Working paper

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Non-Tariff Barriers and Pakistan's Regional Trade

A Legal and Economic Analysis of Non-Tariff Barriers in Pakistan, India, China and Sri Lanka

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Executive Summary

Pakistan, China, India, and Sri Lanka are developing countries with large labor forces and consumer bases. The countries are neighbors, so that transportation costs and cultural barriers to trade are low. Free trade among these countries would allow consumers to get the best products and services at the least cost. However, both economic and non-economic factors have caused these states to close their economies to varying degrees.

States close their economies through domestic laws that enact tariffs and non-tariff barriers (NTBs). Tariffs are taxes on trade, whereas non-tariff barriers are non-monetary restrictions of various kinds, such as documentation requirements, technical or safety standards, and packaging requirements. Tariffs and non-tariff barriers are typically set by regulatory agencies that are empowered by statutes passed in legislatures.

Exceptions in trade law for protecting local industry: The World Trade Organization (WTO) in particular and international trade law in general attempt to limit the use of domestic laws that restrict trade. However, trade law contains several exceptions that allow states - particularly developing countries such as India, Pakistan, and Sri Lanka- to protect local industry. These exceptions are contained in the General Agreement on Tariffs and Trade (GATT) and its associated documents. They include antidumping measures, countervailing duties, safeguards, allowances for developing states, and national security exemptions. Antidumping measures prevent foreign manufacturers from "dumping" their excess stock at low prices (even below cost) in the host country. Countervailing duties are meant to cancel government subsidies to foreign producers that artificially lower their costs. Safeguard measures are used to stem a rapid increase in imports that many cause "serious injury" to a domestic industry. Allowances for developing states allow such states to implement "measures affecting imports" to raise the "general standard of living" of their people[1]. Finally, Article 20 of the GATT allows for trade restrictions to protect health, morals, legal compliance, and various other national interests. Since the scope of these exceptions is unclear, countries can enact numerous non-tariff barriers under the garb of a recognized exemption.

We find that China, India, and Sri Lanka have enacted more non-tariff barriers (NTBs) than Pakistan. China and India have particularly sophisticated NTB regimes. We highlight three points about non-tariff barriers in these countries. First, while Pakistan's NTBs protect entrenched rent-seekers, such as agriculturalists, Indian and Chinese NTBs protect strategic industries, such as small businesses, defense contractors, and electronics manufacturers.

Second, while many Pakistani NTBs operate as bans that shut competitors out of the Pakistani market, Indian and Chinese NTBs create costs that make foreign products more expensive (but still available) to their consumers. Foreign businesses can at least compete with Chinese and Indian

[1] GATT Article 18.

businesses, albeit on unequal terms, and provide local businesses with some incentive to improve; in contrast, Pakistani businesses that are protected by bans (or effective bans) face no foreign competition at all.

Third, while Indian and Chinese NTBs are narrowly tailored to particular types of businesses, Pakistani NTBs tend to protect very general categories of products. Put differently, Pakistani NTBs are blunt instruments, and it is difficult to use them to provide targeted protection to strategic industries.

Sri Lanka's trade restrictions are low, and are concentrated on tariffs rather than NTBs. Sri Lanka's NTBs focus clearly on safety and health concerns and appear less strategic than the NTBs employed by China and India.

A brief overview of the NTB regime in each country follows:

Non-Tariff Barriers in Pakistan

Seven (7) legal instruments have been used to create NTBs in Pakistan. Statutory regulatory orders (SROs) have been used the most, followed by the Import Policy Order 2009 and the Export Policy Order 2009. Its main imports from India are cotton, black tea and chemicals such as polypropylene, which is used in the manufacture of plastics, ropes, auto parts and textiles; and p-Xylene, which is used in the production of polyester. Its main import from China is telephone and radio equipment.

Pakistan's non-tariff barriers are concentrated on agriculture, plant, and food-related products. Agriculturists have historically been entrenched in political offices across the country, so the dominance of agricultural NTBs appears to be a predictable result of interest group pressures to maintain economic rents.

The Ministry of Commerce is the organ of the Federal Government that is responsible for trade regulation. It controls the Trade Development Authority of Pakistan and several other agencies. The Ministry derives its authority to regulate trade primarily from the Imports and Exports (Control) Act, 1950. Article 3 of the Imports and Exports (Control) Act entrusts the Central Government with the authority to prohibit, restrict or otherwise control the import or export of any goods and regulate all practices and procedures involved in import and export. Applications for licenses, the grant, use, transfer, sale or cancellation of such licenses, the determination of the form, manner and period of any associated appeals and the fees charged in respect of any such matters falls within the ambit of powers conferred by the same article.

The Ministry of Commerce uses its statutory authority to regulate trade by passing Statutory Regulatory Orders (SROs). Several SROs have been used to restrict imports over time.

Non-Tariff Barriers in India

In India, on the other hand, sixteen (16) legal instruments have been used extensively to restrict trade. The most-used NTBs include the Defence Procurement Procedure, preference to domestically manufactured electronic goods in Government procurement and a ban on the import of cars whose engine capacity ranges from 1000 to 2500cc.

Some NTBs are targeted at particular countries. For example, import of Chinese milk is prohibited. Other NTBs explicitly protect particular industries, such as the list of "reserved items for small industries."

Two features distinguish Pakistani and Indian NTBs. First, many of the leading Indian NTBs are soft barriers, which operate as delays or bureaucratic hurdles rather than bans. Pakistan's NTBs often operate as bans. Second, Pakistan's NTBs focus on general categories of goods, India's often focus on particular industries and trading partners. India's main imports from China are diamonds, telephone equipment, and computer components. Pakistan is not a major exporter to India.

The Defence Procurement Procedure, 2011[2] covers all capital acquisitions, (except medical equipment) undertaken by the Ministry of Defence, Defence Services, and Indian Coast Guard both from indigenous sources and ex-import. This Procedure was amended in 2013[3] with the express intention of reversing the trend of importing most of the equipment and weapons systems that the armed forces need by giving the first opportunity to the Indian industry to meet the requirement. The first major change relates to the introduction of the 'preferred categorization' in the following order; Buy (Indian), Buy & Make (Indian), Make (Indian), Buy & Make, Buy (Global). While seeking the approval for an Accord of Necessity (AoN) in a particular category, say, Buy (Global), it will now be necessary to give justification for not considering the other higher preference categories. This is expected to give a stronger impetus to indigenization. Stipulations related to the indigenous content have been clarified and made more stringent. Indigenous content requirements will now extend all the way to the lowest tier of the sub-vendor. Hence, import content in the products supplied by the sub-vendors will not qualify towards indigenous content.

The foreign trade of India is guided by the Foreign Trade policy, more commonly known as the Export Import policy, of the Government of India. This is governed by the Foreign Trade Development and Regulatory Act 1992, supra. Section 5 of the EXIM policy dictates that the Central Government has the authority to formulate and amend the import and export policy by notification in the Official Gazette.

The EXIM Policy incorporates all the bans and prohibitions on imports that are listed in the Indian Trade Classification code, abbreviated as the ITC (HS) code. The ITC (HS) code is issued by India's

[2]Available online at http://www.dgqadefence.gov.in/documents/DPP2011.pdf (last visited, 25 November 2013).
[3]*See* Press Information Bureau, Government of India, *Salient Features of Defense Procurement Procedure 2013*, available online at http://pib.nic.in/newsite/erelease.aspx?relid=96361 (last visited, 25 November 2013).

Directorate General on Foreign Trade (DGFT). Currently, the ITC bans 54 (primarily animal-based) products and restricts 442 items.[4]

Non-Tariff Barriers in China

China regularly uses at least eighteen (18) legal instruments to restrict imports. Many of China's NTBs protect sophisticated manufacturers. For example, China's Law on Product Quality is the third most-reported NTB; restrictions on used mechanical and electronic products is the seventh most-reported; and product certification requirements are the ninth.

Like India, and unlike Pakistan, a large proportion of China's NTBs create delays and processing hurdles that raise the costs of foreign competitors rather than shutting them out of the market.

The apex lawmaker in China is the National People's Congress, which comprises 3,000 representatives drawn from each of China's 33 administrative units (including provinces, municipalities, administrative zones, and autonomous regions) as well as the military. Most of the Congress's powers are delegated to a standing committee, which can interpret laws, enact decrees, sign treaties, and approve economic plans.

Article 3 of the China's foreign trade law[5] empowers the department for foreign trade under the State Council to regulate trade with other countries. The State Council is the most important executive organ in China. It operates under the President, who is China's chief executive.

Article 16 of the foreign trade law allows the foreign trade department to restrict exports and imports for 11 reasons. Several rationales are geared toward restricting exports, such as exports of items that are domestically in short supply. However, subsection (7) to (10) provide rationales for restricting imports which include the establishment of a particular domestic industry, maintaining the State's international financial position and balance of international receipts and payments, and restrictions on the import of agricultural, animal husbandry, and fishery products of any form.

Non-Tariff Barriers in Sri Lanka

Sri Lanka also uses eighteen (18) legal instruments to limit trade. Unlike Pakistan, India, and China, most of Sri Lanka's NTBs are explicitly geared toward controlling trade in dangerous substances, such as poisons, opiates, radioactive elements, and processed food. These NTBs do not appear to be protecting specific pressure groups of Sri Lankan producers. Thus, Sri Lankan consumers may be better off than consumers in the other three countries.

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[4] *See* Government of India Data Portal, *Import Export Classification, ITC (HS) Code and Import Policy 2012*, available online at http://data.gov.in/dataset/import-export-classification-itchs-and-import-policy (last visited, 25 November 2013).
[5] Available online at http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content_21917089.htm (last visited, 25 November 2013).

Despite efforts to open the economy to foreign trade and investment, the pace of reform in Sri Lanka has been uneven. In 2011, Sri Lanka faced a large current account and balance of payments (BOP) deficit due to increased imports, including rising petroleum imports. The government has enacted several policy measures to curtail the growth of imports. For instance, in early 2012 the government moved to a more flexible exchange rate policy by depreciating its currency. There has been an increase in tariffs on motor vehicles so as to discourage imports.

An Export Development Board (EDB) levy, often referred to as a "cess", ranging from 10 percent to 35 percent *ad valorem* is applied on a range of imports identified as "nonessential." Most items on the list are subject to specific duties. The EDB levy is calculated in such a way so as to impose an imputed profit margin of 10 percent, which is added onto the import price. This levy is sometimes not charged on the import price but rather on 65 percent of the maximum retail price. The levy is not applicable to locally manufactured products. It is continuously increased by the government: in November 2012 the EDB was increased on dairy products, meat, fruits, vegetables and confectionary.

While local goods are not subject to the Ports and Airports Development Levy of 5 percent, imports are. In November 2011, the government introduced an all-inclusive tax on imported textiles not intended for use by the apparel export industry. This all-inclusive tax was increased in November 2012.

Analysis and Recommendations

Our research suggests that Pakistan's non-tariff barriers are lower than those of India, China, and Sri Lanka. Pakistan uses only a handful of statutes and regulations (statutory regulatory orders) to implement non-tariff barriers. These NTBs do not appear to have a substantial effect on imports: both China and India have overwhelming trade surpluses against Pakistan, and both countries figure as major suppliers of some of Pakistan's main imports.

However, insofar as Pakistan's low non-tariff barriers are the result of a lack of legal know-how, **we expect that Pakistani NTBs could grow**. As lawyers and policymakers become aware of the ways in which exceptions to the free trade regime have been used to restrict imports into China, India and Sri Lanka, they are likely to emulate these methods to erect stronger barriers to trade.

Pakistani trade representatives and officials should be trained on the specific non-tariff barriers that affect Pakistan's exports to India. This training should include the basic theory of non-tariff barriers, empirical evidence of the effects of NTBs, and information on the laws that create these NTBs.

In light of this, we feel that **Pakistan has three options**:

1. It can insist that all countries eliminate their NTBs, with the knowledge that Pakistani businesses stand to lose the least, since they are the least protected.

2. It can unilaterally lower its NTBs to help its consumers (while harming its producers).

3. It can invest in setting up NTBs to counteract the affects of Indian and other NTBs.

The first-best solution would be for all countries to lower their NTBs. Economic theory suggests that this would increase welfare across all countries and force producers to compete on a level playing field. However, we feel that it is unreasonable to expect all four countries to lower their barriers for at least three reasons:

- In practice, it is difficult to identify NTBs and to monitor compliance with any agreement to reduce NTBs.

- It is difficult to tell whether a particular NTB is legal, as a valid exemption under GATT or other trade law, or illegal.

- Political considerations may make it infeasible for Pakistan, India, China or Sri Lanka to open their markets to each other. Composite dialogue, national security, international law, domestic pressure groups, and other matters may force governments to maintain certain NTBs.

The second-best solution would be for Pakistan to unilaterally eliminate its NTBs. This approach also makes economic sense: it would benefit Pakistani consumers and force Pakistani producers who are unable to compete with foreign businesses to redirect their investments. However, we believe that a unilateral opening of the market is also unlikely for two reasons:

- The WTO recognizes the right of developing countries to nurture local businesses, and the international trade regime accepts some protective measures, which every other developing country is already employing. This means that the other countries' businesses are effectively subsidized. They may be able to drive Pakistani businesses out of their own market even though they have no genuine cost advantage.

- Local industries will lobby against such a move and politicians may be unwilling to make such powerful enemies. A unilateral lowering of barriers will be politically costlier than a reciprocal lowering, and industries that will be hurt by such a move may be able to gather formidable political support.

We suspect that the first two solutions are unworkable under the current international trade law regime and political climate. Therefore, **we propose a third approach: Pakistan develop sophisticated NTBs to counteract the effects of Indian and other NTBs.** Pakistan's current NTBs are unsophisticated and protect low-tech industries. In contrast, we recommend that:

All Pakistani NTBs be justifiable under international trade law exemptions. The government should ensure that it only uses non-tariff barriers that qualify under the various exceptions (both general ones and ones geared toward developing countries) contained in international trade law instruments such as the GATT, GATS, TBT Agreement, SPS Agreement, and Agreement on Agriculture. In particular,

- The government must hire and train a cadre of lawyers who are well-versed in international trade law and can evaluate the legality of proposed NTBs.

- The government should organize a standing task force, which regularly studies the changes in the trade policies of partners, evaluate the impact of those policies and respond with counter-policies in real time with the relevant interest groups on board.

Domestic interest groups be educated in the relationship between domestic taxes and subsidies and Pakistani trade policy. We believe that interest groups for and against NTBs can negotiate directly, and successfully, if they agree on lobbying for domestic policies, such as taxes and subsidies, rather than trade policy. For example, if lowering NTBs will help textiles more than harm agribusiness, then textiles may agree to redistribute wealth to agriculture, through a tax on textiles and a subsidy to agribusiness. If agribusiness would lose more from lowering NTBs than textiles would gain, then agribusiness may agree to have subsidies switched to the textile industry. Domestic interest groups can thus delink their concerns with redistribution from trade policy by using taxes and subsidies.

In order to make such bargaining possible, we recommend that interest groups and officials be educated on the current regime of taxes and subsidies to Pakistani industries. This process should be bolstered by domestic interests groups who are representative of their industry. Thus, the All Pakistan Textile Mills Association (APTMA) may adequately represent the concerns of textile millers, but no such parallel can be found in the loosely organized agri-business.

NTBs be disaggregated and slowly redirected to protect strategic industries rather than rent-seekers. The Pakistan government should begin by lowering non-tariff barriers that protect industries with lower political influence, such as the automobiles industry. We expect that once the government lowers NTBs that protect less influential lobbies, the consumers/electorate will appreciate the benefits of free trade (lower prices) and support the abolition of NTBs for politically entrenched industries as well. In particular,

- The government must be educated on which particular NTBs protect which industries. The government must be able to match certain NTBs to certain interest groups in order to remove an NTB strategically.

NTBs that affect many industries simultaneously should be disaggregated into NTBs that affect single industries. This can be accomplished by rewriting laws in more particular language. For example, a standard that applies to "all electronics" can be rewritten into separate laws that apply to cell phones, microchips, hardware, electronic sockets, etc. so that any one of these industries can later be targeted for NTB relaxation without ruffling the others.

Chapter 1: Introduction

Non-tariff barriers to trade (NTBs), as the name suggests, are domestic policy interventions – distinct from tariffs – enacted by States which operate to affect and distort the free international trade of goods, services, and factors of production. These barriers might be implemented as a conscious act to restrict certain forms of trade or may arise inadvertently out of the intersection between the domestic and international legal regimes on matters of trade. As "structural bottlenecks"[6] NTBs encompass a wide range of specific measures taken by the State in question which are often difficult to identify as such[7]: issues as wide-ranging as standards of quality imposed by the importing State to "buy national" policies, institutionalized corruption in the importing State to bureaucratic inefficiencies in the importing State's mechanisms.

NTBs can be organized into three broad categories: first are those imposed upon imports. These NTBs, or non-tariff measures (NTMs) as they are also known, include import quotas, prohibitions on imports and exports, licensing, levying of administrative fees and customs procedures. The second category includes restrictions which are imposed on exports; export taxes, quotas, prohibitions, and other voluntary export restraints. These two categories include NTMs which are applied at the border, i.e. either to goods entering or exiting the State. The third category of NTMs include those imposed internally, i.e. within the domestic economy; such internal initiatives include local legislation covering standards which deal with health, technical, product, labor, and environmental regulation; as well as internal taxes and domestic subsidies for competing products[8].

1. Economic Models of Non-tariff Barriers in International Trade

Economic theory suggests several variables to estimate non-tariff barriers among countries. NTBs are typically estimated indirectly, by first estimating the expected volume of trade between countries and then subtracting the actual volume of trade. Variables used to determine the expected volume of trade include (i) the GDP of each country; (ii) the GDP differential between two countries; (iii) the distance between countries; (iv) the adjacency of countries; (v) the customs-to-revenue ratio of each country; (vi) the import demand elasticity of each country; (vii) the import penetration ratio of a country; (viii) common languages among countries; (ix) the real exchange rate between countries; and (x) the lobbying power of domestic industry.

GDP and GDP per capita are used to determine the size of a country's market and the purchasing power of its consumers. GDP differentials compare the GDPs of trading partners, on the

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[6] East African Community. 2009. *Non-Tariff Barriers (NTBs) - An Overview.* [online] Available at: http://www.eac.int/trade/index.php?option=com_content&id=101&Itemid=122.

[7] Coughlin, C. and Wood, G. 1989. *An introduction to non-tariff barriers to trade*.The Federal Reserve Bank of St. Louis Review, 71 (1), pp. 32--46.

[8] Robert, S. 2012. *Non-Tariff Measures and the WTO*. WTO World Trade Report 2012: "Shining the Light on NTMs. [report] pp. 2-3.

assumption that trading partners with similar GDPs are likely to trade more than partners with very different GDPs. Distance between countries determines transportation costs, so that closer countries are expected to trade more. Adjacency, or a common border, suggests shared cultures and shared tastes, which predispose producers in neighboring countries to gear their production to each others' markets. The customs-to-revenue ratio is a measure of trade openness: if the government collects most of its revenues from customs on imports, it can be understood to attach a low priority to international trade. Import demand elasticity and the import penetration ratio (which are explained in more detail below) measure how much a country's consumers rely on imported products and services. Linguistic commonalities among trading partners lower transaction costs and should increase trade volumes. The real exchange rate is often used as a proxy for the price of foreign goods. Finally, the lobbying power of domestic industries is used as a proxy for non-tariff barriers, insofar as local industries have an incentive to lobby for protectionism.

India and Pakistan have a common border, linguistic similarities, short distance, and a low real exchange rate: factors which would suggest a high volume of trade. However, empirical models have consistently shown that the volume of trade between the neighbors is anomalously low.

Economic theory provides three models to study non-tariff barriers. These are the Gravity model, the Grossman-Helpman model, and the Stigler-Peltzman-Becker framework.

1.1. The Gravity Model

The Gravity model assumes that large economic entities such as countries and cities exert pulling power on people or their products. Therefore, the volume of exports between any two trading partners is an increasing function of their national incomes and a decreasing function of the distance between them. We can infer non-tariff barriers and estimate their effects by noting discrepancies in comparative trade volumes that are not explained by tariffs. For example, suppose that there are only three countries, A, B, and C. Suppose that A and B impose identical tariffs on imports from C and are equidistant from C. If country A has a much higher national income than country B, then the Gravity model predicts that C will export more goods to A than to B. If we find that C does not export more goods to A, then this discrepancy is attributed to non-tariff barriers.[9]

Several researchers have used the gravity model to estimate the effects of non-tariff barriers on India-Pakistan trade. Khan and Mahmood use the gravity model to show that India-Pakistan trade is much lower than trade between most neighboring countries, after controlling for SAARC, NAFTA, EUE, and ASEAN membership. They attribute this discrepancy to the political and military tensions between the two countries.[10] In a related study, the World Bank uses the Gravity model to estimate the "peace dividend" for Pakistan and India, that is, the potential trade volume that could have been realized in the absence of conflict between the neighbors. The study estimates that, but for the political and military tensions between the two countries, the volume of trade between India and

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[9] *See* Howard J. Wall, *Using the Gravity Model to Estimate the Costs of Protection*, 81 REVIEW- FEDERAL RESERVE BANK OF SAINT LOUIS 33-40 (1999).

[10] *See* A.H. Khan & Z. Mahmood, *Pakistan and Emerging Global Trade Environment* (Vanguard: Lahore 2000)

Pakistan in the year 2000 would have been $591 million rather than the $117 million that materialized.[11] The State Bank of Pakistan employs the Gravity model to estimate foregone potential to trade across different industries. It finds that trade in textiles, food, beverages, chemicals, leather, and tobacco products was significantly affected by NTBs in Pakistan and India.[12] Finally, Gul and Yasin use an augmented Gravity model to conclude that Pakistan has the greatest potential for trade expansion with the ASEAN region in general and with the countries of Japan, Sri Lanka, Bangladesh, Malaysia, the Philippines, New Zealand, Norway, Italy, Sweden, and Denmark in particular. The authors note that trade with India is especially low. They also attribute this to long-standing political tensions.[13]

1.2. The Grossman-Helpman Model

This model predicts that cross-sectional differences should be entirely explained by: import elasticity, import penetration ratio and whether or not the industry is politically organized. Import elasticity, which is sometimes called import demand elasticity, is a measure of how an increase in the price of an import affects the domestic demand for that import. The import penetration ratio is the ratio of goods imported to goods consumed, and is a measure of the extent to which domestic consumers rely on imports. Organized industries are those which contribute money to the government. Therefore, this measure can be proxied by their campaign contributions. This is a political economy model which suggests that certain industrial players influence the political process to a large degree. Therefore, this model predicts that trade protection should be higher in industries with a lobby.[14]

Keefer has applied a Grossman-Helpman type analysis to Pakistan.[15] It cites a report that interest group spending per parliamentarian in Pakistan was $120,000 in the 1997 Pakistan elections, compared to just $10,000 per constituency in the 1992 U.K. elections. This spending suggests considerable political organization among the Pakistan's economic elite, and considerable lobbying power among local businesses that seek economic protectionism.

1.3. The Stigler-Peltzman-Becker Framework

This framework suggests that trade policy actually results from the interaction of self-promoting economic interest groups with national and economic political interests. This is a rent-seeking model in which government policy is either a weighted sum of the preferences of special interest groups adopted in a passive fashion or the calculation of frightened politicians who just want to stay in

11 *See* World Bank, *World Economy Gravity Models* (2007)

12 *See* State Bank of Pakistan, *Pakistan's Export Potential: A Gravity Model Analysis* in State Bank of Pakistan Annual Reports (2005).

13 *See* NaziaGul & Hafiz Yasin, *The trade Potential of Pakistan: An Application of the Gravity Model*, 16 Lahore J. of Econ. 23 (2011).

14 *See* P. Goldberg & G. Maggi, *Protection for Sale: An Empirical Investigation*, 89 American Economic Review 1135 - 1155 (1999).

15 *See* Philip E. Keefer et al, *Decentralization in Pakistan: Are Local Politicians Likely to be More Accountable?*Available online at http://siteresources.worldbank.org/INTINVTCLI/Resources/decentralizationinPakistan.pdf (last visited, 17 November 2013).

office. [16] This framework is characterized by competition among interest groups, such as producers and consumers of a particular product. In Professor Becker's version of this model, there is an upper bound on the level of political influence that producer lobbies can exert. This is because protectionism imposes a deadweight loss that provides consumers, foreign competitors, and other losers from protectionism with increased incentives to organize and lobby against rent-seekers. As protectionism increases, deadweight loss increases at an increasing rate. However, while this loss affects the incentives of the losers, it does not affect the incentives of the winners.[17] Becker expands on this argument to suggest that regardless of interest group spending, governments will move toward deregulation in general and a reduction of NTBs and protectionism in particular.

