

Hoda, Anwarul; Rai, Durgesh K.

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Environment and labour on the trade agenda: Lessons for India from the TPP Agreement

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Working Paper 340

**Environment and Labour on the
Trade Agenda: Lessons for India from
the TPP Agreement**

Anwarul Hoda

Durgesh K. Rai

July 2017



INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS

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Abstract

This paper undertakes an evaluation of the Labour and Environment chapters of the TPP Agreement, with a view to determining India's stand if the same or similar provisions are proposed in multilateral, plurilateral or bilateral agreements in future. Analysis in the paper shows that if TPP like provisions are incorporated in multilateral trade agreements, for India there would be only a small area of vulnerability to countermeasures arising from our labour laws and none due to the laws on the environment. The paper does not recommend a change in our stance on keeping environment and labour out of multilateral trade agreements as the current multilateral trade compact, as embodied in the WTO Agreement, does not permit linkage between trade in goods and services with labour and environment and there is no advantage to be gained by developing countries by a move to alter the position. On the other hand, if India accepts the proposition there is the unwelcome prospect of countermeasures being applied against the country's trade and economic interest. The paper, however, recommends that in bilateral negotiations, if the emerging bilateral agreements respond strongly to India's economic interest, there would be no harm in India having an open mind for discussing the inclusion of provisions on the lines of the TPP Agreement with all the safeguards. In fact, India could seek additional safeguards to plug the few chinks that remain in our armour against countermeasures.

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Authors' Email: *ahoda@icrier.res.in; drai@icrier.res.in*

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Environment and Labour on the Trade Agenda: Lessons for India from the TPP Agreement¹

Anwarul Hoda² and Durgesh K. Rai³

1. Introduction

On January 23, 2017, President Trump signed an executive order officially withdrawing the United States from the Trans-Pacific Partnership (TPP) Agreement. Given the worldwide backlash against globalisation, the market access content of the TPP Agreement is unlikely to resurface in the near future. However, the agreement had a substantial regulatory agenda as well, encompassing inter alia environment and labour on which rules do not exist at present in multilateral trade agreements. The idea of positioning rules on these areas in a trade agreement was to facilitate enforcement of the disciplines through possible trade action. On these matters, the major developed Parties to the TPP Agreement, Japan and USA, particularly the latter, have an abiding interest in seeking international disciplines. Rules in these areas first found a place in an international trade agreement in the side agreements of the North American Free Trade Agreement (NAFTA) in 1994. Since then, these have been elaborated in various FTA agreements entered into by the USA in earlier years, and the TPP Agreement provisions on these aspects can be taken to be the latest expression of its concerns. Although developed countries have so far been kept at bay in the WTO on these matters, as their ascendancy in the world economy is put under greater pressure, they may raise these issues again in future. When they do, it is not unlikely that they would resurrect the proposals embodied in the TPP Agreement. What is more, labour and environment issues are already been raised bilaterally by other developed economies, such as the EU and Canada in the context of ongoing negotiations for economic partnership agreements with India. Thus, the regulatory agenda of the TPP Agreement in these areas has continuing relevance for India and other developing countries as it might prove to be the archetype for proposals that might be put forward in future in the multilateral, regional or bilateral context. It is, therefore, necessary to evaluate the provisions of the TPP Agreement carefully, with a view to drawing lessons about the future shape of initiatives that might come from the developed countries, and about the development implications if these initiatives were to be accepted.

In the context given above, we undertake an evaluation of the Labour and Environment Chapters of the TPP Agreement from India's perspective in this paper. In past debates on trade and labour standards and trade and environment, the position taken by India and other developing countries has been influenced by the central fear that developed countries would raise trade barriers on goods and services imported from developing countries on the ground

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² Chair Professor of ICRIER's Trade Policy and WTO Research Programme, New Delhi

³ Research Associate at ICRIER, New Delhi

that they adopted low or lower standards than those followed by developed countries. Did the provisions in the TPP Agreement justify this? The fact that the labour rights and environment obligations of the TPP Agreement were subject to dispute settlement, with the possibility of counter measures being applied in case of failure to adhere to the standards, did clearly establish the mechanism for imposing trade sanctions for environmental or labour standards objectives. But the fear of trade action would prove to be justified only if the benchmark of substantive standards were set at a level that was too high for developing countries to comply with. To examine this question in India's context, we need first to analyse the substantive labour and environment standards incorporated in the TPP Agreement and then look at the current situation in India in respect of these standards.

This paper is about the TPP provisions on labour and the environment; we cover dispute settlement procedures as well because it is the application of these procedures that gives teeth to the substantive obligations and commitments. We examine the TPP standards of labour and environment and evaluate the law and practice in India against the benchmark of these standards, clearly identifying and evaluating the divergences where they exist. In the light of our findings in this regard, we draw conclusions on the central issue of whether developing countries have been justified in fearing trade action and in resisting obligations on labour and environment issues in trade agreements. Should they maintain the past approach in the future?

In Section 2 of the paper, we examine the standards embodied in Chapter 19 of the TPP Agreement on Labour and look at the situation in India with regard to these standards. In Section 3, we similarly analyse Chapter 20 on Environment and discuss the situation prevailing in India. In Section 4, we evaluate Chapter 28 of the TPP Agreement on Dispute Settlement together with the provisions in chapters 19 and 20, which are relevant in the context of disputes. Section 5 concludes.

2. The Labour Chapter

With regard to labour standards, the focus of the TPP is on internationally recognised core labour standards and acceptable conditions of work.

2.1 Internationally Recognised Core Labour Standards

The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) commits all nations to the standards relating to internationally recognised labour rights reflected in the relevant ILO Convention, whether or not a particular Convention has been ratified by them individually.

Article 19.3 of the TPP Agreement requires each Party to adopt and maintain in its law and practice the following internationally recognised labour rights:

- (a) freedom of association and effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;

- (c) the effective abolition of child labour, a prohibition on the worst forms of child labour and other protection for children and minors; and
- (d) the elimination of discrimination in respect of employment and occupation.

A separate paragraph in Article 19.3 obliges each Party to put in place in its law and practice “acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health”.

We proceed to examine in detail each of the internationally recognised labour rights embodied in Article 19.3 and then turn our attention to “acceptable conditions of work”.

2.1.1 Freedom of Association and Effective Recognition of the Right to Collective Bargaining

With regard to freedom of association, the following standards are laid down by the *Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Convention No. 87)*.

- Both workers and employers must have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation
- Workers’ and employers’ organisations must have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. Public authorities are mandated to refrain from any interference that would restrict their right or impede their lawful exercise.

On collective bargaining, the *Right to Organise and Collective Bargaining Convention, 1949 (ILO Convention No. 98)* stipulates that workers must have adequate protection against anti-union discrimination in respect of their employment and the membership of a union or participation in union activities outside working hours must not prejudice the interest of a worker.

Freedom of Association and Right to Organise in Indian Law:

One of the fundamental rights guaranteed by the Constitution of India with regard to freedom of speech is the right to form associations and union. However, it is provided that notwithstanding this right, the government may make laws imposing “reasonable restriction” on the exercise of the right in the interests of sovereignty and integrity of India or public order.

The Trade Unions Act, 1926, lays down the rules regarding registration of trade unions and election of office bearers. It suffers from lack of regulation rather than surfeit of it. There is no requirement even for voting or secret ballot for taking decisions on industrial action or for electing office bearers. It has always been easy to form and register trade unions in India.

Until 2001, any seven or more members of a Trade Union could apply for registration of the trade union under the Trade Unions Act. It was only in 2001 that the law was amended to provide that trade union can be registered only if at least 10% or 100, subject to a minimum of 7 workmen applied for registration. This amendment was in public interest because the earlier law was resulting in a multiplicity of trade unions, which made collective bargaining difficult. Earlier, considerable latitude was given to non-workers in the appointment as office-bearers. This led to capture of trade unions by outsiders and made the system ill-suited for collective bargaining. Now, after the 2001 amendment, the requirement is that only one-third of the office bearers, or five, whichever is less, can be outsiders. The 2001 amendments can be justified as reasonable restrictions in the larger interests of workers. In fact, more needs to be done to impose restrictions on non-workers in union activities to improve the efficiency of trade unions to make them effective instruments of collective bargaining. Even after the 2001 amendments, it is possible for all important positions in the unions, viz., president, treasurer, secretary or general secretary and the principal nominee in the negotiating committee to be filled up by outsiders. Nevertheless, it is still possible to assert that, at present, Indian laws pass the test of full freedom being given to workers in union activities. Indian laws at present are clearly conducive to the formation of trade unions. This assessment is corroborated by the fact that after the economic liberalisation in 1991, the number of registered trade unions increased from 53535 in 1991 to 84642 in 2008.⁴ The only flaw that has been pointed out in the legal framework is that the Trade Unions Act does not apply to Sikkim, where registration of a trade union is subject to police enquiry, pre-grant authorisation and a pre-grant opposition process. This deficiency is a legacy of the period when Sikkim was not a part of the Indian Union.

Collective Bargaining:

One deficiency in the framework of labour laws in India is that there is no central law obliging the employers to recognise a union. In the absence of a central law, several states have passed legislation and filled the gap in the framework within their jurisdiction. For example, the Maharashtra Recognition of Trade Unions and Prevention of Unfair Practices Act, 1971, provides for the registration of any union with thirty per cent membership of the total number of employees in the undertaking as a recognised union. The Kerala Recognition of Trade Unions Act, 2010 provides not only for the recognition of a trade union but also for their designation as the sole bargaining agent. On making an application, a trade union with more than 51 per cent membership is granted recognition and is also designated the sole bargaining agent for collective bargaining. A few other states also have enacted legislation having a bearing on the recognition of trade unions. A provision on recognition in the central law could have facilitated collective bargaining on a countrywide basis but state legislations have served the purpose to some extent in the absence of a centrally enacted provision.

If collective bargaining has not flourished in India, it is because of the fragmentation of trade unions resulting from easy registration procedures contemplated in the Indian law on trade unions. The alignment of trade unions with political parties is another factor that weakens the

⁴ After 2008 no reliable dataset is available.

collective bargaining process. Furthermore, the absence of a strong trade union movement in the country in recent times has been a contributory factor. In fact, trade unions have developed a preference for conciliation to resolve disputes and, if that does not succeed, their choice is adjudication under the Industrial Disputes Act, 1947.

Strikes are an essential tool in the hands of workers to help them in the process of collective bargaining. The law envisages the right of workers to strike, although this is not a fundamental right. One important restriction on this right is in respect of public utility services and the requirement is of prior notice before the commencement of strike. Strikes in public utility services are barred during the pendency of conciliation proceedings. There are parallel restrictions on the right to declare lockouts. The restrictions on the right to strike can be justified as reasonable from the purview of public interest as the public is likely to be put to great inconvenience. The notice period helps the authorities to prepare for alternatives to run public utility services by deploying security forces, for instance. Strikes/lockouts are also prohibited in cases involving a breach of contract, during the pendency of conciliation proceedings before a Board, during the pendency of proceedings before a labour court, tribunal or national tribunal, during the pendency of proceedings before an arbitrator and during any period in which a settlement or award is in operation. These restrictions on the right to strike or declare lockouts aim to ensure an atmosphere free from strife and friction, which may be conducive for the settlement of industrial dispute, and so, they can all be said to be reasonable restrictions.

