The Foreign Manufacturers Liability and Accountability Act: a major concern for Indian exporters to the US

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The proposed Foreign Manufacturers Legal Accountability Act of 2010 (FMLAA) currently being debated in the US requires all foreign manufacturers and producers exporting 'covered products' to establish a registered agent in the US who would be in a position to accept service of process ie. legal responsibility for the liabilities arising out of these products. Covered products include drugs, cosmetics, biological products, consumer products, devices, chemical substances, and pesticides. Through the act of accepting the service of process on his behalf by the registered agent a foreign manufacturer or producer would be deemed to have consented to the jurisdiction in US courts.

This proposed law has raised serious concern within Indian industry and could prove to be very expensive to small and medium scale manufacturers and producers. If this law comes into force, it will effectively become a non-tariff barrier to accessing the US market. The FMLAA adds to the costs of exporting in two specific ways. First, there is the cost of hiring registered agents for receiving service of process. Many Indian exporters to do not export to US market the whole year, a few consignments a year is often the common practice. Many do not even export to US customers every year, doing so periodically once every two or three years. However, exporters would have to maintain a registered agent in the US all year round as it would not be feasible to search and contract a registered agent on a consignment by consignment basis. The cost of maintaining such a registered agent would be significant, especially for some of the smaller exporters.

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Second the law applies to intermediate goods and not just finished products. This brings a large number of Indian exports to the US under the ambit of the law. Product liability issues related to finished product would potentially make intermediate suppliers also liable in case something is wrong with the finished product and causation is difficult to pin-point. This greatly increases the likelihood of many intermediate goods exporters having to shoulder more risk from litigation related to product liability. Preliminary CII estimates are that the additional cost for compliance with this new American law for the Indian industries could be anywhere between US$300 to US$500 million.

The need for the proposed FMLAA is difficult to understand as the Consumer Product Safety Improvement Act (CPSIA) already provides more than adequate protection to the US consumer by requiring producers to test and verify that products entering the United States conform to US standards before they are imported into the country. Thus, many see the FMLAA as an attempt by US lawmakers to satisfy the more protectionist elements among their supporters before crucial mid-term elections in November.

One can argue that the FMLAA violates WTO principles (GATT, Article XI.1) that states that *"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party"*. While the US is certain to dispute the interpretation of the above stated principle, what cannot be argued is that the FMLAA violates the spirit of the WTO in that it fails to meet the stated ambition of this agreement (Article VIII.1C) that *"the contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements"*.

Implicit in this stated ambition for freer and less complicated flow of goods across borders is the understanding that greater the incidence of formalities required for cross-border trade higher is the cost to meet compliance requirements for them. Several studies undertaken by the World Bank and UNCTAD have repeatedly pointed out that high transaction costs are often bigger barriers than tariffs for exporters. It is entirely possible that increasing transaction costs from such protectionist regulation might eliminate any gains from reduction in tariffs that are likely to be achieved in the Doha Round.

This is a major concern for industry in emerging countries like India that are at one hand being asked to bear the burden of substantial tariff reduction, while at the same time see some of their more important markets raise protectionist barriers in the form of regulatory requirements.

It is no secret that the FMLAA was born out of the 'Making it in America' initiative in the US House of Representatives with explicit goal of protecting the US manufacturing sector. The US is expected to put national priorities over principles such as free trade like any other country. But the US itself is a major exporter, and if one takes out China from the US trade portfolio and includes the trade in services along with goods, than US exports and imports are fairly balanced. As a matter of fact China accounts for almost 2/3rd of the total deficit in goods and services trade for the US.

In other words, the US needs global markets just as much as rest of the world needs US markets. Many US jobs are directly or indirectly dependent on US exports. A downward spiral towards protectionism using regulatory means is not conducive for US economic recovery and employment generation. Policy makers in the US government and House of Representatives, and stakeholders such as the AFL-CIO need to understand the complexity and inter-dependence in the web of global economic relations today and be more supportive of the idea of free and more transparent trade. ■