even if it is owned or controlled by a person resident outside India. If a person resident in India owns or controls any office, branch or agency outside India, such office, branch or agency would be deemed to be resident in India under FEMA and will be covered by the exchange regulations. Sec. 2(v) of FEMA uses the expression owned or controlled by a person resident in India. The corresponding expression under Sec. 6 of the I-T Act is ``control and management'' with respect to the Hindu undivided family, partnership firms, companies, and so on. It has been pointed out that mere control of the branch, office or agency by a person resident in India is enough to invite the attention of FEMA. The management of the office or agency may be located outside India, but by virtue of ownership or control the agency will have to take into account FEMA. Control is different from management as known to jurists under I-T law. It is obvious that the definition under FEMA is very different from the corresponding definition of a person resident in India under Sec. 6 of the I-T Act. Overlapping of the two statutes cannot be avoided. For example, Sec. 10(4)(ii) provides for exempt ion of income by way of interest on monies standing to the credit of an individual in a non-resident (external) account in accordance with FERA, 1973, provided such individual is a person resident outside India as defined in Sec. 2(q) of FERA or is a per son who has been permitted by the RBI to maintain the aforesaid account. One has only to look at the judgment of the Kerala High Court in CIT vs Ramallah (92 Taxman 122) to realize what unintended hardship can be caused by the different wordings in the two statues. It is hoped that in the ensuing Budget an attempt is made to harmonize these definition so that there is no conflict between the I-T law and FEMA.

9.4 SUMMARY

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Broadly, the objectives of FEMA are: (i) To facilitate external trade and payments; and (ii) To promote the orderly development and maintenance of foreign exchange market. The Act has assigned an important role to the Reserve Bank of India (RBI) in the administration of FEMA. The rules, regulations and norms pertaining to several sections of the Act are laid down by the Reserve Bank of India, in consultation with the Central Government. The Act requires the Central Government to appoint as many officers of the Central Government as Adjudicating Authorities for holding inquiries pertaining to contravention of the Act. There is also a provision for appointing one or more Special Directors (Appeals) to hear appeals against the order of the Adjudicating authorities. The Central Government also establishes an Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the Adjudicating Authorities and the Special Director (Appeals). The FEMA provides for the establishment, by the Central Government, of a Director of Enforcement with a Director and such other officers or class of officers as it thinks fit for taking up for investigation of the contraventions under this Act. FEMA permits only authorised person to deal in foreign exchange or foreign security. Such an authorised person, under the Act, means authoriseddealer, money changer, off-shore banking unit or any other person for the time being authorised by Reserve Bank. The Act thus prohibits any person who:-

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If a person resident in India owns or controls any office, branch or agency outside India, such office, branch or agency would be deemed to be resident in India under FEMA and will be covered by the exchange regulations. Sec. 2(v) of FEMA uses the expression owned or controlled by a person resident in India. The corresponding expression under Sec. 6 of the I-T Act is ``control and management" with respect to the Hindu undivided family, partnership firms, companies, and so on. It has been pointed out that mere control of the branch, office or agency by a person resident in India is enough to invite the attention of FEMA. The management of the office or agency may be located outside India, but by virtue of ownership or control the agency will have to take into account FEMA. Control is different from management as known to jurists under I-T law. 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9.5 SUGGESTED READINGS

1. T.R Ramamurthy, guide to FEMA.
2. Ravi Pulliani and Mahesh Pulliani, Foreign Exchange Management Act, Rules Regulations

9.6TERMINAL QUESTIONS

1. What is the basic difference between FERA and FEMA? Discuss
2. How export and import is controlled under FEMA?
3. Write down the basic features of FEMA.
4. What penalties are provided in violation of FEMA?

LL.M. Part-2
Subject: Law of Export Import Regulation

Block-III - General Law on Control of Imports and Exports.
Unit-10- Import of goods; Export promotion councils; Export oriented units and export processing zones.

STRUCTURE

10.1 INTRODUCTION

Import trade is regulated by the office of the Director General of Foreign Trade and its Regional Offices functioning under the Ministry of Commerce. The current EXIM policy (1997-2002) lays down the trade control aspects. Sale of foreign exchange towards payment for import of goods into India under the prevailing import trade control policy may be made by authorized Dealers without reference to Reserve bank of India subject to the conditions set out in the exchange control manual. Sale of foreign exchange in payment for imports from Nepal and Bhutan is not permitted. The rupee accounts in India of banks functioning in Nepal and Bhutan are treated as Resident Accounts and rupee transfer may be made to such accounts against imports into India from these countries without reference to RBI.

ADs perform the following functions while handling import business:

Establishment of letters of credit

Handling of documents received under LC

Handling collection bills covering imports

Making remittances towards payment of import bills End use verification etc.

While performing these functions, ADs have to adhere to the exchange control regulations contained in the Exchange Control Manual (particularly Chapter 7) as amended from time to time by ADMA circulars. ADs are also required to follow the procedures contained in AD GP series of circulars.

10.2 OBJECTIVES

The objective of this lesson is to ascertain the "**Import of goods; Export promotion councils; Export oriented units and export processing zones** and development outcomes for economic governance. Further an attempt has been made to study all the relevant factors related with the Foreign Trade Development and Regulation.

10.3 SUBJECT

10.3.1 Import of goods

The principal aspects of exchange control regulations relating to imports are discussed below:

Establishing LCs

LCs is to be established only for bank's own customers who are known to be participating in the trade, particularly with reference to the item of import. LCs are to be established in accordance with provisions of UCPDC 500/URR 525. When a bill of lading is called for in the LC, the LC should stipulate among other conditions, that the BL should indicate the name and address of the importer as well as the AD opening the credit. Remittances for imports under letters of credit or otherwise should be made against shipping documents lorry/railway receipts/exchange control copies of bills of entry/postal/courier wrappers etc.

Import of Designs & Drawings

Import of designs and drawings is freely permitted as provided by the EXIM Policy in force. In addition to the usual exchange control regulations relating to imports the following conditions have to be complied with:

The entire remittance should relate to the cost of drawings & designs imported only and not any other cost.NOC/Tax clearance certificate from Income Tax authorities should be produced.

R&D cess has to be paid. If not already paid, evidence for payment should be submitted to AD within 30 days from date of remittance.

The value remitted should be verified for agreement with the value declared in the exchange control copy of bill of entry certified by customs.

The importer should keep the customs informed about such imports.

Manner of Rupee Payment

Payment in retirement of bills drawn under LC as well as bill received from abroad for collection against imports into India, must be received by AD, irrespective of amount by debit to the account of importers with themselves or by means of a crossed cheque drawn by the importer on their other bankers. Payment against bills should not be accepted in cash. This procedure will apply to private imports also where the amount involved is Rs.20, 000/- or over.

Import Licenses

While opening letter of credit or allowing remittance for the import of goods included in the negative list, AD should obtain from the importer exchange control copy of the import license. All such licensees are issued for CIF value, which also includes commission, if any import licenses cannot be used to the full amount in cover of FOB cost of the goods leaving insurance, freight and commission to local agent of supplier, as additional charges to be paid in rupees over the amount specified in import licenses.

All such remittances should be endorsed on the exchange control copy of import license. Interest remitted need not be endorsed in the import license. Fully utilized license (exchange control copy) should be forwarded to RBI, by the Banks along with R-Returns pertaining to the period during which the last remittance under the license was made.

Attestation of invoices by authorized dealers

Under customs regulations importers have to submit to customs at the time of clearance of goods a copy of the invoice attested by the authorized dealer through whom remittance has been made or will be made as corroboratory evidence of the value of the goods declared on the customs Bills of Entry. To enable the importer to comply with such requirement, AD should furnish to the importer a duly attested copy of the invoice.

Time limit for settlement of import payments

Remittance against import should be completed no later than six months from date of shipment. Hence any deferred payment arrangements involving payments beyond six months from date of shipment need approval of RBI. Sometimes, settlement of import dues may be delayed due to disputes, financial difficulties of importers etc. ADs are permitted to make remittance in such cases even if the period of six months has expired provided AD is satisfied about the confides of the circumstances leading to the delay in payment No payment of interest is involved for the additional period.

However, if the overseas seller insists for payment of interest it may be allowed subject to provisions for payment of interest in EC Manual for a maximum period of 60 days beyond 180 days provided the bill is paid within these 60 days. Remittances against import of books may be allowed without restrictions as to time limit, provided no interest payment is involved nor the importer has foregone any part of the discount/rebate normally allowed to importers towards compensation for delay in settlement of dues.

Interest on Import Bills

ADs may make remittances on account of interest accrued on usance bills or overdue interest paid on sight bills for a period not exceeding 6 months from the date of shipment in respect of imports without prior approval of RBI under "normal interest clause". In case of prepayment of import bills under usance terms, remittance may be made only after reducing the proportionate interest for the un-expired portion of usance at the rate of which interest has been claimed or the `prime rate' of the country of the currency in which the goods are invoiced, whichever is higher. Where interest is not separately claimed, remittance may be allowed after deducting the proportionate interest for the un-expired portion of usance at the prevailing prime rate.

‘Normal Interest Clause’ means interest at the ‘prime’ rate of the country in the currency of which goods are invoiced.

Remittance of Commission

ADs may on application and supported by particulars including relevant correspondence/buying agency agreement, allow remittance of commission to overseas buying agents of Indian importers provided the rate of commission does not exceed 2.5% of FOB value of imports. The amount of commission should also be endorsed in the import licence. In case of the commission payable in Indian rupees also it should be endorsed in the licence.

Imports under penalty

ADs are permitted to make remittances against goods imported without authority – but later on allowed to be cleared by Customs Authorities against payment of penalty. Such remittance may be made to the extent of CIF value of the goods indicated in the relative Exchange control copy of the customs bill of entry evidencing import of goods into India.

Postal Imports

ADs are permitted to make remittances against bills received for collection covering imports by post parcel, provided the goods imported are such as one normally dispatched by post parcel. In these cases the relative postal receipt should be produced to AD as evidence of dispatch through post and the importer should furnish an undertaking to AD to submit the post parcel wrapper within three months from date of remittance. A.Ds. may allow remittances up USD 250/- equivalent per transaction, without insisting on the relative parcel receipt / postal wrapper. In cases, where goods imported are not of a kind normally imported by post parcel for remittance where AD is not satisfied about the bonafides of the application the case should be referred to RBI for prior approval.

Imports through courier

Imports of goods through courier are permitted in accordance with the Courier Imports Clearance Regulation 1995 under the current EXIM Policy 1997-2002.

Advance Remittance

ADs are permitted to allow advance, remittance without any ceilings for import of goods subject to the following conditions:

Documentary evidence indicating the cost of the goods and the insistence of the overseas seller an advance payment should be submitted. The importer should hold the EC copy of a valid import license, if the goods to be imported require a licence. Remittance should be made direct to the suppliers. Physical import into India be made within 3 months (12 months in the case of capital goods) from the date of remittance and the importer should give an undertaking to furnish documentary evidence of import within 15 days from the close of the relevant period. A.Ds. under their discretion can allow extension of time up to one month for such physical import to take place (beyond 3 months) in case of other than capital goods and up to three months (beyond 12 months) in case of capital goods. If the amount of advance remittance exceed USD 15,000/- a guarantee stand by letter of credit from an international bank of repute situated outside India or a guarantee of an authorized dealer in India if such a guarantee is issued against the counter guarantee of an international bank of repute situated outside India should be obtained. In case of extension of time allowed for physical import of goods, guarantee clauses should be suitably amended. In case of import of capital goods; certified copy of importer's contract with the supplier or any other evidence indicating terms of payment should be submitted. In case of import of books, a list of books to be imported should be obtained, which should be attached to Form A1 while submitting it along with the relevant R-Return. Further a separate register titled 'advance remittance for imports' should be maintained for ensuring compliance with the various conditions. ADs should ensure that in the event of goods not imported the amount of advance remittance is repatriated to India.

Form A1

Applications by persons, firms and companies for making payments towards imports into India must be made in Form A1.

Evidence of Import

It is obligatory on the part of importers to submit exchange control copy of Bill of entry/postal wrapper/courier wrapper to AD through whom relative remittance was made as evidence that the relative goods for which payment was made has actually been imported into India. ADs should acknowledge receipt of such evidences by issuing acknowledgement slips to the importers. In case of imports by 100% EOU/Units in EPZ/ETZ for store into bonded warehouse ADs can accept EC copy of INTO-BOND BILL OF ENTRY for warehousing purposes as evidence of import. In case of imports though courier if the amount imports is Rs.100000/- and above then ADs can accept the custom attested EC copy and B/E from the actual importer. If the value of import is less than Rs.100000/- ADs can accept the photocopy of the custom attested EC copy B/E submitted by the courier company to customs, duly certified by the courier company itself. In respect of imports on D/A basis if the importer is unable to produce the documentary evidence before the due date for remittance due to genuine reasons such as non arrival of consignment, delay in delivery/customs clearance of consignment, ADs may on merits allow reasonable time not exceeding three months from the date of remittance to the importer to submit the evidence of import. In case the importer fails to furnish the exchange control copy of bill of entry within three months from date of remittance from the ADs should issue a reminder to the importer to produce it forthwith. If there is still no response entry the AD should issue another reminder by registered post acknowledged due not later than one month from the date of first reminder. If still the importer fails to furnish to AD the EC copy of bill of entry within 21 days of the issue of the second reminder, such transactions should be reported in the BEF statement to be submitted to RBI within 15 days from the end of the quarter to which the statement relates. ADs should report the default to RBI in statement BEF only if the amount is exceeding Rs.300000/-. For imports up to and inclusive of Rs.300000/- ADs should vigorously follow up and the evidence of import and if not submitted by the importer the ADs should report it to RBI in a special report.

