

Doing business in India – A primer



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EXECUTIVE SUMMARY

The process of economic reforms in India was initiated in 1991. Since then there has been a constant endeavor to create a foreign investor friendly climate by simplifying procedures for entry and operations. This elementary guide attempts to present an overview of issues/procedures relevant for a foreign investor *viz.*

- choice of entity
- foreign exchange policy
- investment policy
- trade policy
- certain company law provisions
- other issues relating to intellectual property, labor and tax; and finally
- a few do's and don'ts

Depending upon the proposed strategy and as per the government's investment policy, a foreign investor may opt for setting up either an Indian company (a wholly-owned subsidiary or a joint venture company) or any of the liaison, branch or project office in India.

As per the current policy, prior permission of the government is required for Foreign Direct Investment (“**FDI**”) in certain specified sectors and situations. FDI upto 100 percent is permitted in most areas, with or without prior government approval. In the phase of liberalization and to meet the commitments of the World Trade Organizations of opening up of the economy, there are only certain areas where prior government approval is required. Especially over the last couple of years, many sectors of the economy have been opened up for investment and the caps of investments are being constantly reviewed to increase foreign participation¹. The prevailing level of percentages approved for investment in various sectors by foreign investor, under the automatic route (where no prior approval of the government is required), are published in the manual released by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry and amended from time to time by notifications and press notes.

All foreign exchange transactions are regulated by the Reserve Bank of India (“**RBI**”)² and governed by the Foreign Exchange Management Act, 1999 (“**FEMA**”).

Companies are incorporated in India under the Companies Act, 1956 and are required to comply with its provisions. For instance, an alternate to a director who is unable to attend any Board Meeting(s) may be appointed if the Articles of Association of the company so provide. The foreign investor must be well-aware of a few labor law legislations applicable to establishments and employees. Labor laws in India are numerous and pro-

¹ As part of this constant endeavor, the Ministry of Commerce announced on April 19, 2007 that the ceiling on FDI in telecom was enhanced from 49% to 74% subject to certain criteria and Press Note 3 of 2007 was issued.

² RBI is the central bank in India with headquarters in Mumbai and regional offices in other cities.

employee. Non-manufacturing units have less labor legislations to comply with. Employee benefit legislations cover bonus, gratuity, employee state insurance.

The trademark and patent laws provide protection to trademarks and patents registered in foreign countries. A trademark is registered for ten years while a patent is granted for twenty years. Product patents regime has been recently introduced in India by implementing amendments made to the Patents Act, 1970.

Taxes are levied directly or indirectly. Direct taxes include tax on income arising out of, for instance, royalty, capital gains, fee for technical services, accruing from operations in India. India has entered into Double Taxation Avoidance Agreement (“**DTAA**”) with a number of foreign countries. In case of foreign transactions, the provisions of DTAA between India and the country from which the business activity originates generally governs such taxation. Indirect taxes are levied in the form of customs and excise duty and sales tax.

Sales tax on similar goods varies from state to state in India. In order to ensure parity of tax levied in different states across India, many states have introduced Value Added Tax (“**VAT**”) from April 1, 2005 replacing the prior sales tax system. It is considered to be a uniformly administered tax, which will help eliminate the system of differential rates of taxation and will harmonize the tax regime in India, thereby ensuring that the goods sold in one state in India fetch the same price as being sold at any other place in the country. However, there has been lack of clarity in its implementation, which should smoothen out with time.

1.0 Options for entry

A foreign investor may establish an entity in India depending on the nature of activities envisaged and the prevailing government policy in the proposed sector of investment. Broadly there are two types of vehicles that can be used for carrying on business (a) incorporated entities, namely, wholly-owned subsidiaries and joint venture companies; and (b) unincorporated entities, namely, liaison, project and branch offices. These options are discussed below briefly:

1.1 Incorporated entities

These include corporations duly incorporated under the Companies Act, 1956.

1.1.1 Wholly-owned subsidiary (“WOS”)

The government permits setting up of a WOS in certain sectors like information technology, development of integrated township, mass rapid transport services under the automatic route³. In certain other sectors FDI upto a specified percentage is permitted under the automatic route; however, 100 percent foreign equity may be inducted with prior approval of the Foreign Investment Promotion Board (“FIPB”)⁴. The obvious advantages of a WOS are, total control over funding, management and profit share of the business. However, the flip side is that in a WOS, where the total management is foreign, the advantage of local knowledge of customs and methods is absent from the outset.

1.1.2 Joint-Venture (“JV”)

A joint venture is a popular route for FDI into India either because of the existing sectoral caps in certain areas of investment or it may be the preferred strategy for the foreign investor on account of local knowledge and expertise available through a domestic partner. The joint venture company into which investment is proposed may be an existing Indian company already in business or a new company in which both the foreign investor and the Indian partner acquire an equity stake.

1.2 Unincorporated entities

These include the entities duly formulated for specific purposes and are regulated by FEMA.

1.2.1 Liaison/Representative office

In certain situations, where the foreign entity would like to assess the market in India, it may consider establishing a liaison office. A liaison office requires light structural setup and represents a place of business in India for the parent company. The role of such an office is limited to collection of information about the possible market opportunities and

³ See paragraph 3.1.1 infra.

⁴ See paragraph 3.1.2 infra.

familiarizing the local Indian customer with their products. A liaison office can facilitate technical/financial collaboration between the foreign parent and Indian companies. Such an office is not permitted to engage in any trading or commercial activity and the overseas head office, through remittances, meets all its expenses.

Prior permission of RBI is required to set up a liaison office in India. But, general permission is granted to set up liaison office to insurance companies incorporated outside India who have taken prior approval from the Insurance Regulatory and Development Authority to establish a liaison office in India.⁵

1.2.2 Branch office

If the foreign entity envisages a greater presence in India and is keen to undertake activities (manufacturing/trading) of the head office in India, then it may consider setting up a branch office. A branch office is not a separate legal entity unlike a company and any liability of the branch would be the liability of the foreign entity.

