

Doing business in India – A primer

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CONTENTS

EXECUTIVE SUMMARY	4
CONSIDERATIONS FOR DOING BUSINESS IN INDIA	6
1.0 Options for entry	6
1.1 Incorporated entities.....	6
1.1.1 Wholly-owned subsidiary (“WOS”)	6
1.1.2 Joint-Venture	6
1.2 Unincorporated entities.....	6
1.2.1 Liaison/Representative office	7
1.2.2 Branch office	8
1.2.3 Project/Site office.....	8
2.0 Foreign exchange policy.....	9
3.0 Modus operandi	9
3.1 Foreign direct investment	9
3.1.1 Automatic route	10
3.1.2 FIPB approval	11
3.1.3 Exceptions to the automatic route	12
3.1.4 February 2009 press notes	12
3.2 Transfer of technology.....	12
3.2.1 Automatic route	13
3.2.2 FIPB approval	13
4.0 Trade: foreign trade policy.....	13
5.0 Company law	14
5.1 Types of companies	14
5.1.1 Private company.....	15
5.1.2 Public company	15
5.2 Share capital.....	15
5.2.1 Authorized share capital.....	15
5.2.2 Paid-up share capital.....	16
5.3 Shareholders meetings.....	16
5.3.1 Annual General Meeting.....	16
5.3.2 Extraordinary General Meeting	16
5.3.3 Authorized representative.....	17
5.4 Management.....	17
5.4.1 Directors.....	17
5.4.1.1 Whole-time/Managing Directors	17
5.4.1.2 Alternate director	18
5.4.2 Board meetings.....	18
5.5 Company secretary.....	19
5.6 Resolutions.....	19
5.6.1 Ordinary resolution.....	19
5.6.2 Special resolution	19
5.6.3 Circular resolution.....	20
5.6.3.1 Circular Board resolution.....	20

5.6.3.2	Circulation of members’ resolution.....	20
5.7	Shareholder Thresholds	20
5.8	Audit of accounts.....	21
5A.	Limited Liability Partnership (“LLP”)	22
6.0	Other issues.....	22
6.1	Intellectual property.....	22
6.1.1	Trade marks	22
6.1.1.1	Action for infringement/passing off.....	23
6.1.1.2	Convention applications	23
6.1.1.3	Term	23
6.1.2	Patents	23
6.1.2.1	Convention applications	24
6.1.2.2	PCT applications.....	24
6.1.2.3	What is patentable.....	24
6.1.2.4	Term	25
6.1.2.5	Infringement	25
6.1.2.6	Applying for patents outside India.....	25
6.1.3	Designs	25
6.1.3.1	Term	26
6.1.4	Geographical Indications	26
6.1.4.1	Term	26
6.1.5	Domain Names	26
6.1.5.1	Term	27
6.2	Employment	27
6.2.1	Employment of foreigners.....	27
6.2.2	Payment of Bonus Act, 1965.....	27
6.2.3	Payment of Gratuity Act, 1972	28
6.2.4	The Employees State Insurance Act, 1948.....	28
6.2.5	Employees Provident Fund at 1952.....	28
6.3.1	Direct taxation.....	29
6.3.2	Indirect taxation	30
6.3.3	Value Added Tax.....	31
6.4	Competition Law.....	32
7.0	Do’s & don’ts	32

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, labour 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 participation. 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**”)¹ 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 labour law legislations applicable to establishments and employees. Labour laws in India are numerous and pro-employee. Non-manufacturing units have less labour legislations to comply with. Employee benefit legislations cover provident fund, bonus, gratuity, employee state insurance.

¹ RBI is the central bank in India with headquarters in Mumbai and regional offices in other cities

To ensure greater degree of accountability and transparency in the operations and management of a public company and to protect the interests of all its stakeholders, the Securities and Exchange Board of India (“SEBI”) laid down a set of regulations. In light of the multi-million dollar corporate scandals that have surfaced in India, the need for corporate governance cannot be emphasized enough. Clause 49 of the Listing Agreement (entered into between a listed company and the stock exchange on which its shares are listed) embodies this very principle of corporate governance. Provisions of Clause 49 are mandatory for all listed companies in India and any non-compliance attracts heavy penalty for the defaulting company.