10.3.2 Scope of Export promotion Councils in India

Ministry of Commerce & Industry administers a scheme known as Market Development Assistance (MDA) Scheme for the promotion of exports including services exports. Service Exporters, who are members of SEPC, are eligible for financial assistance under MDA scheme for participating overseas “Buyer Seller Meet” or in any international conference to showcase their service capability. With the new Foreign Trade Policy (2009-14), the Government of India has aimed to accelerate growth in export of services so as to create a powerful and unique ‘Served from India’ brand. Services providers who have a total foreign exchange earnings or earning in Indian rupees which are otherwise considered as having been paid for in free foreign exchange by RBI, of at least Indian rupee 10 lakhs in the current financial year shall be eligible to qualify for duty credit scrip. They shall be entitled to duty credit equivalent to 10 percent of the foreign exchange earned by them in the current financial year. Duty credit entitlement may be used for import of any capital goods including spares, office equipment and professional equipment, office furniture and consumables, provided it is part of their main line of business. In addition to this all service exporters are also entitled for EPCG and other benefits as provided under FTP 2009-2014

Aims and objective of SEPC

(A) To promote exports of Services from India by such methods as may be necessary or expedient and without prejudice to the generality of the premises by:-

Undertaking market studies in individual foreign countries on regular as well as an ad-hoc basis.
Organizing visits of delegations of members to explore opportunities for Services
Organizing, participation in seminars, conferences and meets in India and abroad, trade fairs/exhibitions/buyer-seller meets.
Disseminating information regularly and continuously in foreign countries regarding the potential image of Indian Services sector and informing the public in foreign countries about the advantages of availing Services from India. Compiling statistics and other relevant information regarding international trade in Services, Providing commercially useful information and assistance to members in developing and increasing export of Services and Disseminating information useful to members by literatures, discussions, books, correspondence or otherwise. Offering professional advice to members in areas such as technology up gradation, quality and design improving, standards and specifications of the products and Services; maintaining liaison with agencies dealing in international trade and Services so as to promote export of Services from India. Communicating with the chambers of commerce and other mercantile chambers of commerce, professional bodies, other mercantile and public bodies in India and abroad for promoting measures for the advancement of exports of Services from India. To take up various issues/problems and suggestions connecting with Services, with government and International agencies to promote interest of Services Providers
(B) Promoting interaction between Services providers and government both at central and state levels.
(C)To channelize financial assistance rendered by the central government to members for assisting their export market development efforts.
(D) To collaborate in kindred activities with the other export promotion councils/export promotion organizations in India and similar bodies in foreign countries and with international organizations working in the field.
(E)To enter into contracts
(F)To draw, make, accept, endorse, discount and execute negotiable instruments.
(G) To invest the money of the Council in any Bank approved by the Governing Council and the money received from the Central government as per directions of that government.
(H) To subscribe for, become a member of and cooperate with any other Association, whether incorporate or not, whose objects are, altogether or in part, similar to those contained in this Memorandum and to obtain from and to communicate to any such Association such information as may be likely to fulfill the objects of this Council.

(I) To obtain from the members and to prepare for the Council as a whole, action plans for promotion of exports of Services, development of exports markets, generation of production for exports, setting of export target, generally and in relation to specific countries and sectors, on an annual basis and for such medium and long terms as may be considered desirable and to ensure/undertake execution of such plans.

(J)To construct building(s) and to furnish security by way of mortgage, charge, etc of the Council's properties and assets.

(K)To avail of loans and financial facilities from banks, Financial Institutions, Companies or Corporations for construction of building(s) and to furnish Companies or Corporations for construction of building(s) and to furnish security by way of mortgage, charge, etc. of the Council's properties and assets.

(L)To do all such other lawful acts as would be conducive for the promotion of exports and to the interests of the Council or incidental to the attainment of the above objects or of any of them.

10.3.3 Export Oriented Units And Export Processing Zones

The Export Oriented Unit Scheme is laid down in the EXIM Policy issued by the Ministry of Commerce. The Government found it necessary to step up the growth of exports in order to bridge the increasing deficit in the balance of trade, running down of exchange reserves. The basic objective underlying the scheme of 100% EOUs, as spelt out at its inception, and which is true even today, has been to generate additional production capacity for exports and thereby earn more foreign exchange for the country by providing appropriate policy framework, flexibility of operations and incentives.

Eligibility

Units undertaking to export their entire production of goods and services may be set up under the Export Oriented Unit (EOU) Scheme, Export Processing Zone (EPZ) Scheme, Electronic Hardware Technology Park (EHTP) Scheme or Software Technology Park (STP) Scheme. Such units may be engaged in manufacture, services, development of software agriculture including agro-processing, aquaculture, animal husbandry, bio-technology, floriculture, horticulture, pisciclture, viticulture, poultry and sericulture and may export all products except goods mentioned as prohibited items of exports in ITC (HS) Classifications of Export and Import items.

Commensurate with the policy to give a special thrust to export of computer software, such units would be encouraged to be set up under any of the aforementioned export oriented schemes. Software units may undertake exports using data communication links or in the form of physical exports (which may be through courier service also), including export of professional services.

Application

(a) For setting up of a unit in an EPZ or as an EOU, ten copies of the application in the prescribed form may be submitted to the Development Commission (DC) of the EPZ concerned.

(b)Application for setting up EHTP/STP units shall be in the format prescribed by the Department of Electronics and shall be submitted to the officer designated by the Department of Electronics for this purpose.

(c)For setting up a Private Bonded Warehouse (PBWWH) in an EPZ, three copies of the application in the prescribed form may be submitted to the DC of the EPZ concerned.

Letter of Permission/Letter of Intent

Letter of Permission (LOP)/Letter of Intent (LOI) issued to EOU/EPZ/EHTP/STP units by the concerned authority would be construed as a license for all purposes, including for procurement of raw materials and consumables either directly or through designated canalizing agency. The LOP/LOI shall specify the items of manufacture/service activity, annual capacity, projected annual export performance (EP) for the first five years in dollar terms, Net Foreign Exchange earnings as a percentage for exports (NFEP), limitations, if any, regarding sale of finished goods, by-products and rejects in the DTA and such other matter as may be necessary and also impose such conditions as may be required.

Distinct Identity

If an industrial enterprise is operating both as a domestic unit as well as in EOU/EPZ/EHTP/STP unit, it shall have two distinct identities with separate accounts. It is, however, not necessary for it to be separate legal entity, but it should be possible to distinguish the imports and exports or supplies effected by the EOU/EPZ/EHTP/STP units from those made by the other units of the enterprise.

Importability of Goods

An EOU/EPZ/EHTP/STP unit may import free of duty all types of goods, including capital goods as defined in the Policy, required by it for manufacture, services, production, processing, or in connection therewith, provided they are not mentioned as prohibited items of imports in ITC(HS) Classifications of Export and Import items. However, import of Basmati paddy/brown rice shall be prohibited. The units shall also be permitted to import goods, including capital goods, free of cost or on loan from clients acquired for the approved activity.EOU/EPZ/EHTP units may procure goods required by them for manufacture, services, production, processing or in connection therewith, duty free, from bonded warehouses in the DTA set up under the EXIM Policy.STP/EHTP/EPZ may import free of duty all types of goods for creating a central facility for use by software development units in STIP/EHTP/EPZ.An EOU engaged in agriculture, animal husbandry, floriculture, horticulture, pisciculture, viticulture, poultry or sericulture may import free of duty only such goods as are permitted to be imported duty free under a Customs Notification issued in this behalf.

Items Permitted for Import

An EOU/EPZ/EHTP/STP unit may import, free of duty, the following goods or as may be additionally specified in the relevant customs notification, required by it for manufacture, production, processing, service or in connection therewith, provided they are not prohibited items in the ITC (HC) Classifications of Export and Import items.

(i)Capital goods as defined in the Policy including generating sets and pollution control and quality assurance equipments including their spares;

(ii)Tools, jigs, fixtures, gauges, moulds, instruments and accessories;

(iii)Raw materials, components, consumables, intermediates, spares and packing materials;

(iv)Prototypes and technical samples for product diversification, development or evaluation;

(v)Materials handling equipment like forklifts and overhead cranes;

(vi)Drawings, blue prints, charts, microfilms and technical data;

(vi)Office equipment, spares and consumables thereof.

Conditions of Import

The import shall be subject to the following conditions:

(a)The goods shall be imported into the EOU/EPZ/EHTP/STP premises. However, agriculture and allied sectors units in EOU/EPZ may supply/transfer the capital goods and the inputs in the farms/fields with prior intimation to the jurisdictional Assistant Commissioner of Customs and Central Excise, provided the ownership of the goods rests with EOU/EPZ units;

(b)The normal procedure as prescribed under Customs/Excise rules for EOUs units and units in EPZs,/EHTP/STP will be followed and appropriate bond executed with Customs/Excise authority.

(c)Import of prohibited items in the ITC (HS Classifications of Export and Import items shall not be allowed;

(d)The goods, except capital goods and spares, shall be utilized as per Policy within a period of two years or as may be extended by Customs Authority except gold/silver/platinum for which the provisions of Chapter 8 of the Policy shall apply; and

(e)Goods already imported/shipped/arrived before the issue of LOP/LOI are also eligible for duty free clearance under the EOU/EPZ/EHTP/STP scheme provided customs duty has not been paid and the goods have not been cleared from Customs.

Maintenance of Account of Import and Utilization

The importer shall maintain in the specified form a proper account of the import, consumption and utilization of all imported materials and of the exports made by him and submit them periodically, as may be required, to the DC of the EOU/EPZ/EHTP/STP concerned. The importer shall ensure minimum NFEP and EP as stipulated in Appendix I of the Policy. He shall also abide by all the terms and conditions incorporated in the LOP/LOI/Industrial License (IL) issued to him. Failure to ensure minimum NFEP/EP as stipulated in Appendix I of the Policy or to abide by any of the terms and conditions of the LOP/LOI/IL shall render him liable to penal action under the provisions of the Foreign Trade (Development and Regulation) Act, 1992 and the Rules and Orders made there under without prejudice to any other action such as cancellation or revocation of LOP/LOI/IL.

Second Hand Capital Goods

(i)EOU/EPZ/EHTP/STP units may import second hand capital goods.

(ii)The license referred to in the Policy for import of second hand goods shall, in the case of EOU/EPZ/EHTP/STU units, shall deemed to be the approval given by the concerned Development Commissioner.

Leasing of Capital Goods

An EOU/EPZ/EHTP/STP unit may, on the basis of a firm contract between the parties, source the capital goods from a domestic/foreign leasing company. In such as case, the EOU/EPZ/EHTP/STP unit and the domestic/foreign leasing company shall jointly file the import documents to enable import of the capital goods free of duty.

Re-Import

The units may be allowed by the Assistant Commissioner of Customs/Excise concerned, to re-import, after repairs aboard, machinery/equipment exported by them for this specific purpose. Any foreign exchange payment for this purpose will also be allowed. Capital goods produced from indigenous sources on the basis of lease agreement between the leasing company and the EOU/EPZ/EHTP/STP unit, will be eligible for Central Excise exemption. The value of imported capital goods financed through leasing companies or obtained free of cost and/or on loan basis shall also be taken into account for the purpose of calculation of NFEP as defined in the Policy.

Fax Machines/Laptop Computers

EOU/EPZ/EHTP/STP may install one fax machine at a place of its choice, outside the approved premises, subject to intimation of its location to the concerned Assistant Commissioner Customs/Central

Excise.EOU/EPZ/EHTP/STP units may, temporarily take out the bonded premises duty free laptop computers and video projection systems imported by them for working upon by authorized employees.

Reconditioning, Repair and Re-Engineering

EOU/EPZ/EHTP/STP units may be permitted to import goods of any origin to carry out reconditioning, repair, testing, calibration, quality improvement, up-gradation of technology and re-engineering activities for export in freely convertible foreign currency.

Replacement/Repair of Imported/Indigenous Goods

Goods or parts thereof on being imported/indigenously procured and found defective or otherwise unfit for use or which have been damaged after import may be returned or destroyed and replacement thereof or the same goods after repairs, may be imported from the foreign suppliers.

10.4 SUMMARY

Import trade is regulated by the office of the Director General of Foreign Trade and its Regional Offices functioning under the Ministry of Commerce. The current EXIM policy (1997-2002) lays down the trade control aspects. Sale of foreign exchange towards payment for import of goods into India under the prevailing import trade control policy may be made by authorized Dealers without reference to Reserve bank of India subject to the conditions set out in the exchange control manual. Sale of foreign exchange in payment for imports from Nepal and Bhutan is not permitted. The rupee accounts in India of banks functioning in Nepal and Bhutan are treated as Resident Accounts and rupee transfer may be made to such accounts against imports into India from these countries without reference to RBI.

ADs perform the following functions while handling import business:

- Establishment of letters of credit
- Handling of documents received under LC
- Handling collection bills covering imports
- Making remittances towards payment of import bills
- End use verification etc.

While performing these functions, ADs have to adhere to the exchange control regulations contained in the Exchange Control Manual (particularly Chapter 7) as amended from time to time by ADMA circulars. ADs are also required to follow the procedures contained in AD GP series of circulars. Payment in retirement of bills drawn under LC as well as bill received from abroad for collection against imports into India, must be received by AD, irrespective of amount by debit to the account of importers with themselves or by means of a crossed cheque drawn by the importer on their other bankers. Payment against bills should not be accepted in cash. This procedure will apply to private imports also where the amount involved is Rs.20,000/- or over.

While opening letter of credit or allowing remittance for the import of goods included in the negative list, AD should obtain from the importer exchange control copy of the import license. All such licensees are issued for CIF value, which also includes commission, if any import licenses cannot be used to the full amount in cover of FOB cost of the goods leaving insurance, freight and commission to local agent of supplier, as additional charges to be paid in rupees over the amount specified in import licenses. All such remittances should be endorsed on the exchange control copy of import license. Interest remitted need not be endorsed in the import license. Fully utilizedlicence (exchange control copy) should be forwarded to RBI, by the Banks along with R-Returns pertaining to the period during which the last remittance under the license was made.

Under customs regulations importers have to submit to customs at the time of clearance of goods a copy of the invoice attested by the authorized dealer through whom remittance has been made or will be made as corroboratory evidence of the value of the goods declared on the customs Bills of Entry. To enable the importer to comply with such requirement, AD should furnish to the importer a duly attested copy of the invoice. Remittance against import should be completed no later than six months from date of shipment. Hence any deferred payment arrangements involving payments beyond six months from date of shipment need approval of RBI. However, if the overseas seller insists for payment of interest it may be allowed subject to provisions for payment of interest in EC Manual for a maximum period of 60 days beyond 180 days provided the bill is paid within these 60 days.