An upper bound on protectionism is reassuring, but in a Pakistani context, it is unclear where it lies. The government has recently responded to consumer pressure against the market power of local car manufacturers.[18] The privatization of the telecom and other industries has likewise led to increased competition from abroad. Thus, there are reasons to be hopeful that protectionism will decline over time. However, Pakistan's peculiar political relationship with India may make consumers less willing to organize against domestic manufacturers insofar as public perception views Indian producers less favorably than other foreign competitors. Implications of the Stigler-Becker-Peltzman framework are explored more carefully in the policies section of this report, Infra.

To sum up, the Gravity model helps to determine the magnitude of NTBs employed by a country without relying on too much information from the country under review. It estimates NTBs by comparing the trade volumes of certain countries with expected trade volumes that are derived from the behavior of other countries. The Grossman-Helpman model can estimate NTBs by using information from the country under review, and so requires less information than the Gravity model. The Stigler-Peltzman-Becker framework also looks primarily at data from the studied country, but presents as a theoretical argument rather than an empirical claim: it emphasizes competition among opposing interest groups and predicts deregulation of the economy (including a dismantling of NTBs) as a democracy matures.

2. Non-tariff Barriers versus Tariffs

When an economy reduces tariffs on imported goods, it can substitute non-tariff barriers to maintain restrictions on its imports. In this way, domestic producers can maintain an advantage over foreign competitors. We will consider three models. The first model is the most naïve: it suggests that countries will simply replace their tariffs with NTBs. International trade law has devised the principle of "National Treatment," discussed below, to counter this sort of straightforward substitution. The second model suggests that countries can advantage local manufacturers by

[16]Edward John Ray, *The Determinants of Tariff and Non-tariff Trade Restrictions in the United States*, 89 The Journal of Political Economy 105-121 (1981).

[17]*See* Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. of Econ. 371 (1983).

[18]*See* The Express Tribune, *Auto Policy: Tariff Protection Plan Likely to New Players*, available online at http://tribune.com.pk/story/632150/auto-policy-tariff-protection-plan-likely-to-new-players/ (last visited, 17 November 2013).

lowering their production standards in a nondiscriminatory way. The third model contradicts the second: it says that countries can also advantage local producers by raising their production standards and other non-tariff barriers. These models are explained intuitively below.

The first two models are symmetric. Under one model, a country that reduces tariffs will raise non-tariff barriers, such as product safety regulations and other standards, on imported goods. Under a second model, the country that reduces tariffs will also reduce the safety regulations and standards that it applies to domestic manufacturers. The models are symmetric because both provide domestic producers with an advantage over foreign ones. Under the first model, the importer raises costs for foreign producers (by compelling them to comply with onerous standards). Under the second model, the importer lowers the costs of domestic producers (by lowering the standards that they have to comply with). The second model implies a regulatory race to the bottom: the importing country will reduce its own safety standards; foreign competitors will cut prices to stay competitive with local ones, and local ones will lobby again for even lower standards, to cut their own costs.[19] Such a race to the bottom is likelier to materialize in large economies, such as China and India, where it is worthwhile for foreign producers to cut prices and maintain market access. In medium-sized or smaller economies such as Pakistan and Sri Lanka, foreign producers may simply cease to compete with local firms if they are able to find alternative buyers.

A third model suggests the opposite conclusion: that larger economies such as China and India are likely to over-regulate industries where domestic producers complete with foreigners.[20] This model operates through a cost-shifting mechanism. When a large economy raises regulatory standards on a product, this has two effects: it reduces the global demand for products that do not meet the new regulatory standard, and it creates a new regulatory compliance cost. The revenue of domestic producers is only lowered by the regulatory compliance cost. However, the revenue of foreign producers is lowered by both the regulatory compliance cost and the lowered price of the non-complying product in the global market. Thus, stringent product standards in large economies hit foreign competitors harder than domestic ones. Thus, non-discriminatory standards in large economies like China and India may operate as non-tariff barriers that are not curtailed by the WTO.

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[19] *See* Robert W. Staiger& Alan O. Sykes, *International Trade, National Treatment, and Domestic Regulation*, 40 J. Legal Stud. 149, 150 (2011) ("When nations constrain their tariffs through trade agreements, they in effect promise a certain degree of market access to trading partners. A subsequent relaxation of regulatory standards that apply to import-competing industries (labor and environmental standards, for example) can undermine these market access commitments. In particular, if 'large' nations relax such regulations, foreign suppliers who export to these markets may lower their prices to remain competitive with domestic producers, and some of the costs of the weakening of domestic regulations are thereby shifted abroad through these foreign-exporter price ('terms of trade') movements. Such models provide a formal basis for concern that large nations may weaken their regulatory standards to inefficiently low levels when they have constrained their trade policies as a result of tariff negotiations.").

[20] *See* Staiger & Sykes, supra, at 154-55.

2.1. Non-tariff Barriers versus tariffs in China and India

Empirical literature provides considerable evidence that non-tariff barriers have replaced tariffs in India and China. In India, the substitution is straightforward: India raised non-tariff barriers on the same industries that it lowered tariffs on. In China, the substitution is more complicated: China reduced tariffs on agricultural goods and replaced these with non-tariff barriers; however, it kept relatively high tariffs and low NTBs on manufactured goods.

2.2. NTBs versus tariffs in China

Bao and Qiu constructed a technical barriers to trade (TBT) database from 1998-2006 and examined its effect on China's imports.[21] They find that China's TBT (measured by both frequency index and coverage ratio) are trade restricting for agriculture goods but trade promoting for manufactured goods. If both industries are compared in terms of tariff rates, then the opposite trend can be seen.

WTO has been putting pressure on China to reduce its NTBs. To fulfill its membership requirements at the WTO, China has to implement its commitment to adopt broad and deep trade liberalization measures to make its trade regime consistent with WTO rules. Implementation of these liberalization measures implies a substantial reduction in tariffs and non-tariff barriers across all economic sectors in one of the world's largest and most rapidly expanding markets.

Wang simulates China's exports in the next ten year period and finds that the annual growth rate of China's net exports in labor-intensive goods will increase from 3.3 to 6%, its net food and agricultural imports annual growth rate will increase from 22 to 26%, resulting in an additional US$166 billion net exports in labor-intensive manufacture and US$73 billion additional net imports in food and agricultural products.[22]

The author concludes that the gains to economic growth from China's trade liberalization are mainly generated from three sources that reinforce each other: (1) more efficient allocation of production factors through increased specialization according to each country's comparative advantage, including the migration of additional agricultural labor to manufacture activities, which increase labor productivity; (2) more rapid physical capital accumulation, so that there will be more physical capital stock available in the economy; which compounds the efficiency gain; and (3) more rapid growth of total factor productivity due to speeding technology transfer via expansion of capital and intermediate goods imports from advanced industrial countries.

2.3. NTBs versus tariffs in India

Bown and Tovar, using trade data from India, showed that products with larger tariff cuts in 1990 and 1997 are associated with substitution towards non-tariff barriers of antidumping and safeguard

[21] *See* Xiaohua Bao& Larry D. Qiu, *How do Technical Barriers to Trade Influence Trade?*, 20 Rev. Int. Econ. 691 (2012).

[22] *See* Zhi Wang, *The Impact of China's WTO Accession on Patterns of World Trade*, 25 J. Policy Modeling 1 (2003).

import protection.[23] This paper is one of the few papers that test empirically the relationship between tariff cuts and the subsequent re-imposition of import protection under safeguard exceptions at the product level. Their results suggest that relying on only tariff cuts to proxy for trade liberalization in certain Indian industries runs the risk of substantial mis-measurement. In particular, their result of a relationship between the size of the tariff reduction and subsequent use of antidumping and safeguards in a number of economically sizable sectors indicates *less* dispersion in the actual reduction of *protection* across products than in the tariff-only data that many prior studies have used.

Mitra and Ural find that trade increases productivity across all sectors but productivity especially increases in the less protected industries as long as labor markets are flexible.[24]The authors use the Annual Survey of Industries (ASI) from 1980 to 2000, which encompasses all registered industries in the manufacturing sector. Their results show that NTBs have a negative effect on labor productivity, especially in flexible labor markets. They also find that trade liberalization benefits most the export-oriented industries located in states with flexible labor-market institutions. This shows complementarities between policies of lowering protection, promoting exports and having a smoothly functioning, flexible labor market.

According to this analysis, Pakistan needs to make its labor markets more flexible not only in terms of training but also making labor laws more amenable to competitive pressures. At the same time, the lessons learnt from China suggest that Pakistan needs to focus its resource endowments on areas in which it has a comparative advantage but at the same also needs to increase its capital and technology stock so as to move to the next level of growth.

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[23]*See* Chad P. Bown & Patricia Tovar, *Trade Liberalization, Antidumping, and Safeguards: Evidence from India's Tariff Reform,* 96 J. Dev. Econ. 115 (2011).

[24]Devashish Mitra & Beyza P. Ural, *Indian Manufacturing: a Slow Sector in a Rapidly Growing Economy*, 17 J. Int. Trade & Econ. Dev. 525 (2008).

Chapter 2: Domestic Economic and Legal Regimes

1. Major Imports of Pakistan

The table below shows Pakistan's top imports in 2010. It is taken from the International Trade Centre's Market Access Map (Macmap) resource.[25] India and China are highlighted in bold respectively. Sri Lanka does not show up in this table. Among Pakistan's 200 hundred leading imports, Sri Lanka is only a key importer in the rubber market. Pakistan's imports are concentrated in the agriculture, textiles, and food sectors. Telecommunications is the only significant technologically advanced import. This is predictable: telecom has expanded quickly in Pakistan after the dismantling of the Pakistan Telecommunications Company's monopoly. There is vibrant competition in the telecom market with several players entering from abroad. However, the rest of the economy appears relatively primitive.

Table 1. Major Imports of Pakistan, 2010

Product Description	Value (USD Billion)	Top 3 leading exporters (USD million)
Petroleum oils and oils obtained from bituminous minerals o/than crude etc.	7.2	United Arab Emirates
		Kuwait
		Saudi Arabia
Petroleum oils and oils obtained from bituminous minerals, crude	3.5	Saudi Arabia
		United Arab Emirates
		Iran (Islamic Republic of)
Palm oil and its fractions, whether or not refined (excl. chemically modified and crude)	1.2	Malaysia
		Indonesia
		Singapore
Refined sugar, in solid form, nes	0.79	Brazil
		United Arab Emirates
		Thailand
Cotton, not carded or combed	0.76	**India**
		United States of America
		Afghanistan
Rape or colza seeds, whether or not broken	0.55	Canada
		Australia
		Romania
Vessels and other floating structures for breaking up	0.50	Japan
		Korea, Republic of
		India
Coal, whether or not pulverized, non-agglomerated (excl. anthracite and bituminous coal)	0.48	Indonesia
		South Africa
		Canada
Transmission apparatus, for radio teleph incorporating reception apparatus	0.43	**China**
		Korea, Republic of
		Hong Kong, China

[25] *See* website: http://www.macmap.org/Main.aspx (last visited, 25 November 2013).

Palm oil, crude	0.41	Malaysia Indonesia
p-Xylene	0.35	**India** Iran (Islamic Republic of) Kuwait
Polypropylene, in primary forms	0.33	Saudi Arabia **India** Oman
Diammonium phosphate, in packages weighing more than 10 kg	0.31	**China** Tunisia United States of America
Black tea (fermented) & partly fermented tea in packages exceed 3 kg	0.30	Kenya **India** Rwanda

Source: International Trade Centre's Market Access Map (Macmap)

Among Pakistan's major imports, India provides cotton, p-Xylene, polypropylene, black tea, non-agglomerated iron ores, and soya bean oil cake. India is a major exporter of cotton to Pakistan. The value of cotton exports to Pakistan, however, fell from USD 1.164 billion in 2008 to USD 824.7 million in 2011, hitting a major low in 2009 at USD 480.4 million. In 2009, Pakistan also imported significant amounts of onions and shallots from India. [26]

China is an important exporter of telecommunications technology, generating sets with compression-ignition internal combustion piston engines (diesel and semi-diesel engines), phosphoric/poly-phosphoric acid, telephonic apparatuses, and telegraphic apparatus. Since imports from China are mainly from its electronics industry, any non-tariff barriers would significantly impact the electronics sector in China. In 2011, China's export of urea to Pakistan also skyrocketed.

The main import from Sri Lanka is natural rubber. In 2008, Pakistan also imported Soya bean oil cake (total imported product being USD 116,896).

Pakistan has consistently had a deficit in trade with India.[27]As of 2012-13, the balance of trade between Pakistan and China also stands at a deficit of USD 13.2 billion.[28] Meanwhile, Pakistan had a surplus in trade with Sri Lanka in 2011 (USD 280.67 Million).[29]

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[26] *See* id.
[27] *See* Pakistan Institute ofLegislative Development and Transparency (PILDAT), *Trade Relations Between Pakistan and India*(2012), available online at http://www.pildat.org/publications/publication/FP/TradeRelationsbetweenPakistanAndIndia_IndianPerspective_Jan2012.pdf (last visited, 25 November 2013).
[28] http://tribune.com.pk/story/519815/balance-of-trade-gap-between-exports-and-imports-narrows/
[29] *See Trade with Countries* http://fpcci.org.pk/

2. Non-tariff Barriers in Pakistan

The data below are derived from the WITS/TRAINS dataset on NTB's in Pakistan for the year 2012. We have removed redundancies and excluded duties, levies, customs, and other tariffs that were included in the NTB dataset.

Table 2. Non-Tariff Barriers in Pakistan

\ Products Laws \	Unknown	All Products	Various	Plants	All edible products	Agriculture Products	Vehicles	birds	Food	Wheat	Seeds	Total
SROs (statutory regulatory orders, e.g. the "negative list")	7389	0	0	0	0	0	0	0	0	0	0	**7389**
Import Policy Order 2009 (Ministry of Commerce)	1717	2407	659	58	49	30	13	6	2	2	0	**4943**
Export Policy Order 2009 (Ministry of Commerce)	317	0	0	0	0	0	0	0	0	0	0	**317**
Mandatory standards and conformity test by the PSQCA	24	0	0	0	0	0	0	0	0	0	0	**24**
Pakistan Plant Quarantine Act, 1976	0	0	0	17	0	0	0	0	0	0	0	**17**
Seed Act 1976	0	0	0	0	0	2	0	0	0	0	1	**3**
Drug Act 1976	1	0	0	0	0	0	0	0	0	0	0	**1**

Seven legal instruments have been used to create NTBs in Pakistan. They are listed in descending order of the frequency of their use. Thus, statutory regulatory orders (SROs) have been used the most and the Drug Act 1976 has been used the least. The products that these laws affect are listed as columns, where the left-most column is the most affected by NTBs and the right-most column is the least affected (ignoring the totals). Regrettably, some of the information on the products affected and the SROs employed is vague. The first three columns do not allow us to specify the industries that were affected. Nevertheless, we can draw some tentative inferences.

2.1. Pakistani laws and regulations that implement NTBs

The key Pakistani laws that affect trade with India, China, and Sri Lanka are statutory regulatory orders, policy orders, and inspection standards. Most of these laws are within the ambit of the Federal government. However, recent constitutional changes raise the possibility of provincial governments affecting international trade through their representation on the National Economic Council.

2.2. Constitutional Change: the 18th Amendment's devolution of regulatory power to the provinces

The 18th Amendment to the Constitution of Pakistan devolved regulatory authority from the federal government to the provinces. For example, the 18th Amendment modified Article 156 of the Constitution to include the Chief Ministers of the provinces in the National Economic Council, and to require the National Economic Council to promote "equity" among the provinces. Said article vests the President with the power to set up a National Economic Council comprising of the Prime Minister, assuming the responsibilities of the Chairman of the Council, the Chief Ministers and one member from each Province nominated by the Chief Minister. The National Economic Council is in turn responsible for formulating sound financial, commercial, social and economic policies in line with principles of balanced development and regional equity.

This constitutional shift is potentially significant. Insofar as the National Economic Council is a planning body, it should not erect specific NTBs against imports. However, the Council sets the economic policy that the ministries and other departments must pursue. Planning from the perspective of "balanced development and regional equity" may diverge from planning for absolute growth. The National Economic Council now has a constitutional mandate to promote equity among the provinces. It can use this mandate to prefer imports that benefit all the provinces over trade that benefits only provinces with agricultural lands, coastlines, or rich mineral deposits, even where the latter would create gains from trade.

2.3. Statutory Authority

After the Constitution and treaties, the most important laws in Pakistan are its statutes. These are Acts passed by the elected parliament. Several statutes create prohibitions, inspection regimes, or other procedures that may inhibit trade with foreign countries. Seven of these are discussed below. They are the Imports and Exports (Control) Act; the Customs Act; the Pakistan Animal Quarantine Act; the Pakistan Plant Quarantine Act; the Pakistan Standards and Quality Control Act; the Drugs Act; and the Drug Regulatory Authority Act.

The Imports and Exports (Control) Act, 1950

The Ministry of Commerce is the organ of the Federal government that is responsible for trade regulation. It controls the Trade Development Authority of Pakistan and several other agencies. The Ministry derives its authority to regulate trade primarily from the Imports and Exports (Control) Act, 1950. Article 3 of the Imports and Exports (Control) Act entrusts the Central government with the authority to prohibit, restrict or otherwise control the import or export of any goods and regulate all practices and procedures involved in import and export. Applications for licenses, the grant, use, transfer, sale or cancellation of such licenses, the determination of the form, manner and period of any associated appeals and the fees charged in respect of any such matters falls within the ambit of powers conferred by the same article.

The Ministry of Commerce uses its statutory authority to regulate trade by passing Statutory Regulatory Orders, or SROs. The WITS/TRAINS data set creates a general category for SROs (see above), but then also lists other SROs separately. This is an unhelpful way to categorize regulations. We consider the key statutory regulatory orders under one head below.

The Customs Act, 1969

The Customs Act[30]sets up potential NTBs against electronics, technology, and other knowledge-intensive goods. In general, the Act empowers the Federal Board of Revenue (FBR) to collect duties and other tariffs on imports. However, in Chapter IV, the Act also bans *both* the import and export of items that may infringe on intellectual property rights. Thus, Section 15(c) of the Customs Act bans import and export of goods with a counterfeit trademark (within the meaning of the Pakistan Penal Code, 1860 (Act XLV of 1860), or a false trade description as defined in the Copyright Ordinance, 1962 (XXXIV of 1962), the Registered Layout-Designs of Integrated Circuits Ordinance, 2000 (XLIX of 2000), the Registered Designs Ordinance, 2000 (XLV of 2000), the Patents Ordinance, 2000 (LXI of 2000), and the Trade Marks Ordinance, 2001 (XIX of 2001).

Similar provisions ban the import and export of goods that may infringe copyright, layout design, or patents. In theory, this measure should discourage piracy. However, the Act empowers customs officials to decide whether or not an item violates intellectual property. Customs officials may therefore restrict trade by interpreting intellectual property rights to block imports and aid exports. Section 15 explains that goods imported or exported in violation of Intellectual Property Rights, regardless of any other law in force at the time, shall be adjudicated under section 179 by the appropriate customs officer.

Sections 179 to 192 explain the adjudication procedure under the Act. Adjudication is conducted by "Special Judges," who must have previously worked as Sessions Judges, and is subject to appeal to a Special Appeals Court. Insofar as the special judges under the Customs Act can find intellectual property violation in imports, they can use section 15 to ban these imports.

These are the two main statutes that are used to erect NTBs in Pakistan. However, as the data above illustrate, statutory regulatory orders play a much larger role in restricting trade.

The Pakistan Animal Quarantine Act, 1979

The Animal Quarantine (Import and Export of Animal and Animal Products) Act of 1979[31] empowers the Federal government to prohibit, restrict or otherwise regulate the import or export of

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[30]Available online at http://download1.fbr.gov.pk/Docs/201381118549633FinalCustomsAct1969.pdf (last visited, 25 November 2013).

[31]*See* Animal Quarantine (Import and Export of Animal and Animal Products) Act of 1979, reproduced in SMALL AND MEDIUM ENTERPRISE DEVELOPMENT AUTHORITY, Pakistan (SMEDA), *Regulatory Procedure for Export of Livestock and Livestock Products*, Annexure at p.34. Available online at http://www.smeda.org/index.php?option=com_phocadownload&view=category&download=42:export-of-live-stock-and-live-stock-products&id=18:export-import (last visited, 25 November 2013).

any animal, class of animals or animal products likely to introduce disease to other animals, animal products or man.

Section 3 of the Act explains that the Act shall be applied as though it were part of the Customs Act, supra. So, in addition to the quarantine officer created by this act, customs officers will also have jurisdiction over animal imports. Quarantine officers are empowered by the act to set testing and certification requirements, destroy animal products that they find to be contaminated, and deport unsatisfactory imports at the exporter's expense.

The Pakistan Plant Quarantine Act, 1976

The Plant Quarantine Act[32] instructs the Federal government to set quality controls on imports of goods that potentially infect plants and their products. Section 3(1) empowers the Federal Government to restrict or otherwise regulate the import of any article/class of articles, likely to cause infection to any crop/plant, or of any pest/class of pests.

Pursuant to this Act, the Government enacted its Plant Protection Rules, 1967. These rules were passed before the Act, but were amended and retrospectively incorporated by the Plant Quarantine Act in 1976.

Plant Protection Rules 14 to 28 restrict the import of 14 products into Pakistan from countries that have had instances of pest or disease infestation. The controlled items are potatoes, rubber, sugarcane, tobacco, citrus plants, coffee plants, bananas, coconuts, ground nuts, maize, teas, onions, garlic, shallots, soil, compost, and cotton. These items are not restricted entirely, but are only banned from countries where specific infestations have been recorded or suspected. The Department of Plant Protection has considerable discretion to decide whether an imported item under the Plant Quarantine Act is infested, and whether it should be destroyed, disinfected, or deported.[33]

The Pakistan Standards and Quality Control Authority Act, 1996

This Act[34] established the Pakistan Standards and Quality Control Authority (PSQCA), which is responsible for setting standards for both exports from and imports into Pakistan. Section 8 of the Act lists the powers of the PSQCA. These include the creation and implementation of tests, the granting and withdrawal of licenses, the establishment of voluntary standards and mandatory standards, and registration of inspecting agencies, *inter alia*. The PSQCA has borrowed 15,000 standards from the International Standards Organization (ISO), adopted 6,000 standards from the

[32]Available online at http://www.plantprotection.gov.pk/pdf%20stuff/Pql76.pdf (last visited, 25 November 2013).
[33]*See* Plant Quarantine Rules, *id.*
[34]*See* Pakistan Standards and Quality Control Authority Act, 1996, available online at http://www.psqca.com.pk/about/PSQCA%20Act%20VI%201996%20WEB.htm (last visited, 25 November 2013).

International Electro-technical Commission (IEC), and developed 5,764 standards through its Standards Development Centre (SDC) for a total of 27,764 standards.[35]

The Ministry of Commerce has extended the application of PSQCA standards to all imports. Under its Strategic Trade Policy Framework 2012-2015, the Ministry has decided that all domestic standards formulated by Pakistan Standard Quality Control Authority (PSQCA) will be made part of Import Policy Order in order to ensure uniformity between standards of locally produced and imported goods such that they conform to notified domestic standards.

The Drugs Act, 1976 and the Drug Regulatory Authority Act, 2012

Under section 4(2) of the Drugs Act[36], the Government maydirect that a drug or class of drugs may not be imported or exported save for the issuance of a license or indent or registration in accordance with rules or through a Government agency, in addition to prohibiting the import or export of any drugs.

The Drug Regulatory Authority (DRA) ceased to exist after the 18th Constitutional Amendment returned the provision of health services to the provinces. In the absence of the DRA, the Cabinet Division was to approve drug registration and licenses, but close to 14,000 drug registration cases remained pending in 2012. On October 15, 2012, the National Assembly approved the Drug Regulatory Authority Act, re-establishing the DRA.

The Drug Regulatory Authority Act, 2012[37] creates the new Drug Regulatory Authority. In addition, it prohibits several items under its second schedule. These include any unregistered therapeutic drug not in conformity with the registration dossier and associated pharmaceutical evaluation or in contravention of any of the provisions of this Act or rules and any drug which is dangerous to health even when used according to prescribed usage.

The restrictions in this Act have been incorporated into the Import Control Policy (infra).

2.4. Statutory Regulatory Orders (SROs)

After statutes come regulations, which are passed by the various ministries or departments under statutory authority. The most important regulations passed by a ministry are its statutory regulatory orders or SROs. The Federal government passes statutory regulatory orders in order to regulate the areas that a particular statute allows it to govern. Put differently, the statutory regulatory order is a means of implementing the policy and purpose of a given statute. Several SROs have been used to restrict imports over time. The most important ones are discussed below.

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[35] *See* website, PSQCA Standards Development Centre, http://www.psqca.com.pk/sdc/adoption%20of%20standards.htm (last visited, 25 November 2013).

[36] Available online at http://www.ppma.org.pk/pdf/The%20Drugs%20Act,%201976.pdf (last visited, 23 November 2013).