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

Taxes are levied directly or indirectly. Direct taxes are levied under the Income Tax Act, 1961 (“IT Act”) and 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 govern such taxation. However, starting April 01, 2012, the IT Act is expected to be replaced by the Direct Tax Code (“DTC”), which is a “newer” legislation aimed at simplifying the complex taxation regime of India. 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 had 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, the government is reviewing the various indirect tax laws and has enacted the Goods and Services Act (“GST”) to centralize all indirect tax legislations and provide uniformity in procedure. GST is expected to come into force in phases from April 01, 2012 along with the DTC.

CONSIDERATIONS FOR DOING BUSINESS IN INDIA

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 route². 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”)³. 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

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.

² See paragraph 3.1.1 infra

³The branch of the government which examines the foreign investment cases is the Foreign Investment Promotion Board

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 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. The RBI grants an initial permission for 3 years which may be extended from time to time by an AD Category – I Bank (“AD Bank”).⁴ No extension is granted to liaison offices of NBFCs and those engaged in construction and development sectors (excluding infrastructure development). Upon expiry of their validity, such entities have to either be closed down or be converted in to JVs or WOSs as per the prevailing FDI Policy.⁵ The RBI allots a Unique Identification Number (“UIN”) to all existing and new liaison offices. This UIN must be quoted in all correspondence with the RBI and AD Banks. With the delegation of powers to the AD Banks, all existing and new liaison offices are required to approach the RBI through their designated AD Banks.

The expenses of a liaison office are required to be met entirely from inward remittances of foreign exchange from the head office outside India. Therefore, the RBI has become very stringent in verifying the ability of the applicant company or the head office located outside India, to meet the expenses of the liaison office sought to be established. In furtherance of this objective, the RBI now assesses the net worth and track record of the applicant company for the years prior to the date of application before granting permission.

Additionally, it is often seen that applications from certain countries are scrutinized by the RBI to a greater degree. Although there is no notification or regulation to this effect, the RBI often forwards such applications to the Ministry of Finance, who have the final say in the matter.

Moreover, the RBI requires that a liaison/representative office submits an “Annual Activity Certificate” from its auditors at the end of March 31 along with audited balance sheet on or before September 30 of the year. If the annual accounts are finalized on a date other than March 31, the certificate along with the supporting documents must be submitted through the designated AD Bank within 6 months from the date of the balance sheet.⁶ This requirement has been added to ensure that the office has not deviated from the permitted activities, and has confined itself to such activities as have been approved by the RBI.⁷

⁴ The RBI has delegated powers to AD Banks to perform several functions which include receiving applications from foreign entities for setting up liaison offices. AD Banks are required to forward the application(s) along with the required supporting documents and their recommendations and comments to the Chief General Manager, RBI, Foreign Exchange Department, Foreign Investment Division, Central Office, Mumbai.

⁵ Master Circular No. 11/2010-11 dated July 01, 2010

⁶ AP (DIR Series) Circular No. 06 dated August 09, 2010

⁷ Master Circular No. 11/2010-11 dated July 01, 2010

Prior permission of RBI is required to set up a liaison office in India. But, general permission for setting up liaison office has been granted to insurance companies incorporated outside India provided they have taken prior approval from the Insurance Regulatory and Development Authority. Similarly, foreign banks can establish liaison offices in India only after obtaining prior approval from the Department of Banking Operations and Development, RBI.⁸

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. As in the case of the liaison offices, applications for setting up branch offices are to be made by the applicant foreign entity with their designated AD Bank. Further, all correspondence with the RBI including the submission of the Annual Activity Certificate also must be made through the designated AD Bank.

Branch offices may remit their 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 through whom the remittance is effected.

The purpose for which a branch office can be established includes 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. Although a branch office is not allowed to carry out manufacturing activities on its own it is permitted to subcontract such activities to an Indian manufacturer. In case a branch office wishes to expand the scope of its permissible activities, it may apply to the RBI through its designated AD Bank justifying the need.

Although there is no notification in this regard, it is often seen that where the applicant is a cooperative society or belongs to a certain country like in the case of a liaison office, the RBI forwards the application to the Ministry of Finance.