Branch offices may remit its profits, net of applicable Indian taxes, outside India subject to production of prescribed documents to the satisfaction of the banker also known as Authorized Dealer (“AD”) through whom the remittance is effected.

The purpose for which a branch office can be established include export-import of goods, rendering professional/consultancy services, carrying out research work for the parent company, promoting technical/financial collaboration, representing and acting as the buying and selling agent for the parent company, rendering information technology and other technical services.

Prior permission of the RBI is not required for setting up branch offices in Special Economic Zones (“SEZs”).⁶ However, for branch offices outside SEZs, prior permission of RBI is still required.

1.2.3 Project/Site office

Foreigners may also set up an office temporarily for carrying out specific project work secured from an Indian company. The options for financing include direct inward remittance from abroad, bilateral or multilateral funding from an international financing agency, loan(s) obtained by the Indian company awarding the contract or from a public financial institution/bank in India. Upon completion, a project office may remit any surplus money from the project outside India.

Prior permission of the RBI is not required for setting up a project office in India.⁷

⁵ A.P. (D.I.R Series) Circular No. 39 dated 25.04.2005.

⁶ A.P. (D.I.R Series) Circular No. 58 dated 16.01.2004.

⁷ A.P. (DIR Series) Circular No. 37 dated 15.11.2003.

Application for setting up a liaison or a branch office may be made in Form FNC-1 to the RBI.

2.0 Foreign exchange policy

The authority for all foreign exchange dealings is the RBI. The governing legislation is FEMA read with the related regulations. FEMA replaces the erstwhile Foreign Exchange Regulation Act, 1973, which provided for stricter controls.

FEMA introduced the notion of capital and current account transactions. Investment, whether it is inbound or Indian investment abroad, is a capital account transaction; trade is generally a current account transaction.

Payments for investment may be made by remittance from abroad through proper banking channels or by debiting it to the investor's account maintained with an AD. Declaration in the prescribed form and within the prescribed time limit has to be furnished to the RBI.

Free repatriation of capital investment and profits thereon is permissible provided original investment was made in convertible foreign exchange.

3.0 Modus operandi

3.1 Foreign direct investment

FDI is permitted in all sectors except for those contained in the prohibited list including atomic energy, betting and gambling, lottery business etc. It may or may not require prior regulatory approval depending on the government policy in the relevant sector in which investment is proposed to be made. Proposals, where no such permission is required fall under the 'automatic' route, while for others, an application has to be made to the FIPB.

3.1.1 Automatic route

FDI in certain sectors is permitted under the "automatic" route. However, even for sectors falling under the automatic route, there may be a cap for FDI; any FDI beyond the specified percentage may be made with prior permission of the government⁸ depending on the government policy in that sector. For instance, for existing projects, FDI in airports is allowed upto 100 percent but beyond 74 percent requires government approval. Or, in other words, till 74 percent investment qualifies under the automatic route. For greenfield projects for airports, FDI is permissible upto 100 percent under the automatic route. Similarly, for investment in telecom for ISPs with gateways, FDI is permitted upto 74 percent with FDI beyond 49 percent requiring government approval. For ISPs not providing gateways (both for satellite and submarine cables), FDI upto 100 percent is permissible, however FDI

⁸ See paragraph 3.1.2 infra.

beyond 49 percent requires government approval. For most manufacturing activities, FDI upto 100 percent may be made under the automatic route.

Recently, the government further liberalized FDI by opening up more sectors like permitting FDI upto 51 percent in retail trade of “single-brand” products, with its prior approval, subject to specified conditions. It also brought under automatic route upto 100 percent certain activities like manufacture of industrial explosives and hazardous chemicals, setting up greenfield airport projects and cash and carry wholesale trading and export trading.⁹

Investment in certain specified units *viz.* Export Processing Zones (EPZ)/Electronic Hardware Technology Park (EHTP)/Software Technology Park (STP)¹⁰ also qualifies under the automatic route.

Post investment under this route, the RBI must be informed of the inward remittance within 30 days of receipt of funds towards such an investment. Further, prescribed documentation is required to be filed with the relevant regional office of the RBI within 30 days of issue of shares to the foreign investor.

Existing Indian companies with an expansion program may induct foreign equity by FDI via the automatic route, provided:

- increase in their equity level is a result of expansion of the equity base by the existing company prior to the acquisition of shares by the foreign investor;
- money remitted is in foreign currency;
- expansion program is in the sector falling under the automatic route.

No prior approval of the FIPB is required in respect of transfer of shares/convertible debentures, by way of sale, of the Indian company, from resident to non-resident or vice-versa. This is subject to certain conditions like sectoral caps, pricing norms, etc. Post transfer, companies are to submit the required documents along with Form FC-TRS with the AD. However, the financial service sector (i.e. banks, Non Banking Financial Companies (NBFCs) and insurance) are excluded and require prior regulatory approval.

3.1.2 FIPB¹¹ approval

The Government of India, through the FIPB, is the regulatory body for FDI into India.

For activities, which do not qualify under the automatic route, FIPB has formulated sector-specific guidelines which are amended from time to time. FIPB considers each proposal on a case-to case-basis. Normally, FIPB takes at least 4-6 weeks to grant approval

⁹ Press Notes 3 and 4 dated 10.2.2006.

¹⁰ These units are further described under para 4.0 infra.

¹¹ The branch of the government which examines the foreign investment cases is the Foreign Investment Promotion Board.

after submission of the application. Proposals with a total investment exceeding INR 6 billion¹² are submitted to the Cabinet Committee on Economic Affairs (“CCEA”) for decision by FIPB.

Proposals where government approval is required may be discussed with the government officials in person by the foreign investor himself or through his representatives (lawyers) in India.

After issue of shares to the foreign investor, the Indian company (in which investment has been made) is required to file the prescribed documents with the concerned regional office of the RBI within 30 days.