[37] Available online at website, Government of Pakistan, Drug Regulatory Authority, http://www.dra.gov.pk/gop/index.php?q=aHR0cDovLzE5Mi4xNjguNzAuMTM2L2RyYXAvdXNlcmZpbGVzMS9maWxlL2RvY3MvRFJBUEFjdDIwMTIucGRm (last visited, 25 November 2013).

The No Concessions List of Imports from India

The SRO that affects Pakistan's trade with India most clearly is the No Concessions List (or "Negative List") on imports from India. The Federal government enacted the negative list in SRO No. 280 (I) 2012 in March, 2012.[38]Prior to the enactment of the negative list, Pakistan enforced a "positive list" which enumerated the specific products that India could export to Pakistan. The negative list takes the opposite approach: it enumerates the products that India *cannot* export to Pakistan. By implication, Pakistan can import all Indian products that are not on the negative list. In principle, then, the negative list should allow for freer trade between the neighbors.

Nevertheless, the negative list is clearly protectionist. The list bans imports of over 500 product lines as defined by the internationally recognized Harmonized Standard (HS) code.[39]The banencompasses imports related to agriculture, food, medicine, sporting goods, tobacco, motor vehicles, plastic products, and many other goods. Government officials have repeatedly stated that the purpose of this No Concessions List is to protect local industry. The list of products also suggests that local industry pushed for shelter from Indian competition.

The Positive List of Imports through the Wahgah Border

Also in SRO No. 280(I) 2012, Pakistan enacted a positive list of imports via the Attari-Wahgah land route. Thus, imports over land from India are still limited to enumerated products. By implication, all items not enumerated on the positive list are banned.

The positive list allows India to export various livestock, meats, fruits & vegetables, chemicals, and yarn through the Wahgah border. These imports are still subject to various inspections, tests, and quarantine periods. We will discuss these restrictions on permitted imports later.

The Import Policy Order, 2013

These orders are also SROs. The Import Policy Order is SRO 766(I) 2009 and the Export Policy Order is SRO 767 (I) 2009. The WITS/TRAINS data was compiled under these orders, but they have been replaced now by the Import Policy Order 2013, SRO 193 (I) 2013 and the Export Policy Order 2013, SRO 192 (I) 2013. We will consider the 2013 Import Policy Order in this section. Under section 21 of the Import Policy Order, 2013, "The Federal Government may, where it deems it to be in public interest, suspend for a specified period or ban the import of any goods from all or any source."

In addition, under section 5(B)(iii), "goods from India or of Indian origin specified in Appendix-G shall not be importable." Appendix G contains essentially the same Negative list as in SRO 280 (I)

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[38]Available online at http://eepcindia.org/memcirculars/memcircular-0349-270312.pdf (last visited, 24 November 2013).

[39] This translates to 1,209 products under the Pakistan Customs Tariff (PCT) code, which classifies product lines differently.

2012, above. Likewise, Appendix G-1 of the Import Policy Order contains the 137-item positive list of imports via the Wahgah border.

Pakistan's 2013 Import Policy Order bans the import of 44 categories of products, mostly on religious, environmental, security, and health grounds. Pakistan also bans the import of live animals i.e. cattle, buffalo, sheep and goats, meat and bone meal, tallow containing protein and feed ingredients from any BSE affected countries. Any dispute or clarifications regarding import status of any product which cannot be resolved by the Customs Authorities are referred to Ministry of Commerce for final decision.

Appendix A of the Import Policy order bans import of products that offend national or Islamic religious sensibilities, such as obscene materials, problematic translations, and controlled substances. It also bans hazardous materials such as Asbestos and Benzedrine.

Under sections 5(b)(i) and 11 of the Order, Appendix B sets health and safety inspection requirements on the import of animal, plant, vegetable, and fruit items. Health and safety inspections are regulated by the Ministry of National Food Security & Research[40] through its various departments. For example, import of live animals, animalsemen and embryos is subject to the quarantine requirements of the Animal Quarantine Department and the Marine and Fishery Department. Animal quarantine restrictions are enabled by the Animal Quarantine Act, supra. Plant quarantine regulations are enforced by the Department of Plant Protection and the Federal Seed Certification Agency.

Manufactured goods are subject to testing by Pakistan Standards and Quality Control Authority as explained above. Chemicals are monitored by the Pakistan Environmental Protection Agency (PEPA)[41], which operates under the Ministry of Climate Change and is empowered by The Pakistan Environment Protection Act, 1997.[42]Article 13 of this Act states that, "No person shall import hazardous waste into Pakistan and its territorial waters, Exclusive economic Zone and historic waters." The export policy order primarily affects exporters from Pakistan. We are not focusing on barriers to domestic imports in this paper.

2.5. Other Pakistani laws and policies that affect trade

Pakistan has made substantial progress over the past decade in constructing a more open and transparent trade policy regime, eliminating significant quantitative restrictions on imports and

[40] *See* website: Government of Pakistan, Ministry of National Food Security and Research, http://www.mnfsr.gov.pk/ (last visited, 25 November 2013).

[41] *See* website: http://www.environment.gov.pk/ (last visited, 25 November 2013).

[42] Available online at http://www.environment.gov.pk/act-rules/envprotact1997.pdf (last visited, 25 November 2013).

eliminating a series of preferential regulations advantaging domestic concerns[43]. Significant barriers to trade still persist, however, disadvantaging foreign goods in the domestic market.

Government Procurement

Political pressures on the allocation of procurement awards are common. These include corruption on the part of officials, unnecessary delays in decision-making as well opacity of process. Several reports by suppliers have revealed that instead of giving awards to those with the lowest bid, awards have been used as bargaining chips in unrelated negotiations.

Intellectual Property Rights

Pakistan remains on the Priority Watch List in the 2012 Special 301 report.[44] The report cites weak protection and enforcement of intellectual property rights, particularly with respect to copyrights, pharmaceutical data, and media piracy.

2012 saw the government taking some positive steps by way of improving intellectual property protections. The Intellectual Property Organization law[45] of 2012 provides for special tribunals to adjudicate cases and a policy board with private sector representation to assess policy decisions. However, litigation on violations of intellectual property rights has left a lot to be desired, as few arrests have resulted in prosecutions. Furthermore, even when there were prosecutions, punishments accorded to the perpetuators were minor in nature, doing little to dispense the belief that the intellectual property regime is not implemented strictly. More worrying is the fact that Pakistan is used as a conduit for infringing products by smugglers from Russia and China. Continuing piracy in books discourages legitimate trade and investment. Misappropriation of pharmaceutical test data and other proprietary data is also a problem. There is ineffective regulation of marketing approvals for pharmaceuticals. This regulation is further undermined by an Ordinance issued in 2009 which effectively removes the 18 month time limit for the processing of patent applications.

Other Barriers

The domestic security situation, rampant corruption and an ineffective judicial system make investment in Pakistan highly unattractive. Laws dealing with corruption in Pakistan are: the 1947 Prevention of Corruption Act, the 1973 Efficiency and Discipline Rules, and the 1999 National Accountability Bureau (NAB) Ordinance. In 2002, the National Anti-Corruption Strategy (NACS) was approved by Pakistan's Cabinet. This bill aims to combat certain corrupt practices and recognizes the NAB as the sole federal anticorruption agency.

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[43]The World Bank. 2013. *International Economics & Trade - Pakistan - Policy and Performance*. [online] Available at: http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/EXTSARREGTOPINTECOTRA/0,,contentMDK:20592523~menuPK:579454~pagePK:34004173~piPK:34003707~theSitePK:579448,00.html

[44]*See* United States Trade Representative, *2012 Special 301 Report*, available online at www.ustr.gov/sites/default/files/2012%20Special%20301%20Report.pdf

[45]*See* website: www.na.gov.pk/uploads/documents/1355912657_971.pdf

Contract enforcement can be difficult for foreign investors in Pakistan. Parties pursuing legal remedies in the Pakistani judicial system may face years of delays and unpredictable outcomes in the country's overloaded courts. In July 2005, the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was ratified by ordinance through Pakistan's Cabinet, however this ordinance expired in 2010 and in 2011 a law ratifying the New York Convention was enacted by the Parliament.

The challenges faced by potential investors in Pakistan are similar to those faced in several other developing economies. These include regulatory risk and opacity when it comes to governmental departments and arbitration issues.

3. Major Imports of India

The table below lists India's major imports in 2010. China figures prominently in the full list of major imports. However, Pakistan and Sri Lanka are not important players in India's 200 largest import markets. We note that India's major imports are of precious stones and metals and different types of fuel. The precious metals and stones are cut and otherwise refined by India's jewelry sector. They may also be purchased by consumers as a means to guard against inflation. The fuel imports are necessary to support manufacturers' factories and provide transport to the services sector.

Table 3. Major Imports of India, 2010

Product Description	Value (USD Billion)	Top 3 leading export partners (USD million)
Petroleum oils and oils obtained from bituminous minerals, crude	64.79	Saudi Arabia
		Nigeria
		Iran (Islamic Republic of)
Gold, incl. gold plated with platinum, unwrought, for non-monetary purposes (excl. gold in powder form)	27.19	Switzerland
		United Arab Emirates
		South Africa
Diamonds, worked, but not mounted or set (excl. industrial diamonds)	14.64	United Arab Emirates
		Hong Kong, China
		United States of America
Non-industrial diamonds unworked or simply sawn, cleaved or bruted (excl. industrial diamonds)	7.44	Belgium
		United Arab Emirates
		United Kingdom
Coal, whether or not pulverized, non-agglomerated (excl. anthracite and bituminous coal)	7.10	Australia
		Indonesia
		South Africa
Petroleum oils&oils obtained from bituminous minerals,o/than crude etc	4.68	Singapore
		United Arab Emirates
		Korea, Republic of
Transmission apparatus for radioteleph incorporating reception apparatus	4.40	**China**
		Korea, Republic of
		Viet Nam
Copper ores and concentrates	3.32	Chile
		Australia
		Indonesia
Palm oil, crude	2.79	Indonesia

Product Description	Value (USD Billion)	Top 3 leading export partners (USD million)
		Malaysia
		Thailand
Parts of electrical apparatus for line telephony or line telegraphy, incl. line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or digital line systems and videophones, n.e.s.	2.47	**China**
		Finland
		Korea, Republic of
Diammonium phosphate, in packages weighing more than 10 kg	2.38	United States of America
		China
		Russian Federation
Natural gas, liquefied	2.02	Qatar
		Trinidad and Tobago
		Nigeria
Potassium chloride, in packages weighing more than 10 kg	1.38	Russian Federation
		Canada
		Israel
Parts& accessories of automatic data processing machines & units thereof	1.37	**China**
		Malaysia
		Singapore

Source: International Trade Centre's Market Access Map (Macmap)

India's biggest imports from China include worked diamonds, telecommunications, di-ammonium phosphate (used in fertilizers), and parts and accessories of automatic data processing units. In 2008 and 2010, urea imports also reached significant levels. However, non-industrial diamonds have consistently been India's most significant import from China.

India does not import heavily from Pakistan in a key import market; in 2009 it imported ethyl alcohol and other denatured spirits. Under 1% of India's imports are from Pakistan.

India's main imports from Sri Lanka include cruise ships and rubber products. In 2010, India also imported floating/submersible drilling and productions platforms from Sri Lanka.

India has a surplus balance of USD 1140.37 Million with regards to trade with Pakistan in 2012;[46] India's trade deficit with China in June 2013 reached USD 24.7 billion. [47] Sri Lanka is India's largest trading partner in South Asia, and India has a surplus of USD 3.657 Billion as of 2012.[48]

4. Non-tariff Barriers in India

Table 4. Non-Tariff Barriers in India

Products / Laws	Unknow n	Electroni c Products	Cotton Yarn	21 selected products	Milk, Wheat, Rice, Oil and products	Bus and Truck Radial Tires	Cotton	Total

[46] http://www.theguardian.com/news/datablog/2013/feb/22/cameron-india-trade-exports-imports-partners#data
[47] http://www.thehindu.com/business/Economy/new-figures-show-widening-china-trade-deficit/article5237537.ece
[48] http://www.theguardian.com/news/datablog/2013/feb/22/cameron-india-trade-exports-imports-partners#data

Products / Laws	Unknown	Electronic Products	Cotton Yarn	21 selected products	Milk, Wheat, Rice, Oil and products	Bus and Truck Radial Tires	Cotton	Total
Defence procurement procedure 2011	4008	0	0	0	0	0	0	**4008**
Preference to domestically manufactured electronic goods in procurement in Government procurement	0	594	0	0	0	0	0	**594**
ban on import of cars whose engine capacity ranges from 1000 to 2500cc.	177	0	0	0	0	0	0	**177**
Import of vehicles from selected ports	177	0	0	0	0	0	0	**177**
Conditions and modalities for registration of contracts of cotton yarn with DGFT.	0	0	105	0	0	0	0	**105**
Restricted items for imports	100	0	0	0	0	0	0	**100**
Reserved items for Small Industries	0	0	0	45	0	0	0	**45**
Prohibition on import of milk and milk products from China	0	0	0	0	43	0	0	**43**
Prohibition on export of pulses	12	0	0	0	12	0	0	**24**
Canalised items in India	27	0	0	0	0	0	0	**27**
Quota for export to Bhutan	0	0	0	0	25	0	0	**25**
Provisional assessment of import of Bus and Truck Radial Tires	0	0	0	0	0	16	0	**16**
Policy for issue of import licenses of Rough Marble Blocks for the Financial year 2011-12.	14	0	0	0	0	0	0	**14**
Assessment of import of Bus and Truck Radial Tires	0	0	0	0	0	8	0	**8**
Change in procedure for export of cotton	0	0	0	0	0	0	8	**8**
Import of Marble from Bhutan.	4	0	0	0	0	0	0	**4**

4.1. Statutory Authority

The Customs Act, 1962

Article 11 of the Indian Customs Act, 1962[49] allows the federal government to "prohibit either absolutely or subject to . . . conditions . . . the import or export of goods of any specified description," so long as the government cites any of 22 enumerated grounds. The seven most problematic grounds articulated in Article 11(2) include the conservation of foreign exchange and the safeguarding of balance of payments, the prevention of injury to the economy of the country by

[49]Available online at http://www.cbec.gov.in/customs/cs-act/cs-act-idx.htm (last visited, 25 November 2013).

the uncontrolled import or export of gold or silver, the prevention of surplus of any agricultural product or the product of fisheries, the maintenance of standards for the classification, grading or marketing of goods in international trade, the establishment of any industry, the prevention of serious injury to domestic production of goods of any description and any other purpose conducive to the interests of the general public.

The conservation of foreign exchange is too general a grant of authority to restrict trade, since virtually all imports are paid for in the exporter's currency or some standard foreign currency such as the US dollar. However, measures to preserve a healthy balance of trade and foreign exchange have some protection in the international trade law regime, as explained later. Gold is a major import of India, and restrictions on its trade are likely to harm consumers who wish to guard against inflation or currency devaluation. Clause (g), which guards against surpluses, may be read to accord with the WTO's grant of anti-dumping measures, insofar as dumping creates a surplus of goods. The classification and marketing standards of clause (h) are also generally acceptable, but if these exceed international requirements then they may impose an onerous burden on exporters. Clauses (i), (j), and (v) though, are potentially vague and create significant space for protectionist regulations.

Article 33 of the Act allows the government to specify the locations where imported goods may be unloaded. Thus, the government can increase the transportation costs of exporters by forcing them to bring goods over the sea even where a land route would be more efficient.

Aside from these provisions, the Customs Act lays out detailed documentation requirements, the jurisdictions of inspecting officers and arbitrators, and regulations for controlling Indian exports.

The Foreign Trade (Development and Regulation) Act, 1992

Article 3(2) of the Foreign Trade Act reiterates the Customs Act's affirmation that "The Central Government may . . . make provision for prohibiting, restricting or otherwise regulating . . . the import or export of goods." Section 3(3) clarifies that goods restricted under this Act shall be treated exactly like goods restricted under section 11 of the Customs Act, supra.

The Act creates a licensing system for importers and exporters of goods. Traders who are not properly licensed are subject to various penalties under a judicial process that is specified in the Act. Thus officials can shut down an importer by withdrawing a license. A problematic feature of the Act is that it does not penalize officials for sloppy licensing practices so long as the officials acted in good faith. Under the extremely general language of Article 18, any good faith denial of an import license is immune from legal challenge. Article 18 states that neither can any order made or deemed to have been made under the Foreign Trade (Development and Regulation) Act, 1992 be questioned in court nor can any legal action be brought against any person acting or intending to act in good faith in accordance with the Act or any aforementioned order.

The corresponding provision in Pakistan is the Customs Act Article 217, which declares that the federal government and its officers are immune from suit when they act in good faith within their authority under the Act. The Indian statute extends this protection to orders that are "deemed to be made" under the Act, to "any person for anything in good faith done," and for actions under "any order . . . deemed to have been made" under the Act. This broad exemption from liability carries a significant risk that customs officials and other persons will be able to restrict imports without consequence. We have not yet looked at how the "good faith" exemption has been interpreted in Indian and Pakistani courts, but we expect that the statutory language will be narrowed to prevent arbitrary trade restrictions.

The Prevention of Food Adulteration Act, 1954

Article 5 of this Act[50] enables the government to set standards for purity and labeling of food products vis-a-vis prohibiting the import of adulterated food substances, misbranded food items, any article of food for which a license is prescribed (unless it is in accordance with the conditions of the license) and any article of food which in contravention of the Prevention of Food Adulteration Act or any orders made thereunder.

Sections 44 to 48 of the Prevention of Food Adulteration Rules[51] passed under this Act prohibits the sale of a large number of food items based on their ingredients, concentrations of chemicals, and other standards.

Other Statutes that enable non-tariff barriers in India

Under Article 11(1) of the Rubber Act, 1947[52], "The Central Government may . . . make provision for prohibiting, restricting, or otherwise controlling the import or export of rubber." Additionally, under Article 13, the Government may "if it deems necessary . . . fix the maximum and minimum price . . . for rubber."

Likewise, under Article 20 of the Tobacco Board Act[53], 1975 the Government may "make provision for prohibiting restricting or otherwise controlling the import or export of tobacco and tobacco products."

4.2. Regulations and policies that implement NTBs in India

India's Defense Procurement Procedure

The Defence Procurement Procedure, 2011[54] covers all Capital acquisitions, (except medical equipment) undertaken by the Ministry of Defence, Defence Services and Indian Coast Guard, both from indigenous and foreign sources. This Procedure was amended in 2013[55] with the express

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[50] *See* The Prevention of Food Adulteration Act and Rules (as on 1.10.2004), available online at http://dbtbiosafety.nic.in/act/PFA%20Acts%20and%20Rules.pdf (last visited, 26 November 2013).
[51] *See* id at p. 67 and the following.
[52] Available online at http://commerce.nic.in/aboutus/actspdfs/Rubber%20Act.pdf (last visited, 25 November 2013).
[53] Available online at http://commerce.nic.in/aboutus/actspdfs/tb_act_1975.pdf (last visited, 25 November 2013).
[54] Available online at http://www.dgqadefence.gov.in/documents/DPP2011.pdf (last visited, 25 November 2013).
[55] *See* Press Information Bureau, Government of India, *Salient Features of Defense Procurement Procedure 2013*, available online at http://pib.nic.in/newsite/erelease.aspx?relid=96361 (last visited, 25 November 2013).

intention of reversing the trend of importing most of the equipment and weapons systems that the armed forces need, by giving the first opportunity to the Indian industry to meet domestic demand.

The first major change relates to the introduction of the 'preferred categorization' in the following order: Buy(Indian), Buy & Make(Indian), Make(Indian), Buy & Make(Global), and Buy(Global). While seeking the approval for an Accord of Necessity (AoN) in a particular category, say, Buy (Global), it will now be necessary to give justifications for not considering the other higher preference categories. This is expected to give a stronger impetus to indigenization. Stipulations related to indigenous content have been clarified and made more stringent. Indigenous content requirements will now extend all the way to the lowest tier of the sub-vendor. Hence, imported content in the products supplied by the sub-vendors will not qualify towards indigenous content.

India's Export- Import (EXIM) Policy

The foreign trade of India is guided by the Foreign Trade policy, more commonly known as the Export Import policy, of the government of India. This is governed by the Foreign Trade Development and Regulatory Act 1992, supra. Section 5 of the EXIM policy dictates that the Central Government has the authority to formulate and amend the import and export policy by notification in the Official Gazette.

The EXIM Policy incorporates all the bans and prohibitions on imports that are listed in the Indian Trade Classification code, abbreviated as the ITC(HS) code. The ITC(HS) code is issued by India's Directorate General on Foreign Trade (DGFT). Currently, the ITC bans 54 (primarily animal-based) products and restricts 442 items.[56]

India's EXIM policy enacts strict measures when it comes to import of vehicles. The EXIM policy of India stipulates that vehicles should not be manufactured/ assembled in India and should not have been sold, leased or loaned prior to being imported to India. A heavy customs duty applies to imported vehicles.

Import of New Vehicles

New vehicles are only to be imported from the country of manufacture and made to comply with Central Motor Vehicles Rules (CMVR), 1989. The import of new vehicles shall be permitted only through the Indian Customs Port at Nhava Sheva (Mumbai), Calcutta and Chennai.

Import of Old Vehicles

The Indian government allows second hand vehicles to enter the country only via the Mumbai port. Six categories of second hand vehicles have been identified by the Ministry of Commerce according to cylinder capacity. The government has mandated that the second hand to be imported into India are to have a minimum roadworthiness for a period of 5 years starting from the date of importation

[56] *See* Government of India Data Portal, *Import Export Classification, ITC (HS) Code and Import Policy 2012*, available online at http://data.gov.in/dataset/import-export-classification-itchs-and-import-policy (last visited, 25 November 2013).

into India, with the assurance that service facilities were provided within the country during the designated five year period.

Banned Vehicles

The policy imposes a total ban on the import of cars that have an engine capacity from 1000 to 2500cc. With regards to two-wheelers, scooters with an engine capacity of over 50 cc to 500cc are permitted to be imported. Motorcycle engine capacity should be over 250 cc but not in excess of 800 cc. The DGFT can authorize relaxation of these conditions or imports if the category is not listed in this Public Notice, in exceptional circumstances.

Preferential Market Access Regulations

India has preferential market access (PMA) policies aside from its defense procurement procedure. PMA regulations advantage Indian producers in certain markets over their foreign competitors. An example of such a PMA regulation in telecommunications is the Ministry of Communications and Information Technology's Notification No. 8(78) 2010-IP[57] "for providing preference to domestically manufactured telecom products in Government procurement." Section 7(4) of the regulation shields domestic manufacturers from concededly onerous quality standards. By implication, these burdensome standards will still apply to foreign producers. Moreover, the Telecom agency will have adjudicatory authority to determine whether a competitor's low prices constitute predatory pricing, and should therefore be excluded from the bidding process. The tender conditions are deemed to ensure that domestically manufactured telecom products are encouraged and are not subjected to restrictive products specifications such as the mandatory requirement of prior experience.

Canalized items in India

Canalization is the channeling of items through specific government agencies. The importer does not receive the imports directly from the foreign exporter, but from a government agency that mediates between the traders. The importer places her order with the agency; the agency then places the order with a foreign exporter and receives the good, and finally, transfers these goods to the importer. This circuitous process makes it difficult for foreign exporters to compete as they would in a regular market. The government effectively steps between the traders to create an artificial monopsony in that market. Canalized items are also specified under the India trade policy and may be found in a dataset maintained by the government.[58]

Plant Quarantine Order, 2003

The Plant Quarantine (Regulation of Import into India) Order 2003[59] creates an elaborate licensing and permit system for importing plants, plant products, soil, and other agricultural materials into

[57] Available online at http://www.dot.gov.in/sites/default/files/5-10-12.PDF (last visited, 25 November 2013).
[58] *See* dataset http://data.gov.in/sites/default/files/ITCHS_2012.xls (last visited, 25 November 2013).
[59] Available online at http://dbtbiosafety.nic.in/act/Plant%20Quarantine%20_order_2003.pdf (last visited, 25 November 2013).

India. The Order also includes extensive testing and quarantine requirements for a variety of items listed in the schedules appended to it. This permit system is administered by the Directorate of Plant Protection, Quarantine, and Storage.[60]

4.3. Other Indian Policies and Regulations that affect trade

A rapidly-developing country, India's economic growth for the year 2012 was just over 5 percent[61] and its overall contribution to global trade for the same year was almost 2 percent[62]. As a significant player in the regional economy, India has taken considerable strides towards liberalizing its economy and creating a hospitable environment for foreign competition. However, foreign goods still experience significant hindrances in the domestic market from non-tariff barriers.

Infrastructure

Insufficient infrastructural facilities, including the roads, railroads, ports, airports, education, power grid, and telecommunications, have proven to be great hindrances in India's economic growth.

Local Content Requirements

The government of India has started to enact 'local content' requirements for sectors such as Information and Communications Technologies (ICT), electronics, and solar energy in order to encourage domestic manufacturing and production.