Remittances against import of books may be allowed without restrictions as to time limit, provided no interest payment is involved nor the importer has foregone any part of the discount/rebate normally allowed to importers towards compensation for delay in settlement of dues. Ads may make remittances on account of interest accrued on usance bills or overdue interest paid on sight bills for a period not exceeding 6 months from the date of shipment in respect of imports without prior approval of RBI under "normal interest clause". In case of prepayment of import bills under usance terms, remittance may be made only after reducing the proportionate interest for the un-expired portion of usance at the rate of which interest has been claimed or the `prime rate’ of the country of the currency in which the goods are invoiced, whichever is higher. Where interest is not separately claimed, remittance may be allowed after deducting the proportionate interest for the un-expired portion of usance at the prevailing prime rate.

'Normal Interest Clause' means interest at the 'prime' rate of the country in the currency of which goods are invoiced. ADs may on application and supported by particulars including relevant correspondence/buying agency agreement, allow remittance of commission to overseas buying agents of Indian importers provided the rate of commission does not exceed 2.5% of FOB value of imports. The amount of commission should also be endorsed in the import licence. In case of the commission payable in Indian rupees also it should be endorsed in the licence. ADs are permitted to make remittances against goods imported without authority – but later on allowed to be cleared by Customs Authorities against payment of penalty. Such remittance may be made to the extent of CIF value of the goods indicated in the relative Exchange control copy of the customs bill of entry evidencing import of goods into India.

ADs are permitted to make remittances against bills received for collection covering imports by post parcel, provided the goods imported are such as one normally dispatched by post parcel. In these cases the relative postal receipt should be produced to AD as evidence of dispatch through post and the importer should furnish an undertaking to AD to submit the post parcel wrapper within three months from date of remittance. A.Ds. may allow remittances up USD 250/- equivalent per transaction, without insisting on the relative parcel receipt / postal wrapper. In cases, where goods imported are not of a kind normally imported by post parcel for remittance where AD is not satisfied about the bonafides of the application the case should be referred to RBI for prior approval. Imports of goods through courier are permitted in accordance with the Courier Imports Clearance Regulation 1995 under the current EXIM Policy 1997-2002.It is obligatory on the part of importers to submit exchange control copy of Bill of entry/postal wrapper/courier wrapper to AD through whom relative remittance was made as evidence that the relative goods for which payment was made has actually been imported into India. ADs should acknowledge receipt of such evidences by issuing acknowledgement slips to the importers. In case of imports by 100% EOU/Units in EPZ/ETZ for store into bonded warehouse ADs can accept EC copy of INTO-BOND BILL OF ENTRY for warehousing purposes as evidence of import. In case of imports though courier if the amount imports is Rs.100000/- and above then ADs can accept the custom attested EC copy and B/E from the actual importer. If the value of import is less than Rs.100000/- ADs can accept the photocopy of the custom attested EC copy B/E submitted by the courier company to customs, duly certified by the courier company itself. In respect of imports on D/A basis if the importer is unable to

produce the documentary evidence before the due date for remittance due to genuine reasons such as non arrival of consignment, delay in delivery/customs clearance of consignment, ADs may on merits allow reasonable time not exceeding three months from the date of remittance to the importer to submit the evidence of import. In case the importer fails to furnish the exchange control copy of bill of entry within three months from date of remittance from the ADs should issue a reminder to the importer to produce it forthwith. If there is still no response entry the AD should issue another reminder by registered post acknowledged due not later than one month from the date of first reminder. If still the importer fails to furnish to AD the EC copy of bill of entry within 21 days of the issue of the second reminder, such transactions should be reported in the BEF statement to be submitted to RBI within 15 days from the end of the quarter to which the statement relates. ADs should report the default to RBI in statement BEF only if the amount is exceeding Rs.300000/-. For imports up to and inclusive of Rs.300000/- ADs should vigorously follow up and the evidence of import and if not submitted by the importer the ADs should report it to RBI in a special report.
Ministry of Commerce & Industry administers a scheme known as Market Development Assistance (MDA) Scheme for the promotion of exports including services exports. Service Exporters, who are members of SEPC, are eligible for financial assistance under MDA scheme for participating overseas “Buyer Seller Meet” or in any international conference to showcase their service capability. With the new Foreign Trade Policy (2009-14), the Government of India has aimed to accelerate growth in export of services so as to create a powerful and unique ‘Served from India’ brand. Services providers who have a total foreign exchange earnings or earning in Indian rupees which are otherwise considered as having been paid for in free foreign exchange by RBI, of at least Indian rupee 10 lakhs in the current financial year shall be eligible to qualify for duty credit scrip. They shall be entitled to duty credit equivalent to 10 percent of the foreign exchange earned by them in the current financial year. Duty credit entitlement may be used for import of any capital goods including spares, office equipment and professional equipment, office furniture and consumables, provided it is part of their main line of business. In addition to this all service exporters are also entitled for EPCG and other benefits as provided under FTP 2009-2014.The Export Oriented Unit Scheme is laid down in the EXIM Policy issued by the Ministry of Commerce. The Government found it necessary to step up the growth of exports in order to bridge the increasing deficit in the balance of trade, running down of exchange reserves. The basic objective underlying the scheme of 100% EOUs, as spelt out at its inception, and which is true

even today, has been to generate additional production capacity for exports and thereby earn more foreign exchange for the country by providing appropriate policy framework, flexibility of operations and incentives.

Units undertaking to export their entire production of goods and services may be set up under the Export Oriented Unit (EOU) Scheme, Export Processing Zone (EPZ) Scheme, Electronic Hardware Technology Park (EHTP) Scheme or Software Technology Park (STP) Scheme. Such units may be engaged in manufacture, services, development of software agriculture including agro-processing, aquaculture, animal husbandry, bio-technology, floriculture, horticulture, piscicIture, viticulture, poultry and sericulture and may export all products except goods mentioned as prohibited items of exports in ITC (HS) Classifications of Export and Import items. Commensurate with the policy to give a special thrust to export of computer software, such units would be encouraged to be set up under any of the aforementioned export oriented schemes. Software units may undertake exports using data communication links or in the form of physical exports (which may be through courier service also), including export of professional services. An EOU/EPZ/EHTP/STP unit may import, free of duty, the following goods or as may be additionally specified in the relevant customs notification, required by it for manufacture, production, processing, service or in connection therewith, provided they are not prohibited items in the ITC (HC) Classifications of Export and Import items.

(i)Capital goods as defined in the Policy including generating sets and pollution control and quality assurance equipments including their spares;

(ii)Tools, jigs, fixtures, gauges, moulds, instruments and accessories;

(iii)Raw materials, components, consumables, intermediates, spares and packing materials;

(iv)Prototypes and technical samples for product diversification, development or evaluation;

(v)Materials handling equipment like forklifts and overhead cranes;

(vi)Drawings, blue prints, charts, microfilms and technical data;

(vi)Office equipment, spares and consumables thereof.

Conditions of Import

The import shall be subject to the following conditions:

(a)The goods shall be imported into the EOU/EPZ/EHTP/STP premises. However, agriculture and allied sectors units in EOU/EPZ may supply/transfer the capital goods and the inputs in the farms/fields with prior intimation to the jurisdictional Assistant Commissioner of Customs

and Central Excise, provided the ownership of the goods rests with EOU/EPZ units;
(b)The normal procedure as prescribed under Customs/Excise rules for EOUs units and units in EPZs,/EHTP/STP will be followed and appropriate bond executed with Customs/Excise authority.
(c)Import of prohibited items in the ITC (HS Classifications of Export and Import items shall not be allowed;
(d)The goods, except capital goods and spares, shall be utilized as per Policy within a period of two years or as may be extended by Customs Authority except gold/silver/platinum for which the provisions of Chapter 8 of the Policy shall apply; and
(e)Goods already imported/shipped/arrived before the issue of LOP/LOI are also eligible for duty free clearance under the EOU/EPZ/EHTP/STP scheme provided customs duty has not been paid and the goods have not been cleared from Customs.

10.5 SUGGESTED READINGS

1. V.K.Pamecha, A Guide to Export-Import Consultancy & Registration Services.
2. Edward G.Hinkelman, A Short Course in INTERNATIONAL PAYMENTS - Letters of Credit, Documentary Collections and Cyberpayments in International Transactions

10.6TERMINAL QUESTIONS

1. What are the guidelines for import of goods?
2. Give a brief note on Export promotion councils in India
3. Write an essay on Export oriented units and export processing zones.
4. Write a short note on Evidence of Import.

LL.M. Part-2
Subject: Law of Export Import Regulation

Block-IV - Control of Exports and Technology transfer.
Unit-11-Quality control; Regulation on goods; Conservation of foreign exchange.

STRUCTURE

11.1INTRODUCTION

The Export Inspection Council of India (EIC) was set up by the Government of India under Section 3 of the Export (Quality Control & Inspection) Act, 1963 as an apex body to provide for sound development of export trade through quality control and pre-shipment inspection. The Act empowers the Central Government to notify commodities and their minimum standards for exports and to set up suitable machinery for inspection and quality control. The EIC is assisted in its functions by the Export Inspection Agencies (EIAs) located at Chennai, Kochi, Kolkata, Delhi and Mumbai having a network of 38 sub-offices and laboratories to back up the pre-shipment inspection and certification activity.

11.2OBJECTIVES

The objective of this lesson is to ascertain **Quality control; Regulation on goods; Conservation of foreign exchange** for economic governance. Further an attempt has been made to study all the relevant factors related with the export and import for foreign exchange management.

11.3 SUBJECT

11.3.1 QUALITY CONTROL

Export Inspection Council of India

In the WTO regime, as India's trading partners are installing regulatory import controls, the EIC has also introduced voluntary certification programmes, especially in food sector and is seeking recognition for its certification by official import control agencies of its trading partners to facilitate easier access to their markets for Indian exporters. With the liberalization of the trade regime, the role of EIAs has become voluntary for many items. However, in the areas of Fish & Fishery Products, Dairy Products, Poultry Products, Eggs Products, Meat & Meat Products and Honey, certification for exports remains mandatory. The EIAs are also providing support, by way of training and awareness to the trade and industry for overall up gradation of their quality and quality assurance systems, in line with international requirements.

Inspection Agency Recognition Scheme

EIC continued to recognize Inspection Agencies under the provisions of Section 7 (1) of Export (Quality Control and Inspection) Act, 1963. Under the EIC Inspection Agency Recognition Scheme 2002, which is aligned with the International Standard on Acceptance of Inspection Bodies, ISO/IEC 17020:1998, to make the scheme internationally acceptable, 34 Inspection Bodies have so far been approved and notified by the Government of India?

MOU with Republic of China

An important Agreement of Cooperation on Inspection of Iron Ore between the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China (AQSIQ) and Export Inspection Council of the Republic of India (EIC) was signed in 2006. The Agreement aims at establishing a working mechanism which will strengthen co-operation between both sides and develop and promote trade in Iron Ore in a mutually beneficial manner between India and China. Under the Agreement, only those inspection agencies which have been approved and recognized by Export Inspection Council of India would be able to inspect the Iron Ore being exported from India to China as per standards of China and the applicable international standards. Inspection Certificates issued by the EIC's approved inspection agencies would be accepted as such by Import Regulatory Authorities of China without any further testing thereby resulting in increased free trade of Iron Ore from India to China. It has also been agreed that in case of non-standard inspection behavior of these approved inspection agencies, further action would be taken through consultation between AQSIQ, China and EIC of India so as to ensure a mutually acceptable and effective resolution of the problems. This agreement is expected to solve many inspection related problems in the export of Iron Ore from India to China.

CECA between India & Singapore

The Comprehensive Economic Cooperation Agreement signed between India and Singapore during the month of July 2005, includes the Mutual Recognition Agreement on Goods. Under this agreement, each side would accept certification of results of conformity assessment activities of the other side to demonstrate compliance with its mandatory requirements. The designating criteria for Electrical & Electronics Sector were developed for the purpose of designating Conformity Assessment Bodies for export

Memoranda of Understanding (MOU) with French Ministry of Agriculture and Fishery

During the 14th Session of Indo-French Joint Committee held at Paris on 31st May 2006, India expressed its willingness to sign an agreement between the French Ministry of Agriculture and Fishery and the EIC, under the Department of Commerce to facilitate the import of Food and Fishery Products by France. The French side reaffirmed its willingness to facilitate technical exchanges with the relevant entities to facilitate the implementation of import regulations. EIC has been designated as the Competent Authority for the implementation of the Memorandum for the Indian side.

11.3.2 REGULATION ON GOODS

The 54th edition of the IATA *Dangerous Goods Regulations* incorporates all amendments made by the Dangerous Goods Board and includes changes to the 2013–2014 edition of the ICAO *Technical Instructions*. The following list is intended to assist the user to identify the main changes introduced in this edition and must not be considered an exhaustive listing. The changes have been prefaced by the section or subsection in which the change occurs.

Dangerous Goods Transported by Helicopters—

Provisions have been added to the Regulations, where applicable, to address specific requirements or differences for the transport of dangerous goods by helicopter.

1—Applicability

1.2—Application of these Regulations

The provisions applicable to Approvals and Exemptions have been revised.

1.2.9—Application of Standards.

A new paragraph has been added to clarify that if there is a conflict, the provisions of the Regulations take precedence over that in any standards referred to.

1.5—Training Requirements

Specific provisions, including a new Table 1.5.C, have been added to address the dangerous goods training requirements applicable to staff of designated postal operators.

1.5.6—The provisions applicable to instructor qualifications have been enhanced.

1.6—Dangerous Goods Security

The recommendations on dangerous goods security have been revised to reflect changes to the determination of high consequence dangerous goods for radioactive materials.

1.7—Incident and Accident Reporting

A new paragraph has been added recommending that entities other than operators report dangerous goods incidents or accidents and undeclared or misdeclared dangerous goods identified while in their possession.

2—Limitations

2.3—Dangerous Goods Carried by Passengers or Crew

There have been extensive changes and additions to the provisions for dangerous goods permitted in passenger and crew member baggage. These include:

- revision to the provisions for battery-powered mobility aids to make provision for lightweight mobility aids that are designed to be collapsible and have the battery removed;
- clarification that small cartridges containing a Division 2.2 gas may be carried in checked or carry-on baggage;
- revision to allow all permitted types of fuel cell cartridges in checked baggage;
- allowance for non-spill able batteries in equipment in baggage, subject to limitations on the size of the battery.