Prior permission of the RBI is not required for setting up branch offices in Special Economic Zones (“SEZs”); however, this general permission is subject to certain conditions.⁹

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 activities of a project office are restricted to those that are either related to or incidental to the execution of the project. 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

⁸ A.P. (D.I.R Series) Circular No. 39 dated April 25, 2005 and confirmed in Master Circular No. 11/2010-11 dated July 01, 2010

⁹ Master Circular No. 11/2010-11 dated July 01, 2010

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.¹⁰ General permission has been granted to foreign companies to set up project offices provided they have secured a contract from an Indian company to execute a project in India and (a) the project is funded directly by inward remittance from abroad, or (b) by a bilateral or multilateral international financing agency, or (c) it has been cleared by an appropriate authority or, (d) the Indian entity awarding the contract has been granted term loan by a public financial institution or a bank in India for a project.¹¹

Application for setting up a liaison or a branch office may be made in Form FNC-1 to the RBI, addressed to the Chief General Manager-in-Chief, RBI, Foreign Exchange Department, Foreign Investment Division, Central Office, Fort, Mumbai-400 001.

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 Bank. 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 and fall under the "government" route. Based upon the September 30, 2011 circular of the Department

¹⁰ A.P. (DIR Series) Circular No. 37 dated November 15, 2003 and further confirmed in Master Circular No. 11/2010-11 dated July 01, 2010

¹¹ Master Circular No. 11/2010 dated July 01, 2010

of Industrial Policy & Promotion the investments have to be made only through the issue of equity shares; fully, compulsorily and mandatorily convertible debentures; and fully, compulsorily and mandatorily convertible preference shares in Indian entities, with no in-built options of any type such as put/call options.¹² In other words, equity instruments issued or transferred to non-residents having in-built options or supported by options sold by third parties will lose their equity character and will be treated as debt instruments that will need to comply with External Commercial Borrowing (“ECB”) guidelines. The consequence of this change is that PE investors will not be able to agree such exit rights contractually primarily due to the fact that such investment will qualify as debt necessitating compliance with the onerous ECB guidelines.

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 government¹³ 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 beyond 49 percent requires government approval. For most manufacturing activities, FDI upto 100 percent may be made under the automatic route.

The government 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.¹⁴

Investment in certain specified units *viz.* Export Progressing Zones (“EPZ”)/Electronic Hardware Technology Park (EHTP)/Software Technology Park (STP)¹⁵/Industrial Parks¹⁶ 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 RBI through the designated AD Bank within 30

¹² Circular 2 of 2011 “the Consolidated FDI Policy” D/o IPP F. No. 5(19)/2011-FC-I dated September 30, 2011 (w.e.f. October 1, 2011)

¹³ See paragraph 3.1.2 *infra*

¹⁴ Press Notes 3 and 4 dated February 10, 2006

¹⁵ These units are further described under para 4.0 *infra*

¹⁶ Basic and applied R&D on bio-technology pharmaceutical sciences/life sciences has been included as an industrial activity under industrial parks by Circular 2 of 2011 “the Consolidated FDI Policy” D/o IPP F. No. 5(19)/2011-FC-I dated September 30, 2011 (w.e.f. October 1, 2011)

days of issue of shares to the foreign investor and 60 days for transfer 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 Bank. However, the financial service sector (i.e. banks, Non Banking Financial Companies and insurance) are excluded and require prior regulatory approval.

3.1.2 FIPB 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, and normally, takes at least 4-6 weeks to grant approval after submission of the application. While earlier, proposals with a total investment exceeding INR 6 billion¹⁷ were submitted to the Cabinet Committee on Economic Affairs (“CCEA”) for decision by FIPB, now the Minister of Finance (in-charge of FIPB) can consider the proposals with a total foreign equity inflow of and below INR 12 billion¹⁸. Where the total foreign equity inflow exceeds INR 12 billion, FIPB’s recommendations on the proposal are placed before the CCEA and the FIPB Secretariat in the Department of Economic Affairs process the recommendations of the FIPB to obtain the approval of the Minister of Finance. In addition, the CCEA can also consider the proposals that are referred to it by the FIPB or the Minister of Finance (in-charge of FIPB).¹⁹

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 RBI through its designated AD Bank within 30 days.

¹⁷ US\$ 133 million *approx* (1US\$ = INR 45)

¹⁸ US\$ 266 million *approx*

¹⁹ Circular 2 of 2010 “the Consolidated FDI Policy” D/o IPP F. No. 5 (14)/2010-FC dated September 30, 2010 (w.e.f. October 1, 2010)

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;²⁰
- 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;²¹
- all proposals falling outside notified sectoral policy/caps or under sectors in which FDI is not permitted.