Protection from Anti-union Discrimination:

The Industrial Disputes Act, 1947, contains very strong safeguards against anti-union discrimination. Such practices constitute unfair labour practices punishable with imprisonment as a criminal offence. The Fifth Schedule of the Act squarely addresses anti-union discrimination and includes the following actions as unfair labour practices:

1. “To interfere with, restrain from, coerce workmen in the exercise of their right to organise, form, join, or assist a trade union or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection”
2. “To encourage or discourage membership in any trade union by discriminating against any workman”
3. “To discharge or dismiss workmen by way of victimisation”
4. “To abolish the work of a regular nature being done by workmen, and to give such work to contractors as a measure for breaking a strike”
5. “To transfer a workman mala fide from one place to another, under the guise of following a management policy”

Furthermore, under section 33 (3) of the same Act, a member of the executive or other office-bearer of a registered trade union is recognised as a protected workman in relation to the

establishment. The protected workmen have been provided with the additional safeguard that, during the pendency of proceedings in respect of an industrial dispute, express permission of the presiding officer shall be taken if their condition of service not connected with the dispute is to be changed or if they are to be punished for misconduct not connected with the dispute.

2.1.2 The Elimination of all forms of Forced or Compulsory Labour

The international standard is laid down by the *Abolition of Forced Labour Convention, 1957 (ILO Convention No 105)*

The Convention enjoins the ratifying members not to make use of any form of forced or compulsory labour

- (a) as a means of political coercion or as a punishment for holding or expressing political views
- (b) as a method of mobilizing and using labour for purposes of economic development
- (c) as a means of labour discipline
- (d) as a punishment for having participated in strikes
- (e) as a means of racial, social, national or religious discrimination.

India has ratified the Convention and otherwise too, it is bound by its standards as an ILO member by virtue of ILO membership in light of the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*. Ratifying members have the obligation to undertake effective steps to secure the immediate and complete abolition of forced or compulsory labour.

Forced Labour under Indian Law

Article 23 (1) of the Constitution of India prohibits “begar” and other similar forms of forced labour and further provides that any contravention shall be punishable. Article 35 (a) (ii) of the Constitution confers powers on Parliament to provide for punishment. Accordingly, an Ordinance was promulgated on 24 October 1975 and subsequently the Bonded Labour System (Abolition) Act, 1976, was enacted by Parliament.

The Act provides for the abolition of the bonded labour system to prevent the economic and physical exploitation of the weaker sections of the people. With the commencement of the Act on October 25, 1975 every bonded labourer was set free and discharged from any obligation to render bonded labour. Any liability to repay bonded debt is deemed to have been extinguished and the property of bonded labour freed from any mortgage. The Act makes the practice of bondage a cognisable offence, punishable by up to three years imprisonment. There is provision for constituting vigilance committees at the district and sub-divisional levels for the implementation of the Act.

Despite the existence of unambiguous laws for the abolitions of bonded labour, there is continuing evidence of infractions of the law across the country. An ILO Working Paper by Srivastava (2005) draws on several past government reports to make the point that the problem has not gone away despite the enactment of the law. In 1977, the 32nd Round of the National Sample Survey Organisation (NSSO) estimated that there were 343,000 bonded labourers in 16 major states. In 1991, the National Commission on Rural Labour (NCRL), while presenting a comprehensive picture of the situation reported that there was high incidence of bonded labour in agriculture as well as in a number of non-agricultural sectors, notably stone quarries, construction, brick kilns, bidi rolling, carpet weaving and pottery. The report submitted in 2001 by an expert group constituted by the National Human Rights Commission came to the conclusion that bonded labour was prevalent not only in a limited number of bonded labour prone states but all over the country. Apart from labour bondage arising from debt, trafficking of women and children for commercial sexual exploitation is also prevalent in India. In fact, the number of victims of sex trafficking is much larger and may run into millions. Recent survey data, which could give a measure of the magnitude of the problem, are not available. However, the Trafficking in Persons Report by the US Department of State (2016) has extracted data from the 2014 Crime in India Report of the National Crimes Record Bureau (NCRB) to show that the problem of bonded labour has not gone away. In 2014, 3,056 persons were investigated, out of which 2,604 cases related to sex trafficking, 46 cases to bonded labour and 406 were not categorised. The number of cases investigated could be only the tip of the problem. To the extent that bonded labour still exists, it is clearly a deficiency of enforcement.

Government has also been taking affirmative action to improve the conditions which make the weaker sections vulnerable to bonded labour. Identified bonded labour has been given rehabilitation grants. The Annual Report of the Ministry of Labour and Employment for 2015-16 mentions that between May 2000 and September 2015, a sum of more than Rs.84 million was released by the central government to the north-eastern states for rehabilitation of 282,429 bonded workers. The rehabilitation package for freed bonded labour includes allotment of homestead land, provision of low cost dwelling units, grants for dairy, poultry and piggery development, training for acquiring new skills, wage employment, and supply of essential commodities.

Apart from these, a Central Action Group has been formed in the National Human Rights Commission (NHRC) to hold sensitisation workshops on bonded labour for District Magistrates and other functionaries concerned with the identification, release and rehabilitation of bonded labour.

2.1.3 The Effective Abolition of Child Labour, a Prohibition on the Worst forms of Child Labour and other Labour Protection for Children and Minors

The *ILO Minimum Age Convention, 1973 (ILO Convention No. 138)*, lays down the minimum age for admission to employment. The following are the main standards in the Convention:

- Each member undertakes to pursue a national policy designed to ensure that the effective abolition of child labour and to raise progressively the minimum age for admission to employment
- The minimum age must not be less than the age of completion of compulsory schooling and, in any case, not be less than 15 years
- A member whose economy and educational facilities are insufficiently developed may, after consultations with organisations of employers and workers, specify minimum age of 14 years
- The minimum age in any type of employment which is likely to jeopardise the health, safety or morals of young persons, is required not be less than 18 years
- A member whose economy and administrative facilities are insufficiently developed may initially limit the scope of application of the convention. However, as a minimum, the provisions of the Convention have to be made applicable to mining and quarrying, manufacturing, construction, electricity, gas and water, transport, storage and communications and plantations and other agricultural undertakings mainly producing for commercial purposes. Family and small-scale holdings producing for local consumption and not employing hired workers are excluded from the applicability of the Convention.

The *ILO Worst Forms of Child Labour Convention, 1999 (ILO Convention No. 182)* prohibits the following evil practices designated as the worst forms of child labour and mandates immediate action for their elimination:

- All forms of slavery, sale and trafficking of children, debt bondage, etc.
- The use, procuring or offering of children for prostitution or pornographic performance
- The use or procuring of a child for illicit activities, including the production and trafficking of drugs
- Work which by its nature or the circumstance in which it is carried out is likely to harm the health, safety or morals of children.

The Legal Framework and Situation in Practice in India

India has not ratified either Convention but is bound by these standards by virtue of ILO membership in the light of the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*.

Article 24 of the Indian Constitution mandates that “no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment”.

The Child Labour (Prohibition and Regulation) Act, 1986, is the main central enactment that translates this constitutional guarantee into legislation. The following are the main provisions of the Act.

- A child is a person who has not completed his fourteenth year of age;
- Employment of children is prohibited in the occupations listed in Part A of the schedule to the Act (such as abattoirs, automobile workshops, foundries, handloom and power loom industry, plastic units, and mines) and processes listed in Part B (listed manufacturing processes such as sports goods, paper making, pottery, saw mills, tyre making, and tobacco processing), stone breaking or crushing, rag picking and scavenging, etc. The prohibition does not apply to any workshop where any process is carried out by an occupier with the aid of his family. 'Family' is defined to include husband or wife, children and brother or sister of the occupier. An amendment in 2006 added to Part A prohibits the employment of a child as domestic workers or their employment in restaurants, hotels, motels etc.
- In employments other than where child labour is prohibited, the hours and periods of work are regulated for children: the period of work shall not be more than three hours at a stretch; the total period including rest shall not exceed six hours; no child shall be required to work between 7 pm and 8 am; no overtime is permissible;
- The government may make rules for the health and safety of employed children including provision of drinking water, lighting, toilet, safety features, etc.
- Penalty for breaches includes imprisonment from 3 months to a year.

The Factories Act, 1948, is another central enactment that regulates child labour. It prohibits employment of children below the age 14 years in factories. However, it provides that an adolescent between 14 and 18 years of age can be employed in a factory only after obtaining a certificate of fitness from an authorised medical practitioner. It also stipulates that the working hours for children in this age group must not exceed four and half hours and prohibits work during night hours.

The Child Labour (Prohibition and Regulation) Act, 1986, clearly fell short of international standards in not prohibiting child labour unconditionally even though it prohibited it in those manufacturing and service industries in which they are prone to be used, such as automobile workshops, restaurants, households. There was another shortcoming in the two laws. For hazardous occupations, the age had not been raised generally to 18 years as envisaged in the ILO Convention no 138.⁵ These deficiencies have been eliminated in Child Labour (Prohibition and Regulation) Amendment Act, 2016. This Act prohibits the employment of children (those below 14 years of age) in all occupations and adolescents (those between 14

⁵ It must be noted, however, that several specific laws governing hazardous occupations such as The Mines Act 1952, Dock Workers (Safety, Health and Welfare) Rules, 1990 and The Explosives Rules, 2008 prohibit employment of persons below 18 years of age.

and 18 years) in hazardous occupations and processes. Now, there is full prohibition in Indian laws on employment of children below 14 years of age and on employment of persons below 18 years of age in hazardous occupations and processes as required by the ILO Conventions. In not raising the age from 14 to 15 years, India has taken advantage of the flexibility given by the ILO Convention for members “whose economy and educational facilities are insufficiently developed”. The amendment also increases the penalty to not less than 6 months and extending up to two years.

But some loopholes have been created in the new legislation. The Amendment Act of 2016 has exempted children helping not only the family but also a family enterprise in which workers outside the family are engaged. Children working as an artist in an audio visual entertainment industry have also been exempted from the prohibition. The ILO Convention, no doubt, has an exclusion clause, but it is subject to conditions and limitations. Only children ‘working in family and small-scale holdings producing for local consumption and not regularly employing hired workers’ are excluded from the applicability of the prohibition on child labour. Thus, it is specifically stipulated that the enterprise should not be regularly employing hired workers. Exemption of children working in any industry such as the entertainment industry is also not envisaged in the Convention. Permitting engagement of hired workers in the ‘family’ enterprise in which the child is working and the lack of any condition regarding production being for local consumption, make our law inconsistent with the ILO Convention. The outright exemption of children working in the audio-visual industry makes our law even more inconsistent with the Convention. India is thus likely to be seen as a deviant from internationally accepted norms even after taking major steps in 2016 to bring its laws into conformity with the ILO Convention by prohibiting employment of children unconditionally and banning the employment of adolescents in hazardous industries.

There is no independent legislation designed to curb the worst forms of child labour but the following enactments cover children also, and, in one case, provide for more stringent punishment in situations in which the victim is a child.

We have seen earlier that the Bonded Labour System (Abolition) Act, 1976, aims at the abolition of the bonded labour system to prevent the economic and physical exploitation of the weaker sections. Similarly, The Immoral Traffic (Prevention) Act, 1956 aims generally to prevent sexual exploitation including prostitution.. There is a special provision in respect of children below 18 years under which the punishment for living on the earnings from prostitution of a child is punishable with imprisonment for a term not less than seven years as compared to two years in other cases. The Narcotics Drugs and Psychotropic Substances Act, 1985 contains stringent provisions for the control of narcotic drugs and psychotropic substances and covers employment of children for illicit traffic. Mention must also be made here of The Commissions for Protection of Child Rights Act, 2005, which provides for the constitution of a National Commission and state commissions for protecting of child rights and children’s courts for speedy trial of offences against children or of violation against child rights.