2.4—Transport of Dangerous Goods by Post

The types of dangerous goods permitted in international air mail have been expanded to permit small lithium batteries when contained in equipment. The ability of a postal operator to accept lithium batteries in the mail is subject to specific approval by the civil aviation authority.

2.5—Dangerous Goods in Operator's Property

The allowances for consumer goods have been revised to delete safety matches and add in allowance for portable electronic devices containing lithium batteries.

2.6.10—De Minimis Quantities.

New provisions have been added to address transport of very small quantities of certain dangerous goods.

Dangerous Goods Regulations

3—Classification

3.1.7.4—New test criteria have been added to determine when articles may be excluded from Class 1.
3.3.3—The provisions applicable to viscous flammable liquids have been revised and clarified.
3.6.2.2.3—New provisions have been added to address the transport of uncleaned medical devices/equipment.
3.9.2.6—Provisions have been added to identify the requirements for lithium batteries, including requirements for manufacturers to have a quality management system.

4—Identification

4.2—List of Dangerous Goods

Amendments to the List of Dangerous Goods include:

- addition of a new entry for electric double-layer capacitors, UN 3499;
- an additional proper shipping name, Cartridges for tools, blank has been added to UN 0014;
- six new entries have been added for chemicals under pressure, UN 3500—UN 3505 in Division 2.1 and Division 2.2;
- all of the references to "G" indicating gross weight in columns J and L have been deleted. This is associated with the revision to the definition of net quantity, see Appendix A changes. A small number of limited quantity entries will still retain the 30 kg G limitation;
- allchlorosilanes with a Class 8 subsidiary risk are now restricted to Cargo Aircraft Only;
- UN 2809, Mercury has been assigned a toxic subsidiary risk. Associated with this change, Mercury in manufactured articles has been assigned to UN 3506.

4.4—Special Provisions

A number of special provisions that include provisions for certain substances and articles to be "not subject to these Regulations" have been revised to limit the application to when the substances or articles are carried as cargo, see A32, A41, A47, A67, A69, A70, A98 and A129.
A21—applicable to battery-powered equipment and battery-powered vehicles has been revised to better identify which items are considered as "vehicles" and to then specify that equipment powered by lithium batteries must be assigned to the applicable lithium battery entry.
A51—which permits aircraft batteries to be shipped on a passenger aircraft above the normal net quantity permitted on passenger aircraft has been revised to include provision for lithium ion aircraft batteries under UN 3480.
A69—has been revised to reflect changes to mercury in manufactured articles.

A70—has been revised to more clearly identify under what conditions engines may be considered as “not restricted”.
A146—applicable to fuel cell cartridges, including when contained in, or packed with equipment has been revised to then specify that when lithium batteries are contained in the fuel cell system then the article must be assigned to the applicable lithium battery entry.
A184—is a new special provision applicable to fuel cell cartridges, including when contained in, or packed with equipment to then specify that when lithium batteries are contained in the fuel cell system then the article must be assigned to the applicable lithium battery entry.
A185—which is assigned against the entries for lithium batteries contained in equipment (UN 3901 and UN 3481) specifies that vehicles powered only by lithium ion or lithium metal batteries must be assigned to UN 3171, Battery-powered vehicle.
A186—is a new special provision to address the requirements for electric double layer capacitors.
A187—identifies the classification requirements for the new entries for chemical under pressure, UN 3500 to UN 3505.
A188—is intended to clarify the correct assignment of UN number/proper shipping name for nitroglycerin solution in alcohol.
A189—clarifies the requirements for formaldehyde solutions with less than 25% formaldehyde. xxii 54th EDITION, 1
A190—provides an allowance for neutron radiation detectors which contain boron trifluoride, normally forbidden/forbidden, to be shipped on a cargo aircraft provided the provisions of A190 are met. A190 provides for the transport of these radiation detectors containing no more than 1 g of boron trifluoride to be shipped as cargo as not restricted.
A191—provides for an exception to the requirement for manufactured articles containing mercury to have to show the Division 6.1 subsidiary risk on the Shipper's Declaration and for the packages to have to bear a Toxic hazard label.

5—Packing

Packing Instructions

Almost all of the packing instructions have been revised to include closed head drums (1A1, 1B1, 1H1 and 1N1) and/or other metal boxes (4N) as outer packaging’s.
218—is the new packing instruction to address the new chemical under pressure entries (UN 3500 to UN 3505).The absorbent material requirements in Packing Instructions 350, 351, 360, 361, 373, Y373, 493, 494, 553,651, 652, 657, 658, 680, 850 and 854 have been revised to require sufficient absorbent material to absorb the entire contents of the inner packaging’s.

370 and **Y370**—have been revised to include provisions for a base material in Packing Group III, which has a higher net quantity. There is no change to the permitted quantity of organic peroxide.

Y373, **Y680** and **Y840**—have been revised to add in additional packing requirements for glass inner packaging's to be packed with sufficient absorbent material to absorb the entire contents of the innerpackagingsand placed in a rigid leak proof receptacle before being packed in the outer packaging.

377 and **681**—have been revised to reflect that the chlorosilanes assigned to these packing instructions are now not permitted on passenger aircraft.

869—which apply to mercury contained in manufactured articles have been completely revised.

955—a provision has been added to permit packages containing life-saving appliances, which contain no dangerous goods other than a Division 2.2 gas for inflation purposes, to be shipped in strong outerpackagingsup to a maximum weight of 40 kg gross as cargo and to be considered as not restricted.

965 and **968**—the packing instructions applicable to lithium ion and lithium metal batteries have been revised to limit the quantity of lithium batteries that may be placed in a package under the provisions of Section II. A new Section IB has been added to these packing instructions that permit small lithium batteries meeting the general requirements of Section II to continue to be shipped in non-UN specification packaging's up to a total package weight of 10 kg. Shipments prepared according to Section IB are subject to all of the applicable requirements of these Regulations, including that for dangerous goods training. Section IB shipments do not require the full Shipper's Declaration but do require an abbreviated document or information on the air waybill as indicated in the packing instructions. Section I of these packing instructions has been revised to become Section IA. The package limits specified in Section IA have been revised to become net quantity per package rather than gross weight.**966** and **969**—the packing instructions applicable to lithium ion and lithium metal batteries packed with equipment have been revised to clearly apply a limit on the net quantity (weight) of lithium batteries that may be placed in a package under the provisions of both Section I and Section II. The limit for Section I is 5 kg net on a passenger aircraft and 35 kg net on a cargo aircraft. For Section II the limit is 5 kg net per package for both passenger and cargo aircraft.

967 and **970**—the packing instructions applicable to lithium ion and lithium metal batteries contained in equipment have been revised to clearly apply a limit on the net quantity (weight) of lithium batteries that may be placed in a package under the provisions of both Section I and Section II. The limit for Section I is 5 kg net on a passenger aircraft and 35 kg net on a cargo aircraft. For Section II the limit is 5 kg net per package for both passenger and cargo aircraft.

971—is a new packing instruction that has been added for UN 3499, Capacitor.

<u>7—Marking & Labeling</u>

7.1.5.1—Reference has been included in 7.1.5.1(a) to identify the minimum size of the marking of the UN number on packages as specified in 7.1.5.5.

<u>Dangerous Goods Regulations</u>

7.1.5.5—Has been revised to identify that from 2013 the marking of the UN number on packages should be of a minimum size. This minimum size will become mandatory with effect 1 January 2014.

7.2.4.7—Has been revised to include reference that packages containing lithium batteries shipped in accordance with Section IB of Packing Instruction 965 or 968 must bear both the lithium battery handling label and the Class 9 hazard label.

<u>8—Documentation</u>

8.0.1—A new paragraph has been added to clearly identify dangerous goods that can be described on documentation, such as an air waybill, rather than on a Shipper's Declaration.

8.1.6.9.2, Step 6—Has been revised to remove reference to the use of “G” except for certain dangerous goods shipped in limited quantities.

8.1.6.11—A new paragraph has been added to identify the requirements that now apply for additional information to be provided on the Shipper's Declaration for fireworks.

<u>9—Handling</u>

9.2.3—New text has been added to reinforce that marks and labels on packaging’s required by these Regulations must not be covered or obscured by any other label or marking.

9.3.4—Additional text has been added to address the carriage of Cargo Aircraft Only dangerous goods by helicopters. The exceptions for certain classes/divisions of dangerous goods to have be accessible or loaded in a Class C compartment have been revised to clarify the application for goods with a subsidiary risk.

9.5.1.1—The provisions applicable to notification to the pilot-in-command have been revised, as follows:

- the NOTOC must be provided prior to aircraft push-back or taxi;
- new requirements have been included to specify that the information on the NOTOC must be provided to the personnel responsible for operational control, e.g. the airline operations control centre. This requirement becomes mandatory as from 1 January 2014;

provision for an alternative means of compliance for the NOTOC for helicopter operations are permitted with approval of the State of the operator;

provision has been made for information on the NOTOC applicable to lithium batteries (UN 3090 and UN 3480) to be consolidated and abbreviated;

 a table has been added to clearly identify those dangerous goods that are not required to be shown on the NOTOC.

9.6.4—New reporting requirements have been added for dangerous goods occurrences.

9.8.2—A recommendation has been added that operators should retain documentation, including the acceptance checklist for dangerous goods consignments that were not accepted due to packaging, documentation or other errors.

9.9—Additional specific text has been added for helicopter operations.

11.3.3 CONSERVATION OF FOREIGN EXCHANGE[35]

Suresh Nayar in his article has written elaborately on conservation of foreign exchange. Foreign Exchange control was first introduced in India in 1939 by virtue of the emergency powers derived from the Defense of India rules. These emergency powers were later enacted into the Foreign Exchange Regulation Act, 1947. Thereafter, the Foreign Exchange Regulation Act, 1973 was legislated in 1973 containing comprehensive provisions for the regulation and control of foreign exchange dealings in India and by Indian citizens visiting abroad. This Act provided for the statutory basis to the present system of exchange control of India. The Enforcement Directorate established under this act is concerned with the enforcement of the provisions of the Foreign Exchange Regulation Act, to prevent leakage of foreign exchange occurring through malpractices. The Enforcement Directorate detects cases of violation and also performs substantial adjudicatory functions to curb such malpractices. The Conservation of Foreign Exchange and Prevention of Smuggling.

Activities Act, 1974 was enacted with an objective to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities

[35] **Suresh Nayar has written elaborately on conservation of foreign exchange.(The author is working as Intelligence Officer with one of the CBEC Directorates and the views expressed are strictly personal.**

and for connected matters. It is often said that India adopted and inherited various facets of the administration that the British Raj left behind as part of their colonial baggage. One such aspect is the concept of Preventive Detention. The Constitution of India, which is the sine qua non of our democratic society, explicitly allows for Preventive Detention, a “necessary evil”, which can be triggered on a minimal assumption that the accused would indulge in a wrongful act – even without sufficient evidence conducive for a proper trial. Article 22 of the Constitution empowers the Parliament and the State Legislatures to make laws providing for Preventive Detention for reasons related to the security of the state and maintenance of Public Order. Preventive Detention, which is different from punitive detention, encroaches upon the personal liberty of an individual without adhering to the need of independent judicial scrutiny before taking such an action. Purists maintain that the very spirit of any preventive detention law is repugnant to the rule of law as embellished in the Indian Constitution. This draconian measure compounded by the use of the term “necessary evil” succinctly raises the question as to why such a tolerant Constitution provides for a retrograde provision of Preventive Detention. The answer lies in the vision of the Constitution makers who foresaw the need to curtail the freedom of certain class of individuals, at testing times, in order to ensure peace and social order in safeguarding the country’s unity and progress. The law on preventive detention has gone through several vicissitudes since 1950. The first preventive detention Act was passed by Parliament in 1950, which remained in force upto December 31, 1969. In 1971, this law entered the main stream with a new identity of Maintenance of Internal Security Act (MISA). MISA was directed against dissident activities of those who tamper with public order. In 1974, the Parliament passed the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), which provided wide powers to the executive to detain individuals on the mere apprehension on their involvement in smuggling activities. Similarly to immobilize drug traffickers, the Prevention of Illicit Traffic in Narcotic Drugs & Psychotropic Substances Act, was incepted in 1988. MISA was withdrawn in 1978 and made way for National Security Act in 1980 followed by Terrorist and Disruptive Activities (Prevention) Act (TADA) in 1985 to deal with the terrorists and insurgency activities and POTA in 2001.

