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, 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 up to 100 percent is permitted in most areas and there are only certain areas where prior government approval is required. Especially over the last couple of years and with the “Make in India” drive since 2014, 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 (“DIPP”), 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, 2013 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.

To ensure greater degree of accountability and transparency in the operations and management of a public company that trades on stock exchange 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 surfaced in India, the

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¹ RBI is the central bank in India with headquarters in Mumbai and regional offices in other cities.
need for corporate governance cannot be emphasized enough. Chapter II of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 embodies the governing principles for various disclosures and obligations aimed at ensuring highest levels of corporate governance while, the specific requirements are provided in Chapter IV. These 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 10 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, or accruing from operations in India. India has entered into Double Taxation Avoidance Agreement (“DTAA”) with 88 foreign countries of which 86 are in effect. In case of foreign transactions, the provisions of DTAA between India and the country from which the business activity originates generally govern such taxation. With the introduction of GST on 1st July 2017, a road for uniform procedure of indirect taxation has been paved. GST has replaced the previous complex tax regime. It has completely revamped the realm of indirect tax in India. It has harmonized various forms of indirect taxes under one regime. GST is one indirect tax for the entire country. One of the major advantages of its introduction is the elimination of cascading of taxes, thereby reducing the tax burden on the final consumer.
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, 2013.

1.1.1 Wholly-owned subsidiary ("WOS")

The government permits setting up of a WOS in certain sectors like mining and exploration, petroleum and natural gas, greenfield civil aviation projects, non-scheduled air transport services, information technology, development of integrated township, establishment and operation of satellites, cash & carry wholesale trading, e-commerce activities, greenfield pharmaceutical activity, mass rapid transport services under the automatic route. In certain other sectors such as broadcasting carriage services, insurance, private sector banking, multi-brand retailing, FDI up to a specified percentage is permitted under the automatic route; however, in some of these sectors, 100 percent foreign equity may be inducted with prior approval of the concerned Administrative Ministry/Department. 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.

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2 See paragraph 3.1.1 infra
3 Notification F.No. 01/01/FC/2017-FIPB dated June 05, 2017
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 liaison office can facilitate technical/financial collaboration between the foreign parent and Indian companies as well as promote exports to and imports from India. 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. It can open an account for permitted credits (like funds from head office, tax refund, sale proceeds of its assets) and for meeting the local expenses. The RBI grants an initial permission for three 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 non banking financial companies and those engaged in construction and development sectors (excluding infrastructure development) whose tenure is two years only. 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. Further, all liaison offices must obtain a Permanent Account Number (“PAN”)⁶ from the Income-Tax authorities for operation in India. 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 is 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 three 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 along with a copy to the Directorate General of Income Tax (International Taxation).⁷ This requirement has been

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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 Direction No. 10/2015-16 dated January 1, 2016
⁶ This number is used for identification of a tax payer in India
⁷ AP (DIR Series) Circular No. 06 dated August 09, 2010
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.\(^8\)

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.\(^9\)

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 AD bank 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, software development 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.\(^10\)

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

\(^8\) Master Direction No. 10/2015-16 dated January 1, 2016  
\(^10\) Master Direction No. 10/2015-16 dated January 1, 2016
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 or from a public financial institution/bank in India. Upon completion, a project office may remit any surplus money from the project outside India. Pending completion of the project, the project office may intermittently remit amounts subject to certain conditions and with the prior approval from the AD Bank.

Prior permission of the RBI is not required for setting up a project office in India. 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 - 400001. The project office is required to submit annual activity certificate to AD Bank.

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

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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 concerned Administrative Ministry/Department and fall under the “government” route. Based upon the latest circular of the DIPP, the capital investments have to be made through the issue of equity shares paid fully or partly; fully paid and fully, compulsorily and mandatorily convertible debentures; and fully, compulsorily and mandatorily convertible preference shares in Indian entities.\(^\text{12}\) In-built options are allowed in these instruments, provided there is a minimum lock-in period of 1 year from their allotment date and there is no assured return on exit for the foreign investor. The consequence is that foreign private equity investors will be able to agree on exit rights contractually, provided they are locked-in for 1 year and ensure that the exit return is not decided upfront, rather is determined as per the pricing guidelines prescribed by RBI.