3.1.3 Exceptions to the automatic route

There are certain exceptions to the automatic route of FDI. This means that should a particular project fall within the ambit of the list below, notwithstanding the fact that the activity contemplated would otherwise qualify under the automatic route, FIPB approval would be a pre-requisite. The idea behind imposing these restrictions is primarily to protect the domestic industry.

- all proposals which require an industrial license;¹³
- foreign investment of more than 24 percent in the small-scale sector;
- all proposals in which the foreign collaborator has an existing financial/technical collaboration in India in the “same” field. In such a situation, the foreign investor requires the consent of the Indian partner and has to satisfy the government that the further investment proposed in the “same” field will not jeopardize the existing venture;¹⁴
- all proposals falling outside notified sectoral policy/caps or under sectors in which FDI is not permitted.

3.2 Transfer of technology

To promote industrial environment and to facilitate acquisition of technological capabilities, foreign technology induction is encouraged along with FDI. Transfer of technology would necessitate execution of a corresponding agreement. Again, for transfer of technology, the two methods of investment *viz.* the automatic route and the FIPB approval, apply.

¹² US\$ 142 million wherein 1 US\$ = INR 42 approximately as of April 30, 2007.

¹³ Industrial licence for manufacturing is required for: (i). Industries retained under compulsory licensing, (ii). Manufacture of items reserved for small scale sector by non-SSI units; and (iii). where the proposed location attracts locational restriction. The following industries require compulsory industrial license: (i). Distillation and brewing of alcoholic drinks. (ii). Cigars and cigarettes of tobacco and manufactured tobacco substitutes; (iii). Electronic aerospace and defence equipment: all types; (iv). Industrial explosives, including detonating fuses, safety fuses, gunpowder, nitrocellulose and matches; (v). Hazardous chemicals like Hydrocyanic acid and its derivatives, Phosgene and its derivatives, Isocyanates and di-isocyanates of hydrocarbon, not elsewhere specified (example: Methyl Isocyanate).

¹⁴ Press Note 1 dated 12.1.2005 and Press Note 3 dated 15.3.2005, Ministry of Commerce & Industry.

3.2.1 Automatic route

RBI generally accords automatic approval to foreign technology collaboration irrespective of the foreign equity, provided:

- lump sum payments do not exceed US\$ 2 million;
- royalty payments for transfer of technology are limited to 5 percent for domestic sales and 8 percent for exports.

Royalty payment is net of Indian taxes and is calculated as per the standard conditions i.e. net ex-factory sale price of the product (exclusive of excise duties) minus the cost of standard bought-out components and the landed cost of imported components (irrespective of the source of procurement and including ocean freight, insurance, custom duties etc.). Terms of payment of royalty under the automatic route are irrespective of the extent of foreign equity in the Indian company.¹⁵

Further, royalty payment upto 2 percent for exports and 1 percent for domestic sales is allowed under the automatic route for the use of trademarks and brand name of the foreign collaborator without transfer of technology. But, in case of transfer of technology, payment of royalty for technology shall include the payment for the use of trademark and brand name of the foreign collaborator. ADs may allow the remittance of royalty for the use of trade marks. In case a company wants to pay remittance towards purchase of a trademark/franchise, prior approval of the RBI will be required.

3.2.2 FIPB approval

Prior approval of the government is required with respect to foreign technology collaboration agreements where,

- the proposal requires compulsory licensing;
- the item of manufacture is reserved for the small scale sector;
- there is an existing joint venture or technology transfer/trademark agreement in the “same” field. The definition of the “same” field would be as per the 4 digit National Industrial Classification (NIC) 1987 Code;¹⁶
- the proposal does not meet the parameters of automatic approval as stated under 3.2.1 above.

3.3 Employment of foreigners

A foreigner coming into the country must register himself with the Foreign Regional Registration Office (“**FRRO**”) of the Ministry of Home Affairs under the Foreigners Registration Act, 1939. The foreigner is issued a ‘*permit*’ indicating the date of his arrival and the period during which he is permitted to stay in the country. He is required to visit the FRRO personally along with the prescribed documentation. He is required to surrender his

¹⁵ Press Note 19 dated 15.12.1998 and Press Note 2 dated 24.6.2003.

¹⁶ Press Note 3 dated March 15, 2005.

permit immediately before his departure from India and obtain an endorsement to that effect. The purpose of this registration is to regulate the movements of the foreigner within the area in which the permit was granted and also to restrict his stay within the period specified in the visa issued to him.

Also, see section 5.4.1 (Directors) *infra* regarding appointment of whole-time directors.

4.0 Trade: foreign trade policy

India's import-export promotion measures and related guidelines are contained in the Foreign Trade Policy (“FTP”), implemented on August 31, 2004. The policy has been announced for a period of five years i.e. 2004-09. The FTP has replaced the erstwhile Export-Import Policy. The five year policy is updated every year in consonance with the trends in international trade. The current annual supplement to the FTP for the year 2007-08 was announced on April 19, 2007 with effect from April 1, 2007. Amendments and notifications to the policy are issued from time to time. As per the FTP, the import and export of goods shall be decontrolled unless they are specifically regulated or prohibited under the policy. The item-wise export and import policy is specified under ITC (HS) classification as published, notified and amended by the Director General of Foreign Trade (“DGFT”) from time to time.

A recognition certificate has to be obtained by a person before carrying out any export or import activity from or into India by making an application to the DGFT in the prescribed format, accompanied with the prescribed fee and documents. An Import-Export Code (“IEC”) number is allotted to the applicant, which is essential for carrying out trade related activities unless it is specifically exempted.

The certificate holder has to maintain proper accounts of his imports and exports during the validity period of his certificate. Accounts have to be maintained upto 3 years after the expiry of the validity period and have to be made available for inspection by the licensing authority at all times.