As the statute goes, the COFEPOSA Act was enacted to provide for preventive detention in certain cases for the purposes of:-

a) Conservation and augmentation of foreign exchange (with reference to Foreign Exchange Regulation Act, 1973 or FERA); and

b) Prevention of smuggling activities and for matters connected therewith.
It is apparent thereof that the COFEPOSA Act credits its genesis to immobilize persons who indulge in economic offences like smuggling, foreign exchange racketeering, drug trafficking etc and to disrupt the machinery established for smuggling and foreign exchange manipulation, with all their ramifications. Such smugglers, economic offenders and others of their ilk subvert the law of the land to amass personal wealth thereby building their own empire complete with all mechanics perpetuating nefarious activities further. Slowly but steadily, such offenders more often than not legitimate the hoarded wealth; manage to build contacts at the right places where it matters the most– the Bureaucracy, Judiciary, etc and eventually build an impregnable clout around them. Apart from the above, economic offences such as smuggling, export- import frauds etc have always been a real menace to the stable growth of our economy. High incidence of economic offenders has brought into existence a parallel economy of black money, corporate frauds and scams. It is also an admitted reality that it is extremely difficult to procure direct evidence against financers and organizers of smuggling activities, as per the norms laid down in the Evidence Act to obtain conviction in the Courts of Law. With technology reducing distance like never before, the kingpins, with state of the art communication facilities at their disposal, are able to control smuggling operations from any corner of the world, cocooned in their den leaving little or no evidence about their operations. It is in this backdrop that COFEPOSA continues to hold sway.
The COFEPOSA Act was envisioned to immobilize such criminals from indulging in their despicable activities without fully proving their guilt in a Court of Law thereby empowering the enforcement agencies to strike at the core of organized felony.
The COFEPOSA Act was conceptualized to avoid interference by a Court of Law except by way of examination of such action by duly constituted Advisory Board, thereby exclusively empowering the Executive arm of the Government with the responsibility for its administration. Under provisions of the COFEPOSA Act, a Government officer, not below rank of Joint Secretary in case of Central Government and Secretary in case of State Government, specifically authorized for the said purpose, orders for detention of a person (including a foreigner) with a view to prevent him from acting in any manner prejudicial to conservation or augmentation of foreign exchange, or to prevent him from smuggling or abetting smuggling of goods, or transporting, keeping, concealing or dealing in smuggled goods or harboring persons engaged in smuggling of goods. Members of the Advisory Board are High Court judges or those qualified to be High

Court judges. In the entire scheme of things, the role of judiciary was sought to be limited to the barest extent possible. However, history has it that judicial intervention has practically nailed the proverbial coffin as far as the functional efficiency of COFEPOSA Act is concerned. Though I am not equipped with the Statistics on this front, experience tells me that the Advisory Boards and High Courts have released almost 65% to 70% of those detained under the said Act predominantly on procedural/technical grounds. Though the spirit of preventive detention encompassed the view that Bail was not to be granted to such cases, High Courts all over the country granted bail to a large number of detunes on the grounds of procedural or technical lapses in majority of the cases. Grounds such as failure to supply legible copies of documents to the detenue are really bizarre but have been often cited as a reason for quashing Detention Orders. A cursory look at some other grounds for revocation of the detention order will highlight the fact that the said Act is the lawyers delight and pain for the authority sponsoring the COFEPOSA detention proposal. In certain cases, non –supply of full text of the bail order has been detrimental for the detention order even though the gist of the bail order was supplied to the detenue. In some cases, simply because translations of all relied upon documents in the language known to the detenue was not made; the detenue has walked away scot-free. If one looks at it logically, the grounds of detention are available to the detenue in English and representations thereof, are anyway drafted and strategised by lawyers who are well conversant with English language and equipped with all nuances of the game. Yet it has been claimed that non-supply of translated documents has affected the detenues right to make effective representation before the appropriate authorities. In one case, the ground contested before the Hon'ble High Court related to suspension of his CHA licence by the competent authority, which was not brought to the notice of the Detaining Authority. The Hon'ble High Court held that this is vital information and it was essential for the Sponsoring Authority to have placed the said document before the Detaining Authority. The Detention Order was, therefore quashed. It is true that the Executive cannot have unfettered powers and hence judiciary should definitely step in to examine the complaints of the detenue. Hon'ble Apex Court in the case of Union of India vs Paul Manickam [2003 (162) ELT 6 (SC)] has held that strict construction is necessary as the said preventive law involves deprivation of human liberty, which is greatest human freedom. In this context, the essence of referring to some of the reasons as above (there are many which equally sans logic) is not to challenge or question the judgments, but to bring out the feeling that the procedures prescribed under law are apparently stretched beyond the limits and maximum

mileage of the same are taken by the lawyers at the expense of the merits of the case.
On the flip side, it is seen that the Enforcement Agencies propose COFEPOSA action in almost all cases booked by them, as a matter of right and discretion is thrown to the wind. Sometimes, the same are proposed so as to negate any possible rumors of favoritism/corruption. It is also noticed that COFEPOSA action in certain cases are proposed after the show cause notice is issued when punitive measures such as adjudication and prosecution are on the anvil. By such time, lot of documentation is always on the cards (especially in cases of export / import frauds and the like) and such voluminous paper work and the inordinate delay in sponsoring the cases virtually reduces the scope of detention of the detenue and trashes out any live link with the case making such preventive detention proposals effectively non est. Another issue that comes to mind is whether the Screening Committee, which deliberates over the detention proposals before considering the same as fit for scrutiny of the Detaining Authority, is really required? The Screening Committee meets only once a month and hence crucial time is lost out in further processing of the detention orders in cases considered fit for issuance of said orders. Needless to say, delay in sponsoring cases of detention at the level of Sponsoring Authority and delay of processing of cases thereafter is one of the often cited reasons for quashing of detention orders. The nexus between the date of incident and passing of the Detention Order is a vital factor as far as preventive detention is concerned. Anyway, the final authority of subjective satisfaction vis a vis issuance of Detention Order vests with the Detaining Authority and hence the role of Screening Committee is limited probably to filtering the proposals. Even if the Screening Committee proposes, the Detaining Authority can reject the proposal, if subjective satisfaction is not achieved – So, why have this Committee after all? Doing away with the same will not only ensure drastic reduction in the time gap between the date of incident and the passing of the Detention Order and thus better proximity factor but also cut down heavily on the volume of material to be considered and relied upon at the time of issuance of Detention Order.
There is a school of thought that at a time when FERA, which was the primary Act for enforcing foreign exchange violation, has been replaced by FEMA, making it a civil compoundable offence, to persist with a Prevention Detention Act, (COFEPOSA) and the Forfeiture of Property Act, [Smugglers and Foreign Exchange Manipulators (Forfeiture of Property Act, 1976, (SAFEMA) – a legislation enacted to buttress the COFEPOSA] is untenable. Supporting this view is the opinion that the Customs Act, 1962, adequately covers offences connected with

smuggling. Another reason often quoted is that the said Act has increasingly become a source of harassment, manipulation and corruption. More importantly, three decades and more down the line, the basic objective of this Preventive Detention Law to target the main operators namely the organizers, financers, kingpinsetc who generally remain and operate from behind the scene appears to have been forgotten. The result – In most cases, the catch ends with petty carriers or small operators who are caught red handed increasing the score of those detained under the said Act.So has the COFEPOSA Act outlived its utility? Yes and No – BOTH. I am not playing it safe. Yes, because judicial scrutiny has made way for such binding precedents, which has vastly eroded the chances of survival of the Detention Order. At best, it provides quality fodder for lawyers who laugh their way to the coffers. Somewhere, down the line the reasons for preventive detention have been lost in the maze. Preventive detention is an extraordinary law and the power of preventive detention is a precautionary power to be exercised in reasonable anticipation. Proposing it as a matter of fact and for the purpose of records alone is a dangerous precedent. At the same time.

11.4 SUMMARY

The Export Inspection Council of India (EIC) was set up by the Government of India under Section 3 of the Export (Quality Control & Inspection) Act, 1963 as an apex body to provide for sound development of export trade through quality control and pre-shipment inspection. The Act empowers the Central Government to notify commodities and their minimum standards for exports and to set up suitable machinery for inspection and quality control. The EIC is assisted in its functions by the Export Inspection Agencies (EIAs) located at Chennai, Kochi, Kolkata, Delhi and Mumbai having a network of 38 sub-offices and laboratories to back up the pre-shipment inspection and certification activity. In the WTO regime, as India's trading partners are installing regulatory import controls, the EIC has also introduced voluntary certification programmes, especially in food sector and is seeking recognition for its certification by official import control agencies of its trading partners to facilitate easier access to their markets for Indian exporters. With the liberalization of the trade regime, the role of EIAs has become voluntary for many items. However, in the areas of Fish & Fishery Products, Dairy Products, Poultry Products, Eggs Products, Meat & Meat Products and Honey, certification for exports remains mandatory. The EIAs are also providing support, by way of training and awareness to the trade and industry for overall up gradation of their quality and quality assurance systems, in line with international requirements. The 54th edition of the IATA *Dangerous Goods Regulations* incorporates all amendments made by the Dangerous Goods Board and includes changes to the 2013–2014 edition of the ICAO *Technical Instructions*. The following list is intended to assist the user to identify the main changes introduced in this edition and must not be considered an exhaustive listing. The changes have been prefaced by the section or subsection in which the change occurs.

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- an additional proper shipping name, Cartridges for tools, blank has been added to UN 0014;

- six new entries have been added for chemicals under pressure, UN 3500—UN 3505 in Division 2.1 and Division 2.2;
- all of the references to "G" indicating gross weight in columns J and L have been deleted. This is associated with the revision to the definition of net quantity, see Appendix A changes. A small number of limited quantity entries will still retain the 30 kg G limitation;
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A191—provides for an exception to the requirement for manufactured articles containing mercury to have to show the Division 6.1 subsidiary risk on the Shipper's Declaration and for the packages to have to bear a Toxic hazard label.

Packing Instructions

Almost all of the packing instructions have been revised to include closed head drums (1A1, 1B1, 1H1 and 1N1) and/or other metal boxes (4N) as outer packagings.
218—is the new packing instruction to address the new chemical under pressure entries (UN 3500 to UN 3505).The absorbent material requirements in Packing Instructions 350, 351, 360, 361, 373, Y373, 493, 494, 553,651, 652, 657, 658, 680, 850 and 854 have been revised to require sufficient absorbent material to absorb the entire contents of the inner packaging's.
370 and **Y370**—have been revised to include provisions for a base material in Packing Group III, which has a higher net quantity. There is no change to the permitted quantity of organic peroxide.
Y373, **Y680** and **Y840**—have been revised to add in additional packing requirements for glass inner packaging's to be packed with sufficient absorbent material to absorb the entire contents of the inner packaging's and placed in a rigid leak proof receptacle before being packed in the outer packaging.
377 and **681**—have been revised to reflect that the chlorosilanes assigned to these packing instructions are now not permitted on passenger aircraft.
869—which apply to mercury contained in manufactured articles has been completely revised.
955—a provision has been added to permit packages containing life-saving appliances, which contain no dangerous goods other than a Division 2.2 gas for inflation purposes, to be shipped in strong outer

packaging’s up to a maximum weight of 40 kg gross as cargo and to be considered as not restricted.

965 and **968**—the packing instructions applicable to lithium ion and lithium metal batteries have been revised to limit the quantity of lithium batteries that may be placed in a package under the provisions of Section II. A new Section IB has been added to these packing instructions that permit small lithium batteries meeting the general requirements of Section II to continue to be shipped in non-UN specification packaging’s up to a total package weight of 10 kg. Shipments prepared according to Section IB are subject to all of the applicable requirements of these Regulations, including that for dangerous goods training. Section IB shipments do not require the full Shipper's Declaration but do require an abbreviated document or information on the air waybill as indicated in the packing instructions. Section I of these packing instructions has been revised to become Section IA. The package limits specified in Section IA have been revised to become net quantity per package rather than gross weight.**966** and **969**—the packing instructions applicable to lithium ion and lithium metal batteries packed with equipment have been revised to clearly apply a limit on the net quantity (weight) of lithium batteries that may be placed in a package under the provisions of both Section I and Section II. The limit for Section I is 5 kg net on a passenger aircraft and 35 kg net on a cargo aircraft. For Section II the limit is 5 kg net per package for both passenger and cargo aircraft.

967 and **970**—the packing instructions applicable to lithium ion and lithium metal batteries contained in equipment have been revised to clearly apply a limit on the net quantity (weight) of lithium batteries that may be placed in a package under the provisions of both Section I and Section II. The limit for Section I is 5 kg net on a passenger aircraft and 35 kg net on a cargo aircraft. For Section II the limit is 5 kg net per package for both passenger and cargo aircraft.

971—is a new packing instruction that has been added for UN 3499, Capacitor.

Foreign Exchange control was first introduced in India in 1939 by virtue of the emergency powers derived from the Defence of India rules. These emergency powers were later enacted into the Foreign Exchange Regulation Act, 1947. Thereafter, the Foreign Exchange Regulation Act, 1973 was legislated in 1973 containing comprehensive provisions for the regulation and control of foreign exchange dealings in India and by Indian citizens visiting abroad. This Act provided for the statutory basis to the present system of exchange control of India. The Enforcement Directorate established under this act is concerned with the enforcement of the provisions of the Foreign Exchange Regulation Act, to prevent leakage of foreign exchange occurring through malpractices. The Enforcement Directorate detects cases of violation and also performs substantial adjudicatory functions to curb such malpractices. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 was enacted with an objective to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for connected matters.

11.5SUGGESTED READINGS

1. Export (Quality Control & Inspection) Act, 1963
2. Dangerous Goods Regulations
3. Foreign Exchange Regulation Act, 1973

11.6TERMINAL QUESTIONS

1. Write an essay on foreign exchange conservation.
2. Give a brief account of regulation of goods in Indian by citing Indian position in this regard.
3. Write a brief note on Quality control mechanism in India under different laws.

LL.M. Part-2
Subject: Law of Export Import Regulation

Block-IV - Control of Exports and Technology transfer.
Unit-12- Foreign Exchange Management; Currency transfer; Investment in foreign countries

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STRUCTURE

12.1 INTRODUCTION

Companies operating in international markets should establish management policies on foreign Exchange. The following article provides a framework for developing a comprehensive foreign Exchange exposure management policy in the context of the company's financial treasury objectives, existing business activities, and operating environment. Fluctuations in foreign exchange rates affect the cost competitiveness; prove inability, and valuation of a company's international operations. The absence of a foreign exchange management policy leaves a company unprepared to control the potential adverse effects of currency movements. This can lead to increased costs and reduced market share and profits. To avoid these exposures, the company should develop and document a policy statement, describing the company's attitude, objectives, and appropriate responses when managing foreign exchange risk. The primary objective is to establish a policy that will minimize the effects of adverse exchange rate fluctuations on the financial position of the company. Additional benefits of a clearly stated policy include:

- Involving senior management in policy formulation to establish clear guidelines and avoid future misunderstandings;
- Establishing a fair system for evaluating performance of corporate treasury staff;
- Integrated policy-making, which leads to better, more realistic long-run strategies. It is important to stress that no outside source can establish an optimal policy for individual corporations. Nevertheless, the structure of a policy document tends to be broadly similar, since all companies must address the same major issues in foreign exchange management. The following suggestions are meant to provide a framework for policy development, rather than purporting to be the perfect foreign exchange management system. India is considered to be a strategic player on global landscape when it comes to investments and businesses. Standing as the world's 21st largest outward investor, the country is increasingly encouraging its companies to go out and hunt for new markets and cost-effective sources. Indian firms invest overseas majorly through mergers and acquisition (M&A) transactions. Indian Government's supportive policy regimen, coupled with India Inc's experimental orientation will definitely demonstrate an upward trend in outward foreign direct investment (FDI) in the years to come.