Further, an Indian company may also issue warrants and partly-paid shares to a foreign investor subject to RBI’s terms and conditions on pricing and conversion.\(^\text{13}\) In other words, non-convertible or optionally convertible preference shares and debentures, equity instruments with in-built options having assured rate of return on exit, and warrants which do not comply with RBI requirements will lose their equity character and will be treated as debt instruments that will need to comply with External Commercial Borrowing (“ECB”) guidelines which imposes onerous regulations.

### 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 government\(^\text{14}\) depending on the government policy in that sector. For instance, FDI in single brand retailing is allowed up to 100 percent but beyond 49 percent requires government approval. Or, in other words, till 49 percent investment qualifies under the automatic route. Similarly, for investment in defense and arms manufacturing, FDI is permitted up to 100 percent with FDI beyond 49 percent requiring government approval. In case of pharmaceuticals, distinction is maintained between greenfield and brownfield projects; 100 percent FDI is allowed in greenfield projects under automatic route, but for brownfield projects, automatic route is allowed up to 74 percent and government approval is required beyond 74 percent. For telecom service providers, sector is opened to 100 percent FDI where 49 percent is under the automatic route and beyond 49 percent is through government approval. For civil aviation airports, 100 percent FDI is allowed in greenfield as well as existing projects. For most manufacturing activities, FDI up to 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 “multi-brand” products, with its prior approval, subject to specified conditions. It also brought under automatic route up to 100 percent in market-place based

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\(^\text{12}\) Consolidated FDI Policy Circular of 2017 D/o IPP F. No. 5(1)/2017-FC-1 Dated August 28, 2017

\(^\text{13}\) A.P. (DIR Series) Circular No. 3 dated July 14, 2014 further confirmed under Consolidated FDI Policy Circular of 2017 dated August 28, 2017

\(^\text{14}\) See paragraph 3.1.2 infra
model of e-commerce for facilitating sale between buyers and sellers,\textsuperscript{15} broadcasting carriage services (which includes teleport, DTH, cable network, mobile television, headend-in-the sky broadcasting), cash and carry wholesale trading, non-scheduled air transport services, helicopters, establishment and operation of satellites.

Investment in certain specified units \textit{viz.} Export Progressing Zones (EPZ)/Electronic Hardware Technology Park (EHTP)/Software Technology Park (STP)\textsuperscript{16}/SEZs/Industrial Parks\textsuperscript{17} 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, until now documentation was required to be filed with the RBI in Form FC-GPR through the designated AD Bank within 30 days of issue of shares to the foreign investor. Going forward, pursuant to a recent circular, all reporting to RBI with respect to foreign investment in India shall be made in a Single Master Form.\textsuperscript{18}

Existing Indian companies with an expansion program may induct foreign equity by FDI via the automatic route subject to sectoral caps, 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 DIPP 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 within sixty days from date of receipt of transfer consideration 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 Procedure for FDI approval

The Government of India, (through the DIPP and the concerned Administrative Ministry/Department), is the regulatory body for FDI into India.

DIPP has formulated a manual\textsuperscript{19} laying down the procedure for processing the FDI proposals, for activities which do not qualify under the automatic route. The applicant is

\textsuperscript{15} FDI in inventory based model where the e-commerce entity directly sells to the customer is not permitted

\textsuperscript{16} These units are further described under para 4.0 infra

\textsuperscript{17} Industrial activity for industrial park includes wide variety of activities including basic and applied R&D on biotechnology, pharmaceutical sciences/life sciences, natural sciences and engineering has been included as an industrial activity under industrial parks

\textsuperscript{18} A.P (DIR Series) Circular No.30 dated June 07, 2018

\textsuperscript{19} Standard Operating Procedure (SOP) for Processing FDI Proposals, Notification No. 1/8/2016-FC-1, Department of Industrial Policy & Promotion, Dated June 29, 2017
required to submit the proposal online. After the proposal is filed, the DIPP will identify the concerned Administrative Ministry/Department and e-transfer the application to the concerned Administrative Ministry/Department (Competent Authority) within 2 days. Proposals which do not require security clearance are granted approval within eight weeks from application as compared to ten weeks for proposals requiring security clearance. In cases where investment proposals exceed INR 50 billion\(^2\), the Competent Authority shall place the proposal to the Cabinet Committee on Economic Affairs ("CCEA") for approval processes, within stipulated time period. In addition, the CCEA can also consider the proposals that are referred to it by the Minister in-charge of the concerned Competent Authority.\(^1\)

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 thirty days.

