Chapter 10

INDIA

TARIFFS

1) High Tariff Products

<Outline of the measure>

The simple average bound tariff rate for non-agricultural products is 34.3 % as a result of the Uruguay Round. Bound tariff rates were unified among higher and lower tariff rate items at 40% and 25%, respectively. For processed products, bound rates are unified at 40% for end products and 25% for raw materials, intermediate products, parts and equipment.

In March 2006, India lowered the maximum base tariff rate for all items except for agricultural products from 15% to 12.5%, and also lowered the tariff rates for capital goods and some kinds of parts and raw materials to 5%-10%. These tariff reductions can be evaluated to a certain degree as promoting free trade. However, the 12.5% tariff rate, applicable to finished products, is still applicable to other parts and raw materials. Tariff reduction is also desired for these items. For instance, in the category of textile products, many items are unbound, and almost all bound items have the 35% tariff rate, which is inappropriate in light of India's competitiveness and the international tariff level. The binding coverage for non-agricultural products is 69.8%.

Unbound items include automobiles (applied tariff rate: 60% for new cars; 105% for used cars). Both specific duties and *ad valorem* duties are applied to textiles and clothing (applied tariff rate: 15-30% *ad valorem*). Given these rates, there appears to be significant room for improvement.

<Problems under international rules>

Higher tariff rates themselves do not, *per se*, conflict with WTO Agreements unless they exceed the bound rates. However, from the viewpoint of promoting free

trade and enhancing economic welfare, it is desirable to reduce tariff rates to the lowest possible rate.

Low bound tariff rates are inconsistent with WTO Agreements, but since they make it possible for authorities to set arbitrary applied tariff rates it is desirable that unbound products be bound from the point of view of increasing predictability.

<Recent developments>

Market access negotiations in the DDA for non-agricultural products are ongoing and include negotiations on reducing and eliminating tariff rates.

(2) Introduction of special additional tariffs on imported products

<Outline of the measure>

In addition to imposition of a basic customs duty, the applied tariff rates described above, India collects additional duties (countervailing duties), extra additional duties, and education cesses at customs. The table below specifically shows how the total customs duty is calculated with the value (CIF value plus landing charges) at 100, BCD at 12.5%, CVD at 16%, and ADC at 4%. In this case, the total customs duty is 36.74 to the assessment value 100, which is a higher level than the applied tariff rate that Indian Government usually presents in international negotiations or to the WTO. (The figures in the table below are rounded to two decimal places.)

	Item	**Tariff rate**	**Amount (Tax)**	**Total**
	Assessment Value (CIF value + landing charges)		100.00	
A	Basic Customs duty (BCD)	12.50%	12.50	
B	Total			112.50
C	Additional Duty (Countervailing duty) (CVD)	16.00%	18.00	
D	Total			130.50
E	Education Cess	2.00%	0.36	
F	Total			130.86
G	Education Cess x (A+C+E)	2.00%	0.62	
H	Extra Additional Duty	4.00%	5.26	

	Item	Tariff rate	Amount (Tax)	Total
	(Additional Duty of Customs) x (F + G) (ADC)			
I	Total			136.74
J	Total Customs Duty (A+C+E+G+H)		36.74	

<Problems under international rules>

As described above, while the simple average bound tariff rate India agreed upon in the Uruguay Round for non-agricultural products is 34.3%, the basic customs duty rate is 12.5% in principle, below the average bound tariff rate. Looking at the basic customs duty, as long as the tariff rate for individual products is below the bound tariff rate it is compatible with GATT Article II. On the other hand, extra additional duty and tax education cess can be considered to be “other taxes or surcharges” under GATT Article II:1(b) paragraph 2 and, since these are not listed in India’s bound schedule, it is possibly a violation of GATT Article II.

<Recent developments>

Japan should conduct a detailed survey of this system, and if there is a problem, should request through bilateral working-level negotiations that India improve the tariff system to be compatible with the WTO Agreements to increase transparency.

ANTI-DUMPING

Abuse of AD measures and lack of transparency

<Outline of the measure>

India, which is the world’s most frequent utilizer of AD measures, imposed 323 AD measures from 1995 to June 2006. Among these, 17 cases were against Japan.

In regard to AD investigations/measures that India has conducted against Japan so far, problems have been pointed out. They include cases where: (1) the Indian Government has disclosed no information, although Japan requested disclosure of normal value, export prices, methodology for calculating dumping margins in the case of AD duty collection on a per-unit tax basis, and a causal relationship between the

injury determination and the dumped imports; and (2) the original investigation period of dumping varies from case to case (from 6 to 18 months), showing the possibility of an arbitrary selection of periods when international prices decline or the exchange rate fluctuates.