To boost exports and to facilitate development of technology, the Government has set up various free trade and export processing zones including EPZs, SEZs, EHTPs, STPs, Bio-Technology Parks (“BTP”). In the recent policy, the government also proposes to establish Free Trade and Warehousing Zones along with Agriculture Export Zones (“AEZ”). Certain special benefits in the form of tax holidays, infrastructure facilities like warehousing, banking, clearing and forwarding agencies, custom clearance, better roads, regular supply of electricity and construction material at cheaper rates are provided to these units. Besides these, other benefits for such units include priority for release of foreign exchange; companies developing embedded software are eligible for duty free imports of hardware for testing and development purposes upto US\$ 10,000 and antidumping and safeguard duty exemption for advance license for deemed exports for supplies to SEZ/EHTP/STP units.

5.0 Company law

All companies in India are incorporated under and governed by the Companies Act 1956 (“**Act**” in this section).

5.1 Types of companies

The Act provides for incorporation of different types of companies, the most popular ones engaged in commercial activities being the private limited and public limited companies (liability of members being limited to the extent of their shareholding). These are described below:

5.1.1 Private company

A private company¹⁷ is required to be incorporated with a minimum paid-up capital of INR 100,000¹⁸ and two subscribers. Broadly, it:

- restricts the right to transfer its shares;
- limits the number of its members (shareholders) to fifty;
- prohibits any invitation to the public to subscribe for any of its shares or debentures; and;
- prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

The balance sheet and profit and loss account of the company has to be filed with the Registrar of Companies (“**ROC**”). No person other than the shareholders of a private company can inspect the profit and loss accounts of the company filed with the ROC.¹⁹

5.1.2 Public company

A public company²⁰ means a company which is not a private company. A public company is required to be incorporated with a minimum paid-up capital of INR 500,000²¹ and seven subscribers. A private company, which is a subsidiary of another company, not being a private company, shall be a public company.²²

The profit and loss accounts, balance sheet, along with the reports of the directors and auditors, of a public company, are required to be filed with the ROC and are available for inspection to the public at large. Listed public companies are additionally regulated by the Securities and Exchange Board of India (“**SEBI**”) and have listing agreements with the respective stock exchange(s) on which they are listed.

¹⁷ Section 3(1)(iii).

¹⁸ US\$ 2,381 approx.

¹⁹ Section 220.

²⁰ Section 3(1)(iv).

²¹ US\$ 11,905 approx.

²² Section 3(1)(iv)(c), Companies (Amendment) Act, 2000.

A private company is a more popular form as it is less cumbersome to incorporate and also has less stringent reporting requirements. Usually, foreigners may want to set up a private company initially.

5.2 Share capital

The issue of shares symbolizes the payment of share capital in a company. The share capital is required to be stated in the company's memorandum.²³

5.2.1 Authorized share capital

The nominal or authorized share capital is the amount of capital stated in the memorandum that the company is authorized to issue. The issued capital is that part of the nominal or authorized capital that the company offers for subscription. Enhancement of authorized capital necessitates passing of appropriate resolutions by the Board and shareholders of the company and payment of additional fees to the ROC.

5.2.2 Paid-up share capital

The paid-up share capital is the amount of capital which the shareholders have agreed to give consideration in cash or kind for the shares to be held by them, unless those shares are fully paid up bonus shares issued by a company, generally out of the accumulated profits which are available for appropriation.

5.3 Shareholders meetings

There are two types of shareholders meetings; Annual General Meeting (“AGM”) and Extraordinary General Meeting (“EGM”).

5.3.1 Annual General Meeting²⁴

Companies are under a statutory obligation to call an AGM every year. The first AGM has to be convened within eighteen months of the incorporation of the company. Subsequently, a period of not more than fifteen months should lapse between the date of holding one AGM and the next. A notice informing the date, place and agenda of the meeting has to be given to the members. The meeting is to be held at the registered office of the company or at any other place within the city where the registered office of the company is situated. In case of non-compliance with the provisions of the Act, a fine of INR 50,000²⁵ is imposed and in case of continuing default, the fine may be extended to INR 2,500²⁶ for every day after the first day of default, for which the default continues.²⁷

²³ Section 13(4).

²⁴ Section 166.

²⁵ US\$ 1,190 approx.

²⁶ US\$ 59 approx.

²⁷ Section 168.

5.3.2 Extraordinary General Meeting²⁸

The Board of Directors are authorized to call an EGM on their own or on the requisition made by the members, provided the members demanding the requisition hold not less than one tenth of the paid-up capital of the company. The Board has to call the meeting within twenty one days of deposition of valid requisition. If the Board fails to do so, then the requisitionists may call the meeting themselves.

5.3.3 Authorized representative²⁹

An authorized representative is a person who is appointed as a representative of the company through a Board resolution and acts in the capacity of an individual shareholder. He is in an advantageous position *vis a vis* a proxy shareholder as he has the right to speak in a shareholders meeting and the right to vote both by a show of hands and by poll.

An authorized representative plays a very crucial role in case of a tie during voting while passing a resolution.

5.4 Management

The Act lays down specific provisions with respect to managing the affairs of a company so as to protect the interest of its shareholders and investing public.

5.4.1 Directors

A public company is required to have a minimum of three directors and a private company a minimum of two directors.³⁰

Appointment of first directors is generally done by naming them in the articles filed with ROC for incorporation of a company. These directors hold office for the period, if any, mentioned in the articles. The Board of Directors may appoint, if the articles permit:

- additional directors
- directors to fill causal vacancies
- alternate directors

Directors are under a statutory duty to ensure that company's funds are used for legitimate business purposes. They have an obligation to maintain a register and index of members/debenture holders, call general meetings including the AGM each year, ensure proper maintenance of books of accounts and prepare balance sheets, profit and loss accounts and to get them audited and place before AGM, disclose shareholdings etc.

²⁸ Section 169.

²⁹ Section 187(1).

³⁰ Section 252.

5.4.1.1 Whole-time/Managing Directors³¹

Every company having a paid-up share capital of INR 50 million³² must have a managing or a whole-time director or a manager. An approval from the Central Government (Ministry of Company Affairs) is required:

- whenever any person is appointed as a whole-time/managing director of a public limited or a private company which is a subsidiary of a public company; and
- if the remuneration proposed to be paid to such whole-time/managing director is more than what is prescribed in Schedule XIII of the Act.