Import Licenses

Import licensing schemes are the most common tools in most non-tariff barrier regimes. India has gradually phased out licensing schemes for consumer goods; however some products are still subjected to them, i.e. for motorcycles and vehicles. The requirement for import license is that the person should be residing in India, and working in India for foreign firms that hold greater than 30 percent equity or to foreign nations working at embassies and foreign missions.

A "negative list" of imported products is maintained by the Indian government. All items on the list are subject to various non-tariff regulation. There are three categories in the negative list: banned or prohibited items; restricted items that require an import license; and "canalized" items importable only by government trading monopolies and are made subject to cabinet approval with regards to timing and quantity. Despite these measures, the Indian government often fails to uphold transparency requirements, these include publication in the Official Gazette or notification to WTO committees. Failure to fulfill these requirements acts as a practical trade barrier.

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[60] *See website:* http://ppqs.gov.in/Ipmplant.htm (last visited, 25 November 2013).

[61] The World Trade Organization. 2013. *WTO | 2013 Press Releases*. [online] Available at: http://www.wto.org/english/news_e/pres13_e/pr688_e.htm.

[62] The SME Times. 2013. *India 19th Largest Exporter, Shares 1.7pc in Global Trade*. [online] Available at: http://www.smetimes.in/smetimes/news/top-stories/2013/Feb/23/india-19th-largest-exporter-shares-1.7-pc-in-global-trade628806.html.

When it comes to entry requirements, India has developed two distinct kinds. The two categories are new and secondhand goods—secondhand goods include remanufactured, refurbished, or reconditioned products. The discrimination between new and secondhand goods has resulted in effective barriers of entry for secondhand, remanufactured, refurbished and reconditioned goods.

Customs Procedures

Imports coming into India are subject to price control measures, designed to keep out goods whose price is lower than the ordinary competitive price. However it is reported that India's customs valuation methodologies are not reflective of the actual transaction values, resulting in a marked rise in the cost of exporting to India beyond applied tariff rates. It has also been found that the import of computer equipment has been subject to excessive examination as to the valuation methodologies. This is coupled with extensive searches and seizures for imports.

The methodologies employed by the Indian government have meant that importers into India end up paying higher duties than is necessary, than if the duty was calculated on the basis of actual value of the imported product. The India government accesses the basic customs duty, additional duty, and special additional duty cumulatively as opposed to separately. This means that the additional duty is assessed on the sum of the actual (or transaction) value and the basic customs duty, while the special additional duty is assessed on the sum of the actual (or transaction) value, the basic customs duty, and the additional duty.

The plethora of documentation required by Indian customs officials is a huge disincentive for traders. These documents are a by-products of the complicated and disparate tariff structure in place in India. The excessive documentation leads to frequent and lengthy processing delays.

Government Procurement Opacity

There is no clear governmental procurement policy in India. This results in disparate procurement practices processes, with each department, area and level of government adopting its own policy. Due to lack of transparency in the procurement process local firms are given preference as opposed to foreign firms when it comes to the allocation of government contracts.

Standards, testing, labeling & certification

As per the laws of the Indian government 109 commodities are required to be certified by its National Standards body, the Bureau of Indian Standards (BIS). While this is to maintain the quality of goods coming into the Indian market, however they have the potential to be used as protectionist measures by certain governments.

Intellectual Property Rights Protection

Intellectual property piracy is widespread in India. In 2012, the Controller General of Patents, Designs and Trademarks decided that innovators needed to manufacture in India so as to avoid being forced to license an invention to third parties. India's National Manufacturing Policy[63] aims to limit patent rights in order to assist technology transfer in the clean energy sector. Furthermore, it lacks adequate protections for pharmaceutical and agrochemical products against the use of date generated for marketing approval, such as unfair commercial use of undisclosed tests.

Services Barriers

Equity limitations are enforceable on foreign investment in major services sectors, including financial services, telecommunications, and retail, while foreign participation in legal services is completely banned.

Audiovisual Services

Importing of film and video publicity materials is extremely difficult and licensing of merchandise with regards to movies is restricted because of royalty remittance restrictions. There is a service tax levied on the import of films, music, and gaming software based. This tax is determined according to the value of the intellectual property rights, as opposed to a customs duty on the value of the carrier medium.

Anti-dumping and countervailing measures

Anti-dumping and countervailing measures allowed under the WTO Agreements, but subject to certain restrictions and situations. These are enacted in situations in which the domestic industry is threatened by serious injury dumping or subsidized imports. India employed these protections at times to protect its manufacturers from dumping. However, India's use of these protections has not always been judicious and has not been in the interests of free trade; concerns regarding transparency and due process have been received. India's employment of antidumping law has increased manifold in recent years.

Export subsidies and domestic support

Export subsidies are provided to local manufacturers and industries in order to boost their competitive edge internationally. This is done through the exemption of taxes for export earnings and easing of the local manufacturing tax for goods to be exported. Export subsidies act to redirect exports from other countries into third country markets, domestic support, on other hand, has the effect of a direct barrier—blocking access to the domestic market.

Procurement Preference

[63] *See* website: http://dipp.nic.in/English/policies/National_Manufacturing_Policy_25October2011.pdf ;*see also*, Wall Street Journal, *India Cabinet Approves National Manufacturing Policy* (25 October 2011), available online at http://online.wsj.com/news/articles/SB10001424052970204777904576652474175973718 .

In the procurement process, price preference is given to local suppliers when it comes to Indian government contracts. This results to discrimination against foreign suppliers, especially in International Competitive Bids (ICB's).

Service barriers

Service barriers are applicable for the following sectors: banking, insurance, architecture and engineering, motion pictures, retailing, accounting, legal services, construction, express delivery services, securities and telecommunication.

Other barriers

An undue advantage is accorded to local companies through Equity restrictions and other trade-related investment measures enacted by the Indian government. Foreign Direct Investment is still limited by the government in vulnerable sectors, i.e. agriculture and retail trade. Furthermore, there exists an unpublished policy favoring counter-trade measures.

5. Major imports of China

The International Trade Centre's data on China's major imports in 2010 is excerpted below. We note that China's major imports are of metals, fuel, and components used in the assembly of electronic gadgets and technical equipment. This suggests a mature and sophisticated manufacturing economy.

Table 5. Major Imports of China, 2010

Product Description	Value (USD Billion)	Top 3 leading export partners (USD million)
Monolithic integrated circuits	139.59	Taipei, Chinese Korea, Republic of Malaysia
Petroleum oils and oils obtained from bituminous minerals, crude	135.29	Saudi Arabia Angola Iran (Islamic Republic of)
Non-agglomerated iron ores and concentrates (excl. roasted iron pyrites)	75.98	Australia Brazil **India**
Optical devices, appliances and instruments, nes, of this Chapter	39.57	Korea, Republic of Taipei, Chinese Japan
Soya beans, whether or not broken	25.09	United States of America Brazil Argentina
Petroleum oils & oils obtained from bituminous minerals, o/than crude etc	22.42	Korea, Republic of Singapore Malaysia
Copper, refined, in the form of cathodes and sections of cathodes	21.77	Chile Japan Kazakhstan
Parts & accessories of automatic data processing machines &	18.60	Thailand

Product Description	Value (USD Billion)	Top 3 leading export partners (USD million)
units thereof		Korea, Republic of
		Taipei, Chinese
Motor cars and other motor vehicles principally designed for the transport of persons, incl. station wagons and racing cars, with spark-ignition internal combustion reciprocating piston engine of a cylinder capacity > 1.500 cm³ but <= 3.000 cm³ (excl. vehicles for the transport of persons on snow and other specially designed vehicles of subheading 8703.10)	18.01	Germany
		Japan
		United States of America
Machines and mechanical appliances, n.e.s.	17.09	Japan
		United States of America
		Germany
Copper ores and concentrates	13.02	Chile
		Peru
		Australia
Waste and scrap, of copper (excl. ingots or other similar unwrought shapes, of re-melted copper waste and scrap, ashes and residues containing copper, and waste and scrap of primary cells, primary batteries and electric accumulators)	12.24	United States of America
		Australia
		Spain
Bituminous coal, whether or not pulverized, non-agglomerated	11.71	Australia
		Indonesia
		Russian Federation
Aircraft nes of an un-laden weight exceeding 15,000 kg	10.39	United States of America
		France
		Germany
Motor cars and other motor vehicles principally designed for the transport of persons with engine of a cylinder capacity > 3.000 cm³	9.78	Germany
		Japan
		United States of America

Source: International Trade Centre's Market Access Map (Macmap)

China did not have any major imports from Pakistan in the past few years, except cotton yarn in 2010 and 2011. China does not have any significant imports from Sri Lanka either, however, the recently announced China-Sri Lanka Free Trade Agreement may soon change that.[64]

From India, China's major imports are iron, cotton and palm oil, with diamonds and copper making the list in 2011.

BOT: As of 2013 China has a favorable balance of trade as against Sri Lanka by 2.46 Billion.[65] China also has a favorable balance of trade against India and Pakistan, USD 24.7 billion (June 2013) [66] and USD 13.2 billion (latest figures) [67] respectively.

[64] *See* website: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=88922

[65] *See* website:http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=88922. See also for 2010 figures http://english.mofcom.gov.cn/article/statistic/lanmubb/ASEAN/201102/20110207401409.shtml

[66] *See* website: http://www.thehindu.com/business/Economy/new-figures-show-widening-china-trade-deficit/article5237537.ece

[67] *See* website:http://tribune.com.pk/story/519815/balance-of-trade-gap-between-exports-and-imports-narrows/

6. Non-tariff Barriers in China

Table 6. Non-Tariff Barriers in China

\ Products Laws \	Animal & products	Unknown	Plants & products	Pathogens & harmful organisms	Objects prohibited from entering	Food additives	rubber, steel, plywood, wool	Wheat, corn, rice and products	Grain	Total
Notice by Ministry of Agriculture on the quarantine issues of the animals and animal products imported from the neighboring countries	26,030	0	0	0	0	0	0	0	0	**26,030**
Uncategorized	990	2,227	687	5,206	0	633	241	173	0	**10,157**
Notice on the implementation of China and Brazil Phytosanitary Agreement	0	0	7,809	0	0	0	0	0	0	**7,809**
PRC Law on Product Quality	0	5,206	0	0	0	0	0	0	0	**5,206**
The implementation of The agreement between China and Polish on plant quarantine	0	0	5,206	0	0	0	0	0	0	**5,206**
The Phytosanitary Agreement between the Government of PRC and the Government of the Kingdom of Thailand	0	0	5,206	0	0	0	0	0	0	**5,206**
Implementation regulations on the Import and Export Commodity Inspection Law of the PRC	0	4,528	0	0	0	0	0	0	0	**4,528**
Import Management of Key Used Mechanical and Electronic Products	0	3,118	0	0	0	0	0	0	0	**3,118**
Notice on the issuance of the entry plant quarantine concessionary management approach by the animal and plant quarantine of PRC	0	0	0	0	2,603	0	0	0	0	**2,603**
Mandatory product certification regulations	0	1,720	0	0	0	0	0	0	0	**1,720**
Import management of machinery and electronic products	0	1,521	0	0	0	0	0	0	0	**1,521**
Notice on the standardized management of imported	0	1,521	0	0	0	0	0	0	0	**1,521**

\ Products Laws \	Animal & products	Unknown	Plants & products	Pathogens & harmful organisms	Objects prohibited from entering	Food additives	rubber, steel, plywood, wool	Wheat, corn, rice and products	Grain	Total
machinery and electronic products										
Order No. 53 by the AQSIQ on the inspection and supervision of the procedural requirements on import of used machinery and electronic products	0	1,521	0	0	0	0	0	0	0	**1,521**
Regulations for import and export declaration and inspection	0	1,509	0	0	0	0	0	0	0	**1,509**
Measures for the quantity and weight inspection and appraisal of imports and exports	0	1,006	0	0	0	0	0	0	0	**1,006**
Measures for quality supervision of imports	0	1,006	0	0	0	0	0	0	0	**1,006**
Standardization Law of the PRC	0	1,005	0	0	0	0	0	0	0	**1,005**
National food safety standard on The General Principles of Complex Food Additives	0	0	0	0	0	844	0	0	0	**844**
Notice on strengthening the bunt quarantine of importing grain wheat from India	0	0	0	0	0	0	0	0	164	**164**
Sum	**27,020**	**25,888**	**18,908**	**5,206**	**2,603**	**1,477**	**241**	**173**	**164**	**81,680**

The apex lawmaker in China is the National People's Congress, which comprises 3,000 representatives drawn from each of China's 33 administrative units (including provinces, municipalities, administrative zones, and autonomous regions) as well as the military. Most of the Congress's powers are delegated to a standing committee, which can interpret laws, enact decrees, sign treaties, and approve economic plans.

6.1. Statutory Authority

The PRC Foreign trade Law, 2004

This is the main statute governing China's trade relations. Article 3 of the PRC's foreign trade law[68] empowers the department for foreign trade under the State Council to regulate trade with other countries. The State Council is the most important executive organ in China. It operates under the President, who is China's chief executive.

Article 16 of the foreign trade law allows the foreign trade department to restrict exports and imports for 11 reasons. Several rationales are geared toward restricting exports, such as exports of items that are domestically in short supply. However, subsection (7) to (10) provide rationales for restricting imports which include the establishment or accelerating the establishment of a particular domestic industry, maintaining the State's international financial position and balance of international receipts and payments, necessary restrictions on the import of agricultural, animal husbandry and fishery products of any form among other goods which may be determined by the requisite laws and administrative regulations.

We do not have access to sufficient case law or adjudication to determine what kinds of measures the Chinese government considers necessary to restrict imports. However, prima facie, these restrictions create significant scope for protectionism. Article 18 does require the department to publish the list of restricted goods, which should make the process transparent, but it allows it allows for temporary restrictions on unlisted goods as well, by allowing the department of foreign trade under the State Council to formulate, adjust and publish the catalogue of goods and technologies that are restricted or prohibited for import or export. The department of foreign trade also has the authority, as conferred by Articles 16 and 17, to decide on temporary restriction or prohibition on the import and export of goods and technologies in addition to those listed.

Article 19 allows the department to set quotas on imports and exports. As for trade in services, Article 26 (5) provides wide latitude in that the State may restrict or prohibit international trade in services for reasons not explicitly mentioned as long as they have been mandated by relevant laws and administrative regulations.

A possible sword against protectionist behavior may be Articles 32 and 33 of the trade law, which broadly prohibit monopolistic behavior and unfair competition. However, these laws can cut both ways: foreign goods that are cheaper than local goods may be fall under predatory pricing, which is a means of unfair competition. Thus, the rule can be used both for and against protectionism, depending on how it is interpreted by the adjudicatory authority. Article 32 provides that monopolistic behavior which violates the law is not allowed in foreign trade activities while Article 33 stipulates that engaging in unfair competition, collusion, false advertisement and commercial bribery in foreign trade activities can warrant an action by the department to prohibit the dealer from engaging in import and export any longer.

The PRC Law on Import and Export Commodity Inspection, 1989

[68]Available online at http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content_21917089.htm (last visited, 25 November 2013).

This Act[69] was adopted at the Sixth Meeting of the Standing Committee of the Seventh National People's Congress and is effective as of August 1, 1989.

Article 2 of the Act establishes "an Administration for Import and Export Commodity Inspection."

Under Article 6, "Inspection on import and export commodities performed by the commodity inspection authorities shall cover quality, specifications, quantity, weight, packing and the requirements for safety and hygiene."

PRC Law on the Entry and Exit Animal and Plant Quarantine, 1992

This law[70] set up the PRC's Animal and Plant Quarantine Department.[71] Article 5 sets up the restrictions on animal and plant products that may cause health safety concerns; it empowers the State to prohibit the entry of pathogenic micro-organisms of plants and animals, insect pests and other harmful organisms, animal carcasses, soil and other relevant animals, plants and their products from regions with prevalent epidemics animal or plant diseases. See the fourth column of Chinese NTBs in the table above.

Article 10 and the following establish quarantine and inspection procedures. In particular, Article 14 contemplates that ports of entry will often have insufficient resources to quarantine and inspect animals. In such circumstances, the items will be moved to another location for inspection, and the owner will be responsible for protecting against contamination or infestation during transport.

6.2. Chinese Regulations and Policies that enable NTBs

The two main agencies that regulate trade in China are the PRC Administration for Quality Supervision and Quarantine (AQSIQ)[72] and the PRC Certification and Accreditation Administration (CNCA).[73]

Regulations for the Implementation of the Law of the People's Republic of China on the Entry and Exit Animal and Plant Quarantine

This regulation was promulgated by the Premier of the State Council, Li Peng on 2nd December, 1996. This regulation was to prevent the outbreak of an epidemic from any animal related viruses in the country.

Article 4 implements the policy of the Exit and Entry Quarantine Law, supra. It allows the State Council to ban the entry of transportation from the epidemic areas and seal the concerned ports while allowing port animal and plant quarantine organs to take emergent quarantine measures with

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69 Available online at http://www.china.org.cn/english/travel/40407.htm (last visited, 25 November 2013).
70 Available online at http://www.fmprc.gov.cn/eng/wjb/zzjg/jks/jkxw/t208625.htm (last visited, 25 November 2013).
71 *See* id, Article 3.
72 *See* website: http://ip.people.com.cn/BIG5/152255/10960449.html (last visited, 25 November 2013).
73 *See* website: http://www.cnca.gov.cn/cnca/cncatest/20040420/column/227.htm (last visited, 25 November 2013).

regard to the entry of possibly contaminated objects (as listed in Article 2) to prevent the reach and spread of a serious plant or animal epidemic.

This law also requires that the Ministries of Telecommunications and Transportations cooperate with the government in trying to prevent such outbreaks by transmitting reports concerning such outbreaks in a timely and effective manner. Articled 18 to 25 of the regulation require importer's to submit paperwork for quarantine procedures and to assist the quarantine officers in their inspections. Articles 37 to 45 deal with the quarantine of animals and plants that are in transit in China en route to another country. Article 46 and the following address the quarantining of the vessels or vehicles that were used to transport the animals or plants.

Regulation on the Implementation of the Food Safety Law of the PRC

Regulation on the Implementation of the Food Safety Law of the People's Republic of China[74] was adopted at the 73rd State Council executive meeting on July 8, 2009 and also promulgated on the same day. The food safety regulatory mechanism in extremely complex, with nearly a dozen government departments and ministries involved. These include the Ministry of Health, the State Food and Drug Administration, the State Drug Administration, and the Ministry of Agriculture, the State Administration for Industry and Commerce, the General Administration of Quality Supervision, Inspection, and Quarantine, the Ministry of Commerce, the Ministry of Science and Technology, and the National Institute of Nutrition and Food Safety.[75] The regulation requires the government at or above the country level to strengthen the supervisory and administrative capacity of food safety, improve the co-ordination mechanism between food safety supervision and management departments and integrate and improve the food safety information network so as to share food safety information and technical resources.[76]

Article 37 requires food importers to "submit the licensing certification documents . . . to the entry and exit inspection and quarantine bureau, which shall conduct inspection and quarantine[.]"

Article 40 sets labeling requirements in that imported food additives shall contain Chinese labels and specifications which are in accordance with the provisions of the Food Safety Law and explicitly state the place of origin of food additives and the names, addresses and contact information of inbound agents. It further stipulates that food additives without Chinese labels and specifications shall not be imported.

6.3. Other Chinese Laws and Policies that Affect Trade

The current legal and regulatory system prevalent in China can be opaque, inconsistent, and often arbitrary. Implementation of the law is inconsistent and there is a lack of effective protection of

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[74]Available online at http://www.fdi.gov.cn/1800000121_39_4037_0_7.html (last visited, 25 November 2013).
[75]*See* Wikipedia, *Food Safety in China*, available online at http://en.wikipedia.org/wiki/Food_safety_in_China (last visited, 25 November 2013).
[76]*See Regulation on the Implementation of the Food Safety Law of the PRC*, Article 3.

intellectual property rights. All of this creates a lack of predictability in the business environment, making it difficult for foreign goods to effectively participate in the domestic market. A few of these concerns are discussed below:

Intellectual Property Rights

The regulations regarding IPR require that improvements in technology, despite the fact that they been done by a Chinese entity on a foreign license, become Chinese property. There are also export controls on technology in order to safeguard Chinese national and trade interests. Even though there have been changes in Chinese law, companies continue to impose restrictions on technology transfer. Proposed amendments to Chinese law can impact foreign-owned, China-based research and development institutions with regards to their ability to file patents overseas without a foreign filing license.

These factors, in sum, contribute towards an environment wherein the enforcement of IPR is difficult and often discouraging for foreign concerns seeking to penetrate the Chinese market. The lack of clarity on the subject and the ease with which IPR are often violated or 'watered down' disadvantages foreign goods in the domestic market – particularly when such are forced to compete with 'pirated' duplicates being sold at lower prices.

Franchisers also face huge difficulties in China. The two-plus-one requirement is a main feature of these regulations; this requires that franchisors can operate inside China if they own a minimum of two directly-operated outlets in any part of the world. This requirement makes it extremely difficult for a franchisor to find qualified franchisees to license their product.

Government Procurement

Since joining the WTO, China has started negotiations for accession to the WTO's Agreement on Government Procurement [GPA]. The three proposed revisions made by China to the GPA since 2007 have fallen short of expectations of other GPA members. There is a need for marked improvements in the next offer; particularly important is the inclusion of more sub-central governments and state-owned enterprises. This need has been acknowledged by China, as they prepare for amendments to their Government Procurement Law [GPL] and Tendering and Bidding Law [TBL], so as to eliminate vagueness and convergence between the two laws.

In 2011, the Chinese government took a big step when it directed its sub-central governments to stop implementing indigenous innovation preferences. However, implementation of this policy has been irregular.

Import Substitution Policies

1) The Ministry of Industry and Information Technology Equipment Catalogue

China's Ministry of Industry and Information Technology [MIIT], in November 14, 2011, brought forward and opened up for comment a revised draft, '*Guiding Catalogue of Indigenous Innovation in Major*

Technologies and Equipment'. This draft eliminated the specific eligibility criteria, a criteria necessitated by the 2009 *Catalogue Guiding Indigenous Innovation in Major Technology Equipment*. This will make it easier for foreign market actors to break into the local market. The new catalogue does away with the provisions that required for government procurement preferences as well as identify subsidies and other benefits for certain listed products. Despite these improvements do not necessarily mean that Chine's WTO obligations will be met as the new product selection criteria is quite subjective and unclear, and the benefits promised are not specific enough.

2) Automotive Policy

China, via the National Development and Reform Commission [NDRC] issued regulations requiring manufacturers of New Energy Vehicles [NEVs] in China to "demonstrate mastery" over, and hold intellectual property rights in, core NEV technologies. Furthermore, foreign automobile manufacturers are only allowed to operate in China by virtue of joint ventures with Chinese enterprises.

China has made a concerted effort to encourage the proliferation of Chinese NEV component industry at the direct expense of foreign counterparts. The NDRC issued a draft *Catalogue Guiding Foreign Investment in Industry* [*"Foreign Investment Catalogue"*][77] in 2011; this proposed a new limitation that put a limit on the maximum ownership in NEV battery manufacturing facilities in China at 50 percent; a serious cause for concern as batteries are a critical component in most NEVs. Questions have also been raised whether around national treatment, i.e. if the new consumer subsidies and other incentive programs would be made available to both domestic and imported NEVs.

3) Steel

China's 2005 *Steel and Iron Industry Development Policy* [Steel Policy][78] stipulates that foreign enterprises investing in the local iron and steel industry should have proprietary technology or intellectual property in the processing of steel. This requirement raises cause for concern because of the fact that foreign investors cannot hold a controlling share in Chinese steel and iron enterprises, operating as a *de facto* technology transfer requirement. The Policy encourages the use of local content by calling for a variety of government financial supports for steel and iron projects using newly developed domestic equipment, and requires that domestically produced steel manufacturing equipment and domestic technologies be used whenever domestic suppliers are available – calling into question China's ability to fulfill its commitments under its Protocol of Accession to the WTO which prohibit importation to be contingent on the existence of domestic suppliers.

4) Fertilizer

[77] Available online at http://english.mofcom.gov.cn/article/policyrelease/aaa/201203/20120308027837.shtml (last visited, 25 November 2013).

[78] Available online at http://www.asianlii.org/cn/legis/cen/laws/pfdoiasi501/ (last visited, 25 November 2013).

At present China exempts all phosphate fertilizers except di-ammonium phosphate [DAP] from value-added tax [VAT]. DAP is produced by the United States and is exported to China; it competes directly with phosphate fertilizers produced in China, particularly mono-ammonium phosphate..

5) Telecommunications

There is evidence of practices to discourage the usage of imported components or equipment through MIIT adopting policies. For example, the MIIT reportedly maintains the 1988 internal circular that encourages telecommunications companies to buy domestically supplied components and equipment.