12.2 OBJECTIVES

The objective of this lesson is to ascertain the Foreign exchange management; Currency transfer; Investment in foreign countriesfor economic governance. Further an attempt has been made to study all the relevant factors related with the export and import for foreign exchange management

12.3 SUBJECT

FOREIGN EXCHANGE MANAGEMENT POLICIES (OBJECTIVESAND CONTROLS)

12.3.1 Exposure Identification and Reporting

The starting point for the formulation of an exposure management program is to decide exactly what the company has at risk. The following exposures are generally considered in developing a foreign exchange policy:
• Transaction exposure: Generally considered to be the income-statement impact of all payables and receivables denominated in foreign currency. This could include dividends, service fees, royalties, taxes and duties, etc.
•Translation exposure: Balance sheet exposure that results from the consolidation of financial statements of foreign entities into the "home currency".
• Corporate Earnings Exposure: Measures the impact of currency movements on the company's targeted after-tax consolidated earnings.
•Operating Exposure: Reflects the effects of exchange rate movements on an entity's projected cash inflows and outflows.

12.3.2Economic Exposure

It represents all transactions, assets and liabilities, recorded or anticipated, that will affect the company's cash flow when exchange rates change. This is usually associated with a longer-term (1-5 year) view of exposure management. There is no single correct exposure definition, so foreign exchange policy will depend on the accounting and cash flow implications of each definition for the company, as well as corporate goals and risk tolerance. It is an obvious truism to suggest that, "you cannot manage what is not known." This means that reporting systems are crucial to the entire management process. Most companies utilize some form of standardized reporting to one central location, unless individual entities are viewed as completely independent. Exposure reporting is a key issue, since treasuries can end up over hedged, under hedged, or unheeded because of inadequate information. Timing is also a key consideration, because market opportunities can slip away while managers wait for information on the direction and size of an exposure. The complexities in defining and reporting appropriate exposures underscore the importance of involving treasury personnel at an early stage of the decision-making process. It is important that the area involved in implementing hedging decisions also be part of the process of defining and reporting exposures. Foreign Exchange Management Objectives and Policy Effective foreign exchange management is a financial tool for ensuring the profitability.

12.3.3 Company's primary business.

As such, the company should prepare a comprehensive policy statement on foreign exchange risk that clearly states the company's objectives, the tactics for attaining these objectives, and the allocation of responsibility for exercising these tactics. Policy Formulation A key requirement when establishing a comprehensive policy for managing foreign exchange exposure is to ensure that the tenets, objectives and procedures set forth in the policy are consistent with the company's existing policies towards the return on foreign investment, and that these procedures meet the need to minimize the negative effects of currency fluctuations on the company's consolidated earnings position.

12.3.4 Ranking of Exposure Priorities

The company should rank the types of exposures that it faces as a result of fluctuating exchange rates according to their importance to financial, operating and senior management. This prioritization serves as the basis for focusing exposure management efforts and deciding which protective actions the company should employ. The company should review these ranking as operating conditions change. For most companies, the management of transactional and consolidated corporate earnings exposures takes precedence over exposures arising from accounting translation methods. When situations occur in which the company's earnings are threatened by factors arising from more than one type of exposure, treasury staff should treat the

Underlying exposure according to the priority assigned by management.

12.3.5 Establishment of Risk Thresholds

For each type of exposure, the company should determine:
1. The level above which a foreign currency exposure requires protective action;
2. The degree of fluctuation in corporate earnings resulting from adverse exchange rate movements; and
3. The amount of cash that the company is willing to expend to reduce and protect exposures.

The parameters should reflect the company's tolerance for foreign exchange risk as well as other
Operating risks. Risk thresholds may be expressed in a variety of forms: by currency values; as a
Percentage of earnings by currency or in aggregate; monthly, quarterly, or annually. The company should identify such levels in the context of its size and business. This exercise should ensure that the total cost of hedging, including the cost of personnel and treasury systems, is consistent with the expected benefit from the exposure management process. This will prevent effort being expended on unimportant exposures.

12.3.6Allocation of Treasury Responsibilities

The first decision in allocating treasury responsibilities is the degree to which foreign exchange management is centralized. In general, hedging control and decision-making flexibility are more effective with at least some degree of centralization. However, this issue also depends on overall corporate reporting structures and staffing levels at headquarters and the other offices. The degree of centralization has a direct impact on other issues such as:

- •Performance evaluation;
- •Organizational structure;
- •Reporting responsibilities;

12.3.7 Control structures.

In general, most companies find some degree of centralized management is necessary to hedge on the most cost-effective basis from an overall corporate perspective. Once the centralization issues have been addressed, the role of the treasury group can be more specifically defined.

The primary exposure-related responsibilities of treasury usually include the following:
•Determining the level of currency exposure by time period;
•Monitoring the company's consolidated exposure;
•Forecasting exchange rate movements;
•Deciding which exposure the company must manage;
Adjusting the company's exposed position through measures consistent with the policy's stated objectives. This involves choosing the hedging instrument as well as the timing of execution. The operating units are responsible for providing treasury (in a timely manner) with the information necessary to determine and monitor the company's actual and forecast exposure. Operating, marketing and pricing decisions should be taken into account when evaluating exposure concerns, and therefore should include prior consultation with treasury. While hedging the company's consolidated exposure remains a treasury function, effective management of the company's diverse exposure depends on close interaction between treasury and line functions. This will allow a swifter response to new market trends and future changes in the company's exposure profile. Treasury personnel will also be responsible for developing and maintaining market contacts to stay aware of market conditions affecting corporate

12.3.8 Foreign Exchange

After using policy-designated criteria to determine which exposures should be managed, treasury then determines the appropriate implementation of the hedge. This procedure should not occur in isolation, but in such a way as to involve the foreign exchange function in the broader corporate decision-making process. This requires interaction with tax, accounting, marketing and other corporate areas that have a stake in foreign exchange management. In addition to allocating corporate responsibilities, a thorough foreign exchange policy must specify approved techniques for hedging exposures. Essentially, four different strategies are available to a company for managing foreign currency risk:
1. Take no action;
2. Trade positions actively;
3. Always hedge everything;
4. Selectively hedge risk.
For most companies the first two approaches are impractical alternatives. The third option - to adopt a fully hedged strategy - is costly and offers no flexibility, but does relieve management of the need to take an active

decision-making posture. A selective hedging policy, however, relies on economic decision-making as the basis for judging the company's exposure to risk or, conversely, ability to gain. The company should cover only those exposures where the currency risk exceeds the cost of hedging. Treasury should constantly evaluate and reassess its risk to currency fluctuations and the cost of hedging exposures on a selective basis. A variety of hedging techniques are available for managing currency risk. These techniques may be classified under two groups: internal techniques—those aimed at reducing or preventing an exposed position from arising—and external techniques—typically contractual measures aimed at minimizing exchange losses that may result from an existing exposure. Each company must specify which hedging products are acceptable for managing their exposures. Treasury staff must have clear guidelines within which to function on a day-to-day basis.

12.3.9 Foreign Exchange policy

Effective foreign exchange policy also needs to address confirmations and record keeping, whether paper or electronic. Most companies expect same- day telephone confirmations for each trade, and specify that someone other than the original trader must verbally confirm the deal. Written confirmations are generally sent to a separate area from the trading function—usually a control or audit division of the company. They should obviously be sent to the attention of someone other than the initiator of the transaction. Both verbal and written confirmations must be checked carefully. Any discrepancies must be immediately resolved with the counterparty to the trade, to avoid major trading losses. Corporate control areas can monitor written confirmations to ensure adherence to foreign exchange policies and guidelines. The confirmation process not only helps avoid or reduce serious trade disputes, it also provides a valuable internal check from a policy enforcement perspective. While banks can help in the control process, each corporation is ultimately responsible for its own internal control. No outside entity can police a company's operations. Companies and their banks must work together to minimize the risk of errors or improper trading.

12.3.2INDIAN INVESTMENT ABROAD - OVERSEAS DIRECT INVESTMENT BY INDIAN COMPANIES

Some of the recent developments and statistics pertaining to the Indian investment abroad are discussed hereafter.

Key Statistics

- Overseas direct investment by Indian companies stood at US$ 3.24 billion in July 2013, registering an increase of 89.5 per cent from US$ 1.71 billion invested in June 2013, according to data released by the Reserve Bank of India (RBI).

  The investments were made across 461 deals; Reliance Communications, Apollo Tyres, Zee Entertainment Enterprises and Tata Communications, being the major investors.
- A recent report by the US India Business Council (USIBC) has stated that Indian investments in the country has reached US$ 11 billion and has generated over 100, 000 jobs there. The report titled 'Investing in America, How India Helps Create American Jobs' highlights how bilateral relation and business with India has helped the US.
- Similarly, a report by the Europe India Chamber of Commerce (EICC), a body that promotes bilateral trade between the European Union and India, has stated that Indian companies have invested US$ 56 billion across the continent during 2003-2012, of which EUR 29 billion (US$ 38.47 billion) was invested through M&A transactions. The report titled 'Indian Companies in the European Union: Reigniting Economic Growth' also mentioned that Indian business houses employ 1.34 lakh professionals in Europe, including 40,000 new jobs generated by 511 green-field investments. Tata Group is the largest employer in Europe, which counts about 80, 000 employees across its 19 companies there. India accounts for a substantial 47 per cent of the green-field investment and 63 per cent of the employment creation in the UK, according to the report.
- Meanwhile, Corporate India's M&A activity value touched US$ 1.5 billion in July 2013, according to audit and advisory firm Grant Thornton. The report stated that excluding internal mergers and restructuring deals, the year-to-date M&A deal values have increased by 36 per cent from the value in 2012.
- Indian companies, from energy sector to aviation, are vying for market share in Myanmar. As of now, Indian investments in the country are to the tune of US$ 273.50 million and are anticipated to grow to US$ 2.60 billion in next few years. Myanmar is already host to companies like ONGC Videsh Limited (OVL), Jubilant Oil and Gas, CenturyPly, Tata Motors, Essar Energy, RITES, Escorts, Sonalika Tractors, Zydus Pharmaceuticals Ltd, Sun

Pharmaceuticals Ltd, Ranbaxy, Cadila Healthcare Ltd, Shree Balaji Enterprises, Shree Cements, Dr. Reddy's Laboratories Ltd, Cipla, Gati Shipping Ltd, TCI Seaways, Apollo, and AMRI.

- Kirloskar Brothers Ltd (KBL)'s subsidiary SPP Pumps, has recently inaugurated its most advanced facility at Atlanta, USA. Entailing an investment of US$ 6 million, the new plant is KBL's seventh manufacturing facility worldwide. With an installed annual capacity of 2, 500 units, the plant is equipped with the latest engineering, testing and training methods and will manufacture and assemble end suction, horizontal split case, multi-stage and vertical turbine pumps.
- Meanwhile, Indian conglomerate Aditya Birla Group is intending to invest around US$ 1 billion to set up a chemical/fertiliser plant in the US. Currently, half of the group's US$ 40 billion-turnover is contributed by its foreign markets.

  The latest investment proposal, being considered to take advantage of the falling gas prices in the US, is well aligned with the plans of host of Indian companies that intend to grab opportunities in North America.
- On the similar note, Apollo Tyres has announced that it would infuse US$ 2.5 billion to acquire the US-based Cooper Tires. Furthermore, Reliance Industries seems to be the largest investor in the American shale gas space with an investment of US$ 5.7 billion as of March 2013.

  Indian wellness and slimming firm VLCC has embarked on its second foreign acquisition by buying a controlling stake in Singapore-based Global Vantage Innovative Group (GVig), which manufacturers and retails beauty and wellness products. The deal, to be guessed worth Rs 100-120 crore (US$ 14.75-17.7 million), is expected to help VLCC in strengthening its position in the South-East Asian region.

  In early 2013, VLCC had acquired Malaysian slimming and personal care firm Wyann International.
- TVS Motors is planning to establish a two-wheeler assembly line in Uganda and launch two motorcycle models in the African nation. The new products would be specifically designed and developed according to the needs and desires of the clients in Uganda.

  TVS Motor Company is present in Uganda for about a decade now and operates through eight dealers offering sales, service and spare parts support in the country. Yuvaraj International Uganda Ltd has been appointed as its new distributor.

Government Initiatives

Indian Government is making all efforts to integrate Indian economy with rest of the world in the every possible way. India showed a consistent performance even in the toughest of the times and hence is looked upon as a strategic international player and an important source of funds for other economies. Recently, many of the Indian and Bangladeshi companies have inked agreements for setting up projects in sectors such as limousine services, manufacturing three-wheelers and software development, stated the officials of the Confederation of Indian Industry (CII). Recently, the Indian trade and industry had expressed it to the Government that it continues to see Bangladesh as a “very, very important partner”, and it would like to initiate more of the plans for investment, trade and joint ventures (JV) between the two countries. In March 2013, the Ministry of External Affairs had revealed that in the last six months or so 38 Indian investments had been registered with the Board of Investments in Bangladesh for about US$ 183 million; major investor being Bharti Airtel, Tata Motors, Sun Pharma, Asian Paints, Marico, Godrej, Venky’s Hatcheries, Parle Products, Forbes and Marshall.

Road Ahead

The Government, RBI, and Indian Corporate entities are constantly reviewing the policies and regulations including Home Country Measures (HCMs) to boost globalization efforts through outward FDI without having any adverse effects on our domestic economy and its macro-economic stability. India is expected to be the largest source of emerging market multination enterprises (MNEs) by 2024, according to a recent report by PricewaterhouseCoopers (PwC). By that time, India would be having 20 per cent more MNEs than China, and more than 2, 200 Indian firms are anticipated to invest overseas in the next fifteen years. In a nutshell, Indian MNEs are poised to carve a niche in business services and high-profile manufacturing sectors.