Problems under international rules>

In AD investigations by the Indian Government, provisional decisions and the final decision do not cover all data related to the 15 factors of injury under Article 3.4 of the AD Agreement, which should be examined by the authorities, and the disclosure in some cases does not meet the obligation of the authorities provided in Article 12.2 of the AD Agreement. For these cases, Japanese companies as the interested parties could not conduct any effective data analysis regarding the grounds of the decision, which limited their ability to offer rebuttal arguments. As a result, they lost the opportunity to protect their own interests. This situation is inappropriate, pursuant to Article 6.1 of the AD Agreement.

In regard to AD investigations that India has conducted against Japan, for example, an investigation on Hydroxylamine Sulfate was started in 2000, and the investigation period was determined to be from July 1, 1999 to December 31, 1999 (6 months); for Sodium Hydroxide, for which an investigation started in the same year, the investigation period was determined to be from April 1, 1998 to September 30, 1999 (18 months). The investigation periods vary by case, but the Indian Government has provided no explanation for the reasons. If periods are selected arbitrarily in accordance with a decline of international prices or exchange rate fluctuations, it would be inappropriate, pursuant to Article 2 of the AD Agreement.

<Recent developments>

With regard to the AD investigation concerning Poly Vinyl Chloride (PVC) initiated in June 2006, the product scope under investigation was not clear, and the product scope seemed to include some specialty products (products with high value added) that were not manufactured by Indian industry in a sufficient amount to meet domestic demand. Japan asked the Indian investigative authorities to exclude such specialty products from the product scope under the investigation, arguing that: (1) the specialty products are different from general-purpose products manufactured by Indian companies in their chemical and physical properties and are not under the same conditions of competing from the point of view of their end uses and functions, and that: (2) the imposition of AD duties on the specialty products would lead to cost increases for domestic user industries in India. In November 2006, the Indian complainant companies submitted a document noting that the specialty products described by Japan were not included the product scope, and Japan's arguments were accepted.

In 2003, the EU requested bilateral consultation with India according to WTO dispute settlement procedures, arguing that the AD measures by India were inconsistent with the AD Agreement. Since then, the numbers of AD investigations initiated and AD measures applied by the Indian Government has been on a declining trend. However, India is still one of the world's most frequent appliers of AD measures. Japan needs to continue monitoring AD measures by the Indian Government, pointing out any problems inconsistent with the AD Agreement, and requesting improvement.

TRADE IN SERVICES

Foreign Investment Restrictions, etc

<Outline of the measure>

In February 2002, the Ministry of Commerce and Industry changed the foreign investment license regime to a negative list system. As of the end of December 2006, Foreign direct investment up to 100 percent is automatically allowed in industries/investments that are not included in the following list (notification to the Reserve Bank of India is necessary:

(1) two industries reserved for state-owned firms (nuclear energy and railway);

(2) six industries for which a license is necessary under the Industry Law of 1951 (alcoholic beverages, tobacco, aviation/space/defense electronics, industrial explosives, hazardous chemicals and pharmaceuticals);

(3) investments exceeding 24 percent in about 500 industries that are reserved for small scale industries;

(4) investments conflicting with the location restrictions designated in the new industrial policy of 1991;

(5) when foreign firms already have entered into capital/technology partnerships with Indian firms to establish companies in the same industry (government permits are not required in the following cases:

(i) when investors are venture capital funds;

(ii) existing joint-venture partners hold a share of less than 3%; and

(iii) existing businesses by joint-venture or tie-up are in a rest condition);

(6) capital injection to existing Indian firms (listed firms or financial services firms);

(7) investment in the following industries, as to which foreign investment is prohibited (gambling, lottery, real-estate-related business other than real-

estate development and construction business approved by 2005 Government Note No.2 (Press Note 2), nuclear power, agriculture (excluding plants and flowers, gardening, seed cultivation, livestock raising, and vegetable cultivation under guidelines), and farming business excluding tea farming); and

(8) investments in 22 industries for which individual equity contribution restrictions/guidelines are set.

Major restrictions relating to the (8) above are as follows:

-Financial Services

In March 2004, India relaxed restrictions on foreign investment in private banks, raising the ceiling on permissible foreign ownership from 49% to 74%. In addition, foreign banks may now establish wholly-owned subsidiaries in India, provided that they: (1) are under the jurisdiction of the competent authorities in their home countries, and (2) meet approval requirements of India's central bank (RBI). The current banking regulation law stipulates that foreign voting rights should be restricted to less than 10% of all voting rights in domestic private banks. But in May 2005, abolition of these restrictions was adopted at a Cabinet meeting. This was to be put into effect through an official notice (and announcement of new guidelines) by the RBI, but no notice has been issued as of December 2006.

For insurance businesses, the Insurance Regulation Development Authority (IRDA) Law was enacted in December 1999. Under the law, the insurance market, which had consisted of a government run monopoly, was privatized and opened to foreign investments. In the July 2004 budget bill, India proposed that the ceiling on permissible foreign investments in insurance companies be raised from 26% to 49%. However, as of December 2006, no formal notification has been issued by the government raising the ceiling. As for non-banks, foreign investment up to 100 percent is permitted in 19 sectors, including for designated merchant banks and home financing. However, minimum capital requirements are prescribed according to equity contributions. These investments are also automatically permitted on condition that the guidelines of the Reserve Bank of India are followed.