The application for approval of such appointment and remuneration is required to be filed within 90 days of the appointment. For appointment of a foreign national as a whole-time/managing director, the above approval is required in all cases.

5.4.1.2 Alternate director³³

The Board of Directors, if authorized by the articles of the company or by the resolution passed at the general/shareholders meeting, may appoint an alternate director to act on behalf of an original director during his absence for at least a period of three months from the state in which the meetings of the Board are usually held. The alternate director so appointed shall not hold the office longer than permissible to the original director in whose place he is appointed and has to vacate office when the original director returns. This section greatly facilitates or assists the foreign directors of a company who are unable to travel for the statutory quarterly or any intermediary meetings of the Board.

5.4.2 Board meetings

Board meetings are required to be held every three months.³⁴ Following are examples of powers which may be exercised by the Board³⁵:

- allot shares, make call on shareholders in respect of money unpaid on their shares and to forfeit shares in case of non payment
- make contracts, execute negotiable instruments and borrow money on behalf of the company
- invest upto specified limits in the shares of other companies
- authorize buy back of company's shares
- declare interim dividend
- issue debentures
- invest the funds of the company
- make loans

³¹ Section 269 read with Schedule XIII.

³² US\$ 1,190,476 approx.

³³ Section 313.

³⁴ Section 285.

³⁵ Section 292.

The Board may delegate its powers to borrow, invest funds and make loans upto certain specified limits, to the committee of directors or the managing director.

5.5 Company secretary³⁶

A company secretary is a person possessing the prescribed qualifications and is a member of the Institute of Companies Secretaries of India. He performs various administrative and secretarial tasks of the company. Part of his duties include attending meetings of shareholders and directors, preparing agenda and minutes for meetings and issuing notices to members under the directions of the Board. Every company with a paid-up capital of INR 20 million³⁷ is required to have a whole-time company secretary.

5.6 Resolutions

It is a formal expression of an opinion adopted by votes and a formal record of the action taken by the shareholders and the Board of a company.

5.6.1 Ordinary resolution³⁸

An ordinary resolution is the basic method in which the decisions of shareholders of a company in a general meeting are given specific and formal shape. Ordinary resolution, to be passed, requires a simple majority of members who are present and entitled to vote on the resolution. This shall also include the vote of the chairman of the company, if appointed. Voting on this resolution is generally done by show of hands (voting by poll is the other option that can be exercised) by the members present personally or by proxy and each member has one vote irrespective of the shareholding. The resolution passed by the majority is legally binding upon the minority and the company.

5.6.2 Special resolution³⁹

A resolution is a special resolution when the notice calling the general meeting or other intimation given to the members specifically mentions the same. Such a resolution, in order to get passed, requires that the number of votes (whether on show of hands or poll) cast by the members in favor of the resolution (by voting or by proxy) exceed three times the number of the votes, if any, cast against the resolution. The basic objective of such a resolution is to secure that every important change made regarding the policies of the company is made after due deliberation, and with the sanction, active or passive, express or tacit, of the greater body of the shareholders of the company. Some of the actions which require a special resolution are alteration of the memorandum/articles of the company, change of name of the company and reduction of share capital.

³⁶ Section 383A.

³⁷ US\$ 476,190 approx.

³⁸ Section 189.

³⁹ Section 189.

5.6.3 Circular resolution⁴⁰

For cases where certain important resolution/s has/have to be passed urgently for effective functioning of a company and it is not convenient for the directors to hold a Board meeting, the option of passing of a Board resolution by circulation provided under the Act may be exercised.

5.6.3.1 Circular Board resolution

In order to pass a circular resolution, the Board or the committee of directors has to circulate a draft along with necessary papers, if any, to all the directors, members of the committee, then in India. It is important to ensure that the quorum requirements are fulfilled for a circular resolution.

Moreover, such a resolution must be circulated to all other directors at their usual address in India who must approve them or a majority of directors entitled to vote on the resolution.

5.6.3.2 Circulation of members' resolution⁴¹

Shareholders may introduce a resolution on their own in an AGM. A circular has to be sent to inform other members about the purpose for which the resolution is proposed to be introduced or the reason for opposing the resolution submitted by the directors for consideration at the meeting.

The number of members necessary for requisitioning a meeting should not be less than one twentieth of the total number of members having the right to vote and a minimum of hundred shareholders, each holding shares in the company having a paid-up capital of not less than INR 100,000.⁴²

A notice demanding the requisition has to be delivered at the registered office of the company six weeks prior to the meeting in case of a requisition requiring notice of a resolution (i.e. special notice, for instance, for appointment of auditors); in case of any other requisition, two weeks' notice before the meeting is required.

5.7 Shareholder thresholds

There are certain thresholds that a foreign investor needs to consider while structuring investments in India because they either result in certain minority rights or the ability to block certain actions. It is these specific shareholder thresholds that are critical in analyzing the sectoral caps that the regulators have imposed in accordance with the prevailing foreign investment policy, for foreign investment in different industries. The following are generally applicable in the context of both public and private companies:

⁴⁰ Section 289.

⁴¹ Section 188.

⁴² US\$ 2,381 approx.

1. Ten percent: the approval of at least 10% of the shareholders is required for the requisition of an EGM or for an application to the Company Law Board for relief, if there is oppression or mismanagement by the majority shareholders.
2. Fifty-one percent: the approval of at least 51% of the shareholders is required for an ordinary resolution including for:
 - Alteration of the share capital
 - Declaration of dividend
 - Election, removal and remuneration of directors
 - Approval of annual accounts
 - Appointment of external auditors
 - Appointment of other officers
 - Routine matters relating to the conduct of a company
3. Seventy-five percent: the approval of at least 75% of the shareholders is required for a special resolution including for:
 - Capital increases
 - Alteration in the Memorandum and Articles of the company
 - Changing the registered office address of the company from one state to another
 - Change in the name of the company
 - Buy-back of shares
 - Proposed mergers
 - Liquidation

Therefore, a minority shareholder with more than 25% voting rights would have the ability to block special resolutions.