Quite apart from some deficiencies in the statutory framework prohibiting the employment of child labour, there is also the issue of shortcomings in enforcement. Available data shows that child labour is concentrated in agriculture and allied activities and services such as domestic work, restaurants, construction, auto-workshops, etc. Employment of smaller numbers have been reported in some areas of manufacturing as well, e.g., spinning and weaving, carpet weaving, gem-cutting and jewellery (National Institute of Public Co-operation and Child Development 2010; Prognosys, 2012) . Economic compulsion arising from poverty is the main reason for this state of affairs. One additional factor that had created conditions for employment of children in the past was the shortage of facilities for primary education of children and the discouraging quality of instruction imparted in existing institutions. This has been receiving attention during recent decades through the Sarvashiksha Abhiyan, substantially funded by the Government of India. As a matter of fact, the Government of India has gone further and through the Constitution (Eighty-sixth Amendment) Act, 2002, provided that free and compulsory education will be a fundamental right of all children in the age group of six to fourteen. Further, Parliament has enacted the Right of Children to Free and Compulsory Education (RTE) Act, 2009, which interprets the fundamental right to imply that “every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards”.

It must also be said that the central and state governments have taken steps to improve the enforcement and the cumulative result of improved enforcement⁶ and provision of education facilities through the Sarvashiksha Abhiyan is that the incidence of use of child labour has been coming down in the country. According to the National Sample Survey Organisation (NSSO), the use of child labour has progressively declined from 13.86 million in 1993-94, to 10.13 million in 1999-2000, 9.07 million in 2004-05, and 4.9 million in 2009-10. The latest Indian Census (2011) also shows a substantial decline in the total number of working children between the age group of 5-14 years from 12.6 million in 2001 to 4.35 million 2011 (Labour Bureau 2016).

2.1.4 The Elimination of Discrimination in Respect of Employment and Occupation

The international labour standard in respect of this right is embodied in the *Equal Remuneration Convention, 1951 (ILO Convention No.100)* and the *Discrimination (Employment and Occupation) Convention, 1958*, both of which have been ratified by India. The main elements of this standard are summarised below.

- Each member is required to ensure the application of the principle of equal remuneration for men and women workers for work of equal value, either by means of national laws or legally established or recognised machinery for wage determination or in collective agreements between employers and workers.

⁶ According to Indian Labour Year Book, 2013-14, during the last 5 years, more than 11 lakh inspections were carried out, leading to approximately 0.24 lakh prosecutions and 6238 convictions.

- Members must declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination.
- Members are required to seek the co-operation of employers' and workers' organisations in promoting the observance of this policy and to enact such legislation and to promote such educational programmes as may be appropriate to secure the observance of such policy.
- In respect of employment under the direct control of the national government, as also in activities on vocational guidance and training, the member has the obligation to ensure observance of the policy.

The Situation in India

Article 16 (1) of the Indian Constitution requires equality of opportunity to be provided to all citizens relating to employment under the State. Under Article 16 (2), no citizen shall be discriminated on grounds of religion, race, caste, sex, descent, place of birth or residence. Article 39 further envisages that the State shall direct its policy towards "securing that there is equal pay for equal work for both men and women".

The Equal Remuneration Act, 1976 is aimed at ensuring the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex, against women in the matter of employment. It explicitly provides for payment of equal remuneration to men and women workers for the same work or work of a similar nature. Another section of the Act forbids discrimination against women for recruitment to any work unless the recruitment of women is prohibited by law. There is a provision for the government to set up one or more advisory committees to advise it on providing increasing employment opportunities for women. Procedures for hearing complaints against non-compliance with the provisions of the Act have also been laid down.

Despite the provisions in the Constitution and in the statutes, there are complaints of discrimination in employment against women and against certain communities (scheduled castes, scheduled tribes and backward classes in particular) on the basis of caste on account of the existence in society of age-old social prejudice. In the light of this, the government has provided for reservation in government jobs for the SCs, STs and OBCs at the rate of 15, 7.5 and 27 per cent respectively. The 73rd and 74th Amendments to the Constitution also provide for reservation of seats in panchayats/municipalities in a proportion equal to the population of SCs and STs in the panchayat area. There are provisions also for not less than one-third of the seats to be filled up by women in both panchayats and municipalities. The Central Educational Institutions (Reservation in Admission) Act, 2006, also provides for reservation of seats in central educational institutions for SCs (15%), STs (7.5%) and other BCs (27%). As further affirmative action, central and state governments provide scholarships to meritorious students belonging to these categories and also to minority groups, subject to an eligibility criterion on the basis of the income of parents/guardians.

On the issue of gender discrimination in wages, the situation is more complex. Section 4(1) of the Equal Remuneration Act, 1976, prohibits such discrimination for “performing the same work or work of a similar nature”. Section 2(h) of the Act elucidates the language of Article 4 as follows:

‘same work or work of a similar nature’ means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or woman and the difference, if any, between the skill, effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment.’

Article 2 of the *Equal Remuneration Convention, 1951* of the ILO has the following language:

“ Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value”.

The language of the Indian legislation is quite different from that of the ILO Convention but both would seem to involve considerable subjective judgment in determining comparability. It is difficult to devise a language for the legislation that can deliver perfect gender equality. As for the situation prevailing in India, it should be acknowledged that there is considerable evidence of gender discrimination in the country. A study report prepared by Fabo et al (2014) concluded that, on average, women earned 27 per cent less than men. But the situation is similar in most jurisdictions. It is widely agreed that a multitude of factors lead to the differences in pay between men and women, including the educational level, field of study, work experience, and seniority in the organisation, number of working hours and the size of the organisation. Survey reports have shown such differences in the EU and the USA as well. In a wage equality survey conducted by the World Economic Forum in 2016, India was 103 in the global ranking of countries on gender equality of wages, but Korea (125) and France (134) were lower.

2.1.5 Overall Assessment of India's Adherence to Core International Labour Standards

- The right to form associations and unions is a fundamental right guaranteed by the Constitution of India. Indian laws do not impose any impediments on the freedom of association and right to organise and workers have adequate protection against anti-union discrimination. It may be mentioned, nevertheless, that reforms are needed to improve efficiency in the process of collective bargaining.
- Similarly, the Constitution prohibits any form of forced labour and a specific central legislation provides for the abolition of the bonded labour system. If there is evidence that the problem of bonded labour has been persistent in many parts of the country, it is

clearly on account of shortcomings in enforcement. The numbers are significant only in respect of human trafficking related to sexual exploitation and are small in agriculture and in a few non-agricultural sectors in which the problem exists, e.g., stone quarries, construction, brick kilns, bidi rolling, carpet weaving and pottery.

- As far as child labour is concerned, there are loopholes in the legislation (exemptions for family enterprise using hired workers and audio-visual industry). The large numbers of child labour revealed through surveys by the NSSO right up to 2011 show that there is a significant problem of enforcement as well, even though the numbers are coming down.
- With regard to elimination of discrimination in respect of employment and occupation, the Indian laws are beyond reproach and are reinforced by affirmative action taken by the government in making reservations for the weaker sections. Gender discrimination in wages is a problem as in most jurisdictions in the world.

On the whole, it can be said that there are small weaknesses in regulation but big weaknesses in enforcement.

2.2 Acceptable Conditions of Work with Respect to Minimum Wages, Hours of Work, and Occupational Safety and Health

Article 19.3 of the TPPA stipulates that “Each Party shall adopt and maintain statutes and regulations, and practices there under, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health”. A footnote to the Article stipulates as follows:

“For greater certainty, this obligation relates to the establishment by a Party in its statutes, regulations and practices there under, of acceptable conditions of work as determined by that Party”.

The language implies that the obligation on conditions of work in the TPP Agreement is that each Party shall determine for itself what the conditions of work should be and embody them in its law and practice. This language makes it easier for developing countries to set the standards at a level that they are comfortable with. But it must be borne in mind that there is a separate and strongly worded obligation relating to enforcement of labour laws, and it can be expected that the main focus in judging adherence to the commitments will be on enforcement.

In the TPPA provisions on conditions of work, there is no reference to the relevant ILO conventions, which are in any case only at the level of general principles. Even so, we look at the main provisions in ILO conventions on conditions of work and examine how far the principal Indian laws measure up to them. The standards in the ILO conventions can serve as a point of departure for analysis of Indian laws and practice. If Indian laws approximate closely with the standards set in ILO conventions, even if not required by the TPPA, it will establish India’s overall credibility with regard to the “acceptable conditions of work”. We

have to bear in mind, however, that, given the language of the TPPA, particularly the footnote to Article 19.3, vulnerability to trade action will depend not on how complete Indian statutes and regulations are with respect to minimum wages, hours of work and occupational safety and health in relation to ILO standards but on how effective the enforcement of these statutes and regulations is.

2.2.1 Minimum Wages

Acceptable conditions of work in developing countries constitute an important concern for developed countries as public opposition to trade is often stoked by fears of imported goods produced by labour working on subsistence wages. Labour unions often speak of low wages and long hours of work as well as of low standards of occupational health and safety requirements in developing countries. Wages and hours of work are key aspects and we start by looking at the relevant ILO Conventions and the situation in India on these aspects in turn.

The *Minimum Wage Fixing Convention, 1970 (ILO Convention No. 131)* has the following core elements.

- Each ratifying member undertakes to establish a system of minimum wages covering all groups of wage earners whose terms of appointment are such that coverage is appropriate
- Minimum wages must have the force of law and must not be subject to abatement; and failure to apply must make the concerned persons liable to penal action
- The elements to be taken into consideration in determining the level of minimum wages are the general level of wages, the cost of living, social security benefits and the relative living standards of other social groups. Economic factors such as the requirements of economic development, levels of productivity and the desirability of maintaining high levels of employment have also been mentioned as relevant factors.
- In the machinery for fixing minimum wages, provision must be made for the direct participation of representatives of both workers and employers wherever appropriate

Indian Law and Practice on Minimum Wages

The Minimum Wages Act, 1948, which is a central Act, provides for fixing of minimum rates of wages in the country. Initially, it was not very ambitious in its coverage and provided for minimum wages to be fixed only in agriculture (Part II of the Schedule) and only a few listed mining, manufacturing and other activities. However, Section 27 of the Act authorised state governments to add to either Part of the Schedule “any employment in respect of which it is of the opinion that minimum wages should be fixed under the Act”. State governments have been making additions since then and, according to an estimate by the ILO, around two-thirds of wage earners outside the public sector are covered by minimum wage legislation (International Institute for Labour Studies, 2013). India is not unique in not setting minimum wages for all wage earners. The World of Work Report 2013 by the International Institute for Labour Studies (2013) shows that only half the 151 countries and territories reviewed have

minimum wage systems that apply uniformly on a national or regional basis with a few exceptions while others have systems in which minimum wage rates vary by industry and occupation. However, India's minimum wage system is more complex as not only are there different wage rates for different employments, several states also fix several levels of minimum wages applying to specific jobs requiring different levels of skills in each employment. The ILO Convention No. 131 requires members to "establish a system of minimum wages covering all groups of wage earners whose terms of appointment are such that coverage is appropriate", thus giving them considerable latitude in designing the legislation.

The law is not subject to any abatement even though certain exemptions can be made and offences are punishable with imprisonment. Claims for short payment of minimum wages are also envisaged in the Act along with compensation of up to 10 times the shortfall. The Minimum Wages Act, 1948, provides for two methods for fixing or revising minimum wages: either a Committee (with representatives of workers and employers) is set up for making recommendations or the government circulates proposals, obtains comments from all concerned and then notifies the minimum wages after taking these into account. Thus, the Act requires that irrespective of the method adopted, the machinery for advising on fixing or revising minimum wages must involve representatives of both employees and employers in equal number.

Although the Act mentions that variations in the cost of living index numbers must be taken into consideration, it does not spell out the other factors to be taken into account in fixing minimum wages. However, reports of various committees set up by the government, resolutions passed by various sessions of the Indian Labour Conferences and directions given by the Supreme Court of India have provided guidance on these factors. A Tripartite Committee on Fair Wages appointed in November 1948 drew a distinction between living wages, fair wages and minimum wages. The Committee was of the view that minimum wage must provide not only for sustaining life but also for some measure of education, medical facilities and other amenities. The 15th Session of the Indian Labour Conference laid down the norms for fixing all wages including minimum wages. The standard family should be taken to comprise three consumption units; minimum food requirements should be based on a net intake of 2700 calories; clothing requirement should be based on a family of four making the total 72 yards; for housing the minimum rent charges by government for housing for low income groups should be the norm; fuel, lighting and other miscellaneous items of expenditure should constitute 20 per cent of the minimum wage. In 1991, the Supreme Court expressed the view that children's education, medical expenses, recreation, festivals, ceremonies, and provision for old age should also be provided for by adding 25 per cent in fixing the minimum wage. On the other hand, the 30th session of the Labour Conference warned against the tendency to fix minimum wages at unrealistically high levels.