3.1.4 February 2009 press notes

On February 13, 2009, radical changes were made to the FDI norms in anticipation of greater foreign investments. The Department of Industrial Policy and Promotion issued Press Notes 2 and 3 of 2009 and issued further clarifications on February 25, 2009 through Press Note 4 of 2009 which clarify, expand upon and modify the various previous policies and the method of calculation of direct and indirect foreign investment. Briefly, under the February Press Notes, the dual criteria to determine whether or not foreign holding is to be treated as FDI are *management* as well as *economic control*. This has had a considerable impact on calculating indirect foreign investment in a company, especially with regard to downstream foreign investment.

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.

²⁰ Industrial license 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)

²¹ Press Note 1 dated January 12, 2005 and Press Note 3 dated March 15, 2005, Ministry of Commerce & Industry

3.2.1 Automatic route

Prior to December 16, 2009, investments fell under the automatic route only if:

- lump sum payments did not exceed US \$ 2 million
- royalty payments for transfer of technology were limited to 5 percent for domestic sales and 8 percent for exports, without any restriction on the duration of royalty payments

Royalty payments up to 2 percent for exports and 1 percent for domestic sales were also allowed under the automatic route for the use of trade marks and brand name of the foreign collaborator *without* transfer of technology.

However, in an endeavor to further liberalize foreign technology collaborations, the regime was liberalized by the RBI by a press note²² when the aforementioned limits and thresholds were removed. This means, on date, there is no limit for Indian companies paying lump sum and/or royalty payments to foreign collaborators.

Nonetheless, calculation of royalty has to be done in the prescribed manner, as per the formula. Payment should be 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.).

3.2.2 FIPB approval

Prior approval of the government is required for foreign technology collaboration agreements where:

- the product requires compulsory licensing;
- the item of manufacture is reserved for the small-scale sector;
- there is an existing joint venture or technology transfer/trade mark agreement in the “same” field. The definition of the “same” field would be as per the 4 digit National Industrial Classification (NIC) 1987 Code;²³
- the technology is in sectors which are not under the automatic route for FDI.

4.0 Trade: foreign trade policy

India’s import-export promotion measures and related guidelines are contained in the Foreign Trade Policy (“FTP”), announced on August 27, 2009. The policy was announced for a period of five years i.e. 2009-14. The FTP replaced the erstwhile FTP for 2004-09. The five year policy is updated every year in consonance with the trends in international trade. Amendments and notifications to the policy are issued from time to time. As per the prevailing 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

²² Press Note 8 (2009 series) dated December 16, 2009

²³ Press Note 3 dated March 15, 2005

(HS) classification as published, notified and amended by the Director General of Foreign Trade (“DGFT”) from time to time.

Every importer and exporter is required to comply with the provisions of Foreign Trade (Development & Regulation) Act, Rules and orders made there under, FTP and the terms and conditions of any authorization granted.

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 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 set up various free trade and export processing zones including EPZs, SEZs, EHTPs, STPs, Bio-Technology Parks. To further this objective, the government also provided for the establishment of Free Trade and Warehousing Zones (*governed by the SEZ Act, 2005 and the rules framed thereunder*) along with Agriculture Export Zones in several states. 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 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 (“the 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 company²⁴ is required to be incorporated with a minimum paid-up capital of INR 100,000 (one hundred thousand)²⁵ 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.²⁶

5.1.2 Public company

A public company²⁷ 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 500,000 (five hundred thousand)²⁸ and seven subscribers. A private company, which is a subsidiary of another company, not being a private company, shall be a public company.²⁹

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 SEBI and have listing agreements with the respective stock exchange(s) on which they are listed.

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 prefer 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.³⁰

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

²⁴ Section 3(1)(iii) of the Act

²⁵ US\$ 2,222 *approx*

²⁶ Section 220 of the Act

²⁷ Section 3(1)(iv) of the Act

²⁸ US\$ 11,111 *approx*

²⁹ Section 3(1)(iv)(c), Companies (Amendment) Act, 2000

³⁰ Section 13(4) of the Act

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, amendment of the memorandum of association 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 Meeting³¹

Companies are under a statutory obligation to hold 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 AGM must be held during business hours and 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 50,000³² is imposed and in case of continuing default, the fine may be extended to INR 2,500³³ for every day after the first day of default, for which the default continues.³⁴

5.3.2 Extraordinary General Meeting³⁵

The Board of Directors are authorized to call an EGM on their own or on a 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.