As is apparent, minority shareholders are guaranteed certain rights under Indian law. Minority shareholders with qualified minority may initiate action against decisions of the majority in a court of law. A qualified minority consists of at least one hundred shareholders or one-tenth of the total number of shareholders, whichever is less, or any shareholder(s) holding one-tenth of the issued share capital of the company fully paid-up.⁴³

5.8 Audit of accounts

Auditors of a company are appointed/re-appointed in the AGM through a special resolution. Their tenure lasts till the conclusion of the next AGM. The company in a general meeting may remove auditors before the expiry of their term in office.

⁴³ Section 399 of the Act.

Auditors are required to make a report to the members of the company in respect of the accounts (balance sheet, profit and loss account) examined by them at the end of each financial year.⁴⁴

The Act also provides for formation of an audit committee, consisting of qualified and independent directors, *inter alia* to have discussions with the auditors about the internal control systems and review half yearly and annual financial statements before submission to the Board.

6.0 Other issues

6.1 Intellectual property

Intellectual property laws include laws for trademarks, patents, copyrights, designs and geographical indications. The trademarks, patent, design and geographical indications laws are discussed below.

6.1.1 Trademarks

The law of trademarks is contained in the Trademarks Act, 1999 (*referred to as the Act under this section 6.1.1*). According to the Act, registration of trademarks for services including multi-class applications⁴⁵ is now permissible. The time period for processing a trademark application has been drastically reduced resulting in expediting the process of registering a trademark.

Applications for trademark registrations are to be submitted at the appropriate office of the trademarks registry.

6.1.1.1 Action for infringement/passing off

The Act provides for action against violation of and punishment for both registered and unregistered trademarks. (For registered trademarks, an action for infringement, while for unregistered trademarks, an action for passing-off may be initiated.)⁴⁶ Infringement of a trademark is a criminal offence. For instance, if a person falsifies a trademark by using or altering a genuine mark by a deceptively similar mark, he may be subject to imprisonment between 6-36 months and a fine between INR 50,000⁴⁷ to INR 2 million⁴⁸. The court may however, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term upto six months and fine less than INR 50,000⁴⁹.

⁴⁴ Section 227(2).

⁴⁵One application may be made for registration of the trademarks under various classes; earlier separate applications had to be made for registration in each class. However, fee for each class has to be paid separately.

⁴⁶ A suit of infringement or passing off may be brought in a district court or higher.

⁴⁷ US\$ 1,190 approx.

⁴⁸ US\$ 47,619 approx.

⁴⁹ Section 103 of the Trademarks Act, 1999.

Under Indian law, every person in charge of and responsible for the conduct of the company affairs shall be deemed to be guilty of the offence⁵⁰ and this would include the management.

6.1.1.2 Convention applications

The Act also makes provisions for applications from convention countries⁵¹ where Indian applications are treated at par. A convention country application is registered in India with effect from the same date as in the convention country if the application in India is made within six months from the date of application in the convention country. The priority documents⁵² pertaining to the convention application must be filed with the trademarks registry within two months from the date of filing of the application.

6.1.1.3 Term

A trademark is granted initially for a period of ten years and may be renewed thereafter for an additional period of ten years upon furnishing the requisite renewal fee.

6.1.2 Patents

The legislation governing the patents in India is the Patents Act, 1970 (*referred to as the Act under this section 6.1.2*) as amended from time to time, read with the rules. In order to meet India's obligations under the TRIPS Agreement, an amendment was passed, effective from January 1, 2005. The amendment envisages a product patent regime in agrochemicals, foods and pharmaceuticals. Accordingly, the inventions that are entitled to process patents would now become eligible for product patent protection as well. The provisions for Exclusive Marketing Rights given for the products earlier have been removed.

6.1.2.1 Convention applications⁵³

Patent applications from convention countries⁵⁴ are treated at par with local applications. In order to claim priority in India, the convention country application should be made within 12 months from the date on which the basic application was made in the convention country. The priority date of a claim of the complete specification would be the date of making the basic application. Where an application has been made in more than one convention country, the period of 12 months shall be reckoned from the date on which the earlier/earliest of the applications was made.

⁵⁰ Section 114 of the Trademarks Act, 1999.

⁵¹ Convention countries include the group of countries who are signatories to the Paris Convention.

⁵² Documents pertaining to application filed in the convention country in respect of which priority is claimed.

⁵³ Section 2 (c) – “convention application” means an application for a patent made by virtue of section 135.

⁵⁴ Section 2 (d) – “convention country” means a country which is member of a group of countries or a union of countries or an international governmental organization notified as such under section 133(10). 176 convention countries have been notified so far including USA, United Kingdom, France, Germany, Spain, Singapore.

6.1.2.2 PCT applications

The Patent Cooperation Treaty (“PCT”) essentially facilitates filing of a single application for grant of patent rights in various countries. However, the patent office of the country where the application is made is solely responsible for grant of patent in that jurisdiction. As per recent amendments, PCT applications must be made within 36 months from the date priority is claimed.

A foreign applicant is required to give a local address for service in India, which would also decide the jurisdiction where an application is required to be made.

6.1.2.3 What is patentable

- a) In case of the following inventions, claims for the *methods or processes* of manufacture are patentable:
- Inventions claiming substances for use, or capable of being used, as food or as medicine or drug; and
 - Inventions relating to substances prepared or produced by chemical processes (including alloys, optical glass, semi-conductors and inter-metallic compounds).
- b) Product patents have been introduced in all fields of technology. Accordingly, inventions in areas such as chemicals, food and pharmaceuticals entitled to process patents would now become eligible for product patent protection.

6.1.2.4 Term

The term of a patent granted under the Act is 20 years.⁵⁵

6.1.2.5 Infringement

Recent amendments have extended the scope of damages in case of infringement action by enabling applicants to claim damages from the date of publication and not from the date of acceptance of the patent application, as provided earlier. However, in the case of mail box applications⁵⁶, damages may be claimed only from the date of grant.

