

Legislative Brief

The Foreign Trade (Development and Regulation) Amendment Bill, 2009

The Bill was introduced in the Rajya Sabha on November 25, 2009. It was referred to Standing Committee on Commerce (Chairperson: Shri Shanta Kumar). The Committee submitted its report on March 26, 2010.

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Highlights of the Bill

- ◆ The Bill amends the Foreign Trade (Development and Regulation) Act, 1992, which empowers the government to regulate trade in goods.
- ◆ It extends the ambit of the Act to cover services and technology.
- ◆ It brings all licences for trade in services, goods and technology under the exclusive jurisdiction of the Act.
- ◆ The Bill provides for the imposition of Quantitative Restrictions on imports which cause serious injury to domestic industry.
- ◆ The Bill provides for controls on the trade of specified goods, services or technology which could be used in the manufacture of weapons of mass destruction or their delivery systems (such as missiles).

Key Issues and Analysis

- ◆ The Bill does away with all licensing requirements for cross border trade in services, except as provided for under the Act. This leaves unclear the status of other regulators who may have their own licensing requirements for cross border trade in such services.
- ◆ Traders in specified goods and technologies could have their licences cancelled without being given a reasonable opportunity of being heard. Though they must be given such an opportunity within six months, this provision may create uncertainty for exporters of these materials.

PART A: HIGHLIGHTS OF THE BILL¹

Context

The Foreign Trade (Development and Regulation) Act, 1992 empowers the government to regulate and incentivise foreign trade in goods. It establishes the Director General of Foreign Trade (DGFT) to administer its provisions.

The Bill replaces an amendment introduced in 2001. It retains the provisions on Quantitative Restrictions (QR) proposed in the 2001 Bill and incorporates the recommendations of the Standing Committee on that Bill. It also introduces new provisions to bring trade in services and technology within the ambit of the Act. The Bill provides for the regulation of dual use materials (which have legitimate commercial uses but can also be used to manufacture weapons of mass destruction). It redefines powers of search and seizure under the Act.

Key Features

Trade in Services

- The Bill broadens the scope of the Act to cover cross border trade in services and technology, in addition to goods. It also applies to foreign service providers, who benefit from trade incentive schemes for delivering services to Indian customers (and vice versa for Indian service providers to foreign customers).

- The services to be covered by the Bill include all tradeable services under the General Agreement on Trade in Services (GATS) under the WTO. These cover twelve sectors (a) business (b) communications (c) construction and engineering (d) distribution (e) education (f) environment (g) financial (h) health (i) tourism and travel (j) recreation, cultural and sporting (k) transport (l) others.²

Licensing and Registration of Exporters and Importers

- The Bill states that all licences for import or export shall be regulated only under this Act. This will override provisions under all other Acts.

Quantitative Restrictions

- The government may impose QRs (limits on imports) on an article which can cause serious injury to domestic industry. QRs are valid for 4 years, extendable up to 10 years.
- QRs can be imposed on a developing country for an article only if both following conditions are met: (a) if imports from that country exceeds 3% of total imports of that article and (b) total imports of the article from all developing countries exceeds 9%.

Regulation of Trade in Dual Use Goods and Technologies

- The Bill regulates trade in materials or technologies which can be used in the manufacture of weapons of mass destruction or their delivery systems. Such materials or technologies will be specified in the rules.
- Authorised officers may suspend or cancel an import or export licence for such materials without giving the holder a reasonable chance to be heard. Subsequently, such persons must be heard within 6 months.
- Violation of controls of specified materials shall attract penalties under the Weapons of Mass Destruction Act, 2005. Unauthorised exports of such materials are punishable with fines of Rs 3 lakh to Rs 20 lakhs. Further such violations shall attract a prison term of 6 months to five years, along with a fine.

PART B: KEY ISSUES AND ANALYSIS

Licensing of Services Trade

Clauses
2(a), 2(c),
3, 19

The Bill extends the ambit of the Act to cover trade in services. The Bill brings licensing requirements for services trade exclusively within the purview of this Act, unless a specific notification is issued stating otherwise.

This implies that service providers will no longer require to be licenced, at least for foreign trade in services, by the regulators in other sectors under their own laws (e.g. the Reserve Bank of India regulates the entry of foreign banks under the Banking Regulation Act, 1949). This may lead to uncertainty about which regulator or ministry has jurisdiction to licence cross border trade in the relevant sector.

The Bill states that it will not override other Acts. However, in line with principles of law, this general provision may be overridden by the specific provision which brings licensing of trade under its exclusive purview. This may not remove the uncertainty regarding the jurisdiction of other laws.

Export Licences for Dual Use Goods

Chapter
IV A

The Bill restricts the trade of specified materials which can be used in the design, manufacture or delivery of weapons of mass destruction. Authorised officers or the DGFT may cancel or suspend a licence to trade in such materials without giving the holder a reasonable opportunity to be heard. Though the exporter has to be provided an opportunity to be heard within six months of such a cancellation or suspension, the Bill does not require the DGFT to issue the final order within a stated period of time. This may create uncertainty for those who export materials with dual-use capabilities.

Notes

1. This Brief has been written on the basis of the Foreign Trade (Development and Regulation) Amendment Bill, 2009, which was introduced in the Rajya Sabha on November 25, 2009. It was referred to the Standing Committee on Commerce (Chairperson: Shri Shanta Kumar). The Committee submitted its report on March 26, 2010.

2. See WTO website http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm

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