The central government fixes minimum wages in respect of workers in railways, mining, oilfields, ports or any corporation established by the central and state governments do so for various scheduled employments in their respective jurisdictions. The levels fixed by state

governments vary widely in terms of the components taken into account to fix minimum wages and, in any case, they reflect differences in the cost of living from place to place. One common element in different jurisdictions is that in addition to the central government, 27 state governments and union territories have adopted the variable dearness allowance as a component of minimum wage. This allowance is linked to the consumer price index (CPI) and is revised twice a year on the April 1 and October 1, thus protecting workers against inflation.

The central government adopted the concept of a national floor for minimum wage in 1996 on a non-statutory basis, and has revised it from time to time. The floor of Rs.160 per day was fixed with effect from July 1, 2015. State governments are advised to fix minimum wages at levels not below the national floor. The only issue that might arise in relation to the law and practice on minimum wages in India is that, unlike in other countries, the statutory minimum is not applicable to all employments.

While the norms adopted by India in its minimum wage system pass muster when compared with other countries, there are significant failings in enforcement. One way of measuring the effectiveness of enforcement is to look at the number of irregularities detected during inspections. This has been high in recent years (and sometimes rising) in industrial states other than Tamil Nadu (Andhra Pradesh, Gujarat, Karnataka, Maharashtra) (Labour Bureau, 2013, 2012, and 2011). A more unfavourable report on enforcement of minimum wage rates has come in the World at Work Report, 2013 (International Institute for Labour Studies 2013). Following the methodology of calculating the share of workers' earnings less than the minimum wage, the International Institute for Labour Studies Report (2013) shows that compliance in India was only just above 60 per cent in the late 2000s, improving somewhat from just above 40 per cent in the mid-2000s.

2.2.2 Hours of Work

Some of the longest existing Conventions in the ILO relate to hours of work in industrial and commercial establishments.

The *Hours of Work (Industry) Convention, 1919 (ILO Convention No.1)* applies mainly to manufacturing units, construction, public utilities, and transportation of passengers. The main requirement in the Convention is that the number of working hours of workers shall not exceed eight in a day and forty-eight in a week. There is some flexibility provided in certain circumstances but the daily limit shall not be exceeded by more than one hour and the average over a three week period or less shall not exceed the daily or weekly limit. There is further flexibility for those processes "which are required by reason of nature of the process to be carried on continuously by a succession of shifts, subject on the condition that the working hours shall, not exceed fifty-six in the week on the average". There is provision for permanent exception, such as for those categories of workers whose work is essentially intermittent and for temporary exceptions to deal with exceptional cases. In the case of general increase in pressure of work, exceptions are allowed without any upper limit on the

number of working hours. It is also stipulated that overtime rate for temporary extension of working hours shall not be less than one and a quarter times the regular rate.

The *Hours of Work (Commerce and Offices) Convention, 1930 (ILO Convention No.30)* regulates commercial establishments and those in which persons are employed mainly for office work, except those employed in connection with the administration of public authority. The norm in this Convention too is eight hours in a day and forty-eight in a week, which must not be exceeded. Flexibility from the daily limit on working hours is allowed to some extent. The daily distribution of hours may be rearranged but on any day, it must not exceed 10 hours. In case of interruption of work due to accident or events like power disruption, the number of lost hours may be made up by extra hours on particular days subject to some conditions. Such arrangements shall not be for more than 30 days in a year, the increase in working hours on a day shall not exceed one hour and the hours of work in a day shall not exceed 10. The *Convention* also allows some permanent exceptions, such as in the case of shops and other establishments, and some temporary exceptions, such as when there is abnormal pressure of work due to special circumstances. As in the case of *Convention No.1*, the overtime rates of wages need to be not less than one and a quarter times the regular rate.

Hours of Work in Indian Laws

The Factories Act, 1948, provides for the weekly limit of 48 hours and daily limit of nine hours. The nine hour daily limit is still in conformity with Convention No.1 for industrial workers, which allows the daily limit to be exceeded by one hour (for industry) or two hours (for commercial establishments). The Factories Act, 1948, allows the limit to be exceeded on account of pressure of work by 12 hours a week, subject to the limit of 75 hours in three months. This is also in conformity with ILO Convention no.1, which imposes no upper limit on the overtime hours in the event of exceptional pressure of work. As regards overtime wages, the Factories Act, 1948, requires payment of twice the ordinary rate of wages, which is far in excess of the minimum of one and a quarter times stipulated in Convention No.1.

There is no central legislation applying to shops and other establishments but every state has its own regulation governing them. The laws in Delhi, Maharashtra and Tamil Nadu have the same daily limit of nine hours and weekly limit of 48 and a ceiling of 54 hours in a week, including overtime. In West Bengal, the daily limit is eight and half hours and the weekly limit 48 hours and a limit of 120 hours in a year on overtime. In Tamil Nadu and West Bengal, there is also a limit of 10 hours in a day including overtime.

Article 7 of the ILO Convention number 30, which applies to non-industrial establishments, specifically exempts shops and other establishments permanently from the purview of that Convention. So there is no benchmark in ILO conventions with regard to hours of work in commercial establishments. Even if the standards in Convention number 30 were to apply, the shops and establishments in the states of Delhi, Maharashtra, Tamil Nadu and West Bengal, in which the metropolitan cities of New Delhi, Mumbai, Chennai and Kolkata are situated, would be in compliance.

Indian laws separately regulate the hours of work in two other occupations, namely, motor transport, and building and other construction works. The Motor Transport Act, 1961, specifically provides that “no adult transport worker shall be required or allowed to work for more than eight hours a day or forty-eight hours in any week”. However, for the running of any motor transport service on long distance routes, Article 13 of the Act allows the worker to work up to a maximum of ten hours a day and fifty-four hours in a week, which is within the range permitted by the ILO convention no.1.

As we see later in the following section, the framework statute for the occupational safety and health of building and other construction workers is provided by The Building and Other Construction Workers’ (Regulation of Employment and Conditions of Service) Act, 1996, and the rules are framed by the state governments. These rules provide uniformly for a maximum of nine hour a day or forty-eight hours a week as the hours of work of these workers.

2.2.3 Occupational Safety and Health (OSH)

There are multiple ILO Conventions in OSH, of which two instruments spell out the general standards, viz., *Occupational Safety and Health Convention, 1981 (No 155)* and *Occupational Health Services Convention, 1985 (No 161)*. There are other Conventions also which cover health and safety in particular branches of economic activity such as dock workers or building construction workers and yet others that address protection against specific risks such as radiation, chemicals, etc. In this paper, we limit ourselves to the ILO Conventions that lay down the general standards and examine how far Indian legislation and systems related to occupational safety and health live up to these conventions.

The following are the main obligations of *the Occupational Safety and Health Convention, 1981 (No. 155)*.

- Each member of the ILO is required to implement and review periodically a coherent national policy on occupational safety, occupational health and the working environment, aiming at prevention of accidents and injury to health related to work
- Each member has to take steps to give effect to national policy
- , either through laws or regulations or any other method consistent with national conditions and practiceThe laws and regulations must be enforced through a system of inspections and there must be adequate penalties for violations of laws and regulations
- Employers must be required to ensure: that the workplace, machinery, equipment and processes are safe; that chemical, physical and biological substances are without risks to health; and that, where necessary, adequate protective clothing and protective equipment are provided.

The Occupational Health Services Convention, 1985 (No. 161) provides for the establishment of enterprise level occupational health services to carry out essentially preventive functions

and for advising both the employer and workers on maintaining a safe and healthy working environment.

The Situation in India with respect to Occupational Safety and Health

In India, until recently, a coherent national policy on occupational safety, occupational health and working environment had not found expression in any single government policy document at the national level. It was only in February 2009 that the central government approved the National Policy on Safety, Health and Environment at Work Places. Nevertheless, for many decades, India has had a well-developed regulatory structure for occupational safety and health and central government statutes have covered safety of workers in specific activities (factories, mines, docks, motor transport and buildings and other constructions) or in relation to specific dangers (beedi & cigars, insecticides, dangerous machines, electricity, municipal solid waste or hazardous chemicals). A comprehensive approach, lacking prior to 2009, is now expected to take shape as the national policy gets implemented. The Government of India's OSH enactments include the Factories Act, 1948, the Mines Act, 1952, the Motor Transport Workers Act, 1961, the Beedi and Cigar Workers' (Conditions of Employment) Act, 1966, the Insecticides Act, 1968, the Dangerous Machines (Regulation) Act, 1983, the Dock Workers (Safety, Health & Welfare) Act, 1986, the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, and the Electricity Act, 2003. In addition, rules have been framed under the Environment (Protection) Act, 1986, to cover municipal solid waste in the Municipal Solid Waste (Management and Handling) Rules, 2000, and hazardous chemicals in the Manufacture, Storage & Import of Hazardous Chemicals Rules, 1989.

The Factories Act, 1948, is a comprehensive legislation covering safety, health and working environment in factories, but it does not cover the unorganised sector. Some of the aspects covered by the Act are health (cleanliness, disposal of wastes and effluents, ventilation and temperature, dust and fumes, artificial humidification, overcrowding, lighting, drinking water and toilets), safety (fencing of machinery, work near machinery in motion, striking gear and devices for cutting off power, automatic machines, casing of new machinery, hoists and lifts, lifting tackles, revolving machinery, pressure plants, pits, sumps and opening in floors, protection of eyes, protection against dangerous fumes, precautions for the use of portable electric light, explosive or inflammable gas, precautions for fire, safety of buildings and machinery), welfare facilities (canteens, crèches etc), wages, working hours, leave etc. Provisions in the main statute itself are aimed at ensuring safety of the work place and mitigating risks arising out from the machinery and chemicals that are in use. The Act provides for the appointment of inspectors under a system of inspections to obtain compliance. Offences under the Factories Act, 1948, are punishable with a term of imprisonment, which goes up to seven years in cases of violation of provisions relating to hazardous processes.

As noted above, India's OSH regulations for the manufacturing sector do not cover the unorganised sector, which is a major shortcoming. Even if we leave out micro units from the reckoning, and do not count the tiny and cottage segment, the exclusion of small-scale

industries (SSIs) leaves a major gap because these units account for a substantial proportion of the country's manufacturing output. According to the Annual Report of the Ministry of Micro, Small and Medium Enterprises (MSMEs), the share of MSMEs in the manufacturing output in the country was about 37 per cent in 2012-13. This would include the share of units in the medium category, which would generally be included in the coverage as registered factories. However, the data for earlier years (1990-2000 to 2003-04) show the contribution of SSI units alone to be 38-40 per cent. At present, the share of SSI units in manufacturing output can be assumed to be in the range of 30-35 per cent.

The Mines Act, 1952, along with the Mines Rules, 1955, similarly provide for health and safety of workers in the mines. The Mines Act, 1952, is administered by the Directorate General of Mines Safety (DGMS). The Act empowers the central government to regulate technical operations in mines, and accordingly the following regulations have been framed:

- (a) Coal Mines Regulations, 1957;
- (b) Metalliferous Mines Regulations, 1961; and
- (c) Oil Mines Regulations, 1984.

Separate rules have been framed under the Act to deal with such matters as rescue of workers in mines, vocational training, health and medical surveillance, and other aspects of miners' welfare.