6.1.2.6 Applying for patents outside India

No person resident in India may make an application outside India for grant of a patent for an invention unless an application for the same invention has been made in India. The Controller reviews such an application and if the invention is not considered prejudicial

⁵⁵ Section 53 of the Patents Act.

⁵⁶ ‘Mail-box’ applications are pharmaceutical product patent applications filed under the ‘mail-box’ system before January 1, 2005.

to the defense of the country, grants a written permission to apply for a patent overseas. However, if the invention relates to defense purposes or atomic energy, the Controller cannot grant permission without the prior consent of the Central Government.

6.1.3 Designs

Registration of designs is permitted under the Designs Act, 2000 (*referred to as the Act under this section 6.1.3*). The registrable features of a design include shape, configuration, pattern, ornament or composition of line colors, applied to any article, whether two dimensional or three dimensional or in both forms. The design has to be a result of any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the furnished article appeal to and are judged solely by the eye. But, it shall not include any mode or principle of construction, a mere mechanical device, a trademark or property mark or any artistic work.

The designs which are not new or original or which have been disclosed to the public anywhere in India or any country prior to the filing date or which are not significantly distinguishable from known designs or combination of known designs or which comprise of scandalous or obscene matters are not registrable.

6.1.3.1 Term

A design may be registered for a period of 10 years, which period may be extended for another five years, by making an application in the prescribed manner and upon payment of the requisite fee.⁵⁷

6.1.4 Geographical Indications

Geographical indicators can be registered under the Geographical Indications of Goods (Registration and Protection) Act, 1999 (*referred to as the Act under this section 6.1.4*). “Geographical indication in relation to goods means an indication which identifies such goods as agricultural, natural or manufactured goods as originating or manufactured in the territory of country or a region or locality in that territory where a given quality, reputation or other characteristics of such goods are essentially attributable to its geographical origin. If it is a manufactured good, then geographical indicator shall be that particular territory, region or locality where the production, processing or preparation of the goods takes place.”⁵⁸

The following may be possible grounds for refusal of registration⁵⁹ of geographical indication:

- goods likely to cause confusion
- contrary to the law for the time being in force
- containing scandalous or obscene matter

⁵⁷ Section 11 of the Designs Act.

⁵⁸ Section 2- definition of geographical indication.

⁵⁹ Section 9 of the Geographical Indications of Goods (Registration and Protection) Act, 1999.

- comprising or containing any matter likely to hurt religious susceptibilities of any class or section of citizens of India
- disentitled to protection in a court
- determined to be generic names or indication of goods and are therefore not or ceased to be protected in their country of origin or which have fallen into disuse in that country
- literally true as to the territory, region or locality in which the goods originate, but falsely represent that the goods originate in another territory, region or locality

6.1.4.1 Term

The geographical indications are registered for a period of ten years, which registration may be renewed from time to time.⁶⁰

6.1.5 Domain Names

Domain names or web addresses are addresses assigned to an individual or a company in order for them to be located on the internet. Domain name is a unique identity of the assignee on the web or it is an “Online Brand” name. Since no two parties can own the same address, the internet identity of a party becomes unique. The services rendered by an internet site are now recognized under the law and the service providers are given protection. They can initiate action of passing off against any other service provider rendering service under the name identical or similar to their own.

6.1.5.1 Term

Domain names are registered for a period of five years.

6.2 Employment

The labor laws in India provide extensive protection to industrial workers. However, the management sector is largely governed by individual contracts. Some of the central labor legislations which may be of relevance to a foreign investor are mentioned below. Apart from these, a particular state may have its own laws/rules with which an establishment would need to comply.

6.2.1 Payment of Bonus Act, 1965

Payment of Bonus Act, 1965 (*referred to as the Act in this section 6.2.1*) applies to every factory and establishment all over India employing at least twenty people. Each employee must have worked at least thirty days in that calendar year to be eligible for bonus under the Act. Bonus is granted under the Act based on profit or on productivity.

⁶⁰ Section 18 of the Geographical Indications of Goods (Registration and Protection) Act 1999.

6.2.2 Payment of Gratuity Act, 1972

The Payment of Gratuity Act, 1972 (*referred to as the Act under this section 6.2.2*) provides for gratuity to employees in factories, plantations, shops, establishments and mines in the event of superannuation, retirement, resignation, death or total disablement due to accident or disease. The employee will get 15 days' of wages based on the rate of wages last drawn for every completed year of service in excess of six months. The maximum amount of wages a person may receive is the equivalent of fifteen months of wages.⁶¹

6.2.3 The Employees State Insurance Act, 1948

The Employees State Insurance Act, 1948 (*referred to as the Act under this section 6.2.3*) provides employees with sickness, maternity, and employment injury benefits. The sickness cash benefit includes a cash allowance that equals half of the sick person's average daily wages during the previous six months.

In case of an employment injury, disablement and dependents' benefit may be granted. When the disablement is full, the person will receive a monthly pension equivalent to half of his/her average wages during the previous twelve months. If disablement is partial/temporary, the pension will be proportional. The person will also get medical care. In the event of death from employment, the pension will be paid to the widow or widow's minor sons and minor and unmarried daughters. If no widow or legitimate children exist, the pension goes to other dependents.

The Provincial Governments provide medical care and treatment to insured workmen at appropriate hospitals, dispensaries and other medical institutions. All the medical care costs are shared between the company and the Provincial Government.

6.3 Tax

Similar to most systems of taxation around the world, the tax regime in India is rather complex. Taxes are imposed both at the Central and State levels. Further, taxes are broadly divided into two kinds *viz.* direct and indirect.

6.3.1 Direct taxation

The Income Tax Act, 1961 regulates taxation of companies in India. Rates of taxes and exemptions are announced in the annual budget. The fiscal year runs from April to March in India.

Every company must apply for a Permanent Account Number (“PAN”) and a registration number for tax deduction at source. Direct taxes are applicable on income earned through the business dealings in India. Rates vary depending upon whether the income is earned by a domestic company, foreign company, a firm, or an individual.