Exchange Rate Used: INR 1 = US$ 0.01475 as on August 29, 2013

Exchange Rate Used: EUR 1 = US$ 1.32649 as on August 29, 2013

12.4 SUMMARY

Companies operating in international markets should establish management policies on foreign Exchange. The following article provides a framework for developing a comprehensive foreign Exchange exposure management policy in the context of the company's financial treasury objectives, existing business activities, and operating environment. Fluctuations in foreign exchange rates affect the cost competitiveness; prove inability, and valuation of a company's international operations. The absence of a foreign exchange management policy leaves a company unprepared to control the potential adverse effects of currency movements. This can lead to increased costs and reduced market share and profits. To avoid these exposures, the company should develop and document a policy statement, describing the company's attitude, objectives, and appropriate responses when managing foreign exchange risk. The primary objective is to establish a policy that will minimize the effects of adverse exchange rate fluctuations on the financial position of the company. Additional benefits of a clearly stated policy include:

• Involving senior management in policy formulation to establish clear guidelines and avoid future misunderstandings;

• Establishing a fair system for evaluating performance of corporate treasury staff;

• Integrated policy-making, which leads to better, more realistic long-run strategies. It is important to stress that no outside source can establish an optimal policy for individual corporations. Nevertheless, the structure of a policy document tends to be broadly similar, since all companies must address the same major issues in foreign exchange management. The following suggestions are meant to provide a framework for policy development, rather than purporting to be the perfect foreign exchange management system. The starting point for the formulation of an exposure management program is to decide exactly what the company has at risk. The following exposures are generally considered in developing a foreign exchange policy:

• Transaction exposure: Generally considered to be the income-statement impact of all payables and receivables denominated in foreign currency. This could include dividends, service fees,
royalties, taxes and duties, etc.

•Translation exposure: Balance sheet exposure that results from the consolidation of financial statements of foreign entities into the "home currency".

• Corporate Earnings Exposure: Measures the impact of currency movements on the company's targeted after-tax consolidated earnings.
•Operating Exposure: Reflects the effects of exchange rate movements on an entity's projected cash inflows and outflows.
It represents all transactions, assets and liabilities, recorded or anticipated, that will affect the company's cash flow when exchange rates change. This is usually associated with a longer-term (1-5 year) view of exposure management. There is no single correct exposure definition, so foreign exchange policy will depend on the accounting and cash flow implications of each definition for the company, as well as corporate goals and risk tolerance. It is an obvious truism to suggest that, "you cannot manage what is not known." This means that reporting systems are crucial to the entire management process. Most companies utilize some form of standardized reporting to one central location, unless individual entities are viewed as completely independent. Exposure reporting is a key issue, since treasuries can end up over hedged, under hedged, or unhedged because of inadequate information. Timing is also a key consideration, because market opportunities can slip away while managers wait for information on the direction and size of an exposure. The complexities in defining and reporting appropriate exposures underscore the importance of involving treasury personnel at an early stage of the decision-making process. It is important that the area involved in implementing hedging decisions also be part of the process of defining and reporting exposures. Foreign Exchange Management Objectives and Policy Effective foreign exchange management is a financial tool for ensuring the profitability of the. As such, the company should prepare a comprehensive policy statement on foreign exchange risk that clearly states the company's objectives, the tactics for attaining these objectives, and the allocation of responsibility for exercising these tactics. Policy Formulation A key requirement when establishing a comprehensive policy for managing foreign exchange exposure is to ensure that the tenets, objectives and procedures set forth in the policy are consistent with the company's existing policies towards the return on foreign investment, and that these procedures meet the need to minimize the negative effects of currency fluctuations on the company's consolidated earnings position.
The company should rank the types of exposures that it faces as a result of fluctuating exchange rates according to their importance to financial, operating and senior management. This prioritization serves as the basis for focusing exposure management efforts and deciding which protective actions the company should employ. The company should review these ranking as operating conditions change. For most companies, the management of transactional and consolidated corporate earnings

exposures takes precedence over exposures arising from accounting translation methods. When situations occur in which the company's earnings are threatened by factors arising from more than one type of exposure, treasury staff should treat the
Underlying exposure according to the priority assigned by management.
For each type of exposure, the company should determine:
1. The level above which a foreign currency exposure requires protective action;
2. The degree of fluctuation in corporate earnings resulting from adverse exchange rate movements; and
3. The amount of cash that the company is willing to expend to reduce and protect exposures.
The parameters should reflect the company's tolerance for foreign exchange risk as well as other Operating risks. Risk thresholds may be expressed in a variety of forms: by currency values; as a Percentage of earnings by currency or in aggregate; monthly, quarterly, or annually. The company should identify such levels in the context of its size and business. This exercise should ensure that the total cost of hedging, including the cost of personnel and treasury systems, is consistent with the expected benefit from the exposure management process. This will prevent effort being expended on unimportant exposures.
The first decision in allocating treasury responsibilities is the degree to which foreign exchange management is centralized. In general, hedging control and decision-making flexibility are more effective with at least some degree of centralization. However, this issue also depends on overall corporate reporting structures and staffing levels at headquarters and the other offices. The degree of centralization has a direct impact on other issues such as:
•Performance evaluation;
•Organizational structure;
•Reporting responsibilities;
In general, most companies find some degree of centralized management is necessary to hedge on the most cost-effective basis from an overall corporate perspective. Once the centralization issues have been addressed, the role of the treasury group can be more specifically defined. The primary exposure-related responsibilities of treasury usually include the following:
•Determining the level of currency exposure by time period;
•Monitoring the company's consolidated exposure;
•Forecasting exchange rate movements;
•Deciding which exposure the company must manage;

•Adjusting the company's exposed position through measures consistent with the policy's stated objectives. This involves choosing the hedging instrument as well as the timing of execution. The operating units are responsible for providing treasury (in a timely manner) with the information necessary to determine and monitor the company's actual and forecast exposure. Operating, marketing and pricing decisions should be taken into account when evaluating exposure concerns, and therefore should include prior consultation with treasury. While hedging the company's consolidated exposure remains a treasury function, effective management of the company's diverse exposure depends on close interaction between treasury and line functions. This will allow a swifter response to new market trends and future changes in the company's exposure profile. Treasury personnel will also be responsible for developing and maintaining market contacts to stay aware of market conditions affecting corporate.

After using policy-designated criteria to determine which exposures should be managed, treasury then determines the appropriate implementation of the hedge. This procedure should not occur in isolation, but in such a way as to involve the foreign exchange function in the broader corporate decision-making process. This requires interaction with tax, accounting, marketing and other corporate areas that have a stake in foreign exchange management. In addition to allocating corporate responsibilities, a thorough foreign exchange policy must specify approved techniques for hedging exposures. Essentially, four different strategies are available to a company for managing foreign currency risk:

1. Take no action;
2. Trade positions actively;
3. Always hedge everything;
4. Selectively hedge risk.

For most companies the first two approaches are impractical alternatives. The third option - to adopt a fully hedged strategy - is costly and offers no flexibility, but does relieve management of the need to take an active decision-making posture. A selective hedging policy, however, relies on economic decision-making as the basis for judging the company's exposure to risk or, conversely, ability to gain. The company should cover only those exposures where the currency risk exceeds the cost of hedging. Treasury should constantly evaluate and reassess its risk to currency fluctuations and the cost of hedging exposures on a selective basis. A variety of hedging techniques are available for managing currency risk. These techniques may be classified under two groups: internal techniques—those aimed at reducing or preventing an exposed position from arising—and external techniques—typically contractual

measures aimed at minimizing exchange losses that may result from an existing exposure. Each company must specify which hedging products are acceptable for managing their exposures. Treasury staff must have clear guidelines within which to function on a day-to-day basis.
Effective foreign exchange policy also needs to address confirmations and record keeping, whether paper or electronic. Most companies expect same- day telephone confirmations for each trade, and specify that someone other than the original trader must verbally confirm the deal. Written confirmations are generally sent to a separate area from the trading function—usually a control or audit division of the company. They should obviously be sent to the attention of someone other than the initiator of the transaction. Both verbal and written confirmations must be checked carefully. Any discrepancies must be immediately resolved with the counterparty to the trade, to avoid major trading losses. Corporate control areas can monitor written confirmations to ensure adherence to foreign exchange policies and guidelines. The confirmation process not only helps avoid or reduce serious trade disputes, it also provides a valuable internal check from a policy enforcement perspective. While banks can help in the control process, each corporation is ultimately responsible for its own internal control. No outside entity can police a company's operations. Companies and their banks must work together to minimize the risk of errors or improper trading.

12.5 SUGGESTED READINGS

1. Media Reports, Press Release, Reserve Bank of India website.
2.Yingqi Annie Wei and V.N. Balasubramanyam, editors (Cheltenham, Edward Elgar, 2004), 218 pages.
*3.***Karl P. Sauvant and Jennifer Reimer,** *FDI Perspectives: Issues in International Investment, 2nd edn.*

12.6TERMINAL QUESTIONS

1. What is the role of Foreign Exchange Management In economic development of India? Discuss
2. Write a short essay on Investment in foreign Countries by Indian companies.
3. Write a note on Foreign Exchange policy.

LL.M. Part-2
Subject: Law of Export Import Regulation

Block-IV - Control of Exports and Technology transfer.
Unit-13- Restrictive terms in technology transfer agreements; Automatic approval schemes.

STRUCTURE

13.1 INTRODUCTION

The topic of technology transfer encompasses commercial aspects and a range of laws including intellectual property. No generalizations are possible regarding the terms of the contract and much would depend upon the facts and circumstances underlying a particular technology transfer. This Chapter is limited to providing a general overview of certain commercial and legal aspects that may be considered in a contract for technology transfer.

13.2 OBJECTIVES

The objective of this lesson is to ascertain the Restrictive terms in technology transfer agreements; Automatic approval schemes for economic governance. Further an attempt has been made to study all the relevant factors related with the export and import for foreign exchange management. Majmudar & Co., International Lawyers, Mumbai (India) explained the position with meticulous planning.

13.3 SUBJECT

13.3. 1 TECHNOLOGY TRANSFER AGREEMENTS

A contract for technology transfer can either be a license agreement or a know-how agreement. The license agreement normally refers to the licensing of intellectual property rights such as patents, trademarks, copyrights, etc. whereas a know-how agreement involves the transfer of Information or skills which have not received statutory recognition. This distinction has an impact on the confidentiality and secrecy aspects of the contract. Any technology transfer contract broadly deals with the mode of transfer of technology, its use under certain terms and conditions. The mode of transfer can take place through documents or through the provision of technical services, assistance and training, software programs on diskettes or even through the sale of machinery, raw materials or components that embody technology. Typical provisions of a license or know-how agreement An illustrative list of the provisions are briefly discussed below:

Product/ Service definition

It is essential to provide an exact description of the product or service for which technology is being transferred. A very wide definition can bind the transferor from parting with technology that he had no intention of transferring. It must be determined whether technology for future model .Updates and improvements are included within the definition, and whether the specified consideration would include improvements or whether payments would have to be made in future.

Licensed property

The precise categories and details of patents, copyrights, etc. that are licensed are enumerated. Technical know-how Any technology transfer involves many types of expertise and knowledge.

Therefore, it is important that these are precisely defined. These may include:

(i) latest and complete data on the functioning of the product;
(ii) information and assistance on suppliers of raw material, machinery, spare parts, etc.;
(iii) maintenance manuals and instructions;
(iv) engineering drawings and designs;
(v) test methods;
(vi) response to specific queries from licensee;
(vii) deputation of personnel for on-site supervision.

Territory and sub-licensing

The territory in which the product/ services to be sold/rendered is defined so that the market areas of the Licenser and the licensee are clearly demarcated. This prevents the licensee from becoming a competitor to the Licenser and also provides flexibility for the Licenser to provide Technology to parties in other areas. The normal practice in many cases is to provide that the licensee has an exclusive license as far as India is concerned and that other areas may be added by mutual agreement. Further, it must be specified whether the licensee has a right to sub-license the technology and the terms and conditions if such a right is granted.

Licenser's obligations

The Licenser's obligations may typically encompass;

(i) guarantee that the product manufactured shall meet certain performance tests and standards;

(ii) providing technical assistance either in India or abroad;

(iii) providing minimum sample quantities of test product;

(iv) procuring equipment for the licensee;

(v) training employees of the licensee;
(vi) assist in setting up of facilities for testing and quality control;
(vii) allowing use of intellectual property rights;
(viii) providing knowledge of improvements made to the product;
(ix) buy-back of product, if any;
(x) deputation of on-site personnel.

Licensee's obligations

The following are some of the obligations of any licensee:
(i) to make payments to Licenser;
(ii) treat the technology confidentially;
(iii) to exploit the technology to the maximum extent;
(iv) to reach a minimum quality standard as required by the Licenser;
(v) reporting production details;
(vi) in case of manufacturing concerns -providing factory site with adequate infrastructure.

Warranties, indemnity and infringement The Licenser warranties and agrees to indemnify the licensee for infringement of any rights in respect of the following:
(i) Licenser has full and absolute ownership or otherwise has fully and absolute right and authority to transfer and furnish the know-how;
(ii) the technical know-how provided under the contract and the intellectual property licensed shall achieve the objective of producing a quality product;
(iii) the technical know-how provided under the contract and the intellectual property licensed does not infringe the rights of any third party to the best of the Licenser's knowledge. In case of any third party infringement or proceeding, the contract normally provides that the Licenser and the licensee shall take joint action to defend the matter and the costs of such a defense shall be borne by the Licenser and not the licensee;
(iv) indemnity from third party claims in respect of defective products (provided that the defect is shown to be due to a lapse on the part of the licenser's technology);
(v) licenser is not aware of any actions, suits or proceedings at law or at equity, before any court or authority in relation to know-how;
(vi) the execution and delivery of the contract or the performance by the Licenser of its duties and obligations conflicts with or is contrary to any law or any agreement or commitment to which the Licenser is a party to.

Product liability and Indemnity

Product liability is an area where there is increasing judicial activism. Determining the cause of product liability is obviously critical; i.e. whether it is a manufacturing defect or a technical defect. It is advisable that the licensee procures product liability insurance particularly when products are exported to the European Community and the United States.

Improvements and Inventions

It is possible that the Licenser or the licensee's employees may make improvements to the licensed product. In such an event, it is the duty to disclose such improvements to the other party. The clause should also provide the suitable action regarding the joint registration of the intellectual property right and the party that is entitled to use such a right. In certain cases, the improvement may belong to the licensee for exploitation in the defined territory but the Licenser may have right of first refusal in case the product is to be sold out of the territory.