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 thirty days.

### 3.1.3 Computing foreign investment

In February 2009, DIPP issued Press Notes 2, 3 and 4 clarifying, expanding and modifying the previous policies and the method of calculation of direct and indirect foreign investment. It established management and economic control as the dual criteria to determine whether or not foreign holding is to be treated as FDI. Any foreign investment in an Indian company which is not owned and controlled by Indians will be taken for calculating the indirect investment and sectoral caps. This continues to be the position till date. Foreign investors must be mindful of this while establishing multi layered structures in India. In any event, a company can invest upto two layers in India\(^2\) i.e. downstream investment is not permissible beyond two layers of subsidiaries.

### 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. There is no limit for Indian companies paying lump-sum and/or royalty payments to foreign collaborators and all such payments will be treated as current account transactions. No prior approval from DIPP is required for technology or trademark collaboration as long as the sector is under automatic route of FDI.

### 4.0 Trade: foreign trade policy

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\(^{20}\) US$ 735 million

\(^{21}\) Consolidated FDI Policy Circular of 2017 D/o IPP F. No. 5(1)/2017-FC-1 Dated August 28, 2017

\(^{22}\) Section 186(1) of the Companies Act, 2013
India’s import-export promotion measures and related guidelines are contained in the Foreign Trade Policy (“FTP”) which is announced for a period of five years. The current policy guideline replaced the FTP for 2009-2014 and is contained in FTP 2015-2020. 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 (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 three 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 2013 (“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 company\(^2\) can be incorporated with any amount as its minimum paid-up capital and at least two subscribers, except a one-person company where only one subscriber is required. Broadly, it:

- restricts the right to transfer its shares;
- limits the number of its members (shareholders) to two hundred, except one-person company; and
- prohibits any invitation to the public to subscribe for any of its shares or debentures.

The balance sheet and profit and loss account of the company has to be filed with the Registrar of Companies ("ROC").\(^2\) Any person can inspect the profit and loss accounts of the company filed with the ROC upon payment of prescribed inspection fees.

5.1.2 Public company

A public company\(^2\) 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\(^2\) and seven subscribers. A private company, which is a subsidiary of another company, not being a private company, shall be a public company and accordingly, must comply with the requirements of the Act as are applicable to a public company.

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 by paying prescribed inspection fees. 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 and compliance requirements as compared to public companies. 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.\(^2\)

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\(^2\) Section 2(68) of the Act  
\(^2\) Section 137 of the Act  
\(^2\) Section 2(71) of the Act  
\(^2\) US$ 7,353  
\(^2\) Section 4(1)(e) of the Act
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, 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 as 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 Meeting

Companies are under a statutory obligation to hold an AGM every. The first AGM has to be convened within nine months from the date of closing of first financial year of the company i.e. March 31. Subsequently, AGM must be conducted in such manner that a period of not more than fifteen months lapses between two AGMs and within six months from the closing of every financial year. A notice informing the date, place and agenda of the meeting has to be given to the members, directors and the auditors of the company. 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 or at any other place within India. In case of non-compliance with the provisions of the Act, a fine upto INR 100,000 is imposed and in case of continuing default, the fine may be extended to INR 5,000 for every day after the first day of default, for which the default continues.

5.3.2 Extraordinary General Meeting

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

28 Section 96 of the Act
29 Amendment of Section 96, The Companies (Amendment) Act, 2017
30 US$ 1,471
31 US$ 74
32 Section 98 of the Act
33 Section 100 of the Act
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 representative

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.

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 statutory duty to act in good faith for promoting company”s objects for the benefit of all stakeholders including members, employees, community and environment. They are obligated to perform their duties with due and reasonable care, skill and exercise independent judgment. They must refrain from receiving any undue gain or advantage, cannot assign their office, and must not involve in any direct or indirect conflict of interest. They have to ensure that the 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 key managerial personnel

Every listed company and every unlisted public company having a paid-up share capital of INR 100 million must have a managing or a whole-time director or a manager or a chief

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34 Section 113 of the Act
35 Section 149 of the Act
36 Sections 196, 197, 198 and 203 read with Schedule V of the Act
executive officer, a chief financial officer and a company secretary as its key managerial personnel. Approval from the Central Government is no longer required even if the remuneration proposed to be paid to the directors, including whole-time director and managing director, exceeds 11 percent of the net profits of the company.\(^3\)