6) Semiconductors

The Twelfth Five-Year Plan focuses on research and development in the Chinese semiconductor industry, a contrast to the previous five-year plans which focused on production capacity. However despite this governmental intervention in the sector, it lacks substantial innovation in order to be competitive. There is continuous oversight from the United States over the subsidies made available by the Chinese government to the domestic integrated circuit producers and whether it follows the provisions laid down in the WTO Subsidies Agreement. Furthermore the export of counterfeit semiconductor products from China has undermined the sales of legitimate semiconductor products.

7) Remanufacturing

China imposes a prohibition the import of remanufactured products, which are classified as used goods. There is also a general import prohibition that stops the importation of remanufacturing process inputs [cores] into China's customs territory, except for the special economic zones.

Other Barriers

In order to conduct business in China, a company's representative must be registered as a Representative Office [RO] even to acquire a multiple entry visa or rent an apartment or to use business cards that identify the company's presence in China. The legal process required to register one's company representative is also an arduous task. Not made easy by the fact that only those attorneys licensed in China can appear in domestic courts and act as legal counselors on matters of Chinese law. Also while Chinese lawyers are not prohibited from working foreign law firms, they cannot practice law there in the capacity of licensed Chinese attorneys. These restrictions constrain the ability of foreign concerns to penetrate the market as effectively as their Chinese counterparts.

Foreign exporters hoping to successfully enter China must gain both trading and distribution rights. While Chinese law does allow foreign companies to set up completely owned distribution entities in the case of certain products – including chemical fertilizers, processed oil, and crude oil – limitations do exist for other products, such as books and periodicals, pharmaceutical products, and pesticides.

This makes it difficult for goods produced by foreign enterprises to successfully compete with domestically-produced substitutes.

Even though the complete ban on foreign invested firms to import, export and distribute goods in China has been relaxed, the licensing process remains extremely difficult, time consuming, and highly opaque. Business licenses and distribution rights are difficult to obtain. These requirements have the practical effect of imposing further bureaucratic hurdles for foreign companies.

As part of its WTO commitments, China has agreed to allow market access for "wholesale or retail trade services away from a fixed location." However, even these new regulations provide limited relief for foreign investors as multi-level marketing organizations are still characterized as illegal pyramids, compensation is limited to 30 percent and made subject to personal sales, and there is a requirement for the construction of fixed location "service centers" in the area where sales occur.

Marketing in China is also regulated by the Advertising Law of the People's Republic of China [Advertising Law][79], passed in 1994. The government enjoys excessive control over the Chinese advertising industry, as the regulators have the final say in matters of content. There is a fair amount of ambiguity in Advertising Law, leaving room for a fair amount of interpretation and arbitrary implementation. The aim of these laws is to promote consumer protection as opposed to business promotion. Furthermore, businesses have no right to advertise in China if they do not possess a business license gained through establishing an office in China.

The three-year foreign experience rule acts as significant barrier to obtaining a direct sales license from the government. Furthermore the requirement for a RMB 20-100 million bond deposit is also a major obstacle. The Chinese Government, in the last few years, has been particularly lethargic in its approval of direct-sales license applications for new entrants.

7. Major Imports of Sri Lanka

Sri Lanka's main imports are very similar to Pakistan's. The imports are concentrated in the agriculture and foods sectors, aside from the usual emphasis on fossil fuels. However, among the top imports, there are several entries for motor vehicles of different engine capacities. This may be because Sri Lanka's smaller population has lower demands for subsistence items than Pakistan's population.

Table 7. Major Imports of Sri Lanka, 2010

Product Description	Value (USD Billion)	Top 3 leading exporters (USD million)
Petroleum oils & oils obtained from bituminous minerals, o/than crude etc	1.12	Singapore
		India
		United Arab Emirates
Petroleum oils and oils obtained from bituminous minerals, crude	0.75	Iran (Islamic Republic of)
		Saudi Arabia

[79]Available online at http://www.novexcn.com/advert_law_95.html (last visited, 25 November 2013).

Product Description	Value (USD Billion)	Top 3 leading exporters (USD million)
		India
Refined sugar, in solid form, nes	0.34	Netherlands
		Brazil
		Singapore
Wheat nes and meslin	0.24	Canada
		Australia
		Singapore
Milk and cream powder unsweetened exceeding 1.5% fat	0.23	Singapore
		New Zealand
		Australia
Non-industrial diamonds unworked or simply sawn, cleaved or bruted (excl. industrial diamonds)	0.22	Belgium
		Israel
		United Arab Emirates
Motor cars and other motor vehicles principally designed for the transport of persons, incl. station wagons and racing cars, with spark-ignition internal combustion reciprocating piston engine of a cylinder capacity <= 1.000 cm³ (excl. vehicles for the transport of persons on snow and other specially designed vehicles of subheading 8703.10)	0.20	**India**
		Japan
		Malaysia
Knitted or crocheted fabrics, of other materials, nes	0.16	**Hong Kong, China**
		China
		Taipei, Chinese
Motor cars and other motor vehicles principally designed for the transport of persons, incl. station wagons and racing cars, with spark-ignition internal combustion reciprocating piston engine of a cylinder capacity > 1.000 cm³ but <= 1.500 cm³ (excl. vehicles for the transport of persons on snow and other specially designed vehicles of subheading 8703.10)	0.15	Japan
		Singapore
		India
Medicaments nes, in dosage	0.15	**India**
		Pakistan
		Switzerland
Motorcycles, incl. mopeds, with reciprocating internal combustion piston engine of a cylinder capacity > 50 cm2 but <= 250 cm2	0.14	**India**
		Japan
		China
Knitted or crocheted fabrics, of cotton, nes	0.14	**Hong Kong, China**
		China
		India
Portland cement nes	0.13	**India**
		Pakistan
		Singapore
Lentils dried, shelled, whether or not skinned or split	0.13	Australia
		Canada
		Singapore
Petroleum gases and other gaseous hydrocarbons nes, liquefied	0.128	Oman
		Singapore
		United Arab Emirates
Urea,whether/not in aqueous solution in packages weighing more than 10 kg	0.123	Singapore
		Qatar
		Switzerland
Motor vehicles for the transport of goods, with compression-ignition internal combustion piston engines of a gross vehicle weight <= 5 tonnes (excl. dumpers for off-highway use of subheading 8704,10 and special purpose motor vehicles of	0.116	**India**
		Thailand
		Japan

Product Description	Value (USD Billion)	Top 3 leading exporters (USD million)
heading 8705)		
Woven fabrics of cotton,>/=85%, more than 200 g/m2, dyed, nes	0.109	**India**
		Pakistan
		Hong Kong, China

Source: International Trade Centre's Market Access Map (Macmap)

Sri Lanka's major imports from India include petroleum, medicaments, knitted or crocheted fabrics (of cotton) and cement. Motor vehicles and motorcycles (including station wagons and racing cars) were imported in significant volumes in 2010.

Among Sri Lanka's major imports from China are cotton knitted, crocheted and woven fabrics, as well as petroleum and motorcycles.

From Pakistan, Sri Lanka's major imports are medicaments, petroleum, cotton woven fabrics, rice and fresh produce such as onions, shallots, capsicums and potatoes.

Sri Lanka has a deficit of USD 3,657.9 Million against India as of 2012.[80] It also faces a deficit in trade with Pakistan as of 2011 (USD 280.67 Million),[81] and in trade with China as of 2013 (USD 2459.90 Million).[82] Thus, it is the only economy in our study that faces trade deficits with all the other countries studied. Theoretically, this could give Sri Lankan businesses relatively stronger incentives to seek government protection through NTBs. A survey of the measures used does suggest that Sri Lanka's NTB regime is considerably more sophisticated than Pakistan's.

8. Non-tariff Barriers in Sri Lanka

Table 8. Non-Tariff Barriers in Sri Lanka

\ Products Laws \	Food packing	Dangerous drugs	radio-active sub-stances	Bromo- and choloro-flourocarbons	Food	Vehicle	Food preserv-atives	Milk and Prdcts	anti oxidant	Elctronic	Total
Food (Packaging materials and articles) Regulation 2010	6,897	0	0	0	0	0	0	0	0	0	**6,897**
Import and Export (control) Regulations No. 1 of 2008	0	0	0	4,598	0	0	0	0	0	0	**4,598**
Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984	0	4,598	0	0	0	0	0	0	0	0	**4,598**
Regulations on ionizing	0	0	4,598	0	0	0	0	0	0	0	**4,598**

[80] http://www.theguardian.com/news/datablog/2013/feb/22/cameron-india-trade-exports-imports-partners#data
[81] *See Trade with Countries* http://fpcci.org.pk/
[82] http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=88922 See also for 2010 figures http://english.mofcom.gov.cn/article/statistic/lanmubb/ASEAN/201102/20110207401409.shtml

\ Products Laws \	Food packing	Dangerous drugs	radio-active sub-stances	Bromo- and choloro-flourocarbons	Food	Vehicle	Food preserv-atives	Milk and Prdcts	anti oxidant	Elctronic	Total
radiation protection of the atomic energy safety regulations No. 1 of 1999											
Food (Irradiation) Regulations 2005	0	0	0	0	772	0	0	0	0	0	**772**
Food (Preservations) Regulations	0	0	0	0	193	0	579	0	0	0	**772**
Food (Sweeteners) Regulation 2003	0	0	0	0	386	0	0	0	0	0	**386**
Food (Antioxidants) Regulations 2009	0	0	0	0	0	0	0	0	386	0	**386**
Food (Control of import, labeling, and sale of genetically modified foods) Regulation 2006	0	0	0	0	386	0	0	0	0	0	**386**
Food (Melamine in Milk and Milk Products) Regulations 2010	0	0	0	0	0	0	0	386	0	0	**386**
Direction under Section 10 (1) - Direction No. 5	0	0	0	0	0	0	0	0	0	380	**380**
Sri Lanka Telecommunications Act No. 25 of 1991	0	0	0	0	0	0	0	0	0	380	**380**
Amendment to the National Environmental (Air Emission, Fuel and Vehicle Importation Standards) Regulations, No. 1 of 2003	0	0	0	0	0	241	0	0	0	0	**241**
National Environmental (Air, Fuel and Vehicle Importation Standards) Regulation No. 1 of 2003	0	0	0	0	0	241	0	0	0	0	**241**
Amendment to Food (Coloring Substances) Regulations 2006	0	0	0	0	193	0	0	0	0	0	**193**
Food (Coloring Substances) Regulations 2006	0	0	0	0	193	0	0	0	0	0	**193**
Food (Shelf Life of Imported Food Items) Regulation 2011	0	0	0	0	193	0	0	0	0	0	**193**
Imports and Exports (Control) Regulations	0	0	0	0	0	149	0	0	0	0	**149**

\ Products Laws \	Food packing	Dangerous drugs	radio-active sub-stances	Bromo-and choloro-flourocarbons	Food	Vehicle	Food preserv-atives	Milk and Prdcts	anti oxidant	Elctronic	Total
No. 1 of 2006											
Sum	**6,897**	**4,598**	**4,598**	**4,598**	**2,316**	**631**	**579**	**386**	**386**	**760**	**25,749**

8.1. Socialist Constitutional Commitments

Article 27 of the Constitution of Sri Lanka contains much of the economic policy of the State. The constitutional mandate to control the economy is a broad one. For Example, Article 27(2) commits to rapid development through public and private economic activity, equitable distribution of material resources to serve the common good and establishment of a just social order where the means of production, distribution and exchange are dispersed among and owned by all the people of the country. Article 27 further allows for the passage of any laws necessary for directing and coordinating the requisite public and private activity.

However, these redistribution-centered commitments of the historically socially state are tempered by a commitment to the international economic order in Article 27(15) which entrusts the State with the responsibility to promote international peace, security and co-operation, to aid in the establishment of an equitable international economic and social order and to foster respect for international law and treaty obligations in their dealings with other nations.

8.2. Statutory Authority

Imports and Exports (Control) Act, 1969

Article 4 of this Act[83] establishes that "no person shall import into, or export from, Sri Lanka any goods except under the authority, or otherwise than in accordance with the conditions, of a license issued in that behalf under this Act by the Controller." The Controller of Imports and Exports is an official appointed under the Act.

Thus, all importers will require a license to bring items into the country. The power of the Controller to issue or deny these licenses is extraordinary. Article 7 explains that the controller has full power to issue or refuse a license; he may issue a license subject to any conditions he deems necessary and his decision in either case is final and may not be contested in any court or tribunal.

Finally, Article 14, in similarly broad language, gives the Minister of Trade the power to ban imports and exports from the country. The minister has the authority to prohibit or regulate the import and export of goods from any specified country or by any person, apart from the Government of Sri Lanka.

Flora and Fauna Protection Ordinance, 1938

[83] Available online at: http://www.customs.gov.lk/docs/25298.pdf (last visited, 25 November 2013).

Article 37 of this Act[84] creates a permit system for the import of live animals. Subsection 1 of Article 37 stipulates that no living birds, beasts, or reptiles of species not indigenous to Sri Lanka, or the eggs of any such bird or reptile may be imported into Sri Lanka in the absence of the prescribed permit.

The Sri Lanka Plant Protection Act, 1999

This statute[85] allows the minister to control the import of plants and to carry out inspection on plant-based imports. The key section is Article 12 (2)which allows the relevant minister to make regulations preventing the import, entry and landing of any plants, plants products and organisms, either absolutely or conditionally. The same article empowers the minister to allow for import of organisms only under special license and conditions, to order quarantine of plants, plant products and organisms imported or to be imported, to determine the conditions of such quarantine and the fees to be charged therefore and to inspect or test plants, plant products and organisms at, before, or after, the time of landing. The minster may also order for testing, cleaning, fumigating, disinfecting, destroying at, before, or after, landing and without compensation, all plants, plant products and organisms, or the packages, cases, pots, or coverings in which they may be packed, which are found to be infected with any pest/s.

These provisions are quite similar to the plant protection provisions that we have noted in India and Pakistan.

Other Statutes

Miscellaneous Acts that contain prohibitions or restrictions on particular kinds of imports include the Poisons, Opium, and Dangerous Drugs Ordinance[86], the Fisheries and Aquatic Resources Act[87], the Agricultural Products Ordinance[88], and the Food Act.[89]

8.3. Sri Lankan Policies and Regulations that Affect Trade

Following the end of the country's decades-long civil war, Sri Lankan government is striving to transform the nation into an economic powerhouse. With a relatively open investment climate and financial system, moderately stable monetary policy, improving infrastructure, and highly competitive local companies, the Sri Lankan economy provides in many ways an attractive market within which foreign concerns can sell their goods. However, non-tariff barriers to trade persist which include high transactions costs related to an unpredictable economic policy environment;

[84]Available online at http://faolex.fao.org/docs/pdf/srl22041.pdf (last visited, 25 November 2013).
[85]Available online at http://www.customs.gov.lk/docs/25279.pdf (last visited, 25 November 2013).
[86]Available online at http://www.customs.gov.lk/docs/25345.pdf (last visited, 25 November 2013).
[87]Available online at http://www.customs.gov.lk/docs/25295.pdf (last visited, 25 November 2013).
[88]Available online at http://www.customs.gov.lk/docs/25359.pdf (last visited, 25 November 2013).
[89]Available online at http://srilankalaw.lk/revised-statutes/volume-iii/448.html (last visited, 25 November 2013).

bureaucratic inefficiency and opaque government procurement practices. These issues, and others, operate to hinder market penetration of foreign goods in the Sri Lankan market[90]

Import Policies

Despite efforts to open the economy to foreign trade and investment, the pace of reform in Sri Lanka has been uneven. In 2011, Sri Lanka faced a large current account and balance of payments (BOP) deficit due to increased imports, including rising petroleum imports. The government has enacted several policy measures to curtail the growth of imports. For instance, in early 2012 the government moved to a more flexible exchange rate policy by depreciating its currency. There has been an increase in tariffs on motor vehicles as to discourage imports.

Non-tariff charges on imports

An Export Development Board (EDB) levy, often referred to as a "cess", ranging from 10 percent to 35 percent *ad valorem* on a range of imports identified as "nonessential." Most items on the list are subject to specific duties. The EDB levy is calculated in such a way so as to impose an imputed profit margin of 10 percent which is added onto the import price. This levy is sometimes not charged on the import price but rather on 65 percent of the maximum retail price. This levy is not applicable to locally manufactured products. This levy is continuously increased by the government, in November 2012 the EDB was increased on dairy products, meat, fruits, vegetables and confectionary.

While local goods are not subject to the Ports and Airports Development Levy of 5 percent, it is applicable on imports.

While locally manufactured goods are subjected to the Value Added Tax (VAT), imported goods are liable for an additional imputed profit margin of 10 percent. Both locally manufactured and imported goods are subject to excise fees, an imputed profit margin of 15 percent is added on to the import price.

A Special Commodity Levy (SCL) is charged on some food items from November 21, 2011. The items subject to the SCL are exempted from all other taxes.

In November 2011, the government introduced an all-inclusive tax on imported textiles not intended for use by the apparel export industry. This all-inclusive tax was increased in November 2012.

Import Licenses

The Sri Lankan government imposes an import license for over 400 items at the 6-digit level of the Harmonized Tariff System, for health, environment, and national security reasons. Importers are

[90] U.S.Department of State. 2013. *2013 Investment Climate Statement - Sri Lanka.* [online] Available at: http://www.state.gov/e/eb/rls/othr/ics/2013/204735.htm.

required to pay a fee equal to 0.222 percent of the import price with a minimum fee of Rs 1,000 to receive an import license.

Intellectual Property Rights Protection

Despite improvements in the enforcement of intellectual property rights (IPR), piracy of sound recordings and software in Sri Lanka remains quite high. As per an industry-commissioned study, the rate of software piracy in Sri Lanka was 84 percent in 2011 compared to 86 percent in 2010, 89 percent in 2009 and 90 percent in 2008. These statistics are somewhat misleading if you consider that the commercial value of pirated software rose to $86 million in 2011 from $83 million in 2010 due to increased personal computer sales. Nevertheless, the corporate sector has improved in its use of legal software. In 2010, the Government of Sri Lanka published a policy requiring all government ministries and departments to use licensed software, leading to greater compliance by government agencies.

Relief through litigation is time-consuming and unsatisfactory. The policy also falls short, despite the fact that it can initiate action against offenders without any complaint, but they rarely act of their own. Nevertheless, some success has been experienced in the apparel, software, tobacco and electronics sectors industries.[91]

Other Barriers

Foreign firms identify public sector corruption as a major barrier for investment in Sri Lanka, especially when it comes to large projects with respect to government procurement. It seems that lack of anti-corruption laws is not the problem; it lies in the lack of enforcement..

- Sri Lanka's overstaffed, inefficient bureaucracy and its unaccountable ministerial leadership are responsible for opaque tender procedures, corruption, slow decision-making, and government failure to honor commitments. A national procurement agency aimed at improving government tendering was disbanded in 2008, further aggravating the situation. In 2011, the government appointed a cabinet committee to consider strategic investments, and large strategic investments can be directly reviewed by the cabinet committee

- Certain governmental policies express a bias in favor of local investors.

- Profitable sectors are taxed heavily, a major disadvantage to companies not entitled to special incentives. Taxes were reduced in the 2011 budget, however.

- Importers to Sri Lanka face high import duties and other taxes. A variety of taxes have effectively increased Sri Lanka's tax rates on a range of imported items to between 60 and 100 percent of the cost, insurance, and freight (CIF) value of the product.

[91] *See generally*, Chamila S. Talagala, *Enforcement of Intellectual Property Rights in Sri Lanka: Some Issues*, available online at http://www.academia.edu/1881051/ENFORCEMENT_OF_INTELLECTUAL_PROPERTY_RIGHTS_IN_SRI_LANKA_SOME_ISSUES

- Narrow, crowded, deteriorating roads slow the movement of goods, although the government is building new road infrastructure. Unreliable power supply, particularly outside the capital, forces manufacturers and service providers to install on-site generators. Electricity costs are priced higher than in other Asian countries. Qualified workers are in short supply as the education system produces too few engineers, technicians, scientists, and English speakers.
- Rigid labor laws, including exceptionally high severance pay regulations, along with most unions' resistance to improving productivity, make it difficult to adjust staff size and composition to market conditions.
- Piracy is a problem for foreign rights-holders in music, film, software, and some consumer products.
- Agricultural imports face stiff health requirements that sometimes exceed global standards. Genetically-modified (GM) regulations restrict imports of foreign food and agricultural products.
- At present there is a lack of anti-competition laws operating within the domestic legal system.
- The government took over 37 "underperforming" companies in 2011. These were local companies, and most were defunct, but several were operating businesses.

Import Prohibition

Sri Lanka prohibits the importation of chicken meat in order to protect the market for local chicken producers. Sri Lankan officials have privately agreed that protection of domestic industry is the reason for this barrier. GM regulations restrict entry of genetically-modified products and excessive health requirements for agricultural products also curtail imports of foreign products.

Chapter 3: International Economic and Legal Regimes

1. The General Agreement on Tariffs and Trade

The international trade law regime is regulated by a series of agreements, the most significant of which is the General Agreement on Tariffs and Trade (GATT), which instituted the World Trade Organization (WTO) in 1995[92], an international body focusing on international trade and its regulation.[93]

Article 1 of the GATT requires countries to give all imports equal market access. Article 3 requires parties to treat imports and domestic products similarly in local markets. Article V guarantees the free transit of goods through a country between two trading partners. Articles 7 and 8 ensure fair customs valuations and procedures. Article 10 requires parties to publish their trade regulations in an easily accessible and transparent format. Article 11 requires parties to move away from quantitative restrictions to a system of tariffs so that trade restrictions can be better monitored and quantified. The main principles of the GATT and several provisions that allow deviations from the general GATT regime are discussed later on.

1.1. Article 36 and the Developing World

Article 36 recognizes that developing countries may require some concessions that developed countries do not qualify for. Article 36(1) contains an extensive recitation of reasons to help developing countries obtain higher trade levels. Form a legal perspective, the most promising part of this Article is 36(8), whereby "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." This means that developing countries will not be assumed to have given developed trading partners the same concessions that they have received.

Further exemptions for developing countries, in the context of Article 18, are discussed in a subsection below.

2. The General Agreement on Trade in Services

This agreement, otherwise known as the GATS[94], extends free trade principles from trade in goods to trade in services. Articles 1(3)(b) and 1(3)(c) explain that the agreement applies to all trade in

[92]The World Trade Organization.*WTO | Understanding the WTO - What is the World Trade Organization?.*[online] Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm.
[93]The World Trade Organization.n.d.*WTO | Understanding the WTO - Principles of the Trading System.* [online] Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.
[94]Available online at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (last visited, 25 November 2013).

services except trade in government services, or "services in the exercise of government authority," which are defined as services that are provided on a non-commercial basis and in an uncompetitive context.

Article 2 requires each party to award MFN status to foreign services providers. As explained earlier, this means that services providers from a foreign country are to be treated as favorably as the most favored foreign service-providers. Article 3 requires countries to publish all measures that may adversely affect free trade in services. Article 13 carves out an exemption from the MFN principle for government procurement, that is, for "procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale." Article 20 requires each Member to publish a schedule of its specific commitments under the GATS, and Article 17 requires each Member to afford National Treatment to the services specified in its schedule, unless the schedule specifies different treatment.

3. The Agreement on Sanitary and Phytosanitary Measures

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)[95] provides the basic framework within which States set their standards for human, animal, and plant health. Sanitary and phytosanitary measures are steps to reduce health risks arising out of imported goods. These risks could include the introduction into the domestic environment of a pest or disease, or health concerns arising out of the presence of a particular substance in the imported good.[96] However, such measures can also constitute an effective means of protectionism – placing excessive restrictions on imports disadvantages them in the domestic market, effecting a protectionist regime for domestic goods. The Agreement defines sanitary and phytosanitary measures as:

all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.

Under the SPS Agreement, these measures must be based on scientific data and should be applied only to the extent necessary to protect human, animal or plant life or health; they must not unjustifiably discriminate between States where similar environmental conditions exist. However, Article 10 contains limited exemptions for the special needs of developing and least-developed countries by allowing for longer time frames for compliance in cases of phased introduction of new

[95]Available online at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (last visited, 25 November 2013).

[96] 19 USCS § 2575b (7), [Title 19. Customs Duties; Chapter 13. Trade Agreements Act Of 1979; Technical Barriers To Trade (Standards); Standards And Measures Under The North American Free Trade Agreement; Standards And Sanitary And Phytosanitary Measures].

sanitary and phytosanitary measures to preserve their opportunities for export. In addition, article 10(3) also allows for the grant of specified time limited exceptions, in whole or in part, from obligations under the agreement upon request.