The Motor Transport Workers Act, 1961, regulates various aspects of the conditions of appointment of motor transport workers and covers occupational safety and health. Employers have to maintain rest rooms in every place where transport workers are required to halt at night or to provide a suitable alternative accommodation. Medical facilities have also to be provided at operating centres and halting stations. Further, in every transport vehicle, a first aid box has to be kept in the charge of the driver or the conductor equipped with the prescribed contents.

The Dock Workers (Safety, Health and Welfare) Act, 1986, provides the statutory framework for the safety and health of dock workers and empowers the appropriate government to make regulations providing inter alia (a) for the general requirement relating to the construction, equipping and maintenance for the safety of working places on shore, ship, dock, structure and other places, (b) for the safety of any regular approaches over a dock, wharf, quay or other places, (c) for the efficient lighting of all areas of dock, ship and any other vessel, dock structure or work places which dock workers have to use, and (d) providing and maintaining adequate ventilation and suitable temperature in every building where dock workers are employed. The appropriate government means the central government for the major ports and the state governments for other ports. The central government has notified the Dock Workers (Safety, Health and Welfare) Regulations, 1990, to cover the safety and health of dock workers. Two important deficiencies are that state governments have not yet taken action to notify regulations to cover non-major ports, which

accounted for about 39 per cent of cargo handled in 2011-12 by all ports in the country (National Transport Development Policy Committee, 2014). Also uncovered are 58 inland container depots (ICDs) established at various places in the country, where the containers are stuffed or destuffed of cargo (Ministry of Commerce and Industry, 2016).

The Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996, regulates the employment and conditions of service of construction workers and covers occupational health and safety aspects also. Here too the actual regulations on occupational safety and health of workers are contained in the rules framed by the appropriate government under the Act. For certain establishments such as railways, docks, oilfields, airports or public sector undertakings of the central government, the rule making authority under the Act is with the central government but for all other establishments, state governments make the rules. These rules have been made by the central and state governments and contain requirements relating to occupational safety and health of building workers.

A system of inspections exists for all the five areas, factories, mines, motor transport, docks and building covered by OSH laws. State governments have inspectorates to carry out inspections of factories to enforce adherence to the provisions of the law by employers. Inspections in major ports are carried out by the Inspectorates of Dock, under the overall supervision of the Directorate General, Factory Advice Service & Labour Institutes (DG, FASLI), which is an attached office of the Ministry of Labour & Employment. The Directorate General of Mines Safety (DGMS), which is also a subordinate office of the Ministry of Labour & Employment, administers the Mines Act and enforces safety regulations in respect of coal mines, metalliferous mines, oil mines and all other mines. The Buildings and Other Construction Workers' Act provides for the appointment of the Director General of Inspections for laying down standards for inspection and for inspection of buildings in establishments under the control of the central government. The Act similarly provides for appointment of the chief inspector of buildings in respect of buildings in other establishments.

Occupational Health Services in India at the Enterprise Level

The main requirement of *The Occupational Health Services Convention, 1985 (No.161)* is that there should be provisions in the law requiring that occupational health services are in position at the enterprise level. Article 40 B of the Factories Act, 1948 empowers the state government to require the occupiers of factories with 1000 workers or more with manufacturing processes carrying risks of bodily injury to employ safety officers. The Model Factories Rules issued by DGFASLI for adoption by the state governments provide for factories with hazardous processes to establish occupational health centres in the factory premises staffed with qualified medical personnel including doctors. The Mines Rules, 1955, provide for every mine employing more than 150 persons to have first aid rooms in charge of a qualified medical practitioner; where the number of employees is more than 1000, the requirement is that the medical practitioner should be a full- time employee. The Dock Workers, (Safety, Health and Welfare) Rules, 1990, similarly provide for every port to have

special medical service or an occupational health service to be available at all times with the full complement of medical personnel. In the rules framed by state governments under the Buildings and Other Construction Workers (Regulations of Employment and Conditions of Service) Act, 1996, there are provisions for occupational health services, ambulance room, ambulance van, emergency care services and emergency treatment of building workers. As already mentioned earlier, the Motor Transport Workers Act 1961 also require employers to provide medical facilities for workers.

Thus, in India, occupational safety and health services are mandatorily required at the enterprise level as stipulated in the ILO Convention no. 161.

2.2.4 Overall Assessment of the Situation in India on Conditions of Work

- India has statutes and regulations in place covering minimum wages, hours of work and occupational safety and health (OSH). The minimum wage regulations cover only about two-thirds of wage-earners, but India is not unique in this regard as several countries follow the practice of applying minimum wages for specific employments and such a practice is consistent with the requirements of ILO conventions.
- However, our analysis has revealed at least three gaps in India's OSH statutes and regulations: first, the small-scale manufacturing sector is not covered by any OSH regulation; second, OSH regulations have not been framed for non-major ports; and third, inland container depots have been left out of the purview of the Dock Workers (Safety, Health and Welfare) Act, 1986.
- On minimum wages, the main issue is laxity in enforcement. An ILO Report brings out that compliance in India was only just above 60 per cent in the late 2000s.
- A contributory factor for flaws in enforcement is the complexity of India's minimum wage regulations. Not only are separate minimum wages fixed for diverse occupations but some states also stipulate several levels of minimum wages in each occupation applying to different job descriptions. A simplification of the minimum wage system with rates applying uniformly to all wage earners irrespective of the occupation is bound to improve enforcement.

3. The Environment Chapter

At the outset, we must take note of the following four important provisions in the Environment Chapter of the TPPA that have a bearing on the environmental commitments of TPP countries

1. The Parties recognise the sovereign right of each Party to establish its level of domestic environmental protection and its environmental priorities.
2. Parties are required to enforce environment laws through a sustained or recurring course of action.

3. Each Party has a right to determine priorities for the allocation of environmental enforcement resources.
4. Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing protection afforded by their respective environmental laws.

The first and third points above are important for developing countries as they underscore points that the intention is neither to impose external environment standards on any Party nor to require them to prioritise enforcement resources except in accordance with their own decision. The second point seems to emphasise that all Parties are expected to make a serious effort to enforce environmental regulations and it will not be enough to merely embody the standards in a legal framework. The fourth point is also a key element as it emphasises that Parties should not fall into the trap of encouraging trade or investment by reducing environment protection.

The major standards included in the Environment Chapter relate to the protection of the ozone layer, protection of the marine environment from ship pollution, trade and biodiversity, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and marine capture fisheries. From the importance attached in the TPPA to these environmental standards, one could infer that the set represents the top concerns of developed countries and could be deemed to constitute internationally agreed environment standards even though they have not been characterised as such in any international instrument. We look at each of these international standards and examine also the situation in India in respect of each.

3.1 Protection of the Ozone Layer

3.1.1 Montreal Protocol on Substances that Deplete the Ozone Layer, 1987

The ozone layer performs a critical function of filtering ultra violet radiation reaching the earth; but for it, the radiation would have a drastic effect on human life and health and on terrestrial plant life and aquatic eco-systems. The *Montreal Protocol on Substances that Deplete the Ozone Layer, 1987* mandates Parties to take measures to control the production and consumption of, and trade in, substances that can deplete or otherwise modify the ozone layer. A footnote provides that the Parties will be deemed to be in compliance with the substantive obligation if they implement their obligations under the Protocol. The Protocol has been signed by 191 countries including India. India has already ratified and implemented the treaty. 3.1.2 The Environment (Protection) Act, 1986

Under the Environment (Protection) Act, 1986, the Government of India notified the Ozone Depleting Substances (Regulation and Control) Rules, 2000. These rules not only set the deadline to phase out various ozone depleting substances but also regulated the production, consumption and trade in such substances and products containing these. The rules have been amended in later years, including in 2014 to facilitate the phase out.

India thus seems to be fully compliant with the Montreal Protocol.

3.2 Protection of the Marine Environment from Ship Pollution

The Environment Chapter of the TPP Agreement obliges the Parties to take measures to prevent pollution of the marine environment from ships. The operational provision reads as follow:

“The Parties recognize the importance of protecting and preserving the marine environment. To this end, each Party shall take measures to prevent the pollution of the marine environment from ships.”

3.2.1 International Convention for the Prevention of Pollution from Ships, 1973

It is clarified in a footnote that the provision pertains to pollution regulated by the *International Convention for the Prevention of Pollution from Ships, 1973*, as modified by the subsequent *Protocol of 1978* and further amended by the *Protocol of 1997*, known in short form as MARPOL. It also stipulates that future amendments to MARPOL have to be covered. For the original Parties to the TPP Agreement, domestic legislation implementing their obligations under MARPOL have been listed in an Annex attached to the Agreement. It follows, therefore, that for all future Parties, the requirement will be that they implement the obligations of MARPOL as amended up to date.

The MARPOL is a comprehensive instrument, addressing all forms of ship-sourced pollution. Annex 1, which covers operational pollution, contains stipulations on the quantity of oil that a tanker may discharge in any voyage while under way. Annex II is about the control of pollution by noxious liquid substances carried in bulk; there is total prohibition on the discharge of these substances in port areas. Annex III has specifications on “standards on packing, marking, labelling, documentation, stowage, quantity limitations, exceptions and notifications for preventing pollution by harmful substances”. The Annex introduces the *International Maritime Dangerous Goods Code*, listing marine pollutants. Annex IV is on the control of pollution by sewage from ships and Annex V on the control of pollution by garbage. Annex VI, which is about air pollution by ships, sets limits on sulphur dioxide and nitrogen oxide emissions from ship exhausts and prohibits deliberate emissions of ozone depleting substances.

3.2.2 The Situation in India

India is a signatory to MARPOL and, in fact, has ratified all the six annexes of the Convention as shown in the Status of Convention dated April 16, 2016, on the website of the International Maritime Organisation (IMO).

In India, marine pollution is covered by a consolidated legislation governing shipping, namely the Merchant Shipping Act, 1958. Part XIA, Prevention and Containment of Pollution of the Sea by Oil, was introduced by an amendment in 1983. Subsequently, the first five Annexes of MARPOL have been incorporated in India law through the following rules:

The Merchant Shipping (Prevention of Pollution by Garbage from Ships) Rules, 2009

The Merchant Shipping (Prevention of Pollution by Sewage from Ships) Rules, 2009

The Merchant Shipping (Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form) Rules, 2009

The Merchant Shipping (Prevention of Pollution by Noxious Liquid Substances in Bulk) Rules, 2009

The Merchant Shipping (Prevention of Pollution by Oil from Ships) Rules, 2009

Although no separate rules have been framed for prevention of air pollution, the Directorate General of Shipping regulates the quality of fuel and has introduced a regime for the approval of local bunker suppliers that can meet the standard of fuel supplies set for ships, drilling rigs and platforms.

Thus, there does not appear to be any difficulty for India being compliant with the requirements of the TPP Agreement in respect of the protection of the marine environment from ship pollution.

3.3 Trade and Biodiversity

3.3.1 Convention on Biological Diversity

International concern on conservation and sustainable use of biological diversity has found expression in the *Convention on Biological Diversity* (CBD) adopted at the Earth Summit in Rio de Janeiro in 1992. CBD has been signed and ratified by 196 member countries of the United Nations. The US is the only UN member that has signed but not ratified the Convention.