If a company does not have any profits or has inadequate profits in a given year, remuneration has to be paid in accordance with limits and procedure provided in Schedule V 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 V of the Act. A return for appointment of managing director, whole-time director or manager is required to be filed with the ROC in Form MR-1 within sixty days from the date of appointment.\(^3\)

### 5.4.1.2 Alternate director\(^4\)

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 India. 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

Upon incorporation, a company must hold its first board meeting within thirty days from the incorporation date. Thereafter, board meetings are required to be held at least once in every one hundred and twenty days and at least four such meetings must be held in every year.\(^4\) The board can exercise a number of powers at a meeting, by way of a resolution, namely:\(^4\)

- 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

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\(^{37}\) US$ 1.47 million  
\(^{38}\) Amendment of Section 197, The Companies (Amendment) Act, 2017  
\(^{39}\) Section 196 of the Act  
\(^{40}\) Section 161 of the Act  
\(^{41}\) Section 173 of the Act  
\(^{42}\) Section 179 of the Act
- invest the funds of the company
- make loans, guarantee or provide security for loans
- approve amalgamation, merger, takeover or reconstruction
- diversify business of the company
- make political contributions
- appoint or remove key managerial personnel or take note thereof
- appoint internal and secretarial auditor
- note disclosure of director's interest and shareholding
- buy or sell investments of the company up to prescribed limits
- invite or renew public deposits and review or change existing terms
- approve quarterly, half-yearly and annual financial statements and results of the company

The board may delegate its powers to borrow, invest funds and make loans up to certain specified limits and subject to conditions, as it may deem fit, to the committee of directors or the managing director or any principal officer of the company.

### 5.5 Company secretary

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 reporting to the board regarding compliance with the Act and applicable secretarial standards, provide guidance to directors regarding their duties, represent the company before various regulators, assist the board in conducting affairs of the company, assist and advise the board in ensuring good corporate governance, attending meetings of shareholders and directors, preparing agenda and minutes for meetings and issuing notices to members under the directions of the board.

Every listed company and every other company with paid-up share capital of INR 50 million must appoint a whole-time company secretary and file his appointment in Form DIR-12 with ROC within thirty days of his appointment. Every listed company and any public company with a paid-up capital of INR 500 million or a turnover of INR 2.5 billion or more is required to prepare a secretarial audit report (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 which must form a part of annual board report and filed with 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 at a board meeting is passed by simple majority. Resolution is passed at a shareholders meeting as either an ordinary or a special resolution.

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43 Section 205 of the Act
44 US$ 0.73 million
45 US$ 7.3 million
46 US$ 36.7 million
47 Section 204 of the Act
5.6.1 **Ordinary resolution**

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 resolution**

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.

5.6.3 **Circular resolution**

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. 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. There are certain matters on which a circular board resolution cannot be passed and a physical board meeting is compulsory. Further, if one-third of the total number of directors requires that a particular resolution under circulation must be decided at a meeting, the board has to convene one for passing the resolution.

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48 Section 114 of the Act  
49 Section 114 of the Act  
50 Section 175 of the Act  
51 These matters are identified in para 5.4.2 supra
5.6.3.2 Circulation of members’ resolution \(^{52}\)

Shareholders holding at least one-tenth of the paid-up share capital of the company may introduce a resolution on their own in shareholders meeting. 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.

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 removal of auditors, removal of director); in case of any other requisition, two weeks’ notice before the meeting is required. Additionally, the member requisitionists must deposit such amount which shall be sufficient to meet company’s expenses in circulation.

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:

1. **Ten percent:** the approval of at least ten percent of the shareholders is required for the requisition of an EGM, for introducing resolutions in any general meeting by circulation, or for an application to the National Company Law Tribunal for relief, if there is oppression or mismanagement by the majority shareholders.