4. The Agreement on Technical Barriers to Trade

The Agreement on Technical Barriers to Trade (TBT Agreement)[97] governs technical regulations and standards. The Agreement defines a technical regulation as a "Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory."[98] In contrast, it defines a standard as a document which "provides, for common and repeated use, rules, guidelines or characteristics for products or related processes . . . with which compliance is not mandatory."[99] Thus, the host government requires mandatory compliance with technical regulations, but not with technical standards. Both regulations and standards apply to "terminology, symbols, packaging, marking or labelling requirements [.]"[100]

Article 2 is the crux of the Agreement. It requires States to ensure that technical regulations or standards "are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective."[101]

Article 2 proceeds to mention some legitimate grounds for technical barriers, such as national security and the prevention of deceptive trade practices. It then commits each party to adopt international standards to harmonize technical requirements across borders.

Article 12 of the Agreement carves out some limited exemptions for developing countries. These are relevant to Pakistan, India, and Sri Lanka. In particular, Article 12(4) notes that developing country members who adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods should not be expected to use international standards, as a basis for their technical regulations or standards, which are not compatible with their development, financial and trade needs.

Miscellaneous agreements, such as the Agreement on Agriculture, are discussed in the relevant sections below. Since several treaties regulate trade, the best way to understand the international trade law regime is conceptual. Next, we consider the two main principles that animate international trade law.

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97 Available online at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (last visited, 25 November 2013).

98 Id at Annex 1 section 1.

99 Id at Annex 1 section 2.

100 Id.

101 Article 2.2, id.

5. Foundational Principles: Most Favored Nation and National Treatment

The international trade law framework is based upon two core principles: the Most Favored Nation Principle and the National Treatment Principle. Economically, these two principles have slightly different affects. The former ensures that all importers are treated equally while the latter ensures that imported goods are treated similarly to local goods. We will consider each principle in turn.

5.1. The Most Favored Nation Principle

The first, the principle of 'Most Favored Nation' status, is predicated upon the notion of equality between the members of the WTO. Under this notion, countries cannot normally discriminate among their trading partners. If a WTO member State were to grant one of its trading partners a particular benefit – such as a lower customs duty rate for one of its exports – the State would also have to extend the same benefit to all other members of the WTO. The principle of MFN status finds expression in article 1 of the GATT, as well as in article 2 of the General Agreement on Trade in Services (GATS) and article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), two more of the foundational agreements informing international trade law.[102] For Example, Article 1 of GATT requires that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

While its phrasing suggests a discriminatory approach, the MFN principle actually encourages the equal treatment of goods from all trading partners. Exceptions to the MFN regime do exist, such as free trade agreements which apply only to goods traded within a group of States, special access to markets granted to developing States or barriers against products considered to be unfairly traded by specific States. However, these exceptions are narrowly construed and permitted only under specific instances. The overarching regime, therefore, is informed by the notion of equal treatment to all like products, regardless of their State of origin.

5.2. The National Treatment Principle

The second foundational principle of contemporary international trade law is that of 'National Treatment.' According to this notion, locally produced and imported goods, services and intellectual properties must be treated equally within the domestic market. Again, this concept is predicated upon notions of equality and nondiscriminatory treatment of like goods or services. This principle, however, only applies to goods once they have entered the domestic market; therefore, for example, levying a customs duty on a particular good would not constitute a violation of this principle even if a similar tax were not imposed upon like goods, services or intellectual properties in the domestic context. By way of contrast, imposing a domestic consumption tax on imported goods once the goods had entered the domestic market – and not imposing a similar tax on domestically-produced

[102]The World Trade Organization.n.d.*WTO | Understanding the WTO - Principles of the Trading System.* [online] Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

substitutes – would constitute a violation of the National Treatment principle[103]. The notion of national treatment finds expression in article 3 of the GATT, article 17 of the GATS and article 3 of the TRIPS.[104] For example, Article 3(4) of the GATT states: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

6. Exceptions to Free Trade Principles under International Law

The international legal regime on trade under the GATT (1994)[105] and its associated legal texts allows for NTBs under particular circumstances. The GATT itself allows for the imposition of certain NTMs under particular circumstances which operate to restrict imports. These measures include anti-dumping measures, countervailing duties, emergency protections for domestic industries and protective measures for the protection and promotion of economic development in a developing State.

Instances which allow for the imposition of restrictions on imports by the importing State include:

6.1. Antidumping Measures:

Under the GATT, Importing States are allowed to impose restrictions on goods which have been 'dumped' – i.e. which have been exported by an exporting State – at prices lower than in the exporting State's domestic market, provided that such 'dumping' causes "material injury" to the competing domestic industry in the importing State[106]. These goods are often excess produce which is exported to external markets at lower-than-domestic prices and article 6 of the GATT (relevant portions reproduced below) discusses anti-dumping measures allowable under the GATT regime:

In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product

In Pakistan, the National Tariff Commission (NTC) has initiated several anti-dumping investigations.[107] For example, Chinese exporters have been investigated for dumping tiles, polyester

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[103]Ministry of Trade, Economics and Industry - Japan. *Part II WTO Rules and Major Cases - Chapter 2: National Treatment Principle.* [online] Available at: http://www.meti.go.jp/english/report/downloadfiles/gCT0002e.pdf.

[104]The World Trade Organization.n.d.*WTO | Understanding the WTO - Principles of the Trading System.* [online] Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

[105]*General Agreement on Tariffs and Trade*, WTO, http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf

[106]The World Trade Organization.n.d.*WTO | Understanding the WTO - Anti-dumping, subsidies, safeguards:contingencies, etc.* [online] Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.

[107]*See* National Tariff Commission, *Trade Defense Laws for Safeguarding Interests of Domestic Industry*, available online at http://www.towelassociation.com/Circulars2013/Trade%20Defense%20Laws%20for%20Safeguarding%20Domestic%20Industry.pdf (last visited, 25 November 2013).

staple fiber, and paper; Indian exporters have been investigated for dumping Phthalic Anhydride, which is a chemical used in the production of plastics.[108]

6.2. Countervailing Duties:

Similar to antidumping measures, countervailing duties are duties imposed by the importing State on goods produced by industries subsidized by the exporting State. As per the Agreement on Subsidies and Countervailing Measures (SCM), following a determination that the subsidies extended by the exporting State to the goods being exported materially advantage those goods over those produced domestically in the importing market, a State is allowed to impose a duty to offset the effect of the subsidy[109] Similarly, article 6 of the GATT defines the term "countervailing duty" as:

a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

6.3. Safeguard Measures:

These are temporary measures initiated in order to protect the importing market from a dramatic increase in imports if such an increase injures or threatens to injure it. Such an increase can be in the form of an absolute increase the amount of imports or a relative increase vis-à-vis the imported goods' market share[110]. Emergency measures – 'safeguard measures' in the parlance of the WTO legal texts – implemented by a State to protect domestic industry are covered in article 19 of the GATT, which enables an importing State to restrict imports in the event of unforeseen developments such that imports would cause or threaten serious injury to domestic producers of like or directly competitive products.

A definition of the term "serious injury" has not been provided in the GATT; instead, the term finds definition in the Agreement on Safeguards [SG], which sets out forth the rules for the application of safeguard measures pursuant to article 19 of the GATT[111]. Article 4(a) of the SG defines "serious injury" to a domestic economy as:

[A] significant overall impairment in the position of a domestic industry

6.4. Allowances for Developing States:

The GATT – recognizing their economic realities – makes allowances for developing States in article 18 to:

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[108] *See* id.
[109] The World Trade Organization.n.d.*WTO | Understanding the WTO - Anti-dumping, subsidies, safeguards:contingencies, etc.* [online] Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.
[110] The World Trade Organization.n.d.*WTO | Understanding the WTO - Anti-dumping, subsidies, safeguards:contingencies, etc.* [online] Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.
[111] The World Trade Organization.n.d.*WTO | Trade topics - The Agreement on Safeguards.* [online] Available at: http://www.wto.org/english/tratop_e/safeg_e/safeint.htm.

Implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports

For example, a developing State with a struggling local industry may institute trade barriers restricting imports of goods produced by those industries, thus reducing the competition such industries face. Examples of such protectionism include 'buy domestic' policies instituted in China, which prioritize domestic products in the local market over imported goods; import restrictions including quotas, such as those instituted in the Indian and Pakistani textile industries; and the outright prohibition on the importation of chicken meat in order to protect the domestic poultry market in Sri Lanka.

6.5. The Protection of Life and National Security:

The Agreement on Technical Barriers to Trade (TBT), recognizes the right of States party to the agreement to take certain trade-related measures which would, in effect, constitute NTBs[112]. These measures are justified by the State's responsibility to ensure:

[The] *quality of its exports… the protection of human, animal or plant life or health, of the environment…* [and] *the prevention of deceptive practices*

Similarly, article 20 of the GATT provides for general exceptions, enabling member States to institute measures which might restrict trade as long as they are not applied in an arbitrary or unjustifiable manner to discriminate between countries where the same conditions prevail or effect a disguised restriction on international trade. Article 20 allows member states to institute measures necessary to protect public morals, human, animal or plant life or health, national treasures of artistic, historic or archaeological value, secure compliance with laws or regulations (otherwise consistent with the provisions of the GATT), conserve exhaustible natural resources (provided such measures are made effective in conjunction with restrictions on domestic production or consumption), deal with products of prison labor and import or export of gold or silver and ensure *acquisition or distribution of products in general or local short supply.*

6.6. Limitations on Exemptions from Free Trade

These provisions are, however, subject to the overarching obligation upon States to refrain from engaging in unfair means of protectionism vis-à-vis the domestic market.

To cite an example of such provisions in practice, in the *European Communities — Measures Concerning Meat and Meat Products (Hormones)* case before the WTO's Dispute Settlement Body [DSB], the US and Canada contested restrictions placed by the European Communities – a group of international organizations which was later subsumed within the European Union – upon the importation of

[112] *Agreement on Technical Barriers to Trade*, WTO, Tokyo Round of GATT trade negotiations, http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf

livestock and meat from livestock which had been subjected to hormonal treatments[113]. Though the origins of the dispute predate the formation of the WTO the matter was brought to the DSB for resolution in 1996, and at that forum the restrictions were justified under the provisions of article 20 of the GATT.

The underlying reasoning in this provision of the GATT, therefore, is that – within the rubric of the WTO legal regime – a State is allowed to impose restrictions upon certain imported goods in order to protect "human, animal or plant life or health" within the importing State. This right is paralleled by the duty imposed by the perambulatory text of the TBT quoted above, which obliges the exporting State to maintain adequate standards of quality for the goods exported.

The TBT continues in this vein, recognizing that:

[No] *country should be prevented from taking measures necessary for the protection of its essential security interest…*

To cite an example, the US imposes export restrictions on the exportation of oil extracted within its territory; this is in line with its domestic policies of conserving the domestic oil reserves and – more pertinently – to discourage excessive reliance upon imports[114].

This recognition of a State's ability to affect trade in order to secure its domestic interests is not a blanket condonation of NTBs but is instead subject to the requirement that it is not exercised in a manner which would result in an arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

One of the most significant international cases involving this principle was that of *United States — Import Prohibition of Certain Shrimp and Shrimp Products* – more commonly referred to as the 'Shrimp-Turtle' case[115]. In this case an environmental measure – the use of 'turtle excluder devices [TEDs] – did not constitute a "disguised restriction on international trade" as it was found that the protective application of a measure could most often be discerned from its "design, architecture and revealing structure". The fact that the revised measure allowed exporting countries to apply programmes not based on the mandatory use of TEDs, and offered technical assistance to develop the use of TEDs in third countries, showed that the measure was not applied so as to constitute a disguised restriction on international trade.

The GATT framework, therefore, clearly recognizes that in certain instances States are enabled to implement policies which, in effect, constitute NTBs. This recognition is tempered by the overriding understanding that such domestic measures are constrained by the necessity of protecting

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[113]The World Trade Organization.n.d.*WTO | Dispute Settlement - the Disputes - DS48*. [online] Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm.

[114]Council of Foreign Relations.n.d.*The Case for Allowing U.S. Crude Oil Exports*. [online] Available at: http://www.cfr.org/oil/case-allowing-us-crude-oil-exports/p31005?cid=ppc-Google-grant-curde_oil_PIM&gclid=CKXzm7qvy7oCFQld3godqGoAaA.

[115]The World Trade Organization.n.d. *WTO | Environment - Disputes*. [online] Available at: http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm

vital State domestic interests and are not, instead, a means of covertly effecting distortions in international trade.

7. WTO Decisions on NTBs Relevant to Pakistan, India, China and Sri Lanka

7.1. The Decision Mechanism of the WTO

Trading countries disagree on whether non-tariff barriers are necessary and legal or simply rent-seeking restrictions on trade. These disagreements can become protracted. The Dispute Settlement Body (DSB), an organ of the World Trade Organization, is an invaluable mechanism whereby countries can state their objections to each other's trade regimes and work toward a mutually acceptable settlement. The DSB consists of all the WTO's members, making it a truly international forum.

The process is a clearly structured one, with three stages: the initial consultation, the panel decision, and the appeal. The procedure of the DSB is governed by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSB Rules).[116] The DSB Rules incorporate several special provisions to protect the interests of developing countries. Some of these are noted in the explanation of DSB procedures that follows.

There is an initial consultations and mediation stage. Here the governments of the conflicting countries endeavor to resolve the dispute through discussion. It is hoped that the matter end here, without progressing to the need for a panel decision. Indeed, by January 2008, only around 136 of nearly 369 cases had reached the full panel process[117]. Most of the rest have been resolved within this initial stage, or remain in consultation. The WTO encourages countries to settle the matter between them. Under Article 4(10) of the DSB Rules, "During consultations Members should give special attention to the particular problems and interests of developing country Members."

If the countries fail to come to a mutually acceptable agreement, then the DSB intercedes. It sets up a panel of experts, who base their judgments on the agreements cited by the complaining country. Under Article 8(10) of the DSB Rules, "When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member." Further, under Article 12(11) of the DSB Rules, "Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favorable treatment for developing country[.]" The panel's judgment is automatically adopted.

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[116]Available online at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (last visited, 25 November 2013).

[117] World Trade Organization, *Understanding the WTO: settling disputes*. [Online]. Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

If the panel decides against the respondent country, it will be bound to follow the recommendations contained in the panel or appeals report, in order to make amends. It will be given a reasonable period of time in which to adhere to these recommendations. If it fails to act within this time period it will have to negotiate a mutually satisfactory level of compensation with the complaining country. Failing this, the DSB is empowered to impose limited sanctions against the country. A country which utilizes non-tariff barriers to restrict trade will therefore not be allowed to act with impunity by the WTO, and will face economic consequences.

7.2. Relevant WTO Decisions

Relevant Countries

This section will focus primarily on China and India; this is due to the fact that no significant NTB-related trade disputes involving Pakistan or Sri Lanka have been raised at the DSB.

Non-tariff barrier disputes involving China

Many disputes with China are resolved in the consultation and mediation stage, and therefore do not reach the panel process. We will focus on disputes that involved the panel.

In 2007 the US raised a complaint before the WTO's DSB, questioning a series of Chinese measures regulating the import and distribution of publications and audiovisual entertainment products. Dispute DS363[118] was brought by the United States before the DSB on the 10th of April 2007. The first set of measures it to challenged allowed only particular Chinese state-designated and wholly or partially owned state-enterprises to import films for theatrical release, audiovisual home entertainment products, sound recordings, and publications. The second set of measures that the US opposed limited foreign providers' ability to distribute such products. The United States asserted that these measures were contrary to China's Accession protocol[119], the GATT 1994[120] and the GATS[121].

The panel found the first set of measures to be in opposition to China's commitment under paragraphs 1.2 and 5.1 of China's Accession Protocol[122] to liberalize the availability and scope of the

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[118] World Trade Organization, *Dispute DS363 China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*. [Online]. Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm

[119] *Accession of the People's Republic of China*, WTO,http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002123.pdf

[119] The Protocol on the Accession of the People's Republic of China is the legal instrument by which China acceded to the membership of the WTO and to the provisions of its legal framework – including the GATT, GATS and TRIPS.

[120] *General Agreement on Tariffs and Trade*, WTO, http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf

[121] *General Agreement on Trade in Services*, WTO, http://www.wto.org/english/docs_e/legal_e/26-gats.pdf

[122] An 'Accession Protocol' is a draft membership treaty entered into by a State wishing to join the WTO, defining the Schedules and outlining the final provisions for the timing of acceptance of its Protocol and its full membership to the WTO.

right to trade, and accord all goods national treatment in respect of their distribution as under Article 3 of the GATT 1994. It also found the measures to be contrary to paragraphs 83(d) and 84(a) of China's Accession Working Party Report[123], which emphasize China's commitment to grant the right to trade to foreign providers. Some of these findings were appealed by China and upheld by the Appellate Body. Furthermore, the Appellate Body upheld the Panel's decision that China had failed to demonstrate that the measures were necessary to protect public morals as allowed under Article 20(a) of the GATT. The Panel found the second set of measures to be inconsistent with China's market access or national treatment commitments under Articles 16 and 17 of the GATS. Article 16 stipulates that each member shall treat services and service suppliers of other members no less favorably than as provided by the terms, limitations and conditions specified in its Schedule. *Article 17 of the GATS states that for each of the sectors inscribed in its schedule, each member shall treat services and services suppliers of other members no less favorably, regarding all measures affecting the supply of services, than it treats its own like services and service suppliers. The aforementioned condition may be met by dispensing formally identical treatment or formally different treatment which shall only construed to be less favorable if it modifies the conditions of competition in favor of domestic services and service suppliers.*

Certain of these measures were appealed and upheld by the Appellate Body, binding China to follow the decision. Indeed, China stated at the DSB meeting on 24th May 2012 that it had complied with the DSB recommendations.

Dispute DS413[124] involved similar issues and was also brought by the United States. It requested consultations on measures affecting electronic payment services. These measures ensured that only a Chinese entity would be allowed to supply electronic payment services for payment card transactions denominated and paid in Renminbi (RMB). The US raised the issue of "certain restrictions and requirements maintained by China pertaining to electronic payment services for payment card transactions and the suppliers of those services". The US alleged that China only permitted a Chinese entity – China UnionPay – to provide electronic payment services for payment card transactions denominated and paid in RMB in China. Under this regime, service suppliers of other Member States could only supply these services for payment card transactions paid in foreign currency. China also required that all payment card processing devices be compatible with that China UnionPay's system, and that payment cards bear that company's logo. The US further argued that China UnionPay enjoyed guaranteed access to all merchants in China which accepted payment cards, while services suppliers of other Member States must instead negotiate for access to such merchants. The United States claimed that this was inconsistent with Articles 16 of the GATS, which promises market access, and XVII of the GATS, which promises national treatment.

The World Trade Organization. 2013. *WTO | Accession | Member.* [online] Available at: http://www.wto.org/english/thewto_e/acc_e/acces_e.htm.

[123]*Report of the Working Party on the Accession of China*, WTO, http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002144.pdf

[124] World Trade Organization, *Dispute DS413 China — Measures Affecting Electronic Payment Services*. [Online]. Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds413_e.htm

The panel concurred, finding these measures to contravene Articles 16 and 17 of the GATS, as they modified the conditions of competition in favor of the entity, and thereby failed to ensure national treatment towards foreign suppliers. Moreover, they outright prevented foreign suppliers from providing certain services. On the 23rd July 2013, China claimed that it had fully implemented the DSB's recommendations. This was contested by the United States, which stated that it would monitor and review China's actions.

In both decisions, the WTO places the National Treatment principle – that foreign goods be treated the same as domestic goods- at forefront of its dispute resolution actions. These two measures prevented free trade, breaching promises to allow foreign providers to trade freely in China under the same condition as Chinese providers. Thus the DSB ruled against them and ordered China to remove these non-tariff barriers to trade, and China, after appealing, complied with this demand. China was unable to use Article 20(a) of the GATT to justify its measures; the panel, supported later by the Appellate Body, ruled that China had not shown that the measures were essential in protecting public morals or any other justifiable concern. This suggests that the burden of proof required by the WTO in order to justify non-tariff barriers is rather high. For example, even the dissemination of entertainment with its great potential to impact upon culture and values was not allowed to be limited on the grounds of preserving public morality.

Non-tariff barrier disputes involving India

Many disputes with India are also settled at the consultation and meditation stage. As before, the focus will be on disputes involving the panel.

Dispute DS90[125] involved the United States, Australia, Canada, New Zealand and Switzerland seeking consultations in respect of quantitative restrictions enforced by India on the import of a large number of agricultural, textile and industrial products. The complainants asserted that these restrictions violated India's obligations under Article 11(1) of the GATT 1994, which prohibits restrictions on imports, and Article 18(11) of the same agreement which requires the contracting party to aim to restore equilibrium in its balance of payments on a sound and lasting basis. Moreover, they argued that the restrictions were also contrary to Article 4(2) of the Agreement on Agriculture[126], which states that the contracting party shall replace measures such as quantitative restrictions with ordinary customs duties.

The panel ruled against India, and the Appellate Body too was in agreement with these claims. All three articles were found to be infringed by India's restrictions. At the DSB meeting of 5th April 2001 India stated that it had implemented the DSB's recommendations.

[125]World Trade Organization, *Dispute DS90India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*.[Online]. Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds90_e.htm

[126]*Agreement on Agriculture*, WTO, http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm

Dispute DS146[127] encompassed measures which affected the automotive sector. The European Communities began consultations pertaining to Indian measures which caused imports of automotive parts to be subject to a system of non-automatic import licenses. Furthermore, the European Communities highlighted that import licenses would only be granted to local joint venture manufacturers that had signed an agreement with the Indian government, undertaking to comply with certain local content and export balancing requirements. The Europeans claimed that these measures infringed Article 3 of the GATT 1994, which guarantees national treatment in terms of internal taxation and regulation. It also argued that these measures were contrary to Article 11 of the GATT 1994, which forbids quantitative restrictions on imports in the form of import licenses.

The panel found that India had indeed breached these Articles. On the 6th November 2002, India affirmed that it had fully complied with the DSB's recommendations.

These disputes emphasize the fact that non-tariff barriers in the form of quantitative restrictions on imports will be treated severely, as they are in direct opposition to the WTO's goal of encouraging the free movement of goods and services between countries. The agreements cited contain clear articles prohibiting such non-tariff barriers, and the WTO will strike them down if there is no satisfactory justification for them.

Analysis

These measures by India and China demonstrate a clear desire to provide special advantages to domestic industries. While the two countries have foregone the challenged methods of protecting producers, there is no reason to believe that they have abandoned protectionist ends. The course of dispute settlement suggests a few trends.

First, we note that both China and India use regulatory means to give local producers preferential market access; however, in addition, India also uses the less subtle tool of quantitative restrictions. We assume that regulatory hurdles are more difficult to discover and prove than quantitative restrictions, and so India and China are likely to move toward more sophisticated regulatory NTBs in order to protect their domestic industries in the future.

Second, we note that the countries that are most likely to bring disputes with India and China to the WTO are highly developed countries with large economies. Countries such as Pakistan and Sri Lanka are less likely to challenge India or China in the WTO. This may be because the comparatively smaller trade volumes are insufficient to motivate these countries to engage the DSB. Alternatively, this may be because of a lack of legal sophistication and unfamiliarity with the WTO's DSB. This point is reinforced if we refer to the tables, supra, that list the main imports of China and India. The complainants in these countries were often major providers of key imports.

[127] World Trade Organization, *Dispute DS146 India – Measures Affecting the Automotive Sector*. [Online]. Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds146_e.htm

Third, these disputes were decided not merely under the GATT and other multilateral treaties, but also under bilateral treaties and domestic laws. Domestic courts have jurisdiction to interpret each of these sources, and there is a possibility that DSB decisions will conflict with domestic precedents. It is unclear whether domestic courts should consider their own opinions overruled when these conflict with DSB pronouncements. Put differently, it is unclear whether DSB judgments are of persuasive or greater authority in domestic litigation.

Finally, we note that the disputes discussed above could not be settled at the consultations phase. Further research on the consultations phase will help give us a much richer picture of the dispute settlement procedure. For example, it could tell us whether the consultation phase typically fails because of an intransigent complainant or respondent.

While WTO decisions on our countries of interest are limited, we can also look at DSB pronouncement on industries that are of particular interest to Pakistan. We consider the general WTO "jurisprudence" on issues that are likely to affect Pakistan below.

Relevant Issues

Non-tariff barriers relating to the application of agricultural policy

The non-tariff barriers that Pakistan employs pertain mostly to the application of agricultural policy[128]. Consequently an investigation of such cases will assist an understanding of how Pakistani non-tariff barriers are likely to be treated by the WTO. Cases which have cited the Agreement on Agriculture (AoA)[129]are discussed below.This agreement is often be used to contest non-tariff barriers on agribusiness. The agreement on agriculture does contain certain exemptions whereby developing countries can maintain limited "domestic support" programs for their own agriculturalists. Thus, some protectionist measures adopted by Pakistan would be more acceptable than if they were used by a developed state.[130]

Domestic Support Programs under the AOA

Domestic support, that is, support for domestic agriculturalists that is unavailable to foreign competitors, is generally discouraged by the AoA. The agreement contemplates a reduction in domestic support measures over time. Developing countries are expected to reduce support at lower rates than developed countries.[131] The level of domestic support is determined by calculating the "Aggregate Measurement of Support" (AMS) for agricultural products. AMS is defined in Article 1(h) of the AoA as " the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent

[128]Taneja, N, 2007.*Trade Possibilities and Non-Tariff Barriers to Indo-Pak Trade*. Working Paper No. 200, p17

[129]Available online at http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm (last visited, 25 November 2013).