⁶¹ H.L. Kumar, *Labor & Industrial Law*, 2004 Vol. 2 page 2874-75.

Foreign companies are taxed only on income, which arises from operations carried out in India or, in certain cases, on income, which is deemed to have arisen in India. It includes royalty, fees for technical services, interest, gains from sale of capital assets situated in India (including gains from sale of shares in an Indian company) and dividends from Indian companies.

As regards taxation of income *inter alia* from royalties, fees for technical know-how, capital gains, business income of a permanent establishment, the provisions of the DTAA⁶² between India and the country from which the business activity originates generally governs this. In cases where there is no DTAA, relief is provided to foreign investors on income that is subject to tax in India as well as in their own country.⁶³

6.3.2 Indirect taxation

These include sales tax, customs and excise duty.

Sales tax is levied by Central and State governments on the sale and purchase of goods in India. Imports attract customs and additional duties that may be prescribed. Excise duty is levied on manufacturing. All exports are exempted from sales tax and excise duty.

6.3.3 Value Added Tax

VAT has been implemented in most states of India, with effect from April 1, 2005, replacing the prior sales taxes regime. It is the most significant tax reform in recent years. A total of 550 goods⁶⁴ have been brought under VAT. There are two basic rates of 4 percent and 12.5 percent. 30 states and union territories have adopted VAT as of April 2007. There is an added small segment of goods under the rate of 20 percent and a special VAT rate of 1 percent for gold and silver ornaments, etc. There is also a specific category of tax-exempted goods.

The concept of VAT envisages a uniform and comprehensive tax structure, eliminating needless taxes. But, unlike other countries, VAT is implemented in India on a state-level basis and each state has a choice to keep different rates of taxation for different goods. Further, the assortment of taxes such as excise duty, service tax, octroi/entry tax etc. shall continue to apply apart from VAT. These reasons along with the procedural complexities of VAT have resulted in an initial ambiguity. The government is consequently facing teething problems with its introduction and is facing resistance from the various quarters.

⁶² India has entered into DTAA with 65 countries including USA, UK, France, Germany, Japan.

⁶³ Section 91, Income Tax Act, 1961.

⁶⁴ States such as Haryana and Maharashtra have classified 1000 items; the Empowered Committee on value-added tax is planning to expand the list of items under the VAT list to 2000 items.

7.0 Do's & don'ts

Though there are over a billion people in the country but there are a few cultural traits that are easily identifiable with Indians. The world has become a global village or, in the words of the New York Times columnist Thomas Friedman “the world is being flattened” which is another way of saying that it has become a level playing field. But, people of each country have characteristics and peculiarities that become identified with the country as a whole, fairly or not. India too has its shares of these and has to live with that reputation. It may be worthwhile to be aware of them. Like the rest of the country, Indian business culture is also extremely diverse and heterogeneous. While the following points are illustrative and would assist in negotiating a deal, it is important to be sensitive to, and appreciate the diversity of Indian business culture, which varies across regions, sectors, and ownership patterns.

- A large part of Indian businesses are family-owned or members of different social communities have controlling interests in some of the largest Indian business houses.
- Regional differences prevail within the four corners of India. North and West Indian companies are known to be progressive and bold when compared with their South Indian counterparts who tend to be more conservative in approach and functionality.
- The pace of business meetings in India is comparatively far more relaxed than in some of the western countries. Building a relationship is often considered a prerequisite to doing business. Meetings normally start with small talk about non-work-related topics ranging from weather to the comforts of hotel rooms before people commence with the business issues.
- Indians are somewhat lax about time and generally work as per IST, not the ‘Indian Standard Time’, but ‘Indian Stretchable Time’! Being late for appointments is not unusual. This often happens, and does not necessarily mean much.
- Further, Indians may not ask questions to clarify their doubts and nod their heads too soon in understanding even without doing so! This could perhaps be out of respect for elders as they are taught not to talk back, but is confusing for any investor. However, things are changing and the younger generation may not be inclined to follow this.
- With Indians, one's credibility and trustworthiness are critical in negotiating a deal since relationships and feelings play a crucial role in decisions in India. In general, Indians tend to take greater risks with a person whose intentions they trust.
- Hierarchy is deep-rooted in the system and, at times, the employees do not make the most apparent changes unless the instructions are not received from the “boss”.
- A normal phenomenon in the Indian context is that the subordinates stand up when the “boss” enters the meeting room which is construed as a sign of respect. For foreigners coming from more individualistic cultures, this creates a dilemma - to rise or not.
- Indians have a tendency not to express their disagreements upfront and in a frank manner which would be deemed discourteous. Instead, when differences arise, they may circumvent them by statements such as “we will discuss this later”. Moreover,

- sometimes ratifications may actually have to be done by those not present at the negotiating table.
- Indian negotiators expect and value flexibility in negotiation. It is always advisable to build some buffers in one's initial offer, which allow for bargaining later.
 - Indians are diligent, by nature, eager to see the end-result and, frequently, work unusually late hours without complaining. They are also good at following instructions but it takes time and effort to make them move away from preconceived notions.
 - Indians are generally warm and hospitable (meetings may start with tea which should not be refused) as well as curious people and business conversations may at times, be mixed with personal queries about family, children etc; no offence should be taken and they should not be perceived as intrusive.
 - The system may seem to move at a snail's pace at times, which could be frustrating. In such circumstances, perseverance and patience is recommended.
 - India has people of different faiths. However, most faiths practice removing footwear before entering a place of worship and in many places, footwear is placed at the entrance of the house. Both vegetarian and non-vegetarian fare is available throughout India; however Hindus neither consume nor serve beef as they worship the cow.
 - Indian laws and bureaucracy are quite intricate and cumbersome. Besides the Central laws, there are numerous pieces of legislation which differ considerably across the states. It is, therefore, advisable to hire an Indian lawyer who can help manoeuvre through the maze of these laws and the associated customary practices.