2. **Fifty-one percent:** the approval of at least fifty percent of the shareholders is required 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 seventy-five percent of the shareholders is required for a special resolution including for:
   - Alteration in the Memorandum and Articles of the company
   - Reduction of share capital
   - Changing the registered office address of the company from one state to another

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\(^{52}\) Section 111 of the Act
- Change in the name of the company
- Buy-back of shares
- Proposed mergers
- Liquidation

Therefore, a minority shareholder with more than twenty-five percent 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 individually or as a class 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 for a term of five years in AGM through an ordinary resolution. Subsequently, their appointment is ratified in every AGM during the five year term. The company, in a general meeting, may remove auditors before the expiry of their term by circulating a special notice, passing a special resolution and seeking prior approval from the Central Government.

Auditors are required to make a report to the members of the company in respect of the financial statements (balance sheet, profit and loss account, cash flow statement, statement of changes in equity if applicable and notes) 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 partners, one 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. With effect from 2010-2011, LLPs are taxed as general partnership firms.

53 Section 244 of the Act
54 Section 143(2) of the Act
i.e. tax will be levied on the LLP and not in hands of the partners, but any remuneration paid to partners is taxed as income from business.

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 services including multi-class applications is also permissible. The time period for 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. 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 50,000 to INR 200,000. The court may however, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term up to 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 offence and this would include the management.

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
57 A suit of infringement or passing off may be brought in a district court or higher
58 US$ 735
59 US$ 2,941
60 Section 114 of the Act
6.1.2 Convention applications

The Act also makes provisions for applications from convention countries\textsuperscript{61} 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 documents\textsuperscript{62} pertaining to the convention application must be filed with the trade marks registry within two months from the date of filing of the application.

6.1.3 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 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 applications\textsuperscript{63}

Patent applications from convention countries\textsuperscript{64} are treated at par with local applications. In order to claim priority in India, the convention country application should be made within twelve 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 twelve months shall be reckoned from the date on which the earlier/earliest of the applications was made.

6.1.2.2 PCT applications

\textsuperscript{61} Convention countries include the group of countries who are signatories to the Paris Convention
\textsuperscript{62} Documents pertaining to application filed in the convention country in respect of which priority is claimed
\textsuperscript{63} Section 2 (c) of the Act states that a “convention application” means an application for a patent made by virtue of section 135
\textsuperscript{64} 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.
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 thirty-six 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 new product or process having an inventive step and capable of industrial application can be patented under the Act by any person who is the true and first inventor or his assignee or his legal representative upon his death. Inventive step is a feature of an invention that involves technical advancement as compared to existing knowledge or economic significance or both and which is not obvious to a person skilled in the art. The Act expressly carves out certain exceptions which cannot be considered invention and hence, non patentable. These include any invention which is against established natural law or public order or morality or prejudicial to humans, environment, discovery of scientific principle or formulation of abstract theory, discovery of new form of a known substance, method of agriculture, any process for medicinal, surgical, curative, prophylactic diagnostic, therapeutic or other treatment, topography of integrated circuits, atomic energy, etc.\(^{65}\)

6.1.2.4 Term

The term of a patent granted under the Act is twenty years from the date of filing of patent application.\(^{66}\) In case of applications filed under PCT the term of twenty 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 applications,\(^ {67}\) 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 at least six weeks before the application is filed in any other county. 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

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\(^{65}\) Sections 3 and 4 of the Act
\(^{66}\) Section 53 of the Act
\(^{67}\) Mail-box applications are pharmaceutical product patent applications filed under the mail-box system before January 1, 2005
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.

6.1.3.1 Term

A design may be registered for a period of ten 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.  

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.

The following may be possible grounds for refusal of registration 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

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68 Section 11 of the Act
69 Section 2(1)(e) of the Act
70 Section 9 of the Act
- 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.  

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.

In India, the National Internet Exchange of India (“NIXI”) 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

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71 Section 18 of the Act
72 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
A foreigner coming into the country must register himself which may be done online 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 may be 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 and drawn minimum wage of INR 21,000\(^73\) in that calendar year to be eligible for bonus under the Act. Bonus is granted under the Act based on profit or on productivity.

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, mines, and shops and commercial establishments where ten people are/were employed anytime in a year, 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, except where the service was discontinued due to death or disablement. The employee will get fifteen 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.