[130]*See generally*, ArzeGlipo, *The WTO-AoA: Impact on Farmers and Rural Women in Asia*, available online at http://www.glow-boell.de/media/de/txt_rubrik_5/SuS_Arze_RuralWomen.pdf (last visited, 25 November 2013).

[131]*See* AoA, Article 4(b).

measurements of support for agricultural products." The calculation of AMS and the veracity of AMS reporting are perennial points of contention among countries.

Under Annex 2 to the AoA, countries are allowed to take certain actions that support domestic producers so long as these do not distort trade. These are typically general services that are not geared toward increasing exports. Article 1 of Annex 2 to the AoA explains that domestic support measures exempt from reduction commitments should have no, or at most minimal, trade distorting effects on production, must be provided through a publicly-funded government programmes and should not have the effect of providing price support to producers.

While the exemptions contained in Annex 2 are available to all countries, the AoA also contemplates special protections for developing countries. Article 6(2) of the agreement gives special consideration to the fact that government measures of assistance, domestic support, investment subsidies and agricultural input subsidies are an integral part of development programmes of developing countries and hence should be exempt from domestic support reduction commitments.

WTO Decisions

In Dispute DS283[132], Australia, Brazil and Thailand sought consultations on certain measures of the European Communities. They argued that the European Communities provided export subsidies in excess of its commitments. Moreover, Australia asserted that the European Communities paid its refiners a subsidy not paid to imported sugar. It therefore argued that the European Communities' actions were contrary to Articles 3(3) and 8 of the Agreement on Agriculture, which states that the contracting party may not provide export subsidies for agricultural products in excess of commitments. Additionally, it asserted that the subsidies contravened Article 9(1) of the Agreement on Agriculture, which declared such subsidies to be subject to reduction commitments. Brazil and Thailand argued their cases on the same grounds.

The panel decided that the measures breached these articles, with the Appellate Body later upholding its decision. On the 8th June 2006, Australia, Brazil and Thailand reported to the DSB that they had reached an understanding with the European Communities.

From this dispute, one can note that the WTO will use the Agreement on Agriculture to check non-tariff barriers which impact upon the implementation of agricultural policy. If the effect of these barriers is to discourage free trade in agricultural products, the WTO will not hesitate to denounce them. In this case, the export subsidies provided made it difficult for imported products to operate on a level playing field, as their costs would consequently be much higher than those who were subsidized. This would limit the trade achieved by the imported products, thereby going against the objectives of free trade. Therefore these export subsidies were not allowed.

[132] World Trade Organization, *Dispute DS283 European Communities – Export Subsidies on Sugar* [Online]. Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds283_e.htm

To the extent that Pakistan can avail the exemptions for developing countries discussed above, it is less vulnerable to challenges in the DSB to its domestic support programs for agriculture. However, developed countries have sometimes charged that developing nations are under-reporting their AMS by fitting too many domestic support mechanisms into the AoA exemptions.

Sanitary and phyto-sanitary measures (SPS)

Research shows that the some of the most common non-tariff barriers encountered when trading with India aresanitary and phytosanitary measures (SPS)[133]. The relevant piece of legislation in this case is the WTO Agreement on the Application of Sanitary and Phytosanitary Measures or the SPS Agreement[134].

Canada brought Dispute DS292[135], requesting consultations on European Communities measures implementing a moratorium on the approval of biotech products. Canada declared that such a regulation had limited imports of Canadian agricultural and food products. Furthermore, it contended that a number of member States continued to have national marketing policies and import bans in place regarding biotech products, despite the fact that such products had received approval for import and marketing by the European Communities. It claimed that such measures contravened Articles 2(2) and 5(1) of the SPS Agreement, which state that members shall ensure that any SPS measure is applied only to the extent necessary to protect human, animal or plant life or health; and that the measure must be based on scientific principles and maintained with sufficient scientific evidence and an assessment of the risks. It also asserted that such measures contravene Annex C and Article 8 of the agreement, which state that procedures to ascertain the fulfillment of SPS measures should be completed without undue delay and in the same manner as for domestic products.

The panel found the moratorium to be contrary to Annex C(1)(a) and Article 8 of the SPS Agreement, because it caused undue delays in the approval procedures. It also decided that the measures were contrary to Articles 2(2) and 5(1) of the agreement, as they were not based on adequate risk assessments and were accordingly presumed to lack grounding in sufficient scientific evidence. On the 15th July 2007, Canada and the European Communities informed the DSB of a mutually agreed solution, agreeing to establish a bilateral dialogue on agricultural biotech market access issues of mutual interest.

Clearly then, the WTO will, when necessary, use the SPS Agreement to ascertain whether countries are justifiably restricting trade on food safety and health grounds, or whether such restrictions are simply limiting trade without adequate health and safety benefits. In this case, there was found to be

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133 Husain I, 2013, "Managing India-Pakistan Relations" in *Pakistan-India Trade: What Needs To Be Done? What Does It Matter?* Edited by Kugelman M & Hathaway R, p63

134 *The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*, WTO, http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

135 World Trade Organization, *Dispute DS292 European Communities — Measures Affecting the Approval and Marketing of Biotech Products*.[Online]. Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds292_e.htm

unjustifiable delay caused by the moratorium in the approval of the products. The WTO will therefore move to criticize measures which lead to excessive time being taken to ensure the health and safety of a product. Moreover, it is evident that the respondent party faces the challenge of proving the possession of a sufficient scientific basis for their non-tariff barriers. If the scientific evidence is insufficient, the respondent party will not be allowed to maintain such barriers, as the health and safety benefits are not guaranteed. Any Indian SPS measures therefore must not lead to excessive waiting times for approval of products relative to the amount of time actually needed to ensure their safety. Furthermore, those seeking to implement such measures must ensure that there is firm scientific evidence demonstrating a causal link between the adoption of the measures and the preservation of health and safety.

Technical barriers to Trade (TBT)

Both India and China also employ many non-tariff barriers in the form of technical barriers to trade (TBT)[136,137]. As noted before, an examination of WTO cases involving TBTs will be edifying, in terms of understanding the challenges the two countries are likely to face from the WTO. Here the corresponding legislation is the Agreement on Technical Barriers to Trade[138].

In Dispute DS231[139], Peru desired consultations on a regulation of the European Communities which prevented Peruvian exporters from using the trade description 'sardines' for their products. Peru alleged that this was unjustified and that it infringed Article 2 of the TBT Agreement, which states that contracting parties should use relevant international standards as a basis for their technical regulations, except when such standards would be ineffective in achieving legitimate objectives, related for example to the environment.

The panel concluded that the regulation violated Article 2(4) of the TBT Agreement. In appeal, the Appellate Body upheld the panel's decision. On the 25th July 2005, Peru and the European Communities notified the DSB that they had reached a mutually agreed solution.

Dispute DS231 shows that the TBT Agreement is a legal instrument enabling the WTO to police technical regulations and product standards. Measures will only be allowed if they actually achieve legitimate objectives and do not arbitrarily restrict trade. In this case, the regulation's impact was indiscriminate, as there was an accepted international standard which was satisfied by Peruvian sardines. The regulation maintained by the European Communities, by ignoring the accepted standard, needlessly and randomly prevented Peru from trading its genuine sardines. No legitimate objective was being achieved, and therefore such a non-tariff barrier to trade was deemed

136 Husain I, 2013, "Managing India-Pakistan Relations" in *Pakistan-India Trade: What Needs To Be Done? What Does It Matter?* Edited by Kugelman M & Hathaway R, p63

137 *Ninth Report on Potentially Restrictive Trade Measures,* European Commission Director-General for Trade, http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149526.pdf

138 *Agreement on Technical Barriers to Trade*, WTO, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm

139 World Trade Organization, *Dispute DS231 European Communities – Trade Description of Sardines*.[Online].Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm

unacceptable. Clearly, then, India and China will have to ensure that their technical barriers to trade truly achieve legitimate objectives and that they do not arbitrarily restrict trade.

Dispute DS406[140] was brought by Indonesia against the United States. The United States maintained a measure that banned clove cigarettes. Indonesia complained that this measure allowed production of other types of cigarette – menthol cigarettes, for example. It considered this to be a violation of Article 2 of the TBT Agreement, which outlines the acceptable application of technical regulations.

The panel found the measure to contravene Article 2(1) of the agreement, which accords the same treatment to imported products as is accorded to like products of national origin and to like products originating in any other country. It considered menthol and clove cigarettes to be like products on account of their being flavored as well and also attractive to young people. Notably, the panel decided that Indonesia had failed to demonstrate that the ban was more trade-restrictive under Article 2(2) than necessary to accomplish a legitimate objective [here decreasing smoking among youths]. On appeal, the Appellate Body upheld the panel's decision that the measure breached Article 2(1) of the agreement. On the 14th June 2012, Indonesia and the United States reported back to the DSB with a reasonable period of time for the United States to apply the DSB recommendations.

Like Dispute DS231, Dispute DS406 involved a measure whose actual effect was to arbitrarily restrict trade. Certainly the measure would have prevented young Americans from smoking clove cigarettes. However, as it failed to ban similar types of cigarette, its progress towards fulfilling the legitimate objective of discouraging young persons from smoking would be patchy and ineffectual, as such persons could simply and easily substitute the clove cigarettes for another type. This leads one to beg the question: why clove cigarettes in particular? With other types of cigarette being so similar and allowed by the United States, the restriction appears arbitrary and therefore unacceptable. To avoid thus hurdle for their technical barriers to trade, both India and China must ensure that the measures they enact actually fulfill their lawful aims. Moreover, they will have to prove that their measures do not restrict trade beyond what is necessary to satisfy these lawful purposes.

8. Conclusion

Most trade-related disputes are resolved through consultations, without resort to the DSB process of the WTO. The various treaties controlling international trade, such as the GATT, SPS Agreement, TBT Agreement, and AOA include provisions to accommodate the special economic needs of developing countries. However, DSB cases involving developing countries are rare. This may be in part because of a lack of transparency regarding NTBs in these countries, and in part because of the provisions for differential treatment of such countries, as mentioned above.

140 World Trade Organization, *Dispute DS406 United States — Measures Affecting the Production and Sale of Clove Cigarettes*. [Online]. Available athttp://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm

While SPS and TBT measures are both justifiable in limited cases, as explained above, their misuse will vary among countries. SPS measures are likely to be misused in countries where economies rely heavily on animal and plant products. Countries with immature manufacturing sectors, Like Pakistan and Sri Lanka, are likelier to rely on SPS measures. The tables on main NTBs used by each country confirm this. TBTs are likely to proliferate in economies that wish to protect producers of electronic, chemical, or other sophisticated goods. India and China have more mature manufacturing industries than Pakistan and Sri Lanka. India reports its technical barriers to trade through announcements on the Department of Commerce website.[141] China maintains a search engine of its SPS and TBT notifications at a dedicated government website.[142]Pakistan's TBT notifications are currently unavailable online, though there is hyperlink to these at the website of the Pakistan Standards and Quality Control Authority.[143] Sri Lanka's TBT notifications are also apparently not available online.

The WTO gives developing countries advantages in the dispute settlement process at every stage. These may enable Pakistan, India, China, and Sri Lanka to adopt NTBs without facing the repercussions that more developed economies would. Under the WTO regime, countries decide for themselves whether they are developed or developing, so that even large economies like China can opt into the laxer regime for developing countries.[144]

As noted earlier, developing countries receive special consideration in each stage of dispute settlement. In consultations, their interests are given specific weight and their response deadlines are relaxed; at the panels stage, they may request a panel member from a developing country, obtain extensions from regular deadlines, and are entitled to receive specific responses to their development-related concerns from the panel; and at the implementation stage, they may move more slowly than developed countries are required to. Developing countries may also obtain an accelerated dispute settlement procedure to minimize the effects of the settlement procedure on their economies.[145]

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[141] *See* website: http://commerce.nic.in/trade/international_trade_papers_next.asp?id=12 (last visited, 25 November 2013).

[142] *See* website: http://www.tbt-sps.gov.cn/sites/english/notification/pages/chinawtotbtnotification.aspx (last visited, 25 November 2013).

[143] *See* website: http://www.psqca.com.pk/wto/wto/Pakistan%20%E2%80%93%20TBT%20Notifications.htm (last visited, 25 November 2013).

[144] *See* website: WTO, *Who Are the Developing Countries?*, online at http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited, 25 November 2013).

[145] *See generally,* website: WTO, Developing Countries in WTO Dispute Settlement, online at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p1_e.htm (last visited, 25 November 2013).

Chapter 4: Pakistani Policy Considerations Relevant to Non-tariff Barriers

Pakistan's economy operates under a complex and conflicting legal regime: a patchwork of laws, some of which date back to the country's colonial period; overlapping mandates for agencies; and layers of provincial and federal legislation.[146] After the 18th Amendment devolved substantial regulatory power to the provinces, issues of federal versus provincial jurisdiction have become still more complicated.

Furthermore, bureaucratic inefficiencies and infighting between governmental institutions that regulate trade exacerbate an already-problematic state of affairs.[147] The governance framework in Pakistan is ministerial: each ministry jealously guards its portfolio from any impingement – real or imaginary. This has created an institutional environment where one ministry might implement a policy which, ostensibly, operates within the ambit of its portfolio but also has ramifications for the broader governmental structure and, by extension, upon the operation of policy initiatives affecting trade[148].

Finally, Pakistan's trade policies are also heavily informed by its geopolitical context. The current security situation has adversely affected prospects of free trade with India. This has been a perennial problem, owing to the neighbors' historically antagonistic relationship.[149]

In this section, we will consider specific policy considerations that are not clearly of a legal and economic nature, but nevertheless deeply affect Pakistani trade policy.

1. The Composite Dialogue Policy

The government of Pakistan has sometimes expressed a reluctance to decouple trade from other political issues between India and Pakistan. This is likely because the government uses access to Pakistani consumers as a bargaining chip in all negotiations with India. Indian exporters want access to Pakistani consumers, and may be willing to push the Indian government into making concessions elsewhere in order to secure such access for Indian businesses.

[146]The Heritage Foundation.n.d.*Country Report: Pakistan.* [online] Available at: http://www.heritage.org/index/country/pakistan.

[147]Shafqat, S. 1999. *Pakistani Bureaucracy: Crisis of Governance and Prospects of Reform*. The Pakistan Development Review, 38 (4), pp. 995--1017.

[148] Journal of International Affairs: Columbia University. 2009. *The Politics of Civil Service Reform in Pakistan | Journal of International Affairs.* [online] Available at: http://jia.sipa.columbia.edu/politics-civil-service-reform-pakistan.

[149] The Woodrow Wilson International Center for Scholars. *Pakistan-India Trade: What Needs To Be Done? What Does It Matter?.* [report] Washington, D.C.: The Wilson Center.

The link between trade and other issues between the neighbors- particularly territorial and national security issues- is based on the "Composite Dialogue" framework created by the neighbors in 1997.[150] Under the Composite Dialogue, Pakistan and India decided to discuss all issues between them simultaneously. Pakistan was most interested in negotiating the status of Jammu and Kashmir, while India was most interested in stronger Pakistani action against terrorists. [151]

India and Pakistan are parties to several protracted disputes. There are three territorial disputes: Kashmir, the Siachen Glacier, and the Sir Creek.

Kashmir is a state that has been divided into two parts: 47% of the territory is administered by India while 37% is administered by Pakistan.[152] Pakistan and India have fought three wars over the disputed territory, in 1947, 1965, and 1999. China is also a party to the Kashmir dispute insofar as it claims the Aksai Chin, a part of Kashmir that was historically part of China. India accuses Pakistan of training and supporting militants who attack Indian forces in Kashmir; meanwhile, Pakistan accuses India of political and human rights abuses against the Kashmiri people.

The Siachen Glacier is highest theater of war in the world. India and Pakistan have maintained troops on and around the Sianchen since 1984. This dispute arose because the Simla Agreement, 1972, failed to clearly demarcate the border between the two countries in that region. In 1984, Indian armed forces seized control of much of the Glacier. India argues that it was entitled to the Siachen under the Simla Agreement. Pakistan argued that the Agreement awarded the Siachen to it, and that India had violated the treaty. Since then, Indian and Pakistani troops have had several skirmishes along the so-called "Actual Ground Position Line" between the two armies.

The Sir Creek is the third notable border dispute between the neighbors. This Creek separates the Indian state of Gujarat from the Pakistani province of Sind. Pakistan claims the Creek under the *Bombay Government Resolution of 1914*, which included the Sir Creek in the province of Sind. India argues that the border between Sind and Gujarat is at the mid-channel as depicted in a map drawn in 1925, and retroactively approved by Pakistan.

The Kashmir and Sir Creek disputes have enormous economic significance. Kashmir is the source of several rivers and the subject of much of the Indus Water Treaty, which divides rights to water between Pakistan and India. These water rights are also regularly disputed. India has built the Kishanganga power plant, which diverts water from the Neelam River that would otherwise reach Pakistan. Downstream from the Kishanganga, Pakistan is building its own Neelam-Jehlum hydropower plant. The capacity of the Pakistani plant is likely to be reduced because the water diversion caused by the Kishanganga. This dispute is currently in the Permanent Court of

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[150] *See*SajadPadder, *The Composite Dialogue between India and Pakistan: Structure, Process, and Agency*, Heidelberg Papers on South Asian and Comparative Politics, Working Paper no. 65, available online at http://archiv.ub.uni-heidelberg.de/volltextserver/13143/1/Heidelberg_Papers_65_Padder.pdf (last visited, 25 November 2013).
[151] *See* id at 2.
[152] *See* Wikipedia, *Kashmir Dispute*, available online at http://en.wikipedia.org/wiki/Kashmir_conflict (last visited, 25 November 2013).

Arbitration in the Hague, the Netherlands. Meanwhile, the Sir Creek holds large reserves of petroleum and natural gas, and would add substantially to the indigenous energy resources of whichever country prevails on the territorial claim.

Pakistan has special trade-related reservations that are linked to its territorial disputes as well. These reservations center on proposals for energy trade with India. Insofar as India diverts water that otherwise go to Pakistan to generate electricity, Pakistan is concerned that purchasing such energy from India would validate Indian claims to the diverted water in Kashmir. Similarly, if India were to exploit the resource-rich Sir Creek for fossil fuels, any Pakistani import of such fuels or their derivatives could legitimate Indian territorial claims to the Creek.

Since the territorial disputes have economic implications, the theory behind the Composite Dialogue was to discuss the territorial, political, and economic disputes in unison. As part of the Composite Dialogue, India and Pakistan have undertaken "confidence building measures" from time to time.

Economic and commercial cooperation was one of a series of confidence building measures that would assure each side that the other was negotiating in good faith. Since 1997, the Composite Dialogue has stalled several times, notably during the Kargil Conflict. However, the new Pakistani government, led by Mr. Nawaz Sharif, is substantially the same as the 1997 government that established the Composite Dialogue framework. Pakistan is therefore eager to revive the Composite approach.

The Pakistani Finance Minister, Mr. Ishaq Dar, recently linked the grant of MFN status to India to a revival of the composite dialogue. He also suggested that India was unwilling to re-enter the composite dialogue because of the electoral concerns of Indian parliamentarians, that is, members of the LokSabha. According to a newspaper article, Dar claimed that Pakistan was still very willing to move forward but certain Indian factions have consistently derailed the process.

Elsewhere, the Finance Minister also linked the grant of MFN status to skirmishes between Pakistani and Indian troops across the Line of Control. After repeated shelling across the border, Minister Dar asserted that immediate consideration for the MFN status would not be given- other points of conflict had to normalize before that could happen.

2. Interest Groups in Pakistan

Recall that the Stigler-Peltzman-Becker framework on trade characterized trade policy as a competition among various interest groups against the background of electoral politics. In this section we explore the main interest groups involved in trade policy. We will see that the two most powerful interest groups are agribusiness and the textile industry, and that these two groups have conflicting interests. To appreciate the influence of these interest groups. Let us consider Pakistan's current export market. The International Trade Center provides the following leading exports of Pakistan for 2011.[153]

LEGEND:	
Textiles	
Agriculture	
Cement	

Table 9. Leading Exports of Pakistan, 2011

Product Description	Exports, USD Million	Top Importers	Imports, USD Million	Top exporters to Import partners
Petroleum oils & oils obtained from bituminous minerals, other than crude etc	1,970	Afghanistan	773	
		United Arab Emirates	405	
		Korea, Republic of	305	
Semi-milled or wholly milled rice, whether or not polished or glazed	1,710	United Arab Emirates	282	**India**
		Afghanistan	135	**Pakistan**
		Oman	114	Thailand
Mens/boys trousers and shorts, of cotton, not knitted	1,010	Germany	245	**China**
		United States of America	178	Bangladesh
		United Kingdom	113	Turkey
Cotton yarn,>/=85%,single,uncombed	870	**China**	530	**Pakistan**
		Hong Kong, China	68	Viet Nam
		Korea, Republic of	53	**India**
Toilet & kitchen linen, of terry toweling or similar terry fabric of cotton	870	United States of America	536	**India**
		United Kingdom	44	**Pakistan**
		United Arab Emirates	33	**China**
Bed-linen of cotton (excl. printed, knitted or crocheted)	750	United States of America	286	**India**
		Germany	85	China
		France	79	**Pakistan**
Printed bed-linen of cotton (excl. knitted or crocheted)	630	United States of America	157	**Pakistan**
		France	1,110	**China**
		Germany	91	**India**
Durum wheat	520	Bangladesh	194	
		Yemen	98	
		Kenya	95	
Portland cement nes	490	Afghanistan	241	**Pakistan**
		India	37	Netherlands
		Ethiopia	34	
Womens/girls trousers and shorts, of cotton, not knitted	490	United States of America	136	**China**
		Spain	57	Bangladesh
		United Kingdom	55	Viet Nam

[153]Available online at International Trade Center, Market Access Map, www.macmap.org (last visited, 25 November 2013).

Product Description	Exports, USD Million	Top Importers	Imports, USD Million	Top exporters to Import partners
Pullovers, cardigans and similar articles of cotton, knitted	450	United States of America	285	**China**
		United Kingdom	39	Viet Nam
		Germany	32	Indonesia
Articles of jewelry pt thereof of made of precious metals	450	United Arab Emirates	428	**India**
		United Kingdom	10	Malaysia
		United States of America	8	Singapore
Articles of apparel, of leather or composition leather (excl. clothing accessories, footwear and headgear)	440	Germany	101	**India**
		Turkey	53	**Pakistan**
		France	47	**China**

The data shows that Pakistan's top exports are dominated by the textile industry. Agriculture and cement also figure into the top exports. China is a major importer of Pakistani cotton and India is a major importer of Pakistani cement. Meanwhile, the right-most column shows that India and Pakistan compete for exports of textiles to several countries and in several markets. Competition between industries, both across and within borders, defines the interest group politics of Pakistani trade.

Pakistani interest groups that lobby on NTB-related matters can be divided into two categories:

1. Export-driven interest groups, which lobby the government to challenge India's non-tariff barriers in various forums;

2. Domestic demand driven interest groups that lobby to preserve Pakistan's tariffs and non-tariff measures against Indian exports; and

2.1. Export-driven Interest Groups

The Textiles Industry

The textile industry has historically been the largest industry in Pakistan. The All Pakistan Textile Mills Association (APTMA) has called for the Indian Government to withdraw non-tariff barriers (NTBs) imposed on Pakistan to improve the bilateral trade between the two Asian neighbors. While Pakistan's business community supports giving most-favored nation (MFN) status to India, the NTBs imposed by the Indian side hamper the smooth flow of trade between the two nations. APTMA notes that in spite of India giving MFN status to Pakistan in 1996, Pakistan's exports to India are still considerably low, which suggests that India has not opened up its market to Pakistani goods. In 2009-10, the bilateral trade between India and Pakistan stood at US$ 1.4 billion, of which, Indian exports to Pakistan accounted for US$ 1.2 billion, while Pakistan's exports to India were a meager US$ 268 million. APTMA also argues that Pakistan and India need to harmonize their customs procedures for assessing compliance with safety and quarantine standards.[154]

The Cement Industry

Pakistan's cement industry is in a position to export to India, Afghanistan, and other neighboring countries. While Afghanistan remains a good market for Pakistani cement, the gradual withdrawal of western forces from the country has diminished the prospects of growth.[155] This impending shock to the demand for Pakistani cement has mobilized cement manufacturers to lobby for better access to the Indian market.