The CBD has three objectives: (i) conservation of biological diversity (ii) the sustainable use of its components and (iii) the fair and equitable sharing of benefits arising from the utilisation of genetic resources. The Convention recognises the importance of appropriate transfer of technology for enabling utilisation of genetic resources. Parties are mandated to develop national strategies, plans and programmes for the conservation and sustainable use of biological diversity and make appropriate arrangements for in-situ and ex-situ conservation. A central principle of the CBD is that states have the sovereign right to exploit their own resources pursuant to their own environmental policies, but that they have responsibility to ensure that they do not cause damage to the environment outside their jurisdiction. It recognises that the authority to determine access to genetic resources rests with national governments and is subject to national legislation and that access, where granted, shall be on mutually agreed terms (between the countries providing and acquiring the genetic resource). It is further mandated that access shall be subject to prior informed consent of the Party providing such resources, unless otherwise determined by the that Party. An important provision, as an element of in-situ conservation, is that Parties must respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities

embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

3.3.2 Provisions on Biodiversity in TPPA

It is apparent from Article 20.13 of the Environment Chapter that the 12 TPP members share important concerns in this area, even though the Chapter does not make any reference to the CBD. The Chapter does not purport to embody strong substantive commitments from members with regard to national action to be taken on biological diversity but it does capture the spirit of the CBD. It recognises the importance of conservation and sustainable use of biological diversity and their key role in achieving sustainable development and requires individual Parties to ‘promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law and policy’.

The obligations with respect to the important provisions of the CBD on ‘preserving and maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles’ and facilitating access to genetic resources within their respective national jurisdictions’ are couched in hortatory language. The Parties merely recognise the importance of these objectives and go no further. The Parties also recognise that some Parties may require prior informed consent to access to genetic resources and where such access is granted, they may require the establishment of mutually agreed terms, ‘including with respect to sharing of benefits from the use of such genetic resources, between users and providers’. Although the concept of prior informed consent and sharing of benefits are merely recognised, the provisions of the TPPA have value as they confirm the legitimacy of these practices in the context of the TPPA. Since the US has not yet ratified the CBD, these provisions may serve to guarantee that the rights of Parties recognised in the CBD are respected.

3.3.3 India’s Biological Diversity Act 2003

Having signed the Convention on June 6, 1992, India ratified it on February 18, 1994, and became a Party on May 19, 1994. In 2003, the Biological Diversity Act, 2002, was enacted to give effect to the Convention. The Act regulates the use of biological resources occurring in India or knowledge associated with it for the purpose of research, commercial utilisation or for bio-survey and bio-utilisation. In order to implement its provisions, the Act establishes the National Biodiversity Authority (NBA) at the national level, the State Biodiversity Board (SBB) at the state level and the Biodiversity Management Committee (BMC) at the local level. Any person who is not an Indian citizen or non-resident Indians or a body corporate that is not incorporated in India is required to obtain prior approval of the NBA for the use or transfer of biological resources. Such approval may be granted subject to terms and conditions including the payment of a charge or royalty, as the NBA may deem fit. The NBA is required, inter alia, to ensure that these terms and conditions secure equitable sharing of benefits arising out of the use of accessed biological resources between the person applying for such approval, local bodies concerned and the benefit claimants.

Indian citizens and bodies corporate do not require approval but they have to send prior intimation and the SBB may prohibit or restrict their activity if it is of the opinion that it is detrimental to the objectives of conservation and sustainable use of biodiversity or equitable sharing of its benefits. The BMCs at the local level have been given the role of promoting conservation, sustainable use and documentation of biological diversity and they also have consultative status with the NBA and SBB, which have to involve them in decisions relating to the biological resources and knowledge associated with such resources.

It is seen that the spirit of the CBD and of the Environment Chapter of the TPPA on the conservation and sustainable use of biological resources is very well captured in India's Biodiversity Act. The requirement of prior approval for foreign nationals and corporate bodies for the use or transfer of genetic resources, and fair sharing of the benefits flowing from their use, which is embodied in the Indian law, is clearly recognised as legitimate in the CBD as well as the Environment Chapter of the TPPA.

3.4 Protection of Endangered Species

3.4.1 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

While the TPPA makes nuanced references to other specific multilateral environmental agreements, it is quite explicit in the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES). Affirming the importance of combating the illegal take (acquisition) of and illegal trade in wild fauna and flora, it provides as follows:

“Accordingly, each Party shall adopt, maintain and implement laws, regulations and any other measures to fulfil its obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)”.

CITES provides for comprehensive control of international trade in fauna and flora in the following categories, listed in Appendices I, II and III to the Convention:

Appendix I – Species threatened with extinction: Trade in specimens of these species is expected to be subject to particularly strict regulation.

Appendix II – (a) Species which are not necessarily under threat with extinction but may become so unless trade in specimens is subject to strict regulation. (b) Other species, the regulation of which is necessary in order to bring under effective control trade in species listed in (a).

Appendix III – Species which any Party has identified for regulation within its jurisdiction for the purpose of preventing or restricting exploitation, in which co-operation of other Parties is needed.

Trade in the listed specimens can take place only on the basis of export permit from the exporting country as well as import permit from the importing country.

It must be observed that CITES seeks to regulate rigorously international, and even prohibit, trade of specimens of species threatened with extinction, but does not envisage any preventive steps or supporting action by the Parties to outlaw or otherwise discourage illegal capture, killing or harvesting or felling of trees or trade in specimens of the endangered species. The Environment Chapter of the TPPA does contain some general provisions that go into the domestic sphere such as paragraph 4 Article 20.17, in which it states that “each Party commits to take appropriate measures to protect and conserve wild fauna and flora that it has identified to be at risk within its territory, including measures to conserve the ecological integrity of specially protected natural areas, for example wetlands”.

3.4.2 The Situation in India

In India, the Wildlife (Protection) Act, 1972, is a comprehensive legislation that provides for the protection of wild animals, birds and plants. It prohibits hunting of animals listed in Schedules I, II, III and IV of the Act, except when permitted for specified reasons, such as education, scientific research and scientific management and other bona fide purposes. Similarly, the Act prohibits the picking, uprooting, etc., of specified plants listed in Schedule VI of the Act, which are the six plants of Indian origin included in CITES Appendices. Wild life, animal articles, trophy or meat derived from any wild animal and ivory are the property of the state or central government. Dealing in animals, trophy and animal articles is either prohibited or is subject to licensing and even possession of a trophy is allowed on the basis of a certificate of ownership issued by the Chief Wild Life Warden.

The Wildlife (Protection) Act, 1972, also envisages the declaration of sanctuaries by the state government, if it considers that such area is of ‘adequate ecological, faunal, floral, geomorphological, natural or zoological significance’ for the purpose of ‘protecting, propagating or developing wildlife or its environment’. There is a similar enabling provision for the declaration of a national park by the central government.

The Foreign Trade (Development & Regulation) Act, 1992, enables the Government of India to regulate the import and export of all goods. Under the Act, all wild animals, whether mammals, reptiles, birds of prey, or in the “other” category, or bees and other insects, as defined in the Wildlife (Protection) Act, 1972, including their products and derivatives, excluding those for which ownership certificates have been granted and those required for education, scientific research or management, are prohibited for export. Likewise, import of wild animals (including their parts and products), as defined in the Wildlife (Protection) Act, 1972, with the same exceptions as in the case of export, is prohibited.

As India is a Party to the CITES and has implemented its obligations through the Wildlife Protection Act, 1972, and through the regulation of imports and exports under the Foreign Trade (Development & Regulation) Act 1992, the obligations relating to CITES embodied in the TPPA do not pose a problem for us.

3.5 Marine Capture Fisheries⁷

3.5.1 Fishing Management System

The Environment Chapter of the TPPA recognises the need for individual and collective action to address the problem of overfishing and unsustainable utilisation of fishery resources and mandates Parties to operate a fisheries management system that regulates marine wild capture fishing. It is provided that the system should be designed to:

- (a) Prevent overfishing and overcapacity;
- (b) Reduce by-catch of non-target species and juveniles: and
- (c) Promote the recovery of overfished stocks

3.5.2 International Instruments to be followed

It is further provided that such a management system must be based on the best evidence available and on internationally recognised best practices for fisheries management and conservation. Reference has been made in this connection to the following international instruments on the sustainable use and conservation of marine species:

1. UNCLOS, the *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Seas of December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, at New York, December 1, 1995 (UN Fish Stock Agreement).
2. The FAO *Code of Conduct for Responsible Fisheries (CCRF)*.
3. *The 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement)* done at Rome, 24 November 1993.
4. The 2001 IUU Fishing Plan of Action

Another substantive provision mandates the Parties to promote the long-term conservation of sharks, marine turtles, seabirds and marine mammals. For sharks, Parties have to take steps to collect data and put in place by-catch mitigation measures, catch limits and finning prohibitions. For marine turtles, seabirds and marine mammals, measures have to be taken in accordance with relevant international agreements to which a country is a Party.

3.5.3 Discipline on Subsidies for Fishing

The Article on Marine Capture Fisheries in the Environment Chapter of the TPPA also mandates the “control, reduction and eventual elimination of all subsidies that contribute to

⁷ It is clarified at the outset that the provision does not apply to aquaculture.

overfishing and overcapacity”. Subsidies as defined under Article 1.1 of the WTO SCM Agreement that are specific within the meaning of Article 2 of that Agreement are prohibited:

- (a) If they are granted for fishing that negatively affect fish stocks that are in an overfished condition;
- (b) If they are provided to any fishing vessel, “while listed by the flag State or a relevant Regional Fisheries Management Organisation or arrangement for IUU fishing in accordance with the rules and procedures of that organisation or arrangement and in conformity with international law”.

With respect to (a) above, it is necessary to explain here that Article 1.1 of the SCM Agreement states that a subsidy practice is covered by that agreement if there is a financial contribution by government or a public body, or if a government practice involves a direct transfer of funds, or government revenues are foregone, or government supplies goods or services other than general infrastructure, or there is a form or public support, and a benefit is thereby conferred. The character of subsidy does not change if the government carries out these practices indirectly by making payments to a funding mechanism. Under Article 2 of the SCM Agreement, it is explained that a subsidy is specific if it is specific to an enterprise or industry or a group of enterprises. It is clarified that where the granting authority establishes objective criteria or conditions governing the eligibility for the subsidy, specificity can not be presumed to exist. It is further explained that ‘objective criteria or conditions’ mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application such as the number of employees or size of enterprise. In the Indian context, it has been argued that domestic subsidies for SMEs are not specific under Article 2 of the SCM Agreement by virtue of the fact that ‘objective criteria or conditions’ govern eligibility.

The important point to note is that the prohibition of subsidies for fishery does not apply without qualification. It applies only in situations in which fish stocks are in an overfished condition. It is provided that ‘a fish stock is overfished if the stock is at such a low level that mortality needs to be restricted to allow the stock to rebuild to a level that produces maximum sustainable yield or alternative points based on the best scientific evidence available’. It is also provided that fish stocks that are recognised as overfished by the national authorities or by a Regional Fisheries Management Organisation shall also be considered overfished.

With regards to (b), one needs to refer to the issue of illegal, unreported and unregulated fishing. Without getting into a complete definition, it may be sufficient to mention that illegal fishing covers fishing carried out by national or foreign vessels in waters within the jurisdiction of a state, if it is without the permission of that state, or is in contravention of its laws. Similarly, unreported fishing includes fishing activity that has not been reported to the relevant national authorities in contravention of national laws and regulations. Examples of unregulated fishing are fishing activities carried out in the area of application of a regional fisheries organisation by vessels without nationality or those flying flags of a state not Party

to the regional fisheries organisation concerned. The issue of illegal, unreported and unregulated fishing has been of serious concern in the context of sustainable fishing and it is not surprising that the TPPA sought to ban subsidies to any fishing vessel that is listed for IUU fishing.

In the fisheries sector, the main types of subsidies that are prevalent across the world are (i) subsidies to capital cost for vessels and equipment; (ii) subsidies for variable costs, such as rebate on excise; (iii) price support for the fish catch; and (iv) subsidies to the income of employees. All these categories are likely fall under the discipline of prohibition as, by reducing the cost of operation, they can prima facie lead to overfishing if fish stocks are already depleted. However, the same cannot be said with certainty of other types of fishery subsidies that are prevalent such as (i) subsidies for fishery infrastructure; (ii) management and research subsidy; and (iii) subsidies for permanent withdrawal of vessels, licences and permits. In fact, subsidies for permanent withdrawal of vessels, permits and licences would most likely lead to the rebuilding of depleted fish stocks.