³¹ Section 166 of the Act

³² US\$ 1,111 *approx*

³³ US\$ 55 *approx*

³⁴ Section 168 of the Act

³⁵ Section 169 of the Act

5.3.3 Authorized representative³⁶

An authorized representative is a person who is appointed as a representative of the company by means of 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.³⁷

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 have them audited and placed before the shareholders at the AGM, disclose shareholdings etc.

5.4.1.1 Whole-time/Managing Directors³⁸

Every company having a paid-up share capital of INR 50 million³⁹ must have a managing or a whole-time director or a manager. An approval from the Central Government (Department 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

³⁶ Section 187(1) of the Act

³⁷ Section 252 of the Act

³⁸ Section 269 read with Schedule XIII of the Act

³⁹ US\$ 1.1 million *approx*

- 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.

A person cannot be appointed as managing or whole-time director or manager without the approval of the Central government, unless such appointment is made in conformity with the conditions contained in Schedule XIII of the Act and a return is filed with the ROC in Form 25C within 90 days from the date of appointment.⁴⁰ This section applies in case of every public company or a private company which is a subsidiary of a public company.

5.4.1.2 Alternate director⁴¹

The Board of Directors, if authorized by the articles of the company or by a 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 cannot hold office for a period longer than that permissible to the original director in whose place he is appointed. Further, the alternate director must 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 at least once in every three months and at least four such meetings must be held in every year.⁴² The Board can exercise a number of powers at a Board Meeting, by way of a resolution, namely:⁴³

- make calls 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 up to 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

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

⁴⁰ Section 268 (2) of the Act

⁴¹ Section 313 of the Act

⁴² Section 285 of the Act

⁴³ Section 292 of the Act

5.5 Company secretary⁴⁴

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 50 million⁴⁵ is required to have a whole-time company secretary.⁴⁶ And, a company with a paid-up capital of INR 100,000⁴⁷ or more is required to file a certificate (as to whether the company has complied with all the provisions of the Act from a secretary in whole-time practice, in the prescribed form and time with the ROC.

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 directors of a company. Resolution is passed at a shareholders meeting as either an ordinary or a special resolution.

5.6.1 Ordinary resolution⁴⁸

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 resolution⁴⁹

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.

⁴⁴ Section 383A of the Act

⁴⁵ US\$ 1.1 million *approx*

⁴⁶ GSR 11 (E) dated January 5, 2009 enforced as on March 15, 2009.

⁴⁷ US\$ 2,222 *approx*

⁴⁸ Section 189 of the Act

⁴⁹ Section 189 of the Act

5.6.3 Circular resolution⁵⁰

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 has been provided for under the Act.

5.6.3.1 Circular Board resolution

In order to pass a circular resolution, the board or the committee of directors is required to circulate a draft along with necessary papers, if any, to all the directors, members of the committee, in India and abroad. It is important to ensure that the quorum requirements are fulfilled for a circular resolution. Finally, the resolution must be approved by such directors as are then in India, or by a majority of such directors as are entitled to vote on the resolution.

5.6.3.2 Circulation of members' resolution⁵¹

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 100,000.⁵²

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:

⁵⁰ Section 289 of the Act

⁵¹ Section 188 of the Act

⁵² US\$ 2,222 *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 50% 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.⁵³

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.

⁵³ 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.⁵⁴

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.

5A. Limited Liability Partnership (“LLP”)

The GOI finally passed the LLP Act, 2008 on December 12, 2008. LLP will help fill the lacuna between a partnership, which is highly unregulated and a company, which is regulated by the Act. Like a company, LLP is a separate legal entity with perpetual succession. It can be incorporated with a minimum of two (2) partners, one (1) of who must be a resident of India.

The LLP Act provides for either creation of a new LLP or conversion of an existing firm or a private limited company or unlisted public company into a LLP. Its essence is that it is a separate legal entity wherein no member or partner is liable on account of the independent or unauthorized actions of other partners. The liability of the partners is limited to their respective stake in the LLP. Unlike the case of a partnership there is no upper limit on the number of partners in an LLP. After the union budget of 2009-2010, the government has decided to tax LLPs as general partnership firms i.e. tax will be levied on the LLP and the partners will be exempted from tax,

The ROC is the authority that registers and regulates the affairs of LLPs.