- Distribution Services

Currently, wholesale businesses are not automatically permitted and FIPB permits are required individually. The areas for which individual permits are granted by FIPB follows: (1) import businesses accompanying sales by port delivery/bonded warehouse delivery; (2) wholesale transactions in the cash and carry system; and (3) in the case of selling more than 75% of imported products to own-group companies. In these cases, establishment of wholly foreign-invested sales companies is permitted. As for the cash and carry system mentioned in (2), the scope is over-interpreted, which in reality, also enables credit sales and delivery sales.

Until February 2006, only the establishment of wholly foreign-invested sales companies was permitted. However, in a government announcement dated 10 February 2006 (Press Note No. 3), the Indian government formally decided on a partial opening of the market to retail businesses for which foreign capital participation was previously prohibited, and placed this decision into effect the same day. The following conditions apply to the participation of foreign capital in this sector: (1) prior approval must be obtained from FIPB; and (2) the maximum percentage of foreign equity participation is 51%. In addition, the following guidelines have been established: (1) products sold are to be limited to "single brand" products; and (2) the brand name of the products to be sold will be assigned in the process of product manufacturing. If these guidelines are followed, brand makers can open retail stores through a 51% investment of their own capital. On the other hand, large-scale retail chains such as supermarkets are out of line with the requirement of the above guidelines that "single brand" products will be sold, and participation is not allowed.

Also, on February 10, 2006, the government announced Press Note No. 4 allowing establishment of wholly foreign-invested subsidiaries through automatic permit with regard to wholesale businesses using cash and carry systems and trade industries that engage in export. Previously, prior approval was required by FIPB.

No permits are granted for investments in supermarkets, convenience stores and other retail sectors.

<Problems under international rules>

Although the WTO Agreements contain no general rules on investment, the GATS disciplines service trade activities relating to investment in sectors in which commercial presence obligations are included in a Member's schedule of services commitments. The various restrictions on foreign investment described above do not violate the WTO Agreements so long as the restrictions do not contravene GATS commitments. However, it is desirable that liberalization efforts be made with the spirit of the WTO and the GATS in mind.

<Recent developments>

Japan is monitoring efforts in India to amend laws that would tighten foreign investment regulations. Japan also is requesting in bilateral dialogues and through the WTO services negotiations that foreign investment restrictions be relaxed.

PROTECTION OF INTELLECTUAL PROPERTY

1) Protection of Patents in Relation to Pharmaceuticals, etc.

<Outline of the measure>

Article 27.1 of the TRIPS Agreement stipulates that patents shall be available for any inventions, whether products or processes. However, a 10-year transition period (until January 1, 2005) was granted to developing country Members which lacked patent systems for items such as pharmaceuticals and chemicals (Article 65.4). India did not maintain a system for product patents for pharmaceuticals (Patent Act of 1970). In December 2004, at the end of the implementation term, the President of India decreed the Patents (Amendment) Ordinance of 2004 (Ordinance No. 7 of 2004), introducing the product patent system. Later, (the third) amended Patent Act of 2005 was deliberated, adopted in the Parliament, and was made public on April 5, 2005. With the exception of some provisions, the amended law was retroactively enforced starting January 1. The main points of the reformed law include: (1) introduction of the product patent system; (2) introduction of the definition of pharmaceutical substances; (3) eliminating the provisions for exclusive marketing rights (EMR); (4) limiting the rights of patent rights holders and others through mailbox applications; and (5) introduction of compulsory licenses for pharmaceutical products (both manufacturing and export).

<Problems under international rules and recent developments>

It is highly appreciated that the product patent system was introduced and TRIPS obligations were implemented. While no definitions have been set up for other products, a definition has been established for a pharmaceutical substance ("pharmaceutical substance" means any new entity involving one or more inventive steps). This could possibly create a problem with Article 27.1 of the TRIPS Agreement, which prohibits discrimination within the field of technology. Therefore, the Indian government has set up a technical expertise committee to supervise the issue of eliminating some of the microorganisms from being subject to patentability, and the deliberations on consistency with the TRIPS Agreement. It is necessary to pay close attention in the future to the practices of the product patent system, including decisions during the patent examination.

2) Issues related to Counterfeit, Pirated and other Infringing Products, etc.

India maintains a strong legal system to protect intellectual property rights that is consistent with the TRIPS Agreement, and Japan welcomes India's commitment to put this system in place.

However, enforcement is limited and Japanese companies complain of the vast quantities of pirated software and games that are sold in India. In addition, significant amounts of counterfeit and pirated products enter India from other countries. As the Indian Government does not make statistics on the control of these products by police and customs authorities available, it is, necessary to closely monitor India's efforts to combat intellectual property infringement to ensure compliance with India's obligations under the TRIPS Agreement.