3.5.4 Fishery Management System in India

India signed the UNCLOS in 1995 and ratified it in 1996. It also ratified the UN Fish stocks Agreement in 2003. India has also implemented the Code of Conduct for Responsible Fisheries (CCRF), which is a voluntary fisheries instrument, unanimously adopted on October 31, 1995, by the FAO Conference. Besides, India is a participant in regional fisheries management organisations such as the Indian Ocean Tuna Commission, and the Commission for the Conservation of Antarctic Marine Living Resources.

The CCRF establishes the principles for responsible fishing and fishery activities. The fundamental obligation of the governments is to prevent overfishing and excess fishing capacity and to implement management measures to ensure that the fishing effort is commensurate with the productive capacity of fishery resources. Safe and environment friendly fishing gear have to be developed and allowed in order to maintain biodiversity and to conserve the population structure and aquatic ecosystems. States must ensure that only fishing operations allowed by them are conducted within their waters. They must also implement fisheries monitoring, control, surveillance and law enforcement measures. They should prohibit destructive methods of fishing such as dynamiting or poisoning.

India appears to be fully in compliance with the requirement to operate a fisheries management system that regulates marine wild capture fishing designed to prevent overfishing. Apart from the Wild Life (Protection) Act, 1972 and the Environment (Protection) Act, 1986, it has enacted the following fishery related legislations:

Indian Fisheries Act, 1897

The Territorial waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976

Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981

The central government regulates fishing in the exclusive economic zone while the governments of maritime states regulate it within their jurisdiction in territorial waters. Each maritime state has also enacted its own Marine Fishing Regulation Act.

Comprehensive regulatory measures in operation at present in the country include closed season during the monsoon, when fishing operations are suspended; closed areas for fishing operation by mechanised vessels; marine protected areas; declaration of protected species; prohibition of destructive gears and methods; and stipulation of minimum mesh size and minimum legal size at capture.

India has put in place specific management measures for the conservation of sharks. Four species of shark have been given maximum protection under the Wild Life (Protection) Act, 1972, by inclusion in Schedule I of the Act. Recently, in August 2013, the Ministry of Environment and Forests prohibited the removal of shark fins on board a vessel in the sea. In February 2015, the Department of Commerce prohibited the export of shark fins of all species of sharks. Rapid stock assessment has been conducted for shark in Indian waters based on data for the period 1985-2013 and various areas have been classified as less abundant, declining or depleted. Recovery plans are proposed to be drawn up to revive shark stocks (CMFRI 2015).

Similarly, conservation work has been undertaken in respect of sea turtles. Nine species of sea turtle have been protected by being placed in Schedule I of the Wild Life (Protection) Act, 1972. The Odisha state government has taken extensive conservation measures to protect the well-known Olive Ridley species of turtles under the Odisha Marine Fisheries Regulation Act (OMFRA), 1982. For habitat protection, a prohibition is issued periodically on fishing by trawlers within a radius of 20 km at Devi and Rushikulya. Besides, the Gahirmantha area has been declared a marine sanctuary under the Wild Life (Protection) Act, 1972. Further, under the OMFRA, the state government has made it obligatory for trawlers and mechanised fishing vessels to use 'turtle excluder devices'.

India can thus rightfully claim to have an effective fisheries management system in place for regulating wild capture fishing. This is not to say that there are no issues on India's management of marine wild capture fishing. There are reports of declining catches and overfishing in coastal waters, of illegal, unreported and unregulated landings and of poor implementation of regulations such as those relating to mesh size. Vivekanandan (2010) found that production from marine fisheries in India has been stagnant in the last ten years and overfishing is one of the major factors contributing to this phenomenon. A study by Pramod (2010) has revealed that implementation of mesh size regulation is poor in all states. There exist unregulated fishing vessels in most coastal states in the country. The same study has also reported existence of illegal fish catches in India, especially in island territories. There is evidence of over-exploitation of some species of fish. This is not surprising because of the large population dependent on fisheries for their livelihood.

Fishing Subsidy in India

Important fishing subsidies being granted by the Government of India and maritime states include capital subsidies for motorisation of traditional crafts, and rebate of excise or sales tax on HSD. These practices clearly fall under the definition of subsidies in Article 1.1 of the WTO SCM Agreement and they are also specific subsidies within the meaning of Article 2 of the same Agreement. Similar subsidies are also granted by the major industrialised countries, namely the USA and the EU. However, the difference is that while those economies might be able to argue that there is no incidence of overfishing in the waters in their jurisdiction, in India's case, such an argument would be weak in view of the reports of stressed fishery resources in coastal areas (Vivekanandan 2010). Thus, in the present situation India is likely to become a target of criticism for continuing its fishing subsidy practices despite increasing evidence that the fishery resources are stagnant or even depleted in coastal areas. It could be vulnerable to the charge of being in breach of the obligation to control, reduce and eventually eliminate all subsidies that contribute to overfishing and overcapacity. What is more, the Environment Chapter of the TPPA also requires as follows:

‘In relation to subsidies that are not prohibited by paragraph 5 (a) or (b), and taking into consideration a Party's social and developmental priorities, including food security concerns, each Party shall make best efforts to refrain from introducing new, or extending or enhancing existing subsidies within the meaning of Article 1.1 of the SCM Agreement, to the extent they are specific within the meaning of Article 2 of the SCM Agreement, that contribute to overfishing or overcapacity.’

Although the language above would seem to provide some escape routes to countries like India for increasing their fishery subsidies where such subsidies do not contribute to overfishing, it should be noted that a standstill agreement like this acts unfairly against countries like India with low levels of subsidisation while countries like the industrialised ones are not disciplined despite higher levels of subsidisation.

3.6 Overall Assessment of the Situation in India with Regard to Compliance with Environment Provisions of TPPA

- In respect of the environment, our examination shows that there is virtually no gap between the international standards referred to in the TPP Agreement and India's laws and practice in respect of the Montreal Protocol on the Protection of the Ozone Layer, the protection of the marine environment from ship pollution, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and Trade and Biodiversity.
- In respect of marine capture fisheries, the position in India vis-à-vis the provisions in the TPP Agreement is somewhat more complex. India operates a fisheries management system that regulates marine wild capture fishing designed to prevent overfishing. The inadequacy in India is not with regard to the laws but about their enforcement. There are

reports of poor implementation of regulations and over-exploitation of some species of fish.

- There is an issue with regard to fishery subsidy as well. What the TPP Agreement bans is not fishing subsidy per se. It prohibits such subsidies only if “they are granted for fishing that negatively affect fish stocks that are in an overfished condition”. Since there is some evidence of coastal waters in India being overfished, lack of action to control fishing in these waters may become actionable if a trade agreement has provisions on fishing subsidies like the TPPA.

4. The Dispute Settlement Chapter

A feature of the TPPA is that all substantive commitments (including those on environment and labour rights) are enforceable through the dispute settlement chapter. The dispute settlement chapter is an adapted version of the WTO Dispute Settlement Understanding (DSU) and mimics it in providing an adjudication-oriented mechanism with the following essential features in various stages.

Consultations

As in the DSU of the WTO Agreement, the dispute settlement process starts with a written request for consultations by the complaining Party, and consultations must take place within 30 days of receipt of request (15 days where perishable products are involved).

Good Offices, Conciliation and Mediation

Parties have the option at any time to voluntarily undertake an alternative method of dispute resolution such as good offices, conciliation or mediation.

Establishment of a Panel

If the Parties fail to resolve a matter within 60 days of the date of request for consultations (30 days in the case of perishable products), the complaining Party may request for the establishment of a panel and the panel shall be established on the delivery of the request. Thus, Parties have assured access to the panel process, as in the case of the WTO Agreement

Composition of the Panel

Procedures are laid down to ensure that there is no blockage in the panel procedures for lack of nomination of any of the three panelists. To facilitate the process, the Chapter provides for qualification of panelists and the establishment of a roster of panel chairs.

Submission of Report by the Panel

An initial report has to be submitted to the Parties within 150 days of the appointment of the last panelist (120 days in cases in which perishable products are involved). Any delay in submission of the report should not exceed 30 days. After considering the written comments

of the Parties, the panel has to submit the final report within 30 days of the presentation of the initial report.

Implementation of the Final Report

In case the panel determines that a measure is inconsistent with a Party's obligation or that it has otherwise failed to carry out its obligations or that it is causing nullification or impairment without breaching an obligation, the responding Party has the obligation to eliminate the non-conformity or nullification or impairment. If the Parties are unable to agree on the reasonable period of time to be taken for compliance within 45 days of the presentation of the final report, the matter may be referred to the chairman of the panel for arbitration to determine a reasonable period of time. The panel chairman is expected to determine the reasonable period of time within 90 days of the date of referral. The norm for the time for implementation is 15 months from the presentation of the panel's final report but this may be shortened or lengthened by the arbitrator.

Non-implementation of the Panel Recommendations

In case the responding Party decides not to end the non-conformity or nullification or impairment or where there is disagreement on whether the responding Party has eliminated the non-conformity or the nullification or impairment, the two Parties are expected to enter into consultations with a view to developing mutually acceptable compensation. If the Parties are unable to agree, the complaining Party gets the right to retaliate or in the words of the Agreement, 'suspend the application to the responding Party of equivalent benefits'. Compensation and suspension of benefits or the payment of monetary benefits are, however, temporary measures and the ultimate goal remains to obtain full implementation and elimination of measures inconsistent with the obligations or of nullification or impairment.

Cross- retaliation

The rules of the TPPA, like the rules of the WTO Agreement, require that the suspension of benefits (retaliation) must take place in the same subject matter as in which the panel has determined inconsistency with obligations or found nullification or impairment to exist. All goods, financial services, services other than financial services, and each type of intellectual property rights are deemed to be distinct subject matters. The suspension of benefits may be made in a different subject matter if it is not practicable or effective to suspend benefits in the same subject matter and the circumstances are serious enough.

If the responding Party considers that the level of benefits proposed to be suspended is manifestly excessive or that the complaining Party has not followed the principles or procedures for cross-retaliation or that it has eliminated the inconsistency or nullification or impairment, it may request the reconvening of the panel to consider the matter. If the panel finds merit in the complaint that the level of benefits proposed for suspension is excessive, it may determine the level of benefits it considers to have equivalent effect. If the panel finds that the principles and procedures of cross-retaliation have not been followed, it shall make

an award setting out the extent to which the complaining Party may suspend benefits in the subject matter in order to ensure full compliance with those principles and procedures. In lieu of suspension of benefits, the responding Party may agree to pay a monetary assessment, the amount of which may be agreed with the complaining Party. If there is no agreement on the amount, it shall be set at a level, in US Dollars, equal to 50 per cent of the level of benefits the panel has determined to be of equivalent effect.

Compliance Review

When the responding Party considers that it has eliminated the inconsistency with the Agreement or the nullification or impairment, it may refer the matter to the panel and seek reconfirmation of the situation. If the panel finds that the responding Party has indeed eliminated the inconsistency or nullification or impairment, the complaining Party has to reinstate the suspended benefit.

Non-violation Complaints

As in the WTO Agreement, a Party may invoke the dispute settlement procedures even in cases in which it considers that a benefit it could have reasonably expected to accrue is being impaired or nullified as a result of the application of a measure that is not inconsistent with the obligations of the TPPA. However, the application of the non-violation track has been limited to Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Rules of Origin and Origin Procedures), Chapter 4 (Textiles and Apparel), Chapter 5 (Customs Administration and Trade Facilitation), Chapter 8 (Technical Barriers to Trade), Chapter 10 (Cross-Border Trade in Services) and Chapter 15 (Government Procurement).