Pakistan has a surplus quantity of cement, which can be exported to India easily through Wagah border. However, India bans the entry of trucks larger than 10-wheelers or with a loading capacity of more than 40 tons for cement. This restriction increases the transportation cost for not only cement, but also for other commodities, resulting in the inability of the local industry to compete with the Indian industry. The cement industry charges that the Pakistan government has failed to remove non-tariff barriers imposed by India on Pakistani products, especially cement. Owing to the lack of facilities, new restrictions and faulty equipment Pakistani cement consignments continually have to experience protracted periods of waiting before receiving clearance at the Wagah border.[156]

2.2. Domestic Demand Driven Interest Groups

The Agriculture Industry

Initially the government of Pakistan was to grant MFN status to India by December 31, 2012 by phasing out negative list of tradable goods with India, but it has been delayed due to strong opposition of farmers' lobbies who contend that such a move would destroy Pakistani growers who do not enjoy farm subsidies like Indian farmers.[157] Representatives from the agriculture sector have been keen to remind the government that before acting in haste and granting the MFN status to India, it must give due consideration to the fact that the Doha Round failed primarily because of the immense agriculture subsidies of exporting countries.

Pakistani agribusiness charges hidden and budgeted subsidies to the tune of $99 billion disbursed to the Indian agriculture sector. Agriculturalists therefore want the Indian government to significantly

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154 "APTMA urges India to remove non-tariff barriers." Fibre2Fashion Forum. 28 Nov 2013. http://www.fibre2fashion.com/news/textile-news/newsdetails.aspx?news_id=156462

155 "India's non-tariff barriers, NATO withdrawal haunt Pakistan's cement exports." Pakistan Today 5 Mar 2013. http://www.pakistantoday.com.pk/2013/03/05/news/profit/indias-non-tariff-barriers-nato-withdrawal-haunt-pakistans-cement-exports/

156 "Cement sector hit hard by Indian NTBs." The News 19 Apr 2012. http://www.thenews.com.pk/Todays-News-3-103697-Cement-sector-hit-hard-by-Indian-NTBs]

157 "Allaying fears: President to hold meeting over MFN status to India." The Express Tribune 2 Jan 2013. http://tribune.com.pk/story/487811/allaying-fears-president-to-hold-meeting-over-mfn-status-to-india/

reduce the subsidies it provides to its local farmers, since otherwise the MFN status would mean preferential treatment to the subsidized agriculture products of India.

This contradiction is compounded when viewed in conjunction with the significantly high general sales tax (GST) of 16 percent which the farmers of Pakistan are subjected to in addition to an agriculture tax to the tune of Rs.2 billion annually. While inputs are taxed the output is historically kept low priced and even banned for export, as in the case of pulses & livestock.

Pakistani agribusiness claims that bi-lateral trade between the two neighbors has accrued only meager gains to Pakistan. While India currently has a 30 percent duty on imports of onions, tomato, potato, etc., Pakistan has allowed imports of agriculture items at zero tariff for many years. India has gained over the years even without MFN status and would continue to gain further and rapidly if Pakistan liberalizes trade without corresponding measures by India. In light of these conditions, Pakistani farmers charge that granting MFN status to India would be disastrous for Pakistan's 20 million farming households and future agriculture production.[158]

The Automobile Industry

Members of the auto industry feel that the government is moving too fast on the issue of trade liberalization with India especially on giving Most Favorite Nation (MFN) status, which would yield negative effects for the Pakistani auto industry.[159] While the local auto industry has informed the government of its concerns in relation to said liberalization, it appears that the industry falls pretty low on the government's priority list. The Director General of the Pakistan Automotive Manufacturers' Association (PAMA) has publicly complained that the protection of local automobile manufacturers is low on the government's agenda. PAMA argues that Pakistan needs to strengthen its trade laws to stave off the negative impact of the grant of MFN status to India, since Pakistan has a relatively far more liberal import environment than India where tariffs and non-tariff barriers restrict access to the Indian marketplace.[160]

The auto industry argues that a glut of Indian cars would rampage the local industry and car assemblers, who are already posting intermittent loses, Honda financials serving as a good example.[161]By trade liberalization the overall Pakistan exports to India can potentially reach $ 5 billion, but Pakistan has not shown significant ability to make inroads into the Indian markets. Auto

158 "MFN to India will harm agriculture sector." Dawn 31 Jan 2013. http://www.dawn.com/news/782543/mfn-to-india-will-harm-agriculture-sector

159 "MFN status to India to affect Pak auto industry." Daily Times 14 Dec 2011. http://www.dailytimes.com.pk/default.asp?page=2011%5C12%5C14%5Cstory_14-12-2011_pg5_10

160 "Auto sector reeling under unstable policy." The News 14 Sept 2013. http://www.thenews.com.pk/Todays-News-3-201861-Auto-sector-reeling-under-unstable-policy

161Honda Atlas Pakistan. "3rd Quarter Financial Report." N.p., Dec. 2013. Web.

producers argue trade liberalization would hurt domestic producers of automobiles and electronics without reciprocal gains in textile or cotton. [162]

2.3. Small Traders and Manufacturers

Pakistani manufacturers argue vehemently that the textile lobby is trying to get access to European Union (EU) so much so that they are willing to use India as a staircase at the cost of local industries and manufacturers providing employment to millions of Pakistanis.[163]

Elsewhere, counter-intuitively, the government of Pakistan has come under intense scrutiny at the hands of domestic trading associations who believe that granting Most Favored Nation (MFN) status to India would cause irreparable damage to the local industry. Traders and associations of chemists in Rawalpindi have rejected the government's decision to give the Most Favored Nation status to India, arguing that it will reduce incentives for raw material exploration and extraction in Pakistan. Pakistani traders feel that the government took this decision in haste and without consulting the stakeholders. They maintained that their opposition stems not from bias but rather from the desire to protect the interests of domestic industry.[164]

Small traders believe that Pakistan's decision to grant Most Favored Nation status to India has come under severe pressure from the United States, which is aimed at 'obliterating' the fragile economy of the country. According to them, Pakistan's economy is not in a favorable position to compete with Indian products in either the manufacturing or the agriculture sector. Such liberalization of trade would lead to the retrenchment of the domestic market and an irreversible decline in the fortunes of the local manufacturing and agriculture sectors. They characterize this as an economic ploy on part of the Indian government to dominate and subdue Pakistan.

Traders cite historical trends to fortify their contention and urge the government to review its policy. They argue that during the military dictatorship of General Zia-ul-Haq, India badly damaged the Pakistan manufacturing industry by exporting 697 different items to the country; a majority of the products later on continued to pour in through smuggling. This left the local manufacturing sector subdued. These small traders fear that the MFN status to India would allow the eastern neighbor to flood the Pakistani markets. This would push the small sized industrial units towards closures and challenge the growth of medium sized manufacturing units. Traders fear that India would give huge subsidies to its exporters on manufacturing and agriculture products to encourage them to dump goods which Pakistan is already producing. Apart from fears of opening doors for smuggling, there is also the imminent possibility of boosting the illegal goods' transportation trend from neighboring countries due to Pakistan's weak policies. Pakistani industrial units are already suffering from power

[162]Qamar, Abid. "Trade between India and Pakistan: Potential Items and the MFN Status." State Bank of Pakistan, 2005. Web.

[163] "Industrialists blast Indian non-tariff barriers." Pakistan Defence Forum. 13 Nov. 2011. http://defence.pk/threads/industrialists-blast-indian-non-tariff-barriers.140449/

[164] "Traders oppose MFN status to India" Dawn 11 Dec 2011. http://dawn.com/news/679692/traders-oppose-mfn-status-to-india

shortage and gas cuts and the agriculture sector is fighting catastrophic floods, high priced urea and increasing fuel cost.[165]

3. Populist and Electoral Concerns

Politicians have electoral concerns. Interest groups can influence political fortunes by promising support during election season and afterward in the implementation of policy. More controversially, powerful interest groups can also provide private favors to political figures to obtain favorable outcomes. Meanwhile, the Pakistani electorate can influence trade policy by pressuring its elected representatives.

The Pakistani political system is a multiparty one, with a multiplicity of political parties operating within the domestic political context. Within this milieu, four political parties are currently in prominence; the Pakistan Muslim League *Nawaz* Group (PML(N)), the Pakistan Muslim League *Quaid-e-Azam*Group (PML(Q)) and the Pakistan People's Party (PPP) have enjoyed historical political significance. Recently these well-established political parties have been joined by the Pakistan *Tehreek-e-Insaaf*(PTI), which has risen to assert itself on the domestic political forum. Each of these parties, in courting the populace, formulates a political manifesto delineating their stance on various issues pertinent to the Pakistani polity; among these is their stance on international trade – often informed by domestic populist concerns regarding such trade.

In the 2013 elections, the major political parties incorporated the concerns of leading interest groups into their political manifestos.

3.1. The Pakistan Muslim League- Nawaz Group (PML (N))

The leading party, the Pakistan Muslim League (N) has historically been associated with the manufacturing and agricultural industries and has, therefore, been perceived as being 'pro-business'. In its 2013 manifesto the PML(N) emphasized promoting investment in Pakistan, opening up domestic markets to foreign goods and competition, and "[encouraging] regional trade". The manifesto discussed the adoption of an "export-led growth strategy" with the intent of weaning Pakistan off of its dependence upon the cotton and textile industries in its exports. In this regard the manifesto delineates proposed incentives to be extended to other domestic industries – in many instances the removal of non-tariff barriers – in order to promote an export-driven economic strategy. In order to further ease the entrance of Pakistani goods in foreign markets, the PML(N)'s manifesto also lays out an intent for Pakistan to enter into a series of bi- and multilateral trading agreements, hoping to lay the groundwork for Pakistani goods to enter these markets on favorable terms.

The PML(N) addressed agricultural concerns on several topics in its 2013 manifesto. Its economic revival program commits the party to "Attracting foreign investment in the agriculture and livestock

[165] "Small traders say MFN status to India under US pressure." Pakistan Defence Forum. 5 Nov 2011. http://defence.pk/threads/small-traders-say-mfn-status-to-india-under-us-pressure.138704/

sectors to facilitate exports of high value products to regional markets."[166] Part 3 of the manifesto is entitled "Agriculture and Food Security." It commits the PML(N) to "Turn agriculture into a fully-viable economic industry by changing the policy framework and terms of trade in favor of agriculture;"[167] "Convert Pakistan into a large net exporter of food and high value crops to regional markets by modernizing post-harvest storage and marketing systems;"[168]and "formulate, in consultation with the provincial governments, a National Strategy For Food Security to achieve an average agricultural growth of at least 4% per annum."[169] In its tax policy, the PML(N) proposes "To discourage import of luxury items, [by imposing] a regulatory duty . . . on non essential imports."[170]

3.2. The Pakistan People's Party (PPP)

The main opposition party, the PPP, has historically leaned towards the left – particularly with regards to its stance on domestic economic policy; the party has, in the past, restructured subsidies – particularly for the public sectors of the economy – and extended them to several key sectors of the domestic economy including the agricultural industry. Indeed, a significant part of the PPP's policy initiatives – particularly during its most recent tenure in power – focused on providing domestic agricultural producers with incentives, subsidies and protection in order to inure the industry from external shocks. During its tenure the PPP also raised the support price of wheat – a major Pakistani agricultural product – incentivizing domestic wheat production which, in turn, resulted in a surplus. This surplus was exported, increasing Pakistan's net exports for the period and, going forward, PPP's stated intent is to encourage such initiatives in order to enable the domestic agricultural industry – wheat producers in particular – to be better-positioned to compete internationally. The manifesto continues in this vein, discussing in detail various incentives and subsidies it intends to extend to domestic agricultural producers, asserting that the PPP intends to "[provide] agricultural subsidies at par with those in other countries in the region", recognizing the necessity to achieve parity – and effect competitiveness – with goods originating in potential trading partners.

Parts of the PPP's 2013 Manifesto focus on agribusiness: "Our economic policy will focus on agriculture, access to finance, equitable taxation, responsible borrowing, and building on our social safety programmes."[171] The party elaborates that "The Party recognizes that while agriculture accounts for 24 per cent of GDP, it directly and indirectly employs 60 per cent of our workforce."[172] In its proposed People's Agriculture Programme, the party notes that "Crop selection will be carried out according to location and demand. Export-oriented crops will be encouraged."[173] The manifesto

[166]*See*PML(N) Manifesto 2013, p. 9, available online at http://www.pmo.gov.pk/documents/manifesto.pdf (last visited, 25 November 2013).
[167] Id at p. 29.
[168] Id at p. 30.
[169] Id. At p. 32.
[170] Id at p. 18
[171]*See* Pakistan People's Party Manifesto 2013, p. 34, available online at http://www.pppusa.org/Acrobat/manifesto2013.pdf (last visited, 25 November 2013).
[172]Id at 35.
[173]If at 42.

incorporates the textile industry's concerns by promising several measures, including "assistance and support to make textile exports competitive." However, both the PML(N) and PPP manifestos suggest that a textiles based export policy is less desirable than a policy to promote exports of technologically sophisticated goods such as electronics and machinery.

The PPP's 2013 manifesto explicitly states that the party will "reduce trade barriers and enter into agreements for free trade[174] with friendly countries to benefit Pakistani industries and exports", and "will encourage the manufacturing sector to increase exports..." This export-heavy direction is consonant with a protectionist stance, with the focus placed more on promoting exports *from* Pakistan than on encouraging imports *to* Pakistan. This is understandable given the preferences of all States participating in the international trade regime; however, it begs the question whether or not such policy directives can be effected – especially by a developing economy – without relying upon non-tariff barriers and de-liberalizing trade.

3.3. The Pakistan Tehreek-e-Insaaf (PTI)

The PTI is the most recent significant entrant into the Pakistani political context; though founded in 1996 the party has only recently made significant inroads into the domestic political milieu and has since established itself as one of the largest political parties in the country.

As a relatively young political entity the PTI has little historical anecdotes from which to extrapolate its policy leanings; its manifesto however, expresses an ostensibly conservative perspective on economics, with the stated goal of ensuring a smaller governmental footprint upon the domestic economy. The agricultural industry, in particular, gets particular mention, with a series of policy initiatives – again largely the removal of non-tariff barriers – proposed. Much of the PTI's discourse on the sector revolves around the removal of technical barriers to domestic agricultural productivity – and thus barriers to its competitiveness abroad – and the extension of subsidies or benefits to effect growth in the industry.

3.4. Populist Pressure

A recent poll conducted by Gallup over a representative sample population of over 2600 found that over 63% of Pakistanis are in favor of trade with India. [175]

Stakeholders are not content with the current regional arrangements and trade policies. The populace seeks a redress of tariff and non-tariff barriers and a move towards political reconciliation. Politicians on both sides have been accused of subverting the trade process by linking it to political negotiations and denying South Asia the chance to regionally integrate. Attempts at improvement of

[174] Emphasis added

[175]Gilani Weekly Poll."*Cyber Letter"* Week 138:(02 Sept 2013). Print.

trade relations have been regularly thwarted by stirring nationalistic and patriotic rhetoric. Peace has not been cited as one of the ways to achieve better trade relations but as the only possible way.[176]

To further gauge populist pressure, we rely on opinion pieces and editorials in Urdu newspapers. The Urdu press, which is directed exclusively at the domestic audience, is arguably a better gauge of popular sentiment than the English press, which is geared toward the upper middle class, the upper class, and a foreign audience. Contrary to the Gallup poll, we find that that Urdu press is considerably more hostile to trade with India than the English press. The Urdu press in Pakistan has traditionally portrayed India as an existential threat. The editorial line of Urdu newspapers is closest to the Composite Dialogue policy of the government, which links trade to other political disagreements between the neighbors. For example, following Pakistan's decision to grant MFN (Most Favored Nation) status to India in 2011, many editorials opined that trade relations with India should not be pursued until India resolves the Kashmir issue.

A majority of the Urdu press reacted negatively to the government's decision, formulating their anti-India rhetoric on two tiers. Firstly, many editorials argued that increased trade with India would dilute Pakistan's stand on the Kashmir issue, complementing Munawwar Hassan's (Chief of the Jamaet-e-Islami) view that the MFN status to India was tantamount to "stabbing in the backs of Kashmiris" by the Pakistani authorities.

Secondly, many viewed a liberal trade regime as being inherently disadvantageous to Pakistan and were concerned about the possibility of Indian goods flooding the Pakistani markets. An editorial in the Nawa-i-Waqt equated the government's decision with the "Fall of Dhaka"[177] and criticized the civilian regime for following a policy which was antithetical to Pakistan's national interest.[178]

Views towards trade with China and Sri Lanka are not shaped by any historical animus and are more economic in nature.Infact,today Pakistan is the second largest trade partner of Sri Lanka amongst South Asian countries and both countries have benefited significantly from lower prices of commodities. Empirical research shows an estimated increase in wealth (and efficiency) for Pakistan to the tune of 0.05% of Real GDP after it signed the Free Trade Agreement with Sri Lanka.[179]

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[176] Afsheen, Naz. Political Dominance or Economic Gains: A Case Study of India-Pakistan Trade and Perceptions of the People of Pakistan Peace Prints. "*South Asian Journal of Peacebuilding*" Vol. 4, No. 2: (2012). Web http://www.wiscomp.org/peaceprints.htm

[177] "Another Mischief." Nawa-I-Waqt, November 11, 2011.

[178] Khan ,Shamshad A. and Julka, Amit. "The MFN Debate in Pakistan's Urdu Press: Sign of cracks?" Institute for Defence Studies and Analyses. 23 Nov 2011. (http://www.idsa.in/idsacomments/TheMFNDebateinPakistansUrduPressSignofcracks_AmitShamshad_231111)

[179] Ahmed, Ahmed et al. "Trade Agreements between Developing Countries: A Case Study of Pakistan – Sri Lanka Free Trade Agreement." Munich Personal RePEc Archive. 29209 (2010).

Chapter 5: Recommendations

Our research suggests that Pakistan's non-tariff barriers are lower than those of India, China, and Sri Lanka. Pakistan uses only a handful of statutes and regulations (statutory regulatory orders) to implement non-tariff barriers. These NTBs do not appear to have a substantial effect on imports: we find that both China and India have overwhelming trade surpluses against Pakistan, and both countries figure as major suppliers of some of Pakistan's main imports. However, insofar as Pakistan's low non-tariff barriers are the result of a lack of legal know-how, we expect that Pakistani NTBs could grow. As lawyers and policymakers become aware of the ways in which exceptions to the free trade regime have been used to restrict imports into China, India, and Sri Lanka, they are likely to emulate these methods to erect stronger barriers to trade. To avoid such a scenario, we recommend the following:

1. The discussion on trade in general and MFN status in particular should always be linked to non-tariff barriers. Non-tariff barriers are substitutes for tariffs, and Pakistan will be more willing to lower tariffs if it is assured of a reciprocal lowering of non-tariff barriers by India and other regional countries. In order to ensure such a link we recommend the following:

    a. Pakistani trade representatives and officials should be trained on the specific non-tariff barriers that affect Pakistan's exports to India. This training should include the basic theory of non-tariff barriers, empirical evidence of the effects of NTBs, and information on the laws that create these NTBs.

    b. Pakistan and India should agree on a list of non-tariff barriers that are up for negotiation. The definition of non-tariff barriers is somewhat nebulous, insofar as agricultural subsidies, lack of training, port limitations, infrastructure complaints, and even legal system may qualify as NTBs. If one country demands the lowering of NTBs, the other may counter-demand the lowering of another NTB that neither party had considered. If the parties start with an exhaustive list of NTBs that are up for discussion, then common ground can allow them to agree on reciprocal measures.

2. The Composite Dialogue between India and Pakistan should proceed on all fronts simultaneously. We recognize that the Composite Dialogue is likely to stall, as it has in the past. In that event the delinking of issues must be rethought. The current delinking of trade from territorial and security issues does not satisfy the electorate. Moreover, such a delinking does not consider the economic effects of seemingly non-economic issues, such as territorial disputes. In particular,

    a. Trade in water dependent products, such as agricultural produce, energy, fisheries, and livestock, cannot be delinked from water disputes that arise out of the Indus Water Treaty. If Pakistan imports water-dependent products from India, then it may legitimize India's use of water resources that Pakistan has challenged under the Indus Water Treaty and customary International law.

b. Trade in fossil fuels and minerals should not be delinked from the territorial dispute over the Sir Creek. The Sir Creek and the Rann of Kutch are mineral-rich disputed areas between Pakistan and India. Pakistan has previously expressed concern that India may be mining in these areas.[180] Pakistan must ensure that it does not inadvertently legitimize India's claim to the Sir Creek by importing minerals that were extracted from there.

3. At the domestic level, we recommend that the agribusiness and textile interest groups negotiate with each other directly to determine a joint stance on trade with India and other regional neighbors. Currently, export-focused interest groups such as textiles are focused on lowering Indian NTBs, and are willing to lower Pakistani NTBs in exchange; meanwhile domestic demand focused industries such as agriculture are less interested in Indian NTBs and keener on preserving Pakistani protectionism. We expect that direct negotiations will enable the two powerful groups to bargain to a better outcome. In particular,

    a. We believe that interest groups for and against NTBs can negotiate more successfully if they agree on lobbying for domestic policies, such as taxes and subsidies, that can redistribute wealth among the interest groups without resorting to trade policy. For example, if lowering NTBs will help textiles more than harm agribusiness, then textiles may agree to redistribute wealth to agriculture, through a tax on textiles and a subsidy to agribusiness. If agribusiness would lose more from lowering NTBs than textiles would gain, then agribusiness may agree to have subsidies switched to the textile industry. Domestic interest groups thus delink their concerns with redistribution from trade policy by using the taxes and subsidies.

    b. In order to make such bargaining possible, we recommend that interest groups and officials be educated on the current regime of taxes and subsidies to Pakistani industries.

    c. This process should be bolstered by domestic interests groups who are representative of their industry. Thus, the All Pakistan Textile Mills Association (APTMA) may adequately represent the concerns of textile millers, but no such parallel can be found in the loosely organized agri-business.

4. Before deciding whether to lower NTBs in an industry, the Government should consider whether the affected industry is currently operating at full capacity, such that it would be unable to meet a higher demand when the Indian market is opened up. Thus if textile sector is operating near full capacity and lacks the present ability and thrust to improve exports significantly, negotiating on textile relevant NTBs and granting reciprocal renditons is futile. In such a case, policy attention should be given to industries which are cost efficient manufactures and need access to foreign markets.

[180] *See* The Express Triune, *Violating Borders?: India Denies Mining in Rann of Kutch, Khar* (15 March 2013), available online at http://tribune.com.pk/story/521107/violating-borders-india-denies-hunting-minerals-in-rann-of-kutch-khar/ (last visited, 20 February 2014).

5. The Pakistan government should begin by lowering non-tariff barriers that protect industries with lower political influence, such as the automobiles industry. We expect that once the government lowers NTBs that protect less influential lobbies, the consumers/electorate will appreciate the benefits of free trade (lower prices) and support the abolition of NTBs for politically entrenched industries as well. In particular,

    a. The government must be educated on which particular NTBs protect which industries. The government must be able to match certain NTBs to certain interest groups in order to remove an NTB strategically.

    b. NTBs that affect many industries simultaneously should be disaggregated into NTBs that affect single industries. This can be accomplished by rewriting laws in more particular language. For example, a standard that applies to "all electronics" can be rewritten into separate laws that apply to cell phones, microchips, hardware, electronic sockets, etc. so that any one of these industries can later be targeted for NTB relaxation without ruffling the others.

6. The government should redirect subsidies from low-tech industries to sophisticated industries and the service sector. While the sudden abolition of subsidies is not feasible, the service and tech sectors of Pakistan are growing faster than agribusiness and textiles. A shift of subsidies to these industries is likely to gain popular support (or at least lose less popular support) in an industry that is less politically organized. In particular,

    a. Since the service sector and sophisticated industries are based in cities, employees and customers of these industries are less provincial or feudal than the employees and first customers of agribusiness. They are more mobile, more educated, and more entrepreneurial, and are therefore likely to weigh economic benefits favorably against political preferences. Since these are relatively new industries, they also have less representation or support in the legislature. Finally, these sectors are creating more new jobs than low-tech industries. A shift of subsidies to these industries will be popular with the electorate because it will create jobs, but will also weaken anti-trade interest groups because it will make them bear their full cost of production.

    b. Another reason for reallocation of subsidies can be found in the cost structure of these industries. Technology and service startups are more focused on human-capital than physical capital and thus boast extraordinary returns. From an economic perspective, subsidies to these industries will generate better, earlier and more probable returns than old-school manufacturing. Notably, when the final output is not physical, there is a lesser chance of it being subject to barriers of law and space.

7. The government should ensure that it only uses non-tariff barriers that qualify under the various exceptions (both general ones and ones geared toward developing countries) contained in international trade law instruments such as the GATT, GATS, TBT Agreement, SPS Agreement, and Agreement on Agriculture. In particular,

a. The government must hire and train a cadre of lawyers who are well-versed in international trade law and can evaluate the legality of proposed NTBs.

b. The government should organize a standing task force which regularly studies the changes in the trade policies of partners, evaluate the impact of those policies and respond with counter-policies in real time with the relevant interest groups on board.

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