\(^{73}\) US$ 220
6.2.5 The Employees Provident Fund Act, 1952

Provident Fund (“PF”) is a social benefit provided to the employees whose monthly wages are up to INR 15,000\(^74\), wherein a fixed contribution of twelve percent of the basic wage for a male employee and eight percent of the basic wage for a female employee is to be made by respective employee towards a fund or trust. In addition, the employer too has to make a contribution of 12% of the basic wage of the employees (irrespective of their gender) towards the fund or trust. The quantum of the sum deposited can 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 twenty employees to provide for this benefit, but a voluntary coverage can also be sought if the majority employees and employers are in favor. 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, Employees” Deposit Linked Insurance Scheme, 1976 and Employees’ Pension Scheme, 1995 ("EPF Schemes").

In cases where the EPF Act and EPF Schemes apply to an Indian company, all expatriate employees irrespective of their wages and currency in which salary is drawn, with whose home country India has not executed a social security Agreement (“SSA”)\(^75\) have to contribute towards PF on their global income. The PF authorities have amended the EPF Schemes following which an expat will be entitled to his/her PF accumulations only after attaining the age of fifty-eight. 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 fifty-eight, the expat will be paid his/her PF accumulations only in an Indian bank account. A foreign company 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 \textit{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 PAN and a registration number for tax deduction at source. Direct taxes are applicable on income earned through the business dealings in India.

\(^{74}\) US$ 220
\(^{75}\) 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. The objective is to provide equality of treatment and avoidance of double coverage. India has executed SSAs with Germany, Belgium, Switzerland, Denmark, Luxembourg, France, Netherlands, South Korea, Hungary, Norway, Czech Republic, Finland, Austria, Canada, Australia, Japan and Sweden
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) In 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 twenty percent on all transactions unless the foreign company had a PAN. Absent the PAN of the foreign beneficiary, the Indian deductee had an obligation to deduct a flat rate of twenty percent, even if the applicable withholding tax on the transaction has a lower rate. This position stands changed for non-resident entities other than foreign companies with effect from June 2016. The Central Board of Direct Taxes through its circular of June 24, 2016 enables a foreign company without a PAN to claim benefits of lower tax rates by furnishing personal details such as name, e-mail id, contact number, address, certificate of residence in foreign country, and tax identification number or equivalent used in resident country. The different position for foreign companies raises the concern whether possession of PAN impliedly results in permanent establishment in India; however, it is abundantly clear that foreign companies are required to have a PAN for claiming lower tax benefits.

(d) As per a 2009 Supreme Court judgment, 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 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. There has been considerable debate on whether income arising from cross-border transaction involving transfer of capital assets between two foreign entities should be taxed in India solely on the basis of their nexus with Indian company as part of the same group. The issue was litigated before the Supreme Court in the landmark case of Vodafone International Holdings B.V. vs. Union of India and another. The lower courts had favored the revenue’s tax claim making indirect transfer of Vodafone’s Mauritian entity’s shares taxable in India. The Supreme Court overruling the lower court order, held that transfer of shares of a foreign company (holding shares or assets in an Indian company directly or indirectly) between two non-residents on a principal-to-principal basis outside India cannot be considered a transfer of capital asset situated in India and hence,

not liable for tax as capital gains under the IT Act, provided that the structuring of the transaction is not for tax avoidance but for commercial reasons.

In the wake of this, the IT Act was amended in 2016 to bring thresholds for locating assets in India and thereby subjecting certain international transactions to income-tax liability in India. A capital asset being a share or interest in a foreign company or entity is deemed to be in India, only if the substantial value of the share or interest is, directly or indirectly, derived from the assets located in India. The substantial value is deemed to be derived from Indian assets, if value of the underlying India assets exceeds INR 100 million\(^{77}\) and represents at least fifty percent of the value of all assets owned by the foreign company or entity. If the substantial value threshold is satisfied, transfer of shares or interest between two foreign companies will be subject to tax in India. 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 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.

(f) As regards taxation of income \textit{inter alia} from royalties, fees for technical know-how, capital gains, business income of a permanent establishment, the provisions of the DTAA\(^{78}\) 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.\(^{79}\)

6.3.2 Indirect taxation

There are various forms of Indirect taxes such as sales tax, service tax, customs and excise duty.

With the Introduction of new tax regime in India, various forms of indirect taxes have been subsumed into one comprehensive and uniform indirect tax system i.e. Goods and Services Tax (GST).