Assessment of the Dispute Settlement Chapter

The Dispute Settlement Chapter of the TPP Agreement follows closely the structure and spirit of the Dispute Settlement Understanding of the WTO. It provides for assured access to the panel process, time limits for submission of panel reports and subsequent procedures, automatic acceptance of the panel report, notification by defendant of intention to implement, arbitration in the event of difference on the reasonable period of time for implementation, recourse to dispute settlement in case there is disagreement on compliance with recommendations, suspension of benefits or retaliation in cases in which the panel recommendations are not implemented, and cross-retaliation across sectors. As in the DSU, the Chapter provides for disputes being raised on the non-violation track also and nullification and impairment can occur even in the absence of a breach of the substantive obligations of the Agreement.

The major difference with the DSU in the WTO Agreement is that there is no appellate body to which an appeal could be made on issues of law and legal interpretations made by the panel. This would save the time of 60-90 days allowed for the appellate review in the WTO. This would be in addition to the saving in time in the panel process which can not exceed 180 days against up to nine months allowed in the WTO. At no stage is there any room for the

Parties to block or delay the procedures, which is what makes dispute settlement adjudicatory in its approach.

There is one aspect which makes the dispute settlement procedures of the TPPA more rigorous than in the WTO Agreement. In non-violation complaints in the WTO, there is no obligation on the responding Party to withdraw the measure even if it is found to be causing nullification or impairment. No such option is envisaged in the TPP Agreement even if the measure is not inconsistent with the substantive obligations.

Safeguards against Easy Resort to Dispute Settlement

It must be pointed out that while all the substantive commitments of the TPP are contractual in nature and enforceable under the dispute settlement mechanism of the Agreement, several safeguards have been provided to ensure that the decision on recourse to disputes is not easily taken by individual Parties. In Chapter 19 on labour, it is specifically provided that to establish a violation of an obligation, a Party must demonstrate that the other Party has not only failed to adopt or maintain a statute, regulation or practice, but has done so in a manner that is affecting trade or investment between the Parties.⁸ Similarly, in Chapter 20, to establish a violation of provisions relating to the protection of the ozone layer, or the protection of the marine environment from ship pollution or in respect of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a Party must demonstrate that the infringement is affecting trade or investment between the Parties.⁹ In all these cases, it is not enough for the complaining Party to show that the other Party is not fulfilling its substantive commitment; it must also be shown that trade and investment between the Parties are being affected.

In Chapter 19, while the standards of internationally recognised labour rights have been laid down in the ILO Conventions, in respect of conditions of work, it has been specifically provided that “this obligation relates to the establishment by a Party in its statutes, regulations and practices there under, of acceptable conditions of work as determined by that Party”.¹⁰ On the same lines in Chapter 20, the Parties recognise the sovereign right of each Party to establish its own levels of domestic environmental protection and its environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly.

While there are unambiguous provisions requiring Parties to enforce their labour and environment laws, the Parties have been given some room for manoeuvre on enforcement. Thus both Chapter 19 and 20 give the right to Parties to exercise reasonable enforcement discretion and non-enforcement becomes actionable only if there is a “sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties”.

Further, both Chapters 19 and 20 provide avenues for consultations between Parties to settle differences before seeking recourse to the dispute settlement provisions of Chapter 28.

⁸ See footnote 4 of Chapter 19 of TPP Agreement

⁹ See footnotes 5, 8 and 23 of Chapter 20 of TPP Agreement

¹⁰ See footnote 5 of Chapter 19 of TPP Agreement

Chapter 19 encourages Parties to develop a co-operative labour dialogue in the course of which issues can be raised, discussed and resolved. Similarly, Chapter 20 provides for environmental consultations, first at the level of senior representatives and then at the level of ministers. It is only after these avenues have been exhausted that a Party may seek recourse to the provisions of Chapter 28 on dispute settlement.

Overall Assessment of Threat of Countermeasures being Applied against India for its Laws and Practices in Labour and Environment

We have seen that the gaps in India's regulations with respect to child labour are first, that in family enterprises, the use of hired labour has been allowed, and second, that the use of child labour in the entertainment industry has been exempted from the prohibition. Actionability against these deficiencies depends upon the trade and investment interests of the trading partner being affected. Having regard to the scale of operations of family enterprises, it would be difficult to make a credible case for the interests of trading partners being affected by the use of hired labour in such enterprises. And the use of child labour in the entertainment industry cannot conceivably have such an effect for India's trading partners.

Our analysis has also brought out that weakness in enforcement is an issue in India in both child and forced labour. We have also noted above that non-enforcement becomes actionable only if there is a "sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties". Considering the action taken by the government to spread primary education as well as the dwindling numbers of child labour, it would be difficult for anyone to take the view that there is sustained inaction on this front. Similarly, the government of India has been taking proactive measures on the forced labour front, sensitising officials in this regard, and the numbers have been coming down here too. Trafficking in women for sex has been more difficult to curb but here, it is difficult to envisage that the trade or investment interest of trading partners is affected.

However, in the area of conditions of work, there would seem to be some vulnerability to countermeasures being applied against India. Enforcement is difficult for minimum wages, particularly for the unorganised, small-scale sector and this sector has substantial manufacturing activity. The non-application of the OSH regulations to the small-scale industry sector cannot lead to countermeasures because the Factories Act 1948, which embodies these regulations, does not apply to units not registered as a factory under the Act. A footnote to Article 19.3 of Chapter 19 of the TPPA specifically provides that the "obligation on acceptable conditions of work relates to the establishment by a Party in its statutes, regulations and practices there under, of acceptable conditions of work as determined by that Party".

We have found two deficiencies in the law and regulations relating to dock workers in India. First, the intention of the Dock Workers (Safety, Health and Welfare) Act, 1986 appears to be to cover all ports, whether major or minor, but regulations have not been issued for minor ports. Second, the Dock Workers (Safety, Health and Welfare) Act 1986 does not cover inland container depots (ICDs). The first deficiency could lead to countermeasures but the

second would get the benefit of the footnote to Article 19.3 and does not seem to be liable to countermeasures on the environment side, India's situation is even more comfortable. Most of the laws and regulations are in full compliance with the obligations in India's international agreements. The only exception is fishing subsidy provided in coastal waters to support the artisanal fishermen. However, it is difficult to contemplate that the fishing activity of these fishermen can affect the trade and investment interest of India's trading partners. We need not, therefore, fear countermeasures on this front.

5. Conclusions

Core international labour standards: Indian laws meet the benchmarks on core labour standards set in the ILO Conventions. They do not impose any impediment on freedom of association and the right to organise and workers have adequate protection against anti-union discrimination even though some reforms are needed to improve efficiency in the process of collective bargaining. Forced labour is prohibited by the Indian Constitution and a specific central law has abolished the bonded labour system. On child labour, India has made a legislative move in 2016 to bring the Indian law very close to what is provided in ILO Conventions. Nevertheless, two relatively small blemishes still exist in Indian laws prohibiting child labour. In respect of discrimination in employment and occupation, Indian laws are beyond reproach.

There are problems in the implementation of these standards. Periodic reports indicate the continued existence of forced labour, which is endemic in trafficking of women sex workers but less prevalent in agriculture, manufacturing and services. Child labour numbers have shown up in successive rounds of NSSO, although the numbers are shrinking. In both areas, there is evidence of strong government measures for enforcement buttressed by affirmative action. With respect to discrimination in employment also, enforcement goes hand in hand with affirmative action.

Acceptable conditions of work: India has statutes in place covering minimum wages, hours of work and occupational safety and health (OSH). The minimum wages regulations do not apply to all wage earners but cover only specific employments. This practice is consistent with the requirements of ILO Conventions. However, there are gaps in coverage of the OSH regulations. The entire small-scale industry sector does not have OSH coverage. There is an issue regarding weak enforcement of minimum wages generally and non-enforcement of OSH in respect of non-major ports and inland container depots.

Commitments on environment: There is virtually no gap between the international standards referred to in the TPP Agreement and India's laws and practice in respect of the practice in respect of the Montreal Protocol on the Protection of the Ozone Layer, the protection of the marine environment from ship pollution, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and Trade and Biodiversity. In respect of marine capture fisheries there would be a problem as it is proposed to prohibit subsidies "if they are granted for fishing that negatively affects fish stock that are in an overfished condition". There is some evidence of overfishing in India's coastal waters but the

Government of India has opposed the ban proposed during the WTO negotiations on fishery subsidies.

Possibility of countermeasures against India in core international labour standards: An important safeguard in the dispute settlement chapter of the TPPA is that if a member raises the issue of non-compliance by another member, it must demonstrate how its trade and investment interests are being affected. In light of this, it is difficult to contemplate that countermeasures against India can be successfully pursued for the small loopholes in the law on child labour. As we have observed earlier, the actions being taken by the central and state governments on a wide front towards eliminating child labour and for eradicating forced labour diminish the possibility of countermeasures against India in the area of core labour standards. This is so particularly in the light of the requirements that in order to trigger such countermeasures there should be ‘sustained or recurring course of action or inaction’ and ‘trade and investment between the Parties’ must be affected.

Possibility of countermeasures against India on conditions of work: In the area of conditions of work, the footnote to Article 19.3 in the TPPA would seem to protect India from vulnerability to countermeasures as far as non-coverage of small scale industry by OSH is concerned. However, there could be a liability for countermeasures in respect of poor enforcement of minimum wages on the small scale sector and non-enforcement in respect of minor ports and inland container depots (ICDs).

Possibility of countermeasures against India with respect to environment: As stated in the previous section, on the environment side, India is in a more comfortable situation. Most of the laws and practices are in full conformity with the obligations in international agreements. There may seem to be some vulnerability in fishing subsidy provided in coastal waters but in the event of a dispute it is unlikely that the subsidy can be demonstrated to affect the trade and investment interest of India’s trading partners.

Suggestions on the way forward for India: Our analysis has shown that if TPP like provisions are proposed in a multilateral trade agreement in future there would be only a small area of vulnerability to countermeasures arising from our labour law, in respect of weak enforcement of the minimum wage law and lack of enforcement of OSH measures in non-major ports and ICDs. In all other areas our laws and practice, be they in labour or environment, would be found to be either fully compliant with the benchmarks envisaged in the TPP Agreement or would be protected by the safeguards envisaged in that Agreement. However, our future stance on the issue should be guided less by the unlikelihood or otherwise of a negative effect, howsoever small, and more by the likelihood or otherwise of a positive effect on our economic interest. The current multilateral trade compact, as embodied in the WTO Agreement, does not permit a linkage between trade in goods and services with labour and environment standards and if we are to alter this it must be shown how this would benefit India and other developing countries. No such benefit has been demonstrated. On the other hand, if we accept the proposition there is the unwelcome prospect of our trade and economic interests being hurt through countermeasures. It seems to be appropriate, therefore, for India to maintain its stance in this regard and oppose suggestions for introducing labour

and environment in multilateral trade agreements. This is not to say that India should not take simultaneously resolute action to fill the gaps in its laws and practice relating to core international labour standards and conditions of work and improve enforcement purposefully. The same logic would apply to the area of environment and the need to address issues on India's management of marine wild capture fishing. Such actions would be in India's development interest and progress in this direction could set an example for other developing countries.

Should we maintain the same position in the framework of bilateral negotiations for economic partnership agreements? In some cases, these agreements (such as Indo-Japanese CEPA) have already included some hortatory language to ensure that the laws and regulations "provide for adequate levels of environmental protection" and governments "strive to continue to improve those laws and regulations". However, in some other ongoing negotiations the proposals, which are not yet in the public domain, may go further and seek deeper linkages between trade on the one hand and labour and environment on the other. If the emerging bilateral agreements are promising and respond strongly to our economic interest, there would be no harm in India having an open mind for discussing the inclusion of provisions on the lines of the TPP Agreement with all the safeguards. In fact, India could seek additional safeguards to plug the few chinks that remain in our armour against countermeasures.

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