6.0 Other issues

6.1 Intellectual property

The various tools of IPR used to protect innovations are copyrights, patents, trade marks, industrial design, geographical indications, and layout designs for integrated circuits. There are differences in the degree of protection for each of them. The trade marks, patent, design and geographical indications laws are discussed briefly below.

6.1.1 Trade marks

Trade mark registration is an evidence of ownership, a sort of limited exclusive right to use the mark in relation to the goods or services the mark represents. The law of trade marks is contained in the Trade Marks Act, 1999 (*referred to as the Act under this section 6.1.1*) and its corresponding Trade Marks Rules. According to the Act, registration of trade marks for goods and services⁵⁵ including multi-class applications⁵⁶ is also permissible. The time period for

⁵⁴ Section 227(2) of the Act

⁵⁵ There are 45 classes of goods and services which are based on the international system of classification.

⁵⁶ One application may be made for registration of the trade marks 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

processing a trade marks application has been drastically reduced since the introduction of the online search facility by the office of trade marks registry along with e-filing of forms for registrations, thereby resulting in expediting the process of registering a trade marks.

Applications for trade mark registrations are to be submitted at the appropriate office of the trade marks 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 trade marks. (For registered trade marks, an action for infringement, while for unregistered trade marks, an action for passing-off may be initiated.)⁵⁷ Infringement of a trade mark is a criminal offence. For instance, if a person falsifies a trade mark 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 50,000⁵⁸ to INR 200,000.⁵⁹ 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 50,000. 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 offence⁶⁰ and this would include the management.

6.1.1.2 Convention applications

The Act also makes provisions for applications from convention countries⁶¹ 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 documents³⁸ pertaining to the convention application must be filed with the trade marks registry within two months from the date of filing of the application.

6.1.1.3 Term

A trade mark 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

A patent is an exclusive monopoly granted by the government to an inventor over his invention for limited period of time. 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

⁵⁷ A suit of infringement or passing off may be brought in a district court or higher

⁵⁸ US\$ 1,111 *approx.*

⁵⁹ US\$ 4,444 *approx.*

⁶⁰ Section 114 of the Act

⁶¹ Convention countries include the group of countries who are signatories to the Paris Convention

³⁸ Documents pertaining to application filed in the convention country in respect of which priority is claimed

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 applications³⁹

Patent applications from convention countries⁴⁰ 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.

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. 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 are eligible for product patent protection.

³⁹ Section 2 (c) of the Act states that a “convention application” means an application for a patent made by virtue of section 135

⁴⁰ Section 2 (d) of the Act provides that a “convention country” means a country which is member of a group of countries or a union of countries or an international governmental organisation notified as such under section 133(10). Many convention countries, including the USA, United Kingdom, France, Germany, Spain, Singapore have been notified

6.1.2.4 Term

The term of a patent granted under the Act is 20 years from the date of filing of patent application.⁶² In case of applications filed under PCT the term of 20 years begins from international filing date.

6.1.2.5 Infringement

Amendments in the Act 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 applications⁶³, 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 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 trade mark 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.

⁶² Section 53 of the Act

⁶³ 'Mail-box' applications are pharmaceutical product patent applications filed under the 'mail-box' system before January 1, 2005

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.⁶⁴

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.”⁶⁵

The following may be possible grounds for refusal of registration⁶⁶ of geographical indication:

- goods likely to cause confusion
- contrary to the law for the time being in force
- containing scandalous or obscene matter
- 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.⁶⁷

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

⁶⁴ Section 11 of the Act

⁶⁵ Section 2 of the Act

⁶⁶ Section 9 of the Act

⁶⁷ Section 18 of the Act

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.

In India, the National Internet Exchange of India (“NIXI”)⁶⁸ was established in 2003 to provide neutral internet exchange point services in India. It was established with the Internet Service Providers Association of India to become the operational meeting point of Indian internet service providers with the main purpose to facilitate handing over of domestic internet traffic between the peering internet service provider members. NIXI, created the INRegistry, an autonomous body with the primary responsibility of maintaining the (.in) domains and ensuring its operational stability, reliability, and security. The INRegistry is also India’s official (.in) registry.