6.3.3 Goods and Services Tax

The Goods and Services Tax Act came into effect on July 01, 2017, replacing the previous VAT regime. It is a revolutionary tax reform done in India with the objective to replace the complex tax levying regime with a uniform and comprehensive tax regime. It is a single indirect tax for the entire nation. GST is a multi-stage and destination based tax system, levied on each value addition. IT has 3 components i.e. CGST which is collected by the Central Government on an intra-state sale, SGST which is collected by the State Government on an intra-state sale and IGST which is collected by the Central Government for inter-state sale.

\(^{77}\) US$ 1.47 million
\(^{78}\) India has entered into DTAA with 71 countries including USA, UK, France, Germany, Japan
\(^{79}\) Section 91 of IT Act
The major advantage of GST is the removal of cascading effect on the sale of goods and services, i.e. tax on tax is eliminated. Further, it being a technologically driven system, activities like registration, return filing, application for refund and response to notice are done online on the GST Portal. This not only speeds up the process but also reduces the procedural complexities of the previous tax regime.

### 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. In some instances information has been filed by third parties but in some cases, the CCI suo moto initiated investigation. Clearly, all contracts have to drafted and reviewed ensuring that their terms/provisions do cause “appreciate adverse effect” on competition in India.

While substantive and procedural provisions pertaining to anti-competitive agreements and abuse of dominant position came into force in May 2009, provisions pertaining to combinations were notified in March 2011. The financial thresholds defined under the Act have been constantly reviewed and revised. The latest amendment was prescribed by a notification dated March 04, 2016 as per which, now, the following transactions will constitute a “combination” and will have to be reported to the CCI within thirty 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:

<table>
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<tr>
<th>THRESHOLDS FOR FILING NOTICE</th>
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<tr>
<td><strong>Enterprise Level</strong></td>
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<tr>
<td><strong>India</strong></td>
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<tr>
<td><strong>Worldwide with India leg</strong></td>
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| **Group Level** |
| **India** | > INR 80 billion<sup>84</sup> | > INR 240 billion<sup>85</sup> |
| **Worldwide with India leg** | > US$ 4 billion with at least > INR 10 billion<sup>86</sup> in India | OR | > US$ 12 billion with at least > INR 30 billion<sup>87</sup> in India |

<sup>80</sup> US$ 294 million<br>
<sup>81</sup> US$ 882 million<br>
<sup>82</sup> US$ 147 million<br>
<sup>83</sup> US$ 441 million<br>
<sup>84</sup> US$ 1176 million<br>
<sup>85</sup> US$ 3529 million<br>
<sup>86</sup> US$ 147 million<br>
<sup>87</sup> US$ 441 million
In case of an acquisition, the relevant entities for the Enterprise Level test are the acquirer and the target enterprise (including its subsidiaries, units and divisions). For the Group Level test, it refers to the group to which the target enterprise would belong after the acquisition. In case of a merger or amalgamation, the relevant entity for the Enterprise Level test is the enterprise remaining after the merger or the enterprise created as a result of the amalgamation. In case of group, it would be the group to which the enterprise remaining after the merger or created as a result of the amalgamation, would belong, post-transaction.

Further, in March 2011, the MCA exempted (i) “groups” exercising less than fifty percent voting rights in other enterprises, and (ii) enterprises whose control, shares, voting rights or assets being acquired has assets of less than INR 2.5 billion\(^88\) or turnover less than INR 7.5 billion\(^89\) from the ambit of being termed as a “combination” for a period of five years, i.e. till 2016. Though the March 05, 2016 notification, not only has this de minimis exemption been extended for another period of five years, i.e. till 2021, the financial thresholds have also been increased for enterprises whose control, shares, voting rights or shares are being acquired. Now, till 2021, if such enterprises have assets less than INR 3.5 billion\(^90\) or a turnover of less than INR 10 billion\(^91\), they will be exempted from all “combination” related filings pursuant to the Act.

What is clear from the above is that all contracts, business relationships/arrangements, combinations will, henceforth, have to be assessed in view of the Act, failing which any non-compliant enterprise may be liable to heavy penalty.

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.

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\(^{88}\) US$ 36.7 million
\(^{89}\) US$ 110 million
\(^{90}\) US$ 51 million
\(^{91}\) US$ 147 million
The pace of business meetings in India is comparatively far more relaxed than in some of the western countries, though the trend is gradually changing because of increased emphasis on good and electronic governance. 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 and is banned across the country!

▪ 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 maneuver through the maze of these laws and the associated customary practices.