Inspection and information

The licensee agrees to provide access to any information required by the Licenser in connection with production and sales records. This is useful in case there is any discrepancy in royalty calculations between the Licenser and the licensee. There may also be a provision for penalties in case of discrepancies. Further, the cost of the audit is borne by the licensee in case any discrepancy is found.

Payment of consideration

The consideration can be in the form of a lump sum payment and/or royalty payment based on sales. These payments are subject to RBI guidelines. The net selling price is defined taking into considering these guidelines.

Currency and taxes

The currency in which payments are to be made and the exchange rate to be used is expressly stated. Any payment made by an Indian company towards royalty or fees for technical services are taxable in India in the hands of the foreign collaborator. The tax rate is 20% on such payments under the Indian Income-tax Act ("ITA"). This can be reduced to a lower rate based on India's tax treaties. The payment of these taxes either by the Licenser or the licensee is frequently a negotiating point. The following considerations are important in the negotiation:

(i) Taxes paid in India by a foreign collaborator are normally available as a tax credit in the collaborator's home country. If a tax credit is available, it may be preferable that the foreign collaborator bear the tax in India as it reduces the tax cost of the total transaction.

(ii) In certain cases, the foreign collaborator may not be able to use the tax credits as the overseas company may have carried forward losses or is located in a low-tax country. In such a case, if the taxes are paid by the licensee, no tax credit would be available to the foreign collaborator. No gross-up is required to compute the tax payment made by the licensee under section 10(6A) of the ITA as long as the agreement relates to a matter included in the industrial policy in force or is an agreement that is approved by the Central Government. Research and development Cess of 5% is payable by the licensee on all payments made in connection with the payment of royalty or fees for technical services. Further, drawings and designs are subject to customs duty, but as of now an exemption is in force, so effective rate of duty is nil. However, it is important to note that if capital goods and technology are being imported in a composite transaction, the cost of the technology may be added to the value of capital goods for purposes of custom duty. Confidentiality Secrecy is of utmost importance in any technology transfer agreement and particularly in cases where unpatented know-how is involved. The following issues need to be addressed:

(i) a breach of confidentiality can occur either during the preliminary stage of negotiation or during the duration of the agreement;

(ii)the breach could also occur after the expiry of the agreement. Therefore, the confidentiality provision must survive the termination of the agreement for any reason;

(iii)the technology to be kept confidential must be clearly identified.For example, information already in possession of the licensee and information publicly know are not subject to confidentiality;

(iv)extent of permissible disclosure. For example, it is necessary to disclose certain technical details to an employee or a sub-contractor manufacturing the product or a component;

(v)the extent to which the Indian licensee can bind its employees in respect of confidentiality during and after the employment;

(vi)the obligation to preserve confidentiality is also imposed on the Licenser in cases where the agreement is exclusive. The remedy for breach of confidentiality can be either provided in the contract or in its absence, the law of contract relating to damages for breach would apply. Liquidated damages may also be provided.

Duration of the agreement

The duration of know-how agreements is restricted by the RBI norms in this regard. Royalty payments can be made only during a period of 10 years from the date of agreement or 7 years from commencement of commercial production, whichever is earlier. Thus, most agreements provide for an initial term based on the above norms with a clause enabling renewal of the agreement subject to Government regulations at the time of renewal.

Termination

Termination of the agreement must be distinguished from the expiry of the agreement due to efflux of time. A breach of warranty by the Licenser or the licensee can cause termination of the agreement for instance, due to:

(i) continued non-payment of royalty;
(ii) failure to achieve quality standards set by the Licenser;
(iii) Material breach of key obligations (after providing time to remedy);
(iv) Insolvency or change in ownership of any of the parties.
The identity of the parties is crucial in a technology transfer and the agreement may be terminated if the control over any one of the parties passes over to a competitor. If a technology transfer agreement is part of a joint venture, it may be provided in certain cases that any termination of the technology transfer agreement can also trigger off a termination of the joint venture agreement or vice versa.

Consequences of termination

One consequence that is of utmost importance is that of continued use of technology by the licensee. The Licenser may insist that know-how in the form of documents, equipment, etc. revert back to the Licenser and that the Licensee is not permitted the use of know-how. The termination normally does not absolve the Licensee from its obligations regarding confidentiality Or payment of royalty. The termination is to be contrasted against expiry of agreement wherein the licensee may be permitted to manufacture the product beyond the life of the agreement.

Applicable law

The parties to an agreement have a choice with regard to the substantive law that applies to a particular contract. Ordinarily, Indian Law will apply to the contract as the technology is absorbed and used in India.

Arbitration

It is open to the parties to select the procedure and venue of arbitration. Each party normally bids for the arbitration procedure and venue in their own country and the result is that the procedure in a neutral country is adopted. For example, the International Chamber of Commerce procedural rules can be adopted and the venue of such arbitration can be in Paris. If the venue is not in India, but in say Paris or London, the Indian licensee must consider the high costs of arbitration and examine the enforceability of the awards in the Licensers country. The high costs is itself a deterrent to arbitration in such cases and thus, a more acceptable solution from an Indian Licensee's standpoint may be that the International Chamber of Commerce rules of arbitration may be adopted and the venue may be Singapore, rather than London or Paris. It is also important to specify the number of arbitrators that each party will appoint and it must be an odd number.

13.3.2 AUTOMATIC APPROVAL SCHEMES

Exponential Growth of Technology in India has played a significant role in all round development and growth of economy in our country. Technology can either be developed through own research and development or it can be purchased through indigenous or imported sources. India has opted for a judicious mix of indigenous and imported technology. Purchase of technology is commonly called "Technology transfer" and it is generally covered by a technology transfer agreement. 'Technology transfer' means the use of knowledge and when we talk about transfer of the technology, we really mean the transfer of knowledge by way of an agreement between the states or companies. 'Transfer' does not mean the movement or delivery; transfer can only happen if technology is used. So, it is application of technology and considered as process by which technology developed for one purpose is used either in different applications or by a New user .

Technology generally would comprise the following elements:

- Process Know how
- Design Know how
- Engineering know how
- Manufacturing know how
- Application Know how
- Management know how

RBI accords automatic approval to all industries for foreign technology collaboration agreements subject to-

The lump sum payments not exceeding US $ 2 million ;

Royalty payable being limited to 5 per cent for domestic sales and 8 percent for export, subjected to a total payment of 8 per cent on sales over 10 year period. Payment of royalty up to 2 per cent for export and 1 per cent for domestic sales is allowed under automatic route on use of trademark and brand name of the foreign collaborator without technology transfer. In case of technology transfer, payment of royalty subsumes the payment of royalty for use of trademark and brand name of the foreign collaborators. Payment of royalty up to 8 per cent for export and 5 percent on domestic sales by wholly owned subsidiaries (WOS) to offshore parent companies is allowed under the automatic route without any restriction on the duration of royalty payments

All other proposals for foreign technology agreements not meeting the parameters for automatic approval are considered on merit by the Project Approval Board (PAB).This is chaired by the secretary, department of Industrial Policy and promotion, Ministry of Commerce and Industry. All others proposals of foreign technology agreement, not meeting the any or all of the parameters for automatic approval, are considered for approval, on merits, by the Government. Applications in respect of such proposals should be made submitted in form FC/IL (SIA) to the secretariat for Industrial Assistance, Department of Industrial Policy Promotion, Ministry of Industry, Udyog Bhawan, and New Delhi. No Fees is payable. Approvals are normally available within 4 weeks of filing the application. Government of India issues from time to time lists of Industries "where foreign investment may be permitted". The list so issued is illustrative only. No doubt, a broad technology base has been created in the country, yet a need to update the production technology may arise due to constant technological advancements in developed countries.

Automatic Approval Of Units Under EOU Scheme

Approval of new units

Proposals for setting up units under EOU scheme under automatic route shall be considered by the Unit. Approval Committee taking into account the following:

(i)Residence proof in respect of individual/partnership firms of all Directors/Partners.

(Passport/ration card/driving licence/voter identity card or any other proof to the satisfaction of Development Commissioner);

(ii) Income Tax return of all the promoters for the last three years;

(iii) Experience of the promoters;

(iv) Marketing tie ups;

(v) In case of EOUs, inspection of the project site by an Officer;

(vi) A report from other DCs as to whether any case under EOU Scheme in regard to diversion of goods etc. is pending.

Wherever necessary, the above may be verified through personal interview with the promoters of the project. In the event of the promoters being a well established entity, the procedure of personal interview may be dispensed with. The Unit Approval Committee shall meet on Monday, every week. In case of the absence of Development Commissioner, the meeting will be held by the next senior officer in the Zone. The unit shall intimate the problems being faced by them in advance. In the meetings, apart from the promoters, the other concerned agency with which difficulties are being faced by the unit, may also be called. Recycling of ferrous and non ferrous metal proposals will be considered only if the unit has Ingots making facility and proposes to achieve value addition.

Sensitive sectors

Care shall be taken by the Development Commissioner while approving projects in sensitive sectors such as yarn text rising unit, textile processing, pharmaceuticals/drugs formulations/recycling of ferrous and non ferrous metal scraps etc. Projects for setting up units in sensitive sectors under EOU scheme shall be approved by the Development Commissioner after personal verification of the Directors and inspection of the factory site before signing LUT. Verification could also be carried out through General Manager, District Industries centre or jurisdictional DY/ Assistant Commissioner of customs/Excise.

13.4 SUMMARY

The topic of technology transfer encompasses commercial aspects and a range of laws including intellectual property. No generalizations are possible regarding the terms of the contract and much would depend upon the facts and circumstances underlying a particular technology transfer. This Chapter is limited to providing a general overview of certain commercial and legal aspects that may be considered in a contract for technology transfer. A contract for technology transfer can either be a license agreement or a know-how agreement. The license agreement normally refers to the licensing of intellectual property rights such as patents, trademarks, copyrights, etc. whereas a know-how agreement involves the transfer of Information or skills which have not received statutory recognition. This distinction has an impact on the confidentiality and secrecy aspects of the contract. Any technology transfer contract broadly deals with the mode of transfer of technology, its use under certain terms and conditions. The mode of transfer can take place through documents or through the provision of technical services, assistance and training, software programs on diskettes or even through the sale of machinery, raw materials or components that embody technology. It is essential to provide an exact description of the product or service for which technology is being transferred. A very wide definition can bind the transferor from parting with technology that he had no intention of transferring. It must be determined whether technology for future model Updates and improvements are included within the definition, and whether the specified consideration would include improvements or whether payments would have to be made in future. The precise categories and details of patents, copyrights, etc. that are licensed are enumerated. Technical know-how Any technology transfer involves many types of expertise and knowledge. Therefore, it is important that these are precisely defined. These may include:

(i) latest and complete data on the functioning of the product;
(ii) information and assistance on suppliers of raw material, machinery, spare parts, etc.;
(iii) maintenance manuals and instructions;
(iv) engineering drawings and designs;
(v) test methods;
(vi) response to specific queries from licensee;
(vii) Deputation of personnel for on-site supervision.

The territory in which the product/ services to be sold/rendered is defined so that the market areas of the Licenser and the licensee are clearly demarcated. This prevents the licensee from becoming a competitor to the Licenser and also provides flexibility for the Licenser to provide Technology to parties in other areas. The normal practice in many cases is to provide that the licensee has an exclusive license as far as India is concerned and that other areas may be added by mutual agreement. Further, it must be specified whether the licensee has a right to sub-license the technology and the terms and conditions if such a right is granted. It is possible that the Licenser or the licensee’s employees may make improvements to the licensed product. In such an event, it is the duty to disclose such improvements to the other party. The clause should also provide the suitable action regarding the joint registration of the intellectual property right and the party that is entitled to use such a right. In certain cases, the improvement may belong to the licensee for exploitation in the defined territory but the Licenser may have right of first refusal in case the product is to be sold out of the territory.One consequence that is of utmost importance is that of continued use of technology by the licensee. The Licenser may insist that know-how in the form of documents, equipment, etc. revert back to the Licenser and that the Licensee is not permitted the use of know-how. The termination normally does not absolve the Licensee from its obligations regarding confidentiality Or payment of royalty. The termination is to be contrasted against expiry of agreement wherein the licensee may be permitted to manufacture the product beyond the life of the agreement.The parties to an agreement have a choice with regard to the substantive law that applies to a particular contract. Ordinarily, Indian Law will apply to the contract as the technology is absorbed and used in India.It is open to the

parties to select the procedure and venue of arbitration. Each party normally bids for the arbitration procedure and venue in their own country and the result is that the procedure in a neutral country is adopted. For example, the International Chamber of Commerce procedural rules can be adopted and the venue of such arbitration can be in Paris. If the venue is not in India, but in say Paris or London, the Indian licensee must consider the high costs of arbitration and examine the enforceability of the awards in the Licensers country. The high costs is itself a deterrent to arbitration in such cases and thus, a more acceptable solution from an Indian Licensee's standpoint may be that the International Chamber of Commerce rules of arbitration may be adopted and the venue may be Singapore, rather than London or Paris. It is also important to specify the number of arbitrators that each party will appoint and it must be an odd number. Exponential Growth of Technology in India has played a significant role in all round development and growth of economy in our country. Technology can either be developed through own research and development or it can be purchased through indigenous or imported sources. India has opted for a judicious mix of indigenous and imported technology. Purchase of technology is commonly called "Technology transfer" and it is generally covered by a technology transfer agreement. 'Technology transfer' means the use of knowledge and when we talk about transfer of the technology, we really mean the transfer of knowledge by way of an agreement between the states or companies. 'Transfer' does not mean the movement or delivery; transfer can only happen if technology is used. So, it is application of technology and considered as process by which technology developed for one purpose is used either in different applications or by a new user.
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13.5 SUGGESTED READINGS

1.**Albert E. Muir**, **The Technology Transfer System: Inventions - Marketing - Licensing - Patenting - Setting - Practice - Management**. (Aug 1997)

2.**Richard Razgaitis**,**Valuation and Dealmaking of Technology-Based Intellectual Property:Principles, Methods and Tools** by (Aug 3, 2009)

13.6 TERMINAL QUESTIONS

1. Write an essay on technology transfer agreements in the light of guidelines in this regard
2. What are Automatic approval schemes? Discuss in the light of EOU.
3. How technology transfer agreements are terminated?
4. How new units are set-up? Discuss in the light of new guidelines.