6.1.5.1 Term

Domain names are registered for a period of five years.

6.2 Employment

The labour laws in India provide extensive protection to industrial workers. However, the management sector is largely governed by individual contracts. Some of the central labour 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 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 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.

6.2.2 Payment of Bonus Act, 1965

Payment of Bonus Act, 1965 (*referred to as the Act in this section 6.2.2*) 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.

⁶⁸ This enables more efficient use of international bandwidth and saves foreign exchange. NIXI also improves the quality of services for the customers of member internet service providers

6.2.3 Payment of Gratuity Act, 1972

The Payment of Gratuity Act, 1972 (*referred to as the Act under this section 6.2.3*) provides for gratuity to employees in factories, plantations, shops, oil fields, port and railway companies, establishments and mines in the event of superannuation, retirement, resignation, death or total disablement due to accident or disease. Gratuity is payable to an employee on the termination of his employment provided he has rendered continuous service for at least five years. 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.

6.2.4 The Employees State Insurance Act, 1948

The Employees State Insurance Act, 1948 (*referred to as the Act under this section 6.2.4*) applies to all factories other than seasonal factories. It 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.

6.2.5 The Employees Provident Fund Act, 1952

Provident Fund (**"PF"**) is a social benefit provided to the employee wherein a fixed contribution of 12% of the basic wage of an employee is made by both the employer and employee towards a fund or trust. The quantum of the sum deposited can be the statutory limit of INR 6,500 per month payable by each of the employer and the employee. It can also be voluntarily increased and a higher sum can be deducted from the wage and deposited as long as the request is made jointly by the employee and the employer. It is obligatory for a company employing more than 20 (twenty) employees to provide for this benefit, but a voluntary coverage can also be sought if the majority employees and employers are in favour. Payment of PF is governed by the provisions of The Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (**"EPF Act"**) and The Employees' Provident Funds Scheme, 1952 (**"EPF Scheme"**).

In cases where the EPF Act and EPF Scheme apply to an Indian company, all expatriate employees, with whose home country India has not executed a social security Agreement (**"SSA"**)⁶⁹ have to contribute towards PF on their global income. The PF authorities have amended the EPF Scheme following which an expat will be entitled to his/her PF

⁶⁹ SSAs are reciprocal agreements that India intends to execute with other countries with the intention to provide benefit to employees of India working in the signatory country as well as to employees of the signatory country working in India. Presently, India has executed SSAs with Germany and Belgium.

accumulations only after attaining the age of 58. Further, the amendment states that the “*amount due shall be payable to the credit of the payee’s bank account in India.*” This means that upon attaining the age of 58, the expat will be paid his/her PF accumulations only in an Indian bank account. The impact of this amendment has been a subject matter of debate within the Indian business sector. As it stands today, foreign companies will have to assess the impact of the aforementioned amendment while determining the pay structure of expats in India.

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 IT Act 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. Some noteworthy elements are raised below.

- (a) 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.
- (b) 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.
- (c) On January 20, 2010, the Central Board of Direct Taxes passed a circular which required all domestic companies making payments to foreign companies to withhold tax – effective April 1, 2010 - at 20% on all transactions unless the foreign company had a PAN. Absent the PAN of the foreign beneficiary, the Indian deductee has an obligation to deduct a flat rate of 20% even if the applicable withholding tax on the transaction has a lower rate. A concern has been raised whether possessing a PAN by a foreign company will impliedly result in such foreign company having a permanent establishment in India. There is still not much clarity. Since no precedents have been set so far, our advice, subject to the commercial arrangement of the company in India, has been to go ahead and procure a PAN.
- (d) As per a 2009 Supreme Court judgment,⁷⁰ withholding tax will now be deducted from the foreign income of expatriates for services rendered by them in India. The Supreme Court held that foreign companies paying “salaries” to expatriates for services rendered in India will have to deduct withholding tax and deposit with the Indian tax authorities. This implies that withholding tax will be deducted on the global income of expatriates rendering services in

⁷⁰ Commissioner of Income-tax, New Delhi vs. Eli Lilly and Company (India) Pvt. Ltd., (2009)223CTR(SC)20

India. To this extent, the tax authorities have extra-territorial jurisdiction as sufficient territorial nexus is established between the foreign company and the services rendered by expatriates in India.

(e) Companies engaged in cross-border M&A activity, particularly two non-resident entities need to pay special heed as there is a risk of coming under the Indian tax net. In the recent case of Vodafone International Holdings B.V. vs. Union of India and another the Supreme Court ruled that wherein (i) a controlling interest in rights and entitlements is situated in India, (ii) when a wholly-owned subsidiary or a group company is transferred to a new company, then regardless of the fact that the contracting parties are non-resident in India, such transaction will also come under the ambit of tax laws. In such transactions, the buyer will have to withhold tax, make contractual provisions to this effect with the seller, or risk to be deemed an assessee in default. In other words, acquiring a non-resident company outside India will give the a non-resident acquirer a controlling interest in an Indian company, the transaction between the two non-resident companies will fall within the purview of the Indian tax authorities.

The dispute between the parties is still ongoing with the assessing office of the Income Tax department, but the Mumbai High Court and the Supreme Court of India have specifically expressed their views on legal principles and asked Vodafone International to deposit US\$ 2.5 billion as capital gains tax in India. In fact, by an order dated November 15, 2010, the Supreme Court has already asked Vodafone International to deposit US\$ 500 million along with bank guarantees worth US\$ 1.9 billion in court. The impact of this precedent will tremendously escalate the cost of “indirectly” acquiring controlling stake in an Indian company.

(f) 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 DTAA⁷¹ 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.⁷²

As mentioned earlier, DTC is expected to replace the IT Act with effect from April 01, 2012. Companies looking to invest in India will have to assess their transaction structure and tax liabilities keeping in mind the IT Act as well as changes proposed by the DTC, especially with respect to the various DTAA's executed by India.

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.

⁷¹ India has entered into DTAA with 71 countries including USA, UK, France, Germany, Japan

⁷² Section 91, IT Act

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 goods⁷³ have been brought under VAT. There are two basic rates of 4 percent and 12.5 percent. 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.

The Indian government plans to bring reforms in the indirect tax department and will notify the GST in the near future. As noted before, GST is expected to be implemented in phases from April 01, 2012, along with the DTC.

6.4 Competition Law

On August 28, 2009, the Indian Ministry of Corporate Affairs issued a notification pursuant to which the Monopolies and Restrictive Trade Practices Act, 1969 was repealed and replaced by the Competition Act, 2002 (*referred to as the “Act” under this section 6.4*) with effect from September 1, 2009. The Act, through the Competition Commission of India (“CCI”), aims to regulate (i) anti-competitive agreements, (ii) abuse of dominant position and (iii) combinations. This implies that all contracts will have to be drafted and reviewed ensuring that its terms/provisions do not negatively influence competition in India.

Substantive and procedural provisions pertaining to anti-competitive agreements and abuse of dominant position came into force in May 2009 and provisions pertaining to *combinations* were notified in March 2011 and will come into force from June 01, 2011. The following transactions will constitute a “combination” and will have to be reported to the CCI within 30 days from the date of the decision of the board of directors of the parties or execution of any agreement or other document for effecting the combination:

- *Transactions among Indian companies* - combined US\$ 250 million in assets or US\$ 750 million in turnover of the merged entity;
- *Cross-border transactions involving both Indian and foreign companies* - combined US\$ 500 million in assets or US\$ 1.5 billion in turnover;

⁷³ 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

- *For acquiring groups* - the threshold figures are much higher (a) US\$1 billion for assets and US\$ 3 billion for turnover in India respectively, or (b) assets in excess of US\$ 2 billion, or (c) turnover is more than US\$ 6 billion outside India;
- *Territorial nexus with India* - US\$ 125 million in assets or US\$ 375 million in turnover is required for the combined parties.

Since the aforementioned thresholds were severely criticized by the business community, the CCI increased the value of assets and turnover by 50% and exempted (i) “groups” exercising less than 50% voting rights in other enterprises, and (ii) enterprises whose control, shares, voting rights or assets being acquired has assets of less than US\$ 55.5 million *approx* or turnover less than US\$ 166.6 million *approx*, from the ambit of being termed as a “combination” for a period of five years, i.e. till 2016. This provides some relief to companies that are looking at large acquisitions after June 01, 2011. Nevertheless, all contracts, business relationships/arrangements, combinations will henceforth have to be assessed in view of the Act as the CCI also has to power to suo-moto initiate inquiry against any enterprise and levy heavy penalties if found in breach.

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.